Judgment No. HB 140/2003
Case No. HC 221/02
X-Ref HC 1560/01 & 1556/01

TOOLMAKING ENGINEERING (PVT) LTD

Versus

ALFRED CHIMOMBE

IN THE HIGH COURT OF ZIMBABWE
CHIWEHSE J
BULAWAYO 18 JULY 2003 & 29 JANUARY 2004

Mrs H Moyo for the applicant
S Mlaudzi for respondent

Judgment

CHIWESHE J: This matter has been pending in this court since June 1999. The brief history of the matter is as follows. The respondent was employed by the applicant as its stores manager. He was suspended from duty pending dismissal on 14 November 1997. He subsequently filed an application for reinstatement with a Labour Relations Officer. The matter was heard on 21 August 1998. In a determination dated 8 April 1999 the Labour Relations Officer ruled in favour of the respondent. The applicant company appealed to the Senior Labour Relations Officer who upheld the decision of the Labour Relations Officer. Grieved by that turn of events the applicant further appealed to the Labour Relations Tribunal and eventually to the Supreme Court. Both the Tribunal and the Supreme Court upheld the Labour Relations Officer's determination, namely that in purporting to suspend the respondent pending dismissal the applicant had not sought as is required in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, Statutory Instrument 371 of 1985 permission to terminate respondent's employment. This rendered the suspension invalid and of no

legal force or effect. The respondent was accordingly entitled to reinstatement with full benefits. Although the appeal to the Supreme Court was against the decision of the Labour Relations Tribunal to grant condonation of the late noting of appeal, it was noted in GUBBAY CJ's judgment (as he then was) that there were on the merits no prospects of success (See SC-12-01)

In the meantime and before the appeals to the Senior Labour Relations Officer, the Labour Relations Tribunal and the Supreme Court had been noted, the defendant had registered a writ of execution with this court in which he sought to enforce the payment of his benefits as determined by the Labour Relations Officer. It was this writ that triggered the appeals referred to above. The writ also triggered a multiplicity of applications before this court.

The writ was served on the applicant on 8 June 1999. Thereafter the applicant's legal practitioners wrote to the respondent's legal practitioners requesting that the writ be withdrawn in order that the parties pursue an out of court settlement. On 18 June 1999 the respondent wrote back refusing to withdraw the writ because the applicant had at that stage not made any indications to the respondent as to what it was offering by way of settlement. The applicant then sought and obtained a provisional order suspending the writ pending an appeal against the Labour Relations Officer's determination, (See HC-2909-99). The provisional order was subsequently confirmed.

It should be noted that the applicant's position had been that the Labour Relations Officer's calculations as to the quantum of benefits payable were inaccurate and that the applicant had not been invited to make submissions thereto. Secondly,

that the resultant writ of execution should have been registered with the Magistrates' Court and not the High Court. Under case number HC-1556-01 the applicant filed an application in which it sought by way of review an order to the effect that the determinations by the Labour Relations Tribunal on 8 April 1999 and 26 April 1999 be set aside. This application was dismissed with costs on the higher scale on 11 January 2002.

Under case number HC-221-02 the applicant sought rescission of a judgment granted to the respondent in default on 11 January 2002 under case number HC-1556-01. The reasons advanced for the default was that the applicant's legal practitioner had failed to diarise the date of hearing. Secondly on the merits it was argued that the Labour Relations Officer's determination had been granted without the participation of the applicant. This issue had been conclusively dealt with up to the Supreme Court. Although no formal decision was given to the application, it is unlikely that it would have succeeded. The court given the fact of the inordinate delay in the finalisation of this matter instead urged the parties to come to a common position in the interests of progress. It was finally agreed that the matter be referred back to the Labour Relations Officer for a determination as to the quantum of pay and benefits due to the respondent. Both parties attended the proceedings before the Labour Relations Officer. The resultant determination with which both parties are agreed is now before the court. That would have been the end of the matter save that the order referring the matter back to the Labour Relations Officer did not deal with the question of costs. The only issue left for determination is who should bear the costs of this application. On paper and applying the usual rule that costs follow the result it would appear that the applicant should bear the costs of this application. However, I

am inclined given the history of the case to the view that on the whole both parties are to blame for the delay in the finalisation of this matter. As a result unnecessary appeals, applications and counter applications have been lodged with the Labour Relations authorities, the Supreme Court and this court. In all these matters orders for costs have been granted at the appropriate forum.

Dealing with the present application for the rescission of the judgment granted under case number HC-1556/01 on 11 January 2002, one must point out that the application has to a large extent been overtaken by events. Firstly it will be noted that the parties agreed at a round table conference in chambers that the matter be referred to the Labour Relations Officer for purposes of calculating the benefits due to the respondent. That in itself constitutes an admission that the order sought by the applicants under case number 1560-01 was in principle equitable and acceptable to both parties. It also in a way boils down to an acceptance by both parties that the justice of the case would dictate that the default judgment granted against the applicant ought to be rescinded. To that extent the applicant has succeeded where technically it would otherwise have failed. It is not correct to argue as the respondent does that the issue of calculations of benefit had been decided on appeal. What was decided by the Labour Relations Officer in the first determination was that the respondent's suspension was irregular and that the respondent was entitled to reinstatement with full benefits. That was the decision that was upheld on appeal. The second determination made by the Labour Relations Officer related to the quantum of benefits payable to the respondent. That issue was never taken up on appeal. It was instead taken up on review on the grounds that the Labour Relations Officer had not given the applicant the opportunity to be heard on that particular point

and that as a result the calculations arrived at were wrong and prejudicial to the applicant. The applicant obtained a provisional order to that effect. The applicant however was in default on the date set down for argument as to confirmation of that provisional order. As a result the order was discharged by default with costs on the higher scale. Not surprisingly the applicant filed the present application for rescission of that judgment, which application has now been overtaken by the agreement by both parties to refer the matter back to the Labour Relations Officer. It cannot therefore be said that the present applicant was ill conceived or without merit. However both parties came to an amicable agreement which led to the resolution of the substantive dispute. Both parties must be commended for their reasonable approach in this regard. I am inclined for that reason to order that each party bears its own costs in relation to the present application. In addition I am inclined in respect of the default judgment granted under case 1560-01 on 11 January 2002 to order that the applicant pays the wasted costs and rescind the order for costs on the higher scale. It was the applicant whose oversight led to its default. In view of the strength of its case on the merits it would not however be fair to let the present order as to costs stand as it is. The order was made in default and in all fairness no submissions were made to justify such an order.

Accordingly it is ordered as follows:

(a) the order for costs on the higher scale granted on 11 January 2002 under case number HC-1560-01 is hereby rescinded and in its place substituted the following:

"The applicant pays the wasted costs."

(b) with respect the main application each party shall meet its own costs.

Joel Pincus Konson & Wolhuter applicant's legal practitioners
Samp Mlaudzi & Partners respondent's legal practitioners