

DISTRIBUTABLE: (53)

THANDO NCUBE
v
FIDELITY PRINTERS AND REFINERIES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAKARAU JA
BULAWAYO: FEBRUARY 25 2020 & JUNE 1 2020

K Phulu, for applicant

T M Matawu with *C Manungo*, for respondent

IN CHAMBERS

MAKARAU JA: This is an application for leave to appeal against a decision of the Labour Court, handed down on 27 October 2014 dismissing with costs, an appeal to that court against a decision of the respondent dismissing the appellant from employment. Leave to appeal was denied by the Labour Court on the premise that the intended appeal had no prospects of success.

The facts of this application are common cause.

The applicant was employed as a senior security officer by the respondent. Prior to that, he was employed by the Reserve Bank of Zimbabwe which owed him money upon the termination of his employment. It was a condition of the Reserve Bank that for applicant and others similarly placed to access the money owed, they had to make an application showing good cause. A death or illness in the family could constitute such good cause. In an effort to access the owed amount, the applicant applied to the Reserve Bank for the amount of US\$3500 attaching a burial order of one Sidubi D Moyo, his grandfather. The burial order was fake. The Reserve Bank reported the matter to the respondent, a sister company, which, acting on the report, charged the applicant with an act of misconduct. The applicant was convicted and thereafter dismissed from employment. He appealed to the Labour Court which, as stated above, dismissed the appeal.

It is the applicant's intention to appeal against the decision of the Labour Court. I cite here in full the grounds of the intended appeal. They are framed as follows:

1. The court *a quo* erred on a point of law by upholding the charge against the appellant when such a charge was founded on the requirement by the Reserve Bank that its former employee apply to it for payment of their arrear salaries and terminal benefits, which condition is unlawful and nullity. (*sic*).
2. The penalty imposed on the appellant was a nullity in that there was no compliance with the respondent's code of conduct requiring that the Worker's Committee be consulted before such a penalty is imposed.
3. Alternatively, the court *a quo* erred on a point of law in that it was at large to interfere with the penalty of dismissal because there was no compliance with the respondent's

code of conduct requiring that the Workers' Committee be consulted before a penalty of dismissal is imposed.

4. Alternatively, the court *a quo* misdirected itself on a point of law in refusing to interfere with the penalty of dismissal upon a finding that the circumstances of the matter merited a less severe penalty.

The application for leave to appeal was opposed on the basis that the intended grounds of appeal did not disclose any basis upon which the refusal by the Labour Court to interfere with the penalty imposed by the employer could be challenged or could be regarded as an error at law. Accordingly, and in short, it was argued that the appeal had no prospects of success.

At the hearing of the application, without abandoning the other grounds, counsel for the applicant restricted his argument to the last ground of appeal as one that might enjoy some prospects of success on appeal.

I pause to note in passing that counsel for the applicant was wise in not expending his energies on the first three grounds of the intended appeal.

The first ground is ill conceived as it seeks to challenge the validity of an administrative policy by the Reserve Bank of Zimbabwe to limit access to the arrear salaries and benefits of its former employees. This issue, even though raised before the Labour Court was not an issue properly before that court in appeal proceedings in which the Reserve Bank of Zimbabwe not only lacked interest, but was not a party.

The second and third grounds of appeal are interrelated not only because they are raised in the alternative but also because they seek to raise the same issue. This is in relation to the irregularity allegedly attendant upon the imposition of the penalty of dismissal. It was alleged by the applicant and denied by the respondent, that the worker's committee was not consulted before the penalty of dismissal was imposed. For the purposes of this application, it is not necessary that I determine whether the workers committee was consulted or not before the applicant was dismissed. This is so because not only was this an issue that should have been properly brought in an application for review before the Labour Court, but more importantly, it was never brought to the attention of the court which as a result, did not make any findings on it. Therefore, the court could not have erred as alleged or at all in respect of an issue that was not before it and one that it did not determine.

I now turn to the argument on the fourth ground.

Accepting as the correct position at law that an appeal court should be slow in interfering with findings of fact and the exercise of discretionary power by a lower court, counsel for the applicant submitted that this position does not hold for the Labour Court when exercising its appellate jurisdiction. This is so, he argued, because the Labour Court is not an appellate court *strictu sensu* in that the enabling Act empowers it to hear matters brought before it on appeal, *de novo*. It is therefore not confined to determining the matter on the basis of the record before it but can lawfully act as a court of first instance. Further, he submitted that whilst the Labour Court has appellate jurisdiction, the Labour Act [Chapter 28:01], that grants it this jurisdiction also enjoins

the court to infuse the equities of the dispute into the resolution of all matters brought before it, appeals included.

The argument by Advocate *Phulu* has no prospects of success on appeal. This is so because the Supreme Court, has in several cases pronounced itself on the law regarding the exercise of appellate jurisdiction by the Labour Court in matters relating to penalties. This it has done notwithstanding the provisions of 2 of the Labour Act which the applicant sought to rely on. (See *Mashonaland Turf Club v George Mutangadura* 2012 (1) ZLR 183 (S); *Innskor Africa (Private) Limited v L Chimoto* SC 6/12; *Ajasi Wala v Freda Rebecca Mine* SC 56/2016 and *Tendai Tamanikwa and Another v Zimbabwe Manpower Development Fund and Another* SC73/17.

BHUNU JA writing for the court in *Tamanikwa and Another v Zimbabwe Manpower Development Fund (supra)* had this to say:

“It being common cause that the respondent committed a dismissible act of misconduct, it was within the employer’s discretion to terminate his employment contract. Following the exercise of that discretion, there was no proper or compelling reason advanced as to why the court *a quo* or anyone else for that matter should interfere with the exercise of that discretion. In the absence of any cogent reason for interfering with the employer’s discretion, the respondent’s fate was sealed.”

It was not the applicant’s argument that he will seek to have this Court reconsider its decisions in the cases cited above.

In an application for leave to appeal, the judge considering the application acts as a gate-keeper. The role of the judge is to keep out appeals with no prospects of success. It presents itself very clearly to me that an application that raises a point that has already been determined by

this Court and has been determined against the very point that the applicant seeks to argue on appeal, is one such application that should not be allowed to pass, unless the applicant shows that it intends to request the Supreme Court to reverse its earlier decision and has some prospects of success in that regard. The applicant has not indicated an intention to request this court to reverse itself.

On the basis of the foregoing, this application cannot succeed.

Regarding costs, I see no justification for these not to follow the cause.

In the result, I make the following order:

The application is dismissed with costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners;

Coghlan, Welsh & Guest, respondent's legal practitioners.