HH 133-02
HC 11602/01
HC 1687/02
HC 3953/02

J CHIPUNZA
E CHIHOTA
A CHIRIPAMBERI
B CHITSA
N MASHAZHU
J MATARUSE
M MITI
R MKWANILA
S MUKUZE
S NANSABI
J NGWAYA
C V SIBANDA
versus
BEVERLEY BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 31 May and 15 August, 2002

Mr *P Nherere* for applicants
Ms *B Mtetwa* for respondent

SMITH J: The applicants are employees of the respondent. Last year the respondent embarked on a restructuring exercise which resulted in its decision to retrench 17 of its managers. Letters dated 31 May, 2001 were sent by the respondent to the managers in question advising them that their services were terminated and offering them a retrenchment package. Some of the managers accepted the package they were offered but the applicants did not. It was realised that the respondent had not complied with the provisions of the Labour Relations (Retrenchment) Regulations, 1990 (S I 404 of 1990) (hereinafter referred to as "the Retrenchment Regulations") and so the respondent withdrew the letters of termination. Meetings between the applicants and the respondent were held on 19 June, 5 July, 17 July and l August, 2001. When the parties failed to reach an agreement the respondent, by letter dated 7 August 2001, referred the dispute to the Retrenchment Committee established in terms of the Retrenchment Regulations. That committee considered the matter at its meeting on 22 August 2001 and made its recommendations. The Ministry of the

Public Service, Labour and Social Welfare (hereinafter referred to as "the Ministry"), in a letter dated 20 September 2001, purporting to be from the Permanent Secretary of the Ministry and not the Minister, advised the respondent that its application to retrench the applicants had not been approved.

On 12 October 2001 the respondent instituted review proceedings (case No HC 9926/01) wherein it sought an order referring the dispute between the parties to the Minister of the Public Service, Labour and Social Welfare (hereinafter referred to as "the Minister") so that he could act in terms of s 5(2) of the Retrenchment Regulations. The applicants failed to file any opposing papers timeously and were barred. They filed an application for the upliftment of the bar and then decided not to oppose the respondent's application. The Minister filed a notice of opposition but then withdrew his opposition and said that he would abide by the decision of the Court. Although the draft order filed with the application required that the Minister act in terms of s 5(2) of the Retrenchment Regulations, an amended draft order was filed by the respondent before the matter was heard by OMERJEE J. He issued an order on 25 January 2002 in terms of the amended draft. It read as follows -

> "It is ordered that -
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> 1. The Applicant (i.e. the respondent in this case) must submit an application to the Minister for approval accompanied with full reasons for the retrenchment together with the recommendations of the Retrenchment Committee.
> 2. The Minister is to consider the application on the basis that the lst to 12th respondents (i.e. the applicants in this case) do not object to the retrenchment".

Meanwhile the respondent had awarded salary increases to all its employees other than the applicants, stopped paying the applicants the benefits they had previously been paid (i.e. school fees, motor vehicle allowances and sports club subscriptions), failed to pay the applicants their bonuses for the year 2001 and

resorted to paying the applicants their salaries on dates different to those on which the rest of its employees were paid. In response to this action on the part of the respondent the applicants filed an application seeking reinstatement of the benefits withheld and the award of bonuses and salary increases given to the other employees of the respondent (HC No 11602/01). By letter dated 22 April 2002 the respondent advised the applicants that it was stopping payment of their salaries pending the resolution of the dispute between them. The response by the applicants was to file a further application (case No HC 3953/02) seeking an order that the respondent continue to pay their salaries and other benefits until such time as the dispute is settled.

Mr *Nherere* argued that the three applications are all related in that they all turn, to some extent, on the pendency of the retrenchment dispute. He submitted that unless and until Ministerial approval for the retrenchment of the applicants is granted, their contracts of employment continued to subsist. Consequently, they are entitled to their salaries and all other benefits provided for in their contracts of employment. Under Zimbabwean law, an employer may not unilaterally terminate a contract of employment except in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (S I 371 of 1985), the Retrenchment Regulations or the relevant Code of Conduct. As the respondent had chosen to act under the Retrenchment Regulations the applicants remained employees until Ministerial approval of their retrenchment was given - see *Kadir & Sons (Pvt) Ltd* v *Pangasai & Anor* 1996 (1) ZLR 598(S). Until such time as the applicants' contracts of employment are validly terminated, it is unlawful for the respondent to withhold their salaries and other benefits. The attempt by the respondent to justify the

withholding of the applicants' salaries on the grounds that they had been charged with misconduct cannot be sustained.

Mr *Nherere* submitted that the order sought in case No HC 3953/02 should be granted as the respondent cannot lawfully withhold payment of the applicants' salaries. Furthermore, the order sought in case No HC 11602/01 should also be granted because the increases in salaries, bonuses and other benefits are contractual entitlements, not merely discretionary benefits. As regards case No HC 1687/02, Mr *Nherere* argued that the real issue is that of rescission. The order granted by OMERJEE J in case No HC 9726/01 was granted in default. The appropriate procedure to reverse that judgment would therefore be by way of rescission, not appeal - see *Sibanda & Ors* v *Nkayi Rural District Council* 1999(1) ZLR 32 (S). The Court may rescind a default judgment if there is good and sufficient cause - see *Deweras Farm (Pvt) Ltd* v *Zimbabwe Banking Corp* 1997(2) ZLR 47 (H) which was affirmed by the Supreme Court 1998(1) ZLR 368 (S). He submitted that mere default on the part of the applicants is not decisive. It is but one of the factors that the Court must take into account. The applicants did not oppose the application because they had no objection to the draft order that was attached to the founding affidavit. The amended order was filed with the answering affidavit which was served on the legal practitioners but not brought to the attention of the applicants. The applicants have shown good cause for rescinding the order granted by OMERJEE J.

Ms *Mtetwa, in limine,* submitted that the issue of salaries and other benefits is not properly brought before this Court. In terms of the Code of Conduct an employee who is aggrieved by the conduct of the employer must bring a grievance in terms of clause 7.1 of the Code. The issues raised by the applicants are clearly grievances as envisaged in the Code. They should have exhausted their domestic remedies before

approaching the Court - see *Nicholas* v *Fraser Alexander Zimbabwe (Pvt) Ltd* HH 175/01 and *Chikamwe & Ors* v *Standard Chartered Bank of Zimbabwe Ltd & Anor* SC 152/98. In addition, Ms *Mtetwa* argued that the applicants had not placed any evidence before the Court as to the terms of the contract each had with the respondent. The respondent is not obliged, in law, to pay the applicants an annual increment. It is for the applicants to establish that there is a legal obligation binding on the respondent - see *Chiremba & Ors* v *The Reserve Bank of Zimbabwe* 2000 (2) ZLR 370. The applicants are awaiting the determination by the Minister of an application for retrenchment. Until that determination is made, it would be premature for the Court to intervene in the question of increases in salaries and other benefits. There is nothing before the Court to establish that the respondent is obliged to grant an increment to each and every employee as a matter of right and that it has no discretion in any particular case.

Ms *Mtetwa* further submitted that the respondent is entitled to withhold increments otherwise due to the applicants because of their behaviour since the applications were filed. They have circulated defamatory and malicious correspondence concerning the respondent and its senior management. In any event, increments and benefits are not a right and depend entirely on the circumstances prevailing at any given time - see *Foreman & Moultree* v *KLM Royal Dutch Airlines* HH 241/01.

It was submitted by Ms *Mtetwa* that the applicants should have exhausted their domestic remedies before approaching the Court. There are three applications under consideration. Voluminous papers were filed in each. In none of those did the respondent raise the issue that the applicants should first have exhausted their domestic remedies. That issue was raised for the first time in respondents' heads of

argument. I consider that if a party to an application wishes to raise such issue, that should be done in the opposing affidavit. That will then give the other party an opportunity to reply in the answering affidavit and state why he has approached the court without first exhausting his domestic remedies. The court would then be in a better position to come to a decision. It must be pointed out that the existence of domestic remedies does not exclude or oust the court's jurisdiction. In determining whether or not to exercise its jurisdiction in preference to referring the applicant to his domestic remedies, the court will have regard to a number of factors as stated in *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (HC). One of the factors is whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains. In *Nicholas'* case, *supra*, at p 3 of the cyclostyled judgment BLACKIE J said -

> "Further, the onus is on the applicant to show good reason to by pass a domestic procedure. In *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S), 'it was said that a litigant should exhaust his domestic remedies unless there are good reasons for approaching the court. Also in this court, it has been said that 'domestic tribunals' should not be by-passed without good reason… see *Munyira* v *Secretary for Education & Public Service Commission* S-214-98 (not reported), which relied for the proposition on Baxter *Administrative Law* pp 720-721'.
> *Chikonye's* case (*supra*).
> The applicant has the domestic procedures provided in terms of the Act and termination regulations available to him. These procedures are specifically designed and set up to deal with employer/employee matters. Those procedures have not been shown to be inadequate for the applicant's purposes. The applicant has not put forward any good reason for this court to receive the matter rather than for him to pursue his domestic remedies. He appears to have approached the court believing that he could do so as a matter of right.

In this case, I consider it appropriate that the court should exercise its discretion for the following reasons. Firstly, the respondent did not raise the objections in its opposing affidavit. Secondly, having regard to the seniority of the applicants in the structure of the building society and the decisions taken by the board

of the respondent in relation to the applicants, together with the disputes between the parties before the applications were made, the domestic procedures would not be seen to be completely impartial. Thirdly, the applicants wish to have the order by OMERJEE J set aside and that could only be done by way of an application to court.

To my mind, the starting point in this exercise is to determine the present status of the applicants. In the *Kadir & Sons* case, *supra*, at p 604 B-E GUBBAY CJ 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 pay-roll. 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 the employees their wages. That this is so is underscored by the use of the phrase 'proposed retrenchment' in ss 5, 6 and 7 of the Regulations, as well as by the necessity for the Minister in reaching his decision to take account of the prospects of the employees finding employment in the future and the terminal benefits to which upon approval of the proposed retrenchment they will become entitled.
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> Of course, the Minister may order that his approval of the retrenchment takes effect from a date in the future. The Regulations do not disable him from doing so. But to back-date the retrenchment conflicts with the intendment of the Regulations. A contrary view would cause an injustice to employees who, awaiting the Minister's decision on whether or not they were to be retrenched, are obliged not to seek and obtain other employment".

Clearly, the applicants remain employees of the respondent until the Minister has announced his decision. All things being equal, they are therefore entitled to continue being paid the salaries and other benefits due to them under their contracts at the time the application for approval of their retrenchment was made. What about increases and bonuses that are granted to other employees after the application for retrenchment is made? Mr *Nherere* conceded that where a benefit is in the discretion of the employer it can be withheld at any time. However, the cost-of-living adjustment of 18.25% that was given with effect from l July 2001 was awarded across the board to all employees. The increase of 13% with effect from l September 2001

was awarded on a similar basis. Likewise, the bonus was awarded across the board to all employees. As regards the allowances for motor vehicles, school fees and sports club fees, the applicants were being given those allowances before the application for retrenchment. There is no basis for their withdrawal so long as the applicants remain employees of the respondent.

As regards the application for rescission of the order granted by OMERJEE J, the applicants want the order replaced by one which merely requires the retrenchment dispute to be referred to the Minister for him to act in terms of s 5 (3) of the Retrenchment Regulations. In other words, the Retrenchment Committee will inquire into the merits and decide whether or not approval for the retrenchment should be granted, and not only into the package to be given to the retrenched employees. The applicants' case is that the minutes of meetings between the parties which state that the parties agreed on the actual retrenchments but disagreed on the package had been doctored and manipulated. They did not represent what had happened or been said and should be ignored. The respondent, on the other hand, hotly denies that the minutes are inaccurate. It claims that the applicants have made up the allegations in order to prolong the dispute. Clearly the dispute as to the accuracy of the minutes cannot be resolved on the papers.

What is not in dispute, however, is the following. The respondent filed its application in case No HC 9726/01. The applicants failed to file notice of opposition within the prescribed period and were barred. They subsequently instructed their legal practitioners to file a notice of opposition and to seek the upliftment of the bar. The matter was set down for hearing on 25 January 2992. Two days before that, their legal practitioners advised them that the Chairman of the Retrenchment Committee and the Minister, who were also respondents in that case and who had filed notices of

opposition, had withdrawn such notices and agreed to abide by the order of the court. By that stage the respondent had already given notice to the legal practitioners of the applicants and of the Minister that an amended draft order had been filed and would be prayed for. The order was issued by OMERJEE J on 25 January, 2002.

It is not disputed that the applicants did not appear at the hearing on 25 January and that they were in wilful default. That is a factor that must be taken into account but it is not decisive. In *V Saitis and Company (Private) Ltd* v *Fenlake (Private) Ltd* HH 65-2002 CHINHENGO J dealt very comprehensively and lucidly with the question of rescission of a judgment. At p 8 of the cyclostyled judgment he said -

> "The conclusion I have come to is that the test for rescission of judgment whether in the High Court (under rule 63) or the Magistrates Court (under Order 30) (unless it is a refusal of rescission because wilful default exists) is but one: the applicant has to establish good and sufficient cause or, simply put, sufficient cause for the relief he seeks. That this is so, and has always been so, is evident from MCNALLY JA's words in *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S) where at 369G he said: 'While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we restrict ourselves improperly if we lay down a fixed rule that where there is wilful default there is no room for good and sufficient cause'."

Is there other good and sufficient cause to set aside the judgment? I do not think so. It seems to me that initially the applicants did accept their retrenchment and only disputed the package. That was specifically stated by the Labour Consultant they had retained to argue their case in his letter to the respondent dated 4 June 2001. He said "My clients are not contesting the proposed retrenchment by your company but only wish to place on record the following points for your noting and consideration". It is inconceivable that the Labour Consultant, who must be an expert in the field of Labour Relations in order for him to be retained, would make a mistake on such a vital point. If he had indeed made a mistake, however, then one would have expected

the applicants to have filed an affidavit from the Labour Consultant admitting that he had made a mistake and setting out the circumstances. Another factor which I consider to be of importance is the fact that the applicants forwarded to the Retrenchment Committee their submissions relating to the retrenchment package but they did not forward any proposals relating to the actual retrenchment. Why was that if the retrenchment itself was being opposed?

Another factor which I consider to be very relevant is the time factor. That is a factor which the Legislature obviously considered to be of importance when enacting the Retrenchment Regulations. Under s 5 of the Retrenchment Regulations the Retrenchment Committee is enjoined, within two weeks of the matter being referred to it, to make a recommendation to the Minister. If it fails to make a recommendation, the Minister must call for all the documents in the matter and give his decision. Section 6 requires the Minister to consider, without delay, any recommendation submitted to him by the Retrenchment Committee and then to either approve or refuse to approve the proposed retrenchment within two weeks. Clearly the Retrenchment Regulations appreciate that speed is of the essence.

For the reasons set out above, I consider that the application for rescission of the default judgment should be dismissed with costs.

It is ordered that -

1. The respondent shall continue to pay the applicants their salaries, adjusted upwards by 18,5% with effect from l July 2001 and 13% with effect from September 2001 together with any further adjustments granted by the respondent to its employees generally across the board, after September 2001, until such time as the Minister has approved their retrenchment.

2. The respondent shall grant the applicants a bonus equal to any bonus granted across the board to its employees in 2001 who are on the same grade as the applicants.

3. The respondent shall continue to pay the applicants the benefits relating to school fees, motor vehicles and sports clubs subscriptions at the level they were being paid when the application for approval of their retrenchment was made.

4. The respondent shall pay the applicants costs in connection with cases No HC 11602/01 and HC 3953/02.

5. The application for rescission in case No HC 1687/02 is dismissed with costs.

Chingore & Garabga, applicants' legal practitioners
Kantor & Immerman, respondent's legal practitioners