

REPORTABLE ZLR 35

Judgment No SC. 41/07
Civil Application No. 318/06

LYTON SHUMBA v COMMERCIAL BANK OF ZIMBABWE
LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 25, 2007

T Biti, for the applicant

P Machaya, for the respondent

Before CHEDA JA: In Chambers in terms of r 31 of the Supreme Court rules.

After this matter was set down for hearing on appeal it was struck off the roll because the notice of appeal had been filed out of time and no application for condonation had been made.

This is the application now before me.

In considering an application of this nature the following broad principles need to be taken into account -

- (a) the extent of the delay;
- (b) the reasonableness of the explanation for the delay;

- (c) whether the litigant himself is personally responsible for the delay;
- (d) the prospects of success on appeal, should the application be granted;
- (e) the possible prejudice to the respondent should the application be granted.

The first three and the fifth considerations present no difficulty in this case.

In *De Kuszoba Dabrivski & Anor v Steel* No 1966 RLR 60 (A) it was held that the negligence of the applicants attorneys should not be overstressed in penalizing an applicant if he is not personally at fault.

In this case an explanation has been given, and I accept that the appellant was not personally at fault.

However, it is the fourth consideration which is most important in this matter. I point out here that I am dealing with this matter as a chamber application. It was served on the respondent on 9 October 2007. There is no response from the respondent as at this date, 31 October 2007. However, the fact that there are no opposing papers does not bar me from dealing with the matter as I see it fit.

I have not invited the applicant to file any Heads of Argument as the matter was ready for appeal, both parties having filed their Heads.

I do not consider that on the merits there can be any other issues for submission by the applicant which are different from what has been submitted in his heads for purposes of appeal.

I will therefore take into account what the parties have submitted in their appeal Heads as reflecting their position on the merits.

The applicant was employed by the respondent (hereinafter referred to as “CBZ”). At some stage the respondent moved him and other employees to the CBZ’s nominees. A dispute arose over the applicant’s status of employment. He argued that he was still employed by CBZ and succeeded in the High Court.

Subsequent to that, CBZ offered some of its employees a retrenchment package. The applicant got to know about the package.

In his own words, in the affidavit supporting this application, he says:

“Over the course of time, CBZ Nominees completed the process of collecting the debt due to the respondent and in many cases wrote off the debt. The net result was that there was an effective shut down of CBZ Nominees, resulting in it taking the unilateral decision that it wished to retrench those employees that were working for it. I applied for that voluntary retrenchment, on the basis that this was a mere thank you for the service that I had rendered to CBZ Nominees and without prejudice to my rights against the employer, the respondent *in casu* (my underlining).

On 30 August 2002 I signed an agreement, in which I accepted a retrenchment package but made it clear that this was not with prejudice to my rights against the respondent.”

The applicant is either confused or is simply being dishonest on this point.

Having contended that CBZ Nominees were not his employers it is strange that he could ask to be retrenched by them instead of being retrenched by his proper employers.

In fact the letter by CBZ Nominees dated 17 January 2002, shows that the employees, including the applicant, asked that the retrenchment packages that CBZ offered its employees be extended to them.

The retrenchment package was certainly that of CBZ and not its Nominees.

The letter which he signed on 30 August 2002 clearly made reference to his conditions of employment and all the benefits, Medical Aid, School fees, the Bank's Group Funeral Cover Scheme and Mortgage Bond Cover.

He does not suggest that he had such a package arranged with CBZ Nominees who were not his employers.

I am satisfied that the applicant fully understood the retrenchment package and its effect when he signed it, and that in fact he had asked for it when he learnt that CBZ had offered that package to its employees.

I am also satisfied that in view of the above the appeal that he wishes to pursue has no merit and will not succeed.

In the result, the application for leave to note his appeal out of time should not be allowed.

The application is dismissed with costs.

Honey & Blanckenberg, applicant's legal practitioners

Gollop & Blank, respondent's legal practitioners