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ELSON GUMBO
v
MARANGE RESOURCES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 16, 2016 & APRIL 26, 2016

I Mataka, for the applicant
G Gomwe, for the respondent

APPLICATION FOR LEAVE TO APPEAL

Before **ZIYAMBI JA:** In chambers in terms of r 5 of the Rules of the Supreme Court, 1964.

[1] This application is brought in terms of s 92 F (3) of the Labour Act [*Chapter 28:01*] ("the Act"). Leave to appeal was refused by the Labour Court on 23 January 2015.

[2] The applicant was employed by the respondent as a shift foreman. In November 2012 he was charged with acts of misconduct in that he had violated clauses 11, described by him as 'the confidentiality clause', and 9 of his contract of employment. The charges stemmed from two text messages. The first was sent by the applicant to one Gambiza. The message read:

> "Hello, are you still supplying Marange with cement, be cautious now our financial position is tricky. Did you manage to import those trucks? How is business and family?"

The second was a text message received by the applicant on his cell phone. It read:

> "Am about to convince the finance min to invest in 3 plants to Marange. Do me a paper telling me the cost of landing them and timing of commissioning. Indicate approximate production output thereafter and estimated monthly revenues…"

It was alleged, in respect of clause 11, that the applicant had communicated, to third parties, confidential information relating to his employer's affairs. With regard to clause 9, it was charged, in the alternative, that he had violated the competition clause of his contract by engaging in the mining of diamonds in the Marange area without the consent of his employer.

[3] The applicant was found guilty on the main charge and dismissed from employment. It is not clear from the scanty information provided whether he was also found guilty of the second charge. However since no issue has been made as to the penalty of dismissal I proceed on the basis that this penalty was deemed properly to follow in the event of a conviction on either the first charge or indeed any of the two charges preferred.

[4] According to the facts as related in the judgment of the Labour Court, the applicant, unsuccessfully, filed an internal appeal from the decision of the disciplinary committee. He then reported the matter to a Labour Officer who, having failed to achieve a settlement between the parties, referred the matter to arbitration. Dissatisfied with the arbitrator's ruling against him, the applicant appealed to the Labour Court. The grounds of appeal were that:

> "The arbitrator erred grossly and misdirected herself as to the facts and such gross misdirection as to the facts amounts to a misdirection as to the law in finding that:-
>
> i) The appellant violated clause 11 of his contract of employment (confidentiality clause) by merely mentioning the word "Marange" in a text message to one Gambiza.

ii) The appellant violated clause 9 of his contract of employment (competition clause) by merely receiving a text message on his cell phone from one Timba mentioning some intentions in mining business."

The applicant sought to be reinstated to his former employment with no loss of benefits.

[6] The Labour court dismissed the appeal on the grounds that the appeal was against factual findings of the arbitrator which findings were not appealable.

Having analysed the findings of the arbitrator and found they were factual and raised no point of law, it said:

> "The arbitrator in her factual findings with regards to appellant's text to Gambiza about "Marange" found he could not be referring to Marange as a community".
>
> Commenting on the arbitrator's interpretation of the sentence: *"our financial position is tricky", that:*
>
> > *"Our" to me shows that claimant was referring to none other than the respondent's company. This is highly buttressed by the fact that he was indeed part of respondent's company as an employee that is why he said "our" showing a sense of belonging",* the Court said:
>
> "I am persuaded by the arbitrator's finding that appellant could not have known [the] personal financial status of the people who stayed in Marange to go to the extent of speaking in a representative manner.
>
> When the appellant made submissions before the arbitrator he stated that he meant Anjine another diamond company operating in Marange. It is further stated that the appellant submitted that he said so because of a collective job action that had occurred. However this is not convincing as appellant did not work for Anjine.
>
> The arbitrator thus found that the appellant had breached clauses 11 and 9 of his employment by divulging confidential information to outsiders."

It went on to dismiss the appeal on the grounds that the factual findings raised by the applicant were not appealable.

[6] The applicant was undeterred. He applied for leave to appeal against the judgment of the Labour Court. It is the refusal by that court to grant leave to appeal which has led to this application.

[7] I begin with the Notice of Appeal attached to the application. It is quoted in *extenso*.

"**NOTICE AND GROUNDS OF APPEAL**

TAKE NOTICE THAT appellant, having been granted leave on the …… day of …… **2014**

And tendering all costs for the preparation of the record and any other costs that may be required by law, **ELSON GUMBO** hereby notes an appeal to the Supreme Court against the judgment of the Labour Court attached as Annexure "A" on grounds and issues of law as follows. The appeal is filed against the portion of the judgment namely that:-

a. The appellant did not raise any factual finding that was appealable.

b. The arbitrator's findings were sound both in fact and law.

GROUNDS OF APPEAL

1. The court *a quo* erred at law in not finding that the arbitrator grossly erred as to the facts and such gross misdirection amounts to a misdirection as to the law in ignoring crucial facts in favour of the appellant. This relates to whether or not Gambiza the recipient of the message from appellant never supplied cement to respondent at any given time so there is no way the text message relating to supply of cement could refer to the respondent thereby violating the confidentiality clause of his employment contract.

2. The court *a quo* erred and misdirected itself in finding that the arbitrator's findings were sound both in fact and in law, a finding which sharply contracts her own finding that the appellant did not raise any factual finding that was appealable. The appeal was not per se based on a point of law but on the contention of gross misdirection as to the facts which amounts to a misdirection as to the law.

WHEREFORE applicant prays for an order that;

1. The judgment of the Labour Court be and is hereby set aside and substituted as follows:-

(i) The learned arbitrator erred in finding that merely mentioning the word "Marange" in a text message the appellant was referring to the respondent and violated clause 11 of his contract of employment (confidentiality clause).

(ii) The respondent shall pay costs of this appeal."

[8] Annexure "A" was not attached to the notice of appeal although it forms part of the record and follows the applicant's founding affidavit though not mentioned or identified therein. *Ex facie* the document, it is a judgment by the Labour Court refusing leave to appeal. The Labour Act does not provide for an appeal against a refusal by that court to grant leave to appeal. It provides for an application to the Supreme Court for leave to appeal where the Labour Court has refused such leave. Thus the appeal could not validly have been noted against the judgment marked "Annexure A".

[9] The draft notice of appeal does not comply with the Rules of this Court.

It will be noted that the judgment appealed against has not been identified. The date of the judgment has not been indicated. Section 7(b) of the Supreme Court (Miscellaneous Appeals and References) Rules requires that the date of the judgment appealed against be set out in the Notice of Appeal.

While there is a judgment marked Annexure B contained in the body of the record, it has not been identified as the judgment sought to be appealed against.

The prayer would not bring finality to the dispute.

[10] On the merits, lest I be accused of promoting form against substance, the Labour Court was not shown to be irrational in its finding that the arbitrator made factual findings which were not appealable.

The applicant argued that the fact that Gambiza denied supplying cement to Marange was crucial to the decision and both the arbitrator and the Labour Court misdirected themselves in ignoring this fact.

However the reasons given by the arbitrator as quoted above do not display irrationality at all let alone to the extent that is required to amount to a misdirection in law. In this regard the following passage from the judgment of this Court in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR664 (S)[1] bears repeating:

> "The general rule of the law, as regards irrationality, is 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 the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion."

[11] Accordingly, in addition to the litany of errors expressed above, no prospects of success on appeal have been shown to exist.

The application is therefore dismissed with costs.

Chambati Mataka & Makonese, applicant's legal practitioners

Mutamangira & Associates, respondent's legal practitioners

[1] At p 670C-D