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Judgment No. SC 97/02

Civil Appeal No. 342/01

TANGANDA TEA COMPANY LIMITED v PAUL MADODA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 10 & NOVEMBER 19, 2002

J M Mafusire, for the appellant

A Gijima, for the respondent

ZIYAMBI JA: This is an appeal against the grant to the respondent of condonation for late noting of an appeal to the Labour Relations Tribunal (the Tribunal).

The background to the matter is as follows –

Until 24 January 1998, when he was dismissed following internal disciplinary proceedings, the respondent was employed by the appellant as workshop manager.

By way of review proceedings in the High Court, the respondent challenged his dismissal. His application was dismissed by the High Court but upheld on appeal. The Supreme Court remitted the matter to a properly constituted disciplinary committee for a rehearing.

The rehearing was held as ordered and the respondent was again

discharged from employment. He challenged the dismissal in the High Court.

The High Court dismissed the application on 16 May 2000 and, on the same day, the respondent filed a notice of appeal.

On 12 June 2000 the appellant wrote to the respondent, requiring him to pay security for costs in terms of Rule 46 of the Rules of this Court. Despite reminders to his legal practitioners, no security was paid.

Meanwhile, proceedings for his eviction from premises previously occupied by him as an employment perquisite had been brought in the High Court and, following the grant to the appellant of a default judgment, the respondent was duly evicted by the Deputy Sheriff from the premises. Notwithstanding his eviction, the respondent brought an urgent Chamber application in the High Court for, *inter alia*, a stay of eviction. The application, which was scheduled for hearing on 15 November 2000, was, on that date, withdrawn and costs tendered but not paid.

On 21 November 2000, the respondent filed an application for rescission of the default judgment in the High Court. By 14 December 2000, security for costs as requested by the appellant had not been paid and the appellant's legal practitioners applied to the Supreme Court for a dismissal of the appeal on the ground that the respondent had failed to furnish the said security. The application was successful and the appeal was dismissed. Undeterred by the dismissal, the respondent proceeded to file an application for reinstatement of the appeal. This application was dismissed by the Supreme Court on 21 March 2001.

With no further recourse to the superior courts, and perhaps having exhausted all his perceived remedies in these courts, the respondent shifted his focus

to the Tribunal and filed a "COURT APPLICATION FOR CONDONATION FOR LATE NOTING OF AN APPEAL", the grant of which application is the subject of this appeal. The founding affidavit is undated but a "Notice of Address for Service" attached to the founding affidavit was dated 26 June 2001.

In terms of subs 7 of s 101 of the Labour Relations Act [*Chapter 28:01*] (the Act):

> "Any person aggrieved by -
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> (a) a determination made in his case under a code; or
>
> (b) the conduct of any proceedings in terms in terms of a code;
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> may, within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Tribunal."

Section 10(1) of the Labour Relations (Settlement of Disputes) Regulations, 1993, SI 30 of 1993, (the Regulations) provides that:

> "An appeal to the Tribunal in terms of the Act shall be noted, within fourteen days of the receipt of the decision, determination, order or direction appealed against, by completing a notice of appeal…". (my underlining).

The respondent averred in his founding affidavit that the delay in filing his notice of appeal to the Tribunal from the decision of the disciplinary committee in September 1999 (a delay of some twenty-one months) was due to his engagement in the various proceedings listed above. He averred that he could not, at the time of review proceedings in the High Court and Supreme Court, file a notice of appeal with

the Tribunal as that would amount to multiplicity of proceedings. His prospects of success, he claimed, were "actually overwhelming". He went into details of the evidence against him and his defence. He averred that he had "clear defences to all the allegations" and his prospects of success were "clearly unassailable".

When the matter came before the Tribunal, the member of the Tribunal, before whom the application was placed, granted the application for condonation with costs.

The appellant has appealed against the order granted by the Tribunal on the grounds that the grant of condonation in the circumstances of this matter was manifestly unreasonable and an improper exercise of judicial discretion having regard, *inter alia*, to the reason proffered for the delay; the fact that the respondent had boycotted internal disciplinary proceedings and had therefore become debarred or non suited in regard to an appeal on the merits; and the fact that costs had been awarded against the appellant contrary to an express prayer by the respondent for costs to be costs in the cause.

At the hearing before us, the point was taken by the appellant, and conceded by Mr *Gijima* for the respondent, that, in terms of s 26 of the Regulations, only the Chairman of the Tribunal can grant condonation of a failure to comply with the Regulations and that the member who granted it had no jurisdiction to do so. That this concession was properly made is evident from the clear provisions of s 26 which are as follows:

"26. The Chairman may -

(a) condone any failure to comply with these regulations; or

(b) authorize any departure from these regulations."

Section 2 of the Regulations defines "Chairman" as follows:

"'Chairman' includes the Deputy Chairman when the latter presides over the Tribunal in the absence of the Chairman."

Both the Act and the Regulations make a clear distinction between the Chairman, the Deputy Chairman and members of the Tribunal.

The Tribunal is established by s 83 of the Act. Section 83(3) provides:

"The Tribunal shall consist of -

(a) the Chairman; and

(b) the Deputy Chairman; and

(c) not fewer than two and not more than four other members who shall be qualified legal practitioners or persons experienced in labour relations."

It is clear, then, that only the Chairman, as defined in s 2 of the Regulations, is endowed with the power to condone any non compliance with the Regulations or to authorize any departure therefrom. Thus the member of the Tribunal had no jurisdiction to condone any failure by the appellant to comply with the Regulations. On this basis alone, the appeal must succeed.

However, the respondent has further difficulties.

The record shows that the hearing by the disciplinary committee

scheduled for Thursday 16 September 1999 was postponed to 23 September 1999 at the request of the respondent's legal practitioner, Mr Gonese, to allow him to appear on behalf of the respondent. However, on 21 September 1999, Mr Gonese, by letter, objected to the hearing. At page 20 of the record, the events are recounted as follows:

> "On 21 September a letter from Mr Gonese advised that, in his view, the hearing was not appropriate because of the Chairman and the thirty days provided for in the Code.
>
> The Chairman had replied in writing refuting those statements. Mr Gonese then said, at 08h30 on Thursday, he would come though, but asked that the hearing be delayed until 11h00, so that he could object in person before it started. The Chairman refused, as the objections referred to had already been dealt with, and the lawyer had stated that he and his client would not attend the Hearing anyway. The Chairman told the Hearing that, apart from any other consideration, at least two witnesses had been told to be present on (the) 23rd at the expense of any other commitments they had, and that the Company had made every reasonable effort to accommodate the accused. The case was also taking up valuable work time, and further delays could not be allowed.

The proceedings therefore started in the absence of Paul Madoda and his lawyer. Asked by the Chairman if they now had all the evidence that they required, the WC representatives replied that they had."

The rehearing concluded at 5.45 pm on that day and resumed on Friday 24 September 1999 at 10.00 am. The respondent was outside and declined an invitation to attend the hearing referring to a letter from his lawyer. The hearing was finally concluded on Saturday 25 September 1999 and, on 27 September, the determinations of the committee were presented to the respondent.

By taking a conscious decision to absent himself from the disciplinary hearing, the respondent forfeited his opportunity to present any defence which he might have had. He acted in contempt of the committee established by law to conduct the hearing. Such conduct ought not to be condoned. He cannot now be heard to complain that he has not been given another opportunity to present his defence. It would be wrong to indulge the respondent in these circumstances and condonation of his behaviour would encourage wanton abuse of court process.

As to the delay, the reason given by the respondent for not lodging his appeal within the prescribed period was that he was pursuing review remedies in the High Court and Supreme Court. The various suits came to an end on 21 March 2001 when the respondent's application for reinstatement of his appeal was dismissed by SANDURA JA. The date of filing of the application for condonation to the Tribunal is illegible and the founding affidavit not dated, but the court application attached thereto carries the typed date 26 June 2001, some three months after the determination of the application for reinstatement of the appeal. There is the averment that the respondent changed legal practitioners but no indication as to when the new legal practitioners commenced to act on his behalf. Thus, even if the series of suits in the superior courts could be considered as an explanation for the delay, the respondent has failed to explain the delay from 21 March to 26 June 2001.

It cannot be over-stressed that an applicant for condonation must place all the necessary details before the Court to enable it to correctly assess the merits of the application. Delays and other infringements of the Rules must be clearly explained and not simply glossed over.

On the issue of costs, it was submitted by the appellant that the award of costs against the appellant was contrary to the express request in the application that costs be in the cause. Indeed, no reason was given by the Tribunal for this award, which is a departure from the norm in applications of this nature.

Because of the above, I am satisfied that, apart from the fact that the presiding member of the Tribunal had no jurisdiction to grant condonation of the respondent's failure to comply with the Regulations, the learned presiding member did not properly apply her mind to all the facts of this case with the result that there was an improper exercise of her discretion.

Accordingly, the appeal is allowed. The order of the Tribunal is set aside and is substituted by the following:

"The application is dismissed with costs".

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Manase & Manase, respondent's legal practitioners