

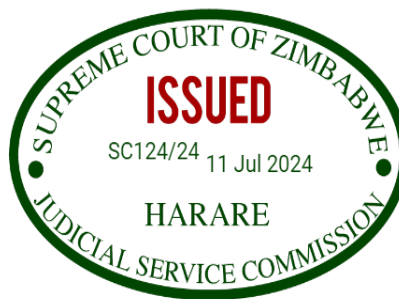
REPORTABLE (64)

**ZIMBABWE REVENUE AUTHORITY
v
ABIGAIL MUKAHIWA**

**SUPREME COURT OF ZIMBABWE
HARARE: 27 MARCH 2024 & 11 JULY 2024**

Ms B. Mahuni, for the applicant

B. Magogo, for the respondent



IN CHAMBERS

UCHENA JA:

This is an application for both condonation and extension of time within which to apply for leave and application for leave to appeal to the Supreme Court against the decision of the Labour Court (“court *a quo*”) in terms of s 92F (3) of the Labour Act [*Chapter 28: 01*].

BACKGROUND FACTS

[1] The applicant is a body corporate established in terms of the laws of Zimbabwe. The respondent is employed by the applicant as a Revenue Specialist. The respondent was charged with acts of misconduct in that she failed to carry out a proper clearance of a motor vehicle which is a D25 offence in terms of the applicant’s code of conduct. On 24 January 2020 the dispute was referred to a Labour Officer for determination of the alleged misconduct as the applicant’s disciplinary committee could not sit.

- [2] It was the applicant's case that on 17 October 2018, the respondent processed an application for change of ownership of a motor vehicle. The applicant submitted that the respondent had the responsibility of carrying out a physical examination of the vehicle and to check the correctness of the documents attached thereto. It was the applicant's contention that although the engine number of the vehicle was correct there were other details which raise questions as to whether or not a physical examination was done or the respondent deliberately misrepresented the facts.
- [3] The respondent submitted that the applicant's allegations were baseless since a physical examination report or form was attached as part of the first submissions. She argued that a proper examination of the vehicle in question was conducted. She further submitted that the client who approached her for change of ownership of the vehicle was a fraudster. The respondent submitted that she was not trained to detect fraud.
- [4] The case was referred to a Labour Officer in terms of s 101 of the Labour Act [*Chapter 28:01*], who held that the issue for determination was whether or not the respondent carried out a physical examination of the vehicle in question. The Labour Officer found that both parties agreed that the application for the change of ownership of the vehicle was fraudulently made by the owner of the motor vehicle. He further held that the applicant had the onus to prove that the respondent was guilty of the charges levelled against her. He found that the respondent had completed a change of ownership physical examination form. He held that the charges levelled against the respondent could not be sustained for lack of evidence. The Labour Officer found the respondent not guilty and ordered her reinstatement without loss of salary and benefits or the payment of damages in lieu of reinstatement.

- [5] Aggrieved by that decision, the applicant lodged an appeal in the Labour Court (court *a quo*). The appellant submitted that the respondent committed a serious offence. It argued that a penalty of dismissal was appropriate. Counsel for the respondent submitted that the respondent was not guilty as she carried out the physical examination as required. It was averred on her behalf that she received work instructions, read them and understood them. It was argued that she adhered to the instructions without any deviations.
- [6] The court *a quo* found the respondent guilty of contravening para D25 of the applicant's code of conduct. It ruled that the courts should promote better working systems at work places. It sentenced the respondent to a final written warning. It ordered the respondent's reinstatement or payment of damages in lieu of reinstatement.
- [7] Aggrieved by the decision of the court *a quo*, the applicant applied for leave to appeal which the Labour Court found to be fatally defective and struck it off the roll. The applicant applied for condonation for the late re-application for leave to appeal in terms of s 92F (2) of the Labour Act. The Labour Court dismissed that application. The applicant still wishes to appeal against the decision of the Labour Court but has to get over the dismissal of its application for condonation and being out of time. It filed this application in pursuit of the intended appeal.

SUBMISSIONS DURING THE HEARING OF THIS APPLICATION.

- [8] At the hearing of this application, Ms *Mahuni* counsel for the applicant submitted that both parties had preliminary issues. She averred that the respondent's notice of opposition was served out of time hence it is deemed abandoned in terms of r 43 (5) of the Supreme Court Rules, 2018. She submitted that the respondent was supposed to serve its opposing papers

within three (3) days which it failed to do. She urged me to expunge the respondent's notice of opposition from the record. In respect of the applicant's application she on being asked to comment on its validity submitted that it was properly before me and should be determined as an unopposed application.

[9] In response, Mr *Magogo*, counsel for the respondent submitted that he differed with the submissions by the applicant that failure to serve a notice of opposition on time meant that it is regarded as abandoned. He stated that the Supreme Court rules do not have such a provision and when the Supreme Court rules are silent, we resort to the High Court Rules and in terms of r 7 of the High Court Rules, 2021, where a notice of opposition has been filed out of time, a party can seek condonation. Therefore, counsel sought that respondent be condoned for serving the notice of opposition a day out of time.

[10] Counsel for the applicant submitted that it had applied for condonation and leave in terms of s 92F (3) of the Labour Act. On being asked if this Court's jurisdiction can be triggered without a refusal of leave by a judge of the Labour Court, Ms *Mahuni* submitted that she was relying on the authority in the case of *Zimbabwe Anti-Corruption Commission v Mangwiro & Anor* SC 11-22.

THE ISSUES

[11] The issues which arise for determination are:

1. Is there a valid application by the applicant in view of the provisions of s 92F (2) and (3) of the Labour Act?

2. Can the failure by the respondent to file her notice of opposition in time be condoned?

ANALYSIS

[12] Section 92F (2) and (3) of the Labour Act provides as follows:

- “(2) Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subs (1) shall seek from the judge who made the decision or, in his or her absence, from any other judge leave to appeal that decision.
- (3) If the judge refuses leave to appeal in terms of subs (2), the party may seek leave from the judge of the Supreme Court to appeal”.

[13] Section 92F (2) mandatorily provides that any party wishing to appeal from a decision of the Labour Court on a question of law, shall apply to a judge who made the decision or, in his or her absence from any other judge for leave to appeal that decision.

[14] Section 92F (3) thereafter conditionally provides for an application for leave to a judge of this Court. An applicant can only apply to a judge of this Court, if, a judge of the Labour Court, refuses to grant him/her/it leave to appeal in terms of subs (2).

[15] A reading of s 92F (2) and (3) establishes that the intention of the legislature is that the jurisdiction of a judge of this Court to hear and determine an application for leave can only be triggered by a refusal by a judge of the Labour Court to grant the applicant leave to appeal to the Supreme Court.

[16] A dismissal of an application for condonation by a judge of the Labour Court does not entitle a party to apply to a judge of this Court, as an application for condonation is merely meant to pave way for an application for leave before a judge of the Labour Court made out of time.

It is an application meant to facilitate for the application for leave before a Labour Court judge out of time whose refusal of leave triggers this Court's jurisdiction to hear an application for leave to appeal. If the dismissal of the condonation application complicates the applicant's further endeavours towards the noting of an appeal there are lawful ways of overcoming that hurdle.

- [17] The determination of whether or not an application is properly, before a judge of this Court is based on the interpretation of s 92F (2) and (3). Words in a statute must be given their ordinary grammatical meaning. The courts are not allowed to add or subtract from what the legislature has legislated. Reference is made to the case of *Bhyat v Commissioner for Immigration* 1932 AD 125 at p 129. In the case of *Greenshields v Willenberg & Ors* 25 SC 556 at p 568 the court held as follows:

“The court must be careful not to extend the meaning of statutes beyond the plain effect or necessary implication of the language used by the Legislature.”

- [18] The point was emphasized by MATHONSI JA in the case of *John Basera v The Registrar of the Supreme Court of Zimbabwe & 4 Others* SC 35/22 where he said:

“The resolution of the matter involves a purely interpretative exercise. On a literal interpretation, “if the words of a statute are clear then one must follow them even if they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity.” See *R v Judge of the City of London Court* [1892] 1 QB 273 at 290, and *Chegut Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264D-E.”

- [19] In the case of *ZESA Holdings (Pvt) Ltd v Munyanyi & Anor* SC 6/24, CHATUKUTA JA respectfully and carefully explained why she did not agree with the findings made in the Zimbabwe Anti- Corruption case (*supra*). She held that this Court lacks jurisdiction to determine an application for leave to appeal unless the Labour Court refused to grant it on

merit. She stated that it is incompetent for a single judge of this Court to review a judgment of the court *a quo* dismissing an application for condonation for late filing of an application for leave to appeal. She held that the application for leave to appeal which the applicant lodged in the court *a quo* was only struck off. It was not refused meaning the court did not deal with it on the merits. It also implies that the application was defective hence the applicant had and still has an opportunity to rectify the defect and lodge the application for leave in the Labour Court. I respectfully agree with her exposition of the interpretation of s 92F (2) and (3) of the Labour Act.

[20] In the case of *Chomurema & Anor v Telone* SC 86/14 GWAUNZA JA (as she then was) at paras 8 and 10 commenting on the interpretation of s 92F (2) and (3) of the Labour Act said:

“[8] Had the Labour Court struck the matter off the roll, the applicants would most likely have been alerted to the need to file a proper application with the same court, for condonation together with one for leave to appeal to the Supreme Court

[9] ...

[10] The application was dismissed in chambers by GARWE JA on the 14 of December 2010, without considering the merits thereof. This was on the basis that this Court could not consider the application for leave to appeal to it before:

1. Condonation for the late filing, of that application in the Labour Court had been obtained, and
2. The leave of the Labour Court had been properly sought and denied.”

[21] It is apparent from the case law discussed above, that this Court has already authoritatively held that an application for leave to appeal cannot be made to this Court until an application for leave to appeal has been refused on the merits by a judge of the Labour Court.

[22] In spite of the law and relevant case law being brought to Ms *Mahuni's* attention, she remained adamant that the applicant's application was properly before me.

[23] In view of the authorities of this Court on this issue the application before me is a nullity and should be struck off the roll with no order as to costs as the respondent was before me only for the purpose of applying for condonation of the late filing of its notice of opposition.

[24] In view of my finding that the applicant's application is a nullity there is no need to determine the respondent's application for condonation for the late noting of its notice of opposition.

DISPOSITION

[25] The applicant's application being a nullity should be struck off the roll.

[26] It is therefore ordered as follows:

“The matter be and is hereby struck off the roll with no order as to costs.”

Muvingi & Mugadza, applicant's legal practitioners.

Mafongoya & Matapura, respondent's legal practitioners.