

REPORTABLE

(73)

**VENGESAI CHIRASHA
v
NATIONAL FOODS LIMITED**

**SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & HLATSHWAYO JA
BULAWAYO 26 JULY, 2016 & MARCH 13, 2018**

Appellant, in person

A. K. Maguchu, for the Respondent

HLATSHWAYO, JA: This is an appeal against the whole judgment of the Labour Court sitting at Bulawayo handed down on 19 September 2011 in case number LC/MT/28/10. Leave to appeal and condonation of late noting of appeal as well as extension of time within which to note an appeal were granted by this Court on 26 February 2016.

There were two matters for determination before the Labour Court: proceedings for the setting aside of an arbitral award (the first matter) and an appeal against the employer's decision to terminate the employment of the employee (the second matter). The Labour Court dismissed both matters and the appellant, a self-actor, has appealed against both decisions, on the following grounds:

1. The court *a quo* erred grossly at law in its finding that what was placed before it was an application for review as opposed to an appeal;
2. The court *a quo* erred grossly at law by not finding that the award was contrary to public policy for the arbitrator sought to demand receipts - an issue which did not emanate from the parties nor was it a requirement of the policy he held was binding between the parties.
3. The court *a quo* erred grossly at law by not finding that by singling out appellant for disciplinary action and leaving the co-accused persons the respondent acted *ultra vires* article 23 (2) of the Declaration of Rights Charter.
4. The court *a quo* grossly erred at law by not finding that the appellant was wrongly convicted.
5. The court *a quo* grossly erred at law by re-establishing the charges which had been quashed by the respondent's appeals committee.
6. The court *a quo* grossly erred at law by not observing the provisions of s 12B (4) of the Labour Act as required by the law of unfair dismissal.

The appellant then sought as relief the setting aside of the arbitrator's award and its substitution with the granting of his claim for \$3 840 and his own re-instatement in employment or payment of damages *in lieu* thereof.

BACKGROUND FACTS

The common facts are that the appellant and the respondent were employer and employee since 2005. The appellant was employed as a stock control clerk. In September 2004, the respondent had entered into a Works Council agreement with its employees regarding transfer expenses. In 2009 the appellant was transferred to Victoria Falls at one of the

respondent's commercial depots. Appellant then raised a complaint that his transfer expenses were not met. The appellant later took up the matter to the human resources department and was paid US\$359-00 in April 2010. The appellant submitted that no breakdown of the money had been given. He felt short-changed as he believed that he was not paid in accordance with the 2004 Works Council agreement. The appellant then raised a complaint with a Labour Officer. Conciliation process failed and the dispute was referred to compulsory arbitration. The arbitrator heard the matter and dismissed it for the following reasons:

1. There was no explanation as to what the claim for transport was based on.
2. There was nothing in the form of receipts for the claim of hotel accommodation amounting to \$384-00.
3. The claim by the appellant for relocation allowance in the sum of \$94-50 was valid but the appellant had already been paid \$359-00, an amount well above \$94-50, thus the claim had already been taken care of.

Aggrieved by the arbitrator's decision, the appellant instituted proceedings to have the arbitral award set aside by the Labour Court.

Review Or Appeal?

The issue before the Labour Court was whether the court was seized with an application for review or an appeal. The Labour Court concluded that the application before it was a review and not an appeal and that it had no jurisdiction to review the arbitrator's decision. The appellant has not challenged the court *a quo's* view that it had no jurisdiction to review the arbitrator's decision. Rather, the appellant has suggested, with scant authority, that a court called upon to review a matter has the discretion to treat the review as an appeal. On the record it is clear that what was brought before the court was a review application.

However, what complicates this matter is that the appellant, a self-actor and layman, claims that he had intended to bring an appeal to the Labour Court but was misled into filing a wrong application by an officer of the Labour Court, an assistant registrar called Mr Muna - who was allegedly acting in connivance with the respondent.

In the court *a quo*, the appellant expressed his bafflement thus:

“I was advised by Mr Muna that I should lodge a review, for if you lodge an appeal, it may spend two years before the matter is heard in court. As a lay person, I requested Mr Muna to help me, to assist me for the matter to be heard quickly. He said money is requested in the amount of US\$50-00. As a person who wanted to be assisted I sought for money. I managed to get US\$40-00 and he received it and he prepared the papers.... So where I am right now I am a confused person, that I am given advice by members of this court, which then leads to the matter being of no use in the same court.”

Commendably, upon hearing of this the judge *a quo* immediately called the police to investigate. They apprehended Mr Muna and incarcerated him pending trial. The court *a quo* reflected and concluded as follows on the matter:

“Appellant then said that his intention was to appeal against the arbitrator’s decision, but when he came to the labour offices, he was advised by the court’s Mr Muna to make an application for a review. He took up the advice and ended up paying \$40-00. He had his application for review prepared by Mr Muna. Looking agitated, he said that he could not appreciate how he could be penalized when he got the advice from the court. Unfortunately, this was wrong advice.

As a result of this complaint against Mr Muna, investigations had to be instituted by the Registrar concerning the alleged advice. However, the appellant never made a request to the court to have Mr Muna called as a witness.

What is in the record is a well prepared application for review. Applicant approached this court with that application. It was served on the respondent. This is what the court had before it, and was called upon to review.

Mr *Maguchu* having submitted that this court had no jurisdiction in terms of the law to entertain a review against the decision of the arbitrator, Applicant was not heard to dispute this nor was he heard to say he was making an application for an appeal against the decision of the arbitrator. He was neither heard to say he was making an application for his review application to be altered to that of an appeal after he had raised a complaint against Mr Muna. In the end result, I find that I must deal with a review against the decision of the arbitrator. Having addressed myself on the law.... I find

that this court has no jurisdiction to entertain the application for a review against the decision of the arbitrator. The application is dismissed.”

The attitude displayed by the court *a quo* above, in my view, betrays a failure to act fairly and assist an unrepresented litigant. Once the court had initiated the process which led to the investigation of Mr Muna’s conduct, the matter was now squarely in the court’s hands so that it could not abdicate its responsibility and merely leave it up to the appellant to call Mr Muna as a witness. Worse still, the same court could not further hold it against the appellant for failure to have the witness called. The court was seized with the fact that Mr Muna’s alleged irregular advice was the subject of the registrar’s investigation, yet it appears to have shown no interest in the outcome of that inquiry.

However, the matter does not end there. It gets worse. The appellant makes even more serious allegations that the respondent’s group human resources director and others were busy issuing food hampers to labour officers, arbitrators and registrars of labour courts, including Mr Muna, on or about the time that he was allegedly misled into filing a review instead of an appeal.

In his answering affidavit in the application for leave to appeal to this Court the appellant states:

“18. Firstly, applicant approached the Labour Court with appeal papers against the arbitrator’s award, the papers were manipulated by the assistant registrar. Respondent used and still uses that manipulation as its chief argument. It later emerged that the same respondent, through the office of the deponent, was issuing hampers to the same assistant registrar and other administrative authorities.”

And in his heads of argument, the appellant focused on this issue in the following manner:

“*In casu*, the Respondent patronized and colluded with Court officers to mount controversy on Appellant’s papers which in turn Respondent sought and still seeks to rely upon in having the matter thrown away on a legal technicality. I refer to page 54 and 55 of the appeal record SC38/14, wherein the Respondent’s Group Human Resources Director and others were discussing and subsequently issuing food hampers to Labour Officers, Arbitrators and Registrars of the Labour Court to induce an obvious outcome.”

The appellant then attached copies of e-mail messages exchanged between employees of the respondent, as follows:

- A. From: Innocent Magaya
Date: 20 September 2011 08:15
Lloyd chinanhamabwe
Tabeth Melusi
Subject: RE: HAMPERS
---- got three hampers for the labour office, so who are the recipients?
- B. From: Lloyd Chidanhamabwe
Date: Tuesday, September 20, 2011 8:08
Innocent Magaya
Tabeth Melusi
Subject: HAMPERS
Further to our discussion on Labour Court Registrars Hampers last week. Its just a reminder on the issue. **Their names are Muna and Mutadzo.**(emphasis added)
- C. From: Tabeth Melusi
Date: Tuesday, September 20, 2011 9:04Am
Augustine Sekayi; Lloyd Chidanhamabwe; Ngoni Gamba, Innocent Magaya, Takudzwanashe Munyanga
Subject: Bulawayo Hampers
Augustine,
May you please process the two hampers as per e-mail below for Innocent. The hampers are worth \$45 each. Taku---payment of \$135 including another hamper for Arbitrator- (named) here in Harare will be delivered to your place today. Lloyd please go ahead and organize 2 hampers as per instruction.
Please note that you need to prepare 5 hampers including 4 from the previous week.
Regards.

And each of these food hampers was by no means a trifling parcel but consisted of significant grocery items as follows: 5 x 2kg Flour, 6 x 400g Peanut Butter, 6 x 500g mixed jam, 3 x 2 litres Mazoe Orange Crush and 1 x 5kg Roller Meal.

The appellant pointed out that his appeal at the Labour Court was heard on 19 September 2011 and judgment was reserved. The flurry of e-mails quoted above occurred the very next morning 20 September following the hearing, raising suspicion in his mind that the “gifts” were intended to influence the outcome of his appeal. He was unsure, however, as to when the giving out of the hampers had commenced or how widespread the practice was. There was no evidence or allegation that the presiding judge *a quo* or the arbitrator concerned had received any of these hampers. It appears that this alleged interference affected only that aspect of his appeal pertaining to the challenge of the arbitral award.

Mr *Maguchu*, for the respondent, did not deny that the respondent had distributed food hampers as alleged, but simply submitted that the practice had long since ceased and should have no relevance to the current proceedings.

However, in my view, the above allegations, though untested, are of a very serious nature. The approach by the courts in circumstances of alleged financial bias is that the existence of the slightest financial interest in a matter by an adjudicator would nullify the proceedings. The learned author Lawrence Baxter in his seminal work, *Administrative Law*, Juta & Co Ltd, 1984 explains this apparently stricter test for bias where pecuniary interest is involved as follows:

“Where pecuniary interest is alleged it is usually said that, if shown to exist, the “smallest” or “slightest” pecuniary interest will be sufficient to vitiate the decision. This has led many commentators to argue that the test for bias in cases of pecuniary interest, as opposed to other cases of bias, is stricter than usual. There seems to be no

need to adopt such a distinction: it is perfectly consistent to interpret the cases as stipulating that the slightest pecuniary interest will give rise to an apprehension by the reasonable man of a real likelihood of bias”.

I can find no reason why this principle cannot apply to the current case provided all the allegations are properly proved. Had such proof been available, and the administrator shown to have had an indirect financial interest in the outcome of the matter, having been promised or received the food hamper for the purpose of subverting appellant’s case, any reasonable person, under such proven circumstances, would perceive a real likelihood of bias on his part in the carrying out of his responsibilities. However, such critical proof and linkage between the administrator’s actions and the respondent’s conduct remained too elusive on the record for this court to make a definitive determination.

Furthermore, the matter was not helped by the appellant’s own inconsistent submissions. For example, in his heads of argument appellant, in one paragraph, maintains that what was placed before the court below was an appeal and the court grossly erred in treating it as a review, but in the very next paragraph claims that his papers were manipulated to turn his intended appeal into a review.

Be that as it may, the allegations and circumstances of this case are of such a serious nature that they cannot simply be glossed over. For any party to seek to influence Labour Court officials in such a blatantly vile manner to decide matters in its favour or misdirect litigants for its benefit as was allegedly done here is abhorrent in the extreme. It strikes at, suffocates and fouls the very source and wellspring of justice. Accordingly, one is left with no choice but to refer this matter to the appropriate authority, the Judicial Service Commission, to investigate and make the necessary decisions.

Whether The Labour Court As At 19 September 2011 Had The Jurisdiction To Review The Decision Of An Arbitrator

Before NARE J, in the Labour Court, was an application for the review of an arbitrator’s decision. The respondent’s legal practitioner stated that the Labour Court had no jurisdiction to review the decision of an arbitrator which point the Labour Court agreed with basing itself on two judgments of this Court: *Minerals Marketing Corp of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (S) and *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S), which two judgments have since been rendered otiose consequent upon the amendment of the Labour Act in 2005.

Now, s 89 of the Labour Act prescribes the functions, powers and jurisdiction of the Labour Court. In particular, s 89(1) in its relevant portions provides that:

“(1) The Labour Court shall exercise the following functions—

- (a) hearing and determining applications and appeals in terms of this Act or any other enactment;
- (b)
- (c)
- (d)
- (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters.

[Paragraph inserted by section 29 of Act 7 of 2005]” (my emphasis)

GARWE JA in the *Zimasco (Pvt) Ltd v Marikano* 2014 (1) ZLR 1 (S) at 6F-7D explained the import of s 89(1) (d)(1) of the Labour Act as inserted by Act No. 7 of 2005 as follows:

“The above provisions are, in my view, clear and unambiguous. In respect of labour matters, the Labour Court shall exercise the same powers of review as does the High

Court in other matters. The jurisdiction to exercise these powers of review is in addition, and not subject, to the power the court has to hear and determine applications in terms of the Act. ... The suggestion ... that the Labour Court has been given the same power of review as would be exercisable by the High Court in respect of labour matters is, in my considered view, incorrect and inconsistent with the provisions of the Act. I say this for two reasons. Firstly, the Act is clear that no court, other than the Labour Court, shall have jurisdiction in the first instance, to hear and determine any application, appeal or matter referred to in s 89(1) of the Act – see s 89(6) of the Act. ... Secondly, it is clear that the interpretation given relies on a superficial reading of the wording of s 89(1)(d) [*sic*]. The section should be understood to mean ‘the same powers of review in respect of labour matters as would be exercisable by the High Court’ or alternatively ‘the same powers of review, as would be exercisable by the High Court, in respect of labour matters’. Any other reading of the paragraph would clearly result in an absurdity.”

The above interpretation by the court in *Zimasco (Pvt) Ltd* was recently applied by Patel JA in *Lungu & Ors v Reserve Bank of Zimbabwe* SC 1/17. In the *Lungu* matter, the appellants challenged the Labour Court’s jurisdiction to review the decision of an arbitrator. The appellants’ argument is succinctly captured at pages 4 to 5 of the cyclostyled judgment as follows:

“In his heads of argument and at the hearing of the appeal, Adv. *Mpofu*, for the appellants, embarked upon an excursus outside the stated grounds of appeal into the review jurisdiction of the Labour Court. He submits that s 89(1) (d1) of the Labour Act [*Chapter 28:01*] limits that court to the same review powers as are exercisable by the High Court. Therefore, since the review of arbitral awards cannot be instituted in terms of the High Court Act [*Chapter 7:06*] but only under the Model Law scheduled to the Arbitration Act [*Chapter 7:15*], it follows that the Labour Court, being a creature of statute and having no inherent jurisdiction, cannot review the decisions of arbitrators. Adv. *Mpofu* relies for this proposition upon the decisions in *Catering Employers Association of Zimbabwe v Zimbabwe Hotel and Catering Workers Union & Another* 2001 (2) ZLR 388 (S) and *National Social Security Authority v Chairman, National Social Security Authority Workers Committee & Others* 2002 (1) ZLR 306 (H).

In the *Catering Employers Association* case, it was held that Article 34(2) of the Model Law sets out the sole grounds on which the High Court may set aside an arbitral award. The court cannot therefore rely on the grounds set out in s 27 of the High Court Act to set aside an arbitral award on review. This position was adopted in the *National Social Security Authority* case on the somewhat questionable basis that the general power to review proceedings conferred by s 26 of the High Court Act does not extend to arbitral awards because an arbitrator does not fall into any of the stipulated categories, *i.e.* inferior courts of justice, tribunals or administrative authorities. In any event, it was reaffirmed that the narrow grounds on which an arbitral award may be set aside are set out in Article 34 of the Model Law, and recourse to the courts against an award may only be made by way of an application under that article. The legislature had in enacting

the Model Law, so it was held, deprived the High Court of its inherent jurisdiction to review the conduct of an arbitrator.”

Patel JA in the *Lungu* matter dismissed the appellants’ argument where at pages 6 to 7 of the cyclostyled judgment he preferred the interpretation in the *Zimasco* judgment by stating:

“I fully endorse the above reasoning. The only possible meaning and effect to be ascribed to s 89(1) (d1) of the Labour Act is that the Labour Court has the same power to review any inferior proceedings in labour matters on the same grounds of review as may be invoked by the High Court in the exercise of its powers of review in relation to other matters not embraced by the Labour Act. The interpretation propounded by Adv. *Mpofu* is not only specious in that it divests the Labour Court of the full breadth of its oversight in labour matters but also absurd in that any procedural or other irregularity committed by an arbitrator would be rendered wholly unreviewable, whether by the Labour Court or the High Court. That surely could not have been the intention of Parliament in the enactment of s 89 of the Labour Act.”

It is critical to note that the Labour Court’s jurisdiction to review the decision of an arbitrator in terms of s 89(1)(d1) of the Labour Act became effective as from 2005. At the time that the matter came before the Labour Court in 2011 and the judgment was made which then became the subject of this appeal, the Labour Court had the power as prescribed by the law to review an arbitrator’s decision. This power was clearly explained by this Court in the *Zimasco* and the *Lungu* judgments as referred to above. Therefore, the court *a quo* misdirected itself in declining jurisdiction in the mistaken view that it could not review an arbitrator’s decision when in point of law it had the powers to do so. The matter should be remitted back to the Labour Court to exercise the powers of review that it is clearly imbued with.

Appeal Against Dismissal

As regards the second matter, the court below found as follows:

“Applicant was initially represented by a(Trade)Union, which withdrew at the last minute, having realized that it had not submitted the grounds of appeal in time. Despite advice by the Union, that the case must not go on because no grounds of appeal had been filed when the appeal was noted, Appellant decided to go on on his own. He, therefore, approached the court without any proper grounds of appeal.

Mr *Maguchu* argued that the appeal could not be entertained by the court because the grounds of appeal were filed six months after the notice of appeal was made. This was contrary to the law and therefore the appeal was a nullity. The appellant was supposed to withdraw those grounds of appeal and then proceed to make an application for condonation. I agree...

The rules were not followed in this case, so the appeal on its own is a nullity. It ought to be dismissed.”

The above finding that the appeal before the court *a quo* was a nullity has not been challenged in this appeal. As long as the finding remains extant, appellant cannot challenge the merits of an appeal which was held to be a nullity. By not appealing against that finding, he has accepted the appeal to be a nullity. See *First Banking Corporation Ltd v Marimo* SC 57/05 and *Dlodlo and Ors v Road Motor Services(Pvt) Ltd* SC 59/06.

Since it is improper for this Court to determine the merits of what is admittedly a nullity, the grounds of appeal pertaining to the appellant’s dismissal are irregular and ought to be dismissed.

Disposition

The appeal succeeds in part. The purported appeal by the appellant against his dismissal from employment ought to be dismissed. Costs on the ordinary scale would naturally follow upon such an outcome. However, the challenge of the dismissal of the proceedings pertaining to the arbitrator’s award must succeed with costs.

Accordingly, it is ordered as follows:

1. The appeal succeeds in part.
2. The appeal against his dismissal from employment is dismissed with the appellant bearing the costs thereof on the ordinary scale.
3. The appeal pertaining to the arbitrator's award is allowed with costs on the ordinary scale to be borne by the respondent.
4. The matter relating to the challenge of the arbitrator's award is remitted to the Labour Court for consideration on the merits before a different judge.
5. This judgment and the record are referred to the Judicial Service Commission for it to investigate and take appropriate action on matters raised herein.

GARWE JA: I agree

GOWORA JA: I agree

Dube, Manikai & Hwacha, respondent's legal practitioners.