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MARTIN JONGWE

V

1) NATIONAL FOODS LIMITED 2) KABASA J (AS JUDGE OF THE LABOUR COURT)

SUPREME COURT OF ZIMBABWE

KUDYA AJA

BULAWAYO: 23 MARCH 2021

CHAMBER APPLICATION

Applicant in person

C. Chamunorwa, for the first respondent

No appearance for the second respondent

KUDYA AJA: The applicant is a tenacious serial litigant in the Bulawayo Labour Court, High Court and in the Supreme Court. He is a disgruntled former employee of the first respondent, who has been fighting tooth and nail without success to have his labour case, which was struck off the roll by the second respondent in the Labour Court on 22 March 2015, reviewed by the High Court.

On 23 October 2020, he filed the present chamber application for reinstatement of his appeal in case number SCB 33/20 in terms of r 70 (2) of the Supreme Court Rules, 2018.

The brief background of the case is that the Labour Court struck off his appeal on 22 May 2015. His subsequent application for leave to appeal to the Supreme Court was dismissed by the Labour Court on 30 November 2015 on the ground that his appeal was premised on questions of fact and not points of law. He abandoned the appeal route and sought to review the Labour Court decision of 22 May 2015 in the High Court on 28 January 2016. That application was struck off the roll by Makonese J on 21 September 2017 on two grounds. The first was that it was not properly before the Court. The second was that it had been filed out of time and without seeking condonation.

Thereafter, he filed an application for condonation and extension of time to file the review on 4 October 2017. The application was determined by Mathonsi J, as he then was, who dismissed it on the merits on 14 June 2018. Even though it was a final and definitive judgment, he proceeded to seek leave to appeal against that judgment before Mabikwa J, who correctly dismissed the application in the *ex tempore* judgment of 15 July 2019. He however availed the written reasons on 12 March 2020.

Dissatisfied with the dismissal by Mabikwa J, the applicant filed the notice of appeal to which the present application relates 11 May 2020. On 21 September 2020, he was invited by the Deputy Registrar of the High Court Bulawayo to inspect the appeal record in terms of r 15 (8) of the Supreme Court Rules. Instead, he unsuccessfully sought the inclusion of documents, which did not form part of the record of the judgment that he was appealing against and in the process

failed to inspect the record of appeal within the prescribed period prompting the Registrar of this Court to regard the appeal as abandoned and deemed dismissed by letter of 6 October 2020, in terms of r 17 (11) and (12) of the Supreme Court rules.

The notice of appeal of 11 May 2020 was filed in reaction to the written judgment. The applicant indicated on the face of the notice that he was appealing against the judgment handed down on 13 March 2020. He raised six grounds of appeal against the judgment in his draft notice of appeal, which I adjudge to be prolix, argumentative and totally incomprehensible. The relief sought is worded as follows:

WHEREFORE the appellant prays for an order that:

a) The appeal is allowed.

b) The judgment of the High Court –MABIKWA J HB 48/20 be and is hereby set aside.

c) First respondent to pay appellant's costs.

The first respondent contests the application and filed its opposing papers on 20 October 2020. It took four preliminary points and pleaded over to the merits. On 2 November 2020, the applicant filed his answering affidavit and took a preliminary point challenging the validity of the respondent's opposing affidavit. He took the point that the two Group Directors who issued the resolution authorizing the deponent to the first respondent's opposing affidavit to represent the company in these legal proceedings were in fact not directors of the first respondent. He attached heads of argument prepared by the first respondent's previous legal practitioners and signed by the deponent to the opposing affidavit as proof of his averment. The document was not only irrelevant but was inadequate to establish his suspicions. I, therefore,

dismissed his preliminary point on the basis that his bald unsubstantiated assertion was inadequate to non-suit the first respondent.

The four preliminary points taken by the first respondent attacked the validity of the notice of appeal filed on 11 May 2011. The first was that it *ex facie* provided the wrong date of the written judgment as 13 instead of 12 March 2020. The second was that the notice of appeal was filed outside the prescribed mandatory period of 15 days from the 12 March 2020. The third was that the relief sought failed to state the exact resultant relief sought on setting aside the appealed order. The last and pertinent point was that the notice of appeal should have been filed within 15 days of the *ex tempore* judgment of 15 July 2019, and the failure to do so for whatever reason constituted a fatal irregularity, rendering the notice of 11 May 2020, void *ab initio* and of no force or effect.

It is correct that the failure to cite the correct date of the judgment appealed against in a notice of appeal contravenes the peremptory requirements of r 37 (1) (a) of the Rules and invalidates such a notice. See *Sambaza v Al Shams Global BVI* SC 3/18. Again, and more importantly, it is settled that where an *ex tempore* judgment is delivered and written reasons are supplied later, a notice of appeal is activated by the *ex tempore* judgment and not the written judgment. In Innocent *Kadungure v Cheryl Chandi Kadungure* SC 19/07 at p 5 ZIYAMBI JA lamented the unabated infringement of this procedural principle by legal practitioners in these words:

> **"If the judgment or order is delivered orally then the date of judgment is clearly the date of such oral delivery. If the judgment is handed down in written form the 'date of judgment' is the date of such handing down. This is elementary knowledge which every legal practitioner should have at his finger-tips. Yet infringement of this Rule carries on unabated despite the fact that the attention of legal practitioners continues to be**

drawn to the provisions thereof. As a result, many 'appeals' are being struck off the roll with costs which are most likely being borne by the appellants" (my emphasis).

The applicant is a self-actor. Though he is not a legal practitioner he professes a deeper knowledge of the rules of this Court than the average layman. It was common cause that the oral judgment was delivered on 15 July 2019. The applicant had 15 days to 5 August 2019 to note an appeal against that judgment. He failed to do so. He elected to await the written reasons, which were handed down on 12 March 2020. By the time he noted the appeal on 11 May 2020, and served the notice on both the Registrar of the High Court and the respondent on 12 May 2020, he was woefully out of time. He could only appeal against the judgment in question after seeking condonation and extension of time to file the notice of appeal from a judge of this Court in chambers. He did not do so. Even though, the notice of appeal was filed within the requisite 15 days in line with the provisions of Practice Direction No.1 of 2020, which in recognition of the Corona virus pandemic, froze the running of *dies induciae* between 30 March 2020 and 10 May 2020, the failure to file the notice of appeal within the required period of the *ex tempore* judgment, constituted a fatal irregularity. This is because Practice Direction no 1 of 2020 was inapplicable in the present circumstances. The notice of appeal was, therefore a nullity.

In any event, like in the *Sambaza*, case, *supra*, at p 7, the relief sought on appeal in the present matter, which I have already set out earlier on in this judgment, is fatally defective.
Para (b) of the relief sought fails to articulate the exact nature of the relief that the appeal court should grant on setting aside the judgment of the court *a quo*.

In the *Sambaza* case, at p 9, UCHENA JA concluded thus:

> "The authorities clearly state that r 29(1)(a) to (f) is mandatory and must be complied with. A notice of appeal which does not comply with this Rule is fatally defective and cannot be amended as there will be nothing to amend. A nullity cannot be amended."

The application for reinstatement, therefore, stands on a fatally defective notice of appeal filed on 11 May 2020. It cannot be granted.

The first respondent prayed for costs on the higher scale. It was common cause that in another matter between the parties, SC 79/2020, the applicant conceded in his founding affidavit that it was erroneous for him to seek leave to appeal against the final and definitive order of Mathonsi J before Mabikwa J. Despite this concession, he has for incomprehensible reasons to do with his alleged right to a fair trial tenaciously sought to appeal against the correct order of Mabikwa J. I find his approach to be an abuse of court process, which has had the inevitable result of unnecessarily putting the first respondent out of pocket in opposing a hopeless and fatally defective application. He is a proper candidate for an order of costs on the higher scale.

Accordingly, it is ordered that:

1. The application for reinstatement of the appeal in case No. SCB 33/20 be and is hereby struck off the roll.
2. The applicant shall pay the first respondent's costs on the scale of legal practitioner and client.

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