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Judgment No. SC 50/07
Civil Appeal No. 69/05

JEMITIAS MAKOTOVANI v

NEWPEAK MANUFACTURING (PVT) LTD

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 12, 2007

Applicant in person

P Machaya, for the respondent

Before GWAUNZA JA: In Chambers, in terms of r31 of the Supreme Court Rules.

After hearing the parties, I dismissed the application and indicated the reasons would follow. These are the reasons.

The applicant sought an order granting him leave to appeal, out of time, against the judgment of the Labour Court in Case No. LC/H/262/2002. In that judgment dated 25 January 2005, the Labour Court dismissed the applicant's appeal against his retrenchment from employment with the respondent.

In his founding affidavit, the applicant correctly noted that it was incumbent upon him to –

(i) give a good explanation for the delay in filing his notice of appeal; and

(ii) show that he had good prospects of success on appeal.

In relation to the first point, that is, the delay in filing his appeal, the applicant explained that even though the judgment of the Labour Court was dated 25 January 2005 and despite numerous enquiries, he had only been availed of the judgment on 11 March 2005. The respondent in its opposing affidavit conceded the truth of this averment, since it had also received the same judgment around the same time.

The applicant asserted albeit without any substantiation, that the Labour Court had attributed the delay in availing the judgment to the parties, to the fact that the relevant file had "somehow" been misplaced.

In view of the fact that the respondent too, was not able to access the judgment until March 2005, I was inclined to give the applicant the benefit of the doubt regarding the reason for his failure to access the judgment in question timeously. It follows from this that the applicant had given a satisfactory explanation for the delay in filing his notice of appeal.

Having passed the first test, the applicant still had to persuade the Court that he enjoyed good prospects of success on the merits of the appeal.

In para 15 of his founding affidavit, the applicant asserted only as follows in this respect:

> "Therefore on prospects of winning the case, I was simple (*sic*) victimized by the management of Newpeak Manufacturing for legally trying to safeguard my interests."

The Labour Court considered this averment and made a factual finding encapsulated in the following comments lifted from its judgment:

> "Apart from the mere say so from the bar by Mr *Sithole*, (appellant's counsel) there is no evidence that shows that appellant was victimized. The appellant was in Court and Mr *Sithole* did not see it fit to put him on the stand to adduce evidence of his victimization… So, in the absence of any evidence of victimization, this ground is dismissed."

Before me, no new argument was advanced to challenge the correctness of this factual finding by the Labour Court. The applicant did not, in other words, establish that if the Labour court erred in this finding, it did so so grossly that it erred on a point of law.

I found accordingly, that he had failed to prove any prospect, much less a good one, for success on appeal, on this ground.

The applicant sought to rely on one other main argument in a bid to persuade the Court that he had good prospects of success on appeal. He charged that the court *a quo* erred by finding that the correct procedures were followed in the process of his retrenchment. In particular, the appellant charged that the Minister of the Public Service, Labour and Social Welfare had signed the relevant retrenchment papers "under duress".

Quite apart from the fact that the Minister himself has not tendered any evidence on the alleged duress, the appellant did not say what possible pressure could have been applied on the Minister, by whom, or why, to induce him to sign the retrenchment papers. The respondent observed in this respect, and justifiably so on the evidence before the Court, that the Minister concerned had not in any event been made a party to these proceedings. Thus, even if for some reason the Minister had indeed been forced to sign the papers under duress as claimed by the applicant, the latter would have had some difficulty in proving this point, without involving the Minister in the proceedings.

The Labour Court, in my view, correctly dismissed this particular ground of appeal. I was accordingly not persuaded any prospects of success on appeal could flow from it.

The applicant made other submissions relating to factual findings of the Labour Court, without averring, much less proving, that the Labour Court had so grossly erred in such findings as to have erred at law.

When all was said, the applicant, I found, had failed to show that he enjoyed any prospects of success on the merits of his intended appeal.

Hence my dismissal of the application.

Coghlan, Welsh & Guest, respondent's legal practitioners