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Judgment No. SC 40/03
Civil Appeal No. 147/01

MOSES NGONDO AND THIRTEEN OTHERS

v PORTLAND HOLDINGS LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, MAY 12 & NOVEMBER 28, 2003

A M Gijima, for the appellants

J M Mafusire, for the respondent

MALABA JA: This is an appeal from a judgment of the High Court delivered on 11 May 2001, by which an application made by the appellants for review of the respondent's decision to dismiss them from employment was dismissed with costs and an order made that they proceed with the appeal they had earlier on lodged with the Labour Relations Tribunal ("the Tribunal").

The appellants were employed by the respondent at its plant in Colleen Bawn in Gwanda. On 27 and 28 September 1999 workers at the Colleen Bawn plant resorted to an unlawful collective job action. The appellants were thereafter charged with the offence of taking part in an unlawful collective job action in contravention of clause 3:5:1 of the respondent's employment Code of Conduct ("the Code"). They

were also each charged with inciting and intimidating other workers to join the unlawful collective job action in breach of clause 3:5:2 of the Code and also deliberately giving false and misleading information to other workers in contravention of clause 3:4:2 of the Code.

The disciplinary hearings into the offences charged against the appellants were to commence on 2 October 1999 but were postponed to 8 and again to 11 October 1999 at the request of the appellants or their legal representative. When the hearings were about to commence on 11 October 1999, the workers demonstrated at the venue and barricaded it, thereby causing the disciplinary proceedings to be abandoned.

The workers resorted to yet another unlawful collective job action on 12, 13 and 14 October 1999. On 15 October 1999 a meeting, which was attended by officials from the Ministry of Labour, representatives of the respondent's management and the first, third and eighth appellants representing the other workers who had previously been charged with acts of misconduct relating to their activities on 27 and 28 September 1999 was convened. It was agreed at this meeting that disciplinary proceedings against the appellants had to commence on 19 October 1999 and that those of them who required representation would ask that the proceedings be postponed. The papers show that disciplinary hearings were held in respect of allegations of misconduct levelled against individual appellants on different dates and times.

The proceedings were completed on 2, 3, 4, 9, 11 and 18 November 1999. In addition to facing charges arising from the events of 27 and 28 September 1999, each appellant faced three more charges of taking part in an unlawful collective job action; inciting and intimidating others to join the unlawful collective job action; and giving false or misleading information to other workers, arising out of the events of 12, 13 and 14 October 1999.

The record of proceedings in respect of each appellant shows that they indicated that they did not require representation. At the end of the disciplinary proceedings, each appellant was found guilty as charged. In respect of the offence of taking part in an unlawful collective job action they each received a final warning. They were, however, dismissed from employment for the commission of the other offences.

On 26 January 2000 the appellants filed a notice of appeal against their dismissals with the Tribunal in terms of s 101(7) of the Labour Relations Act [*Chapter 28:01*], which provided that:

> "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 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."

On 18 February 2000 the appellants made an application to the High Court for the review of the decisions on 2, 3, 4, 9, 11 and 18 November 1999 to dismiss them from employment. Taking the longest period of delay, the application

was made eighteen weeks after the termination of the proceedings in which the irregularity complained of was committed. Taking the shortest period of delay the application was made twelve weeks from the termination of the disciplinary proceedings. Either way, the application was in breach of Order 30, rule 259 of the High Court Rules, which requires an application for review to be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. No application for the grave non-compliance with the mandatory provisions of rule 259 was made.

The appellants alleged as grounds for review that: they were denied the right to representation; there was a splitting of charges; and the sanction of dismissal could only be imposed on an employee who committed an offence whilst on a final warning. There was no allegation of bias, *mala fides* or failure on the part of the hearing officer in each case to apply his mind to the case made in the application for review.

The allegations made as grounds for review had no basis at all in the facts. As stated above, the appellants indicated that they did not require legal representation. They waived their right to representation. The offences charged were separate acts of misconduct based on different allegations of fact from those necessary to found a conviction for participating in an unlawful collective job action. There was no splitting of charges. The respondent was entitled to impose dismissal as a sanction for the offences committed by the appellants if the hearing officer considered that the circumstances required that the breach be punished with a penalty more severe than a final warning. The respondent was entitled to dismiss the

appellants if it took the view that their conduct was of so serious a nature as to constitute a repudiation of the contract of employment.

The learned judge in the court *a quo* dismissed the application on the ground that no special reasons had been shown by the appellants for approaching the High Court instead of exhausting the remedy of appeal to the Tribunal.

I, however, take the view that the learned judge should not have entertained the application at all, because it was not properly before the court. The respondent had made it clear in the opposing affidavit that the application was out of time and no application for condonation of the late institution thereof had been made. Mr *Mafusire*, for the respondent, made the same point on appeal. Mr *Gijima*, for the appellants, could not say why the application for condonation of late institution of the application was not made. There was no record that it was ever made and considered by the court *a quo*.

In *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) GUBBAY CJ said at 260 D-E:

> "I entertain no doubt that, absent an application, it was erroneous of the learned judge to condone what was, on the face of it, a grave non-compliance with r 259. For it is the making of the application that triggers the discretion to extend the time. In *Matsambire v Gweru City Council* S-183-95 (not reported) this Court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of r 259 was not sought, the matter was not properly before the court. I can conceive of no reason to depart from that ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such a non-compliance, to appreciate the necessity for a substantive application to be made."

The appeal is accordingly dismissed with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Manase & Manase, appellants' legal practitioners

Scanlen & Holderness, respondent's legal practitioners