FARAI MUSIKAVANHU
versus
HIPPO VALLEY ESTATES LIMITED
and
TRIANGLE LIMITED
and
HIPPO VALLEY PENSIONS FUND
and
MINERVA BENEFITS CONSULTING

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 24 November & 7 December 2016

Opposed application

T Sibanda, for applicant
S Moyo, for 1st and 2nd respondents
D Sigauke, for 3rd and 4th respondents

TSANGA J: The applicant, Farai Musikavanhu was a former employee of the first and second respondents, namely Hippo Valley Estates Limited and Triangle Limited. Due to irreconcilable differences, a mutual agreement was reached that his employment was to be terminated. A core provision of the termination of employment agreement was that he would be taken as having gone on early retirement as contemplated by clause 22 (iii) of the Hippo Valley Pension Fund Rules. The applicant's point is that when the decision to leave employment was made, a specific condition of departure was that he would be deemed to have retired at 55 years and therefore entitled to his full benefits immediately. According to applicant, full details of what was to be paid were agreed to and his argument is that there was no room for these benefits to be paid at some future date as communicated by the respondents in their "**options**" to him.

The applicant averred that in violation of what was agreed to he had since been told to wait until the age of 55 before he could access the full benefits. He attains this age in February 2017. His lawyer Mr *Sibanda* argued that under the *caveat subscriptor* rule his employers could not seek to raise excuses and were bound by what they had signed. More particularly, his standpoint was that they could not now raise excuses for not paying applicant whilst he wallowed in poverty. He also argued that the matter was rightly before the High

Court and not the Labour Court since the latter does not grant an interdict. In addition, he argued that a *prima facie* right had been established and that the irreparable harm he would suffer if he interdict was not granted had been articulated, more so as he ought to have been paid as way back as March 2016.

The applicant therefore sought an interdict in the following terms:

1. The 1st and 2nd Respondents be and are hereby ordered to do all the necessary acts to ensure that the full sum of US$246 375.00 is paid to applicant by the 3rd and 4th Respondents within three days of the service of this order.
2. In the event of noncompliance with paragraph 1 above, 1st 2nd and 3rd Respondents be and are hereby ordered to pay US 246 375.90 to Applicant, jointly and severally, the one paying the other to be absolved, upon service of this order.
3. Interest shall accrue on the sum due at the prescribed rate from the 30th of March 2016 to date of payment in full.
4. 1st and 2nd respondents shall pay the costs of suit on an attorney-client scale.

The relevant clause, on which he rests his claim is r 22 of the Hippo Valley Estates Pension Fund Rules states as follows:

> "A member who has attained the age of 55 years may, with the Employer's consent or at the instance of the Employer, retire from the service of the Employer on the first day of any month prior to the normal retirement age provided that the age requirement shall not apply in respect of a member whose retirement is due to retrenchment or redundancy, subject to the provisions of the Act and other relevant legislation."

Applicant's counsel asserted that despite the wording of the above rule, parties could reach an agreement to the contrary. Furthermore, he said the amounts due were to have been paid within 14 days of their agreement.

The employers, Hippo Valley Private Limited and Triangle Limited being the first and second respondent respectively, averred that what was agreed to by parties was early retirement as contemplated by the applicable rule i.e. meaning the age of 55. To achieve this end, they in fact made contributions to the retirement fund up to February 2017 to enable him to retire at this age since he was not yet 55 but would attain this age in less than year.

Mr *S Moyo* who argued on behalf of first and second respondents, stressed that early retirement is a technical term which the applicant could not by pass. This age for early retirement is also the age at which one qualifies for tax benefits afforded to tax payers on account of old age in terms of the tax laws of Zimbabwe. His point was that nowhere in the agreement was applicant deemed to have reached the age of 55 before his time. With specific reference to the annexure that captured what was to be paid to applicant, he highlighted that a pension fund credit is not payment and also that a pension entitlement is not a severance payment but is paid according to the rules of the pension fund. He disputed the allegation that

all payments were to be paid within 14 days as the agreement had made it clear that benefits that were to vest in the future would vest in the future. As such, he queried why the first and second respondents as well as the third and fourth respondents, had been dragged to court. He argued that the employers had paid applicant all that was due and emphasised that the pension fund is a separate entity hence the clarification that the pension was a credit under the pension fund. Significantly, he stressed that applicant was only two months from reaching the stipulated age for early retirement which is in accordance with the pension fund rules which are accordingly informed by the tax laws of the country. He maintained that the parties could therefore not manufacture a jurisdictional fact that he had attained the age of 55 more so that the Pensions and Provident Funds Regulations, Statutory Instrument 323/91 make it clear that trustees are not empowered to use their discretion to make him receive his benefit before time. He said that the above instrument in question, does however make provision for those who opt to receive a pension benefit before the age of 55, in which case there are certain benefits that are foregone. As such, his point was that applicant had been given a choice to choose to forgo benefits or to wait until he reached 55. He opted for the latter. Mr Moyo furthermore emphasised that the effect of paying him what is not due would be to the prejudice of others.

Additionally, he highlighted that in terms of s 6 (a) of the Pensions and Provident Funds Act [*Chapter 24:09*], the effect of registration of a pension fund is that it becomes a body corporate capable of suing and be sued. As such, it is not for an employer to direct the activities of a pension fund since it is a separate and distinct body. He said the mere mention of a "pension credit" had led in this case to the employers being wrongly dragged to court. He sought costs on a higher scale given the fact that the applicant could simply have abided with the law and waited until he had reached the age of 55. Instead, he had dragged the respondents unnecessarily to court thereby putting them out of pocket.

Mr *Sibanda* who argued on behalf of third and fourth respondents, stressed that the third respondent, Hippo Valley Estates Pension Fund operates within the confines of the law and cannot implement directives that infringe the law. In particular, he drew attention to s 16 of the Pension and Provident Funds Regulations, 1991, SI 323 /91 which provides under s 16 as follows:

> "Retiring age in retirement annuity fund
> 16. (1) The rules of a retirement annuity fund shall provide for a retiring age, which shall be **not less than fifty-five** and not more than **seventy years**, and may permit a member to elect his retiring age within such limits".

He further drew attention to s 24 (c) of the same statutory instrument which makes it clear that an accumulated credit under a pension fund can never be paid all at once. A beneficiary is only an entitled to one third and the balance is used to purchase a pension for life. He emphasised that the difference between an employee who retires within these time frames and one who does so before, is in the tax that is payable. As such, applicant's quest for the whole amount due was said to be ill founded and would violate the law. Like the first and second respondent, costs were sought on a higher scale more so that the amount due to applicant under the pension scheme, and, when it would be paid, had been fully brought to his attention by the fourth applicant, Minerva Benefit Consulting and yet he had persisted with his court application.

In response to the above arguments, applicant's counsel maintained that it is to the agreement alone that the parties should have recourse to. In particular he relied on para 7 of the party's agreement which was worded as follows:

> **"Payment**
> The employee and the Employer further agree that in consideration of the retirement and undertakings in this Termination of Employment Agreement, the Employer shall follow severance payments as detailed in Annexure "A" "B" "C" and "d" hereto. Such severance payment constitutes the entire obligation of the Employer to the Employee".

He maintained that the parties were free to conduct themselves in the manner that they did and that the first and second respondents were accordingly bound. He alleged that the first and second respondents were trying use their blue chip status to frustrate an employee. He further responded that the third and fourth respondents being trustees, ought to act fairly. He also argued in response that the joinder of all parties was necessary and that there was no basis for the argument that there had been a misjoinder given their counsel's spirited response of these proceedings. He denied that applicant sought to evade tax and clarified that his client's position was that payment should be made within 14 days of the agreement, which is what was not compiled with. He denied that costs on a higher scale were justified given that but for the respondents' conduct, the application would not have been necessary. Moreover, he argued, the foundation of the application was the agreement which had been breached.

The applicable pension rules which have been canvassed above are very crystalline in how they define the age at which one becomes entitled to approach the employer and to enjoy the benefits guaranteed under the early retirement plan. Furthermore, in terms of the Pension and Provident Funds Regulations, 1991, SI 323 /91, the rules of a retirement annuity fund are clearly mandated to provide for a retiring age, which cannot be **not less than fifty-five** and not more than **seventy years**. In terms of the Hippo Valley Estates Pension Fund, the age is

set at 55, at which point an employee may approach the employer for early retirement. Therefore applicant's argument that the parties reached a contrary agreement whereby they bound themselves to his retirement immediately as if he were 55 is an exercise in reality distortion in the face of the rules. According to applicant's own admission, he insisted that the mutual termination be governed by s 22 of the rules of the Hippo Valley Estates Pension Fund, which rule is clear that one must have reached 55 to become entitled to the benefits due to an early retiree.

It is also not difficult to see why his employer agreed to the provision being applicable. At the time of the agreement, the applicant a little less than a year from reaching the age that would make him legible for retirement. It was therefore a gracious gesture on their part to make full payments to the pension fund so as to enable him to benefit at 55. As counsel for respondents have pointed out, it is therefore indeed surprising in face of the clear rules of the pension fund that is in question, and, of the regulations governing pension and provident funds, that this application was persisted with. They have indeed been dragged unnecessarily to court and that have been put out of pocket.

As stated in *Zimbabwe Online Private Limited* v *Telecontract* 2012 (1) 197 (H) at p200, drawing on *Borrowdale Country Club* v *Murandu* 1987 (2) ZLR 77 (H), courts do not lightly concede to a prayer for an award of costs on a legal practitioner to client scale. However, they will grant such an award where the unsuccessful party's conduct has been completely unreasonable and reprehensible such as where "a party's attitude has been that of a man who has deliberately and stubbornly refused to bring a dispassionate mind to bear on the dispute, which could have resolved quite amicably and in expensively if he had showed the slightest cooperation". In such circumstances, as stated, it would be quite unfair for the successful part to be put out of pocket in the matter of costs.

In this instance, the applicant clearly refused to bring a dispassionate mind to bear on the dispute, despite the applicable rules being brought to his attention.

Accordingly, the application is dismissed with costs on a higher scale.

Chinawa Law Chambers, applicant's legal practitioners
Scanlen & Holderness, 1st and 2nd respondent's legal practitioners
Musengi & Sigauke, 2nd and 3rd respondent's legal practitioners