

DISTRIBUTABLE (60)

**PATRICK MANJOVHA
V
DELTA BEVERAGES (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, HLATSHWAYO JA & BHUNU JA
HARARE: 30 JANUARY 2020 & 24 MAY 2021.**

L. Ziro, for the appellant

F. Mahere, for the respondent

BHUNU JA: This is an appeal against the whole judgment of the Labour Court (the court *a quo*). The order appealed against is dated 14 November 2018, Ent No. EC 64/21 Civil Appeal No. SC 12/19. The respondent's objection *in limine* to the effect that the appellant's claim had prescribed. Consequently it dismissed the appellant's application for condonation of late noting of appeal and extension of time within which to note the appeal. Aggrieved by the judgment *a quo*, the appellant approached this Court on appeal for relief.

PRELIMINARY OBJECTION

On 30 of September 2019 the learned counsel for the respondent gave notice of intention to raise a preliminary point premised on the appellant's alleged failure to comply with the peremptory provisions of r 37(1)(a) of the Supreme Court rules 2018. The Rule provides as follows:

“37(1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his or her legal practitioners which shall state –
(a) the date on which, and the court by which, the judgment appealed against was given;”

The basis of the objection is that the appellant did not state the correct date when judgment was handed down as is required by r 37(1)(a) of the Supreme Court Rules 2018. The submission is that the appellant in his notice of appeal stated 14 November 2018 as the date judgment was handed down when the actual date of judgment was 3 May 2019.

A perusal of the record of proceedings suggests that there were two hearings presided over by the same judge involving the same parties in the same case number LC/H/603. The first sitting was on 7 November 2018 where the learned judge *a quo* issued the following order under order number LC/H/ORD/1229/2018:

“WHEREUPON after reading documents filed of record and hearing counsel for both parties:

IT IS ORDERED THAT:

1. The preliminary issues are upheld.
2. The claim is prescribed.
3. The application for condonation of late noting of appeal and extension of time be and is hereby dismissed with costs.”

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The second case according to the record of proceedings commenced on 7 November 2019 and the learned judge *a quo* issued an order substantially on the same lines but under a different judgment number LC/H/115/2019. The order reads:

“It is accordingly ordered that:

1. The preliminary issues are accordingly upheld, the claim is prescribed.
2. The application for condonation of late noting of appeal and extension of time be and is hereby dismissed with costs.”

The appellant in his sole discretion has elected to appeal against the first order under order number LC/H/ORD/1229/2018. He correctly stated the date on which the judgment was given as appears on the face of the corresponding order. He has not appealed against the subsequent order of 2019 which appears to be a restatement of the initial order of 2018 above.

Although the dates of hearing appear suspiciously to have been confused that issue was not ventilated before us. We therefore came to the unanimous conclusion that the appellant correctly cited the date appearing on the face of the order appealed against. It being an entrenched position in our law that one appeals against the order of court and not the reasons we unanimously upheld the appellant's contention that he had complied with the law by stating the date appearing on the face of the first court order. We accordingly dismissed the respondent's objection *in limine* without any further ado.

The appellant subsequently applied for leave to appeal to this Court. The application was granted by the court *a quo* on 19 December 2018 with costs being costs in the cause.

BRIEF SUMMARY OF THE CASE.

The appellant was employed by the respondent as a truck driver/salesman. He was charged with theft of his employer's property and he paid an admission of guilt fine to the police. He was subsequently dismissed from employment for theft in terms of the respondent's registered code of conduct on 29 January 2015. He appealed to the works council without success.

On 18 March 2015 he was served with a letter advising him of the dismissal of his appeal and if aggrieved to appeal to the court *a quo* within a period of 14 days in terms of the registered code of conduct.

The appellant did not appeal to the court *a quo* within the prescribed time limit. He applied for condonation of late noting of appeal and extension of time within which to note the appeal. His application was successful and on 20 January 2016 he was ordered to lodge his appeal within 7 days of the order.

The appellant was again in default by failing to comply with the 7 days period. He again belatedly approached the court *a quo* 2 years later on 17 August 2018 with an application for condonation of late noting of appeal and extension of time within which to note the appeal. The application was unsuccessful hence this appeal.

FINDINGS OF THE COURT A QUO

In dismissing the application the court *a quo* found that the appellant's cause of action had prescribed in terms of the Prescription Act [*Chapter 8:11*]. This was because of his failure to successfully prosecute his appeal within the prescribed 3 year period from the date of his dismissal.

The court *a quo* also found that in the absence of a provision in the registered code of conduct authorising it to extend the 14 day period within which the appellant was obliged to appeal, it had no jurisdiction to extend the *dies induciae*.

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THE APPELLANT'S GROUNDS OF APPEAL.

Arising from the above two findings of the court *a quo*, the appellant has raised the following two grounds of appeal:

- “1. The court *a quo* erred and misdirected itself at law by concluding that the appellant's right to appeal the decision of the Works Council had prescribed in terms of the Prescription Act [*Chapter 8:11*] by computing the period (of) prescription began to run from 18 March 2015, while overlooking the fact that the Appellant's right to appeal and time to appeal had been successfully condoned and extended under LC/H/19/16 granted on the 20th of January 2016.
3. The court *a quo* erred and misdirected itself by concluding that (the) Labour Court does not have jurisdiction and power to condone late filing of appeals sought to be made outside the days stipulated by an Employment Code agreed to by the parties and neither can the Labour Court extend the time within which such appeals can be made outside the days stipulated in an employment Code.”

ISSUES FOR DETERMINATION.

The grounds of appeal raise two issues for determination:

1. Whether or not the appellant's cause of action has prescribed.
2. Whether or not the Labour Court has the jurisdiction to extend the time within which to appeal set out in the employment code of conduct.

WHETHER OR NOT THE APPELLANT'S CAUSE OF ACTION HAS PRESCRIBED.

It is trite that ordinary debts are irrevocably extinguished by prescription after 3 years in terms of s 15 (d) of the Prescription Act. Section 2 defines a debt as including anything that may be sued for. That definition squarely brings an appeal within the ambit of the definition of a debt. The definition therefore renders an appeal subject to the Prescription Act. It is therefore necessary to ventilate the time frames in this case to see if the appellant's appeal falls foul of the Act.

In this regard it is common cause that the appellant's cause of action arose from his dismissal from employment by the disciplinary committee on 29 January 2015. The notice of dismissal was served on him on 6 February 2015. He lodged various appeals and applications which interrupted the running of prescription in terms of s 7(2) of the Act. Subsection (3)(b) however provides that if one fails to successfully prosecute his cause of action and in this case his appeal to finality the interruption shall lapse and the running of prescription shall not be deemed to have been interrupted. The subsection provides as follows:

- “(3) Any interruption in terms of subsection (2) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the person claiming ownership in the thing in question—
- (a) does not successfully prosecute his claim under the process in question to final judgment; or
 - (b) successfully prosecutes his claim under the process in question to final judgment, but abandons the judgment or the judgment is set aside.”

The section is couched in clear unambiguous terms. Once a litigant has failed to successfully prosecute his cause of action and in this case his appeal to finality the interruption lapses and the running of prescription is not deemed to have been interrupted.

APPLYING THE LAW TO THE FACTS.

It is common cause that on 20 January 2016 the court *a quo* gave the appellant 7 days within which to prosecute his appeal with effect from the date of the order. He failed to prosecute his appeal within the prescribed period with the result that his appeal lapsed and prescription was deemed not to have been interrupted by operation of law.

Prescription began to run on 6 January 2015 when he was served with notice of dismissal, the set period of prescription of 3 years had already set in as at the time of the court *a quo*'s judgment on 14 November 2018.

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In *Hodgson v Granger & Anor*¹ the court articulated the purpose of prescription, it said:

“It is important, in this exercise of interpretation, to emphasise that it is trite that the whole purpose of statutes of limitation is to ensure that a person who has a valid cause of action, of which he is aware, proceeds reasonably timeously to prosecution thereof before events become ‘stale’. It is absolutely clear that the purpose is to penalise the dilatory creditor but not a creditor who is unaware, through no fault of his own, of the cause of action at his disposal.”

As the appellant was eminently aware of his cause of action right from the beginning way back in January 2015, his dilatoriness in prosecuting his appeal deserves censure to give effect to the purpose of the Act.

¹ 1991 (2) ZLR 10 (H)

DISPOSITION

The net effect of the appellant's failure to prosecute his appeal in the court *a quo* is that there can be no valid appeal before this Court in the absence of any appeal having been placed before the court *a quo* in respect of this matter. The appellant's failure to successfully note his appeal with the court *a quo* within the 7 day period as ordered by the court sounded the death knell for his appeal as the 3 year prescription period had already run its course.

From the foregoing, the learned judge *a quo* cannot be faulted for holding that the appellant's appeal has prescribed for want of successful prosecution within a period of 3 years. That finding of fact strips the court of the jurisdiction to determine the second issue.

That being the case, the appeal can only fail. Costs follow the cause.

It is accordingly ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant is to bear the costs of suit.

GWAUNZA DCJ:

I agree

HLATSHWAYO JA:

I agree

Hungwe and Partners, the appellant's legal practitioners.

Dube Manikai Hwacha, the respondent's legal practitioners.

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