KIEV CHAMBOKO
v
DOROWA MINERALS LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 7, 2011 & JUNE 4, 2015

A J Dhliwayo, for the applicant
F A Rudolf, for the respondent

Before **MALABA DCJ**, in Chambers.

This is an application for leave to appeal against the decision of the Labour Court dismissing an application for rescission of a default judgment. The application followed refusal of leave to appeal by the Senior President of the Labour Court on the grounds that the application was made after the expiry of the time – limit within which an application for leave to appeal against a judgment of the Labour Court must be made and absence of prospects of success on appeal to the Supreme Court.

The applicant was employed by the respondent as a Human Resources and Training Manager before he was dismissed from employment following disciplinary proceedings in which he was found guilty of acts of misconduct. The allegations of the misconduct were that he had applied for and obtained advances of money from a scholarship fund operated by the

respondent to cover three semesters on the pretext that he had two children at the University of Cape Town in South Africa and Africa University in Zimbabwe who needed school fees to be paid in foreign currency.

It is common cause that at the time the applicant applied for and received payment of the money he knew that he had no children at the universities concerned. When it was discovered that the applicant had misrepresented the fact that he needed the money to pay school fees for children at the two universities the respondent suspended him. He was charged with the misconduct of committing conduct inconsistent with the fulfillment of the express or implied conditions of the contract of employment and fraud or theft by false pretences. The applicant sought to defend himself by saying that the payment of the money was on the approval of the General Manager and the company secretary. He did not appreciate that the gravamen of the charges was that he had misrepresented to the officials concerned that he had children at the two universities and obtained their approval as a result of the misrepresentation.

What the applicant could not deny was that he did not use the money he had received from the scholarship fund to pay school fees at the universities because there was no cause for the payment of school fees.

The arbitrator who heard the appeal against the dismissal of the applicant accepted the argument that the money was paid to the applicant on the authority of the General Manager. He allowed the appeal. The respondent appealed to the Labour Court against the

arbitral award on the ground that it was grossly irrational. Judgment in default was given against the applicant on 28 September 2007.

On 13 August 2010 the applicant made an application to the Labour Court for rescission of the default judgment. He alleged that he or his legal representative had not been served with a notice of set down of the appeal for hearing on 28 September 2007. He said he knew of the default judgment on 27 July 2010. He alleged that he had even filed heads of argument after that date on the belief that the appeal was still to be set down for hearing.

In para. 6 of the founding affidavit to the application for rescission of the default judgment filed on 30 July 2010, the applicant said:

> "6. I am applying for the main matter to be re-set down since when the matter was set down to be heard in Mutare, I attended Court but no heads of argument had been filed."

The application for rescission of judgment was opposed. On 8 December 2010 the application was dismissed by the Senior President of the Labour Court. The reasons for the decision were given as being that:

> "- The delay is too inordinate and
>
> - There is no explanation why applicant took three years to file the application for rescission.
> - If applicant attended court as he indicated in his affidavit, there would have been no reason why the court would enter default judgment.
> - The law does not assist those that slumber and there must be finality to litigation."

The applicant said he did not know of the judgment dismissing the application for rescission of the default judgment until on 23 February 2011. He said he received the reasons for the decision on 20 April 2011. Instead of applying for leave to appeal he noted an appeal with the Supreme Court, only to be told by the Registrar that there was no appeal before the Supreme Court as leave had not been sought from and granted by the President of the Labour Court who made the decision.

On 20 July 2011 he made an application for leave to appeal. Leave was refused on the ground that the application for leave was made out of time with no application for condonation of failure to comply with the time limit and there were no prospects of success on appeal.

According to r 36 of the Labour Court Rules 2006, the applicant was required to make an application for leave to appeal within 30 days of the judgment being given on 8 December 2010.

In making the application to the Senior President of the Labour Court for leave to appeal against the judgment on 27 July without seeking condonation and extension of time within which to seek leave the applicant overlooked the fact that there was no proper application before the court *a quo*. The applicant had lost the right to seek leave to appeal. As such the court *a quo* had no power to consider the application and enter the verdict of refusal of the application because there were no substantive issues placed before the court by a void process.

This Court is in the same position as the court *a quo*. It cannot grant the applicant leave to appeal in respect of a matter which is by operation of the law no longer appealable. The applicant's legal incapacity to seek leave from this Court to appeal against the decision of the Labour Court given on 8 December 2010 continues and has not been legitimized by the fact that the Senior President of the Labour Court said her decision on the application was a refusal of leave to appeal as if she had the power to consider the application in the first place after the expiry of the 30 days time limit within which the application had to be made.

In any case an applicant for leave to appeal must file a notice of appeal that conforms to the requirements of the rules of court at the time the application for leave to appeal is made. Where the notice of appeal filed is fatally defective, there is no valid application. In this case the document filed as a notice of appeal is fatally defective. It does not state the date on which the judgment sought to be appealled against was given. Even if the application had been properly before the Court it would have been dismissed for lack of prospects of success.

Whichever way one looks at the matter, the admitted facts proved the acts of misconduct charged against the applicant. The respondent stated as the basis of the charges leveled against the applicant that it was the belief that he had two children at the University of Cape Town and Africa University who needed school fees to be paid that induced the decision to authorize the payment of the money to him. The applicant did not deny that at the time he made the application for the money and received payment of it, he knew that the children were not at the universities. The children had not been admitted to these institutions of learning to incur obligations to pay school fees.

It was the misrepresentation of the fact that the children were students at the universities requiring payment of school fees which induced the respondent to authorize the payment of the money to the applicant ostensibly for the specific purpose of paying school fees for the children. It was not a defence to the charges of misconduct to say that the payment of the money was authorized by the General Manager. The same official made it clear in the letter dated 21 November 2003 inviting the applicant to attend the disciplinary hearing that the charges of misconduct leveled against him arose from the fact that he received the money by misrepresenting that he had one child on a degree course at Africa University and another at the University of Cape Town.

The matter is struck off the roll with costs.

Dhliwayo & Associates, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners