DISTRIBUTABLE (55)

DELTA BEVERAGES (PRIVATE) LIMITED
v
SPIWE MAPURANGA

SUPREME COURT OF ZIMBABWE
HARARE: 25 MARCH 2022 &13 JUNE 2022

T. L. Mapuranga, for the applicant

S. Chatsanga, for the respondent

IN CHAMBERS

BHUNU JA: This is an application for condonation and extension of time within which to appeal against the decision of the Labour Court. The application is brought in terms of r 43(1) of the Supreme Court Rules, 2018 (the rules).

The respondent was employed by the appellant in 1988 as a canteen worker. On 29 July 2011 the appellant held a farewell party for one of its employees Mr Rusike. It is common cause that the respondent, as a canteen worker and other workers were extremely busy on that day such that they were unable to have lunch or to eat at the party. When they were about to knock off they were authorised by their supervisor to take some meat with them as they had not had an opportunity to eat at the party.

As they were leaving, the respondent and her co-workers were searched at the gate and were found in possession of meat by the security guards. Disciplinary action ensued after the incident and the respondent was charged in terms of the Delta Beverages Employment Code of Conduct (2003) under the category offence of "Theft/Fraud/ Dishonesty".

The respondent was found guilty by the Disciplinary Committee of theft and was dismissed from employment. She appealed unsuccessfully to the Head of Department Appeals Committee as well as to the Works Council Appeals Committee. Dissatisfied with these decisions, she noted an appeal to the Labour Court (the court *a quo*). The court *a quo* summarised the respondent's grounds of appeal as follows:

"1. She was wrongly charged for theft since her immediate supervisor had authorised her to take the meat.
2. The company destroyed valuable evidence (the meat) which was critical in determining her guilt or otherwise.
3. The duty to prepare the gate pass lay with her supervisor and not her, hence she cannot be faulted for failure to produce one when she was arrested at the gate.
4. The employer did not give due weight to her 23 year clean employment record, which if it had, could have returned a lesser penalty.
5. The company relied on evidence of the witnesses which was not clearly proven to find her guilt."

The court *a quo* found that the facts of the case and the evidence led did not demonstrate that the respondent stole meat from the appellant. It found that the respondent could not be faulted for having left the premises without written authorisation when her supervisor did not see the need to issue her with one. Consequently, the court *a quo* granted the appeal and reinstated the respondent without loss of salary and benefits and in the alternative damages *in lieu* of reinstatement.

Aggrieved by the decision of the court *a quo*, the applicant filed an appeal to this Court on 4 April 2013. The matter was set down for hearing on 4 June 2021. However, the

matter could not proceed on the hearing date as the notice of appeal was fatally defective for want of compliance with r 31 (1)(e) of the Supreme Court Rules, 2018 (the rules) in that the relief sough was not exact. As a result it was struck off the roll. This prompted the applicant to make the present application for condonation and extension of time within which to appeal.

In an application for condonation for failure to comply with the rules of the court, the applicant should satisfy the court that it has a reasonable explanation for the delay, that the delay is not inordinate and that the intended appeal enjoys good prospects of success. These requirements were articulated in the case of ***Forestry Commission v Moyo 1997 (1) ZLR 254 (S)*** as follows:

(a) That the delay involved was not inordinate, having regard to the circumstances of the case;

(b) That there is a reasonable explanation for the delay;

(c) That the prospects of success should the application be granted are good; and

(d) The possible prejudice to the other party should the application be granted.

The explanation given by the applicant is that its legal practitioner filed a defective notice of appeal resulting in the matter being withdrawn on 21 June 2021. In my view this explanation is unreasonable. The reason for the withdrawal was that the notice of appeal was defective in that the relief sought was not exact as required by the rules and that the appeal was not filed within the time limit as provided for by the rules. It is an established principle of our law that a legal practitioner owes his or her client a duty of due diligence. The courts have pronounced that there is a limit beyond which a litigant can be absolved from the sins of his or her legal practitioner. See the case of *Viking Woodwork P/L v Blue Bells Enterprises P/L* 1998 (2) ZLR 249 at 252H-253C.

The dispute between the parties arose over a decade ago. Following the pronouncement of the judgment by the court *a quo* the applicant applied for leave to appeal. When leave to appeal was granted the appellant failed to file the appeal timeously. It went on to seek condonation and extension of time within which to appeal. This Court granted the indulgence sought on 12 March 2013. The order for condonation stated in para 2 as follows:

> "2. The application for extension of time within which to deliver and file the notice of appeal is granted. The notice of appeal shall be deemed to have been delivered and filed on the date of this order."

Once again the applicant failed to file a valid appeal within the time limit prescribed. The Notice of appeal was then filed on 28 June 2018, five years later, after the expiration of the 15-day time period prescribed by r 38 of the rules. The delay is inordinate. The court is of the view that the applicant cannot be absolved from the consequences of the lack of diligence on the part of its lawyers because the applicant has demonstrated tardiness in having its appeal prosecuted.

Perhaps the applicant was under a misconception that has confused several legal practitioners in noting an appeal after such an order is made. More often than not legal practitioners are of the view that after such an order is granted there is no time limit within which the notice of appeal should be filed. The case of *Afritrade International Limited v ZIMRA* SC 1-19, which dealt with a similar matter to the one at hand is apposite. GUVAVA JA in chambers expressed the following sentiments:

> "It also seems to me that the assumption made by legal practitioners and litigants is legally wrong as it seeks to read the Rules in isolation. It completely disregards the Rules that state that service has to be effected on the Registrar of this Court, Registrar of the court *a quo* as well as the respondent(s). This is all prescribed in r 29 (2).
> In terms of procedure, it also overlooks the fact that in granting an application for condonation and extension of time within which to appeal there is no record of proceedings which is being appealed against and that no specific case number has been accorded to the intended appeal.

> In my view therefore, when the court makes an order such as the one in question, it simply means that the "draft" notice of appeal which must be filed together with the chamber application for condonation and extension of time to note an appeal has been accepted by the court.
> In my view it follows that the applicant must thereafter file the notice of appeal within the prescribed period in terms of the Rules…
> The process begins with the noting of an appeal to this Court. It is at this stage that the appellant is issued with a case number. In terms of Rule 30 (a), where leave is not necessary an appellant has fifteen days within which to file and serve the notice of appeal. This same 15 day rule applies with equal force where an applicant has been condoned and granted extension of time within which to note an appeal, unless a shorter period is ordered by the judge.
> I*n casu*, the applicant had 15 days from the date the order was made within which to file its notice of appeal under a new and separate case number." (my emphasis)

In light of the above authority the applicant ought to have filed an appeal within 15 days from the date of the order of the court. An inference can be drawn that the applicant is determined to frustrate the execution of the judgment issued by the court *a quo*. The law is clear that there must be finality to litigation. McNALLY JA spoke on this in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C- E when he said the following:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. See also *Merchant Bank of Southern Africa v Manzini & Ors* SC 58-17 p 9." (*my emphasis*)

The conduct of the appellant amounts to an abuse of court process. The applicant ought to have observed time limits as provided for in the rules if it was desirous of having its appeal prosecuted. It is because of the foregoing that the court finds that the explanation tendered by the applicant is unreasonable.

However, that is not the end of the matter. In determining an application of this nature, the court is enjoined to look not only at the delay and the reasonableness of the explanation for such delay, but also at the prospects of success of the intended appeal. The draft notice of appeal raises the argument that the court *a quo* erred in finding that the

respondent had not stolen meat from the appellant. In the first ground of appeal, the applicant alleges that the respondent was guilty of theft as she was found in possession of meat which exceeded the amount authorised by the supervisor and that she did not have a gate pass authorising her to take the meat.

Two issues arise from the above argument raised by the applicant that is whether the respondent was guilty because the meat in her possession was in excess of that authorised and whether she was guilty because she did not have a gate pass. The court is of the view that indeed a gate pass was required to exit the premises with such goods. However, the duty to issue a gate pass lay with the supervisor after he had advised the respondent and her colleagues to carry some meat with them.

Her supervisor testified that he did not see the need to issue the respondent with a gate pass as he had also given other members of staff meat to take home on that day. He also stated that he did not issue a gate pass as he believed the portions he gave them were reasonable and he would be answerable if there were any problems. It is clear that the applicant could not obtain a gate pass from the supervisor on the day in question as he, as the issuing authority, had determined that a gate pass was not necessary. In such circumstances the respondent cannot be faulted for attempting to leave the premises without a gate pass.

The next issue is whether the respondent took more meat than what was authorised by the supervisor. It is common cause that the meat was destroyed before the supervisor had an opportunity to see it. The supervisor submitted that he did not know how much in excess of the authorised amount the appellant took as he did not see the meat before it was destroyed. He however averred that he only authorised them to take two sausages each, measuring about

30-40 cm each. The court *a quo* remarked that such evidence was unbelievable as it was unlikely that the supervisor measured the sausages and because he did not see the meat allegedly stolen.

The findings by the court *a quo* are not grossly unreasonable given that the supervisor testified that he was under immense pressure to proffer these charges against the respondent and her colleagues. In light of the testimony by the supervisor, the court *a quo* made a finding that the charge against the appellant and the attendant evidence to prove it was not in sync.

It is trite that an appellate court will not easily interfere with the discretion of a lower court unless in the light of gross misdirection. In *Barros & Anor v Chimponda* 1999 (1) ZLR 58 (S), the court held as follows:

> "It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing."

Further, in *Hama v NRZ* 1996 (1) ZLR 664 (S), the court held that:

> "… an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before it, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at such a conclusion."

The factual findings of the court *a quo* cannot be faulted. There was in sufficient evidence to prove that the respondent stole the meat. The crucial witness of the applicant

testified that he is the one who authorised the respondent to leave the premises with the meat. The conclusions made by the court *a quo* cannot be said to have been manifestly absurd. In that regard, the intended appeal lacks merit.

Having found that the applicant's delay of five years to file a valid appeal is inordinate, that the explanation proffered is unreasonable and that the appeal does not have good prospects of success, the court is of the view that the application ought to be dismissed.

Accordingly it is ordered as follows:

The application for condonation and extension of time within which to appeal be and is hereby dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners.

Lovemore Madhuku Lawyers, respondent's legal practitioners.