

DISTRIBUTABLE (62)

CITY OF HARARE
v
AMOS CHIKWANDA

SUPREME COURT OF ZIMBABWE
BHUNU JA
HARARE: FEBRUARY 19 & 20, 2018 & MARCH 26, 2020

A. Muchadehama, for the applicant

C. Mafongoya, for the respondent.

CHAMBER APPLICATION

BHUNU JA: This is an application for reinstatement of an appeal in terms of r 34 (5) of the Supreme Court Rules 1964. The brief facts giving rise to the application are that the applicant employed the respondent as its clerical officer.

Sometime in October 2011 the respondent received and receipted a total amount of US\$34 247.00 in the course of duty. The money went missing and the respondent was charged with failure to remit the receipted money for banking. The prime suspect for the missing money was the respondent's supervisor who also went missing soon after the money disappeared.

Consequently, the Disciplinary Committee charged and dismissed the appellant from employment in connection with the missing money. The Committee found that the

respondent was at fault in that there was no evidence that he handed over the missing money to his supervisor Mr Manyere because the supervisor had not signed acknowledging receipt of the money. As the respondent was dissatisfied with his dismissal from employment, the matter was subsequently referred to the arbitrator. The arbitrator ruled in favour of the appellant and confirmed the dismissal.

Aggrieved by the arbitrator's award, the respondent successfully appealed to the Labour Court. In an order dated 25 October 2013 it determined that the respondent's dismissal was unlawful and proceeded to make the following order:

- “1. The appeal be and is hereby upheld.
2. The respondent is ordered to reinstate the appellant without any loss of salary or benefits from the date of unlawful dismissal.

If reinstatement is no longer an option, the parties may agree on the quantum of damages in lieu of reinstatement. In the event that parties fail to agree on the amount of damages, either party can approach this Court for quantification of damages.

There is no order as to costs.”

Dissatisfied by the above order, the applicant sought and was granted leave to appeal to this Court on 9 July 2014. By the time the applicant obtained leave to appeal the time within which it was obliged to file its appeal had already expired, thereby necessitating an application for condonation of late noting of appeal. The application for condonation was granted by this Court on 18 June 2015. The order reads:

“IT IS ORDERED THAT:

1. The condonation of late noting of appeal and extension of time within which to appeal be and is hereby granted.
2. The notice of appeal dated 12 December 2014 shall be deemed to have been filed on the date of this order.

3. There shall be no order as to costs.”

Following the granting of the above order, on 10 August 2017, the Registrar of the Labour Court issued a notice for the applicant to pay US\$120.00 within 5 days of receipt of the notification letter in terms of r 34 (1) being costs for the preparation of the record of proceedings. The notice was served on the Applicant on 16 August 2017.

The applicant defaulted in making the required payment within the prescribed 5 days’ period. Whereupon the Registrar wrote to the applicant’s legal practitioners on 23 November advising that the appeal was deemed to have lapsed. The letter reads:

“**RE: CITY OF HARARE V CHIKANDA**

Reference is made to the notice of appeal you filed on 27 March 2017.

It is noted that you did not make any arrangements for the preparation of the record within the time specified in Sub rule (1) of Rule 34 of the Supreme Court Rules, 1964.

In terms of Sub-rule (5) of Rule 34 of the aforementioned rule, the appeal is deemed to have lapsed.”

In terms of r 34 (5) the applicant can only be granted relief by a judge of this Court upon proof of good cause for non-compliance. The sole issue for determination on the merits is whether or not the applicant has shown good cause for the admitted disdain of the rules. The respondent has however raised a point *in limine* that has to be disposed of before delving into the merits of the application.

The point *in limine* is premised on two grounds:

1. That the application does not conform to the rules.

2. That the applicant has not taken diligent and determined steps to prosecute the appeal.

Counsel for the respondent merely stated without elaborating why he says the application does not conform to the rules of court. It is for the objector to prove that there has been a fatal disdain of the rules. It is not for the court to forage through the rules in search of fatal procedural irregularities not apparent to it. This is for the simple but good reason that it is for parties to make up their respective cases without leaving it to the court or judge to fill in the gaps.

In *Delta Beverages (Pvt) Ltd v Murandu* SC 38/15, this Court had occasion to observe that:

“Parties are expected to argue their cases so as to persuade the court to see merit, if any, in the arguments advanced for them. They are not expected to make bald unsubstantiated averments and leave it to make of them what it can.”

As for the second ground for objection, it does not deal with any procedural preliminary points but the merits of the application. That being the case, I find that there is absolutely no merit in the points *in limine* raised. Both points *in limine* are accordingly dismissed.

Turning to the merits of the application, the applicant has in effect proffered one reason for its non-compliance with r 34 (5). Its reason for failure to pay for the preparation of the record of proceedings is that being a large organisation, it is overwhelmed with cases of litigation such that omissions and errors of this kind are bound to happen.

In his founding affidavit Hosia Chisango the applicant's Acting Town Clerk deposed at para 18 that the notification for payment was received on time and forwarded to the Finance department. Payment was however not done in error owing to overwhelming litigation workload. At para 19 this is what he had to say:

- “19. I have discovered after enquiring from the relevant official that because of the numerous similar payments that were being made around the same time this payment was mistakenly omitted. It was only after the notice dismissing the appeal was served that verifications with the records were done and it became apparent that this payment and a few others had been omitted.
20. I must hasten to state that because of the size of the applicant organisation, it is currently struggling to cope with litigation costs. The applicant by virtue of its size is naturally involved in a lot of litigation. This means that on a daily basis, either we are paying costs for the serving of notices of set down or we are paying costs to issue court process, or we are paying costs of preparation of records or we are paying Sheriff's costs of serving process. In the end some payments are omitted.
21. Quite unfortunately the time frames that are required for us to be paying these litigation costs are too short and very often we are struggling to meet them. (*Emphasis provided*).

The long and short of it all is that the applicant is saying owing to its huge size and enormous amount of litigation it is unable to comply with the rules of court. Paragraphs 19 to 21 of its founding affidavit however tell a totally different story. They disclose a woeful lack of diligence and disgraceful dereliction of duty on the part of the respondent, its officials and legal practitioners.

It is clear from the founding affidavit that after lodging the claim for payment with the finance department no one made a follow up to check whether payment had been effected within the prescribed period. No follow up was made despite knowledge that the payment could be omitted in error. Blaming the volume of work is just a red herring meant to cast wool over the judge's eyes.

Both the applicant's officials and its lawyers were reckless in their handling of the appeal. They cannot be allowed to hide behind the volume of work as if they are the only big organisation involved in enormous amounts of litigation. What immediately comes to mind is the attorney General's office that has to handle litigation for the entire government and other City Councils that operate more or less in the same manner as the applicant.

The averment made by the Acting Town clerk to the effect that the appellant was hampered in its endeavour to effect payment timeously by an overwhelming amount of litigation is uncorroborated hearsay not supported by the officers and the legal practitioner concerned. No weight can therefore be given to the Acting Town Clerk's averments in this respect in the absence of any supporting affidavits from the officers concerned. For that reason the applicant's claim that the failure to pay was not deliberate sounds hollow and unconvincing because recklessness is tantamount to intention. See *Rosenthal v Marks* 1944 TPD 172 at 180 where the court said:

“Gross negligence (*culpa lata crussa*) connotes recklessness, an entire failure to give consideration to the consequences of his action, a total disregard of duty.”

The appellant and its legal practitioners' maltreatment of the appeal fits the respondent's averment that “*the applicant has not taken diligent and determined steps to prosecute the appeal*”.

This matter dates back to 2011. Since then the proceedings have been a charade of deleteriousness and applications for indulgency from the court by the applicant. A perusal of the record of proceedings shows that:

1. On 5 March 2014 The applicant was granted a consent order condoning late filing of an application for leave to appeal to the Supreme Court.
2. Having been granted leave to appeal, the applicant again defaulted in lodging the appeal with this Court timeously.
3. The applicant then filed a defective application for condonation of late noting of appeal and extension of time to appeal. The matter was struck off the roll.
4. The applicant then lodged another application for condonation and extension of time which was granted on January 2015.
5. There is another order of this Court showing that on 18 June 2015 this Court again granted the Appellant another order for condonation of late noting of appeal and extension of time within which to appeal.

The appellant's deplorable prosecution of this appeal gives the court the impression that the appeal has been lodged for the sole purpose of buying time. This notion is compounded by the fact that the court *a quo* made an unassailable factual finding that the applicant was not to blame for the theft of the money. At p 6 of the cyclostyled judgment, this is what the learned judge had to say:

“I believe the probabilities of this case are that the appellant (*Amos Chikwanha*) did his part, money was handed over to Manyere. Whether it was deposited in the safe or not is another issue. Appellant did his part. There was no way he could have forced his superior to sign”

That finding of fact is incontrovertible as it is consistent with undisputed evidence that after being handed over the cash by the respondent, Manyere disappeared together with the money. After his disappearance with the money the respondent was allowed to work for seven months without charge. Considering the well-known *dictum* in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664, the appellant's prospects of success on appeal are virtually non-existent, considering that there is nothing irrational about the court *a quo*'s findings of fact.

For the foregoing reasons the application cannot succeed. Costs follow the result. It is accordingly ordered that the application for reinstatement of appeal be and is hereby dismissed with costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners.

T.A Toto Attorneys, the respondent's legal practitioners.