REPORTABLE (ZLR) 20

Judgment No. SC 29/08

Civil Appeal No. 101/07

COMMUNICATION & ALLIED INDUSTRIES PENSIONERS ASSOCIATION v COMMUNICATION & ALLIED INDUSTRIES PENSION FUND

SUPREME COURT OF ZIMBABWE
MALABA JA, GWAUNZA JA & GARWE JA
HARARE, FEBRUARY 4 & NOVEMBER 17, 2008

T Biti, for the appellant

W Ncube, for the respondent

MALABA JA: This is an appeal from a judgment given by the High Court on 24 January 2007 dismissing with costs an application for an order the terms of which were that:

> "(1) Within seven (7) days of the delivery of this Order on the same, the Commercial Arbitration Centre in Harare shall appoint an Arbitrator in this dispute which Arbitrator shall proceed to arbitrate on the dispute in terms of the Arbitration Act No. 6 of 1996 as read together with UNICTRAL MODEL LAW."

The cause of action was the refusal by the Trustees of the respondent to have the dispute between the parties referred to arbitration on the ground that it was not the kind of dispute the parties agreed under r 7 of the Rules governing the administration of the affairs of the respondent to refer to arbitration. In dismissing the application the court *a quo* in effect accepted the contention by the respondent's Trustees that the dispute

fell outside the ambit of r 7.

The question for determination in the appeal is whether the decision of the court *a quo* is wrong. To be considered in that connection are the grounds of appeal which are that:

> "1. The court *a quo* erred in holding that there was no dispute existing between the parties that warranted the matter to be referred to arbitration.
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> 1.2. More importantly even if the court *a quo* was correct in holding that the dispute between the parties was an amendment of the Rules rather than their enforcement surely that is a matter that had to be referred to the Arbitrator and not for the court to decide on the merits."

The facts on which the decision of the court *a quo* was made are these. The respondent is a self-administered fund established with effect from 1 July 1970 and governed by the Communication and Allied Industries Pension Fund Rules ("the Rules"). I shall from now on refer to the respondent as "the Fund". The affairs of the Fund are administered and controlled by nine Trustees. In addition to the powers given them over matters under specific Rules, the Trustees are given under r 6 an absolute discretion to do anything not inconsistent with the provisions of the Rules as amended from time to time that, in their opinion, is for the benefit and protection of members and beneficiaries of the Fund.

The object of the Fund is to provide benefits for officers and employees and former officers and employees of the Post and Telecommunications Corporation which was dissolved and what were divisions incorporated as successor companies, namely Tel-One (Pvt) Ltd; Net-One (Pvt) Ltd; Zimpost (Pvt) Ltd and People's Own

Savings Bank Limited on their retirement through age, ill-health or other reasons specified under the Rules. I shall now on refer to the successor companies as "the employer organizations".

One of the categories of beneficiaries under the Fund is that of employees who would have been discharged from employment for the reasons specified in Rule 46. These are employees who were discharged owing to the abolition of office or to any retrenchment. I shall now on refer to them as "Rule 46 Pensioners". They are entitled to benefits calculated in accordance with the formula prescribed under r 54(6) which takes into account the accumulated contributions made by the member every year from the fifth year of service together with an additional benefit equal to a prescribed percentage of his accumulated contributions excluding any voluntary contributions paid in terms of r 36.

Rule 39 gives the Trustees the discretionary power to make additions to the benefits payable to the member in terms of r 54(b) as they see fit. It provides as follows –

"**Addition to pension**

39. The Trustees shall have power to make such additions to pensions as they decide provided that:

(a) any such addition may be reduced, suspended or increased at any time as the Trustees decide.

(b) any such addition or variation of such addition shall take into account the amount of every increase referred to in the proviso to r 38; and

(c) any decision in terms of this rule shall be made after consultation with the actuary, and

(d) any such addition shall be approved by the Registrar."

The additions referred to in r 39 may be made to a benefit payable to a member of any category of pensioners. Where the benefit is being paid to a pensioner who receives an additional pension from the Consolidated

Revenue Fund because he used to work for the Government of Zimbabwe and/or the Central African Pension Fund because he used to work for the Federation of Rhodesia and Nyasaland, the exercise of the power must take into account amounts of increases made to those pensions.

Rule 38 provides that:

> "**Net payment of benefits**
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> 38. The amount of each payment of benefit made from the Fund shall be the amount laid down in these Rules less the amounts paid from the Consolidated Revenue Fund and the Central African Pension Fund direct to the member or beneficiary or estate; provided that if the amounts that are paid from the Consolidated Revenue Fund and/or the Central African Pension Fund are increased, the net pension payable from the Fund, including any additions granted in terms of r 39, shall not be less than it would have been if such increase had not been made."

Rule 47 makes it clear that every pension payable to a Rule 46 Pensioner shall be charged on and paid out of the general revenues and assets of the employer organizations. It is highly unlikely that r 38 would have any application to benefits and additions payable to Rule 46 Pensioners.

The appellant as an association of pensioners made a claim on behalf of Rule 46 Pensioners to the Trustees. The claim was to the effect that Rule 46 Pensioners were entitled to additions to benefits calculated in accordance with a formula which took into account the amounts of increases made to salaries of employees in the services of the employer organizations. The basis of the claim was the allegation that the Trustees were bound by the provision of r 39(b) to take into account the increases made to the salaries of serving employees by the employer organizations when calculating the additions to benefits payable to Rule 46 Pensioners only.

The Trustees denied that any rule let alone r 39(6) imposed upon them any obligation to calculate the additions to benefits payable to Rule 46 Pensioners in accordance with the formula suggested by the appellant. They pointed out that r 39(b) referred to amounts of increases to pensions paid directly to a member or beneficiary from the Consolidated Revenue Fund and/or the Central African Revenue Fund. They said r 39(b) did not make any reference to amounts of increases to salaries of serving employees of the employer organizations.

When it became clear to the appellant that r 38 was inapplicable to benefits and additions payable to Rule 46 Pensioners as they were paid by the employer organizations and not the Fund, a concession was made to the effect that on the face of it the language of r 39 confers on the Trustees the discretion to make the decision as to what factors to take into account in calculating the additions they would have decided to make to the benefits payable to any pensioners including Rule 46 Pensioners.

A startling proposition was nonetheless made on behalf of the appellant. It was that notwithstanding the discretionary power given to the Trustees under r 39 the court could impose upon them an obligation to take into account the amounts of increases made to salaries of serving employees by the employer organizations when they calculated the additions to the benefits payable to Rule 46 Pensioners only.

The Trustee still disagreed with the appellant on the allegation that r 39 could be construed so as to imply existence of the obligation on them. Seeing that a dispute had arisen between the parties about the matter of the existence or otherwise under the Rules of the obligation on the trustees to calculate the additions made to benefits payable to Rule 46 Pensioners only by taking into account the amounts of increases made to salaries of serving employees by employer organizations, the appellant asked that the matter be referred to arbitration in terms of r 7. The Trustees refused to act in terms of the submission on the ground that the dispute was not the kind which fell within the ambit of r 7. The terms in which the Trustees and members agreed to submit disputes between them to arbitration were that:

> "Any dispute that may arise between the Fund and a member or former member or any person deriving a claim from a member about any matter under these Rules shall be decided by the Trustees, provided that if any party to the dispute is dissatisfied with the decision the Trustees and that party shall refer the dispute to arbitration in accordance with the arbitration laws in force in Zimbabwe or to a court of law."

The application was made to the court *a quo* for an order the terms of which anticipated a finding that the dispute was referable to arbitration in terms of r 7. The learned Judge held that the matter about which the dispute between the parties had arisen was not a matter under the Rules. Consequently she dismissed the application. She said:

> "Rule 54(b) provides a formula which is applied in calculating the pension benefit which is premised on the pensioner's period of service and their own contribution to the Fund. The mode of calculating benefits which is suggested by the applicant is not laid out in the Fund Rules. In my view the suggestion by the applicant would amount to amending the Rules as the Rules specify in very clear terms the formulae to be applied when awarding pensions to this particular

category of employee. Rule 39 upon which the applicant also seeks to rely, gives the Trustees the power to make any additions to pensions as they deem fit. These additions are however discretionary and may be removed at any time. On a careful reading of the founding affidavit these are not the type of increases being sought by the applicant. They have sought a more structured increase which takes place every time the other employees receive a salary increment. In paragraph 6 of the founding affidavit the applicant makes the following concession:

> 'I appreciate that in terms of clause 39 of the Rules, on the face of it, there is nothing to compel the Trustees of the respondent to make such increases.'

This was in my view an acceptance that this provision did not give the applicants the power to compel the Trustees to make the payments sought in terms of this Rule … The dispute between the parties in my view seems to be dealing with an amendment of the Rules rather than their enforcement."

Rule 7 is a written submission to arbitration agreed upon by the parties to the Fund. It must be construed according to its language. The submission to arbitration is in my view not very wide. It covers any dispute arising between the parties about any matter under the Rules. The matter about which the dispute which the parties must refer to arbitration should the other party in the dispute be dissatisfied with the decision of the Trustees on it, should not be a matter outside the Rules. It must be a matter for which the parties made provision under the Rules.

The first question to ask and answer is; what is the dispute about? The second is; does the dispute fall within the ambit of the written submission to arbitration agreed upon by the parties? In *Heyman v Darwins Ltd* [1942] 1 ALL ER 337 LORD MACMILLAN said at p 345D:

> "Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party founding on the clause applies for a stay the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause".

The dispute in this case was about the existence or otherwise as a matter of law under the Rules of an obligation on the Trustees to take into account amounts of increases made to salaries of serving employees by employer organizations when calculating additions to benefits payable to Rule 46 Pensioners. The papers show that the appellants were demanding as a matter of law that the Trustees must act in the manner suggested whilst the Trustees argued that the decision as to what factors were to be taken into

account in calculating additions to benefits payable to pensioners or beneficiaries was a matter of discretion provided for under r 39.

The next question is whether the matter about which the dispute arose was a matter under the Rules. It was common cause that there was no rule which in express terms imposed on the Trustees the obligation to take into account amounts of increases made to salaries of serving employees by employer organizations when calculating additions to benefits payable to Rule 46 Pensioners. Whilst conceding the fact that r 39 did not impose on the Trustees such an obligation, the appellant made the startling proposition that the court could nonetheless proceed on the basis that the Trustees were under the obligation. What is provided for under r 39 is clearly a matter of discretion. The court cannot make Rules for the parties.

In *Finlayson v Standard Chartered Pension Fund* 1995(1) ZLR 302(H) it is stated at p 317 B—C that:

> "Trustees must act with impartiality and endeavour to avoid decisions that have the direct effect of conferring upon some of the beneficiaries more benefits than are received by others on the same level of entitlement unless the disparity is sanctioned by the trust instrument. This principle of common law is succinctly summarized in para 827 of *Halsbury's Laws of England* vol 48 in these terms.
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> > 'Except where the instrument creating the trust expressly gives him a discretion as to adopting a course which will benefit one beneficiary at the expense of the others, it is the duty of a trustee to hold an even hand between the parties interested under the trust and to look at the interests of all and not to those of any particular beneficiary or class of beneficiaries. He must not be a partisan of one of several beneficiaries'."

The claim by the appellant would have the court impose on the Trustees a burden they did not undertake under the Rules. The principle of impartiality which Trustees must observe in dealing with beneficiaries under the Rules requires that the court should intervene in matters of administration of the Fund for purposes of enforcing the Rules.

In my view, it could not by any stretch of imagination be said that the matter sought to be imposed on the Trustees was a matter under the Rules. It was a matter outside the Rules. The court *a quo* was correct in holding that the dispute was about a matter not under the Rules. As such the dispute did not fall within the terms of r 7.

The appeal is accordingly dismissed with costs.

GWAUNZA JA: I agree

GARWE JA: I agree

Honey & Blanckenberg, appellant's legal practitioners
Coghlan, Welsh & Guest, respondent's legal practitioners