HC 5737/2000

PHYLLIS SIBANDA
and
MUNYAMA NGANGURA
versus
THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 30 January and 17 April 2002

S. Hwacha, for the applicants
P. Nherere, for the respondent

CHINHENGO J: The applicants were employed by the ICRC and their contracts of employment were terminated following upon events that are in dispute between the parties. The applicants contend that the ICRC should have complied with the Labour Relations Retrenchment Regulations, 1990 (S.I. 404/90) as amended by Statutory Instrument 252/92 ("the Regulations"). The ICRC maintains that the termination was by agreement and there was therefore no requirement for it to comply with the Regulations. More importantly, however, the ICRC maintains that it is an international organisation which, in terms of the Privileges and Immunities Act [*Chapter 3:02*] ("the Act"), enjoys immunity from suit and legal process. In other words the ICRC's position is that this Court has no jurisdiction in respect of civil or administrative proceedings instituted against it by its former employees because its actions were part and parcel of its official mission.

I will examine the issue of this Court's jurisdiction first,

because if this Court has no jurisdiction then that is the end of the matter.

The privileges and immunities of foreign States and diplomatic and consular representatives of foreign States and of certain international organisations and courts and certain persons connected with them, is governed by the provisions of Part IV of the Act. Section 7(1) in particular provides for the privileges and immunities of international organisations such as the ICRC and these are specified in Part 1 of the Third Schedule to the Act. Of relevance to this application is the immunity from suit and legal process of the ICRC which is specified in paragraph 1 of Part 1` of the said Third Schedule. In terms of s 7(1) of the Act an international organisation which enjoys the immunity mentioned above must be notified by the President, by notice in the *Gazette,* which notice must specify as applicable to the organisation any or all the privileges and immunities set out in Part 1 of the Third Schedule. It was not in issue in these proceedings whether or not the President acted in terms of s 7(1) of the Act in respect of the ICRC. I must therefore accept that the ICRC enjoys the immunity from suit or legal process and that such immunity was duly accorded or conferred on it by the President.

The fact that immunity from suit and legal process was conferred on the ICRC does not, by itself, shed any light on the nature and extent of that immunity. This is a matter which I must determine in these proceedings. The ICRC, though an international organisation, cannot be treated any differently from a foreign sovereign where immunity is involved and the position at international law must be the same for it as it is for a foreign sovereign. The position as I understand it is that international law is part of our law (*Barker McCormark P/L v Government of Kenya* 1983 (2) ZLR 72 at 79G) and that it is now accepted that the doctrine of absolute immunity applies only in respect of *jure imperii* and not *jure gestionis:* in the latter case the doctrine of restricted immunity applies (see *Barker*

McCormark supra). England, which along with Russia espoused the doctrine of absolute immunity for longer than most other countries, apart from South Africa, changed course following the decision in *Rahimtoola v Nizam of Hyderabad* (1958) AC 397 at 418; [1957] 3 All ER 441 at 461 where LORD DENNING said:

> "It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts … foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognisable by them."

This position was followed in *Thai Europe Tapioca Service Ltd v Government of Pakistan & Ors* [1975] 3 All ER 961 (CA); *The Phillipine Admiral v Wallen Shipping (Hong Kong) Ltd and Ors* [1976] All ER 78 and *I Congreso del Partido* [1981] 2 All ER 1064. In South Africa the acceptance of the restricted doctrine of sovereign immunity was made in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) and other cases after it such as *Kaffararia Property Co (Pty) Ltd v The Government of the Republic of Zambia* 1980 (2) SA 709 (E). The rationale for the adoption of the restricted doctrine of sovereign immunity was well articulated by LORD WILBERFORCE in *I Congreso del Partido (supra)* at 1070g – h where he said:

> "The relevant exception, or limitation, which has been engrafted on the principle of immunity of States, under the so-called restrictive theory, arises from the willingness of States to enter into commercial, or other private law, transactions (a) It is necessary in the interest of justice to

> individuals having such transactions with States to allow them to bring such transactions before the courts. (b) To require a State to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereign or governmental act of State. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its sovereign functions."

In *Rahimtoola'*s case *supra* the test for deciding in which case the doctrine of restricted sovereign immunity was to apply was laid down in the following words:

> "Applying the principle it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly but rather on the nature of the dispute. Not on whether conflicting rights have to be decided but on the nature of the conflict. Is it properly cognisable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns for instance the commercial transactions of a foreign government (whether carried on by its own independent agencies or by setting up separate legal entities) and it arises properly within the territorial jurisdiction of our courts there is no ground for granting immunity."

A more eloquent formulation of the test was given in *I Congreso del Partido* again by LORD WILBERFORCE at 1070j where he said:

> "When … a claim is brought against a State … and State immunity is claimed, it is necessary to consider what the relevant act is which forms the basis of the claim: is this, under the old terminology, an act '*jure gestionis*' or is it an act '*jure imperii*'; is it (to adopt the translation of these catchwords used in the Tate letter) a 'private act' or is it a 'sovereign or public act', a private act meaning in this

> context an act of a private law character such as a private citizen might have entered into."

In *Barker McMormac (supra)* GEORGES JA held that the appellant's claim against the Government of Kenya for damages arising from a lease agreement could not be regarded, on the face of it, as one in regard to which sovereign immunity could successfully be raised. The court granted the appellant leave to serve the summons and declaration so that the issue of the right to immunity could be fully canvassed in court.
What emerges from the decision in *Barker McCormac (supra)* is that an organisation or government claiming immunity in any given case must raise the defence and, after fully canvassing it in court, the court may then decide whether immunity may validly be raised. In terms of the Act, as I have said, the position of the ICRC is no different from that of a foreign government. It enjoys immunity from suit and legal process but subject to international law. It must be made clear that *Barker McCormac (supra)* did not decide the question whether on the facts before the court, immunity availed the respondent. The case however decided the question of jurisdiction on the same basis as laid down in *Rahimtoola*'s case *supra*. The considerations are that, because immunity is not absolute, then the foreign sovereign, and in this case the ICRC, must submit itself to the jurisdiction of the Court so that a determination can be made whether or not the foreign sovereign or the organisation concerned enjoys immunity and, more importantly, whether or not the particular issue in dispute is covered by the immunity. This to me means, as stated in *Rahimtoola*'s case *(supra),* that the question of immunity depends on the nature of the dispute or on the nature of the conflict and on whether or not the dispute is properly cognisable by our courts. If upon investigation the court is satisfied that immunity avails to the foreign sovereign, then that is the end of the matter. But if it finds that immunity does not attach in respect of the dispute in question because of its nature, then the matter must be determined on its merits. When the question whether the Government of Kenya enjoyed immunity in respect of the dispute between it and Barker McCormac (Pvt) Ltd was eventually brought to the High Court it was decided by SAMATTA J in *Barker McCormac (Pvt) Ltd v Government of Kenya* 1985 (1)

ZLR 18 (H), who relied on all the cases I have cited and at 29C – F said:

> "It is not in dispute that the defendant purchased the property for the purpose of using it as its High Commission. Mr *Mkushi* submitted that, this having been the purpose, the purchase was an act *jure imperii.* I think this contention may well be valid, but it is not helpful to the defendant in this case as far as its plea to immunity is concerned. Its purchase of the property did not in any way interfere with the rights of the plaintiff as a lessee and, therefore, that act could not be the subject matter of complaint by the plaintiff. The act which forms the basis of the plaintiff's claim is the alleged breach by the defendant of the lease and not the purchase of the property. Assuming that the alleged breach did take place, it is clear that it happened because the defendant wanted to use the premises as part of its High Commission. Does this reason make the refusal by the defendant to allow the plaintiff to continue occupying the leased premises an act *jure imperii.* I do not think so. The purpose for which a breach is committed cannot alter its character. The defendant's act of entering into a landlord/lessor and tenant/lessee relationship with the plaintiff, was in my judgment, a non sovereign act. The fact that the defendant found it necessary for security or other reasons, not to have tenants in the building cannot, in my opinion convert the non-sovereign act into a sovereign act."

The learned judge went on to quote with approval from *I Congreso del Partido* at 1102e – g and decided that the plea to jurisdiction had no merit. This disposes of the ICRC's objection in *limine,* to wit, that because it enjoys diplomatic immunity it is *ipso facto* immune from the jurisdiction of this Court. In *Barker McCormac* (*supra*) the difficulty arising from deciding whether our courts have jurisdiction was aptly summarised at 82G – H. GEORGES JA said:

> "In the view I take of this matter it is unnecessary to rule on that issue (whether the court should on its own raise the issue of immunity). It can be argued that the municipal court has jurisdiction over a claim by reason of the nature of the claim and that such jurisdiction is barred only when

> the defendant raises the issue of sovereign immunity. On the other hand it can be argued that the jurisdiction is barred once it appears on the record that the defendant can raise the issue of sovereign immunity and that the court should not proceed unless satisfied that the defendant consents or that the claim does not fall within the category of claims in regard to which sovereign immunity can be raised."

He declined to rule on this issue without hearing further argument. I think however that the espousal of the restricted doctrine of sovereign immunity by itself means that the foreign sovereign is, *prima facie,* subject to the jurisdiction of the domestic tribunal. He must appear and plead the defence and, depending on the court's finding, his immunity may be confirmed or decided against, and in the latter case, the matter will be dealt with on its merits. It seems to me futile therefore to raise the issue of sovereign immunity as a complete bar except in obviously clear cases. It seems to me equally futile or pointless, except in very clear cases, for the domestic court to have to be seized with this question at the start of the proceedings. To raise the issue of immunity is to invite the court to determine its applicability in any given case depending on other factors such as, in particular, the nature of the dispute. The question of jurisdiction of the domestic court must always be in the background and the nature of the dispute in the forefront, because the latter is determinant of the course to be followed by the Court.

The present dispute arises from employment contracts. The applicants were employed by the ICRC from 1985 and 1991 respectively. The first applicant's contract of employment was terminated on 31 December 1998 and that of the second applicant on 31 December 1997. Their contracts of employment were standard form contracts which they were required to sign upon taking up employment. They provided in clause 7 that –

> "Any dispute arising in the application of the conditions (of employment) mentioned above shall be settled in conformity with the labour legislation in force in the country (Zimbabwe) or, in default of such legislation, in accordance with local custom and usage."

The applicants construed this clause to apply to any dispute over termination of the contract and not only to the conditions of employment during the subsistence of the contract. The ICRC on the other hand construed the above clause as a choice of law clause, which specifies the law to be applied to the interpretation of the "conditions mentioned above" in the contract and not as a submission to jurisdiction. I will return to this matter later on. For the moment it is necessary that I pronounce on the nature of the dispute.

When a foreign organisation establishes itself in Zimbabwe it necessarily must, and usually does, employ local personnel to carry out certain of its functions. The employment contract is a commercial arrangement of master and servant. It entails the provision of a service by the employee and the payment for the service by the organisation concerned. In my view such an arrangement falls to be determined, so far as the question of the organisation's immunity is concerned, as an *actus jure gestionis,* a commercial transaction. And, should a dispute arise from the employer/employee relationship established by such a commercial arrangement, then the doctrine of restricted sovereign immunity should apply. A local person who finds employment with an international organisation is not likely to know, or to be concerned about, the immunity from suit or legal process of his prospective employer. The contract which he enters into with such an employer is not likely to allude to that issue. The contracts *in casu* did not advert to the issue of immunity at all. I think that it would be grossly unjust to the

individual concerned if our courts were to accept that an employer such as the ICRC can invoke its immunity in a purely civil or commercial dispute with its local employee. It would indeed conduce to injustice. And I think the organisation concerned would have no reason to take the view that the challenge brought up by the employee interferes with its official functions for which the immunity is conferred in the first place. The employment of the local person by the organisation has, as its purpose, the efficient discharge of its functions by that organisation. But the relationship it establishes with the local employee is purely a private act, the kind which the employer can enter into with any other employee. It is simply a master and servant relationship which must be subject to the local laws. Additionally, when the organisation breaches the laws which apply to such a relationship then that breach cannot be protected by the invocation of an immunity which is conferred for a purpose different from that for which the organisation invokes it.

Coming to the correct interpretation of the clause in the contract of employment cited above, it is my view that the parties agreed that, in the event of a dispute arising, not only in regard to the conditions of employment narrowly defined as other than conditions of termination of employment but also in regard to actual termination, the laws of Zimbabwe would apply. I do not agree that the clause was not a waiver of immunity or that it was not a submission to the jurisdiction of the local courts. The immunity granted by the Act is in respect of suit and legal process. If the ICRC accepted that the laws of Zimbabwe would apply to any dispute arising from the contract of employment, can it then be said that the parties contemplated that the law of Zimbabwe would be applied other than by a domestic tribunal or court? If the ICRC was of this view, the same cannot be said of the applicants. It is only reasonable to

hold that the parties, or at least the applicants, had in mind the resort to Zimbabwean laws in Zimbabwean courts in the event of any dispute arising in their relationship with the ICRC. I am satisfied that, in the context of the contract of employment, the parties agreed not only that the laws of Zimbabwe would apply, but also that those laws would be applied by Zimbabwean courts. The ICRC, to that extent, waived its immunity. This is not surprising as such waiver accords with my earlier finding that the nature of the dispute is commercial; that it is cognisable by our courts and that it is subject to the restricted view of immunity.

The ICRC's counsel submitted that a distinction must be made between immunity from jurisdiction and immunity from legal liability and that the ICRC enjoys an immunity from jurisdiction and not necessarily from legal liability. I acknowledge that distinction, but in view of my finding on jurisdiction what remains to be considered, therefore, is the question of legal liability. In view of the above, it must be clear that in my view the ICRC cannot successfully argue that its immunity is a procedural bar or that in regard to the present dispute it is exempt from local jurisdiction. Equally, the attempt by the ICRC's counsel to distinguish *Barker McCormac (supra)* on the basis that that case was concerned not with diplomatic immunity but with sovereign immunity is not sustainable. Immunity, whether diplomatic or sovereign, has the same consequence and it does not matter that it is conferred by virtue of international law or by virtue of an enactment. The Act in *casu* is merely a vehicle for giving effect, in Zimbabwe ,to the provisions of international law as codified in the relevant international treaties. The case of *S v Muchindu and Others* 1995 (2) SA 36 (W) cited by the ICRC's counsel in his heads of argument is not helpful to the ICRC. That case was concerned not with the rights of the ICRC as an organisation and in the context of a commercial or employment relationship, but with whether a member of staff of the ICRC who enjoys diplomatic immunity can be subpoened in a court of the receiving State. The decision that he could not is correct, but that case is distinguishable from the present which is concerned with an entirely different matter. I cannot comment on the other case cited by counsel, *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues* 2001 (1) SA 1285 (W) as I have not been able to obtain it.

The ICRC raised another preliminary point which was that the

applicants are in reality seeking a review of the ICRC's decision to dismiss them. It was submitted on its behalf that the applicants labelled the relief they seek as one for a declaratory order simply to get round the rules of this Court requiring that any review proceedings should be instituted within eight weeks of the suit, action or proceeding in which an irregularity or illegality is complained of. It was submitted further that the second applicant should have instituted these proceedings by 28 February 1998 and the first applicant by 28 February 1999. This application was only instituted on 19 May 2000. Further it was submitted that the applicants did not seek condonation of their failure to institute the review proceedings timeously and that the court cannot grant any such condonation when condonation has not been sought. It prayed for the matter to be struck off as one which is not properly before the court, with the costs being borne by the applicants jointly and severally.

I cannot agree that this application is in reality one for a review. Review proceedings are concerned with an irregularity of a procedural nature. The mere fact that the applicants allege a failure on the part of the ICRC to comply with the Regulations does not raise a matter of procedural irregularity or impropriety. It raises, rather, the issue of unlawfulness in the action taken by the ICRC. The raising of immunity by the ICRC places this dispute outside the realm of review proceedings. The relief sought by the applicants is that the ICRC be declared not to be immune from legal suit and legal process in respect of the dispute in issue and that it be directed to act in terms of the Regulations and other provisions of the Labour Relations Act [*Chapter 28:03*]. The relief sought by the applicants is not one of reinstatement or damages, as was the case in *Mutare City Council v Mudzime & Ors* 1999 (2) ZLR 140 (S) which, among other authorities, was cited by the ICRC's counsel, nor is it one that is alleging a failure to follow prescribed procedures which are or must be followed by the respondent. On the contrary, the ICRC's position is that it is not bound by the Regulations in view of the immunity it enjoys. In other words it refuses to comply with the Regulations because it believes that it is not bound by them. The only appropriate relief for the applicants to seek is that of a declaration that the ICRC is, in the circumstances of this dispute, obliged to comply with the Regulations; that it is bound by the Regulations and must comply with them.

If the applicants had not, in their affidavits, stated that they

were in fact retrenched, I would have been quite prepared to issue the declaration sought in the draft order without addressing the last issue. The applicants made averments in support of their contention that they were retrenched without compliance with the Regulations. It therefore becomes necessary for me to consider whether in fact they were retrenched. If they were, then there would be reason to issue the declaration. But if they were not retrenched then, regardless of the merits of such declaration, no point would be served by its issuance.

The basic positions of the parties on the question of retrenchment is the following. The first applicant averred that she was employed by the ICRC from 1990 and her contract of employment was terminated on 28 February 1998. She was agreeable to the termination subject to the payment of a satisfactory retrenchment package. She says that no agreement was ever reached on the terms of her retrenchment and that matter remains outstanding between her and the ICRC. The ICRC position in respect of the first applicant is that the termination of her contract of employment on 28 February 1998 was mutual, and that she accepted in full and final settlement a termination package "which exceeded by far any obligations ICRC might have under Zimbabwe's labour laws were it bound by them". The ICRC relies on a letter dated 18 February 1998 (Annexure B3) as proof of the mutual termination of first applicant's contract. The first applicant signed the letter, but she now argues that Annexure B3 was concerned only with severance pay and other payments which were purely contractual, and not with any payments which the employer is required by Zimbabwean law to pay upon retrenchment of an employee. She also averred that a Mr Frank Schmidt of ICRC agreed that, whilst her employment was being terminated, he would liaise with the ICRC head office with regard to her entitlement to a retrenchment payment in terms of Zimbabwean law. Annexure B3 seems to me to accord with the averments of both parties: it is not inconsistent with them. As such, there seems to me to be a dispute of fact which cannot be resolved on the papers – the dispute being whether or not the ICRC, through Mr Schmidt, agreed to investigate the applicability of the Regulations or whether Annexure B3 was entered into in full and final settlement of any obligations which the ICRC may have had towards the first applicant at the termination of her

employment.
The second applicant's case is much clearer. He was advised by letter dated 1 December 1997 (Annexure C2) that as his post of Information Officer was "cancelled" as from 1st January 1998, because of the need to reduce local staff, his employment would be terminated on 31 December 1997. He objected to the termination of this contract of employment and protested that he was in fact being retrenched and that the Regulations should apply (see his letter dated 16 December 1997 being Annexure C3). The ICRC rejected that protestation, and paid him certain terminal benefits. He accepted, under protest, that payment which was described as severance payment. The ICRC's position is that the second applicant was in fact paid a retrenchment package, even though it was referred to as a severance payment, and that payment was in excess of six months which, by the standards in this country, was more than generous. The ICRC raises other issues concerned with the second applicant's failure to hold himself available to render his services but the second respondent adequately explains why he did not hold himself available to give service. He refers to the necessity of approaching the Ministry of Foreign Affairs to have the dispute amicably resolved and the need to minimise his claim for damages. That explanation is reasonable.
What is clear is that both applicants were prepared to have their employment with the ICRC terminated provided that they were retrenched according to law. It seems to me that, in respect of the first applicant, her success will depend on the resolution of the dispute of fact which I have outlined above. That dispute must be resolved at a trial where evidence can be led. It can, in my view, be resolved separately as a substantive matter on its own because the issue is whether she in fact accepted the termination package offered by the ICRC in full and final settlement of its obligations towards her. I would therefore refer that dispute of fact to trial on the papers as they stand. The parties need only make discovery and then ask for a trial date.
The second applicant's case calls for the issuance of the relief sought by the applicants. I will grant that relief. In the circumstances therefore the following order is made:

1. The relief sought by the applicants in terms of the draft

order is granted in respect of the second applicant.

2. In relation to the first applicant -

(a) the matter is referred to trial for the purpose only of determining whether or not she consented to the termination of the contract of employment with the respondent;

(b) in the event that it is determined that there was no mutual agreement as referred to in subparagraph (a) hereof, then the declaratory order issued in terms of paragraph 1 hereof will apply to her.

(c) the question of costs as between her and the respondent shall be determined at the trial.

Dube Manikai & Hwacha, applicants' legal practitioners
Kantor & Immerman, respondent's legal practitioners.