DISTRIBUTABLE (51)

COPIER KINGS (PRIVATE) LIMITED
v
DUMISANI MSINDAZI

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, MAVANGIRA JA & UCHENA JA
HARARE, FEBRUARY 16 & AUGUST 21, 2017

C. Kwaramba, for Appellant

S. M. Hashiti, for the Respondent

UCHENA JA: This is an appeal against the decision of the Labour Court. The respondent was the appellant's employee. He was its accountant. Sometime in June 2010, $4 127 00 was stolen from the appellant. The respondent and another employee, a cleaner were implicated. It was alleged that they connived to steal the money from the company.

The appellant took disciplinary action against the respondent. In July 2011 a disciplinary committee convicted the respondent, and dismissed him from employment.

On 1 August 2011, the respondent requested the appellant to pay him for his outstanding leave days and the appellant complied. On 4 August 2011, the respondent noted an appeal against his conviction and dismissal from employment to the internal Appeals Authority.

On 16 August 2011 the Appeals Authority responded advising the respondent that, by requesting and accepting "terminal benefits" in the form of cash for his leave days, he had waived his right to appeal. The Appeals Authority was of the view that the respondent had by such conduct indicated his acceptance of the decision to dismiss him and thus had waived his right to appeal against it.

The respondent appealed against the determination of the Appeals Authority to the Labour Court. The Labour Court found in his favour and held that what the respondent accepted were not terminal benefits and further, that such acceptance did not constitute a waiver of the right to appeal. It ordered that the matter be remitted to the Appeals Authority for a hearing. The appellant now appeals against the decision of the Labour Court.

The appeal is based on the following grounds:-

1. The Labour Court misdirected itself in holding that there was no proof that the respondent had received his terminal benefits when there was documentary evidence of his signing for them. In so holding the court a *quo* grossly mistook the facts which mistake amounts to a misdirection in law.
2. In any event the court's view of the facts was so grossly unreasonable that no reasonable person applying their mind to the question to be decided would have arrived at such a decision. Had the court a *quo* applied its mind it would have found that a dismissed employee does not encash leave days because any outstanding leave days become part of the terminal benefits when one's contract has been terminated. In that regard the court failed to take into account a relevant consideration.

3. Consequently the court a *quo* erred on a point of law by failing to come to the conclusion that the respondent's acceptance of his terminal benefits amounted to a waiver of his right to appeal against his dismissal.

At the hearing of this appeal, Mr *Hashiti* for the respondent, raised a preliminary point, to the effect that the notice of appeal was fatally defective on the ground that it was served on the Labour Court a long time after the peremptory fifteen days prescribed in terms of r 4 as read with r 5 of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975 had lapsed. Mr *Hashiti* submitted that the appeal was served on the Labour Court in August 2015 pursuant to an order granted on 30 October 2014 which deemed the Notice of Appeal to have been filed on that day.

In terms of r 4 as read with r 5 of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975 the notice of appeal was supposed **to be filed and delivered to the presiding officer of the tribunal or the officer whose decision is appealed against within fifteen days**. However the said notice of appeal was served on the Registrar of the Labour Court on 24 August 2015 nearly 10 months after the granting of the order. The respondent submitted that the notice of appeal was fatally defective and ought to be struck off the roll for not complying with a mandatory provision of the Rules.

In response, Mr *Kwaramba* for the appellant whilst admitting that the notice of appeal was served on the Labour Court on 24 August 2015 submitted that the failure by the appellant to comply with r 4 as read with r 5 was not the appellant's fault. He submitted that the chamber application for condonation and extension of time within which to appeal was heard and the order granted in the absence of the parties. As such the parties were not aware of

the order at the time it was granted on 30 October 2014. Mr *Kwaramba* submitted that the parties were advised of the order by the registrar in August 2015 and as such the Notice of Appeal could not have been served on the Labour Court within fifteen days of the granting of the order.

The allegation that the Registrar's office caused the appellant to fail to timeously serve the Notice of appeal on the Labour Court was made by Mr Kwaramba from the Bar. That cannot establish fault on the Registrar's office. The letter which the appellant alleges advised it of the order granted in its absence in chambers was not produced and is not on file. One also wonders why the appellant took 10 months to discover that an order granting condonation had been granted in chambers. A diligent litigant is expected to follow up progress on its application. The applicant did not explain why if it was fallowing up its application it took it 10 months to realise that its application had been granted by a judge in chambers in the absence of the parties.

Rules 4, 5 and 6 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 states as follows:

> "4. Notice of appeal
>
> (1) An appeal shall be instituted by means of a notice **directed and delivered by the appellant to the presiding officer of the tribunal or the officer whose decision is appealed against, and to all other parties affected.**
> (2) A notice shall also be filed with the registrar.
>
> 5. Time within which notice to be given
> (1) Subject to the provisions of rule 6, a **notice shall be delivered and filed in accordance with the provisions of rule 4 within fifteen days of the decision appealed against being given.**
> (2) An appeal from a decision of the Labour Court in terms of section 92F (appeals against decisions of the Labour Court") must be delivered and filed in the Supreme Court no later than fifteen days from the grant of leave to appeal by the President of the Labour Court who made the decision or, where such leave is refused, within fifteen days from the grant of leave by a Judge of the Supreme Court.

6. Condonation of late noting of appeal
Save where it is expressly or by necessary implication prohibited by the enactment concerned, a judge may, if special circumstances are shown, extend the time laid down, whether by rule 5 or by the enactment concerned, for instituting an appeal."

The rules clearly provide that the notice of appeal must be delivered and served to all interested parties and the Labour Court within fifteen days of the date of the decision appealed against or fifteen days of the granting of condonation and extension of time. In this regard the court finds that the appellant did not comply with the Rules.

The question which has to be answered is whether the alleged failure by the Registrar's office to inform the parties of the order should result in the notice of appeal being struck off the roll as prayed for by the respondent.

The appellant's allegation that he was advised of the order granted in chambers in August 2015 was not substantiated. The serious allegation that court officials did not perform their duties efficiently cannot be accepted on the unsubstantiated allegation made from the bar. A diligent legal practitioner would have sought a supporting affidavit from the Registrar's office confirming that such an error occurred. In the absence of such confirmation I cannot accept the appellant's unsubstantiated allegation.

The appellant should apply for condonation to a judge in chambers explaining why it took it 10 months to serve the Notice of Appeal on the Labour Court after its application for condonation had been granted.

Litigants cannot avoid complying with the rules by merely making unsubstantiated allegations against court officials. Reliance on unsubstantiated allegations can if accepted, enable a litigant to easily lie, his way out of non-compliance with the rules.

In view of the appellant's failure to substantiate the allegations it gave as the reason for its failure to serve the Labour Court timeously the appeal should be struck of the Roll with costs.

It is accordingly ordered as follows:-

The appeal is struck off the roll with costs.

GWAUNZA JA: I agree

MAVANGIRA JA: I agree

Messers Mbizo Muchadehama & Makoni, appellant's legal practitioners

*Messers Coglan Welsh & Guest, r*espondent's legal practitioners