

INNOCENT CHITIKI
versus
PAN AFRICAN MINING PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 1 & 16 June 2015, 29 July 2015

Civil Trial

Ms *L. Rufu* for plaintiff
T. Nleya, for defendant

CHIGUMBA J: The new Constitution of Zimbabwe has restored the jurisdiction of the High Court over purely labour matters at first instance. The Labour Court's exclusive jurisdiction over all purely labour matters at first instance has been overridden by the Constitution. Plaintiff issued summons on 25 March 2011 for the payment of a sum of USD\$8 936-56, being the balance due to him from the defendant in terms of an agreed early retirement package. The defendant adopted the stance that it had paid all the amounts due to the plaintiff in terms of the parties' agreement. The issue that the court must determine is whether the amounts paid to the plaintiff by the defendant for October, November and December 2010 constituted notice pay in terms of the early retirement package, and whether the additional payment of cash in lieu of leave and other benefits paid during October-December 2010 also formed part of the early retirement package. If they did not, then the plaintiff's claim must succeed. The court directed the parties to address it on whether this was a purely labour matter, and if it was, whether this court's jurisdiction was ousted by the terms of the *Labour Act [Chapter 28:01]*.

I am grateful for the submissions made by both counsel for the defendant and counsel for the plaintiff, which provided great assistance to the court in resolving this issue. Section 171(1) (a) of the Constitution of Zimbabwe¹ provides that;

“The High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe”.

¹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

Section 89(6) of the Labour Act provides that:

“89 Functions, powers and jurisdiction of Labour Court

(1) The Labour Court shall exercise the following functions—...

(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).”

The import of the provisions of s 171(1) (a) of the current Constitution is to reinstate the jurisdiction of this court over labour matters at first instance, which jurisdiction had previously been ousted by s 89(6) of the Labour Act. See *Confederation of Zimbabwe Industries v Rita Marke Mbatha², and Capri (Pvt) Ltd v Maponga³*. It is an inescapable conclusion that the Labour Court no longer enjoys exclusive jurisdiction over labour matters at first instance. That exclusivity, which was based on an act of Parliament, was overridden by the Constitution. It is therefore no longer necessary to consider whether a matter is purely labour at first instance before assuming jurisdiction to determine it.

Counsel for the plaintiff submitted that, in any event, the facts do not support the supposition that this is a ‘purely’ labour matter, a fact which would have allowed this court to ‘assume jurisdiction’ over it before the provisions of s 171(1)(a) of the current Constitution came into force. I found this submission persuasive, taking into consideration previous findings of this court that agreements which emanate from contracts of labour (where the cause of action and the remedy for that cause of action are at common law) are enforceable on the basis that they are not ‘purely labour’ matters which this court was previously precluded from hearing at first instance. See *Arnold Sikhumbuzo Mahlangu v CZL Incorporated (Pvt) Ltd⁴, Madinda Ndlovu v Highlanders Football Club⁵, Medical Investments Limited v Pedzisayi⁶*. Having concluded that the court was cloaked with the requisite jurisdiction to determine the matter, trial commenced.

From the evidence adduced during the trial, the pleadings and the documentary evidence submitted to the court the following facts are common cause; Plaintiff is a former employee of the defendant who requested that he be given an early retirement package, three months before

² HH125-15

³ HH 92-15

⁴ HH27-13

⁵ HB 95-11

⁶ 2012 (1) ZLR 111 @ 114D-F to 115 A-B

the date on which he was due to reach retirement age. In October 2010, in response to plaintiff's request, a retirement package was negotiated between the parties. It was agreed that the plaintiff would be paid a sum of USD\$25 873-12 by 31 December 2010. On 5 October 2010, the parties signed an agreement which was titled Innocent Chitiki Early Retirement Package. Under 'statutory, benefits, the plaintiff was to be paid a total of USD\$11 148-00, which was made up of 3 units of notice pay, cash in lieu of leave, leave bonus, housing benefits during notice plus one month up to 31 October, full benefits except business allowances during notice period telephone allowances. 'Other' benefits totaling USD\$14 725-12, included a vehicle, annual bonus, fuel up to one month after notice, term 1 school fees, service pay and additional gratuities such as relocation to Gokwe rural home at defendant's expense.

It is common cause that it was part of the early retirement package that; all salaries and monthly benefits were to be paid as and when due up to 31 December 2010, all other benefits were to be paid in December 2010, the vehicle was to be released immediately. It is common cause that the defendant was told to stay at home during the notice period and that the fact that he was not required to report for duty was defendant's standard practice for retiring employees who worked in sensitive areas that were vulnerable to security breaches. It is common cause that the plaintiff wrote a letter to the defendant asking for payment of his package to be deferred until after 31 December 2010 the date when he officially reached retirement age, in order to avoid incurring punitive tax obligations. It is common cause that that the plaintiff initially wanted to be paid a package of USD\$50 000-00 and that he felt shortchanged by the final sum of the negotiated package.

The plaintiff's claim appears to be premised on the supposition that he ought to have been paid notice pay, as well as his monthly salary and benefits for the three month notice period during which he did not report for duty at defendant's specific instance and request. Plaintiff understood that he would be paid the 'full package' on 31 December 2010. The monthly salary that he received in September, October, and November 2010 was not part of his three month notice pay, in his view. Is this claim supported by the evidence, or by the agreement between the parties? If it is, plaintiff is entitled to be paid the sum of USD\$8 936-56 which he is claiming from the defendant. Plaintiff told the court that his contract of employment with the defendant terminated on 31 December 2010 and that the payments made to him prior to that were his

normal monthly salaries and benefits and did not form part of the retirement package. This evidence was directly controverted by the evidence of the two defence witnesses, Cindirella Masimbe and Effort Lungu.

The defendant's witnesses told the court that it was defendant's policy to pay cash in lieu of service of the notice period especially for senior executives such as the plaintiff who worked in sensitive positions. They explained the payments made to the plaintiff in terms of exhibit 7, the gross amounts, and the net amounts paid. Their evidence was that plaintiff was paid a slight excess of the agreed sum in the early retirement package. Mr. Lungu was emphatic that the entire retirement package was reduced to writing and signed on the 5th of October 2010, and pointed to the notes on exhibit 7 which clearly stated that; "...all elements that were outstanding from previous meetings have been resolved and agreed ...", and "...all salaries and monthly benefits to be paid as and when due up to 31 December 2010". (my emphasis). This referred to the notice pay which according to the defendant was to be paid in monthly installments to avoid the punitive tax regime prejudicing the plaintiff who only attained the retirement age in December 2010.

In a civil case, the plaintiff must prove its case on a balance of probabilities. This has been interpreted to mean that:

"It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not" the burden is discharged, but if the probabilities are equal it is not". See *Milner v Minister of Pensions*⁷, and *Thulisani Dube Nyamambi v Bongani Ncube*⁸. In the case of *Zimbabwe Electricity Supply authority v Dera*⁹, the court said that:

"... in a civil case the standard of proof is never anything other than proof on the balance of probabilities. The reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. In a criminal matter, on the other hand, the trial is an attack by the State, representing society, on the integrity of an individual. The main concern is to do justice to the accused. If the prosecution fails, the State does not lose".

⁷ 1947 2 All ER 372 @ 374

⁸ HB82-15

⁹ 1998 (1) ZLR 500 (SC)

The learned authors *Hoffmann & Zeffertt*, in their book *SA Law of Evidence*¹⁰ state that;

“There are no exceptions to the rule that all issues in a civil action are decided upon a preponderance of probabilities.”

In *Joubert, The Law of South Africa*¹¹ the learned author says that:

“In civil proceedings, proof is furnished upon a preponderance of probability and this is the case even when allegations of criminal or immoral conduct are to be proved.”

Accordingly, we must balance the plaintiff’s claim against the defendant’s defence, and in so doing, decide which of their versions is more likely to be true. In other words which version is more believable, or most likely to have transpired, than the other. The preponderance of probabilities is an exercise which involves an evaluation and an assessment of the likelihood of the plaintiff’s version being the correct one as opposed to the defendant’s, or *vice versa*. In making this decision we look at the pleadings, at the documentary evidence, and at what the parties’ representatives said and did while they were in the witness stand. The plaintiff did not come across as a person who deliberately set out to mislead the court. What was clear was that he felt that the defendant had misled him into accepting less money than what was due to him, what he was entitled to, and what he wanted, which was USD\$50 000-00.

What was equally clear, was that the plaintiff was under the mistaken impression that the word ‘package’ referred to a lump sum, one off payment. Operating under that misapprehension, he happily accepted the equivalent of his monthly salary for September-December 2010, while carefully planning how he would spend his ‘package’ once he got to his rural home in Gokwe. He suffered a rude awakening when he was paid his ‘package’ less three months cash in lieu of notice. He was angry, and confused. The defendant told him that because he did not report for duty during those three months he was not entitled to a monthly salary, only cash in lieu of notice. But it was defendant’s policy not to allow senior executives to report for duty during the notice period. The defendant may have been crafty, or devious in its negotiations with the plaintiff. But if the unwittingly plaintiff agreed to be shortchanged, is it our place in

¹⁰ 4 ed at p 528

¹¹ vol 9 para 573 p 340

these proceedings to make that right when he agreed and signed for what he believed he was entitled to?

The evidence supports the fact that the plaintiff asked the defendant to defer payment of his package until January 2011 after he had reached the official retirement age to avoid paying punitive tax. There is no evidence that the parties agreed that the ‘full package’ would be paid in January 2011. The payment plan which appears on page 9 of exhibit 7 supports the contention made on behalf of the defendant that the cash in lieu of notice pay and the cash in lieu of leave were to be paid to the plaintiff on a monthly basis in October, November and December 2010. Although in terms of exhibit 1 plaintiff made it clear that it was his intention to serve notice from October –December 2011, in reality that is not what transpired. The plaintiff did not report for duty during that period. He was aware of the defendant’s policy. His evidence that other senior executives who did not report for duty during the notice period were paid their full salaries as well as cash in lieu of notice was bald, and unsubstantiated. There is no evidence that the parties agreed that the whole package would be paid in December 2011 when the early retirement agreement itself contains contrary evidence.

The plaintiff failed to discharge the onus on him to prove his case on a balance of probabilities. The probabilities raised by the evidence, coupled with the facts which are common cause, do not support the plaintiff’s version of events, and do not entitle him to the relief that he seeks. On the contrary, the probabilities support the defendant’s version especially on the crucial point of whether there was ever any agreement between the parties that the package be paid as a whole at the end of January 2011, and whether the plaintiff had been given assurances that despite not being required to report for duty, he would be paid his normal salaries and benefits until December.

For these reasons, the plaintiff’s claim is dismissed with costs.

Messrs Dzimba, Jaravaza & Associates, plaintiff’s legal practitioners
Messrs Gill, Godlonton & Gerrans, defendant’s legal practitioners