REPORTABLE ZLR (1)

Judgment No. SC. 1/05
Civil Appeal No. 198/02

PROSPER GANDA AND THIRTEEN OTHERS v

FIRST MUTUAL LIFE ASSURANCE SOCIETY

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, JANUARY 10 & 24, 2005

A M Gijima, for the appellants

No appearance for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Relations Tribunal ("the Tribunal") (now the Labour Court) which dismissed with costs the appellants' application for the condonation of the late noting of their appeal to the Tribunal.

The background facts are as follows. In July 1998 the appellants, who were employed by the respondent ("the Society"), resorted to collective job action in order to redress certain grievances. They were subsequently charged with misconduct in terms of the Society's Code of Conduct ("the Code").

Thereafter, they appeared before a hearing officer, who found them guilty and recommended that they be dismissed. They then appealed to the Society's chief

executive officer, but the appeal was not successful. The chief executive officer accepted the hearing officer's findings and recommendation, and terminated the appellants' employment. Some of the appellants were dismissed on 31 August 1998 whilst the others were dismissed in the middle of September 1998.

Subsequently, on 10 December 1998 the appellants, through their legal practitioner, filed a court application in the High Court seeking a review of the chief executive officer's decision and the setting aside of their dismissal. That application was heard and dismissed with costs on 9 February 2000 on the ground that the appellants should have exhausted their domestic remedies before approaching the High Court.

Thereafter, on 5 July 2001 the appellants filed an application in the Tribunal for the condonation of the late noting of their appeal against the termination of their employment. That application was heard by the Tribunal on 8 March 2002 and was dismissed with costs on 29 April 2002 on the ground that the appellants had not given any reasonable explanation for their failure to note the appeal timeously.

Aggrieved by that decision, the appellants appealed to this Court.

The appellants' failure to note the appeal timeously was explained by one of the appellants in his affidavit, an affidavit with which the rest of the appellants associated themselves. The relevant part reads as follows:

"2. On or around the 5th August 1998 I, together with the other applicants hereto, were (*sic*) dismissed by the respondent owing to allegations of misconduct. We challenged these dismissals by way of appeals and these appeals were thrown out on or around the 31st August 1998.

3. We took the matter to the High Court by way of an application for review in February 1999 (December 1998). The High Court ruled that we should first exhaust domestic remedies before approaching the High Court for the remedy we were seeking.

We then instructed our then legal practitioners, Dube, Manikai & Hwacha, to note an application for condonation for late noting of appeal to the Labour Relations Tribunal. Affidavits in pursuance of this application were duly drawn in our names and we duly instructed our legal practitioner, Mr S.V. Hwacha, to lodge the said application with this Honourable Court. I have attached hereto a copy of my own affidavit duly drawn and commissioned in May 2000 as Annexure 'B' hereto.

4. All along the applicants hereto and I as a representative of the applicants was (*sic*) under the impression that the said application had been duly lodged with this court, having satisfied all the requirements for the lodging of the application. It was only on or around the 21st May 2001 that (when?) I made an inquiry at the Labour Relations Tribunal that I was advised that there was no such application pending in this Honourable Court. Thereafter, I advised my trade union as well as my colleagues of this position. The trade union then made a follow up with Mr Hwacha who advised that he had had problems with the payment of his statement of account, hence had not filed the papers."

The issue which arises for determination is whether the above averments constitute a reasonable explanation for the appellants' failure to note the appeal timeously.

In addition, it is pertinent to note that it has been stated in a number of cases that a person seeking condonation of the late noting of an appeal should give a reasonable explanation, not only for the delay in noting the appeal, but also for the delay

in seeking condonation. Thus, in *Saloojee and Anor, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138H STEYN CJ said:

> "What calls for some acceptable explanation is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation. As indicated, *inter alia*, in *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at p 449, and in *Meintjies'* case *supra* [*Meintjies v H.D. Combrinck (Edms) Bpk* 1961 (1) SA 262 (A)] at p 264, an appellant should, whenever he realises that he has not complied with a Rule of Court, apply for condonation without delay."

Applying that test to the facts of the present case, there can be no doubt that the decision of the Tribunal was correct.

As already stated, some of the appellants were dismissed on 31 August 1998, whilst the others were dismissed in the middle of September 1998. Thereafter, instead of noting an appeal to the Tribunal in accordance with the provisions of the then Labour Relations Act [*Chapter 28:01*] ("the Act") (now the Labour Act [*Chapter 28:01*]), they filed a court application in the High Court on 10 December 1998, i.e. about three months after they had been dismissed. They gave no explanation whatsoever for failing, during that period, to note an appeal to the Tribunal or to seek condonation of the late noting of the appeal.

The appellants averred that after the dismissal of their High Court application on 9 February 2000 they instructed their legal practitioner to file an application for condonation, and signed affidavits in support of that application. However, the affidavits referred to were signed before a Commissioner of Oaths in May

and June 2000, and not in February 2000 immediately after the dismissal of the High Court application. Once again, the appellants gave no explanation whatsoever for the delay of about three months in finalising the affidavits.

The appellants further averred that after instructing their legal practitioner to file an application for condonation, and signing affidavits in support of that application, they believed that the application had been filed with the Tribunal. They added that it was only on 21 May 2001, when one of them checked with the Tribunal, that they discovered that no application for condonation had been filed by their legal practitioner. When they approached their lawyer, he said that no application had been filed because his fees had not been paid.

Before considering whether the appellants' averments constitute a reasonable explanation for the delay in seeking condonation, I would like to set out what one of the appellants said in his affidavit. When referring to what happened after the appellants had instructed their legal practitioner to file the application for condonation, he said:

> "Contended (Content?) that we had signed the necessary papers we waited in vain for our legal counsel to advise us of the date when hearing of the application had been scheduled for. Numerous follow ups to his offices and offices of the Commercial Workers Union yielded no favourable response. Fed up, we decided to check with the Tribunal what was causing the delay, and to our horror we discovered that the lawyers had not filed anything at the Tribunal."

It is pertinent to note that the appellants did not allege that their legal practitioner had been paid. In my view, he had not been paid, and that is why he did not

file the application. If he had been paid, the appellants would have said so and would have filed an affidavit from him explaining why he did not file the application in accordance with their instructions.

Furthermore, if it is true that between May 2000 and May 2001 the appellants made "numerous follow ups to his offices", the legal practitioner would have told them that he would not file the application before his fees were paid. He could hardly be blamed for adopting such a stance.

Having discovered, on 21 May 2001, that no application for condonation had been filed by their legal practitioner, the appellants did not act without delay. Instead of filing the application urgently, they waited until 5 July 2001. Once again, they gave no explanation for the delay of about forty-four days.

However, even if it were accepted that the failure to note the appeal to the Tribunal timeously and the delay in seeking condonation of the late noting of the appeal were due to the fault of their legal practitioner, that would not assist the appellants. As I stated in *Maswaure v Nyamunda* 2001 (1) ZLR 405 (S) at 409 E-G:

> "Even if the delay in applying for condonation were due to the fault or negligence of the appellant's legal practitioners, the appellant would not escape the consequences of their lack of diligence. As STEYN CJ said in the *Saloojee* case *supra* at 141 B-E:
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> > 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the

> explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'"

In the circumstances, I am satisfied that the appellants did not give any reasonable explanation for failing to note the appeal to the Tribunal timeously, and for the long delay in seeking condonation of the late noting of the appeal.

In any event, it must be borne in mind that in determining the application the Tribunal exercised a judicial discretion. Unless it is shown that the Tribunal made an error in exercising that discretion, this Court would not interfere with the Tribunal's decision. See *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A. In my view, no such error has been established.

In the circumstances, I do not consider it necessary to deal with the prospects of success of the appeal on the merits. As MULLER JA said in *P.E. Bosman Transport Works Committee and Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799 D-E:

> "In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other

periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be."

In my view, those comments apply to the present case with equal force.

Finally, I wish to comment very briefly on the case of *First Mutual Life Assurance v Jackson Muzivi* (not yet reported) SC-62-2003, which was referred to by counsel for the appellants. Although it appears that Jackson Muzivi had participated in the collective job action in which the appellants in the present case had participated, it is clear from the judgment in *Muzivi's* case *supra* that that case had nothing to do with condonation of the late noting of the appeal to the Tribunal. It is, therefore, of no assistance to the appellants.

As there was no appearance for the Society, I shall not make any order with regard to the costs of the appeal.

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Mbidzo, Muchadehama & Makoni, appellants' legal practitioners

Atherstone & Cook, respondent's legal practitioners