HB 65-18
HC 1831/17

THEMBINKOSI KHUMALO
versus
MUNICIPALITY OF VICTORIA FALLS
and
THE LOCAL GOVERNMENT BOARD

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 7 MARCH 2018 AND 15 MARCH 2018

Opposed application

R Moyo-Majwabu for the applicant
K Ngwenya for the 1st respondent
P Taruberekera for the 2nd respondent

MATHONSI J: This application centres on the validity and enforceability of a collective bargaining agreement entered into between a Municipality and its employees represented by their trade union. It evolves around the authority, if any, of either the Minister of Local Government, Public Works and National Housing and/or the Local Government Board to regulate the contracts of a local authority and to reject or amend such contracts. It finally dovetails on the ability of the Local Government Board, in its oversight responsibility over municipalities, to lawfully direct a municipality to refrain from performing its contractual obligations towards a retiring employee.

The facts are that the applicant was employed by the first respondent in various capacities from 1 October 1991 until he retired from its employ on 30 November 2016, an impressive record of service spurning over 25 years. At the time of his deserved retirement he held the lofty position of Town Treasurer, a post he held from the time of his elevation by letter dated 11 March 2011. Prior to the applicant's retirement, the first respondent had negotiated with its employees' trade union a collective bargaining agreement (CBA) containing clause 21 providing for gratuity for employees who had completed at least five years of continuous service to the municipality on termination of their employment. Irrespective of the circumstances of such

termination of employment such employees would be paid a gratuity calculated as a percentage of the employee's current (yearly) emolument multiplied by the number of years served. The clause also provides a formula for the computation of the gratuity depending on the number of years served. The CBA was registered with the Registrar of Labour on 5 May 2010 during the tenure of the applicant's employment.

Towards the applicant's retirement date the council of the first respondent held an ordinary full council meeting number 7 of 2016 on 30 August 2016 during which it deliberated on the retirement benefits of the applicant in terms of its conditions of service contained in the CBA I have referred to. A resolution was reached at the conclusion of those deliberations and recorded in the minutes of that meeting thus:

"It was resolved:

- That Council proceeds to process Mr T. E Khumalo's gratuity as provided for in terms of his contract and the Victoria Falls Municipality Conditions of Service-2008.
- That Council gives to Mr T E Khumalo the laptop, cellphone and the Toyota D4D AAE 6898 which was issued to him, at no cost to him, and
- That the entire retirement package be submitted to the Local Government Board for approval.
- That Council should look at its Management Vehicle Policy with the hope of adopting the Bulawayo City Council Vehicle Policy Scheme."

The retirement package being offered to the applicant had been computed and was tabled before the same council meeting which approved it including a gratuity of $236 250-00. When the package was sent to the second respondent for approval, it hit a brick wall. The second respondent refused to approve the payment of the gratuity to the applicant even though it approved the rest of the package. The bad news was communicated to the applicant by letter of 6 June 2017 written by the Town Clerk, prompting the applicant to bring this application seeking an order setting aside the resolution of the second respondent rejecting the decision of the first respondent on payment of his gratuity and that the gratuity be paid to him as per the council resolution of 30 August 2016.

Although the first respondent filed opposition, it made it clear that in withholding the gratuity, it had acted at the instance of the second respondent. For that reason it pleads a no contest and would abide the decision of this court. It is surprising that the second respondent's opposing affidavit was deposed to by George Sifihlapi Mlilo, the then Permanent Secretary in

the Ministry of Local Government, Public Works and National Housing who stated that he was authorized to depose to the affidavit. He did not state by whom he was so authorized given that he is not a member of the second respondent, an entity established in terms of section 116 of the Urban Councils Act [Chapter 29:15] and is headed by a chairperson.

Be that as it may, Mlilo stated that gratuity should be calculated as a percentage of the employee's current monthly emolument multiplied by the number of years served. The first respondent's conditions of service erroneously provide for gratuity calculated on yearly emolument. He stated that the error in the conditions of service "has gone unnoticed over the years" which presumably the second respondent sought to correct by disapproving payment of gratuity to the applicant even though it is common cause that during the same year that the applicant resigned several other employees were paid their gratuities in terms of the "error." Only the applicant was treated differently.

Mlilo stated that the amount due to the applicant as gratuity is "too steep and unreasonable" and would cripple the activities of the first respondent. He then suggested that as the first respondent's conditions of service were only registered in 2010, gratuity should be reckoned from the date of registration up to the date of retirement based on monthly emolument and not yearly emolument. The contents of Mlilo's opposing affidavit are consistent with the remarks of the then Minister Saviour Kasukuwere as captured in a newspaper article in the Newsday publication of 10 October 2016 which quoted the Minister ranting and raving that he had rejected the retirement package of the applicant after agreeing with Mlilo that they would stop the payment.

The question which arises therefore is: Was the Minister and the Permanent Secretary entitled to usurp the functions of the second respondent, an institution appointed by the Minister in terms of the Act and which carries out specific oversight duties over municipalities provided by statute? Allied to that is the validity, for purposes of this application, of an opposing affidavit deposed to by an overarching Permanent Secretary in a suit in which his ministry is not a party but the Board is? Apart from the quite revealing interview given by the Minister to Newsday what business really does Mlilo, as Permanent Secretary, have deposing to an opposing affidavit on behalf of a properly constituted and fully-fledged Local Government Board?

Mr *Majwabu* for the applicant submitted that Mlilo is not a member of the second respondent who is not expected to know how it arrived at the decision it took concerning the approval of the applicant's terminal benefits. For that reason he cannot swear positively to the facts of the matter. He simply has no capacity to file opposition on behalf of the second respondent, lacking as he is in *locus standi in judicio*. Mr *Taruberekera* who appeared for the second respondent made quite interesting submissions in response. According to him, the second respondent is not a legal *persona* or entity, even though no issue was taken about the citation or joinder of the second respondent in the opposing affidavit. He submitted that whatever is done by the second respondent is legally done through the Minister. As such the Permanent Secretary, as head of the ministry, is automatically authorized to depose to the opposing affidavit.

It is needless to say that not a single legal authority was cited by Mr *Taruberekera* in support of that proposition. The second respondent is constituted in terms of section 116 of the Urban Councils Act [Chapter 29:15] and consists of seven members appointed by the Minister chosen from a number of interest groups like the Urban Councils Association which submits a list from which one member is chosen, another member is chosen from a list submitted by the town clerks, one from a list submitted by the Municipal Workers Union, one is a member of the Public Service Commission and two are appointed for their ability and experience in public administration and are or have been employed by a local authority or the Public Service for not less than fvie years in a senior post. From that pool the Minister appoints a chairperson and another as vice-chairperson.

In terms of section 123 the second respondent's functions include *inter alia* providing guidance for the general organization and control of employees in the service of councils, to ensure the general well-being and good administration of councils staff and make model conditions of service for adoption by councils. There can be no doubt that the second respondent is an autonomous body which stands on its own and has specific functions which it discharges independently of the Minister or his Permanent Secretary. It is fully equipped to sue and be sued in its own right and is accountable for its actions as a stand-alone body.

Just the thought that the Ministry takes the view that the second respondent is nothing but an appendage of the Minister or his office means that we must really be afraid. If the second

respondent does not exist independently of the Minister who appointed it and is a mere extension or representative of the Minister which is not even allowed, through its chairperson or other member, to defend a suit or to defend a decision it has purportedly taken means that every rule of corporate governance has been threaded. In fact one may be forgiven for surmising that the impugned decision was not even taken by the second respondent but by those who have arrogated to themselves the statutory duties of that entity to the extent of seeing nothing wrong with deposing to an affidavit on its behalf. Legally the opposition is clearly defective, if for no other reason than that Mlilo could not represent the second respondent when he is not its member.

Not that there is any merit in the opposition itself. It is common cause that the first respondent's conditions of service, in terms of which the disputed gratuity should be paid to the applicant, are a product of negotiations at the workplace which gave rise to a collective bargaining agreement concluded in terms of the provisions of the Labour Act [Chapter 28:01]. It is also common cause that the said collective bargaining agreement was registered with the Registrar of Labour Relations on 5 May 2010 in terms of section 78 of the Labour Act. That section requires a collective bargaining agreement concluded following negotiations to be submitted to the Registrar for registration. In terms of section 79 (2);

> "Where any provision of a collective bargaining agreement appears to the Minister to be –
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> (a) in consistent with this Act or any other enactment; or
> (b) contrary to public interest;
> (c) unreasonable or unfair, having regard to the respective rights of the parties; he may direct the Registrar not to register such collective bargaining agreement until it has been suitably amended by the parties thereto."

The Minister of Labour is empowered to reject an application for registration on the basis that the agreement is inconsistent, contrary to public interest, unreasonable or unfair. It means that if indeed there was a discrepancy or unfairness of a kind in the agreement embodying the gratuity provision, the authorities had an opportunity and the wherewithal to block its registration. They did no such thing and the agreement was duly registered triggering the provisions of section 82 relating to the binding nature of collective bargaining agreements. See *NetOne Cellular (Pvt) Ltd* v *Minister of Labour and Another* 2015 (1) ZLR 291 (H).

But that is not all. Upon registration, section 80 enjoins the Minister to publish the agreement as a statutory instrument. It appears common cause, from the submissions made, that the statutory instrument was published.

Therefore the provisions of section 80 set in. It provides;

> "(1) Upon registration of a collective bargaining agreement the Minister shall publish the agreement as a statutory instrument.
> (2) The terms and conditions of a registered collective bargaining agreement shall become effective and binding—
> (a) from the date of publication of the agreement in terms of subsection (1); or
> (b) from such other date as may be specified in the agreement."

What must be appreciated is that the Minister is empowered by section 81, even where the agreement has been registered, to direct the parties to it to negotiate an amendment where the agreement has, subsequent to registration, become unreasonable or unfair having regard to the respective rights of the parties. Once the parties have reported back to the Minister, he or she is allowed by subsection (3) to amend the agreement. Clearly therefore the Minister has all the artillery to interfere with a collective bargaining agreement in the public interest. Unfortunately all that machinery at the disposal of the Minister was not unfolded. The agreement remained valid and binding by statutory necessity right up to the retirement of the applicant when his gratuity in terms of the agreement became due.

That this is so can be gleaned from the words of Mlilo himself at paragraph 8 of the opposing affidavit. He said:

> "8. Ad Paragraph 12
> It is correct that some retired members from the 1st respondent's (employ) were given the gratuity based on yearly emoluments. This position was reached in error and was over sight. It has since (dawned) to the 2nd respondent that such cases should not have been allowed in the first instance. Gratuity as indicated in paragraphs above should be calculated based on monthly emoluments and not yearly emoluments."

All that this boils down to is that the first respondent's agreement with the applicant contained a provision, which the first respondent signed for and which was endorsed by the Minister upon registration and publication, which provision, had the first respondent been better informed, would not have agreed to. It however agreed to it and it was religiously complied with

in respect of all retiring employees until it came to the applicant. The applicant's claim is based on contract. It is a principle of our law that the sanctity of contract should always be upheld. That is what was discussed in *Book* v *Davidson* 1988 (1) ZLR 365 (S) at 378 G – 379 C:

> "There is, however, another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts. (*Roffey* v *Catterall, Edwards and Goudre (Pty) Ltd* 1977 (4) SA 49 (N) at 504 – 505 E)
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> > 'If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.' (*Printing and Numeric Registering Co* v *Sampson* (1875) LR 1G Eq 462 at 465).
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> > 'To allow a person of mature age; and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country' (*E Underwood and Son Ltd* v *Barke* (1899) 1 CH 300 (CA) at 305)"

While embracing the principle of sanctity of contract in *Alliance Insurance* v *Imperial Plastics (Pvt) Ltd & Another* S-30-17 (as yet unreported) MALABA DCJ (as he then was) made the crucial point that courts of law are only confined to interpreting a contract and not creating a new contract for the parties. The court should respect the contract made by the parties and give effect to it.

That is the exact point underscored by PATEL JA in *Magodora and Others* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403 C-D:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. ----. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms."

The second respondent's case is that because the first respondent erroneously committed itself in the employment contract to pay gratuity to the applicant based on a percentage of his yearly emolument as opposed to his monthly emolument thereby creating this oppressive circumstance in which the first respondent must pay more to the applicant than it would have

paid, it would not approve such payment. It would do so even though the terms of the contract were not amended by a Minister who had the power, reposed to him or her by statute, to amend or correct the contract but did not do so leaving it registered and binding. That should happen only to the applicant even though other retirees who left during the same year as him, benefited from the gratuity provisions as registered.

This court cannot assist the respondent side step the imperatives of the contract that way. Having uncovered the anomaly it should set in motion the process of rectifying it. However this court will not excuse the respondents from the consequences of the contract which they entered into with their eyes very wide open.

Mr *Majwabu* for the applicant moved for the award of costs on the higher scale even though no case was made for such an award in both the founding affidavit and the draft order attached to it. He submitted that this is because the opposition to the application was unjustified and that in the process the applicant has been unnecessarily put out of pocket. The award of costs of any kind is discretionary upon the court which ordinarily wields it against a party for undertaking a step in the proceedings which lacks probity. There can be no doubt that the second respondent has been extremely remiss in the handling of this matter to an extent that one may perceive an intent to victimize the applicant. Otherwise how else could one explain the approval of terminal benefits of not less than twelve other employees during 2016 using the same gratuity provisions and refusal to approve only that of the applicant? He was obviously being discriminated against.

More importantly, the second respondent was very tardy even in the conduct of its opposition. As I have said there was no opposition at all in light of the opposing affidavit deposed to by Mlilo who had no business whatsoever doing so. There was no attempt whatsoever to advance any valid legal argument in view of what has been stated above. I therefore take the view that punitive costs, as a seal of the court's disapproval of such frivolous opposition, are called for.

In the result, it is ordered that:

1. The board resolution taken by the second respondent on 5 May 2017 regarding the gratuity of the applicant be and is hereby set aside.

2. The first respondent be and is hereby directed to pay the gratuity due to the applicant in terms of the Council Resolution made on 30 August 2016.

3. The second respondent shall bear the costs of this application on the scale of legal practitioner and client.

Messrs James, Moyo-Majwabu and Nyoni, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners