Judgment No. HB 14/2004
Case No. 2088/2001

MOSES NAMBUTA & 21 OTHERS

Versus

DUNLOP ZMBABWE LIMITED

And

THE WORKERS COUNCIL OF DUNLOP ZIMBABWE LIMITED

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 MARCH 2003 & 26 FEBRUARY 2004

J James for the applicants
Adv. P Nherere for the respondents

Opposed Application

NDOU J: The twenty-two applicants were all employed by the first respondent and were subsequently retrenched. The applicants are challenging the said retrenchment as being unlawful and therefore invalid. In their wisdom, the applicants chose to challenge the validity of their retrenchment via an ordinary court application as opposed to an application for review.

The proceedings in respect of which the applicants' are being made is the process culminating in the decision of the second respondent of 31 July 2000 to retrench applicants. The relevant proceedings, therefore, terminated on 31 July 2000.

According to the founding papers, the applicants, right from the start accepted their retrenchment without reservation. The only issue raised in the founding papers is not the retrenchment but the size of the retrenchment package.

In limine

Advocate Nherere, for the respondents raised a point *in limine* on the procedure used by the applicants. He submitted that it is contended by the

respondents that this is an application for review which should have complied the requirements of order 33 of the High Court Rules, 1971. He contented that the contention by applicants that this is an ordinary application is untenable and advanced simply in order to try and get round applicants' failure to comply with the requirements of the rules of this court governing applications for review.

It is trite that the essence of a review is that the reviewing court looks at the method by which the decision is reached. A review is directed at questioning the decision making process. It does not address the substantive merits of the decision sought to be impugned. It is noteworthy that in the present case, applicants are not alleging breach of contract by first respondent. Breach of contract would have been the cause of action in a so-called "ordinary application". Instead, applicants are challenging the decision to retrench them which decision was taken by second respondent, and approved by the Minister of Public Service, Labour and Social Welfare. The basis of the challenge is alleged procedural irregularities. Applicants' case is that respondents' failed to comply with the provisions of the Retrenchment Regulations. What is being put in issue are the procedural aspects of the decision, not the substantive merits thereof. The application is, therefore, one for review. Indeed, that is precisely why the second respondent has been made party to these proceedings. Had this been an ordinary application remedy there would have been no need to cite second respondent – (Compare): *Mashave & Ors* v *ZUPCO & Another* 1998 (1) ZLR 567 (H); Kwete v Africa Community & Publishing Trust & Ors HH 216-98 at page 3 of the cyclostyled judgment; *Matsambire* v *Gweru City Council* 183-95; *Mutare City Council* v *Mudzime & Ors* 1999 (2) ZLR 140 (S) at 143. Contrast: *Musara* v

ZINATHA 1992 (1) ZLR 9 (H) and *Kadir & Sons (Pvt) Ltd* v *Panganai & Ano* 1996 (1) ZLR 598 (S).

As such, the application should have complied with the provisions of the High Court Rules governing applications for review. Applicants cannot get round the rules by simply labelling the application an ordinary application when, in reality it is an application for review.

Order 33 rule 259 of the High Court Rules (*supra)* states:

> "Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred: Provided that the court may for good cause shown extend the time."

In *casu*, this application should have been filed by or on 25 September 2000 but it was only filed on 13 July 2001 i.e. more than ten months out of time. The applicants have not sought condonation of their failure timeously to institute these review proceedings. In the absence of an application for condonation, I cannot grant such condonation. The court may not grant an indulgence which applicants themselves have not even bothered to seek – *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) at 260C-E and *Mutare City Council* v *Mudzime & Ors* 1999 (2) ZLR 140 (SC) at 143.

In all the circumstances, this application is not properly before this court and for that reason I accordingly struck it off the roll with costs.

James, Moyo-Majwabu & Nyoni applicants' legal practitioners
Webb, Low & Barry respondents' legal practitioners