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THOKOZILE ZINONDO
v
CAFCA LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, JULY 24, 2017

The Applicant in person

W. Magaya, for the respondent

IN CHAMBERS

Before **GWAUNZA JA**, in chambers in terms of s 92F (3) of the Labour Act.

This is an application for leave to appeal to the Supreme Court against the decision of the Labour Court. On 24 July, 2017, I dismissed this application. The applicant wrote to the Registrar requesting reasons for my order. These are they.

The factual background of the matter is as follows:

The applicant was employed by the respondent as an industrial nurse from May 1980. When she started working, her salary was tagged at grade C1 and thereafter she

rose through the ranks to grade C3. In July 2013, she retired having attained the retirement age of 65. Thereafter the respondent offered her a contract to work as an occupational Health Officer which she accepted.

Before her retirement the applicant was being paid a monthly salary of $572. However, during the period of employment as an Occupational Health Officer, she accidentally came across a March 2011 basic salaries schedule. The schedule showed that she was the least paid employee in the grade C3 and that she was paid even less than some employees in lower grades C2 and CI. Thinking it was an error, the applicant approached the Human Resources Executive with a view to having her salary reviewed upwards. On being advised that it was not an error she proceeded file a complaint with a labour officer. The dispute was subsequently brought before an arbitrator.

The arbitrator found that the applicant had been underpaid from July 2011 to September 2013 and that she was supposed to be paid $13 986.00. The respondent appealed against the award to the Labour Court and the court upheld the appeal on the basis that at law an employer can pay different salaries to employees doing the same work based on the terms of their agreements. This is as long as the terms do not violate the Collective Bargaining Agreement. The court *a quo* thus concluded that the findings of the arbitrator were not supported by the law *albeit* morally sound.

Aggrieved, the applicant filed an application for leave to appeal to this court, before the Labour Court. The application was set down for hearing on 16 February 2016. Neither the applicant nor her legal representative attended the hearing and consequently, the application was dismissed in default. The applicant then filed an application for rescission of the default

order dismissing her application for leave to appeal. In motivating her application, she argued that the default was not wilful and that the judgment ought to be rescinded.

On 19 August 2016, the court dismissed the application for rescission on the following grounds, that:

i) the applicant was to blame for the actions of her erstwhile legal practitioners,

ii) her legal practitioners had not given an explanation for their inaction,

iii) there were inconsistences in her submissions, and

iv) she had no prospects of success on appeal.

The applicant then filed an application for leave to appeal against the order dismissing her application for rescission of the default order. On 22 March 2017, that application was dismissed, hence the present application for leave to appeal against the order that dismissed her application for rescission of the default order.

It is trite that an applicant seeking leave to appeal must establish that he has prospects of success on appeal. In the words of Garwe JA in *Chikurunhe and Ors v Zimbabwe Financial Holdings* SC-10-08;

> "The party seeking leave must show *inter alia* that he has prospects of success on appeal. In other words, leave is not granted simply because a party has sought such leave."

In this case, the question of prospects of success hinged on whether or not the applicant satisfied the requirements for rescission.

In an application for rescission of a default judgment the court must be satisfied that there is good and sufficient cause to rescind the order. In *Makoni v CBZ Bank Limited* HH-357-16, CHITAKUNYE J quoted the case of *Stockil v Griffiths* 1992 (1) ZLR 172 (S) at 173D-F wherein GUBBAY CJ aptly noted that: -

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86(not reported); Roland and Another v McDonnell 1986 (2) ZLR 216(S) at 226E-H; Songore v Olivine Industries (Pvt) Ltd 1988(2) ZLR210(S) at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default ;(ii) the bona fides of the application to rescind the judgement; and (iii) the bona fides of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

From this authority, it is clear that the test of a good and sufficient cause involves the establishment of the following factors:

(a) explanation for the default must be reasonable;

(b) the *bona fides* of the application to rescind the judgment;

(c) the *bona fides* of the defence on the merits of the case and

(d) prospects of success.

I now proceed to deal with these factors separately.

The explanation for default and bona fides of the application to rescind

In her application for rescission of the default order, in the court *a quo*, on one hand, the applicant submitted that her default was due to the inadvertence of her erstwhile legal practitioners who did not advise her that the matter had been set down nor attend the hearing

of the matter. She expanded on this submission in her founding affidavit and stated that her legal practitioners had been served with a notice of set down but had not notified her of this fact.

On the other hand, in her oral submissions at the hearing, the applicant argued that her legal practitioners were not served with the notice of set down, thus they were unaware of the hearing date and so was she. These submissions were inconsistent with the evidence on record, in particular, the return of service which was placed before the court and which showed that the applicant's legal practitioners had been served with the notice of set down.

The court *a quo* found that other than the applicant's inconsistent explanations, her legal practitioners had not filed a supporting affidavit admitting to the blame and/or explaining why they failed to act on behalf of their client despite being served with the notice of set down.

It is trite that where the legal practitioner is the one who is at fault, he must file an affidavit admitting his errors. The principle was laid out in the case of *Diocese of Harare v The Church of the Province for Central Africa* SC-9-10, where this Court held that:

> "Although in argument Mr Zhou suggested that the failure to comply with the relevant Rules of court was wholly attributable to the respondent's legal practitioners, there was no admission of negligence by the legal practitioner. . ..
>
> It would have been after the responsible legal practitioner had filed an affidavit admitting fault and explaining in some detail what happened, that the Judge would be in a position to decide whether the respondent should not be visited with the sins of its legal practitioners. Where no factual basis for making such a distinction of culpability has been provided, the Judge would have no right to draw it. It must follow that without an affidavit from the person responsible for the "oversight" admitting fault and explaining the circumstances under which he or she overlooked the Rules, one is at a loss for the reason why it was found necessary to state in the opposing affidavit that an "oversight" on the part of the respondent was the cause of non-compliance. The procedure adopted by the respondent is another example of lack of care to ensure that Rules of court were complied with."

In light of the above authority, with regards the explanation for the delay and the applicant's *bona fides*, my view is that the court *a quo* was correct in concluding that the applicant's explanation for the default was not reasonable and that her application for rescission lacked *bona fides* as she was clearly trying to mislead the court.

Prospects of success

The applicant argued that despite receiving a salary that was in terms of the Collective Bargaining Agreement (CBA), such salary was less than that received by others in her grade and by some in lower grades. Accordingly, she was entitled to the difference as from July 2011.

It should be noted that CBAs stipulate minimum wages for any particular grade. An employer is only guilty of an unfair labour practice if he fails to pay the minimum salaries for a particular grade provided therein. It follows therefore that employees may receive different salaries despite being in the same grade. The actual amount of the salary depends on the employee's negotiations with the employer in forming the employment contract.

Moreover, it is trite that an employment contract is one that is between the employer and the employee. The principles of the law of contract such as freedom of contract therefore apply. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), at page 57, the Constitutional Court of South Africa, explaining the freedom of contract principle, stated thus:

> "Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity"

Further, in *Malunga & Ors v PTC SC*-117-97, this court dealt with a matter almost similar to the present one. In that case the appellants were receiving different salaries despite the fact that they were doing the same work. They argued that payment of different wages for the same type of work had no objective basis and was irrational. The learned judge of appeal found that there was no legitimate expectation on the part of an employee to be paid more than what he is supposed to be paid simply because other employees may be receiving greater, seemingly unjustified benefits.

It was on the basis of the foregoing, and authorities cited, that I found no fault in the decision of the court *a quo* to the effect that the applicant had no prospects of success on appeal in this matter, had tendered no satisfactory explanation for the default in question and had also demonstrated a lack of *bona fides* in the defence that she proffered. In short, she had not proved a case for the relief sought.

Accordingly, I dismissed the application with costs.

Coghlan Welsh and Guest, respondent's legal practitioners