HH-57-03
HC - 11591/2001

MARTHA SIMBA **APPLICANT**

And

SAYBROOK P/L **RESPONDENT**

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE 9 May 2002 and 9 April 2003

Opposed Civil Application

Mr. R K H Mapondera, for the applicant.
Mrs. J B Wood, for the respondent

HLATSHWAYO J: The applicant, Ms. Martha Simba, seeks the condonation of her late application for the review of disciplinary proceedings conducted by the respondent, Saybrook (1978) (Pvt) Limited, on the 18 and 19th May 2000 against her. Rule 259 of the High Court Rules provides that any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding within 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 *Kodzwa v Secretary for Health and Another* 1999 (1) ZLR 313 (S) at 315 SANDURA JA set out the factors to be considered by the courts in deciding whether or not to allow condonation, as:

a) The degree of non-compliance
b) The explanation for it
c) The prospects of success
d) The respondent's interest in the finality of judgment

e) The convenience of the court and the avoidance of unnecessary delay in the administration of justice.

I am of the respectful view, however, that the first three requirements are the standard requirements, and that the last two can be subsumed under one or the other of the first three. I shall accordingly deal with the three requirements below:

THE DEGREE OF NON-COMPLIANCE

The applicant filed her court application on 6 December 2001, seventeen months after the deadline of 6 July 2000, the date on which the eight weeks period expired. Thus, the period of the delay is more than twice the prescribed limitation. The limitation of eight weeks was stipulated to ensure that the reviews are undertaken when memories and evidence are still fresh, which all make it easier for the court to arrive at a proper decision in the shortest possible time. Although, as submitted on behalf of the applicant, the degree of non-compliance alone is not decisive, where, as in this case, it is so gross, the court must give due weight to it, and the other factors like the explanation for the non-action and prospects of success must weigh extremely heavily in favour of the applicant for the court to condone so long a delay.

THE EXPLANATION FOR THE DELAY

The applicant submitted that her delay in instituting review proceedings was due to the following factors:

a) The negative effect of criminal charges brought against her.

She was charged by her employer with theft of $560.42, the subject of the disciplinary proceedings. On 19 May criminal charges were preferred against her at the magistrates court. She was tried on 15 January and 22 November 2001, at the end of which she was acquitted.

It was submitted on the applicant's behalf that she suffered psychological stress on account of, and concentrated her efforts on, the criminal prosecution "so that it was impossible or impractical for her to institute civil proceedings against her employer". This, in my view, is to overstate the applicant's case, because even by her own admission, she did during that period seek advice concerning the civil matter. Be that as it may, it is significant that the submission is not that she was under the illusion that the criminal matter had to be disposed of first before she could pursue the review.

b) "Due to frustration she fell pregnant and the pregnancy affected her health as she was in her early forties and the pregnancy was a difficult one". There was insufficient information placed before the court to enable me to assess meaningfully this rather curious submission. Therefore, I shall not attempt to do so, except to observe that, on the facts, the allegedly difficult pregnancy occurred well after the expiry of the eight weeks period. Had the applicant's submission been that at the time she was supposed to have filed her review, she was going through a difficult pregnancy, which distracted her from the case, it would have been more reasonable.

c) The applicant sought assistance from the director of the company who referred her to the general manager and from a labour relations officer, but to no avail. These uncontroverted

facts were adduced to show that the applicant did no sit back but did seek assistance in the pursuance of her matter, and they do stand her in good stead. However, to be weighed against that is the submission that the proper procedure was for her to appeal in terms of the Code of Conduct, instead of approaching various officials. On balance, though, I found in her favour that she was not a sluggard in the matter.

d) She could not afford legal representation as she had been dismissed from work on 20 May 2000. This submission is clearly an afterthought as the lack of means does not appear to have been a factor determining her legal options at the relevant time, nor is there an explanation as to why the relatives who were prepared to help her after the criminal trial were not prepared to assist her earlier on.

All in all, therefore, the explanations given for the delay, taken together, are not reasonable.

THE PROSPECTS OF SUCCESS

The applicant's prospects of success hinge on whether the alleged disciplinary proceedings held on 18 and 19 May 2000 were procedurally correct in terms of the registered Code of Conduct for the Clothing Industry, SI 132 of 1994, hereinafter called "the Code". Section3 of the Code provides: "When the Code is broken by an employee, the circumstances shall be thoroughly investigated with the representative of the workers' committee and appropriate disciplinary action implemented". It was submitted for the applicant, that an investigation required by the Code should have involved "a reconciliation of the cash box and the petty reconciliation book at the instance and request

of a representative of the workers' committee… A reconciliation of the vouchers and the cash box at the specific instance and request of the general manager is a clear violation of section 3." I did not find merit in this submission. Clearly section 3 requires the involvement of a representative of the workers' committee, which was done in this case, but does not exclude the involvement of other interested or affected officials. I agree with the respondent's submission that the disciplinary procedures of the Code were complied with.

The applicant was informed of the charge against her and she was invited to refute or admit the charge. She refuted the charge but completely failed to explain the cause of the shortfall.

There was also nothing wrong in finalizing the disciplinary proceedings ahead of a pending criminal court case and the acquittal in the criminal case does not entitle the applicant to seek the reopening of the disciplinary proceedings on that ground alone. See *L Munyuki v The City of Gweru* 1998 (1) ZLR 182 (S) and *ZFC Limited v Eunice Geza* 1988 (1) ZLR 137 (S).

CONCLUSION

I have shown above that the magnitude of failure to comply with the rules is so gross that it would take a very clear explanation and overwhelming prospects of success to condone it. The explanations for the delay given above are weak and the prospects of success are even weaker.

Accordingly, the application for condonation of the delay in instituting review proceedings is dismissed. However, given the totality of the circumstances of this case, I deemed it appropriate, and

hereby order accordingly, that each party shall bear its own costs.

Applicant’s legal practitioners:	*Madanhi & Associates*
Respondent’s legal practitioners:	*Byron Venturas & Partners*