

**ONESIMO MUSI**  
v  
**OLD MUTUAL LIFE ASSURANCE COMPANY**

**SUPREME COURT OF ZIMBABWE**  
**ZIYAMBI JA, GOWORA JA & BHUNU JA**  
**HARARE, OCTOBER 15 & NOVEMBER 16, 2015**

The appellant in person

*S Hwacha*, for the respondent

**ZIYAMBI JA**

[1] This is an appeal against a judgment of the Labour Court refusing an application for condonation and an extension of time within which to appeal against an award made by the arbitrator on 17 January 2013. The delay in noting the appeal was 12 months. The learned judge found the delay to be inordinate, the explanation for the delay unreasonable and the prospects of success non-existent.

[2] The sole ground of appeal is that the court *a quo* ‘grossly erred and seriously misdirected itself on the facts such misdirection amounting to a question of law’ in ignoring appellant’s submissions and holding that appellant had no prospects of success on appeal.

It was the appellant’s contention in his notice of appeal to the Labour Court that the arbitrator had erred in dismissing his claims relating to bonus, a second vehicle, and the applicable salary scale to be used in calculating his retrenchment package.

[3] The Labour Court was cognisant of the test to be applied in applications of this nature.

At p 4 of its judgment<sup>1</sup> it said:

“In regards (*sic*) the application for condonation the test laid down for applications of this nature is for the court to consider:

- (a) The extent of the delay;
- (b) The reasonableness of the explanation for the delay
- (c) The prospects of success on appeal should the application be granted.
- (d) The possible prejudice to the respondent should the application be granted.

See for an example *Kombayi v Berkhout* 1988 (1) ZLR 53 (S).”

[4] Having found the delay was inordinate and the explanation therefor to be unsatisfactory, the Court was prepared to condone the delay if in its opinion, there were prospects of success on appeal. It found that there were none.

Referring to the grounds of appeal filed by the appellant it said:

“In regards (*sic*) the first two grounds the appellant alleges gross misdirection on the facts on the part of the arbitrator in respect to the issues of bonuses and salary. The arbitrator in his award concluded that the applicant’s claims for salary and bonus payments were not merited and he consequently dismissed both claims. The applicant in his appeal has not demonstrated clearly how the arbitrator grossly misdirected [himself] on both bonus and salary. The third and fourth grounds also do not indicate in what form the arbitrator committed errors of law in respect to the claim for the share options and the second vehicle. The arbitrator in his award had found that the issue of the second vehicle was outside his mandate as the issue had not been placed before the Retrenchment Board. I can find no fault in that finding. In regard [to the] shares, the arbitrator found that there had been no formal offer to the applicant to join the employee share participation scheme. The applicant has in his appeal failed to indicate how the arbitrator committed fatal errors of law in regard [to the] share issue. In view of the above I am satisfied that there are no prospects of success on appeal.”

[5] Going by the above reasoning the allegation that the Labour Court committed a gross misdirection of fact amounting to a misdirection in law is not sustainable.

[6] Condonation is an indulgence granted by a Court in the exercise of its discretion. It is not a mere formality and the grant thereof is not a right. The applicant bore the onus of satisfying

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<sup>1</sup> Record page 45

the Labour Court that there were sufficient grounds to warrant the exercise of its discretion in his favour. The criteria laid down in this jurisdiction for interference with the exercise of a discretion by a lower court are well established. They are set out in *Barros & Anor vs Chimphonda*<sup>2</sup> as follows:

“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 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 irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court.”

[7] I can find nothing in the reasoning of the court *a quo* which would constitute an error in the exercise of its discretion warranting interference by this Court with its judgment.

[8] Accordingly the appeal is dismissed with costs.

**GOWORA JA:** I agree

**BHUNU JA:** I agree

*Dube, Manikai & Hwacha*, appellant’s legal practitioners

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<sup>2</sup> 1999 (1) ZLR 58(S) at pp