M C K MAMBO
versus
NATIONAL RAILWAYS OF ZIMBABWE
and
KASIYAMHURA N.O.

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 11 February and 19 March, 2003

Mr *Tsunga* for applicant
Mr *F Girach* for lst respondent

SMITH J: The applicant (hereinafter referred to as "Mambo") was an employee of the first respondent (hereinafter referred to as "the NRZ"). The second respondent is the Senior Labour Relations Officer who dealt with the dispute between the NRZ and Mambo. Mambo, who was based in and working at Mutare, was transferred to Bulawayo on 15 November, 1999. He challenged the decision to transfer him. The dispute was due to be heard by a labour relations officer on 10 April 2000 but, at the request of the NRZ, it was postponed to 26 May. On 8 May the NRZ charged Mambo with misconduct in that he failed to report for duty in Bulawayo in accordance with his transfer to Bulawayo. Then on 30 May the NRZ dismissed Mambo. On l September the Labour Relations Officer ordered that Mambo be reinstated within 14 days. The NRZ appealed against that decision to the Senior Labour Relations Officer who, on 5 February 2000, determined that Mambo had violated the terms of his contract of employment by disobeying a lawful order given to him by his employer that he was transferred to Bulawayo. The Senior Labour Relations Officer granted NRZ permission to dismiss Mambo. Mambo has appealed to the Labour Relations Tribunal against the determination of the Senior Labour Relations Officer.

On 29 May 2001 Mambo filed this application seeking an order setting aside the decision of the NRZ on 29 May 2000 to dismiss him and the decision of the Senior Labour Relations Officer on 5 February 2001 granting the NRZ leave to dismiss him. He also seeks an order that the issue of whether or not he should be transferred to Mutare be remitted for consideration by another Senior Labour Relations Officer and that he be reinstated without loss of pay and other benefits.

The application is out of time. Mambo has applied for condonation of the late filing of his application. The reasons he gives are as follows. The two actions he instituted in the magistrates court in 2000 for the payment of his salary, which had been stopped, exhausted all his resources. He approached various bodies for financial or professional assistance but without success. He then applied to the High Court on 29 March 2001 for leave to sue *in forma pauperis*, which application was successful. However, he was not able to get an appointment with the legal practitioner assigned to act for him until 24 April 2001. There was also a delay attributable to the need to wait for the Labour Courts to make a determination on the transfer issue.

This application was filed a year to the day after the NRZ determined that Mambo be dismissed, and almost three months after the determination of the Senior Labour Relations Officer. As regards the latter, Mambo has noted an appeal to the Labour Relations Tribunal. That appeal is still pending.

I consider that the period of the delay in filing this application is such that the Court cannot grant condonation on the basis of the reasons given. If the Court were to grant the order sought, it would mean that the NRZ would have to pay Mambo his salary and allowances for a whole year. Rule 259 of the High Court Rules requires that an application for review must be filed within 8 weeks. The reason why there is such a limitation is obvious. Where a party wishes to have a decision made by some

body reviewed and set aside, that must be done expeditiously. The longer the period that a decision remains unchallenged the more difficult it is to restore the *status quo ante*. In my view, where the delay in filing a review application exceeds 6 months, the Court should refuse to condone the late filing unless there are very compelling reasons.

In his founding affidavit Mambo said that he had been an employee of the NRZ for over 25 years. From April 1996 to 29 May 2002 when he was dismissed, he had not been given any meaningful work to do and so did nothing, other than collect his salary and benefits. That means that the NRZ paid Mambo for 4 years without requiring him to do any work. Such a state of affairs does appear to reflect on the competence of the Human Resources Department of the NRZ. It would not be right for the Court to add to the financial burden of the NRZ by ordering it to pay Mambo for a fifth year of no work.

In *Mtetwa* v *Moyo & Anor* HH 222-89 GREENLAND J said that in determining whether or not "good cause" has been shown, the first factor the Court will consider is the reason for the delay. If the reason, or part of the reason, is due to a fault on the part of the applicant, then that cannot be accepted as "good cause". The second factor which the Court will consider is the applicant's prospects of success on the merits. However, I consider that it will not be necessary for the court to consider the second factor if the delay in making the application has been unreasonably long and the reasons proferred by the applicant for the delay are unacceptable.

In the case of this application, not only has there been an inordinate delay in the filing thereof, but also there is a failure to comply with rule 257 of the High Court Rules. That rule requires that an application for review must state, shortly and clearly, the grounds on which the applicant seeks to have the proceedings set aside or

corrected and the exact relief prayed for. In many judgments handed down over the last few years, legal practitioners have had their attention drawn to the requirements of rule 257 and the necessity to comply therewith. There have been warnings that failure to comply with the requirements of that rule will result in the application being dismissed. In *Minister of Labour & Ors* v *PEN Transport (Pvt) Ltd* 1989(1) ZLR 293(SC) GUBBAY JA, as he then was, dealt with the requirements of rule 257 at 295-296 as follows -

> "The notice of motion itself was not in accordance with proper practice. It simply asked for the relief particularised in an annexed draft order, which was that the determination be set aside and the dismissal of the employee confirmed. I am bound to reiterate the stricture of GREENFIELD J in *Utterton* v *Utterton* 1969 (2) RLR 404 (GD) at 409 F-G; 1969 (4) SA 391 (R); that the requirement of rule 227 (1) of the High Court Rules 1971, that an applicant should append to his notice of motion a draft of the order he seeks, does not relieve him of the necessity to ensure that the nature of the relief appears *ex facie* the notice. But there was a far more serious defect in the preparation of the application. Although the existence of two grounds of review were urged upon the court *a quo* only the second, that the labour relations officer had declined to hear the employer's accountant, Mr MacKenzie, and had also failed to investigate from other employees the circumstances surrounding the dismissal, was alleged in the founding affidavit. The first ground was not disposed of at all. It was that the labour relations officer had no jurisdiction to make the determination he did because it had been orally agreed that the employee would serve a probationary period of three months, thereby permitting termination pursuant to s 2(1)(c) of the Regulations. That omission amounts to non-compliance with Rule 257 of the High Court Rules, which provides that the notice of motion (in the wide sense of embracing the supporting affidavit) -
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> '…shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected'".

In *Lazarus* v *Minister of National Supplies & Anor* SC 80-90, GUBBAY JA repeated what he had said in the *PEN Transport* case, *supra*, about the necessity comply with rule 257 and said -

> "Non-compliance will bar the grant of relief"

In this case there has been no attempt to set out the grounds on which Mambo seeks to have his discharge by the NRZ or the determination of the second respondent

set aside. Although in the *PEN Transport* case, *supra*, GUBBAY JA said that the grounds for seeking the relief sought could be set out in the supporting affidavit, I would strongly recommend that the grounds be set out in the notice advising the respondent that the application for review is being made. If that is done, then both the respondent and the Court will be made aware, before even starting to delve into the founding affidavit, of the exact relief sought and the grounds upon which the application is based.

When an application is dismissed on the basis of non-compliance with rule 257, it would be appropriate, in my view, to order that the costs be paid by the legal practitioner concerned. The failure to comply with rule 257 would clearly be due to the incompetence or negligence of the legal practitioner.

Condonation for the late filing of the application is refused. The application is dismissed.

*Henning Lock Donagher & Winter*, legal practitioners for applicant
*James. Moyo-Magweba & Nyoni,* legal practitioners for lst respondent