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Judgment No. SC 26/10
Civil Application No. 48/09

JOHN NYAKAMA v LOBELS BREAD (PVT) LTD

SUPREME COURT OF ZIMBABWE
HARARE, JULY 22, 2010

The applicant in person
I Chagonda, for the respondent

Before **GARWE JA**, In Chambers

An application for an extension of time within which to appeal in terms of r 31 of the Supreme Court Rules.

This is an application for an extension of time within which to appeal. The application is opposed by the respondent on the basis that the applicant has no prospects of success on appeal.

The appeal involving the two parties to this application was set down for hearing before the Supreme Court on 20 July 2009. The Court found that the appeal had not been noted timeously and accordingly ruled that, in the absence of condonation, there was no appeal before it. The matter was consequently struck off the roll.

On 4 August 2009, the applicant filed an application for condonation for the late filing of the appeal. The respondent opposed the application.

When the application was placed before me in chambers, a copy of the notice of appeal was not attached as required by the Rules. The applicant was advised of this fact and he responded by filing a copy of the notice of appeal. On perusal of the notice of appeal I found that it did not itself comply with r 29 of the Rules of this Court in two respects. The notice of appeal did not state firstly the date on which the judgment appealed against was given and secondly whether the appeal was against the whole or part only of the judgment. The applicant was again advised of these shortcomings.

As a result, the applicant filed a notice of withdrawal of the application on 25 March 2010.

In the meantime the applicant had filed what he termed a "fresh" application for an extension of time within which to appeal. Clearly this application was filed in contemplation of the withdrawal of the defective application previously filed by the applicant. That application, according to the applicant, was served on the respondent on 23 February 2010. Excluding weekends, the respondent therefore had three days within which to respond i.e. by 1 March 2010. Indeed, on 1 March 2010 the respondent filed its notice of opposition and incorporated the affidavit previously filed as well as the heads of argument. I mention these facts because the applicant suggests that the notice of opposition and heads of argument were not filed timeously and that therefore the

respondent was barred. That is not in fact correct as the applicant had withdrawn the previous application and had filed a fresh one.

The facts giving rise to this application are largely common cause. They appear in the judgment of the court *a quo*. The applicant was employed by the respondent as a transport manager. Following his suspension without pay and benefits by the respondent, the matter was referred to a Labour Relations Officer who ruled in his favour and ordered his reinstatement. Dissatisfied, the respondent appealed to a Senior Labour Officer. Whilst that appeal was pending, the appellant was again suspended on a different allegation of misconduct. A Labour Relations Officer who heard the matter ordered the respondent to re-instate the appellant to his former position without loss of salary and benefits and in the alternative gave leave to either party to approach the Labour Relations Officer for quantification of damages in the event that the parties failed to agree.

Although the appeal previously filed by the respondent was set down for hearing the papers do not disclose its fate.

In May 2003, when it became clear that re-instatement was no longer possible, the matter came up before a Labour Relations Officer for quantification of the damages due to the applicant. The matter was then referred for arbitration. An award was made in favour of the applicant but the respondent noted an appeal to the Labour Court. The applicant then filed an application for interim relief pending the

determination of the appeal. He was awarded the equivalent of 24 months salary. The respondent again noted an appeal to the Supreme Court against the interim award. On 29 April 2005, despite the appeal, the arbitral award was registered as an order of the High Court on the basis of quantification prepared by the applicant himself. The respondent successfully applied for the setting aside of the writ and the quantification. An order was made referring the matter to the arbitrator for quantification of the damages due to the applicant.

The arbitrator to whom the matter was referred was for one reason or another unable to deal with the matter. Following an application filed with the High Court, the High Court ordered that the arbitration be done by an arbitrator appointed by the Commercial Arbitration Centre. This was duly done and an award was made on 29 January 2008.

Dissatisfied with the award and the manner in which the award had been arrived at, the applicant noted an appeal to the Labour Court. The Labour Court declined to hear the matter on the basis that it had no jurisdiction to do so. That judgment was not appealed against and stands to this day.

The appellant then sought to have the arbitral award set aside. By the time he made this decision he was in breach of the Arbitration Act [*Cap. 7:15*] which provides that an application for the setting aside of an award may not be made after three months from the date of receipt of the award. Realizing this difficulty the applicant filed an

application before the High Court seeking condonation of the late filing of the application to set aside the award. MAKARAU JP (as she then was) who heard the application was of the view that an application to set aside an arbitral award may not be made after three months from the date of receipt of the award by the party intending to have it set aside and that the Court has no power to extend that period. She accordingly dismissed the application.

That judgment was delivered on 11 February 2009 but only released on 25 February 2009. However, it was found that the judgment contained a number of errors and was referred back to MAKARAU JP for corrections. The corrected version was made available on 19 May 2009.

It must be mentioned at this stage that for the purposes of noting an appeal, the pertinent date is 11 February 2009 and not the other two dates on which copies of the judgment were made available. The applicant was therefore out of time when he filed his notice of appeal on 9 March 2009.

The factors to be taken into account in an application of this nature have been stated in a number of cases and are now well established. It serves no purpose to restate them. For purposes of the present application, the applicant's explanation for the delay is acceptable and no issues arise in that respect. The only issue is whether the applicant has prospects of success on appeal.

The present application is for condonation and extension of time to file an appeal against the judgment of MAKARAU JP. Having perused the judgment of MAKARAU JP I am not persuaded that the applicant has prospects of success on appeal.

The simple issue before MAKARAU JP was whether the application for condonation for the late filing of the application to have the arbitral award set aside was permissible in terms of the law. She found that in terms of the law such an extension was not permissible and that, once lost by the lapsing of the time period of three months, the right to bring an arbitral award before the Court is lost forever. Indeed, on a correct reading of Article 34(3) of the Model Law, it is clear that an application to set aside an award may not be made after three months have expired from the time the award is received.

It seems to me that the difficulty associated with this matter was triggered by the order of the High Court that the arbitration be done by an arbitrator appointed by the Commercial Arbitration Centre. Following this order the matter was regarded as falling under the Arbitration Act and not the Labour Act. Indeed as MAKARAU JP remarked, it was unfortunate that a way was not found to bring the issues back before the machinery set up in terms of the Labour Act. It is apparent that the decision to refer the matter to be dealt with under the Arbitration Act and the decision by the labour Court declining jurisdiction may have been incorrect. However, these decisions were not appealed against and their correctness or otherwise is not before me. Had they been appealed against, the outcome may well have been different.

On the question of costs Mr *Chagonda*, for the respondent, advised that he would not be seeking an order of costs in the event that this application failed.

For all the above reasons, the application is dismissed with no order as to costs.

Applicant in person
Atherstone & Cook, respondent's legal practitioners