MARTIN JONGWE
versus
NATIONAL FOODS LIMITED
and
LABOUR COURT (BULAWAYO- HON KABASA)

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 MAY 2018 AND 14 JUNE 2018

Opposed Application

Applicant in person
S Chamunorwa for the first respondent

MATHONSI J: The applicant is not a stranger to the courts at all. In fact for a period spurning more than 8 years he has been a constant visitor either to the Labour Court in Bulawayo where he has a rich record of cross reference files dating back to 2010 or this court where he first made an approach in 2016. In the present application, which he filed in this court on 4 October 2017, the applicant seeks condonation of the late filing of a review application which he intends to launch against the judgment of the Labour Court, per KABASA J, handed down on 22 May 2015, some two years and five months earlier.

What can be gleaned from the papers placed before me is that the applicant had a labour dispute with his employer, the first respondent, as far back as 2005 when an attempt was made to transfer him from Bulawayo to Harare. He managed to obtain an order of the Labour Court granted on 1 November 2010, per MOYA-MATSHANGA J, interdicting his transfer to Harare pending proper consultation and clarification of issues he had raised. That provisional order was later confirmed by the same judge on 25 February 2010 but only to the extent that transfer to Harare was stopped.

Apparently at some stage the labour dispute was referred to an arbitrator in terms of the Labour Act [Chapter 28:01]. The arbitrator, who issued an award which was not appealed

against and remains extant to this day. The applicant must have been unhappy with the outcome of proceedings before the arbitrator but did not contest it. Instead he decided to make a direct approach to the Labour Court seeking relief which KABASA J described as "novel in nature." The applicant had sought an order to the effect that a case of his constructive dismissal had been established, that he receives compensation and damages in line with the proposed terms of separation being direct and indirect loss, that the notice period follow determination under the preparatory ruling LC/MT/URA/77/10 relying on the inviolable exemption clause and that the arbitration award of Hon. M Mpango on leave conditions at National Foods Ltd be substituted with the conditions under Statutory Instrument 41/98.

The Labour Court must have had serious challenges trying to decipher what the applicant sought from that court. The relief sought was meaning less in the extreme. When moving his application the applicant had argued that his was not an appeal from a decision of the arbitrator but a direct application in terms of section 89 (2) (d) of the Act. The respondent contested the application on the ground that the applicant could not approach that court in terms of that provision because that section envisaged the existence of an application in terms of section 93 (7) (1) of the Act. That provision relates to a case where a labour officer has either issued a certificate of no settlement, but for some reason it is not possible to refer the dispute or unfair labour practice to compulsory arbitration, or the labour officer has refused to issue a certificate of no settlement, in which event the Labour Court may, on application, dispose of the matter in terms of section 89 (2) (b).

The court upheld the point *in limine* taken by the respondent and in a judgment delivered on 22 May 2015, it dismissed the application. The dismissal triggered a chain of events, as the applicant fought tenaciously to overturn that judgment, which culminated in this application for condonation. First the applicant launched an application for leave to appeal that judgment to the Supreme Court. The application was filed on 29 June 2015. He pursued it all the way even though it was apparently defective. By judgment handed down on 30 November 2015, per KABASA J, the Labour Court struck the application off the roll with costs by reason that it was defective for want of form.

Having come unstuck with his intended appeal, the applicant changed horses in midstream. He filed an application for review in this court on 28 January 2016 in HC 216/16

more than 8 months after the judgment of the Labour Court sought to be brought on review was handed down. The review application was hopelessly out of time given that in terms of rule 259 of this court's rules an application for review shall be instituted within eight weeks of the termination of the proceedings. Again the applicant vigorously pursued that irregular application all the way to the date of set down which was 21 September 2017. It was argued before MAKONESE J who promptly ruled that it was improperly before the court as it was filed out of time and struck it off the roll.

Still the applicant would not capitulate. On 4 October 2017 he filed the present application for condonation of the late filing of a review application still pursuing a review of the Labour Court's judgment handed down on 22 May 2015, never mind that his latest effort was coming two years five months after the judgment. That is quite an inordinate delay calling for a very satisfactory explanation if the court were to countenance the grant of condonation.

In his founding affidavit, the applicant stated that he was indeed aware that the rules require that an application for review be made within eight weeks but the matter was initially an appeal and not a review application. He stated further that he had to turn to review when his application for leave to appeal was unsuccessful. The applicant appears to blame that on the Labour Court although he does concede that his failure to seek condonation following the termination of his application for leave to appeal on 30 November 2015 was owing to his "misunderstanding of the rules." Thereafter the applicant's story becomes muddled and confused.

He takes us on a journey of his trials and tribulations in the Labour Court even before the judgment sought to be impugned was handed down, blaming everything that went wrong on the Labour Court. Regarding the merits of the review itself he stated in paragraph 14 of his founding affidavit:

> "14. The procedure adopted by the 2nd respondent to threaten a negative result anterior to hearings is reviewable on basis of explicit bias. The failure to deal with a preliminary point on two consecutive times is an irregularity that renders the eventual outcome incompetent. There was no legal basis of refusing jurisdiction under section 89 (2)(d) of Act and it was irregular to refuse jurisdiction and request domestic remedies having already granted application and invited merits. The procedure adopted by the court *a quo* to take a preliminary point repeatedly

> and to change course of hearings without substantive application is not provided for in the rules------."

There is a regrettable habit among Zimbabweans especially self- actors, which the above passage betrays, that if you compile a list of words and arrange them into long-winding sentences even if they are unrelated then somehow the group will, merely by proximity, translate into something meaningful and that a valid point will just emerge on its own. I say so because not only is the foregoing passage meaningless, it also does not commend the applicant's case as meritable at all.

What the Labour Court did in the judgment sought to be taken on review was to hold that there was no legal foundation for the applicant to make an application to it seeking an order *inter alia* that he had been constructively dismissed from employment and awarding him damages. The applicant had advanced the argument that he was entitled to have direct access to that court in terms of section 89 (2) (d) of the Labour Act. It is important to consider that the labour dispute, or is it unfair labour practice, had previously been referred to and adjudicated upon by an arbitrator. The applicant was unhappy with the arbitral award but did not contest it. In terms of section 98 (10) of the Act:

> "An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

The applicant missed the train when he did not note an appeal and then sought to make a direct approach ostensibly in terms of section 89 (2) (d). That section provides:

> "(2) In the exercise of its functions, the Labour Court may in the case of an application other than one referred to in paragraph (b) or (c) or a reference, make such determination or order or exercise such powers as may be provided for in the appropriate provisions of the Act."

The court ruled that as the applicant was raising an unfair labour practice, his case was already provided for in section 93 and he was required to seek redress through conciliation by a labour officer. If that failed the matter had to be referred to arbitration and if unhappy with arbitration he would appeal to the Labour Court in terms of section 98 (10). It decided that procedurally it was incompetent for the applicant to make an approach to it the way he had done. In my view that reasoning is sound.

That then brings me to what the court has regards to an application for condonation. The position of the law is that whenever a litigant realizes that he or she has not complied with a rule of court he or she must apply for condonation without delay. If the litigant does not do so, he or she is required to give an acceptable explanation, not only for the delay in the filing of the application, but also for the delay in seeking condonation. What calls for some acceptable explanation is not only the delay in the application but also the delay in seeking condonation meaning that there are two hurdles to be overcome in such an application. See *Ngirazi* v *Saurosi and Another* HB 84-18; *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251C-D; *Salooje and Another NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) at 138H.

The applicant's explanation for the failure to file a review application within eight weeks is that, although he was indeed aware of the eight weeks requirement, he had to first try his luck at seeking leave to appeal. When that failed he had to fall back on a review application. After that he misunderstood the rules. In my view that is not an acceptable explanation at all. Condonation is not granted and is indeed not available because a party has failed in his or her pursuit of another remedy and because he or she would not want to accept his fate he or she would rather try luck elsewhere.

Apart from that, the applicant has not explained the delay in seeking condonation itself. To the extent that he says he was aware of the *dies inducae* of eight weeks he then has to give an acceptable explanation as to why he took years to approach the court seeking condonation. This is a litigant who had to wait until his initial application was dismissed as being improperly before the court to seek condonation.

If that finding appears harsh to the applicant then I have to consider whether there is any merit in the proposed application itself. This is because it is settled in our jurisdiction that where the explanation for the delay is unsatisfactory then the prospects of success of the application have to be very high before the court can exercise its discretion to condone the non-compliance. That is the point eloquently expressed by BEADLE CJ in *Kuszaba-Dabrowski et uxor* v *Steel N.O* 1966 RLR 60 (AD) at 64:

> "---- the more unsatisfactory the explanation for the delay, so much greater must be the prospects of success of the appeal be, before the delay will be condoned and the converse

> must of course be equally true, the more satisfactory are the explanations for the delay, the more easily will the court be inclined to condone the delay provided it thinks there is prospects of the appeal succeeding."

See also *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (S) at 323 B-C; *Musemburi and Another* v *Tshuma* 2013 (1) ZLR 526 (S).

I have stated that the decision by the Labour Court to refuse the application on the procedural irregularity of the applicant's direct approach to it when the Act requires the matter to commence by conciliation was sound indeed. In fact this is a case which had not only be conciliated before it had also been arbitrated on. The applicant was therefore inviting the court to entertain the matter not as an appeal, he having lost that opportunity when he did not appeal, but as a court of first instance. It was untenable. The Labour Court is a creature of statute and cannot do that which it is not empowered to do by the statute creating it.

I would refuse to condone the applicant's failure to comply with the rules on those grounds. *Mr Chamunorwa* for the respondent made an interesting point relating to jurisdiction. He submitted that this court does not have jurisdiction to review decisions or proceedings of the Labour Court which occurred before the promulgation of the Constitution of Zimbabwe (Amendment) (No 1) Act, 2017. Prior to that amendment of section 174 of the Constitution, the Labour Court was not subordinate to the High Court. The original section 172 did not make the Labour Court subordinate to the High Court and yet in terms of section 171 (b) this court was conferred review jurisdiction in respect of courts subordinate to it. Section 171 (1) (b) provides:

> "The High Court has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions."

It is only section 5 (2) of Act No of 2017 which now provides that:

> "For the purposes of this section and section 171 (1) (b) it is declared for the avoidance of doubt, that the Labour Court and Administrative Court are courts subordinate to the High Court."

In my view that amendment was brought about by a realization that there was a doubt arising from the wording of section 171 (1) (b) which excluded the Labour Court. It sought to remove that doubt. *Mr Chamunorwa's* argument is therefore attractive indeed. However, it does require any further discussion because I have already concluded that the applicant does not make a case for condonation. It has not merit.

In the result, the application is hereby dismissed with costs.

Calderwood, Bryce Hendrie and Partners' 1st respondent's legal practitioners