HH 100-2006
HC 5115/02

LYTON SHUMBA
versus
COMMERIAL BANK OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 3 February & 5 October 2006

Opposed Application

Mr. Biti, for the applicant
Adv. Machaya, for the respondent

PATEL J: The applicant in this matter seeks an order, *inter alia*, for the reinstatement of his contract of employment and the payment of arrear salaries and benefits from the 1st of January 2002.

The Facts

The applicant commenced his employment with the respondent (CBZ) on the 26th of April 1995. In August 1998, CBZ unilaterally transferred the applicant and other employees to work for an associate company, CBZ Nominees (Pvt) Ltd. In August 1999, this Court granted an order *per* HH 161-1999 declaring the applicant to be an employee of CBZ on secondment to CBZ Nominees. This decision was upheld and confirmed on appeal by the Supreme Court in SC 105/2001.

In August 2000, while the matter was still pending on appeal, the applicant was given a retrenchment package by CBZ Nominees. In their letter to the applicant, dated the 25th of August 2000, CBZ Nominees indicated that the agreed severance package would be submitted to the Ministry of Labour for its approval in terms of the Labour Relations (Retrenchment) Regulations, 1990. On the 30th of August 2000, the applicant appended his signature to this letter confirming that he had understood its contents and acknowledging that his retrenchment cheque would follow in due course.

The applicant received a total amount of $2,959,450.14 under the agreed retrenchment package. The total sum comprised notice pay and a retrenchment severance gratuity of $1,481,315.85, an additional 9 months

stabilisation allowance of $1,269,699.30 and a *pro rata* bonus of $67,357.29.

Subsequently, on the 17th of January 2002, CBZ Nominees wrote to CBZ confirming that the applicant had been retrenched at his own request and was given a retrenchment package applying the same formula as had been applied by CBZ in relation to other CBZ staff.

The applicant claims that his acceptance of the retrenchment package from CBZ Nominees did not amount to any abandonment or waiver of his rights as an employee of CBZ. As against this, the respondent avers that the applicant elected to be retrenched by CBZ Nominees and thereby effectively relinquished his position as an employee of CBZ on secondment to CBZ nominees.

Secondment and Retrenchment

The words "second", "retrench" and "severance pay" are terms that are in common usage and, as such, do not ordinarily attract any disputation as to their meaning. Nevertheless, for the sake of clarity, it seems pertinent to enlist their dictionary definitions for present purposes.

The words in question are defined in the New Collins Concise Dictionary (1982) as follows:

- "second" – to transfer an employee temporarily to another branch, etc.
- "retrench" – to reduce costs; economise. [See also *Continental Fashions (Pvt) Ltd v Mupfuriri & Others* 1997 (2) ZLR 405 (S), in the specific context of the Labour Relations (Retrenchment) Regulations 1990].
- "severance pay" – compensation paid by a firm to employees for loss of employment.

What emerges from these definitions is that an employee who is seconded to another branch or enterprise is transferred on a temporary basis and, therefore, remains employed by the seconding office or employer. Where it becomes necessary to retrench the employee for economic reasons, such retrenchment must ordinarily be effected by the principal employer. In any event, where retrenchment does take place, the

payment and receipt of a severance package invariably connotes the termination of employment.

The Present Case

What transpired *in casu* is that the applicant was seconded from CBZ to CBZ Nominees in August 1998. Whilst on secondment, as was confirmed by the two court decisions in his favour, the applicant remained an employee of CBZ. However, in August 2000, the applicant requested CBZ Nominees to retrench him. Thereafter, a severance package, on terms applicable to employees of CBZ, was negotiated and formally agreed between the applicant and CBZ Nominees. The applicant then accepted the retrenchment package and was duly paid the amounts due to him under that package.

In these peculiar circumstances, the crucial issue, as I see it, is the period of service encompassed by the retrenchment package received by the applicant. In terms of paragraph 2 of the letter from CBZ Nominees to the applicant, dated the 25th of August 2000, the applicant was paid a retrenchment severance gratuity of 2 months per year of service. Based on his current salary and allowances of $141,077.70 per month, this equated to the sum of $1,481,315.85. This total amount converts to 10.5 months pay which, at the rate of 2 months per year, equates to 5.25 years of service. The latter corresponds almost exactly with the period from April 1995 to August 2000, viz. from the commencement of the applicant's employment with CBZ to the date of his retrenchment by CBZ Nominees.

What all of this means is that the applicant has already received by way of his retrenchment package from CBZ Nominees what he would have received had he been uninterruptedly employed by CBZ from April 1995 to the date of his retrenchment in August 2000. Put differently, had he been retrenched in August 2000 by CBZ rather than by CBZ Nominees, he would have been paid the same amount that he actually received from CBZ Nominees. Despite this, he persists with his claim for reinstatement and arrear emoluments.

In our law, a waiver of rights is not to be lightly presumed. See *Chidziva & Others v ZISCO Ltd* 1997 (2) ZLR 368(S). Nevertheless, a waiver of contractual rights can be effected expressly or may be implied by conduct. As was held by KORSAH JA in *Chidziva's* case, at 383:

> "The conduct of the majority of the retrenched employees, by accepting the retrenchment package, was inconsistent with the enforcement of the right to have the matter referred, in terms of s 3(6) of the Regulations, to the retrenchment committee, and clearly evinced an intention to surrender that right. The respondent acted upon their intention to accept the retrenchment package and paid to them the benefits of the agreed package. With acceptance of such payments the rights of the appellants perished."

EBRAHIM JA, in the same case, concurred as follows, at 385:

> "In cases where the defendant relies on waiver as a defence, what is required of the defendant is that he must allege and prove a decision by the plaintiff to abandon the right which is being asserted against the defendant. The decision must have been conveyed to the defendant: *Traub v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634. It is trite law that the decision to abandon a legal right may be made in one of two ways:
> (a) an express abandonment of the right; or
> (b) an implied abandonment. See *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A); *Borstlap v Spangenberg & Anor* 1974 (3) SA 695 (A).
> ..... In the instant case, the conduct of the appellants can only lead to the conclusion that they waived their rights."

In casu, I am satisfied on the facts before me that the applicant himself initiated his own retrenchment and, having agreed to a severance payment corresponding to his combined period of service with CBZ and CBZ Nominees, proceeded to accept the agreed retrenchment package. To use a well-worn adage, the applicant cannot have his cake and eat it. He cannot take a severance package equating to the full notional period of his service with CBZ and at the same time deny that he has been duly retrenched and that his employment has been mutually terminated.

In my view, by accepting the agreed package, he evinced an intention to abandon his rights as against CBZ Nominees as well as CBZ itself. Having waived his rights, he cannot now claim to be reinstated with full entitlement to arrear emoluments. To grant him the relief that he

seeks would be tantamount to sanctioning his unjust enrichment at the obvious expense of the respondent.

In the result, the application *in casu* is dismissed with costs.

Honey & Blankenberg, applicant's legal practitioners
Gollop & Blank, respondent's legal practitioners