TAAZADZA NHEMACENA MUNHUMUTEMA
versus
JOSHUA TAPAMBWA
and
SYDNEY KAZHANJE
and
STANBIC BANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 17 September, 2010 & 17 November 2010

Opposed Application

D C Kufaruwenga, for the applicant
D Ochieng, for the respondents

MUTEMA J: The present feud has its genesis in matters of employment law. The first and second respondents are the third respondent's managing director and human resources manager respectively. The Applicant was employed by the third respondent as a manager. In 1995 he was dismissed from employment by the respondents. On 21 December, 1999, the Employment Council for the Banking Undertaking which heard the applicant's appeal, resolved that an incorrect Code of Conduct had been used and ordered that the applicant "should be reinstated with full pay and benefits from the date of his initial discharge, to the date that the hearing in terms of the NEC's Code of Conduct (S I 111 of 1994) takes place". Dissatisfied with this decision, the third respondent lodged an appeal to the then Labour Relations Tribunal. On 6 March, 2003 the Labour Relations Tribunal dismissed the appeal and upheld the Employment Council's decision of reinstatement. This is the judgment number LRT/H/19/2003. Thereafter, the third respondent approached the Labour court to quantify the amount payable to the applicant. This was after the parties had in vain attempted to settle out of court. The Labour court ruled that the third respondent was barred from approaching the court until after purging its contempt of not complying with its earlier judgment upholding the Employment Council's decision of reinstatement. This is the judgment number LC/H/156/2007.

Thereafter, on 7 July, 2008 the applicant lodged contempt of court proceedings against the third respondent in the Labour court. That application was dismissed on the basis that the Labour court had no jurisdiction to entertain it. On 22 September 2009 the applicant registered the two Labour court judgments cited above with this court for enforcement purposes.

The current application filed on 6 July, 2010 avers that the applicant has on countless occasions, tendered his services to the third respondent but the respondent via its agents the first and second respondents has scoffed at him and refused to reinstate him.

The order sought in terms of the draft reads:

"IT IS ORDERED THAT:

1. The first, second and third respondents are hereby declared in contempt of judgment number LRT/H/19/2003 of the Labour Relations Tribunal (delivered on 2 September 2002) and judgment number LC/H/156/2007 of the Labour court (delivered on 21 May 2007) which were registered with the court in terms of s 92 B of the Labour Act [*Cap 28*:*01*].

2. The first and second respondents shall be committed to prison for ninety (90) days until such time they comply with the aforesaid orders.

3. The third respondent is hereby ordered to pay a fine of US$500-00 per day from the date of the granting of this order up to the date upon which the third respondent complies with judgment number LRT/H/19/2003 of the Labour Relations Tribunal (delivered on 2 September, 2002) and judgment number LC/H/156/2007 of the Labour court (delivered on 21 May 2007) which were registered with this court in terms of s 92 B of the Labour Act [*Cap 28*:*01*].

4. The costs of this application shall be borne by the first, second and third respondents jointly and severally the one paying the other being absolved on a legal practitioner and client scale".

The respondents opposed the application on the main plank that the facts of the matter do not ventilate any semblance of contempt of court. Firstly, the judgment of the Labour court of 21 May, 2007 (LC/H/156/2997) is not an order *ad factum praestandum* that can be enforced by contempt of court proceedings. Secondly, the judgment (LRT/H/19/2003) dated 2 September, 2002 was complied with in that the applicant was reinstated and all that he was owed by the third respondent by way of back pay was calculated and tendered to him but the applicant rejected the tender. It so happened that due to effluxion of time, by the time the applicant was reinstated, he had already reached retirement age but he refused to retire.

Contempt of court was described by LORD DIPLOCK in *Attorney General* v *Times Newspapers Ltd* (1973) 3 ALL ER 54 HL at p 71 as follows:

> "Contempt of court is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. One may leave aside for the purposes of the present appeal the mere disobedience by a party to a civil action of a specific order of the court made on him in that action. This is classified as a 'civil contempt'. The order is made at the request and for the sole benefit of the other party to the civil action. There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impugnity …".

Now, on the facts of the present case, does the respondents' conduct amount to disobedience of a court order? Regarding judgment LC/H/156/2007, the import of the order was that the employer ("the third respondent") was barred from approaching the court until after purging its contempt of failing to reinstate the applicant to employment. It therefore imposed no enforceable obligation and in the event, the order should not have been registered in terms of s 92 B of the Labour Act. Its registration created no order *ad factum praestandum* that can be enforced. Perhaps had the respondents approached the court in pursuit of the same subject matter one could argue that they would have disobeyed that court order but that is not the case. Since none of the respondents breached or disobeyed that order which in any event created no enforceable obligation, I find no ground upon which it can be said that the respondents are in contempt of court, regarding this particular order.

As regards the other judgment – LRT/H/19/2003 – the operative part of that judgment reads: "The appeal is accordingly dismissed and the decision appealed against is upheld with costs". The decision that had been appealed against was that of the Employment Council for the Banking Undertaking sitting as an Appeals Board. That Board had ruled that "Stanbic should effectively reinstate Mr Munhumutema up to the day that they hold the new initial hearing. His reinstatement should be with full back pay of all monies owed to him".

That ruling was given, as already stated above, on 21 December, 1999. After the third respondent had appealed against that ruling to the Labour Relations Tribunal, that appeal was dismissed on 6 March, 2003.

The question which begs the answer is whether the respondents, particularly the third respondent, did comply with the Board's order for reinstatement with full back pay of all monies owed to him as upheld by the Labour Relations Tribunal on 6 March, 2003, when the

Tribunal confirmed the Appeals Board ruling of 21 December, 1999. Of note is the fact that the applicant had been dismissed as far back as 1995. In 1995 the applicant was not yet due for retirement but by 21 December, 1999 he had passed his retirement age of 60 years which was due in June, 1999.

The third respondent contends that it did comply with the order of reinstatement with full pay and benefits. The applicant contends to the contrary.

On the facts of this case was the applicant reinstated? In *Commercial Careers College* (*1980*) (*Pvt*) *Ltd* v *Jarvis* 1989 (1) ZLR 344, it was held that:

> "Reinstatement meant no more than a directive that the employee be replaced in her post and remunerated. It did not entail the further obligations on the part of the employer to provide work".

And in *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* 1997 (2) ZLR 389 it was held that from an order of reinstatement, the following consequences are said to flow:

(a) the employee is entitled to be replaced in his post;

(b) there is no obligation on the employer to provide him with work;

(c) the employer must continue to remunerate him upon the tender of his services;

(d) the employer is to restore him to the pay roll with effect from the stipulated date.

Upon reinstatement the ordinary contractual relationship between employer and employee resumes i.e. the status *quo ante* dismissal is restored and the relationship should continue with all the rights and obligations under the contract of employment until such time as the contract was terminated on lawful grounds. What the third respondent did in *casu* by calculating all salaries with corresponding increments together with interest that were owed to the applicant and tendering the same to him effectively amounted to reinstatement.

The order of the Appeals Board and indeed that of the Labour Relations Tribunal created no rights for the applicant outside the normal contract of employment between the parties for to do otherwise would entail the Tribunal creating a new agreement for the parties which no court is legally competent to do. The contract of employment between the parties was to run until the applicant attained the age of 60 years (his retirement age) which was due in June, 1999. Despite having been dismissed in 1995, the applicant, on being reinstated pursuant to the Tribunal's order, had what he was owed until his retirement age calculated and tendered to him on 10 June 2006 including an *ex gratia* payment of $15 million by way of

cheque. However, for reasons best known to himself, the applicant refused to accept the payment.

Paragraph 1.20 of the third respondent's Pension Fund Rules clearly stipulates that the normal retirement age is 60 years. Paragraph 5.1.1 (iii) allows retirement past the normal retirement date if the member so wishes and the employer is agreeable but not later than the attainment of age 70 years . (my emphasis). In the instant case, no such agreement to extend the applicant's retirement age up to 70 years was ever reached by the parties. The contention by the applicant that "in terms of the proviso to r 5.1.1. (ii) of the Pension Rules, the retirement age provided for in the Pension Rules does not apply to an employee who has been made redundant" is a misinterpretation of the relevant paragraph. The proviso sought to be relied upon reads:

> "It is specifically provided that the age requirements shall not apply in respect of a member whose retirement is due to retrenchment or redundancy".

This proviso is only relevant to and limited to subpara (ii) which governs early retirement stipulating age 55 years (or 50 years in respect of a female member). These are the age requirements which "shall not apply in respect of a member whose retirement is due to retrenchment or redundancy". The proviso does not at all apply to the normal retirement age in subpara (i).

Although the Appeals Board, and *a fortiori* the Labour Relations Tribunal ordered applicant's reinstatement by the third respondent "up to the day that they hold the new initial hearing … with full back pay of all monies owed to him" both orders were made well after the applicant's retirement date of age 60 years as contemplated by the contractual relationship between the two parties. It cannot, by any stretch of the imagination, be construed to mean that the employment contract was meant to endure after the cut off date of retirement. As it is the applicant is now well over 73 years and no initial hearing has been held. Can it then be argued that the applicant has rights emanating from the contractual relationship? To hold so would not only be absurd, but would be tantamount to the court either making or extending a contract for the parties which is legally incompetent for any court to do. I am sure the order of reinstatement did not contemplate such an eventuality. The reinstatement was confined by implication to the date of the applicant's retirement as per the original contract of employment. Had the anomally *prima facie exitant* in the order been laid bare to both tribunals, the wording of the reinstatement order would certainly have taken it into account.

In the event, the third respondent did comply with the order of reinstatement and there is nothing on the papers to sustain that the respondents committed a civil contempt of court. Consequently, the application be and is hereby dismissed with costs.

Dzimba, Jaravaza & Associates, applicant's legal practitioners
Atherstone & Cook, respondents' legal practitioners