Judgment No. S.C. 1/2001
Civil Appeal No. 73/2000

CHUBB UNION ZIMBABWE (PRIVATE) LIMITED

v CHUBB UNION WORKERS COMMITTEE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
HARARE, JANUARY 15 & 25, 2001

E Matinenga, for the appellant

D Mwonzora, for the respondent

GUBBAY CJ: On 21 April 1998 a hearing was convened by a labour relations officer to whom an alleged unfair labour practice had been referred by the Workers Committee of Bulawayo Chubb Union, now the respondent. Present at the hearing were two representatives of the appellant, the secretary of the National Employment Council for the Engineering, Iron and Steel Industry ("NEC") and representatives of the respondent. The merits of the complaint were fully canvassed by the parties. Thereafter, on 19 June 1998, the labour relations officer handed down her determination. It read:

> "It is an unfair labour practice to differentiate conditions of service of people on a regional basis. Management to rectify this by (a) applying the job evaluation (exercise) *in toto*; (b) pairing the workers as they have done in Harare; (c) backdating all promotions to date when Harare employees were also upgraded."

In a letter of 27 August 1998 to the labour relations officer, the appellant wrote:

> "We have been informed by NEC that they have not completed their investigations on the issue and we are appealing against your first determination since the determination was based on inadequate information. We say this because no-one from the Ministry collected any details from Chubb's personnel records for verification of any accusations, hence the inaccurate accusations in the determination." (emphasis added).

No steps were taken, however, to have the determination set aside.

On 23 November 1998 the appellant was advised by the provincial magistrate, Matabeleland North, that the determination had been registered in terms of s 96(2) of the Labour Relations Act [*Chapter 28:01*] ("the Act") and that unless the sum of $509 619.44 was paid within seven days a warrant of execution against its property would be issued. This notification was met with the response that the appellant was not in a position to comply with the "instruction (sic) as the issue in question is still under consideration by NEC and we are awaiting a meeting to be convened on 4 December 1998 to discuss and resolve/finalise the issue".

On 8 January 1999 the messenger of court, under a warrant of execution that had been issued, sought to attach the appellant's property. Only then did the appellant proceed to take some positive action. Within four days it filed with the Labour Relations Tribunal ("the Tribunal") a notice of appeal against the determination of the labour relations officer and an application for condonation of the late noting of an appeal.

Of course, no appeal lay against the determination of the labour relations officer; only an application in terms of s 93(5) of the Act for the unfair labour practice to be referred to a senior labour relations officer – such application to

be made within fourteen days of the date of receipt of a copy of the determination. See s 9(2) of the Labour Relations (Settlement of Disputes) Regulations 1993, SI 30 of 1993, as amended by SI 154 of 1994 ("the Regulations").

The learned chairman of the Tribunal treated the application as one seeking condonation of the failure to refer the determination to a senior labour relations officer within the prescribed fourteen days. Applying the three factors to be considered in deciding whether condonation should be granted, he held that:

(a) the extent of the delay was inordinate having regard to the circumstances of the case;

(b) no reasonable explanation for the delay had been proffered; and

(c) the prospects of success before the senior labour relations officer were not good.

At the inception of the hearing before this Court, counsel for the appellant was asked whether the application for condonation should not have been made to the senior labour relations officer to whom the determination had to be referred, and not to the Tribunal. In response our attention was directed to s 26(a), as read with s 9(2), of the Regulations.

Section 26(a) of the Regulations provides that the chairman of the Tribunal may condone any failure to comply with these Regulations. Plainly, there was a failure to comply with the regulation set out in s 9(2).

It seems to me somewhat illogical that condonation is to be obtained, not from a senior labour relations officer who is to determine the merits of the dispute of unfair labour practice, but from the Tribunal; and that the latter is vested with the discretion in respect of a matter which may never come before it. Be that as it may, I am satisfied that a plain reading of the relevant sections of the Regulations indicates that the Tribunal is indeed vested with the power to condone the appellant's non-compliance.

The learned chairman's finding that the delay of six-and-a-half months was of inordinate duration cannot be faulted. The fact that a period of only fourteen days is allowed for an application in terms of s 93(5) of the Act to be referred to a senior labour relations officer, is indicative of a legislative intention that the second stage of such litigation is to proceed expeditiously.

I also share the learned chairman's view that the explanation for the inordinate delay in referring the determination to a senior labour relations officer was far from satisfactory. The explanation was that at the time the appellant received the determination of the labour relations officer, NEC had not completed its investigations into the complaint of an unfair labour practice. That being so, the appellant would only be in a position to refer the determination or implement it, as the case might be, after the completion of such investigation.

This reasoning is a *non sequitur*. The investigation by NEC commenced before the complaint of an unfair labour practice came before the labour relations officer. NEC took part in those proceedings. A determination was made

against the appellant. It was legally binding until set aside. The appellant appreciated its significance because it advised the labour relations officer that it intended to "appeal". What it should have done was to refer the determination and then request the senior labour relations officer to withhold the hearing of the issue until NEC had completed its investigations. Yet it deliberately took no action. Even when the determination by the labour relations officer was registered the appellant remained supine, merely proclaiming that it was not prepared to comply. In these circumstances, it seems to me that the comment of the learned chairman, that the appellant was contemptuous of the labour relations officer and her office, was justified.

With regard to the third factor – that of the prospects of success – two arguments were addressed. The first was that since a registered code of conduct governed the procedure of grievance resolution between the appellant and its workers, the power of a labour relations officer or a senior labour relations officer to intervene in any dispute or matter was ousted by s 101(5) of the Act. Accordingly, the labour relations officer should have declined to hear the complaint of the respondent for want of jurisdiction.

The point taken would have been valid, but for the fact that it is clearly revealed that the appellant, by its conduct, submitted to the jurisdiction of the labour relations officer. It did not appear at the hearing in order to protest the want of jurisdiction. It appeared to oppose the complaint that it was guilty of committing an unfair labour practice. In other words, it waived the right to insist on the dispute being dealt with in terms of the procedure under the code of conduct by submitting to

the jurisdiction of the labour relations officer. See *Du Preez v Philip-King* 1963 (1) SA 801 (W) at 804 F-G; *Grauman v Pers* 1970 (1) RLR 130 (GD) at 133 F-H; Pollak on *Jurisdiction* 2 ed at 10-11.

The second argument advanced was that the labour relations officer had erred in finding that an unfair labour practice had been established in that after the job evaluation had been carried out the Harare employees of the appellant were upgraded, placed on an increased salary structure and made to work in pairs; whereas the conditions of the Bulawayo employees in the same grades were not altered. This finding, so the argument went, overlooked that upgrading was not based merely upon the completion of three years service. It was also based upon the factors of ability, qualifications and good performance.

I do not believe it can be said that this argument is devoid of merit. However, I am satisfied that even though there may be some prospects of the argument succeeding, the cumulative effect of the other factors above-mentioned, was so adverse as to justify the refusal by the learned chairman to grant condonation. As was said by MULLER JA in *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799 D-E:

> "… where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should … not be granted whatever the prospects of success may be."

These observations were approved by this Court in *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (SC) at 358 A-D.

For these reasons, if the application for condonation had been made before me, I too would have refused it.

But it is not even necessary to go as far as that. For the appeal to succeed, it had to be shown that the exercise by the learned chairman of the discretion to grant condonation was one so outrageous in its defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question could have arrived at such a conclusion. Quite clearly the appellant has failed in that endeavour.

The appeal is to be dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Mwonzora & Partners, respondent's legal practitioners