HB 68/19
HC 2813/16

RODNEY MANZINI

And

LIBERTY NYAMOWA

Versus

BBR (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 10 SEPTEMBER 2018 & 9 MAY 2019

Opposed Application

A. Ndlovu for the applicants
P. Madzivire for the respondent

MABHIKWA J: The two applicants are former employees of the respondent. They seek from this court an order to the effect that:

1. The memorandum of agreements of voluntary retrenchment signed on 12 August 2016 between the applicants and the respondents be declared valid and binding between the parties.
2. The respondent be ordered to pay the applicants their retrenchment packages forthwith in the sums of US$11 452,00 and US$13 372,00 respectively.
3. The respondent be ordered to pay costs of suit at an attorney and client scale.

Background facts

The brief background facts of this matter are that on 12 August 2016 the applicants were called to the respondent's offices and signed agreements for voluntary retirement packages. The agreements had been drafted by the respondent and accepted by them. The agreement copies are in fact attached to the application as annexure "A". Prior to the signing of the agreements respondent had on 10 June 2016 written a letter to employees inviting for applications for

voluntary retirement. Applicants had responded to the instruction by writing their applications for voluntary retirement.

On 26 July 2016, the respondent accepted the application. For ease of reference and for its importance in this matter, I will reproduce the entire short letter by respondent to 1st applicant below, which is annexure "D" in the application.

"26 July 2016

Rodeny Manzini
Quality Controller
Motive Power Depot
Bulawayo

Dear Mr Manzini

Re: APPLICATION FOR VOLUNTARY RETIREMENT

I refer to my letter inviting applications for voluntary retirement dated 10 July 2016 in view of the financial constraints that the company is facing due to harsh economic conditions.

This serves to advise you that your application dated 14 June 2016 has been accepted, and that the processing of your voluntary package is in progress. You shall be invited shortly to sign the relevant memorandum of agreement.

The BBR Board and Management wishes to thank you for your commitment and invaluable contribution to the company during your engagement. We further advise that, should the circumstances so require your services and that you are available, we shall not hesitate to re-engage you in future. Please update us should your contact details change.

May I take this opportunity to wish you the best in your future endeavours.

Yours faithfully
For and on behalf of BBR (Pvt) Ltd

(Signed)
_____
J. M. Sengwayo
H R Manager

Cc Chief Executive Officer
Finance Executive
Technical Manager (Locomotives)"

Please note that the underlining in the above letter is mine. It is clear from that letter that an offer for voluntary retrenchment was made by the respondent (employer). The letter is clear also that the employee's application for that voluntary retrenchment was accepted. That was a full and unequivocal agreement.

The employer went on even to thank the employee for his commitment and contribution to the company during his period of service. It went on also to advise that the processing of his package was in progress and to wish him well in future endeavours.

The culmination of these correspondences and engagements was the signing of the memorandum of agreement. The agreement was clear and unambiguous that the respondent offered a retrenchment package and the applicant (employee) accepted the package offer in full and final settlement of all monies due and owing to him. The employment contract between the parties was thus terminated effective from 31 August 2016.

In my view, this was a clear termination of contract by mutual consent between the parties. See *Victoria Falls Municipality* vs *Nyathi & Ors* 2012 (1) ZLR 132 (H) where the court held that agreement by consent is the foundation of contract. That a true offer means an express or implied intention to be bound by the offeree's acceptance – *animus contrahendi*. The agreement *in casu* was reduced to writing and titled "Memorandum of Agreement for Retrenchment", and signed by all the parties and their respective witnesses. The respondent has not even alleged that the offer had been mistakenly or fraudulently made in the 1st place. The applicants then religiously checked their bank accounts for their deposited retrenchment packages as per the agreement. They were stunned when on 31 August and in typical

"summersault" fashion, respondent wrote them a letter advising them that it is unable to continue with the process of retrenchment and that they were to report back to work by 1st September 2016. This, in the court's view was a clear bilateral cancellation of an agreement, hence the application..

The respondent opposed the application. It raised two (2) points *in limine*. Firstly, it was submitted that the applicants have cited the respondent as BBR (Pvt) Ltd. There is no entity registered with the Registrar of Companies in Zimbabwe with such a name or which carried on business in that style name. Respondent went on to cite a list of authorities to the effect that if the citation of a party is defective, the whole process is a nullity. It was submitted that effectively there was no respondent before the court in this case and therefore the application is null and void.

In the papers filed of record, respondent completely avoided mentioning what correct citation or name should be but in passing, counsel for the respondent insinuated that it should be Beitbridge Bulawayo Railways (Pvt) Ltd.

The court noted that the respondent's correspondences with the applicants was written on letterheads contained BBR (Pvt) Ltd. Also the relevant agreement which was drafted by the respondent also carried that abbreviation (BBR). In fact the court noted that the papers, including the papers filed of record being the application and opposition papers used the names Bulawayo Beitbridge Railway (Pvt) Ltd and BBR (Pvt) Ltd interchangeably. When this was brought to the attention of the counsel for the respondent, he indicated that he had not realised that fact and abandoned the point *in limine*. The parties then agreed that if need be, the citation be amended to read Beitbridge Bulawayo Railway (BBR) (Pvt) Ltd.

On the 2nd point, respondent submitted that the applicant had brought before the High Court a purely labour dispute. The respondent submitted that section 172 of the Constitution of Zimbabwe and section 189 (6) of the Labour Act creates the Labour Court which has the exclusive jurisdiction to hear, as a court of first instance, all labour related matters. This submission is erroneous. Sections 13 and 23 of the High Court Act (Chapter 7:06) vests the

High Court with "Full original civil and criminal jurisdiction over all persons and over all matters within Zimbabwe. It is also common knowledge that the creation of the Labour Court did not oust the High Court's jurisdictional powers vested to it by the Constitution of Zimbabwe and the High Court Act.

In my view, this was a classic case of clutching at technicalities in the hope that the matters may be disposed on them and avoid exposing the fact that one's case is weak, or that one's client has no case at all. In my view, it is an undesirable tactic used by lawyers were they notice that their client's case is weak. The court dismisses the second point *in limine* also.

On the merits, very little was submitted. In fact both counsel stuck and abided by their heads of argument and other documents filed of record with virtually nothing to add. Counsel for the respondent, in a bid to convince the court that notwithstanding the falling away of the two points *in limine* respondent should still succeed, implored the court to consider what he called "a recent judgment which was at all fours with the current case and would virtually assist the court dispose the case". He however did not name the full citation or copy of the judgment and promised to avail it to the court through the Registrar's Office.

The respondent eventually availed a copy of the Supreme Court judgment by Honourable ZIYAMBI JA with Honourables GOWORA JA and OMERJEE AJA concurring, in the case of *Freda Rebecca Mine Holdings (Ltd* vs *M. Nhliziyo & 180 Ors* SC-16-13 Civ App SC-82-11.

The court notes that the *Freda Rebecca Gold Mine* case is distinct from the current one in a multitude of ways.

(1) In Freda Rebecca the retrenchment involved a multitude of workers, 181 of them and perhaps almost the entire workforce. *In casu*, there are only two (2) employees involved. Others had been voluntarily retrenched including the Human Resources (HR) Manager who drafted and signed the voluntary retrenchment agreement in annexure "A" on behalf of the respondent.

(2) In Freda Rebecca, there was no agreement concluded and signed. *In casu*, all negotiations were completed and reduced to writing, and then signed by both parties.

(3) In Freda Rebecca, the retrenchment process (which was not completed) was done in terms of the Labour Act (Chapter 28:1) culminating in the approval by the then Minister of Public Service, Labour and Social Welfare ("the Minister"). The Minister approved the retrenchment on certain terms and conditions as allowed by Part IV sections 12C and 12D of the Labour Act that dealt with compensation for loss of employment as well as special measures to avoid retrenchment. The net effect of the Minister's terms and conditions was that appellant would pay a whopping ZW$28 billion to the respondents.

In casu, though between employer and 2 employees, the negotiations, correspondence and even the agreements (Annexure "A") took a completely private agreement between the employer and one employee at a time with no reference to or involvement of the Labour Act or the Minister at all. The wage bill in issue was for just 2 employees.

(4) In Freda Rebecca, paragraph 2 of the internal memorandum notifying the employees of the retrenchment exercise clearly stated that they remained employees of the mine with the finalisation of the exercise.

In casu, the agreement was complete and signed and was clear that the employment contract had been terminated. Even the letter thanking the employees was clear that the company may re-engage them in future should the need arise.

(5) In Freda Rebecca, the mine wrote to the Minister indicating that it was abandoning the retrenchment exercise because clearly, the onerous conditions imposed by the Minister were financially detrimental to the mine than the retention of employees. After all, it was to avoid financial collapse that the appellant (mine) had sought to take the drastic measure of retrenchment in the hope that it would be able to carry on with its business. It was acceptable, and the mine succeeded because the Minister's directive under the said section does not terminate the employment of the proposed retrenches. It merely sets the conditions upon which the employer, if still so minded, can proceed to retrench.

In Freda Rebecca Mine case, when the employees received letters requesting them to return to work, they all signed acknowledging receipt of the letter and reported for duty for about 2 days before declining to work thereafter, arguing that their contracts had in fact terminated by reason of the retrenchment.

In casu, the applicants never resumed work when asked to do so by the respondent, which would have been probably a tacit acceptance to a new employment agreement.

I have already said that all these facts do not apply in the current case and the host of cited authorities related to retrenchment in terms of the Labour Act. The list is inexhaustive but the above are the most salient differences between the two cases.

I am convinced that in casu, respondent is simply attempting to renege on a clear and unambiguous voluntary retrenchment agreement which in fact respondent drew up and called upon the applicants to sign. It was wrong for the respondent to change heart and then start claiming that whatever amount it had deposited in the applicants' accounts would go towards salaries and then at the same time order the two to return to work.

It is a matter in which throughout, the respondent should have been aware that it has no case but was intransigently bent on taking chances using legal nomenclature and technicalities

Accordingly, the application succeeds and it is ordered as follows:

1. The memorandum of agreements of voluntary retrenchment signed on 12 August 2016 between the applicants and the respondent be declared valid and binding between the parties.
2. The respondent be ordered to pay the applicants their retrenchment packages forthwith in the sums of US$11 452,00 and US$13 372,00 respectively.
3. The respondent be ordered to pay costs of suit at an attorney and client scale.

Dube & Associates, applicants' legal practitioners
Joel, Pincus, Konson & Wolhuter, respondent's legal practitioners