INTERCONTINENTAL HOLDINGS (PVT) LTD
versus
VERONICA NECHITIMA
and
TEN MWANZA
and
TADYIWA SANGO
and
KUCHINEI MAZARURA
and
MARTHA DOCTOR
and
MARTHA NYAMUKAI

COURT HIGH COURT OF ZIMBABWE
MTSHIYA J:
HARARE, 18 March 2010 and 31 March 2010

Advocate *Morris*, for the applicant
Mrs Veronica Nechitima (in Person and on behalf of all respondents)

MTSHIYA J: The applicant herein seeks the following relief:-

"1. That the respondents and all persons claiming occupation through them be and are hereby directed forthwith to vacate the property known as Greenhills Farm situate at the PrimaFlora farming operation in Tynwald, together with all their goods and chattels, and failing which the Deputy Sheriff together with such officers of the Zimbabwe Republic Police as he may require shall eject the respondents aforesaid together with all persons claiming occupation through them from the said premises.

2. That the respondents shall bear the costs of this application and all coats of the Deputy Sheriff in ejecting them".

It is common cause that the applicant is the owner of immovable property known as Greenhills measuring 12,1544 hectares situate in Tynwald, Harare, (Grenhills). The applicant carries on agricultural activities on Greenhills which include the growing of paprika, roses and some vegetables.

On the strength of a Zimbabwe Investment Centre licence the major activity on Greenhills at the moment is the growing of paprika. The paprika project is being run under an associate company of the applicant called Holdex Investment (Private) Limited. Prior to the grant of the investment licence, Greenhills concentrated on the production of roses.

It is also common cause that the respondents in this matter were employed by the applicant until retrenched on the basis of a retrenchment package approved by the Ministry of Public Service Labour and Social Welfare, (the Ministry) on 7 June 2006. Each respondent's terms and conditions of retrenchment were:-

"3 Months severance pay

2 Months per full year worked service pay

3 Months notice pay

Cash in lieu of leave at 30 days per annum

3 Months relocation allowance

NEC Gratuities for over 8 years worked".

The retrenchment was attributed to the collapse of the main business. All respondent's signed for their retrenchment packages and have all since acknowledged receipt of their packages.

On receipt of their packages the respondents undertook to vacate Greenhills. They all declared as follows:-

> "We, the undersigned workers, voluntarily choose to accept a retrenchment package from the owners of Intercontinental Holdings (Private) Limited trading as Prima Flora understanding that it complies with Statutory Instrument 252 of 1992. The package to be paid will be paid as follows:- Three months notice pay; Three months severance pay: Three months relocation allowances: Outstanding leave, gratuity of two months per completed year worked. After payment as stated above is received, we agree to vacate the farm within 48 hours. We have no other claims against the farm or owners in question. We acknowledge this notice constitutes formal notice of termination of employment required by law and commences 1st May 2006 and shall end 31st May 2006. It is agreed that NSSA, NEC and any income tax will be deductible from the amounts below and our attached signatures hereby confirm that we are in agreement with the amount of monies to be received".

The retrenchment package referred to in the above declaration is in line with what was approved by the Ministry.

Contrary to their undertaking, the respondents have not vacated Greenhills and hence this application. The applicant argues that the respondents are not entitled to continued occupation of Greenhills. Many efforts have been made to ensure the departure of the respondents from Greenhills but to no avail.

Upon being served with this application, on 26 August 2009, one Mr A. Windimani (Wandimani) of Suite 4 Alpha House, Kwame Nkruma Avenue, Harare, purporting to represent the six respondents, filed a notice of opposition to the applicant's application. The

notice was supported by an affidavit from the first respondent only. The rest of the respondents did not file any supporting affidavits. Strictly speaking therefore it means second to sixth respondents, are not before the court. This was raised as a point *in limine* by the applicant but was later abandoned for the sake of progress.

The applicant had also raised, as point *in limine*, the issue of the notice of opposition filed by Windimani who is not a legal practitioner. It was submitted that the said Windimani, being not a legal practitioner, could not purport to represent any of the respondents. I agreed with that submission.

When Windimani attempted address me in this court, he raised the point that he was a trade unionist representing his members. I pointed out to him that whereas the Labour Act [*Cap 28:01*] allows trade unionists to represent their members in the Labour Court, there was no such enabling legislation with regards representation in the High Court. The parties could appear in person or be represented by a legal practitioner. I therefore denied him audience before me and thereafter allowed the first respondent, Veronica Nechitima (Nechitima) to address the court.

The last point *in limine* raised by the applicant was that the purported notice of opposition was filed out of time. That was correct.

Notwithstanding my decision to allow the first respondent to address the court, she too was not properly before the court for the following reasons:-

1. the filing of a notice of opposition on her behalf by a non-legal practitioner rendered the process procedurally defective, to the extent that in terms of the rules of the court there was no notice of opposition.
2. The application was served on the respondents on 6 August 2009 and the purported notice of opposition was only filed on 26 August 2009. That was out of time and there was no application for condonation.
3. The applicants' heads of argument were served on the respondents on 19 January 2010 and up to the date of the hearing of this case no efforts had been made through court processes to rectify the issues raised *in limine* by the applicant.

In addressing the court Nechitima applied for a postponement so that a legal practitioner could be engaged by the respondents so as to put the papers of all respondents in order and then have the case argued.

Advocate *Morris* opposed the application for a postponement mainly on the basis that the respondents had no case at all and the postponement would only lead to an escalation of costs. Advocate *Morris* then went further to submit that since the respondents were not legally represented he was prepared to abandon all the preliminary issues he had earlier on raised and have the matter argued on the merits, with the first respondent representing the rest. He referred the court to Rule 4C of the High Court Rules 1971 (the Rules) which provides as follows:-

> "4C. The court or a judge may, in relation to any particular case before it or him, as the case may be-
>
> (a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
>
> (b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient".

I rejected Nechitima's application for a postponement for the purposes of engaging a legal practitioner at the last hour. In rejecting the application I pointed out that the:-

- points *in limine* were raised in applicants' Heads of argument which were filed on 19 January 2010 and served on the respondents on the same day – a period of two months before this hearing. No steps were ever taken to attend to the issues raised *in limine*, which issues included legal representation. The respondents had ample time to arrange for legal representation.
- Throughout the alleged dispute the respondents were being advised by their trade Unionist, Windimani.

Being in agreement with Advocate *Morris's* argument that I put aside procedural technicalities and proceed to condone irregularities referred to in the points *in limine*, I found it to be in the interests of justice to proceed by way of rule 4C of the Rules as prayed for by the applicant. In so doing I convinced myself that the issues raised were of a procedural nature and most importantly the applicant had abandoned its opposition to them. It was thus necessary, in the interests of justice to grant condonation and proceed to dispose of the matter on the merits.

Advocate *Morris* submitted that he would abide by the filed Heads of Argument.

I then asked Nechitima to respond to the applicants arguments on her own behalf and on behalf of the other respondents. She reluctantly proceeded and submitted that in the main the respondents would have preferred to meet face to face in court with Mr Dobson, Applicant's Managing Director. She then submitted that the main issue was that although they

accepted payments under the retrenchment package, the package had been signed for by management. Respondents' had no problems though with the package except that it was not based on the agreed May increases.

Nechitima admitted that the employment relationship between respondents and the applicant had terminated at the end of May 2006 when all respondents were paid their packages. She said, however, they had to accept the money since 'no one can refuse money'.

In the main Nechitima's arguments were that they had nowhere to go and had served respondent for a long time and that the retrenchment package had been irregularly imposed on the respondents.

The papers before me clearly indicate that the respondents were retrenched in terms of the law. The respondents accept that Greenhills is owned by the applicant and that they could only remain there by virtue of their employment. When that employment was lawfully terminated at the end of May 2006 through agreement and subsequent approval by the relevant Ministry, the respondents had no right to remain at Greenhills.

Nechitima, conceded on behalf of all the respondents that they knew they had been retrenched and they also accepted payments from their retrenchment packages. If indeed there were any irregularities, which I must say are difficult to appreciate in view of the undertaking signed by the respondents and quoted in full herein at page 2 of this judgment, the applicants should have proceeded by way of review in this court. They did not do so and thereby waived their right to challenge the retrenchment package. In Chidziva & Ors Zimbabwe Iron & Steel Company Co Ltd 1997(2) ZLR 368(S) KORSAH JA had this to say regarding the issue of waiver:-

> "The effect of the waiver of a legal right is to extinguish that right and any concomitant obligation: *Laws v Rutherfurd* 1924 AD 261. In order to establish a waiver, all that one must show is that the party has taken some step which is only necessary, or only useful, if the objection to the irregularities has been actually waived, or has never been entertained. However, the intention or conduct of the party waiving a right must be conveyed to the other party……..
>
> In the present case, the conduct of the majority of the retrenched employees, by accepting the retrenchment package, was inconsistent with the enforcement of the right to have the matter referred, in terms of s 3(6) of the Regulations, to the retrenchment committee, and clearly evinced an intention to surrender that right. The respondent acted upon their intention to accept the retrenchment package and paid to hem the benefits of the agreed package. With acceptance of each payments the rights of the appellants perished……

It is true that delay in enforcing a right does not *per se* amount to a waiver. *Mahaber v Sharman NO & Anor* 1985 (3) SA 729 (A) 736J-0737A. But as INNES CJ observed in *New York Mutual v Ingle supra* at p 551:

> 'Neglect to enforces a right timeously may under certain circumstances have the same effect as a waiver of it, even though the period of prescription has not elapsed. Such cases come very near the line of estoppel. As pointed out by the Privy Council in Lindsay *Petroleum Co v Herd* (LR 5 PC Appeals, at p 240), where a man has by his conduct and neglect, 'though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted' then lapse of time becomes of great importance. When a person entitled to a right knows that it is being infringed, and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it"

See also *Fungura &Anor v Zimnct Insurance Co. Ltd* 2000(1) ZLR 379(H).

The principles of law enunciated in the paragraphs quoted above apply in *casu*.

This application was filed on 7 July 2009. The respondents accept that their employment contracts were terminated at the end of May 2006. The respondents accepted their retrenchment packages. The respondents only started formally raising the issue of irregularities attaching to the Ministry approved packages on 26 August 2009 in their notice of opposition to this application. Clearly they had long lost their chance to approach this court for review. The conduct of the respondents since 31 May 2006 does not help their argument pertaining to irregularities attaching to the retrenchment package(s).

Assuming that the respondents were being provided with employer accommodation at Greenhills, the maximum period of remaining at Greenhills after termination of employment on 31 May 2006, would have been one month. Even if we were to extend that to 7 June 2006 when the Ministry approved the retrenchment package(s) the respondents would still remain unprotected by the law. This is so because s 12(6) of the Labour Act [*Cap 28:01*] provides as follows:-

"1. …….
2. …….
3. …….
4. …….
5. …….
6. Whenever an employee has been provided with accommodation directly or indirectly by his employer, the employee shall not be required to vacate the accommodation before the expiry of a period of one month after the period of notice specified in terms of subsection (4) or (5)
7. ……

The respondents undertook to vacate Greenhills by 31 May 2006. They still remain on the property.

My finding therefore is that the respondents have no right whatsoever to remain at Greenhills and accordingly the applicant is entitled to the relief it seeks.

It is therefore ordered as follows:-

1. That the respondents and all persons claiming occupation through them be and are hereby ordered to vacate the property known as Greenhills Farm situate at the PrimaFlora farming operation in Tynwald, together with all their goods and chattels, within fourteen (14) days from the date of service of this order and failing which the Deputy Sheriff together with such officers of the Zimbabwe Republic Police as he may require shall eject the respondents aforesaid together with all persons claiming occupation through them from the said farm.

2. That the respondents shall bear the costs of this application and all costs of the Deputy Sheriff in ejecting them.

Atherstone & Cook, applicant's legal practitioners
All respondents, Greenhills Farm, Tynwald, Harare