

NKULULEKO MABHENA

Versus

P.G. INDUSTRIES (ZIM) LIMITED

And

P.G. ZIMBOARD PRODUCTS (PVT) LTD

And

**P.G. INDUSTRIES (ZIM) LIMITED GROUP
CHIEF EXECUTIVE OFFICER N.O.**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 17 FEBRUARY 2011 & 12 JANUARY 2012

S S Mazibisa for applicant
Ms E. Sarimana for respondents

Opposed Court Application

KAMOCHA J: The applicant in this matter is an employee of P.G. Industries the first respondent which had purported to dismiss him by letter dated 8 May 2000 with effect from 31 July 2000. He contested the dismissal in court. He was successful and was on 17 July 2002 granted an order in the following terms:-

“In the result it is ordered that:-

- (1) The respondent’s decision to terminated the applicant’s contract of employment be and is hereby declared to be null and void.
- (2) The applicant be reinstated without loss of salary and benefits from 1st June 2000 to the date of reinstatement.
- (3) The applicant’s claim for payment of the sum of \$3 192 803 being in respect of under payment of salary and bonuses be and is hereby dismissed.
- (4) The respondent is to pay 50% of the applicant’s costs of suit.”

As can be seen from the above his claims for unlawful termination of the contract of employment and reinstatement without loss of salary and benefits were successful but his

claim for three million dollars failed. In making the above order the learned Judge opined thus at page 20 of her judgment:-

“The nature and history of this matter are such that in my opinion the applicant should have foreseen that a genuine dispute of fact might arise and that he took a risk in option to proceed by way of motion.”

The respondent appealed against the order for reinstatement but its appeal was dismissed with costs. Similarly the cross appeal by applicant against the dismissal of his claim for payment of the sum of \$3 192 803 was dismissed with costs. The appeal judgment was handed down on 28 November 2003.

Two years later the applicant was back in court suing his employers seeking an order to compel the respondents to render an account of his salary and benefits from 1 June 2000 to date of reinstatement. What was being sought was an order to lay foundation for the determination of whether or not there had been compliance with the order in case number HC 8044/02 since the parties were not agreed as to the exact content and extent of the salary and benefits due. On the one hand the respondents contended that they had paid the amount which they considered was due in terms of the decision of this court whilst applicant contended otherwise.

The court on 15 February 2007, then issued the following order.

“Accordingly, it is ordered that:-

- 1) First and second respondents be and are hereby directed to render a statement of account of applicant’s salary and benefits within seven (7) days of this order, showing applicant’s salary and benefits from 1 June, 2000 to date of reinstatement for purposes of debate by the parties;
- 2) First and second respondents bear costs of this application.”

The issue of whether or not the above order was complied with attracted divergent versions from the parties. The applicant on the one hand averred that the order had not been complied with and described the respondents’ behaviour as being contemptuous of the court order. The first and second respondent on the other hand stated that they had in fact prepared statements of salary and benefits more than once which applicant rejected preferring his own calculations. The respondents did however, concede that such statements were not produced within 7 days of the court order. Despite the fact that the statements of account of applicant’s salary and benefits were not produced timeously the parties considered them hence their rejection by the applicant who

preferred his own calculations. It would therefore not be correct to state that they were not prepared and produced. It would also not be correct to say the respondents were in contempt of the court order when in fact the statements were made and produced albeit not timeously. In the result this court finds they were prepared and produced albeit out of time.

In the present application the order that the applicant seeks is as follows:-

“It is ordered that:-

- (1) 1st and 2nd respondents be hereby held to be in contempt of court orders HC 8044/00; HH 115/02; SC 248/02 (X Ref SC 363/02) and HC 3793/04; and HB-25-07 (sic).
- (2) 1st and 2nd respondent (sic) be hereby ordered to pay a fine of US\$50 000 for the contempt within five days of service of this order.
- (3) The applicant be and is declared reinstated to his post of Marketing Director, job grade E4, Executive Head of Sales and marketing Department of 2nd respondent effective from 28 February 2009 and his terms and condition of service as outlined in paragraph one (1) and 12 to 17 read with annexed documents.
- (4) That 1st and 2nd respondents be and are hereby granted to expose 1st and 2nd respondents’ assets in whatever form wherever they exist for attachment and disposal until the full effect of this order is achieved.
- (5) 1st and 2nd respondents be and are hereby ordered to pay applicant a sum of US\$49 498 867 (net) GBP 1 500 pounds (net) and ZA-Rand 404 000 (net) as at 28 February 2009 and a further sum of US\$2 657 240 and ZA-Rand 60 000 up to 31 October 2009 as shown or summarized statements hereto respectively. See note book attached. And further the respondents be and are hereby ordered to ensure that the applicant is paid his salary and benefits commensurate with his job description and job title with effect from 1st of November 2009.
- (6) The 3rd respondent be and is hereby ordered to ensure compliance by 1st and 2nd respondents with the court orders set out in paragraph 1 – 5 above.
- (7) The respondents bear the costs of this application on an attorney-client scale.”

The above draft order clearly reveals that it was not formulated and drafted by a legal practitioner. A perusal of the court application and the documents filed of record establishes that the applicant drafted paragraph 5 of the draft as shown as page 123 of the record.

Paragraph 5 of the draft order is outrageous to the extreme and induces a sense of shock. The applicant is claiming the following amounts from his employment during the period

31 June 2000 when the employer purported to dismiss him and 27 February 2009 when he was allegedly reinstated.:

US\$49 498 867 (net)

GBP1 500 (net)

ZAR404 000 (net)

He claimed to have earned these amounts from 1 June 2000 to 28 February 2009. These amounts would have made him the best paid executive in this country under the present economic environment. He does not end there, but claims to have earned further amounts of US\$2 657 240 (net), ZAR60 000 from February 2009 to 31 October 2009 – a period of 8 months. I reiterate that this would be the best paying job in this country under the current economic environment.

It should have been very clear to the applicant and especially to his legal representatives that such a claim should have been initiated by way of summons as the claim is mainly for damages allegedly suffered as a result of his purported dismissal.

The respondents have vehemently disputed the figures claimed by the applicant. They contended that the applicant was in fact paid a sum of \$21 820 as a gesture to meaningfully compensate him. That was so because his entitlement by law amounted to US\$0.64 which was his 8 billion Zimbabwe dollars entitlement.

It is quite clear that there are serious disputes of fact on the issue of salary arrears and benefits to which the applicant claims to be entitled which can only be resolved through a trial. For instance how does one earn such huge amounts of money from one's employment within such a short space of time or even in a life time? It is even very doubtful if the group of companies does have that kind of money. This can only be properly ventilated through a full trial.

On the issue of the respondents being in contempt of orders the impression created in the draft order is that respondents failed to comply with five court orders when in fact there were only three, namely the judgment by MUNGWIRA J which was case number HC 8044/000; judgment number HH-115-02; judgment by NDOU J which was case number HC 3739/04 judgment HB-25-07 and Supreme Court case 363/02; judgment SC-248-02.

This court has already made a specific finding that the respondents were not in contempt of judgment HB 25/07 case number HC 3792/04.

In SC 248/02 the Supreme Court upheld the decision of this court declaring the termination of the applicants' contract of employment null and void and reinstating him without loss of salary and benefits from 1 June 2000 to the date of reinstatement. The respondent averred that they were not in contempt of the court order as they reinstated the applicant with effect from 1 June 2000 without loss of salary and benefit and was required to resume duties on 1 July 2004. He was allegedly reinstated to the position of Customer Services Manager a grade D position. But the applicant's position before the purported dismissal was that of marketing Director Grade E4 (Executive Head of Sales and Marketing Department) of P.G. Zimboard Products (Pvt) Ltd. What the respondents attempted to do was not in terms of the court order as they were demoting the applicant to a lower grade. The respondents were clearly wrong. On realizing that the applicant would not accept any demotion the respondents, on 27 February 2009, addressed a letter to the applicant wherein they had this to say:-

"REINSTATEMENT TO THE P.G. INDUSTRIES (ZIM) LTD GROUP

We refer to the above matter and please note that P.G. Industries (Zimbabwe) Ltd hereby reinstates you to the position of Sales and Marketing Executive within the group.

In view of this, it is our desire to meet you (Mr Mabhena) and your legal representative which will then enable us to expediently iron out the semantics and effectively absorb you in the group. Could a meeting therefore be arranged as soon as practically possible.

Yours sincerely

Ellen Makoni
Group Human Resources Manager"

The applicant averred that the respondents again failed to reinstate him in terms of the court order. He alleged that he had not been put back to his previous position including the same responsibilities and job description and salary. I have already pointed out that the respondents' efforts to give the applicant a different post were clearly wrong and contrary to the court order. The applicant was correct in rejecting the inferior post that had been offered to him as it was contrary to what the court had ordered.

The respondents have contended that the applicant is currently gainfully employed as a Sales and Marketing Manager and all back pay due to him had been paid to him. He was owed eight million Zimbabwe Dollars which would have been US\$0.64 but was, instead,

paid US\$21 820 as a gesture to meaningfully compensate him. This, in my view, is a reasonable amount which cannot be ignored.

This court makes specific findings that (a) the respondents indeed paid applicant the sum of US\$21820 when he was lawfully only entitled to \$0.64. (b) His claim for the following amounts:- US\$49 498 869 (net); GBP1 500 (net); ZAR404 000 (net); US\$2 657 240 (net) and ZAR60 000, should be dismissed; (c) The respondents have re-employed the applicant from 28 February 2009 to date in an inferior position contrary to the order of this court; (d) the applicant should accordingly be replaced to his post of marketing Director, job grade E4, Executive Head of Sales and marketing Department.

The respondent purported to reinstate the applicant wrongly by giving him a junior post with a lower salary and benefits. But this court cannot go so far as holding that the respondents did so with disdain of the court order. They just seemed to have placed a wrong interpretation on the court order. They erroneously believed that by re-instating him as an E1 employee they would have satisfied the requirements of the court order. They had failed to seriously apply their minds to the issue before them. That may indeed be said to have verged on contempt of the court order but I would not go so far as holding that they deliberately and intentionally intended to be contemptuous of the court order.

It must also be mentioned that the applicant's attitude did not help the situation. He was belligerent and did not want to co-operate. He was reported to have staged sit ins and disrupting the work place. He was also reported to have fallen ill and was bed ridden and was said to have been in a comma for a while. The respondents financially assisted him with his medical bills and also in times of his bereavement.

However, the above must not be taken as an excuse to demote the applicant. It is only relevant when considering the level of costs that should be awarded to the applicant.

In the result the order of this court is as follows:

It is ordered that:-

1. The applicant be and is hereby declared re-instated to his post of Marketing Director, job grade E4, Executive Head of Sales and marketing Department of 1st or 2nd respondents effective from 28 February 2009 as per letter by the respondent dated 27 February 2009;
2. The prayers in paragraphs 1, 2, 4, 5 and 6 of the draft order on page 5 supra be and are hereby dismissed; and
3. The respondents shall pay costs of this application on the ordinary scale.

Messrs Cheda & Partners, applicant's legal practitioners
Messrs Coghlan & Welsh respondent's legal practitioners