GIFT BOB DAVID SAMANYAU & 38 OTHERS
versus
FLEXIMAIL (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 4 November, 2010 & 8 June, 2011

Opposed Application

*M Gwisai*, for the applicants
*H Zhou*, for the respondent

MUTEMA J: This matter has trudged a long and tortuous journey. The applicants are former employees of the respondent who were charged with misconduct and dismissed in 2005 following disciplinary processes. The applicants challenged their dismissal right up to the Labour Court in case number LC/H.15/06. The Labour Court found for the applicants on 5 July, 2007 and ordered their reinstatement, alternatively, payment of damages in lieu of reinstatement. The respondent opted to pay damages, caused their quantification on 10 December 2008 equivalent to 5 years salary using the cut off date of 5 July, 2007 and tendered them to the applicants.

The tender, dated 11 February, 2009 from the respondent's legal practitioners addressed to the applicants' erstwhile legal practitioners, Mwonzora & Associates, reads:

> "RE : L MAWERE AND OTHERS v FLEXMAIL : QUANTIFICATION OF DAMAGES
>
> In line with the judgment of the Labour Court handed down on 10 December, 2008, please find herewith our client's cheque in the sum of $12 594-77 (revalued), in full settlement of the amounts due to your clients. A copy of the schedule as to how the various figures were arrived at is attached hereto.
>
> You will note from the computation that the amounts have been revalued and inflation adjusted to February, 2009.
>
> The matter is accordingly closed ..."

The applicants, through their then legal practitioners mentioned above rejected the tender and returned the cheque in question. The attempt at payment was tendered after breakdown of quantification negotiations. The primary reason for rejecting the tender was that the respondent

attempted to pay the damages in Zimbabwe dollars in February, 2009 when the currency had become moribund.

In their amended draft order the applicants are seeking a declaratory order in the following terms:

"IT IS HEREBY ORDERED:

1. The respondent be and is hereby ordered to pay damages in lieu of reinstatement to the applicants in United States Dollars using the initial United States Dollar salary scales which were used by the respondent when it started paying its employees in foreign currency.
2. That the respondent pay the costs of suit".

The main thrust of the applicants' argument, as gleaned from the founding affidavit and heads of argument is as follows:

The applicants have approached this court since it is the only court with inherent jurisdiction, seeking a *declaratur* that the principle of currency nominalism has no place in labour law (a common law principle) as it would be at variance with the Labour Act's aim of achieving social justice. Further, they seek a declaration to the effect that damages in lieu of reinstatement have to be paid in an effective manner, that is in an amount, currency and quantity that achieves fairness as required by the Labour Act. The applicants further seek an order compelling the respondent to pay damages in United States dollars using the initial United States dollar salary scales which were used by the respondent when it started paying its employees in foreign currency i.e. in February, 2009. A successful appellant, so the argument went, should have a discretion to choose payment of damages in the currency that will redress the injury suffered and adequately compensate him/her/ it for the loss as well as fulfil the objectives of the Labour Act. Interpreting the order of the Labour Court to mean payment in Zimbabwe dollars would amount to making the order a *brutum fulmen* because the Zimbabwe dollar, by the time of the tender, had became *de facto* valueless and useless. This would amount to non-payment thereby reducing court orders into empty judgments which is both unfair and against public policy.

The respondent's opposition was premised on the following main planks:

1. The matter is *res judicata* in that the Labour Court handed down judgment in case number LC/H/15/06 ordering the respondent to either reinstate the applicants or pay damages in lieu thereof. Following quantification of such damages, the amount due and payable was duly remitted to the applicants. In the event, this application disguised as an "application for

a declaratory order" is merely meant to deal with the same issues which were concluded by the Labour Court.

2. The issue brought before this court is an employment/labour issue and by virtue of s 89 (6) of the Labour Act, [*Cap 28:01*], the jurisdiction of this court is ousted.
3. What the applicants are asking this court to do is to:
   3.1 ignore the salaries payable to the applicants as at 5 July, 2007 when an order of reinstatement was made by the Labour Court;
   3.2 depart from the current position of law and order payment of damages based on a date after the order of reinstatement was made;
   3.3 ignore the lawful currency that governed the contractual relationship between the parties as at 5 July, 2007 (which required payment of salaries in Zimbabwe dollars) and set aside that trite position to enable the applicants to be paid afresh, damages in lieu of reinstatement in US dollars. This is despite the fact that as at 5 July, 2007, the applicants' employment contracts entitled them to remuneration in Zimbabwe dollars and not in US dollars sought by the applicants.
4. The issues raised by the applicants have been dealt with by the courts on many occasions and are not unique to the applicants.

I am mindful of the fact that what the applicants are inviting this court to do, as submitted by Advocate *Zhou*, boils down to two pertinent issues, viz:

1. To do that which Parliament should, i.e. to make law by repealing the common law principle of currency nominalism; and
2. To "overrule" those decisions of the Supreme Court which have already made the point that in quantification of damages in respect of labour disputes, the rates that are applicable are those that applied at the time of dismissal or suspension – See *Redstar Wholesalers* v *E Mabika* SC 52-05 and *First Mutual Life Limited* v *Jackson Muzivi* 2000 (1) ZLR 325 (S).

Points 3 and 4 of the respondent's opposition cited above are interwoven with point 2 cited immediately above so I shall deal with them *pari passu* later on. First, let me deal with points one and two of that opposition quoted above. They allude to the issue of *res judicata* and ousting of this court's jurisdiction by virtue of s 89 (6) of the Labour Act.

As regards the issue of *res judicata* I have not been persuaded that it is applicable in the instant case. In order to successfully ground such a defence, the litigant raising it must show that the

dispute has been conclusively settled on the merits by a court of competent jurisdiction and that the two actions are between the same parties, concerning the same subject matter founded on the same cause of complaint. See *Gwaze* v *National Railways of Zimbabwe* 2002 (1) ZLR 679. The original dispute before the Labour Court was concerned with the lawfulness or otherwise of the applicants' dismissal and the quantum of damages payable in lieu of reinstatement. That court did not deal with the issue of the form of currency of payment, which is the gravamen of the present application. That issue only arose following the introduction of the multi-currency regime in January/February 2009 – well after the Labour Court had already handed down its judgment which was silent on the currency to be used, thereby providing the basis of discretion being asserted by the applicants. The present application seeks not to reverse, amend or modify the order that the applicants be paid five years salary as damages for the unlawful dismissal, but simply seeks a declaratory order that in view of the introduction of the multi-currency and the judicial and State recognition of the *de facto* redundancy of the Zimbabwe dollar, a successful litigant may choose to be paid in any applicable foreign currency in the country and that payment in a moribund currency is not an effective fulfilment of the court's order. The Labour Court, not being endowed with inherent jurisdiction to make such a declaration, it cannot be said that the dispute was dealt with on the merits let alone conclusively settled.

Regarding the issue that this court's jurisdiction is ousted by s 89 (6) of the Labour Act, I am unable to subscribe to this view. The subsection cited provides that:

> "(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subs (1)".

Subsection (1) has six paragraphs listing the functions to be exercised by that court to the exclusion of all other courts. Those functions do not include issuing declaratory orders. This meant that the Labour Court has no inherent jurisdiction to issue declaratory orders and in the event, the jurisdiction of the High Court remains intact. In *Sibanda & Anor* v *Chinemute N O & Anor* HH 131-2004, MAKARAU JP (as she then was) put it aptly thus:

> "Thus, the power to issue a declaratory order is not available in all courts that apply common law. It is specific to this court ...
>
> It is common cause that the Labour Court has not been specifically empowered to issue declaratory orders as this court has been. It cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction"

I am in respectful agreement with this view.

I now turn to the other points raised in opposition cited *supra*.

Regarding the point raised that the applicants are inviting this court to do what Parliament should, *viz* to make law by repealing the common law principle of currency nominalism, it is settled that it is not impermissible of the Judiciary to make law by way of decided cases if an opportunity presents itself to plug a legislative gap especially where not to do so will leave many an unlawfully dismissed employee languishing in the asylum of financial misery. The applicants are not asking this court to declare that the principle of currency nominalism no longer has any space in our common law generally. They are simply asking the court to pronounce that following the introduction of the multicurrency regime in January/February, 2009 and the concomitant disuse of the Zimbabwe dollar which had become moribund as a result of economic and many other circumstances which had conspired to facilitate this major unprecedented conflagration, and Parliament has remained in a near catatonic state in addressing this occurrence, this court should declare that in the realm of employment relations, the principle of nominalism has for now, no place until economic normalcy has been restored.

This court is enjoined to take judicial notice of the reality that immediately before and after the country adopted the multicurrency regime in about February, 2009, the Zimbabwe dollar was so valueless that it had ceased to be the medium of exchange in all financial transactions. To therefore have an employer tender damages in lieu of reinstatement in the form of Zimbabwe dollars in February, 2009 as what the respondent did to the applicants in *casu* is tantamount to giving someone an ordinary stone and expect him/her to transact using that stone as a medium of exchange. It does not make any sense in any sane society. Should Zimbabwe continue being immutable to change on this score? On principles of equity, this court should tread a path that will avoid iniquity and injustice where legislative intervention is not forthcoming.

The words of GUBBAY ACJ (as he then was) in the case of *Zimnat Insurance Company Limited* v *Chawanda* 1990 (2) ZLR 143 (S) at p 153 paras D-F regarding judicial law-making bear useful repetition for clarity:

> "Even if confirmation of the appellant's liability to the respondent should meet with disapproval as being an encroachment upon the discretion reposed in the law-giver to change the law, we would strongly defend the Judiciary's right to do so. Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs, and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease

to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions".

After quoting the celebrated American jurist, Oliver Wendell Holmes' opening page of his famous work, The Common Law which reads:

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a Book of Mathematics".

The learned ACTING CHIEF JUSTICE at p 154 paras A-E of the *Zimnat* case *supra,* went on to say:

> "Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process. The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand".

The learned ACTING CHIEF JUSTICE then quoted a famous passage by LORD ATKIN, referring to judicial precedents:

> "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred".

The quotations cited above are not only attractive and persuasive but fit the instant scenario of the application before me like a fiddle. The principle of currency nominalism works fairly in an economy which can be described as normal or stable or at the very worst, in which inflation is not hyper, not like in an environment with a runaway inflation as was the case in this country in the period immediately preceding the introduction of the multi-currency regime. After introduction of multiple currency in February, 2009 it is beyond cavil that the Zimbabwe dollar died a natural death by disuse. To then give someone such currency which no one nationwide was prepared to accept in

any transaction, let alone beyond our borders, as damages in lieu of reinstatement, and after having laboured for the employer for periods ranging between 25 and 46 years like what the respondent did in casu is not only immoral but an infringement of a human right. If judges continue to cling to their precedents in such a scenario of social and economic change, like the grasp of an epileptic during a fit, they will certainly be sacrificing the fundamental principles of justice and fairness for which they stand.

I am prepared in the instant case not to let the ghosts of the past stand in the path of justice clanking their medieval chains but to pass through them undeterred in the interests of justice and fairness.

In any event, the assertion that by granting the order sought would be usurping the role of the Legislature has no legal leg to stand on for the issuing of orders in foreign currency has been decisively dealt with before locally, regionally and internationally. In *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) GUBBAY JA (as he then was) was of the view that in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative approaches taken in England and South Africa, making orders in foreign currency had to be adopted in order to bring Zimbabwe into line with other foreign legal systems. In that case the court relied on the House of Lords decision in *Owners of the MV Eleftherotria* v *Owners of the MV Despina* R (1971) 1 ALL ER 421 (HL).

In South Africa, a similar approach was followed in the case of *Elgin Brown & Hommer* v *Dampskibsselskabet Torm Limited* 1988 (4) SA 671 (NPD).

After reviewing the three authorities cited immediately above, MAKARAU JP (as she then was) awarded delictual damages in foreign currency to a party who had purchased a house in local currency against a seller who had failed to effect transfer as a result of a prior sale to another party in *Kwindima Fabiola* v *Mvudura Louis* HH 25-2009. At p 5 of the cyclostyled judgment the learned judge reasoned as follows:

> "It appears to me that the issue I have to determine is whether to extend the approach that has been taken in the *Makwindi* case and be innovative enough to suggest that where a loss has been suffered and can be calculated in both the local and in a foreign currency, the court has a discretion to award judgment in that currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. It would then follow that where that currency is the foreign currency as opposed to the local currency, then judgment should be in the foreign currency for to award damages in the local currency, where the local currency has been rendered valueless by inflation might be to deny a plaintiff the redress that he or she seeks".

Adopting the approach taken in the *Kwindima* case *supra*, I am persuaded that in the instant case, in order to adequately compensate the applicants, the currency which the respondent must pay them as damages for unlawful dismissal in lieu of reinstatement should be in foreign currency. I say so because in a multi-currency regime where the local currency has become moribund, to award damages to an unlawfully dismissed employee who has toiled for the employer for between 25 and 46 years in such local currency is not only clinging to a positivist jurisprudential approach but iniquitous and offends against all known tenets of justice in a civilised and democratic society. Such an award should not be a *brutum fulmen* but must be meaningful and beneficial to the beneficiary. Even on an international plane, in terms of Article 10 of the I.L.O. Convention 158 Termination of Employment Convention 1982, adequate compensation should be paid for unjustified loss of employment. Certainly payment in Zimbabwe dollars in this era will not amount to adequate compensation.

The last point to deal with relates to points 3 and 4 of the respondent's opposition as encapsulated in the contention that the applicants are inviting this court to "overrule" those decisions of the Supreme Court which have already made the point that in quantification of damages in respect of labour disputes, the rates that are applicable are those that applied at the time of reinstatement as held *inter alia*, in the case of *Redstar Wholesalers* v *Mabika* SC 52/05 and *First Mutual Life Limited* v *Jackson Muzivi* SC 09/07.

In the instant case, the applicants, in applying for payment of their damages to be made in US dollars want the rate applicable to be "the initial United States dollar salary scales which were used by the respondent when it started paying its employees in foreign currency". In support of their contention in this regard, the applicants argued in their heads of argument in this vein:

> "As to a potential objection of what would be the appropriate salary in foreign currency to use, this is not an insurmountable obstacle. Reference may be had to the salary scales of the first month that the respondent first started fully and wholly paying its employees remuneration in foreign currency. Alternatively is to look at the first National Employment Council (NEC) salaries in foreign currency and applying those. After all these are exactly the salaries that the applicants would have been earning if they had been reinstated rather (than) being paid damages in lieu of reinstatement. What is called for here is not mathematical precision computation but substantive justice and fairness that in the words of OMERJEE J in *Stanmarker Mining (Pvt) Ltd* v *Metallon Gold Corporation*, places the successful party 'as nearly as possible in the same position as he would have occupied if the contract had been performed ...'".

*Prima facie*, the argument is titillating. The citation of the *Stanmarker* case *supra* is HC 3074/04. Therein OMERJEE J made the pronouncement when holding that regarding judgments sounding in foreign currency "it is the plaintiff's prerogative to claim in a currency that will most

truly express his loss and accordingly most fully and exactly compensate him for that loss. However, in order to succeed a claimant is required to lay a foundation that supports him claim". In that case the court found that the plaintiff had laid an adequate foundation establishing its entitlement to damages in United States dollars because the defendant was selling the disputed shares (which it claimed were valued in Zimbabwe dollars) in United States dollars including their final disposal.

I am constrained to shy away from the applicants' contention in this connection for two reasons. Firstly, the pronouncements by OMERJEE J in that case were confined to the choice of currency by the claimant which I have already disposed of *supra* in the applicants' favour and not to the rate of salary to invoke when calculating damages in lieu of reinstatement.

Secondly and more importantly, based on the doctrine of *stare decisis*, this court is bound by the plethora of Supreme Court decisions to the effect that in calculating damages for unlawful dismissal in lieu of reinstatement, the rate of salary to be used is the one pertaining at the date of the reinstatement order; certainly not the one obtaining at a later date.

Since I have already held that the applicants must be paid their damages not in Zimbabwe dollars but in foreign currency of their choice (and they chose the United States dollars), the rate of salary to be used in the calculation of the damages should be the one obtaining as at 5 July, 2007 (the date of the reinstatement order) but being the official rate of exchange of the Zimbabwe dollar – United States dollar equivalent.

I also find that the respondent, in the face of the stark economic reality obtaining at the time of its tender of the damages, was quite unreasonable in refusing to yield to reason. It should accordingly pay the applicants costs of suit. In any event costs always follow the result.

In the event, there is need to amend the applicants' amended draft order to read as follows:

"IT IS HEREBY ORDERED

1. The respondent be and is hereby ordered to pay damages in lieu of reinstatement to the applicants in United States dollars using the official rate of exchange of the Zimbabwe dollar-United States dollar equivalent obtaining on 5 July, 2007.
2. That the respondent pay the costs of suit".

*Zimbabwe Labour Centre*, applicants' legal practitioners
*Kantor and Immerman*, respondent's legal practitioners