

REPORTABLE (4)

BALLANTYNE BUTCHERY (PRIVATE) LIMITED
t/a DANMEATS
v
EDMORE CHISVINGA & OTHERS

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GARWE JA & PATEL JA
HARARE, FEBRUARY 24, 2014 & FEBRUARY 26, 2015

A. Mugandiwa, for the appellant

D. Mwonzora, for the respondent

PATEL JA: This appeal arises from the application of two retrenchment agreements that were entered into between the parties on 23 January 2009. The first agreement stipulated the payment of specified terminal benefits, while the second provided for various payments in kind, *i.e.* fuel coupons and pork bones. The latter package was duly paid out and accepted without controversy. The dispute *in casu* relates to the first agreement.

The appellant paid out the first retrenchment package in Zimbabwe Dollars on 13 February 2009, following the introduction of the multi-currency regime on 2 February 2009. Some four months later, on 16 June 2009, the respondents applied to a labour officer for the enforcement of their retrenchment benefits. Following the failure to settle the matter, it was referred to arbitration on 9 July 2009.

The arbitrator found that the appellant had wrongfully paid the package with unusable Zimbabwe Dollar currency that had become defunct with effect from 3 February 2009. The appellant was accordingly ordered to recalculate the retrenchment package in the correct multiple currency of South African Rands or United States Dollars and to deposit the recalculated amounts into the respondents' bank accounts.

On appeal against this award, the Labour Court found that the delay of several months in enforcing the retrenchment package was not inordinate and that the respondents had not waived their rights. The arbitrator was entitled to hear further evidence to supplement the agreement as to when the packages were to be paid. There was no need for the respondents to make a specific claim for damages as the appellant had committed an unfair labour practice. The relief sought, *i.e.* payment in currency other than that agreed, was not incompetent and the arbitrator did not thereby rewrite the contract for the parties.

In effect, the court found that the arbitrator had not exceeded his terms of reference and had, in accordance with equity, correctly awarded payment in acceptable as opposed to valueless currency. Consequently, the retrenchment package was confirmed for payment in United States Dollars at a rate of conversion to be agreed between the parties or, failing such agreement, to be determined by the court. The appellant was also ordered to pay the respondents' costs.

The grounds of appeal herein are manifold, with most of them being tangential to the crux of the matter, and not having been pursued during the course of argument at the hearing of the appeal. In essence, the principal issue to be addressed is whether or not the arbitrator exceeded his terms of reference and thereby arrived at the wrong conclusions. Flowing from this is the correctness or otherwise of the decision of the Labour Court in upholding the arbitrator's award.

The Material Facts

The retrenchment agreements in question were both concluded on 23 January 2009. The first agreement states that “the works council has come up with its own minimum wage rates for the purposes of calculating the package” and that “the minimum wage for A1 grade was pegged at ZWD 2 quadrillion”. The agreement does not provide a specific date for payment. In contrast, the second agreement stipulates the payment of “USD90 worth of fuel coupons flat figure per every employee retrenched, USD200 worth of fuel coupons per every year served, 20 kilograms of pork bones per every year served” to be “settled in two lots with the first payment being by end of January 2009 and the remainder in February 2009”. Having regard to these material distinctions between the two agreements at the time when they were concluded, the parties appear to have envisaged that the retrenchment package under the first agreement would be discharged in Zimbabwe Dollars.

Both agreements were approved by the Ministry of Public Service, Labour and Social Welfare on 30 January 2009. On 11 February 2009, the appellant effected

payment of the first retrenchment package in the new Zimbabwe Dollar currency. This was done by RTGS payments into the respondents' bank accounts, which payments were duly reflected in those accounts on 13 February 2009. It appears that the respondents did not access or utilise their respective payments at any stage. However, they did not immediately lodge any complaint and only applied to the labour officer to enforce their retrenchment benefits four months later.

The arbitral award indicates that other employees who were not retrenched were paid their wages in United States Dollars at the end of the month on 28 February 2009. However, no evidence to that effect appears to have been placed before the arbitrator nor was any evidence led to show what currency these employees received as wages between 11 and 13 February 2009.

After the retrenchment agreements were concluded and approved, but before they were implemented, certain critical developments took place on the monetary plane. On 2 February 2009, the Reserve Bank issued its Monetary Policy Statement (the MPS), which introduced a multi-currency regime permitting free trade in any convertible currency and, at the same time, retaining the local currency as re-valued. This was accompanied by the promulgation, on the same date, of the Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations 2009, S.I. 6 of 2009 (the Regulations). I will revert to the import of the MPS and the Regulations and their impact on the facts of this matter later in this judgment.

Terms of Reference and Grounds of Appeal

Where a dispute is referred to compulsory arbitration by a labour officer, s 98(4) of the Labour Act [*Cap 28:01*] enjoins the officer to determine the arbitrator's terms of reference after consultation with the parties to the dispute. *In casu*, the sole issue to be determined by the arbitrator, as framed by the labour officer *qua* referring authority, was as follows:

“whether or not the respondent [appellant herein] paid the mutually agreed retrenchment package in time”.

On 16 August 2009, the arbitrator found that the payment of the retrenchment package in Zimbabwe Dollars contravened a Government directive requiring the use of South African Rands or United States Dollars for all money transactions in Zimbabwe. Consequently, he held that:

“The employer wrongfully paid the retrenched bank accounts with unusable Zimdollar currency which had ceased to be used by government directive with effect from 3rd February 2009. Therefore that transaction in Zimdollars is declared null and void as referred to [*sic*] my issued terms of reference.”

Although this finding does not directly address the stipulated term of reference, it does arguably indirectly answer the question framed, by the implication that the package should have been paid before 3 February 2009. However, by way of remedy, the arbitrator then proceeded to order the appellant:

“To recalculate the retrenched package in the correct multiple currency of either Rand or US dollars as directed by the Government's directive dated 3rd February 2009, using the N.E.C. Food Allied Industries Memorandum of Agreement for Salary/wages scale A1 to C4 as basis for recalculations.”

By making this award, the arbitrator clearly exceeded his terms of reference. He was simply required to determine whether or not the retrenchment package had been timeously paid within the contemplation of the parties as captured in the retrenchment agreement. It was not within his remit, in the event that he answered the question posed in the negative, to prescribe the remedy to be applied and the specific manner in which the agreement should be implemented. In effect, the arbitrator misdirected himself by making a new contract for the parties.

On appeal from the arbitrator, the Labour Court also fell into the same error. What the appellant sought in the appeal was the setting aside of the arbitral award. The respondents did not lodge any cross-appeal and did not move the court to vary the arbitral award. They simply prayed for the dismissal of the appeal with costs. The court found for the respondents but did not expressly dismiss the appeal. Instead, it confirmed the retrenchment agreement and ordered as follows:

- “1. The retrenchment package between the parties is confirmed.
2. The Zimbabwean Dollars payable are to be converted and paid in United States Dollars.
3. The rate of conversion is to be agreed between the parties.
4. Should the parties fail to agree on the conversion rate, either party can approach the court for the determination of the applicable rate.
5. The Appellant will pay the Respondent’s costs.”

The court *a quo* clearly misconceived and misapplied its adjudicative function and powers on appeal. What it did was to fundamentally alter the arbitral award instead of simply upholding it. Furthermore, unlike the arbitrator, it disregarded the fact that the appellant had already paid the retrenchment package in Zimbabwe Dollars. More significantly, it completely failed to address the principal question at the core of the

dispute between the parties, *i.e.* whether or not the mutually agreed retrenchment package had been paid on time. And in so doing, it made a new contract for the parties, purportedly as relief for the alleged breach of the retrenchment agreement. As is appositely cautioned by Christie: *The Law of Contract in South Africa* (5 ed.) at p. 366:

“The fundamental rule that the court may not make a contract for the parties is a salutary one, the principle of which has probably never been seriously questioned. It is unthinkable that the courts should not only tell the parties what they ought to have done but then make them do it by enforcing the court’s idea of what the contract ought to have been.”

Considerations of Equity

In terms of s 2A(1) of the Labour Act, the purpose of the Act is “to advance social justice and democracy in the workplace” by, *inter alia*, “securing the just, effective and expeditious resolution of disputes and unfair labour practices” (paragraph (f)). Section 2A(2) requires that the Act be construed in such manner as best ensures the attainment of the purpose referred to s 2A(1), while s 2A(3) stipulates that the Act shall prevail over any other enactment inconsistent with it.

Relying upon these provisions, Mr *Mwonzora* for the respondents submits that the arbitrator and the Labour Court could not ignore considerations of equity in arriving at their respective decisions. Thus, their respective orders for payment of the retrenchment package in convertible currency were not designed to substitute the retrenchment agreement but to make it more workable.

Mr *Mugandiwa* for the appellant counters that s 89(2) of the Act, which prescribes the powers of the Labour Court, does not expressly include the power to

dispense equity. Additionally, he points to s 98(2) which provides that the Arbitration Act [*Cap 7:15*] shall apply to any dispute referred to compulsory arbitration. Article 28 of the Model Law scheduled to that Act delineates the rules applicable to the substance of a dispute submitted to arbitration as follows:

- “(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of any contract and shall take into account any usages of any trade applicable to the transaction.”

It would appear from s 98(2) of the Labour Act, as read with Article 28 of the Model Law, that an arbitrator to whom a dispute is referred under the Act is confined to the applicable rules of law and cannot invoke considerations of equity, unless expressly authorised to do so by the parties. If this is correct, the same limitation would apply to the Labour Court on appeal from an arbitrator because, in terms of s 98(10) of the Act, it may only entertain any such appeal on a question of law.

Conversely, if it is accepted that the Labour Court enjoys equitable jurisdiction by virtue of subs(s) (1) and (2) of s 2A of the Labour Act, then it is arguable that even an arbitrator may dispense equity in labour matters. This is because, as is declared in s 98(9), in hearing and determining any dispute, an arbitrator shall have the same powers as the Labour Court. This position would obtain notwithstanding Article 28

of the Model Law, by reason of subs(s) (3) of s 2A, which accords primacy to the provisions of the Act over any other enactment inconsistent with it.

In three previous decisions of this Court, *Malimanjani v Central Africa Building Society* SC 47/07 and *Nzuma & Others v Hunyani Paper and Packaging (Pvt) Ltd* Civil Appeal No. SC 137/11, and *Fleximail (Pvt) Ltd v Samanyau & Others* SC 21/14, it was accepted, *obiter* and without elaboration, that the Labour Court is endowed with equitable jurisdiction. This position was explicitly reaffirmed in *Madhatter Mining Company v Tapfuma* SC 51/14, in reliance upon the specific wording of s 2A(1)(f). It was held, *per* Gwaunza JA, at p. 16 of the cyclostyled judgment, that:

“The principles of equity and social justice as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (*e.g.* damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there has been a change to the realisable currency. Equity would demand that a formula be found to give effect to the employee’s entitlement to payment of, and the employer’s obligation to pay, the debt in question”.

I respectfully associate myself with these sentiments, but with two significant caveats. The first, obviously enough, concerns the need to distinguish the specific facts of any given case. On the facts in Tapfuma’s case, it became necessary to apply equity to compute a debt owed to an employee, which debt had not been satisfied and was still due, in a currency that would be effectively realisable. This scenario must be distinguished from a situation where the debt in question has already been paid in a currency that is realisable at the time of payment.

The second caveat relates to the application of equity in those instances where it might conflict with rules of law. In this context, the need for predictability must be seen as paramount. See Bennion: *Statutory Interpretation* (1984) at pp. 308-310. As was aptly captured by Lord Diplock in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] 1 All ER 810 at 836:

“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates. That any or all of the individual members of the two Houses of Parliament that passed it may have thought the words bore a different meaning cannot affect the matter. Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed.”

Furthermore, as is lucidly expounded by Megaw LJ in *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* (1977) 3 All ER 641 at 646-647, the danger of allowing judges the latitude of freely interpreting statutes according to their own view of what is just and equitable:

“... is not, indeed, that the judges become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation. Hence the law, whatever it may gain in other respects, may in some cases suffer a loss in what has always been regarded as one of the essential features of law – uniformity; or at least predictability. Sometimes, in relation to the judicial view of ‘the presumed purpose of the legislation’, it may be a case of *quot judices, tot sententiae*: whereas in relation to what the legislation has actually said, it is unlikely that judicial opinion would vary so widely.”

Reverting to the Labour Act, while it might be accepted that the Labour Court, as well as tribunals arbitrating labour disputes, are duly empowered by virtue of s 2A(1) of the Act to dispense equity, they clearly cannot in so doing disregard existing

rules of law. In particular, equity cannot be invoked and applied so as to override or negate the provisions and requirements of any legislation enacted by Parliament or by an executive authority duly delegated to frame subsidiary legislation. The position might be different if such legislation is shown to be inconsistent with any substantive provision of the Act, in which event that provision would prevail in conformity with s 2A(3) of the Act. Subject to these qualifications, I have no hesitation in endorsing the application of equitable principles in the adjudication and resolution of labour disputes.

Import and Impact of the MPS and the Regulations

The arbitrator found that the use of the Zimbabwe Dollar had been nullified by Government directive with immediate effect from 3 February 2009 and that the appellant had therefore paid unusable currency into the respondents' bank accounts. The Labour Court also adopted the position that the local currency had become defunct and valueless in February 2009.

Contrary to the findings of the arbitrator and the court *a quo*, the Zimbabwe Dollar had not been demonetised with the introduction of the multi-currency regime, whether by the MPS or by any other Government directive. Both the arbitrator and the court clearly misconceived the import and effect of the MPS issued on 2 February 2009. As part of the new currency reforms to be applied, para(s) 5.1 and 5.2 of the MPS explicitly preserved the Zimbabwe Dollar as "the nations' currency". In terms of para 5.3, the local currency was to be re-valued with immediate effect, accompanied by the introduction of new currency denominations. Thereafter, as

prescribed in para(s) 5.4, 5.5 and 5.6, the old currency was to co-circulate with the new currency until 30 June 2009.

These policy measures were duly codified in ss 3 and 8 of the Regulations, which were also promulgated on 2 February 2009. The Regulations were made under s 2 of the Presidential Powers (Temporary Measures) Act [*Cap 10:20*]. In terms of s 5 of that Act, regulations made thereunder are to prevail over any other law to the contrary, to the extent of any inconsistency. In any event, by virtue of s 6(1) of the Act, such regulations, unless they are earlier repealed, expire and cease to have any effect after 180 days following the date of their commencement. Thus, the Regulations *in casu* would have lapsed at or around the end of July 2009.

Section 3 of the Regulations provided for the issue of new currency, the saving in force of certain coins and banknotes at the re-valued rate and the co-circulation of the old and new currencies. The effect of conversion on debts, contracts, securities, *etc.* was spelt out in s 8, which in its relevant portions stipulated as follows:

- “(1) The conversion to the new currency system in terms of these regulations shall not prejudice the subsistence or validity of debts, contracts, securities or any other legal act or instrument whatsoever made, done, executed, incurred, entered or created before the 2nd February, 2009.
- (2) Subject to subsection (3), every debt, contract, security or any other legal act or instrument whatsoever involving any obligation to pay or right to receive money in terms of the old currency system and which continues to subsist or be valid on the 28th February, 2009, shall, on and after that date, be construed in accordance with the new currency system.
- (3) Debts incurred, contracts entered or securities created or transferred before the 2nd February 2009, shall be deemed to have been incurred, entered, created or transferred in terms of the old currency system and may be settled, discharged, sold or liquidated in terms of the old or the new

currency system on and between the 2nd February, 2009, and the 30th June, 2009”

Whether Retrenchment Package Paid on Time

It probably cannot be doubted that when the matter was first argued before the arbitrator and at the time that he rendered his award, *i.e.* in August 2009, the Zimbabwe Dollar had effectively become moribund. However, there is no evidence on record to show that the local currency had completely ceased to be a medium of exchange at the time of payment by the appellant, between 11 and 13 February 2009. That being the case, it seems to me that the appellant was entitled, as it did at that time, to settle and discharge its obligations under the retrenchment agreement in Zimbabwe Dollars, in accordance with s 8(3) of the Regulations. It would then follow that the question referred for determination by the arbitrator and the court *a quo* must be answered in the affirmative: that the appellant effectively paid the mutually agreed retrenchment package in time. Moreover, in the absence of evidence to the contrary, there would have been nothing to prevent the respondents, at that time, from accessing and utilising their respective packages in Zimbabwe Dollars, instead of waiting for 4 months to raise their complaint before a labour officer.

As I have already indicated, considerations of equity, as enunciated and applied in Tapfuma’s case, *supra*, cannot be brought to bear upon the disposition of the present matter for two reasons. Firstly, the facts herein are distinguishable in that the respondents’ retrenchment packages have already been paid in a currency that was extant and realisable at the time of payment. Secondly, the appellant has duly fulfilled its

obligations under the retrenchment agreement, not only as contemplated in the agreement itself but also in compliance and in accordance with the governing law, *viz* s 8 of the Regulations. I would add, for the sake of completeness, that there is nothing contained in that section that can be said to be inconsistent with any provision of the Labour Act so as to be overridden by virtue of s 2A(3) of that Act.

The continuing operation and application of the Regulations, after February 2009 and until they expired at the end of July 2009, is obviously questionable. Each case necessitating the payment of employment debts in realisable currency would have to be considered and determined on its own facts and in light of the changing commercial environment that prevailed during that period.

Disposition

In the result, the appeal must be upheld. As regards costs, however, I am disinclined to follow the general rule that costs should follow the cause. Although the respondents have only themselves to blame for their tardiness in accessing their retrenchment payments, the fact remains that they will have secured nothing in return for their years of service to the appellant. For that reason and in this particular respect, I take the view that it would be unjust and inequitable to mulct them with costs in the matter.

It is accordingly ordered that:

1. The appeal be and is hereby allowed.
2. Each party shall bear its own costs.

3. The judgment of the court *a quo* is set aside and substituted as follows:

“(i) The appeal is upheld with no order as to costs.

(ii) The arbitrator’s award of 17 August 2009 is set aside.”

GWAUNZA JA: I agree.

GARWE JA: I agree.

Wintertons, appellant’s legal practitioners

Mwonzora & Associates, respondent’s legal practitioners