HC 24-03

ZIMBABWE POSTS (PRIVATE) LIMITED
versus
ZIMBABWE POSTS AND
TELECOMMUNICATIONS UNION

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 8 and 29 January 2003

Mr *C Kuhuni* for the applicant
Mr *T Biti* for the respondent.

MAKARAU J: This matter came before me as an urgent application for relief in terms of Order 49 Rule 449. I am satisfied as to the urgency of the matter.

The application required me to interpret an order granted by this court on 11 July 2001 and subsequently upheld by the Supreme Court on 26 November 2002. In making the application, the applicant contended that the order by Blackie J was ambiguous and needed to be interpreted. In particular, the applicant sought that I make the following order:

"1. The shortfalls payable by applicant in terms of clause b of the order under case no HC 10498/00 are the difference between each and every staff member's salary appearing on schedule A1 and any lesser amount they received from 1 July 2000 until the date the lesser amounts matched the figures appearing on Schedule A1.
2. The Applicant is not required to automatically apply to Schedule A1 the percentages agreed between the parties in 2001 and 2002 Collective Bargaining Agreements.
3. The parties cannot now renegotiate the 2001 and 2002 Collective Bargaining Agreements after their implementation."

The application was opposed.

The respondent raised three main grounds in opposing the application. It argued firstly that this court has no jurisdiction to interpret the order operative between the parties, which is the order of the Supreme Court. Secondly, the respondent argued that even if it were accepted that the order under scrutiny is the order of this court, this court is *functus officio* as the court has no capacity after delivering judgment, to amend or vary is own order. Finally, it was argued that the matter is *res judicata* between the parties as the order being sought by the applicant is not an interpretation of the order but an avoidance of the

consequences of that order.

It would appear to me that I could avoid the first two issues raised by the respondent relating to the question of jurisdiction. This is so because as argument advanced between the parties, it became apparent that there is no dispute between the parties regarding the literal meaning of the order granted by Blackie J and subsequently confirmed by the Supreme Court. Both parties understand the order, (whichever court the order belongs to), to mean that the applicant is bound to pay its employees the salaries specified in the Schedule A1, used during the negotiations of the salary increases in 2000 and subsequently forming part of SI 26/00. The judgements of both courts make it quite clear that the applicant could not resile from that agreement on the basis of an error it made as to its capacity to make the payments agreed upon in that agreement.

At this stage a brief historical narrative of the dispute between the parties becomes imperative.

Studies carried out in the telecommunications industry prior to 1999 revealed that the employees of the applicant were paid the lowest salaries in the industry. The study revealed that there were three bands of salaries, namely the upper quartile, the medium quartile and the lower quartile where the salaries of the applicant's employees were located. In March 1999, the Board of the Posts and Telecommunications Corporation resolved that its employees be paid salaries in the medium or middle quartile. Negotiations were then held between the management of the applicant and the representatives of the employees on the percentage increases to be awarded to each grade of employees. An agreement was reached and was subsequently embodied in SI 26/00 in accordance with the provisions of the Labour Act, [Chapter 28.01].

The applicant paid its employees the new salaries from October 1999 to March 2000 when it realised that the new wage bill had become unaffordable. The parastatal reduced the salaries. The respondent objected to the reduction and a dispute arose. The dispute ended up before Blackie J who ruled that the applicant was bound by the provisions of the schedule it had used during the negotiations leading to the collective bargaining agreement. An appeal to the Supreme Court against the decision was in vain, resulting in the applicant accepting that it has to make all the payments in terms of the schedule it used in negotiating the terms of S.I.26/00 and in paying its employees from October 1999 to March 2000.

The matter was heard in the High Court on 15 March 2000 and judgment was handed down on 11 July 2001. An appeal was noted to the Supreme Court thereafter and the Supreme Court judgment was handed down on 26 November 2002. In the interim, the applicant and its workers had entered into negotiations to increase the salaries of the

workers for the years 2001 and 2002 respectively.

The issue that is now arising between the parties is whether or not the increases agreed upon in 2001 and 2002 are affected by the salaries in the Schedule A1 that gave rise to the promulgation of S.I.26/00. In other words, the issue is whether or not the subsequent wage increases that occurred in 2001 and 2002 have to be automatically applied to the Schedule A1 figures. The issue can best be demonstrated by the use of an example. I shall use the example of an imaginary employee of the applicant in a certain grade who was earning $10 000-00 in 1999. If in terms of Schedule A1 his salary was fixed at $30 000-00 but was only receiving $15 000-00 in the year 2000, (due to the reduction effected by the applicant in March 2000), there is no dispute that he is entitled to the shortfall of $15 000-00 per month for the year. The issue is that if in the year 2001, before the judgment was out, the same employee was awarded a 30% increment, is that 30% to be calculated on $15 000-00 or on $30 000-00 or on some other figure. The same dispute arises albeit more complexly, for the year 2002.

While this application was purportedly brought before me in terms of Order 49 Rule 449 for the interpretation of an order of this court, it became common cause between the parties that the real issue for determination between the parties is not the literal meaning of the order. The real dispute between the parties is as I have tried to demonstrate above, the effect or import if any, the order has on the Collective Bargaining Agreements concluded between the parties in 2001 and 2002.

At this stage, I must point out that the above was not the issue that was presented before me when the matter was called up. It emerged from argument. It is however the real dispute between the parties. I now have to justify my dealing with the issue in the circumstances.

I am inclined to deal with the issue notwithstanding that it was not the issue before me when the application commenced. In my view, justice is practical and the court should not shy away from dealing with the real dispute between the parties where in doing so, the court is not occasioning any injustice to any of the parties. In adopting this approach, I am guided by the dictum in *Collen v Rietfontein Engineering Works*[1], where at page 433 CENTLIVRES JA, faced with a similar situation, observed as follows:

"This court, therefore, has before it all the materials on which it is able to form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial."

In adopting this approach, CENTLIVRES JA relied on certain dicta by DE VILLIERS JA in the case of *Shill v Milner*[2] at page 105, DE VILLIERS JA had this to say:

"The importance of pleadings should not be unduly magnified. 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or

[1] 1948 (1) SA 413 AD.

[2] 1937 AD 101.

would prevent full inquiry. Bu within those limits the court has wide discretion. For pleadings are made for the court, and not the court for pleadings. Where a party has had every facility to place all the facts before the trial court and the investigations into all the circumstances has been as thorough and as patient as in this instance, there is no justification for the interference by an appellate tribunal merely because the pleadings of the opponent has not been as explicit as it might have been.' Robinson v Randfontein Estates GMO Co Ltd. 1925 AD 198."

Although the above dicta related to issues arising during trials of actions, in my view, they are of equal application in applications. The major difference between an application and a trial is one of form rather than of purpose.

In the matter before me, no party will suffer any prejudice, as both parties have not only identified this as the real issue before them, but, have extensively addressed me on the issue verbatim and in writing. It will be idle of me not to deal with the real issue between the parties and to insist that the applicant prepare fresh papers to air the real dispute between the parties. I have further asked myself whose interests I will be serving by dismissing the application as not properly bringing the dispute before me. Clearly not of both parties who have since adopted the real dispute as the only dispute between them. While it is trite that the court cannot plead a case on behalf of the parties, and the applicant ought to have sought to amend its draft order and application, I am convinced that in the case before me, no party will suffer any injustice if I were to deal with the real issue between them. The parties have by consent sought to enlarge the issues between them and the court can hardly be seen seeking to confine what the parties have enlarged.

I now turn to consider the issue between the parties.

Did the order by BLACKIE J as confirmed by the Supreme Court have any express import on future collective bargaining agreements between the parties? I think not. The issue before the court in 2000 was whether or not the applicant could resile from the negotiated agreement. The court held that it could not. Thus, it ordered that the applicant make the necessary payments that would bring its employees' salaries for the year 2000 in line with the Schedule A1. I do not read the order to go any further than this.

Indeed, the order could not as the court was not asked to do so. The issue of the 2001 and 2002 collective bargaining agreements had not arisen when the matter came before the High Court in March 2000.

This finding, however, does not the end the matter. It is a fact that the order has the effect of setting the salaries of applicant's employees for the year 2000. Subsequent salary increases were agreed upon for the years 2001 and 2002. The issue then becomes one of fact. It is this: what did the parties agree upon in the years 2001 and 2002 respectively.

It is common sense that the parties must have had certain positions when they negotiated the 2001 and 2002 increments. In other words, the percentage increments granted respectively for each year must have been a percentage of certain specified salaries for each grade of employees. The parties must have used a certain base line. For there to be a valid and enforceable agreement, the parties must have been *ad idem*on this base line used in computing the increments for each year. The first inquiry would be aimed at establishing the base line used and the second at establishing whether there was a meeting of the minds on this base line.

For any court to arrive at a determination of what the parties agreed upon or whether there was any agreement in the first place for the years 2001 and 20022 respectively, evidence as to what the parties negotiating the agreements used as the base line and the minutes of their negotiations will be useful. This evidence is not before me due to the nature of the application that was put before me. I am therefore not in a position to make a finding on the real issue between the parties in the absence of such evidence. The matter must referred to trial for this evidence to be led.

In the result, I make the following order:

1. The case is referred to trial.
2. The application is to form the summons commencing action and the opposing papers are to stand as appearance to defend.

3. The applicant is to file a declaration within 10 days of this order.

4. Costs of this application are to be in the cause.

Coghlan Welsh & Guest, applicant's legal practitioners;
Honey & Blanckenberg, defendant's legal practitioners.