

REPORTABLE (97)

MEJA PWANYIWA
v
SHAMVA GOLD MINE

**SUPREME COURT OF ZIMBABWE
HARARE: 5 JULY 2024 & 29 OCTOBER 2024**

C. Matanhire, for the applicant.

W. Musikadi with *K. Chikanhure*, for the respondent

IN CHAMBERS

UCHENA JA:

[1] The applicant filed a chamber application for condonation of his non-compliance with r 60 (2) of the Supreme Court Rules, 2018 as read together with s 92F (3) of the Labour Act [*Chapter 28:01*] (the Labour Act) and extension of time within which to file an application for leave to appeal.

FACTUAL BACKGROUND

[2] The applicant is a former employee of the respondent. He was, since July 2020 employed as a general labourer on a fixed duration contract which was regularly renewed until 31 March 2022 when it was terminated by effluxion of time. In April 2022, the respondent engaged independent contractors, Hardsoft Mix Investments (Pvt) Ltd and Redject Mining Corporation (Pvt) Ltd, for the provision of employees to work in its mine. They agreed that the companies, would employ the respondent's former contract employees as their

contract workers. After the engagement of these companies, the respondent informed its former employees that their further employment at the mine could only be guaranteed upon their signing new fixed duration contracts with the contractors. The applicant signed a new fixed duration contract with Hardsoft Investments.

[3] Aggrieved by the non-renewal of his contract with the respondent which was terminated by effluxion of time on 31 March 2022, and the respondent's new arrangement on how it was to secure labour services for its mine, the applicant lodged a claim to the designated agent against the respondent for unlawful termination of employment. The applicant submitted that although he had signed a new fixed duration contract, he had not abandoned his claim for unlawful termination and unfair labour practice. He submitted that in terms of SI 109 of 1993 contract workers can only be engaged to perform work other than normal production underground. It was his submission that he should have been given permanent employee status as he worked underground. The applicant further submitted that he signed the Hardsoft Investment contract under undue influence. He further submitted that he remained the respondent's employee because he continued taking instructions from the respondent at all material times. The applicant therefore claimed salaries and benefits from the respondent at the scale of a permanent employee from the date of termination of the contract or damages for unlawful termination of the contract.

[4] In response the respondent submitted that the applicant had no cause of action as the parties' employment relationship lawfully terminated on 31 March 2022 by effluxion of time. It submitted that as the applicant was not relying on s 12B (3) (b) of the Labour Act, he appreciated the validity of the termination of his contract of employment. The respondent further submitted that the designated agent had no jurisdiction to grant the

relief sought by the applicant as it was declaratory in nature. The respondent argued that s 34 of SI 109 of 1993 only regulates contracts of employment for contract workers, and does not state that an employee engaged for normal production underground, ought to be employed as a permanent employee.

[5] The designated agent held that conferring permanent status on an employee whose fixed term contract had lapsed would be a rewriting of a contract for the parties. He further held that he could not grant an order granting the applicant a permanent employee status without first reinstating him as the respondent's employee. The designated agent therefore dismissed the applicant's application.

[6] Aggrieved by the designated agent's decision, the applicant appealed to the Labour Court (the court *a quo*). The court *a quo* held that it could not interfere with the decision of the designated agent unless there was a misdirection. The court *a quo* further held that it was not the duty of the court to change the applicant's lapsed contract into one of permanent employment. The court *a quo* therefore dismissed the applicant's appeal for lack of merit.

SUBMISSIONS BEFORE THIS COURT

[7] Mr *Matanhire*, counsel for the applicant, submitted that the delay in noting an appeal was caused by the fact that the applicant was mobilizing funds to engage the services of a legal practitioner. He averred that the explanation for the delay is reasonable. Counsel further stated that the intended appeal has bright prospects of success as the court *a quo* made a decision contrary to precedents. He submitted that s 17 (2) of the Labour Act allows the bringing of a contract into conformity with regulations. He stated that the fixed term contract should not have been terminated. Counsel further submitted that the case of

Magodora & Anor v Care International Zimbabwe 2014 (1) ZLR (S) 397 in which this Court held that even if a contract entered into by the parties seems oppressive the court has no authority to rewrite it for the parties, is distinguishable from this case. He prayed that the application be granted with costs.

- [8] Mr *Musikadi*, counsel for the respondent, submitted that he was abiding by the papers filed of record. He argued that the applicant's intended appeal has no prospects of success. He averred that the applicant's complaint is on the fixed term contract. He stated that awarding the applicant the status of a permanent employee would amount to the court creating a new contract for the parties. Upon being asked by the court to comment on s 17 (2) of the Labour Act, as read with the definition of "contract worker" in SI 109 of 1993, he submitted that the wording of the Collective Bargaining Agreement uses the term "or" which is disjunctive meaning that the first part of the definition before "or" is separate and independent from the latter part after the disjunctive "or". He submitted that in his statement of claim, the applicant averred that he was employed as a lasher, and was promoted to an assistant machine operator. He submitted that the applicant never worked as an assistant machine operator. He submitted that GUBBAY JA (as he then was) in *S v Ncube* 1987 (2) ZLR 246, at p 264C-E commented on the meaning of the term "or" as disjunctive. He further submitted that there are two circumstances in the CBA's provision defining the words "contract worker" which are distinct and separate from each other which means the applicability of one excludes the applicability of the other. He summed up by stating that this means the employment of the applicant as a contract worker on fixed term contract disentitles him to claim that he was employed to perform a specific task.

THE LAW

[9] The application before this Court is a chamber application for condonation of non-compliance with the rules and extension of time to note an appeal. An application for condonation must satisfy certain legal requirements before the indulgence sought can be granted. In the case of *Bessie Maheya v Independent African Church* SC 58/07, MALABA JA (as he then was) at p 5 of the cyclostyled judgment said:

“In considering applications for condonation of non-compliance with its Rules, the Court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the respondent’s interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice.”

APPLYING THE LAW TO THE FACTS

Extent of the delay and reasonableness of the explanation

[10] In the case of *Tel-One (Pvt) Ltd v Communication and Allied Services Workers Union of Zimbabwe* SC 01/06, GWAUNZA JA (as she then was) said the following:

“Essentially, in an application of this nature, the applicant must satisfy the court firstly, that he has a reasonable explanation for the delay in question and secondly that his prospects of success on appeal are good.” (Emphasis added).

[11] The judgment under case number LC/H/1194/22 was handed down on 18 July 2023. The applicant applied to the court *a quo* for leave to appeal under LC/H/591/23. That application was dismissed on 28 November 2023. The appellant immediately filed an application for leave to appeal under SC 664/23 which was withdrawn on 11 December 2023 after the respondent had raised several preliminary issues. On 17 April 2024, the

applicant filed another defective application for condonation and late noting of leave to appeal under SC 206/24 which was struck off the roll.

[12] In the case of *Meintjies v H.D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 264 it was held that whenever an appellant realizes that he has not complied with a rule of the court, he must apply for condonation without delay. It is apparent that the applicant tried his best to rectify his non-compliance with the rules as soon as possible considering the circumstances of the case. However, he made defective applications before this Court. From a perusal of the record, the reason and extent of the delay is attributed to the fact that he was a self- actor. The courts should generally be accommodative when dealing with self-actors who evidently exhibit difficulties in appreciating and complying with the rules of court.

[13] In the case of *Sibangani v Bindura University of Science and Education* CCZ 7/22 GOWORA JCC commenting on the need for courts to be tolerant towards self-actors at p 13 para 32 said:

“There is an unwritten rule of practice that wherever possible and where justice demands courts should ensure that unrepresented litigants be accorded a measure of tolerance where it concerns procedural issues”

It is therefore appropriate in this case to appreciate that the delay caused by several failed applications by a self-actor is not inordinate and that the explanation given is reasonable.

I now turn to the prospects of success.

PROSPECTS OF SUCCESS

[14] The test of prospects of success on appeal is an assessment of whether or not a different court would arrive at a different finding than the court *a quo*. This was enunciated in the case of *Essop v The State* 2016 ZASCA 114 at p 6. The prospects are usually ascertained from the intended grounds of appeal. The applicant's intended grounds of appeal challenge the failure by the court *a quo* to find that the respondent had failed to comply with SI 109 of 1993 and that this amounted to an unfair labour practice. The applicant further argued that the court *a quo* erred in holding that the fixed term contract had been validly concluded. In the applicant's submissions before this Court, Mr *Matanhire* argued that in terms of s 17 (2) of the Labour Act, it is permissible to bring a contract in conformity with regulations and thus the fixed term contract should not have been terminated. *Per contra*, the respondent argued that the applicant's intended grounds of appeal do not attack the findings of law made by the court *a quo*. It avers that it did not participate in any form of unfair labour practice. It argued that it was not the duty of the courts to create contracts for the parties.

[15] It is my considered view that the court *a quo*'s findings cannot be faulted. It is apparent from the record that the applicant sought an order to the effect that his employment was on a permanent basis. The relief sought is incompetent. Further, the applicant's claim before the designated agent was for a declaratory order. This Court in *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union & Ors* 2005 (1) ZLR 341 (S) at 347A-D held as follows:

“... before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application “in terms of this Act or any other enactment”. This necessarily means that the Act or other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring. ... nowhere in the Act is the power granted to the Labour

Court to grant an order of the nature sought by the respondents in the court *a quo*, nor have I been referred to any enactment authorizing the Labour Court to grant such an order.”

In light of the designated agent and the court *a quo*'s lack of jurisdiction to grant a declaratory order, it is my view that the intended appeal on that aspect, carries no prospects of success. It has been held by this Court that the Labour Court cannot grant a declaratory order. It is further apparent that the applicant freely and voluntarily entered into a contract of fixed duration which has been terminated by effluxion of time. It is therefore unlikely that the appeal court will arrive at a decision different from that arrived at by the court *a quo*.

[16] The applicant further argues that the court *a quo* should have made a finding that the employment contract entered into by the parties was void for the reason that it was in violation of SI 109 of 1993 and as such he was entitled to damages. The court *a quo* however concluded that it was not for the court to rewrite the terminated contract for the parties. Before the court *a quo*, the applicant conceded that he signed a contract whose provisions are different from what he seeks in his intended appeal. The court *a quo* relied on the case of *Magodora (supra)* at p 403D where this Court held as follows:

“In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive.

This is so as a matter of public policy. See *Wells v South African Alumenite Company* 1927 AD 69 at 73; Christie: “*The Law of Contract in South Africa (3rd ed.)*” at pp 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd v Transvaal Rugby Union & Anor* 1997 (3) SA 851 (W) at 864E-H.”

[17] In view of the above authorities, the decision of the court *a quo* is unlikely to be faulted for holding that it cannot rewrite contracts of employment for the parties. In any event, the applicant is no longer an employee of the respondent, he is now under the employment of another entity. This means the applicant's intended appeal has no prospects of success. Moreover, s 17 (2) of the Labour Court Act reads as follows:

“Where a Minister has made regulations in terms of subsection (1), every contract, agreement, arrangement of any kind whatsoever determination or regulation made in terms of any enactment which related to the employment of an employee to whom such regulations relate and which provides terms and conditions less favourable to the employee than those specified in the regulations, shall be construed with such modifications, qualifications, adaptations and exceptions as may be necessary to bring it into conformity with such regulations.”

[18] The meaning of the above provision is that where regulations have been made, any agreement with conditions less favourable to the employee have to be construed with such modifications to bring it in conformity with the regulations. Section 17 (2) would have been applicable if the appellant had not been employed as a contract worker in terms of the first part of the definition of “contract worker” in SI 109 of 1993. In view of the disjunctive “or” the second part which refers to employment “to perform a specific task which excludes normal production underground” does not apply to the applicant who was employed as a labourer on a fixed term contract. In the case of *Magodora (supra)*, it was held that even if a contract entered into by the parties seems oppressive the court has no authority to rewrite it for the parties. The words “specific task” means a detailed and exact task. That is, not consistent with the applicant's employment as a labourer and as claimed by him, an assistant machine operator. The employment as a contract worker for a fixed duration excludes the possibility of his also having been employed to perform a specific task. The court *a quo* was therefore obliged to enforce what the parties agreed to. It is also my view that s 17 (2) of the Labour Act is not applicable in the circumstances of this case as it seems

to provide for contracts which are still in existence. In this case the contract was terminated on 31 March 2022.

[19] The court *a quo* is therefore, unlikely to be faulted for finding that it cannot rewrite a contract for the parties. In *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) GUBBAY CJ said:

“It is not enough that the Appellate Court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed, and the Appellate Court may exercise its own discretion in substitution ...”

See also *Hama v NRZ* 1996 (1) ZLR 664 (S) at 670 C-D. This means the appeal court is not likely to, interfere with the decision of the court *a quo*.

DISPOSITION

[20] In light of the above, the applicant’s intended appeal has no prospects of success. The applicant’s application cannot therefore be granted. There is no reason why costs should not follow the result. It is therefore, ordered as follows:

“The application be and is hereby dismissed with costs.”

Bonongwe & Company, applicant’s legal practitioners.

Chimuka Mafunga Commercial Attorneys, respondent’s legal practitioners.