

REPORTABLE (18)

NATIONAL RAILWAYS OF ZIMBABWE
v
(1) ZIMBABWE RAILWAYS ARTISANS UNION (2) RAILWAY ASSOCIATION OF YARD OPERATING (3) RAILWAY ASSOCIATION OF ENGINEN (4) ZIMBABWE AMALGAMATED RAILWAYMEN UNION

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GUVAVA JA
HARARE, JUNE 14, 2014 & JULY 27, 2015

T. Mpofu, for the appellant

T. Magwaliba, for the respondents

ZIYAMBI JA:

[1] This appeal from the judgment of the Labour Court raises the issue whether an Arbitrator can, in a compulsory arbitration, dictate the terms of a collective bargaining agreement between the parties.

[2] Collective bargaining agreements are governed by Part X of the Labour Act [*Chapter 28:01*] (“the Act”). They are to be negotiated by the parties mentioned therein as the following provisions demonstrate:

“PART X

COLLECTIVE BARGAINING AGREEMENTS NEGOTIATED BY TRADE UNIONS AND EMPLOYERS ORGANIZATIONS

74 Scope of collective bargaining agreements

- (1) This Part shall apply to collective bargaining agreements negotiated by **registered trade unions, employers and employers' organizations or federations thereof**:

Provided that nothing in this Part contained shall prevent an unregistered trade union or employers' organization from negotiating a collective bargaining agreement.

- (2) Subject to this Act and the competence and authority of the parties, trade unions and employers or employers organizations may negotiate collective bargaining agreements as to any conditions of employment which are of mutual interest to the parties thereto.

- (2) Without derogation from the generality of subsection (2), a collective bargaining agreement **may** make provision for—

(a) rates of remuneration and minimum wages for different grades and types of occupations;

(b) **benefits for employees**;

(c) deductions which an employer may make from employees' wages, including deductions for membership fees and union dues, and deductions which an employer may be required or permitted by law or by order of any competent court to make;

(d) methods of calculating, or factors for adjusting rates of pay, and the dates, times and modes of payment;

(d) all issues pertaining to overtime, piece-work, periods of vacation and vacation pay and constraints thereon;

(e) the demarcation of the appropriate categories and classes of employment and their respective functions;

(f) the conditions of employment for apprentices;

(g) the number of hours of work and the times of work with respect to all or some of the employees;

(h) the requirements of occupational safety;

(i) the maintenance of, and access by the parties to, records of employment and pay;

(j) procedures for dealing with disputes within an undertaking or industry;

- (k) **housing and transport facilities or in their absence, an allowance for the same;**
- (m) measures to combat workplace violence and handling its aftermath ...” (The emphasis is mine)

[3] The list of subjects set out in subs (3) are suggestions as to matters that may be included by the parties in a collective bargaining agreement. Thus the parties may elect to include all or any of the suggested topics in their agreement. The point being made is that the statute does not confer a right on any of the parties, without agreement of the others, to have included in their collective bargaining agreement, any of the subjects on the list. This is understandable since a collective bargaining agreement is a contract between the parties to it and only they can set the terms by which they will be bound. It follows that any benefits to be included in the collective bargaining agreement must be agreed by the parties. They cannot be imposed by the Arbitrator, or indeed any court, in the same way that a court cannot write a contract for the parties.

What occurred in this case was totally improper. The Labour Officer, the Arbitrator and the Labour Court all missed the point.

THE BACKGROUND

[4] The proceedings on record commenced on the 27th June 2007, when the General Secretary of ZARWU¹ wrote to the designated agent of the Railway Employment Council in the following terms:

“Dear Sir

RE: DISPUTE HOUSING ALLOWANCE AND EDUCATIONAL ASSISTANCE

¹ It is not clear whether these are the initials of the 4th or 1st respondent.

On the full council meeting on 21 June 2007 there was disagreement between Labour and Management on the above issue.

Labour through ZARWU are referring the matter to your office for Conciliation (Labour Act Section 63).

We wait to hear from your office”

Thereafter, all the parties were notified of a hearing to be held on 12 July 2007 and later postponed to 19 July 2007.

[5] On 19 July 2007, the parties appeared before a conciliator. The latter required each of the parties to state his position on the matter and enquired as to whether any of the parties had varied its position on the dispute. The parties had not. He therefore issued a certificate of no settlement and, by agreement with the parties, referred the matter to an arbitrator for compulsory arbitration. The terms of reference were agreed to be whether the respondents were entitled to:

- (a) Housing allowance, and if so, the quantum thereof (the claim was stated at \$7 500 000.00 per month);
- (b) Education allowance calculated at government school rates, whether boarding or day school for up to a maximum of three children or registered dependents;
- (c) The effective date of such award.

The Arbitrator appointed to deal with the matter was Mr Chinjeruke.

[6] The point was taken before the Arbitrator, *in limine*, that the matter was not properly before him since no conciliation had taken place. That point was dismissed on the basis

that the parties could, in terms of s 93(1) of the Act, agree, and did in fact agree, to refer the matter to arbitration.

[7] As to the merits, it was contended before the Arbitrator that the appellant had not refused to negotiate on the allowances but proposed rather that the negotiations be centered on basic pay. Accordingly, the appellant's refusal to accede to a request to negotiate on the allowances did not indicate bad faith on its part. However, in the event that the arbitrator came to the conclusion that the appellant had refused to negotiate, the most he could do was to order the parties to negotiate. He could not impose 'unagreed' terms and conditions on the parties. In that submission the appellant was correct. It was, however, ignored by the Arbitrator.

[8] It was further contended on behalf of the appellant that the dispute, having arisen from the respondents' assertion that they are entitled to the allowances in terms of s 74(3) of the Act, was a dispute of interest as opposed to one of right since that section provides for discretionary collective bargaining negotiations. The Arbitrator appeared to accept this reasoning. He said:

“... the dispute in its current form is a ‘dispute of interest’. Because of “may” ... in section 74(3), the matters are negotiable.”

He then went on to find:

“However, allowances such as Housing and School Fees, have to exist in one form or the other”

and awarded, without giving reasons for so doing, school fees and housing allowances totaling 55 per cent of the basic salary of the employees. The appellant was aggrieved by the award and appealed to the Labour Court.

[9] Before the Labour Court, one of the main grounds of appeal was that the allowances sought and obtained by the respondents were not a right or entitlement but were to be negotiated. In the appellant's words, the Arbitrator had elevated a 'negotiable to an imperative' and thereby committed an error of law. A further ground of appeal was that the Arbitrator's award was premised on 'serious misdirections of fact which amount to misdirections in law'. In particular, it was alleged that the Arbitrator erred in his finding that allowances such as Housing and School fees 'have to exist in one form or the other'.

[10] The Labour Court dismissed the appeal. Its concern was:

"This award was handed down on the 9th November 2007. Three years down the line the respondents' grievances have not been resolved. On page 6-9 of the record it has been shown that referring the matter back for conciliation will not assist as each party maintained its original position. This will further delay the finalization of this case."

ISSUES ON APPEAL

[11] The grounds of appeal are far from clear and concise. However, the main issue which clearly arises for determination and which is dispositive of the appeal, is whether the Arbitrator could properly impose, upon the parties, the terms of a collective bargaining agreement and whether the court *a quo* was correct in upholding the decision of the Arbitrator to do so.

[12] As already stated above, the matters listed in s 74(3) of the Act are matters which the parties may, at their discretion, decide to include in their collective bargaining agreement. The appellant's position at all times was that it preferred to negotiate on basic salaries and not allowances. In my view both the Labour Court and the Arbitrator ought to have

found that the allowances, not having been negotiated by the parties and therefore not forming part of their collective bargaining agreement, were not a right or entitlement available for appropriation by the respondents. This is a matter for the parties to bargain and reach agreement on. It is not a matter where a court can intervene. A court can only intervene to enforce any agreement the parties will have concluded.

[13] The Arbitrator could not, therefore, impose terms and conditions in the collective bargaining agreement. His finding that housing and school fees allowances ‘have to exist in one form or the other’ was misguided, devoid of any legal basis and irresponsible. So, too, was the subsequent award of the said allowances in percentages² lacking evidential foundation and, as submitted by the appellant, “plucked out of the air”. Clearly, the Arbitrator acted outside his powers when he purported to set the terms of the collective bargaining agreement between the parties and the Labour Court erred in law when it upheld the arbitrator’s award.

[14] An additional issue arising from the grounds of appeal is whether the Labour Court erred in failing to find that the referral to arbitration by the Labour Officer, before attempting to conciliate the matter, was a nullity.

It was submitted, in support of this ground of appeal, that the matter ought to have been conciliated by the Labour Officer before the referral to arbitration and that the failure to conciliate rendered the referral to arbitration a nullity.

[15] It seems to me that in terms of the provisions of s 93(1) of the Act, the Labour Officer could properly refer the matter to arbitration by agreement with the parties and it is clear

² The percentages amounted to 55 per cent of the employees’ salaries.

that this is how the matter was referred to the Arbitrator. The terms of reference were agreed by the parties. However, in view of the fact that there was no legal right which was being sought to be enforced, the dispute being one of interest only, the Arbitrator's role in those circumstances would merely be a conciliatory one. Thus both the Labour Officer and the Arbitrator misconstrued their respective roles in the matter.

[16] I may comment here that while the Act provides no bar to a referral to arbitration by agreement, the Labour Officer ought to have assisted the parties in coming to some agreement. Since the dispute was one of interest, his role in conciliating the matter and assisting the parties to reach agreement, was invaluable. He ought to have attempted to settle the dispute by conciliation. Section 93(1) of the Act provides:

“(1) A labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, **shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration.**” (My underlining)

[17] The referral to the Arbitrator merely shifted the responsibility to conciliate the matter. The appellant's position was 'I will pay you the best salary that I can pay in the circumstances but I would rather not commit to pay allowances'. There is nothing wrong with that approach. Each undertaking is beset with its own peculiar circumstances. The fact that one employer considers it appropriate to pay allowances puts no obligation on another employer to do the same. Apart from dismissing the claim as being devoid of merit, the arbitrator had no meaningful role to play in this matter save to urge the parties to negotiate further on the issues in dispute. He could not, as he purported to do, create a contract for the parties.

[18] It follows from the above that the Labour Court committed an error of law when it dismissed the appeal against the Arbitrator's award.

[19] It is, therefore, ordered as follows:

1. The appeal is allowed with costs.
2. The order of the Labour Court is set aside and substituted with the following:

‘The appeal is allowed with costs.

The Arbitrator's decision is set aside.’

GWAUNZA JA: I agree

GUVAVA JA: I agree

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Sinyoro & Partners, respondents' legal practitioners