

DISTRIBUTABLE (10)

TENDAI BONDE
v
(1) NATIONAL FOODS LIMITED
(2) LOVEJOY NYANDORO [as chairman of Appeals Committee]
(3) CHIPO NHETA [as Chairman of Works Council]

SUPREME COURT OF ZIMBABWE
GUVAVA JA
BULAWAYO, OCTOBER 15, 2020 & MARCH 22, 2021

Applicant in person

A. K. Maguchu, for the respondent

IN CHAMBERS

GUVAVA JA:

[1] This is an application for leave to appeal from a judgment of the Labor Court. The court *a quo* found no merit in the application for leave to appeal and dismissed it, on the main that the draft notice of appeal did not raise questions of law. The applicant was dissatisfied with the judgment of the court *a quo* and filed an application for leave in terms of r 60 of the Supreme Court Rules, 2018.

BACKGROUND FACTS

[2] The brief background of this application may be summarised as follows.

The applicant was employed by the first respondent as a stock quality analyst. He was charged with misconduct by the first respondent on the basis that he had been found in possession of unauthorised email communication which was between Group

Executives. The first respondent was of the view that the applicant's conduct amounted to an act of unauthorised impingement of emails in the organisation. The applicants conduct was aggravated by the fact that the applicant had allegedly shared this information with other persons without the written consent of the first respondent in terms of the first respondent's IT policy.

- [3] Following a charge of misconduct, a hearing before the disciplinary committee was set down but was postponed on six separate occasions at the request of the applicant. On the final occasion, the disciplinary committee proceeded to hear the matter and found the applicant guilty in absentia. He was subsequently dismissed from employment.
- [4] Following the applicant's dismissal, he proceeded to file an appeal with the Appeals Committee in terms of the Disciplinary Code. Again, the applicant did not attend the hearing before the Appeals Committee and the Committee proceeded to dismiss the appeal and to uphold the decision by the Disciplinary Committee.
- [5] The applicant appealed to the Labour Court under LC/B/37/2019 before MURASI J on the basis that the hearing committee had erred by not finding that he was wrongfully charged. The applicant further averred that the committee had erred in finding that he was in possession of documents whereas the documents, subject to the charge, had been loaded onto his computer following a breach of his password.
- [6] The first respondent raised a point in *limine* to the effect that the appeal was improperly before the court as the applicant had not appeared before the two lower tribunals which tribunals had issued default judgments against him and as such these decisions could not

be appealed against. The court proceeded to uphold the point in *limine* and struck the matter off the roll.

[7] The applicant then made an application for condonation of late filing of an application for review and extension of time within which to file an application for review. The court *a quo* dismissed the application. The court found that the applicant failed to give a reasonable explanation for the delay in making a valid application for review and that in any event he lacked prospects of success on review.

[8] The applicant subsequently sought for leave to appeal to this Court under LC/MT/48/20. The applicant argued that the court *a quo* had made material omissions in its findings and that its discretion had been based on wrong principles of law. He also attached his intended notice of appeal to the application. The court *a quo* dismissed the application on the basis that the applicant's intended grounds of appeal did not raise questions of law as required by the Labour Court Rules. Undeterred by this dismissal the applicant launched this application.

APPLICANT'S SUBMISSIONS

[9] At the hearing, the applicant raised a point *in limine* to the effect that the first respondent's opposing affidavit was fatally defective in that it had omitted to cite the case references. He also averred that the terminology in paragraph 27 of the first respondent's notice of opposition was defective in as far as it stated "our prayer" which was an attempt by the first respondent to include persons who had had not appeared before the court *a quo*.

[10] On the merits, the applicant submitted that the court *a quo* misdirected itself by making findings of fact contrary to the evidence presented, particularly that his dismissal took place on 31 August 2018 when the actual dismissal date had been 31 July 2018. It was the applicant's case that his dismissal on that date disregarded a valid sick note which was against Labour Laws and the court *a quo* had failed to consider same. Applicant further argued that the court *a quo* erred by failing to make a ruling on his application for rescission of judgment and by failing to decide the matter based on the evidence of the screenshot, emails and a forensic report.

RESPONDENT'S SUBMISSIONS

[11] Counsel for the first respondent, Mr. *Maguchu*, opposed the preliminary points raised by the applicant and argued that the failure to list the reference case numbers on the notice of opposition does not render the notice of opposition defective as the first respondent had clearly cited the case number SCB 67/20. Counsel further argued that the reference to "our prayer" under paragraph 27 of the notice of opposition was erroneously made and in any event did not detract from the actual prayer sought. It was counsel's argument that it was clear from the opposing affidavit that the second and third respondents were not active in the matter and that it was the first respondent which sought relief.

[12] Mr. *Maguchu*, also raised a preliminary point to the effect that the applicant's intended notice of appeal was fatally defective as it did not cite the correct date when the judgment appealed against was handed down. Counsel further submitted that the relief sought by the applicant was defective.

[13] On the merits, it was counsel's argument that the applicant clearly had a misunderstanding of what he sought to have impugned in the judgment of the court *a quo*. Counsel further argued that the court did not err in dismissing the applicant's application as it had no prospects of success on appeal.

DETERMINATION OF PRELIMINARY POINTS

[14] Both parties raised preliminary points. I will deal with the applicant's preliminary objections first. The point raised by the applicant sought to impugn the first respondent's opposing affidavit on the basis that it was fatally defective as it does not cite the reference cases in the matter and the prayer sought is stated as "our prayer" suggesting that it is for all the respondents. Rule 39 of the Supreme Court Rules, 2018 ('the Rules') provides for the procedure under which applications are made before this Court. In terms of r 39 (3) a respondent has a right to oppose to any application. Rule 39 (3) provides as follows:

"The respondent shall have the right to file opposing affidavits within five days of receipt of the application in terms of this rule and, thereafter, the applicant shall have the right of filing answering affidavits within a further period of five days calculated from the date of receipt of the respondent's opposing affidavits."

In *casu*, the first respondent timeously filed its notice of opposition and the notice indicates the case number before this Court being SCB 67/20. I find nothing amiss with the notice of opposition as presented. There is no rule of this Court which requires that every affidavit must have a reference of corresponding cases. In fact the rule of practice is that any affidavit or pleading in a matter must show the case number under which it is made. The reason for this is obvious. The respondent must be responding to a particular case which has been brought to the court by the applicant. It enables the registrar to file the notice of opposition in the correct file. This is particularly important in matters such as this, where there has been protracted litigation between the parties with many cases

being filed before the court. In my view, citation of case numbers is merely a management tool to avoid misfiling of cases. It could never have been the intention that the failure to cite reference files, which have come before the court, would lead to a notice of opposition being defective.

[15] It was also the applicant's argument that the relief sought by the first respondent in its notice of opposition was defective as it referred to "our" suggesting that it was for all the respondents and not just the first respondent which had filed the opposition. It is not in dispute that the second and third respondents have not been actively involved in this matter. It thus follows that a reference to "our" in the respondent's prayer suggests reference to it alone. All that the respondent sought was a dismissal of the application with costs on a legal practitioner and client scale. I am not persuaded that the prayer of the 1st respondent in the notice of opposition as framed, renders the opposing affidavit fatally defective. Even if the Court is to give an order for costs against the applicant such costs would be for the first respondent as it is the only respondent before this Court. The applicant's preliminary points are thus devoid of merit and are accordingly dismissed.

[16] With regards to the first respondent's point *in limine*, it was submitted by counsel for the first respondent that the appellant's notice of appeal is fatally defective as it does not identify the correct date when the judgment appealed against was handed down and that it has an incompetent relief sought in the prayer. It was the first respondent's submission that on filing an application for leave to appeal the applicant must attach a notice of appeal that complies with the rules. The applicant opposed the point raised by the first respondent and argued that the correct date when the judgment was handed down was 13

March 2019. The applicant did not however amend the notice of appeal which is before me.

[17] Rule 59 (3) of the Supreme Court Rules provides what should be included in a notice of appeal. The rule states as follows:

“The notice of appeal shall state –

- (a) The date on which the decision was given;
- (b)
- (c)
- (d) The exact nature of the relief sought;
- (e)

The provisions are mandatory. The applicant accepted that the date on his draft notice of appeal was incorrect. The applicant did not amend the date and as such the notice of appeal as is remains defective as it has an incorrect date.

[18] It is trite that the draft notice of appeal placed before the Court in an application of this nature becomes the notice of appeal which forms the basis of the appeal to be heard by the Court. It is thus imperative that the draft notice of appeal must comply with the rules of the court. The applicant’s notice of appeal is thus defective in this regard.

[19] The applicant’s draft notice of appeal is also rendered defective by the relief sought on appeal by the applicant. The applicant’s amended notice of appeal has the following relief sought on appeal:

“**WHEREFORE** the appellant prays for an order that:

- a) The appeal is allowed with costs.
- b) The judgment of the court *a quo* is set aside and is substituted with the following order:

“The application is allowed with costs”

AND IT IS ORDERED THAT:

PRAYER (1)

Appellant to file notice of Review to Labour Court within ten (10) days; application to be heard before a different judge. (*sic*)

PRAYER (2)

Supreme Court to make such other order that the court considers speedy, equitable and inexpensive to meet justice of case.”

It is apparent that the applicant wanted an order that the Court siting as an appeal court, grant him condonation and extension of time within which to file his review application.

This is not what the applicant sought *in casu*. In *Mudyavanhu v Saruchera & Others* SC 75/17 the Court stated the following:

“Rule 29 (1) (e) is specific in its language and requires that the relief sought be exact and competent so that the court is left in no doubt as to what exactly the appellant seeks.”

See also *Sambaza v AL Shams Global BVI Limited* SC 3/18.

The phrase ‘exact nature of the relief sought’ means that an appellant must inform the Court of the relief he/she wants. The Supreme Court’s mandate is to examine the correctness or otherwise of a decision of the lower court. In doing so the court is guided by the relief sought by the appellant. The need for the relief sought on appeal to be exact cannot be over emphasised.

[20] The applicant in *casu*, gives two prayers on appeal which are both incompetent. The first prayer is that this Court order that the applicant file his notice of review to the Labour Court within ten days and for the application to be heard before a different judge. If this Court finds for the applicant on appeal it will mean that he has a right of audience before the Labour Court to make a fresh application for review. The applicant will have to make

a completely fresh application for review in terms of the rules of the Labour Court. He will have twenty-one days within which to make his application for review as per the dictates of r 20 (1) of the Labour Court Rules, 2017. As such the prayer sought under prayer (1) is untenable before this Court.

[21] The applicant's alternative prayer is for the Supreme Court to make an order "as appear (*sic*) to it necessary in the justice of the case". The second prayer clearly fails to meet the threshold of the mandatory rule which provides that the exact nature of the relief sought must be given. It cannot be for this Court to draft a relief for the applicant, rather the applicant should inform the Court of the redress he seeks. The relief sought renders the notice of appeal fatally defective. The first respondent's preliminary points thus have merit.

[22] I also find it necessary to highlight that the defect in the applicant's application is further compounded by the fact that his grounds of appeal are not clear and concise and do not raise questions of law. A reading of the applicant's eight grounds of appeal shows that they are difficult to comprehend and attack the factual issues surrounding the applicant's matter. What was before the court *a quo* was an application for condonation and extension of time within which to file an application for review. The applicant's grounds of appeal should challenge the court *a quo*'s findings on the application. The applicant's grounds as they are clearly do not do so.

[23] Rule 44(1) of the Rules provides that grounds of appeal must be clear and concise. In *Chikura N.O & Anor v Al Sham's Global BVI Limited* SC 17/17 the Court remarked that:

"It is not for the Court to sift through numerous grounds of appeal in search of a possible valid ground; or to page through several pages of 'grounds of appeal' in order

to determine the real issues for determination by the Court. The real issues for determination should be immediately ascertainable on perusal of the grounds of appeal. That is not so in the instant matter. The grounds of appeal are multiple, attack every line of reasoning of the learned judge and do not clearly and concisely define the issues which are to be determined by this Court.”

The Court must not be left to guess what the appellant is challenging exactly from the decision of the court *a quo*.

[24] The applicant must also ensure that his grounds of appeal raise questions of law. Section 92F(1) of the Labour Act [*Chapter 28:01*] provides that an appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court. The applicant in making an appeal must not only allege, but also show, that the Labour Court misdirected itself on a point of law. Mere regurgitation of facts, as has been done by the applicant in his draft notice of appeal, will render the grounds of appeal defective.

[25] In respect to costs the first respondent sought costs in the event that it was successful. I find no basis to deny the first respondent its costs as prayed.

[26] In the result, the matter is struck off the roll with costs.

Calderwood, Bryce Hendrie & Partners, respondent’s legal practitioners