REPORTABLE (40)

Judgment No. SC 48/03
Civil Appeal No. 147/02

THE INTERNATIONAL COMMITTEE OF THE RED CROSS

v (1) PHYLLIS SIBANDA (2) MUNYAMA NGANGURA

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, SEPTEMBER 30, 2003 & JANUARY 13, 2004

H Zhou, for the appellant

S V Hwacha, for the respondents

SANDURA JA: This is an appeal against a judgment of the High Court which declared that the appellant ("the ICRC") did not have immunity from suit and legal process in respect of civil proceedings instituted against it by the second respondent ("Ngangura"), directed the ICRC to comply with the Labour Relations (Retrenchment) Regulations, 1990 ("the Retrenchment Regulations") before terminating Ngangura's employment, and referred to trial the issue of whether the first respondent ("Sibanda") had consented to the termination of her employment.

The background facts are as follows. Ngangura and Sibanda were employed by the ICRC in Zimbabwe. Ngangura's employment was terminated on 31 December 1997, and Sibanda's was terminated on 31 December 1998. However, the circumstances in which their employment was terminated were not common cause.

Ngangura and Sibanda alleged that they had been unlawfully retrenched, whilst the ICRC contended that the termination of employment had been by agreement and that the Retrenchment Regulations did not, therefore, apply. When legal proceedings were threatened, the ICRC alleged that it could not be sued in Zimbabwe because it enjoyed immunity from suit and legal process in terms of the Privileges and Immunities Act [*Chapter 3:03*] ("the Act").

Undaunted by the stance taken by the ICRC, Ngangura and Sibanda filed a court application in the High Court seeking an order declaring that, in respect of their contracts of employment, the ICRC did not enjoy immunity from suit and legal process, and directing the ICRC to comply with the Retrenchment Regulations. The learned judge who heard the application granted the order sought by Ngangura, but referred to trial the issue of whether Sibanda had consented to the termination of her employment. Aggrieved by that decision, the ICRC appealed to this Court.

Two main issues arise for consideration in this appeal. The first is whether the ICRC enjoys immunity from suit and legal process in respect of contracts of employment. If it does, that is the end of the matter and the appeal must be allowed. However, if it does not enjoy that immunity, the second issue to consider is whether the termination of employment was by agreement. If it was, the Retrenchment Regulations would not apply and the appeal must be allowed.

Section 7(1) of the Act, which deals with the privileges and immunities of specified international organisations, reads as follows, in relevant part:

> "The President may, by notice in the *Gazette*, confer upon any international or regional organisation or agency … specified in such notice all or any of the privileges and immunities set out in Part I of the Third Schedule."

The privileges and immunities set out in Part I of the Third Schedule include immunity from suit and legal process.

In the court *a quo*, it was not in issue whether or not the President had acted in terms of s 7(1) of the Act in respect of the ICRC. Accordingly, the learned judge accepted that the ICRC had been duly accorded the immunity from suit and legal process. But, as the learned judge correctly observed, that does not shed any light on whether or not the immunity covers all suits and legal processes.

In order to answer that question, it is necessary to examine the nature and extent of the immunity accorded a foreign sovereign in terms of international law, because it could hardly have been the intention of the Legislature to grant greater immunity to an international organisation, such as the ICRC, than that granted to a foreign sovereign.

The issue concerning the immunity from suit and legal process accorded a foreign sovereign has been the subject of judicial pronouncements for many years. Thus, in *Rahimtoola v H.E.H. The Nizam of Hyderabad & Ors* [1957] 3 All ER 441 (HL) LORD DENNING said the following at 461 E-G:

> "It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it; and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilised countries there

has been a progressive tendency towards making the sovereign liable to be sued in his own courts – notably in England by the Crown Proceedings Act, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them."

As to the nature and extent of sovereign immunity, the learned LAW LORD had this to say at 463I-464A:

"Applying this principle it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether 'conflicting rights have to be decided', but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

Similarly, in *I Congreso del Partido* [1981] 2 All ER 1064 (HL) at 1070 f-j LORD WILBERFORCE said:

"It is necessary to start from first principle. The basis on which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of '*par in parem*' …, which effectively means that the sovereign or governmental acts of one state are not matters on which the courts of other states will adjudicate.

The relevant exception, or limitation, which has been engrafted on the principle of immunity of states, under the so-called restrictive theory, arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations. (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that

> state. It is, in accepted phrases, neither a threat to the dignity of that state nor any interference with its sovereign functions.
>
> When therefore a claim is brought against a state … and state immunity is claimed, it is necessary to consider what the relevant act is which forms the basis of the claim: is this, under the old terminology, an act '*jure gestionis*' or is it an act '*jure imperii*'; is it (to adopt the translation of these catchwords used in the Tate letter) a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of a private law character such as a private citizen might have entered into?".

See also *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 (CA) at 890 f-g.

The above pronouncements by both LORD DENNING and LORD WILBERFORCE received the approval of this Court in *Barker McCormac (Pvt) Ltd v Government of Kenya* 1983 (2) ZLR 72 (S) at 79 G-H, 1983 (4) SA 817 (ZSC) at 821 F-G, where GEORGES JA (as he then was) said:

> "I am completely satisfied therefore that the doctrine of sovereign immunity generally applied in international law is that of restrictive immunity. There are no decisions of courts of this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law."

It is, therefore, clear that the doctrine of sovereign immunity applicable in this country is that of restrictive immunity as opposed to absolute immunity. In other words, a foreign sovereign would enjoy immunity from suit and legal process where the relevant act which forms the basis of the claim is an act "*jure imperii*", i.e. a sovereign or public act. On the other hand, he would not enjoy such immunity if the act which forms the basis of the claim is an act "*jure gestionis*", i.e. an act of "a private law character such as a private citizen might have entered into".

The position in South Africa is the same. It was stated by CORBETT CJ in *The Shipping Corporation of India Ltd v Evdomon Corporation & Anor* 1994 (1) SA 550 (A) at 565 A-B as follows:

> "The legal position in this country regarding the doctrine of sovereign immunity was carefully and comprehensively surveyed by the Full Bench of the Transvaal Provincial Division in the case of *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (1980 (2) SA 111 *supra*). As this survey shows, South African Courts initially applied the doctrine of absolute immunity, but in the *Inter-Science* case the Court … decided to follow the world-wide trend and to apply the restrictive doctrine."

In my view, an international organisation, such as the ICRC, enjoys immunity from suit and legal process subject to the provisions of international law, and the doctrine of restrictive immunity applies to it. It could hardly have been the intention of the Legislature to grant absolute immunity from suit and legal process to such an organisation when a foreign sovereign did not enjoy such immunity.

I now wish to consider the nature of the act which forms the basis of the claims brought by Ngangura and Sibanda against the ICRC. That act is a contract of employment which, clearly, is "an act of a private law character such as a private citizen might have entered into".

Having come to that conclusion, it is not necessary for me to consider whether clause 7 of the conditions of employment, which provided that any dispute arising in the application of the conditions would be settled in conformity with the labour legislation in force in the country, constituted a waiver of the ICRC's immunity.

In the circumstances, as the learned judge correctly decided, the ICRC does not enjoy immunity from suit and legal process, and the point *in limine* raised by it falls away.

I now wish to deal with the merits of the claim by the two employees, i.e. that before terminating their employment contracts the ICRC should have complied with the Retrenchment Regulations. The ICRC's reply to this was that there was no need to comply with the Retrenchment Regulations because the contracts of employment were terminated by agreement.

In the case of Sibanda, the ICRC relies upon its letter to her which was dated 18 February 1998. It was written by Frank Schmidt ("Schmidt"), the ICRC's regional delegate, and reads as follows:

> "Dear Mrs Sibanda,
>
> This is to confirm the agreement we reached in our meeting on 17 February in my office regarding the termination of your employment with the ICRC's regional delegation in Harare.
>
> We agreed on the following specific points:
>
> 1. Your contract of full-time employment will end on 28 February 1998. Under a separate, fixed-term contract, you will continue to work for us, at 50% of your time, from 1 March to 31 December 1998. The financial and practical conditions pertaining to this arrangement, including severance pay, will be the same as those set out in Mr Givel's letter to you of 1 December 1997.
>
> 2. You have made arrangements with the University of Southern Queensland/Toowoombe to finish your studies in business administration by the end of 1998. This means that the financial support which ICRC is providing you with for these studies will also terminate at the end of 1998. You have assured me that the cost of this support will not vary from that which we accorded you previously.

Please confirm directly to Patricia Barber what this will mean in actual figures and due-dates for our payments to the University.

3. Due to the above points having remained pending for some time, you said that you have fallen behind in your studies. I have agreed to compensate you with a reasonable amount of extra time off to allow you to catch up. Please discuss the exact modalities of this with Patricia as well.

4. You have asked me if ICRC can provide you with a PC for your studies. I said I could not promise you anything, as we are under instruction from HQ not to divest ourselves of any of our EDP equipment at present, but that we are prepared to examine other possibilities. Please also discuss with Patricia.

I would like to emphasise once again that these arrangements exceed by far any obligations that ICRC might have toward you under Zimbabwe's labour laws, were it bound by them, and that they are far more generous than any I have ever known ICRC to make for any local staff, or indeed for any expat, ending their employment with the institution.

I am pleased that we have thus successfully and definitely concluded a somewhat protracted process of clarification of the terms of your departure. I would appreciate your confirming your agreement to these terms, as set out above, by returning to me a copy of this letter with your signature.

With my best wishes for your personal and professional future, I remain …".

As requested by Schmidt, Sibanda confirmed her agreement with the terms set out in the letter by returning to him a copy of the letter signed by her. In addition, the few remaining issues which were to be finalised in consultation with Patricia Barber were agreed upon and finalised on 19 February 1998.

Subsequently, on 24 February 1998 Sibanda received her terminal benefits, amounting to $118 703.10, in respect of the termination of the main contract of employment, and on 18 December 1998 she received her salary and other benefits, amounting to $23 326.00, in respect of the fixed term contract.

However, the allegation by Sibanda was that in addition to the terms set out by Schmidt in the letter dated 18 February 1998, it was agreed that the issue of whether or not she would receive a retrenchment package, determined in terms of this country's labour law, would be dealt with later. This allegation was made for the first time in the answering affidavit, and Sibanda does not explain why it was not made in the founding affidavit.

In any event, I find the allegation incredible, bearing in mind the detailed agreement set out by Schmidt in his letter dated 18 February 1998. The letter set out in great detail what matters had been agreed upon and what matters were still be to finalised. There is no mention of a retrenchment package being considered later.

Taking a robust and commonsense approach, I am satisfied that there is no dispute of fact in this matter which cannot be resolved on the papers. See *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S).

In the circumstances, I am satisfied that the termination of Sibanda's employment was by agreement and that the Retrenchment Regulations do not apply. Sibanda's application should, therefore, have been dismissed.

However, Ngangura's case stands on a different footing. On 1 December 1997 the ICRC's administrator advised him by letter that because of the need to reduce the local staff, his employment would be terminated on 31 December 1997. He objected to the termination of his employment unless it complied with the

Retrenchment Regulations, but accepted, under protest, the terminal benefits offered by the ICRC. He made it clear, however, in a letter dated 16 December 1997, that he looked forward to negotiating a proper retrenchment package.

In the circumstances, I cannot accept that the termination of Ngangura's employment was by agreement.

Finally, I wish to deal very briefly with the allegation by the ICRC that the application by Ngangura and Sibanda was in fact an application for a review of the ICRC's decision to dismiss them. It was alleged that the relief sought had been described as a declaratory order in order to avoid the consequences of having failed to institute the application for review within the time limit specified in the High Court Rules.

Commenting on this allegation the learned judge in the court *a quo* said:

> "I cannot agree that this application is in reality one for review. Review proceedings are concerned with an irregularity of a procedural nature. The mere fact that the applicants allege a failure on the part of the ICRC to comply with the Regulations does not raise a matter of procedural irregularity or impropriety. It raises, rather, the issue of unlawfulness in the action taken by the ICRC."

I respectfully agree. The ICRC alleged that the Retrenchment Regulations did not apply because the termination of employment had been by agreement. On the other hand, Ngangura and Sibanda alleged that the Regulations applied, and sought a declaration to that effect.

In the circumstances, the following order is made:

1. The appeal against the order granted in favour of the first respondent is allowed with costs. The order is set aside and in its place is substituted an order dismissing the application with costs.

2. The appeal against the order granted in favour of the second respondent is dismissed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Dube, Manikai & Hwacha, respondents' legal practitioners