LEOPARD ROCK HOTEL (PVT) LTD
versus
EDWARD CHIKOSI
and
JUSTICE BRIDGET T CHIVIZHE N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 29 June 2018 & 10 October 2018

Opposed Application

C Maunga, for the applicant
M Moyo, for the 1st respondent

TSANGA J: This case raises the preliminary point as to whether the High Court has power to review decisions of a Labour Court. It was argued *in limine* that the High Court does not have jurisdiction to review labour matters. The reasoning was that since both the High Court and the Labour Court have the same powers of review in labour matters, this puts them at par. The first respondent argued that the applicant should have approached the Supreme Court on appeal since that court could have exercised its review powers in hearing the matter in terms of s 25 of the Supreme Court Act [*Chapter 7:13*].

The background facts

The first respondent, Edward Chikosi, worked for the applicant, Leopard Rock, as a front office manager. He was dismissed on 7 February 2012 for fraud. He referred the matter to conciliation on the basis that a wrong Code of Conduct had been used. The matter was referred to an arbitrator who ruled that a wrong Code had indeed been used and as a result reinstated the first respondent. The Applicant appealed to the Labour Court and was partially successful in that on 8 January 2016, it set aside the arbitral award dated 29 August 2013. It remitted the matter back to the employer to utilise the correct Code. However, whilst the body

of the judgement clearly stated that the first respondent's position reverted to suspended "with pay" pending the hearing under the correct Code, in the operative part of the judgement, the relevant provision stated that he was suspended "without" pay.

It was not in dispute that on 15 January 2016, the first respondent had immediately brought it to the attention of the judge, the second respondent in this matter, what it perceived to be a typing error in her judgment. In the meantime, on 23 February 2016 a hearing had been commenced under the relevant and applicable Code and the applicant had subsequently dismissed the first respondent. On 23 March 2016, in response to the letter of 15 January 2016, the judge corrected the error in the operative part of the judgment to indicate that the suspension was "with pay". A corrective order was granted. The import of this was that the first respondent subsequent to his dismissal, sought back pay from the applicant backdated from 2012 till his final date of dismissal under the relevant Code in 2016.

The applicant sought to appeal the decision of the Labour Court. However as applicant was out of time by time the demand was made, it had filed an application for condonation for the failure to timeously file the application for leave to appeal to the Supreme Court, together with an application for leave to appeal the judge's decision of 8 January 2016 as corrected. The application for condonation was heard before the same judge on 22 September 2017.

It was at the hearing of the application for condonation and for leave to appeal that the first respondent's counsel had raised the preliminary point that the application was defective as there was no notice of appeal attached to the application. The judge had agreed and reasoned thus:

> "Firstly the applicant has failed to comply with the generally accepted practice that in an application for leave, an applicant must attach the proposed Notice of Appeal setting out the grounds on which he/she proposes to appeal. The applicant has proffered an argument that no specific requirement is laid in the Labour Act and Rules for a party to, in filing its application for leave to appeal, attach the proposed Notice of Appeal, Whilst it is indeed correct as alluded that no specific requirement is made in the Labour Act and Rules, it has however become a general accepted practice in this Court.
>
> There are two main reasons why this is important .Firstly, the court must satisfy itself the proposed appeal complies with section 92F of the Labour Act [*Chapter 28:01*] and therefore points of law arise therein. Section 92F (1) reads as follows:
>
> 92F Appeals against decisions of Labour Court
>
> (1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court"

> The second reason is that the court must satisfy itself that the grounds of so raised enjoy good prospects of success on appeal."

It was against the backdrop of this ruling of 22 September 2017 that the applicant approached this court on review, and, to which the first respondent raised the preliminary point regarding the propriety or otherwise of the High Court's review powers in this instance. Since appeals from the Labour Court go to the Supreme Court, the contention by the first respondent was that it is the Supreme Court alone that can review decisions of the Labour Court. Reliance was placed for this argument on the case of *Tendai Tamanikwa* v *Zimbabwe Manpower Development Fund SC 33/13* which deals with the Supreme Court's review powers in terms of s 25 of the Supreme Court Act.

The legal position on the preliminary point

The issue of the High Court's powers to review labour matters is constitutionally now straightforward following the Amendment to the Constitution of Zimbabwe in 2017.

The Constitution describes the jurisdiction of the High Court in s 171 as follows:

> **171 Jurisdiction of High Court**
> (1) The High Court—
> (*a*) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
> (*b*) has jurisdiction to supervise magistrates courts and other subordinate courts and **to review** their decisions;
> c).……

Section 174 on the other hand deals with "other courts and tribunals". It is this section in particular that was amended by section 5 of Act 10 of 2017 in the following terms:

> "For the purpose of this section and **s 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."

Herein, in the constitution itself, is a clear indication that the legislature's intention was and is to subordinate the Labour Court to the High Court for purposes of review.

Given that s 171 (1) (b) gives the High Court review powers, the import of the amendment is that the High Court now clearly has jurisdiction to review decisions of the Labour Court as subordinate courts. The amendment unequivocally names the Labour Court and the Administrative Court as falling within the High Court's reviewable ambit. The amendment to the constitution unequivocally provides for it. The preliminary point on lack of jurisdiction accordingly lacks merit. At the time that the judge heard the application for

condonation and leave to appeal, and, at the time that this application for review was filed, the Constitutional amendment as outlined above had already come into effect.

Being that as it may, whilst the totality of the above provisions answer the question of whether the High Court can review labour court decisions it does not answer the question of whether the matter was properly before the High Court as a review matter. The core issue for determination is whether the applicant incorrectly brought an application for review when it should have appealed directly to the Supreme Court on a question of law.

Whether review was the proper procedure

As far as the reviews by High Court are concerned, the High Court Act sets out as follows:

> "**26. Power to review proceedings and decisions**
> Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review
> All proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

Whilst s 26 of the High Court Act accords powers of review, s 27 sets out the grounds or circumstances upon which a matter may be reviewed by the court, namely:

> "(*a*) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (*b*) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (*c*) gross irregularity in the proceedings or the decision".

In other words, the grounds are clearly spelt out.

What is pertinent to the resolution of this matter is that the application for review laid out four grounds for review, three of which centred on errors on questions of law. Only the first ground was said to pertain to procedural irregularity being the averment that the judge failed to determine the application for condonation. As regards the other three grounds pertaining to questions of law, the first of these was that the second respondent before whom the matter was heard had misdirected herself in making an error of law to the effect that the general practice of the Labour Court trumped the Act and the rules. The second error of law was said to be in relation to the finding that compliance with s 92F and the requirements of good prospects of success could only be determined from a draft notice of appeal. The third error of law was said to be in the finding that an application for leave to appeal without a draft notice of appeal would be defective in terms of generally accepted practice, notwithstanding that it was not a

requirement of the Labour Act and the Labour Court Rules at least at that time. This was said to be a gross irregularity in that it prevented a fair trial on the issues.

The gravamen of applicant's complaints being questions of law upon which appeal lies to the Supreme Court, this court finds that this application was improperly brought as an application for review as even the first ground could have been holistically more properly canvassed in an appeal in terms of s 25 of the Supreme Court Act in dealing with the grounds which were on questions of law. In any event, the ground on procedural irregularity, being the contention that the Judge erred in failing to consider the issues of condonation first which would have required her to hear reasons behind the delay before deciding on the issue of prospects of success is one that can be resolved with reference to the Supreme Court's own authority. The sentiments expressed by the Supreme Court in the matter of *Afaras Mtausi Gwaradzimba v C. J. Petron &Company (Proprietary) Limited* SC 12/2016 cited by the respondents are apt with regard to the fact that it is not necessarily detrimental "for a court not to deal with each and every submission raised by the parties and instead confine itself only to those issues which are critical to its decision".

> "… in a case where a number of issues are raised, it is not always incumbent upon the court to deal with each every issue raised in argument by the parties. It is also correct that a court may well take the view that, in view of its finding on a particular issue, it may not be necessary to deal with the remaining issues raised. However this is subject to the rider that the issue that is determined in these circumstances must be one capable of finally disposing of the matter".

Applicant made a single application for condonation and for leave to appeal. It follows that it would have been considered holistically by the court. If Applicant had wanted the issue of condonation to be determined without reference to its application for leave to appeal then it would have lodged two distinct applications. Moreover, this was a matter where the judge was already familiar with the background to the matter and the reasons for the delay especially as part of the reason for the delay lay in an error that the Judge had made in granting her original order. It was not improper for her to have zeroed in on the notice of appeal under the circumstances.

This is as far as I will go. The other grounds were issues of appeal on questions of law to the Supreme Court. What can be discerned from the grounds of appeal is that the other three issues for determination can be distilled to whether the Labour court was relying on rule making outside the requirements of the rules of procedure at the time and whether this was not within range of what could be expected of a judge in the Labour Court. The Applicant was correct in

seeing the questions arising from the hearing of 22 September 2017 as legal ones. It should therefore have approached the Supreme Court in accordance with s 92F of the Labour Court Act. The erstwhile practitioners should take the responsibility.

Costs have been sought by the first respondent on a higher scale. I do not find that these are merited as this cannot be said to be an application that was frivolous or one where the Applicant refused to see reason.

Accordingly, the application is dismissed with costs on an ordinary scale.

Maunga Maanda & Associates, applicant's legal practitioners
Dube-Banda, Nzarayapenga & Partners, 1st respondent's legal practitioners