

ELISHA SHIRIPINDA  
versus  
CITY OF HARARE

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 15, 19 & 18 May 2017, 16 June 2017 & 5 July 2017

**Trial action**

*B Furidzo*, for the plaintiff  
*K Kaseke*, for the defendant

DUBE J: The plaintiff claims \$286 070.71 being outstanding balance of an exit package.

The plaintiff was employed by the defendant as a Senior Staff Officer Administration. He was put on forced leave resulting in him approaching the Labour Court seeking to revoke the suspension and reinstating him. An order by consent was granted by the Labour Court on April 2008. The plaintiff submitted that the defendant has failed to comply with the consent order and approaches the court for an order compelling the defendant to fully comply with the agreement between the parties. The defendant's position is that the exit package was fully paid by 2008 and it has fully paid in terms of the order. It maintained that the plaintiff is not entitled to the current salary as claimed or at all.

The following issues were referred to trial.

- (a) Whether or not the defendant owes the plaintiff an outstanding balance as part of the exit package, and if so, the quantum.
- (b) Whether or not the plaintiff is still on the defendant's payroll.

The plaintiff testified in his own case. His evidence is as follows: On 14 March 2008, the Labour Court awarded him an order by consent. It paid 3 months' notice pay, pay for each year served, and relocation pay by July 2008 and paid the last item of the package on 2 May 2011. The defendant paid US\$65 000, 00 in December 2011. He remains on the defendant's payroll because there are outstanding salaries. The defendant still owes him \$10

533, 36. He engaged an accountant to work out how much he is owed. He insisted under cross-examination that he remains on the payroll until the exit package is fully paid. The witness testified generally well. The witness did not delve much into the details of his claim having them to be dealt with by his accountant.

Kitara Kennedy Kujinga testified in favour of the plaintiff's case. His testimony is as follows. He is a chartered management accountant. He used the consent order for quantifying the defendant's claim. The defendant paid part of the exit package in 2008. He was not given the land, vehicle, cell phone and line and fuel. According to the consent order, he remained on the defendant's payroll until the exit package was fully paid. An amount of \$65 000, 00 was paid in December 2011. The defendant ignored the years of service he put in from July 1984 to the date when they paid that amount. The amount of \$65 000, 00 was calculated using the Zimbabwe dollar salary of \$1 813,97 instead of \$2 095, 95 leaving a shortfall of \$7 008, 70 not \$10 533, 36 as given by the defendant. The witness stated that the plaintiff's claim is up to December 2015 based on the US dollar salary. It stated that the plaintiff is owed \$169 727, 35 from January 2012 to December 2015. He stated that the defendant acknowledged that the plaintiff is on their payroll and this entitles him to a gross salary paid in US dollars which must be used to calculate what is owed to the plaintiff. When they paid the plaintiff in 2011 they used an old salary and that's why a revision was done. There is a balance of \$7 008, 70. As long as there is any balance outstanding to the plaintiff, he remains on Council's payroll until the exit package is fully paid.

The court will not summarise his evidence related to payment of monies in terms of clauses (i) to (iv) and (vi) to (xi) because the plaintiff conceded during the trial that the plaintiff's claims are misplaced. The witness is an expert witness and it won't be necessary to comment on his credibility.

Vincent Tizirepi Hama testified on behalf of the defendant. He is defendant's payroll administrator. He stated as follows. All monetary payments were made on 31 July 2008. The defendant was paid notice pay, service pay, and relocation pay, and gratuity, encashment of leave days and long service of 20 years based on his gross salary. The vehicle, cell phone and line and stand remained outstanding. After this payment the defendant was not obliged to continue to make salary payments to the plaintiff. The payments made were in full and final settlement of the monetary value of the exit package. The items remaining were non-monetary. The non-monetary items were not paid but given. The defendant continued to pay the plaintiff his salary and benefits due to a misinterpretation and understanding of clause 12.

The whole amount outstanding had already been paid in July 2008. The admission of US\$10 032-35 emanated from an error made in which \$65 000-00 was paid when it ought not to have been paid. The witness testified well and maintained his version under cross-examination.

The background to this application goes like this. The plaintiff obtained a consent order from the Labour Court re his exit package. He approached the Labour Court for quantification of the consent order for purposes of enforcement. The Labour Court declined to deal with the application and dismissed his application on the basis that it was *functus officio*. An appeal was lodged against this refusal with the Supreme Court and the court declined to deal with the matter. It is at this stage that the plaintiff instituted this action.

An issue arose regarding the jurisdiction of this court to entertain this matter. The provisions of the Labour Act [Chapter 28:01] do not confer jurisdiction on the Labour Court to quantify an order made by consent of both parties. The Labour Court is a creature of statute whose powers derive from and are confined to the four corners of the relevant statute. The court can only exercise powers specifically conferred on it by the relevant statute. A claim for breach of contract and enforcement of an order is a debt collection matter and is a civil claim, see *Chiweshe and Ors v Air Zimbabwe Holdings (Pvt) Ltd* 2014 (2) ZLR 837 (H) where the court remarked as follows,

“The first issue raised is that this court has no jurisdiction on the ground that the plaintiffs’ issues are labour disputes which should be handled by the Labour Court. Notwithstanding the fact that the first and second plaintiffs filed summons when they were still employees of the defendant, it is accepted that they are now ex-employees. The plaintiffs are now claiming outstanding salaries from a former employer. Outside the employment arena which is generally governed by the Labour Act, [Cap 28:01] (“the Act”), this becomes a purely debt collection matter. In that situation, depending on the amount to be collected, the plaintiffs are free to approach either the High Court or the Magistrates Court. I therefore believe the plaintiffs *in casu* are already in the right forum”.

The parties entered into an order by consent which essentially is an agreement between the parties. The plaintiff’s claim is based on allegations of breach of contract. The plaintiff became entitled to assert his rights in a civil court upon the signing of the consent order. Once the plaintiff ceased to be an employee of the defendant by entering into an agreement over his exit package with the employer, the matter ceased to be a labour matter. This is a common law claim and the court is being called upon to apply its common law powers and apply pure principles of civil law. The spat is practically a contractual dispute between the parties. The High Court is a court of inherent jurisdiction and hears all matters except those that are the preserve of other courts and tribunals and where its jurisdiction is expressly

ousted. Its jurisdiction is in this instance unfettered. The High Court has the preserve to deal with claims for breach of contract and enforcement of an order by consent stemming from the Labour Court. A litigant who is seized with an order by consent from the Labour Court and seeks its quantification for purposes of enforcement is off course when he approaches the Labour Court for relief.

The plaintiff's case is premised on the contention that the defendant breached the contract in that it failed to pay the exit package and hence was liable to pay the plaintiff's salary in terms of item (xii) until the package was paid in full. The defendant's position is that its acknowledgement of indebtedness resulting in the plaintiff being paid exorbitant amounts was erroneous. It was submitted on its behalf that the city authorities misread the consent order resulting in it continuing to pay the plaintiff well after the exit package had been paid. It submitted that the plaintiff was overpaid and is not owed any money. The defendant contended that when one considers the extra \$65 000.00 paid which covers the period July 2008 to May 2011, there is no doubt that the plaintiff was over paid. The plaintiff concedes that by 29 July 2008 all the monetary clauses of the package of the claim including, 3 months' notice pay, 3 months relocation allowance, 3 months' pay for each year served, gratuity and 20 years long service award, service pay and encashment had been paid and cannot be sustained. It accepts that the full package was paid by May 2011. It submitted that the plaintiff did not pay salaries for the period July 2008 to May 2011 when the last item was delivered. The plaintiff abandoned the idea he had peddled during the trial that he was on the defendant's payroll arguing instead that for as long as the outstanding salaries were not paid he was required to remain being paid and the monthly salary remained due and payable until it was cleared. He contended that the defendant continued to pay him his salaries and that this was the parties' interpretation of the order and the intention of the parties is evidenced by their conduct after the package was agreed to and hence the defendant is bound by the position it assumed.

The court is being asked to interpret the terms of the consent order. The court must determine if the plaintiff is owed any outstanding balance and if so how much. The determination of this issue rests on an interpretation of the order by consent order. The law is that a court interpreting a contract is required to consider the language of the terms of the contract in order to discern the intention of the parties. The court must give to the contract its ordinary grammatical meaning and effect. The remarks of the court in *Burger v Central Africa Railways* 1903 TS 571 are apt. The court remarked as follows,

“It is a sound principle of law that when a man signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature”

Another case in point is *Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 43 @ p 47, where the court remarked as follows,

“Now, this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction, and in a suit between parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such a document be contradicted, altered, added to or varied by parole evidence”.

See also Hansen *Schrader & Company v de Gasper* 1903 TH 100 the court reiterated this approach and stated thus,

“Now, it is not for this court to speculate as to what the intentions of the parties were when they entered into a contract. That must be gathered from their language and it is the duty of the court as far as possible to give, effect to the language used by the parties .....”

A court interpreting terms of a contract is required to first apply the literal rule of interpretation in examining the terms and language of the contract and only employ other cannons of interpretation where the words used are ambiguous. The court must consider the meaning of the words used and their effect by examining the language used in the contract and give effect to them. It must have regard to the ordinary grammatical meaning of the words used and should do so unless the meaning given results in an absurdity. It must give effect to the intention of the parties to the contract. The court may not make use of any extrinsic evidence that has the effect of redefining the terms of the contract the parties resolved to enter into. It is not the responsibility of the court to make contracts for the parties.

The consent order dated 1<sup>st</sup> April 2008 is worded in the following terms;

“Whereupon after perusing documents filed of record and hearing counsel.

IT IS ORDERED THAT:

1. The applicant’s exit package shall be as follows
  - i. 3 months’ notice pay at current gross monthly salary.
  - ii. 3 months’ pay for each year served based on current gross monthly salary.
  - iii. 3 months’ pay relocation allowance based a current monthly gross salary.
  - iv. Provision of a motor vehicle, if in disrepair, Council to repair motor vehicle to the satisfaction of V.I.D or an A.A.Z certificate would suffice.
  - v. Three months’ pay as gratuity.
  - vi. Payment of medical aid for 12 months
  - vii. Provision of a cell phone and line
  - viii. Encashment of leave days outstanding
  - ix. Tax exemption from the whole package per tax regulations.
  - x. 20 years long service award based on current salary at current Council formula
  - xi. A commercial stand
  - xii. Monthly salary to be paid up to the date of payment of the package.”

Clause (xii) makes provides that a monthly salary be paid up to the date of payment of the package. The meaning of the clause is very clear from the language employed. The effect of clause (xii) of the exit package is that if the exit package remained unpaid, a monthly salary would be paid to the plaintiff up to the date of payment of the package. This entails that if any one of the items remained outstanding or was partially paid, then a salary would be required to be paid until the package was paid. Once the full package was paid the obligation to pay the plaintiff salaries would cease. The grammatical meaning of clause (xi) is fairly clear and straight forward and there is no ambiguity in it. Clause (xii) is similar to a damages clause. The order by consent has no effect of reinstating the defendant nor does it entail that he remains on the defendant's pay roll. The idea was not to reinstate the plaintiff.

The order does not make reference to a salary and benefits associated with the salary. If the parties had intended that this be the position they would have specified so in the exit package. That was clearly not the intention of the parties. The monthly salary was not meant to carry with it the benefits most of which are related to actual service. The salary is only a yardstick by which he would be paid in terms of the order. The plaintiff admits in his closing submissions that clause (xii) is a damages clause. Where an employee has been laid off and agrees to an exit package, a condition entitling him to be paid his salary does not include payments of benefits unless the agreement specifically states so. The defendant was only entitled to a salary until the exit package was paid.

The last item of the package to be paid is the land which was delivered on 8 May 2011. Items (i) to (xi) of the consent order had by that date been met. That is the time when the package was paid and in full. The plaintiff was entitled to be paid his salary for the period July 2008 to May 2011. Once the full package was paid, the plaintiff ceased to be entitled to any further payment of salaries. Just because the salary was not paid in full during that period does not give the defendant an entitlement to continue being paid a salary

That the defendant continued to pay him a salary does not assist his case. The \$65 000.00 paid in December 2011 covers the period July 2008 to 2011 and more. I find therefore that the plaintiff was paid his salary in full for the period when the salary was in abeyance. I reject the plaintiff's contention that for as long as the salary was not cleared he continued to be entitled to a salary. I am also not persuaded by the defendant's contention that once all the monetary aspects of the order were complied with on 29 July 2008 that is when the package was paid in full.

The defendant submitted that its officials adopted a wrong position when it paid out salaries and benefits to the plaintiff based on an erroneous interpretation of the consent order and paid the plaintiff salaries and benefits well after the package had been fully paid. During closing submissions, the plaintiff seemed to be shifting goal posts and sought to rely on the fact of a wrong interpretation rather than seek a correct interpretation of the order. In *Tregers Industries (Private) Limited v Commissioner General of the Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H) @ 70 the court remarked as follows,

“The applicant argued that the respondent is “estopped” by the actions of his subordinates from denying that the applicant’s interpretation of section of the Act is correct. I do not accept this submission. What the applicant is saying is that irrespective of the correct interpretation, the fact that the respondent’s employees accepted that the goods in question were zero rated estops the respondent from arguing to the contrary. As a matter of law that cannot be correct. If an interpretation of the law is not correct, then that interpretation is not correct. The fact that respondent’s employees may not have looked into the matter more carefully cannot estop the respondent from arguing that such interpretation is not correct”. See also *Delta Corporation Ltd v Zimbabwe Revenue Authority* HH 621/15.

Where parties to a contract agree to terms of a contract and one party adopts a wrong interpretation of the contract, the party relying on a wrong interpretation of the contract is not estopped by its wrongful actions, stemming from a wrong interpretation of the contract, to seek a true interpretation of the contract. Such a party is not estopped from asking the court to give the contract its true and proper meaning. It is the duty of the court upon considering the terms of the contract, to give its terms a true meaning and effect. A wrong interpretation of a contract does not become correct simply because one party wants to rely on it. A litigant is not barred from seeking a revision of the figures where it is shown that it laboured under some mistaken belief.

A look at the breakdown of the monies paid shows that the plaintiff was paid substantial amounts of money after May 2011 and the defendant acknowledged owing him further salaries and benefits. The plaintiff laboured under the mistaken belief that it was still required to pay salaries to plaintiff after the payment of the full package in May 2011. The plaintiff’s argument that the defendant is bound by the erroneous calculations lacks merit. The plaintiff has accepted that the defendant made an error when it acknowledged that it owed \$10 533.36 instead of \$7008, 70. The plaintiff abandoned the better part of its claim due to a wrong interpretation of the order. It is prepared to accept those errors because it is owed but will not acknowledge that it was overpaid and argues that it is the defendant’s fault. In fact, both parties laboured under a wrong interpretation of the order. No law binds the defendant to that erroneous position. The defendant is not estopped from asking the court to

give the contract its proper meaning. The court will not allow the plaintiff to insist on reliance on a wrong interpretation of the order but give the order its proper interpretation. The defendant made an error ,it is entitled to a proper interpretation of the package.

An amount US\$65 000 was paid in lieu of salaries up to November 2011.The plaintiff promised to pay a further \$10 533.33 being salaries which the defendant admitted and gave out resulted from its miscalculation of figures .The plaintiff recalculated his figures and submitted that the calculations of the defendant with respect to the \$10 533. 33 were erroneous. The plaintiff persists with a claim for \$7008.70 only and outstanding salaries from January 2012 to the date of judgment. The plaintiff was only entitled to salaries up to May 2011.The defendant erred in calculating his salary including his benefits. The \$7008.70 claimed relates to arrears said to be outstanding after payment of \$65 000.00. The plaintiff has not shown any entitlement to payment of any salaries after May 2011. After May 2011 the plaintiff became entitled to interest on the amounts outstanding only. The defendant's officers were mistaken on the interpretation of the order and laboured under the mistaken view that the defendant was still under an obligation to pay salaries after May 2011 and further that he was still entitled to benefits and hence erroneously paid him his salary and benefits . The fact that the defendant continued to pay the plaintiff his salaries and benefits does not assists the plaintiff's case. The plaintiff wanted to make a meal out of the fact that he was misled to believe that he was owed a lot of money.

Once the plaintiff was laid off, he seized to be entitled to a bonus, encashment of leave days, service pay a bonus and like other benefits which could only accrue to him if he was still serving. The plaintiff was entitled only to a monthly salary until the package was paid in May 2011 after which he seized to be entitled to any salaries. Subsequent payments for salaries after this period were made erroneous. The \$65000.00 was not correctly calculated as it includes long service award payment for 25 years which is not provided for in the package. The package provided for a 20 year long service award only. The money paid already covers the period over which he was entitled to a salary. The plaintiff has not established any right or entitlement to further salaries. His claim fails .In the result, the plaintiff's claim is dismissed and I accordingly order as follows;

1. The plaintiff's claim is dismissed.
2. The costs of this trial shall be borne by the plaintiff.

*J Mambara & Partners*, plaintiff's legal practitioners  
*Kanokanga & Partners*, defendant's legal practitioners