CHRISTMAS MAZARIRE
versus
OLD MUTUAL SHARED SERVICES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 14 April and 16 April and 24 April 2014

Urgent chamber application

A. Moyo, for the applicant
N. Madya, for the respondent

MTSHIYA J: This is an urgent application wherein the applicant seeks the following relief:-

"**PROVISIONAL ORDER**

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

23. The purported termination of the applicant's contract of employment by the respondent by letter dated 31st March 2014 is declared unlawful and is hereby set aside.
24. The respondent be and is hereby ordered to pay all salaries and benefits due to the applicant in terms of the contract of employment pending the lawful termination of the contract of employment.

2.5 That the respondent shall pay costs of suit on the Law Society scale of Attorney and Client.

INTERIM RELIEF GRANTED

That pending the confirmation or discharge of this provisional Order applicant is granted the following relief:

1. That respondent shall forthwith restore and reinstate applicant to its payroll and to this end pay all salaries due and grant all benefits due to the applicant in terms of the contract of employment extant between the parties.

2. That respondent shall pay costs of suit in respect of this Urgent Chamber Application on the Law Society Zimbabwe's scale of Attorney and Client."

It is common cause that the applicant, with effect from 4 January 2010, was employed by the respondent as General manager (Risk). Following a restructuring process the name of the post was changed to Risk/Governance Executive. On 6 March 2014, as a result of the restructuring exercise, the Managing Director of the respondent, Mr Simon J. Hammond, invited the applicant to a meeting where he informed the applicant that his job had become redundant and that he would therefore be retrenched. The applicant was told that the retrenchment would be with immediate effect. The applicant then requested the respondent to officially inform him of its position in writing. Indeed, on the same date (i.e 6 March 2014) a letter in the following terms was handed to the applicant:-

"Dear Christmas

RE: RETRENCHMENT

I refer to the discussion held this morning, the 6th of March 2014, in which you were informed of your retrenchment.

It was explained to you that in October 2013, Old Mutual Shared Services embarked on a restructuring exercise of the Risk and Governance function. This exercise resulted in your current role being deemed redundant hence the need for the retrenchment.

It was explained to you that the employer offers the retrenchment based on the formula stated below:

1. Equivalent of 13.5 month's pensionable salary lump sum payment as severance pay at the date of retrenchment.
2. 3 months pensionable salary as notice pay.
3. A gratuity of 75% (seventy five percent) of pensionable monthly salary for each year of service.
4. Six (6) months Employer Medical Aid contributions.
5. Cash in lieu of leave based on pensionable salary at the date of retrenchment.
6. One month pensionable salary as stabilisation allowance.
7. A pro-rated bonus.
8. To purchase the company allocated vehicles at 20% of the cost price.
9. All indigenous Plan and Management Incentive Plan shares vest immediately.

It was explained to you that the retrenchment is with immediate effect, and also that you will need to do a proper handover of the Risk portfolio to the Managing Director OMSS.

Yours sincerely,

S J Hammond (Mr.)

Managing Director"

The retrenchment formula was rejected by the applicant.

It is clear from the above letter that the retrenchment package on offer by the respondent was indeed discussed at the meeting of 6 March 2014. However, on 14 March 2014, through a twelve page letter, the applicant responded to the respondent's letter of 6 March 2014. His response, in part, read as follows:-

"**Response to the Meeting of 6 March 2014 and Letters of 6 March 2014**

2. I hold, and currently hold, a valid contract of employment with Old Mutual Services (Private Limited. This contract of employment was executed on 23 `November 2009 and formally accepted in terms of the provisions of my letter of 23 November 2009.

3. As at 06 March 2014, I submit that I have considered, and continue considering, the meeting and letter of Thursday, 06 March 2014 **to be an act of the employer[i.e. Old Mutual Shared Services (Private) Limited] forcing me to immediately, and without notice, proceed, to go, on leave, with full benefits, pending lawful termination of my subsisting contract of employment, as stated under clause 2 above.**

4. With regard to the document that was handed to me during the meeting on Thursday, 06 March 2014, by Laurence T Gonye, the Human Resources Executive of Old Mutual Shared Services (Private) Limited, and titled: 'OLD MUTUAL RETRENCHMENT FORMULA', I am not aware that, up to, and until and including at, 11h00 on Thursday, 6 March 2014, Old Mutual Shared Services (Private) Limited, as my employer, has ever negotiated and agreed such an arrangement with me, as employee. This understanding also applies in the case of Old Mutual Zimbabwe Limited, the sole beneficial owner of the entire issued shares in the capital of Old Mutual Share Services (Private) Limited.

5. Given the extra ordinary circumstances as set out/ outlined in clause 1 above; and clauses 8-35 below, I am submitting that Old Mutual Shared Services (Private) Limited, as employer, immediately pays, to me with good value to the credit of my nominated bank account in Zimbabwe, in full and final settlement (net of any applicable statutory taxes) compensation in the sum of USD850 000-00 (Eight hundred and fifty thousand United States Dollars). This amount or value is exclusive of any sums of money and/or benefits that are contractually due to me (as employee) as at the date that is determined as the effective date on which lawful termination of my contract of employment with Old Mutual Shared Services (Private) Limited is agreed upon.

6. Contractual compensation and/or remuneration, and/or emoluments, including statutory leave entitlements, that is/are due to me, as at Thursday. 06 March 2014, remain/s due and payable or 'en-cashable' and is/are not subject for negotiation, save for the deferred share elements for full paid and issued B Class in the capital of Old Mutual Zimbabwe Limited. The table under clause 37 details such entitlements, as at 06 March 2014.

7. The stated value of USD850-000-00 (Eight hundred and fifty thousand United States Dollars), under clause 5 above, is based on, or derived from, expected and contractual compensation, and/or remuneration, and/or emoluments due to me, assuming an on-going conducive tenure (and term) of my contract of employment, including a congenial working environment and cordial interpersonal relationships with other members of the executive management of Old Mutual Zimbabwe Limited and all its subsidiary entities, including Old Mutual Shared Services (Private) Limited."

On 24 March 2014, the respondent again wrote to the applicant in the following terms:-

"**RE: TERMINATION OF CONTRACT OF EMPLOYMENT**

I acknowledge receipt of your letter dated the 14th of March 2014 and below is the employer's response to the issues you raised. Please note that the response is summarized and does not necessarily follow your paragraph numbering.

Be advised that your contract of employment was terminated as a result of a restructuring exercise and not as a result of an act of misconduct. The termination was with effect from the 6th of March 2014. On the basis of goodwill the employer paid you a full salary and benefits for the month of March 2014. However, your salary and benefits will cease effective 31 March 2014. Please not that the only issue left for the parties to agree on is that of the retrenchment package due to you.

The fact that there was a restructuring exercise of the Risk and Governance function was known to you as far back as October 2013, as stated in your letter. At the completion of the restructuring exercise, what would have been your role was upgraded from a major job area Role size "P" to a function size "Q". The focus of the new role is of a strategic nature and is responsible for determining overall business risk directions, and devising and implementing strategic initiatives. As stated in the new job descriptor, the role now requires the incumbent to have full actural and financial modelling competencies.

This restructuring process resulted in your role being deemed redundant. You were however, given the opportunity to apply for the new position as stated in your letter but you chose not to apply.

Your performance record in the old role for the years served is noted and there is no dispute on how well you performed. The restructuring exercise was necessitated by the ever changing needs of the business and not because of your performance or competency in the previous role. As you are also aware the restructuring exercise has not only taken place in Zimbabwe but the rest of Old Mutual Africa.

In the meeting of the 6th of March 2014, the company offered you a severance package based on the established Old Mutual retrenchment formula. The formula has been restated below for your ease of reference as follows:

1. Equivalent of 13.5 months' pensionable lump sum payment as severance pay as at the date of retrenchment, which amounts to -$80, 437-46.

2. 3 months' pensionable salary as notice pay, which amounts to - $17 874-99

3. A gratuity package of 75% (seventy five percent) pensionable monthly salary for each year of service, which amounts to - $18 976-87.

4. Six (6) months Employer Medical Aid contributions, which amounts to - $1 884-00.

5. Cash in lieu of leave based on pensionable salary as at the date of retrenchment, which amounts to - $12 019-58.

6. One month pensionable salary as stabilisation allowance, which amounts to - $5 958-33

7. A pro-rated bonus.

8. To purchase the company allocated vehicle at 20% of the original cost price.

9. All Indigenous Plan and Management Incentive Plan shares vest immediately.

I wish to advise you that the employer's offer remains stated above and you settlement request of $850 000-00 was rejected by the company. The amount you seek is not only unreasonable and unaffordable but also overlooks the fact that we are custodians of shareholders' and policyholders' funds and cannot be seen to utilize their funds in such a manner every time an employee's contract is terminated.

The employer is prepared to explain the offer in greater detail and should you need further clarification of the offer feel free to contact myself or Laurence Gonye, the HR Executive.

Be advised that for purposes of concluding this matter I will be expecting your response not later that seven (7) days from date of receipt of this letter.

Yours sincerely

S J Hammond

Managing Director"

Clearly as at 24 March 2014, the respondent was aware that the matter had not yet been concluded but for some strange reason, notwithstanding failure to agree on the retrenchment package, the employer took the view that the applicant's employment terminated on 6 March 2014.

On 27 March 2014 the applicant wrote back to the respondent reiterating his position contained in his letter of 14 March 2014. He wrote, in part;

> "5. Please not that I have not, and do not, agree that Old Mutual Shared Services (Private) Limited, as employer, ceases payment of my full salary and benefits effective 31 March 2014. My position in this matter is well set out in terms of clauses 2 and 3 of my letter of Friday, 14 March 2014 and, as detailed under clause 37 of the same letter and clause 17 here below.
> 6. you as the Employer representative and Laurence Gonye, as the Human Resources Executive at Old Mutual Shared Services (Private) Limited are exhorted to ensure continual monthly payment of my full salary and benefits (on the same date as is ordinarily that date on which all employees of Old Mutual Shared Services (Private) Limited are paid) until such time that agreement on the lawful termination of my contract of employment is made. Until lawful termination of my contract of my employment, the payment of my full salary and benefits must continue to the credit of my bank account, as already on record with the Human Resources Division of Old Mutual Shared Services (Private) Limited. I look forward to your confirmation to that effect, no later than Friday. 04 April 2014."

The above letter indicated a deadlock in the retrenchment negotiations, resulting in the respondent writing to the applicant on 2 April 2014 in the following terms;

> "**RE: TERMINATION OF CONTRACT OF EMPLOYMENT**
>
> I acknowledge of your letter dated the 27th of March 2014 whose contents have been noted.
>
> It is the company's view that the parties have failed to reach an agreement. We have therefore referred the matter to the Retrenchment Board. You shall hear from the said Board in due course."

Indeed as of now the matter is still before the Retrenchment Board.

In his founding affidavit the applicant states in para(s) 5 and 6 as follows:

> "5. In the main, this is an application for:
>
> 5.1 An order declaring that the purported termination of the applicant's contract of employment by the respondent by letter dated 31st March 2014 is unlawful and is hereby set aside; and
> 5.2 an order that the respondent is to pay all salaries and benefits due to the applicant in terms of the contract of employment pending the lawful termination of the contract of employment. Effectively, seek an

> interdict against the respondent stopping it from ceasing the payment of my salary and benefits pending the determination of an alleged application for retrenchment made by the respondent to the Retrenchment Board or the lawful termination of the contract of employment. Put more positively, it is an application to compel respondent to pay my full salary and benefits pending the finalisation of the Retrenchment proceedings allegedly instituted by the respondent and pending before the Retrenchment Board or the lawful termination of my contract of employment." (my own underlining)

I want to believe the letter referred to in 5.1 above is the one dated 24 March 2014.

In its opposing appears the respondent argued that:-

a) This court has no jurisdiction because this is a labour matter
b) The applicant has not yet exhausted available domestic remedies i.e. approaching the Labour Court
c) This court cannot reinstate the applicant before a determination on whether or not his employment was lawfully terminated on 6 March 2014.
d) The applicant has not made an application for any substantive relief
e) The matter is pending before another forum i.e. the Retrenchment Board; and;
f) The matter is not urgent because termination of employment took place on 6 March 2014 and yet this application was only filed on 11 April 2014.

In response to the respondents' opposition, the applicant submitted that the Labour Court has no jurisdiction to issue a declaratur and as such the applicant cannot obtain the remedy through the provisions of the Labour Act [*Cap* 28:01] (the Act). That Act, it was submitted, spells out what the Labour Court can do.

The applicant said the High Court, through its inherent jurisdiction, was the correct forum to be approached by the applicant for the relief sought. Furthermore, it was observed that s 13 of the High Court Act [*Cap* 7:06] provides that:-

> "Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all matters within Zimbabwe."

It is indeed also important to note that in addition to the above provision in the High Court Act, s(s) 171 (1) (a) and 172 (a) of the Constitution of Zimbabwe Amendment (No 20) Act 2013, provide as follows:-

> "171 (1). The High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe.

172(2). The Labour Court has jurisdiction over matters of Labour and employment as may be conferred upon it by an Act of Parliament."

Unless legislatively ousted, the jurisdiction of the High Court extends to all civil matters in Zimbabwe. This is the position as of now, notwithstanding the existence of the Labour Court whose jurisdiction is dependent on what an Act of Parliament says. I therefore believe it would be unconstitutional for the High Court to deny a litigant a hearing in any civil matter if its jurisdiction in that matter is not specifically excluded through legislation. The Zimbabwean High Court can hear <u>any civil</u> matter including labour related matters such as this one.

A number of authorities were correctly cited to prove that the Labour Court has no jurisdiction to deal with interdicts. In the main reference was made to the following cases :-

"**NATIONAL RAILWAYS ODF ZIMBABWE v ZIMBABWE RAILWAY ARTISANS UNION & ORS: CS 8/05 where ZIYAMBI J.A** stated:

<u>The Application for an Interdict</u>

It was contended by the appellant that the Labour Court erred in dismissing the point in limine raised by the appellant, namely, that the Labour Court had no jurisdiction to entertain an application of this nature, which was for an interdict.....

Thus, before an application can be entertained by the Labour Court; it must be satisfied that such an application is an application 'in terms of this Act or any other enactment.' This necessarily means that the act or other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring" (pages of the Cyclo-styled judgement).

See Also BARCLAYS BANK OF ZIMBABWE LIMITED V SHEPHERED NDIRAYA SC 72/05 where **MALABA J.A.** stated:

"As the Labour court can only hear and determine applications for relief specified under the appropriate provisions of the act and there was no power to grant the relief sought by the respondent, the le3arned senior president could not interdict the appellant from conducting disciplinary hearing proceedings under its employment Code of Conduct." (page 4 of the cyclo-styled judgement)

See Also: HAMILTON FORTUNATE GOMBA v ASSOCIATED MINE WORKERS UNION HH 118/05"

The above reflects what the Labour Court, as a creature of statute, can do.

On urgency the applicant submitted that in refusing to continue paying him his salary pending the finalisation of the retrenchment package, the respondent was breaching the

labour law of the country. That breach, it was argued, became clear on 2 April 2014 when the respondent declared a deadlock without pronouncing on the applicant's salary, pending the decision of the Retrenchment Board.nad furthermore, on 27 March 2014 the respondent had stated that the applicant's salary and benefits would cease on 31 March 2014.

In support of his argument the applicant cited *Kadir and Sons (Pvt) Ltd* v *Panganai and Anor* 1996 (1) ZLR 598 (S) where it was said:-

> "It is clear to me that until the critical stage of the Minister's decision has been reached, the employees whom the employer proposes to retrench remain on the payroll. They have not been retrenched. The fact that in the interim period the employer may have ceased to operate the business does not rid him of the legal obligation to pay employees their wages."

The applicant therefore argued that it was illegal for the respondent to deprive him of his salary before the retrenchment exercise was finalised/ concluded. He denied that his employment had been terminated on 6 March 2014. True, at that point he had not yet been retrenched.

In considering submissions made by both sides I am satisfied that this court has jurisdiction to deal with the matter before it. Admittedly the Labour Court has jurisdiction on all those matters specified in the Act that created it. It, however, has not been empowered to issue/grant interdicts, defined in Herbstein and Van Winsen – *The Civil Practice of the Supreme Court of South Africa* 4th ed as follows:-

> "An interdict is an order made by a court prohibiting or compelling the doing of a particular act of protecting a legally enforceable right which is threatened by continuing or anticipated harm. Most interdicts are prohibitory in nature, ordering the respondent to desist or refrain from doing a particular act. A mandatory interdict on the other hand, orders the respondent to perform an act." (my own underlining)

In casu, the court is being asked to compel continued payment of the applicant's salary and benefits.

Notwithstanding the wording of the draft order, I do strongly believe that the exact relief the applicant is seeking is to be found in his founding affidavit. In para 5.2 of his founding affidavit the applicant clearly states that his "is an application to compel respondent to pay him full salary and benefits pending the finalisation of the Retrenchment proceedings allegedly instituted by the respondent and pending before the Retrenchment Board or the lawful termination on my contract of employment." That is the relief this court is being asked to grant.

The applicant is simply asking this court to compel the respondent to continue paying him his salary until he is retrenched in terms of law and I believe this court has jurisdiction to entertain the applicant's application for the relief he seeks.

Although largely based on labour law, what is before the court, as we have seen, is a civil matter which this court can deal with as provided for in the High Court Act and in the Constitution. Apart from the fact that the Labour Court is not capacitated to grant the relief, there is no legislation that ousts the jurisdiction of this court in a civil matter of this nature.

It cannot be doubted that in refusing to continue paying him his salary pending finalisation of retrenchment proceedings, the respondent is illegally depriving the applicant of his salary and benefits to which he has a clear right. The illegal act of the respondent, in my view, clearly dictates that the matter should be heard urgently. I believe that this court has a duty to act swiftly where there is a breach of the law. Failure to do so would perpetuate an illegality. The authorities cited by the applicant clearly demonstrate that pending the finalisation of the retrenchment process an employee remains entitled to his/her salary and benefits.

I have already agreed that there was no retrenchment on 6 March 2014. A wish existed, but the parties did not agree.

I am unable to distinguish this case from *Hamilton Fortunate Gomba* v *Associated Mine Workers Union* HH 118/05 where PATEL J, (as he then was) said:-

> "At common law, either party to an indefinite contract of employment is entitled to terminate it by giving the requisite period of notice to the other party. Under our law, however, the employer's right to terminate upon notice is effectively hamstrung by section 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 2003. In the absence of the employee's agreement or consent, the employer is confined to two possible avenues for terminating the employment contract. The first is to suspend then the employee on the grounds of misconduct in terms of section 3 of the above-cited Regulations, as read with section 12B of the Labour Act. The second is to follow the route of retrenchment as prescribed by section 12C of the labour Act, as read with the Labour Relations (Retrenchment) Regulations, 2003 (S.I 186/2003).
>
> In the instant case, the respondent has followed neither of the above avenues in purporting to terminate the applicant's contract of employment. Accordingly, it must be found that the applicant's employment with the respondent has not yet been lawfully terminated in accordance with the Labour Act and its Subordinates regulations."

In casu the respondent chose the retrenchment route as provided for under s 12 C of the Act as read together with S.I 186/2003. The applicant was advised of that route on 6

March 2014, where upon he requested that details of the proposed retrenchment be reduced to writing.

Despite the stance taken by the respondent that the effective date of his termination was 6 March 2014, subsequent correspondence between the parties, after the applicant had exercised his mind on the respondent's letter of 6 March 2014, confirms that the thrust was on agreeing on the retrenchment package. I take the view that, if say the parties had reached agreement on the retrenchment package on 6 March 2014 all what would have remained was to register the package in terms of the law. *In casu* that was never the position and to date the respondent has not abandoned the retrenchment route. Until that journey is completed through the finalisation of a retrenchment package, the applicant remains on the respondent's pay roll and hence the need to compel the respondent to continue paying him. Pending the finalisation of the retrenchment package, I equate the applicant's position to an employee who is on forced leave on full salary and benefits. (See para 3 of his letter at p 3 of this judgement).

To the extent that the applicant has established an illegality on the part of the respondent, I find it not necessary to delve into the other numerous matters raised herein. The legal position is that the applicant has not yet been retrenched and is therefore entitled to his salary and benefits. The effective date of termination of employment is the date the parties, either on their own or through the Retrenchment Board or Minister, will reach agreement on the retrenchment package. That date cannot be 6 March 2014. All the applicant agreed to was that his employment was being terminated through a process called retrenchment. That process has not been concluded.

The relevant paragraphs of the minutes of the meeting of 6 March 2014 state that:-

"Purpose of the Meeting

- SJ then further informed CM that the company was now placing him on retrenchment after failing to secure as suitable placement elsewhere in the Old Mutual world-wide group and was offering him the standard Old Mutual retrenchment package. SJ requested CM to ask any questions and seek clarification on anything that had been said.

- CM said that the Acting GCEO had given him a brief outline of the Risk Role restructure but had not gone into detail on the new structure of the Risk department.

- CM responded on a "without prejudice basis" and stated that, in view of the fact that he holds an employment contract, a point not disputed by anyone, the employer should write formally to notify him of the matters discussed in the meeting.

- LG agreed to provide CM with this letter on the same day. He explained that the retrenchment regulations require a discussion to be conducted and the reasons for retrenchment explained, which is what had been done.

- CM was also advised that the retrenchment would be with immediate effect and as a result he was required to hand over to the Managing Director, items listed on the attached copy of a letter handed to him during the meeting."

(SJ above stands for S.J Hammond representing the respondent and CM stands for the applicant).

It is important to note from the above minutes that the respondent was alive to the fact that "retrenchment regulations require a discussion." The position is that the discussion was never concluded as the respondent had wished and hence referral to the Retrenchment Board. Accordingly any conclusion to the effect that the retrenchment was with immediate effect on 6 March 2014 is totally misleading and incorrect, as borne out by the facts of this matter.

It is, in my view, untenable that the court can allow the applicant to suffer in the face of an illegality, and more so when the balance of convenience is squarely in his favour. One wonders what prejudice the respondent is being exposed to when there is still a retrenchment package to be concluded. If continued payment of salary and benefits is proved, to have not been merited, something extremely remote, then recovery can be made from the retrenchment package.

I have no doubt that the respondent is fully aware of the provisions of the law regarding retrenchment. I therefore do not understand its argument about terminating employment and then discussing a retrenchment package. In our law, as already indicated, retrenchment is one of the ways of terminating a contract of employment. The respondent, in my view, deliberately sticks to termination on 6 March 2014, yet it accepts that discussions on retrenchment were never concluded. To that end I see no reason why costs should not be awarded on a higher scale.

As *in Hamilton Fortunate Gomba*, supra, the circumstances of this case demand that I give a final order.

I accordingly order as follows:-

1. The refusal by the respondent to continue paying the applicant his full salary and benefits pending finalisation of the retrenchment package by the Retrenchment Board be and is hereby declared illegal.
2. Pending the finalisation of the Retrenchment package by the Retrenchment Board the respondent be and is hereby ordered to continue paying the applicant his full monthly salary and benefits; and
3. The respondent be and is hereby ordered to pay costs on the Law Society scale of attorney and client.

Messrs Kantor and Immerman, applicant's legal practitioners
Messrs Winterton, respondent's legal practitioners