

REPORTABLE (13)

ZIMBABWE PLATINUM MINES (PRIVATE) LIMITED
v
MARKO PHUTI

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA & PATEL JA
HARARE, 8 MARCH 2016

T. Mpofu, for the appellant
L. Uriri, for the respondent

PATEL JA: After hearing argument from counsel and following a unanimous decision of the Court, the appeal was partially allowed with costs. We further indicated that the reasons for judgment would follow in due course. Those reasons are as follows.

Background

The respondent was employed by the appellant as its Operations Manager. He was charged with several counts of unsatisfactory work performance. He was subsequently dismissed after having been found guilty by the appellant's Disciplinary Committee. His appeal to the internal Appeals Committee was unsuccessful and the

decision to dismiss him was upheld. He then appealed against that decision to the Labour Court.

At the hearing of the appeal before the Labour Court, the appellant herein raised two points *in limine*, the first being that the relief sought was not stated in the notice of appeal, and the second to the effect that the grounds of appeal were too broad.

The respondent herein countered these objections by applying to amend his notice of appeal so as to incorporate the relief sought. The Labour Court reasoned that labour disputes should not be decided on technicalities and that it was authorised to condone non-compliance with its Rules. Since no prejudice was alleged or suffered by the appellant, the court condoned the respondent's failure to comply with the Rules and granted the application to amend the notice of appeal. As regards the grounds of appeal, the court found that they were sufficiently clear and had been understood by the appellant. Consequently, the court dismissed both points *in limine*.

Turning to the merits, the court *a quo* assessed all of the evidence before it, including the factual submissions contained in the respondent's heads of argument. The court concluded that the five allegations of unsatisfactory work performance had not been proved on a balance of probabilities and that the Disciplinary Committee had erred in that regard. Accordingly, the appeal was upheld with costs. It was ordered that the respondent be reinstated or, in the event of reinstatement being untenable, that he be paid damages *in lieu* of reinstatement, to be quantified if necessary.

Grounds of Appeal

The first ground of appeal before this Court is that “the court *a quo* erred in law in failing to find that the purported appeal before it was a nullity”. The remaining four grounds of appeal relate to the factual findings of the court *a quo* and the consequent alleged misdirections in law. It is not necessary to elaborate or delve into these grounds, as our decision to allow the appeal turned exclusively on the first ground of appeal.

The gist of the first ground of appeal, as appears from the appellant’s heads of argument, is that the notice of appeal before the Labour Court did not contain a prayer and was therefore fatally defective. Since the notice was a nullity, the court had no discretion to condone the defect and proceed as it did to determine the matter on the amended notice of appeal. The appeal should have been struck off the roll and the respondent, if he were so inclined, could then have proceeded to resuscitate his appeal.

In his heads of argument, the respondent takes the position that the court *a quo* correctly condoned the defectiveness of the respondent’s notice of appeal. The court had the requisite discretion to condone any non-compliance with its Rules. In this regard, the appellant has not shown that the court exercised this discretion improperly and, therefore, there is no basis for interfering with that condonation.

Disposition

In terms of s 49 of the Labour Act [*Chapter 28:01*], in its relevant portions:

“(1) On an appeal before the Labour Court in terms of section *forty-seven*—
(a);
(b) the Labour Court shall, **subject to such procedures as may be prescribed**, act in such manner and on such principles as it deems best fitted **to do substantial justice to the parties**, and to carry out the objects of this Act.
(2)”
(The emphasis is mine).

This statutory injunction to do substantial justice between the parties is explicitly reiterated in r 26(a) of the Labour Court Rules 2006, which allows the court to depart from the Rules as follows:

“at any time before or during the hearing of a matter [to] direct, authorise or condone a departure from any of these rules in the interests of justice, fairness and equity”.

Advocate *Uriri*, for the respondent submits that r 15(1)(a) of the Rules simply requires an appellant to, *inter alia*, “complete in three copies a notice of appeal in Form LC 3”. There is nothing in the Rules, so he argues, that expressly requires the relief sought to be set out in the notice of appeal. He relies in this respect on the decision of this Court in *Standard Chartered Bank v Chinyemba* 2004 (2) ZLR 197 (S), where it was held that a notice of appeal is not fatally and incurably defective merely because it does not set out the relief that is sought.

Advocate *Mpofu*, for the appellant, submits that the court *a quo* accepted that the absence of any prayer in the notice of appeal before it amounted to a defect that rendered the notice a nullity. Nevertheless, the court proceeded to condone this fundamental irregularity. This constituted a clear misdirection on its part. He also argues

that *Chinyemba's* case (*supra*) is distinguishable from the present in that the former did not specifically address the question of compliance with the Labour Court Rules.

In *Chinyemba's* case, the Court was seized with the interpretation and application of the Labour Relations (Settlement of Disputes) Regulations 1993 (since repealed and replaced by the Labour (Settlement of Disputes) Regulations 2003). The appellant's contention was that the impugned notice did not set out the relief sought and was therefore fatally defective. The Labour Relations Tribunal dismissed this point *in limine* on the basis that in terms of s 14 of the Regulations it was empowered to seek clarification in respect of notices of appeal which were not clear. The Tribunal concluded that this provision gave litigants an opportunity to cure defective notices of appeal at the hearing of the matter and that, consequently, any defect in a notice of appeal cannot be fatal.

The Supreme Court agreed with the conclusion of the Tribunal that the alleged defect in the notice of appeal was not fatal. It was noted that the 1993 Regulations set out the procedures to be followed on appeal. However, unlike r 29(1) of the Supreme Court Rules 1964, the Regulations did not prescribe the contents of a notice of appeal. It was accordingly held that, on a proper reading of the Regulations, the lawmaker intended to allow for a certain amount of latitude in respect of proceedings before the Tribunal. In my view, the critical distinction *in casu* is that the Labour Court Rules now in force are not silent as to the contents of a notice of appeal. In addition to setting out the procedure

to be followed on appeal, r 15 clearly prescribes the contents of a notice of appeal by specific reference to “a notice of appeal in Form LC 3”.

I note that r 37, which governs the completion of forms prescribed by the Rules, allows some measure of flexibility in that regard. It provides that:

“(1) Subject to this rule, a person required to complete any form prescribed in the Schedule may improvise it by making such alterations to it as circumstances require.

(2) The registrar may refuse to accept any improvised form and require the party improvising it to submit another form substantially compliant with that prescribed in the Schedule if the registrar is of the opinion that the improvised form is not so compliant.

(3) Where a dispute arises as to the discretion exercised by the registrar under sub rule (2), the registrar shall refer the matter to a President in chambers who may thereupon—

(a) direct the registrar to accept the improvised form; or

(b) direct the party who improvised the form to submit another form substantially compliant with that prescribed in the Schedule; or

(c) give such other directions as to the manner in which the parties may proceed as the President thinks fit in the circumstances.

(4) All forms in terms of these rules that are out of print or otherwise unavailable may be issued by the registrar, who may omit any explanatory notes or other irrelevant matter therefrom.”

It is trite that the Labour Court is entitled to dispense equity in its duty to do substantial justice between the parties. However, it cannot do so outside the confines of the law. Although s 49(1)(b) of the Labour Act allows for flexibility and latitude in the exercise of the court’s functions, it is still required to act subject to such procedures as may be prescribed, *i.e.* in accordance with the Labour Act and the Labour Court Rules.

Rule 15(1)(a) of the Rules requires a prospective appellant to complete a notice of appeal in Form LC 3. This form prescribes the details of an appeal that must be set out in the notice as follows:

- The determination and authority appealed against.
- The date of issuance and service of the determination appealed against.
- A brief statement of the facts and grounds on which the appeal is based. (If the space provided is inadequate, details of the grounds of appeal may be attached in a separate document).
- The form of the relief sought from the Labour Court (as indicated in separate boxes to be ticked or as otherwise specified).
- Name and address of the appellant's legal practitioner or representative.
- List of witnesses to be summoned to attend the hearing.

The notice of appeal in the instant case lists the name of the appellant, the dates when the determination appealed against was issued and served, and the names and addresses of the parties' respective legal practitioners. There is no indication of the actual determination appealed against or of the form of relief sought from the Labour Court. The grounds of appeal are set out in a separate document attached to the notice. The three grounds of appeal therein obliquely provide some indication of the determination appealed against. However, the precise relief sought from the Labour Court is not mentioned at all.

In my view, the omissions that I have identified in the notice of appeal are critical and cannot be regarded as being mere technicalities. Nor can it be said that the respondent has simply improvised the notice by making appropriate alterations to the prescribed form. Taken in its entirety, the notice is not “substantially compliant” with the form prescribed in the Schedule within the contemplation of r 37. Consequently, the court *a quo* seriously misdirected itself by condoning the respondent’s flagrant disregard of the Rules and granting the application to amend the notice of appeal before it.

For the foregoing reasons, the appeal was partially allowed and the following order was made:

1. The appeal is allowed with costs on the first ground of appeal set out in the notice of appeal.
2. The judgment of the Labour Court is set aside and substituted with the following:

“The appeal is struck off the Roll with costs”.

ZIYAMBI JA: I agree.

HLATSHWAYO JA: I agree.

Kantor & Immerman, appellant’s legal practitioners
Mawire & Associates, respondent’s legal practitioners