REPORTABLE ZLR (55)

Judgment No. SC 61/07
Civil Appeal No. 11/06

AGRICULTURAL BANK OF ZIMBABWE LIMITED t/a AGRIBANK
v
(1) CLEMIO MACHINGAIFA (2) CHENJERAI MUTAMBISI

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, OCTOBER 15, 2007 & MARCH 17, 2008

J Dondo, for the appellant

M S Gwaunza, for the respondents

GARWE JA: This is an appeal against the judgment of the High Court, Harare handed down on 13 July 2005 in which the High Court granted with costs an application by the respondents declaring, *inter alia*, that they were entitled to payment of a mileage allowance of 4 000 kilometres per month calculated at the Automobile Association of Zimbabwe (AAZ) rates.

The facts of this case are these. The respondents were employed by the appellant as Assistant Director, Credit Risk and Assistant Director, Debt Recovery, respectively. Both respondents signed revised contracts of employment in the year 2000 which stipulated their conditions of employment. The contract of employment provided in paragraph 3 as follows:

> "3. Motor Vehicle Use
> You are entitled to the use of an Agribank company Car under the prevailing terms and conditions. You are required to familiarize yourself with the existing rules and regulations for the use and disposal of the motor vehicle.
>
> or
>
> You are entitled to purchase a motor vehicle under the prevailing motor vehicle scheme. You will use the car for business and claim in accordance with the existing rules and as amended from time to time. You are also entitled to a mileage allowance based on a mileage of 4 000 kilometres per month at the applicable standard AAZ rates." (underlining my own)

The underlined portion of para 3 is at the centre of the dispute in this matter.

By letter dated 30 August 2001, the appellant's Human Resources Manager wrote to the respondents advising them that following the restructuring of management grades the appellant's board had approved the conversion of the company car scheme to a personal car scheme under the managers and field staff motor vehicle scheme with effect from 1 September 2001. The conversion to a personal car scheme was done without reference to the respondents. The conversion meant that the use of a company car was being done away with and the respondents would no longer access fuel and other facilities previously offered by the bank in this regard. The respondents were offered a loan equivalent to the purchase price of their existing company vehicles and a monthly allowance of $30.300.00 to assist in "the cost of running the motor vehicle".

It appears the respondents were not happy with the conversion to the new scheme and on 3 September 2001 wrote a letter to management raising various issues on the matter and threatening legal action because of what they perceived as a breach of

contract. One of the issues raised was their entitlement to an allowance based on a monthly mileage of 4 000 kilometres.

The response by the managing director of the appellant was that such an allowance "would ultimately be too expensive for the bank to sustain" and that the change had been "influenced by the magnitude of the vehicle allowance cost and its sustainability".

Thereafter, the parties engaged in considerable exchange of correspondence on the matter. The respondents continued to insist that they were entitled to the allowance. The appellant maintained that it could not justify payment of such a huge allowance. The appellant eventually stated by letter dated 14 April 2004 that the allowance had been included by mistake and that the intention had been to allow the respondents to use their personal vehicle and submit claims for such use under the bank's prevailing terms and conditions.

In June 2004, the respondents then filed a court application seeking, *inter alia*, a *declarator* that they were entitled to payment of the allowance. After hearing both parties, the High Court granted the application with costs. It is against that decision that the appellant has appealed to this Court.

The decision of the court *a quo* is attacked on four bases. These are firstly that the court *a quo* erred in finding that the inclusion of the allowance in question was

not the result of a mistake; secondly that the court *a quo* erred in dismissing the appellant's defence of waiver; thirdly that the court *a quo* erred in failing to take into account the fact that in terms of the contract of employment agreed to by the respondents, the appellant could change its policies and procedures; and fourthly that the court *a quo* erred in coming to the conclusion that it had jurisdiction to determine what was essentially a labour dispute contrary to the provisions of s 89(6) of the Labour Act [*Cap* 29:01]. I proceed to deal with each of the four grounds raised.

WHETHER THE HIGH COURT HAD JURISDICTION TO DETERMINE THE APPLICATION

It is the appellant's contention that what was before the court *a quo* was essentially a labour dispute and in the light of the provisions of s 89(6) of the Labour Act [*Cap* 28.01], only the Labour Court has the jurisdiction in the first instance to hear and determine such a matter. In support of its argument, the appellant has cited the case of *Sibanda & Anor v Bensen Chinemhute & Anor* HH-131-2004. In that case MAKARAU J (as she was then) made the following remarks at p 7:

> "Consequent upon my finding above, that this court is only barred from exercising its inherent jurisdiction in labour matters where the Labour Court has jurisdiction, it appears to me that this court retains its jurisdiction to grant declaratory orders in terms of s 14 of the High Court Act in labour disputes …".

The learned judge continued at p 8 of the cyclostyled judgment:

> "Similarly, I hold that in the absence of the specific power on the part of the Labour Court to issue a declaratory order as competent relief to parties appearing before it, the jurisdiction of this court to do so in the first instance has not been ousted."

The above case does not in fact support the appellant's contention that the High Court has no jurisdiction to hear the application. To the contrary the case is authority for the proposition that the High Court retains its original jurisdiction to grant declaratory orders, even in labour disputes. The appellant has not sought to argue that that case was wrongly decided.

In *Johnson v AFC* 1995(1) ZLR 65(H) GUBBAY CJ had occasion to consider when a *declarator* can be granted. The learned Chief Justice remarked at p 72 E-F:

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an 'interested person', in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the Court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a pre-requisite to the exercise of jurisdiction …".

It was not in contention before the court *a quo* that the respondents were interested persons. The only issue for determination was whether the case was a proper one for the exercise of discretion under s 14 of the High Court Act. The trial court reached the conclusion that it was. The fact that the dispute could well have been determined in the Labour Court is not the determining factor. In *Johnson v AFC supra*, GUBBAY CJ remarked at p 77B:

> "Nor does it seem to me that the availability, in the same court, of a remedy by way of interdict was of itself reason to refuse declaratory relief. Standing alone, it will seldom be sufficient to induce a court to decline jurisdiction. It is but one factor to be taken into account by the court in the exercise of its discretion whether or not to make a declaration of rights …"

See also Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4 ed, p 1058.

I am of the view that the court *a quo* was correct in coming to the conclusion that it had the jurisdiction to deal with the matter. Paragraph 1 of the order granted by the court *a quo* was clearly declaratory.

This ground of appeal must therefore fail.

THE QUESTION OF WAIVER

The appellant has argued that the court a quo should have dismissed the application on the ground that the respondents had by their conduct waived whatever rights they might otherwise have had.

In terms of the common law, there is a presumption against waiver. R H Christie in the *Law of Contract in South Africa*, 3 ed states at p 488:

> "Having gone to all the trouble to acquire contractual rights people are, in general, unlikely to give them up. There is therefore a presumption, even in some cases a strong one, against waiver. That means not only that the *onus* is upon the party asserting waiver to prove it, but that although, as in all civil cases, the *onus* may be discharged on a balance of probability, it is not easily discharged ….
>
> To this it is only necessary to add that it has repeatedly been held that clear proof is required, especially of a tacit as opposed to an express waiver …".

Attention is also drawn to the judgment of this Court in *Philemon Chidziva & 4 Ors v Zimbabwe Iron & Steel Company* SC 137/07.

In dealing with this argument, the trial Judge stated at p 4 of the cyclostyled judgment:

> "The respondent further submitted that the applicants must be held to have waived their rights by not bringing up the matter to court timeously. The submission is clearly devoid of any merit when regard is had to correspondence filed of record in which the respondent admits that the applicant never manifested any signs of abandoning their rights. On 25 September 2001 the managing director acknowledged that the applicants' memorandum raised the issue of 'Legal action insinuated because of perceived contractual agreement violation'. On 5 June 2003 the Human Resources Manager, in response to another communication from the second applicant, also acknowledged that the matter was first raised in 2001 and as far as the bank was concerned it had been deliberated upon to its finality then. The above statement was clearly misleading. The bank never said it had made a mistake at that stage. The issue was therefore very much alive.
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> Finally the bank, in the final Memorandum of 14 April, acknowledged that the matter had been brought up on a couple of times since 2001. In such circumstances it cannot be said that the applicants abandoned their rights when the requirements of a waiver were not met at all."

I agree with the trial Judge in this respect. At no stage did the respondents suggest that they were abandoning their entitlement to the allowance. They immediately wrote to management on 3 September 2001, voicing their concern at what they considered was a breach of their contract of employment and even threatened legal action. Although it appears that they did request for the extension of the period within which to repay their loans at no time did they waive their entitlement to the allowance. It is also not correct, as suggested by the appellant, that the respondents did not assert their rights for more than twenty months. The correspondence on file shows that the

respondents immediately complained and, as already noted, even threatened to take legal action.

Even if it were to be accepted for a moment that there was such a delay our law is clear that:

> "Delay in enforcing a contractual right is not necessarily a waiver of the right. One can go further and say that delay, of itself and without more, can never deprive a party of a contractual right except by prescription …" - R H Christie *op. cit.*, at p 491.

This ground of appeal must also fail.

THE DEFENCE OF MISTAKE

It is the appellant's contention that the allowance was never intended and that it was inserted by mistake. If, so the appellant argues, the allowance were to be paid this would result in the respondents being paid twice in the sense that they would be entitled to motor vehicle loans to purchase motor vehicles and at the same time receive allowances for the use of the same vehicles based on a monthly mileage of 4 000 kilometres at standard AAZ rates.

A party to a contract relying on an error of judgment who can go further and show that at the time of the contract he was labouring under some misapprehension may escape liability under a contract. The *onus* however is not easy to discharge. As stated by RH Christie, *The Law of Contract in South Africa op. cit.*, p 353:

> "Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the

> *onus* of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge."

The learned author continues at p 354:

> "However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract … and in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his *error* is *iustus*."

In responding to concerns by the respondents that the appellant had breached the contract of employment, the Managing Director of the appellant made it clear that the appellant had made a mistake as it could not justify these allowances or sustain them. He went on to state that the allowance was almost equivalent to the respondents' monthly salary and was by implication too high.

The trial court observed that during a period of two years and eight months the appellant had not at any stage alluded to the possibility of such an allowance having been included by mistake. He noted that the appellant made this assertion for the first time on 14 April 2004. The trial Judge remarked as follows on pp 3-4 of the judgment:

> "As can be seen from the above memorandum the respondent was then being categoric that it had made a mistake a thing it failed to do during the couple of times the matter had been brought up since 3 September 2001. The matter would not have dragged this far if the respondent had stated, the first time the matter was raised, that the inclusion of the allowances was a mistake. The suggestion, in the memorandum, that the allowances whose payment the applicants sought were not intended and the bank did not regard them as part of the applicants' contract is simply untenable. If the respondent did not intend the allowances to be part of the contract, it would have removed them from the contract document at the time it

amended the contract by removing the first option which related to the use of company vehicles.

Further when one examines the contract document filed of record it reveals that 4 000 kilometres was hand written while about 99% of the document was type written. There are also some figures that were hand written such as the salary, annual bonus, clothing allowance, the vacation and occasional leave etc. There can be no doubt that these were inserted into the blank spaces after careful thought. It seems to me that the same applies to the 4 000 kilometres. The suggestion, therefore, that the inclusion of the entitlement of a mileage allowance based on mileage of 4 000 kilometres per month at the applicable standard AAZ rates, was inserted by mistake is equally untenable.

If at all it had been a mistake the respondent would have immediately realized it and would have said so when the applicants first raised the issue on 3 September 2001 failing which respondent would have realized and said so at any other subsequent occasion the applicant raised it in 2001 or early 2002 or even 2003. It therefore seems to me that if at all the respondent had made a mistake then such mistake was grossly unreasonable."

I am inclined to agree with the above observations.

It is apparent in this case that when the appellant made provision for this allowance in the contract of employment there was no question of mistake at that stage. That allowance was what the appellant was prepared to offer the respondents. Later, however, the appellant had a change of heart because of the amounts involved which were calculated using AAZ rates. It considered the allowances as too high and unsustainable.

The position is now settled that an offeror cannot escape liability by establishing that he has made a wrong offer which was accepted – *University of Zimbabwe v Gudza* 1996(1) ZLR 249(S), 253 D-E. The offeror will not be permitted to

rely on the absence of the consensus if the mistake was due to his own carelessness – *University of Zimbabwe v Gudza supra* at p 254B-C.

I accordingly reject the appellant's argument that the court *a quo* erred in rejecting its claim that the allowance had been inserted by mistake.

WHETHER THE APPELLANT COULD ALTER THE RESPONDENTS' CONDITIONS OF SERVICE

The appellant has argued that, in terms of para 11 of the contract of employment, the respondents undertook to subscribe to the bank's policies and procedures currently in use and as revised and amended from time to time. Pursuant to this clause, so it is argued, a revised motor vehicle scheme came into existence with effect from 1 September 2001.

I do not accept that on the basis of para 11 of the contract of employment, the appellant was empowered to remove, without reference to the respondents, such a fundamental right as the entitlement to payment of a monthly mileage allowance. If the appellant's argument were to be taken to its logical conclusion, on the basis of that paragraph, even the respondents' salaries could have been reduced. I do not accept that the bank in amending its policies and procedures was empowered to alter clearly defined contractual rights to payment of a salary and allowances. Clause 3 of the contract of employment clearly states that the respondents were:

> "… entitled to a mileage allowance based on a mileage of 4 000 kilometres per month at the applicable standard AAZ rates."

Such an entitlement could not be changed, altered or amended at whim on the basis that the appellant was entitled to change its policies and procedures from time to time. A party to a contract cannot unilaterally alter the terms and conditions of the contract in these circumstances.

This submission must also fail.

In the result, I find that this appeal has no merit.

The appeal is dismissed with costs.

SANDURA JA: I agree

ZIYAMBI JA: I agree

Chinamasa, Mudimu, Chinogwenya & Dondo, appellant's legal practitioners
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