REPORTABLE (1)

JOSEPH LUNGU AND OTHERS
v
RESERVE BANK OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & MAVANGIRA JA
HARARE, 14 OCTOBER 2016 & 26 JANUARY 2017

T. Mpofu, for the appellants

T. Magwaliba, for the respondent

PATEL JA: This is an appeal against the judgment of the Labour Court setting aside an arbitral award in favour of the appellants which upheld their claim for the payment of arrear salaries and benefits.

Background

The appellants, being 153 in number, were employed as security guards on fixed term contracts renewable every three months. Their periods of employment ranged from 2007 and 2008 until January and April 2011 when their contracts of employment expired by effluxion of time. Their contracts were not renewed because the project for which they were employed was finally wound up in 2011.

In July 2010, in a separate matter involving the respondent, its workers' committee and its employees, the first arbitrator (Nasho) ordered the payment of back pay, from 1 March 2009 to the date of the award, in line with the multi-currency system. In conformity with that award, a Works Council Agreement was concluded on 15 September 2010 to fix the back pay due to all employees and the salary structure for non-managerial employees from 1 January 2010 onwards.

In a subsequent matter, the appellants *in casu* challenged the termination of their employment on the basis that their contracts had become permanent upon repeated renewal. The second arbitrator (Mugumisi) dismissed their claim of unfair dismissal on 4 April 2012. On appeal, the arbitral award was upheld by the Labour Court. That decision is currently pending an application for leave to appeal to this court.

On 10 December 2012, following the rejection of their unfair dismissal claim by arbitrator Mugumisi, the appellants filed a further claim for the payment of arrear salaries and benefits. The third arbitrator (Mambara) found in their favour and awarded the payment of arrear salary and benefits, in accordance with the 2010 Works Council Agreement, from 1 January 2010 to the date when each claimant was retrenched. The respondent, being aggrieved by that award, applied to the Labour Court for the review of the award.

Decision Appealed and Grounds of Appeal

The court *a quo* rejected two of the grounds of review mounted by the respondent. It found that the Mambara award did not improperly seek to review or enforce the Nasho award. It also found that the prior decision of the court upholding the Mugumisi award was different from the matter currently before it because the former concerned back pay from the date of termination to the date of reinstatement as opposed to salary and benefits accrued before termination. Consequently, it was not necessary that the current matter be held in abeyance pending the determination of the appeal in the earlier matter.

The court *a quo* found in favour of the respondent on the remaining two grounds of review. Firstly, it held that the Mambara award did operate to review and alter the court's previous decision that the appellants had not been unfairly dismissed. This resulted in uncertainty on the employment status of the appellants and the possible institution of other unnecessary claims. Moreover, the arbitrator's findings that the appellants had implied permanent contracts of employment and that they had been retrenched were equally erroneous. Secondly, the court found that the issue of the appellants' grades was not part of the arbitrator's terms of reference. Thus, the arbitrator had misdirected himself in going beyond his remit and basing his award on extraneous terms of reference. The court accordingly held that the review succeeded on these two grounds. The arbitral award was set aside and substituted with the dismissal of the appellants' claim.

The grounds of appeal *in casu* are that the court *a quo* erred in the following respects:

- in concluding that the arbitrator's award mandating the quantification of an admitted liability had the effect of altering the court's previous judgment.
- in placing any significance on the arbitrator's misuse of the word retrenchment.
- in concluding that the arbitrator had effectively conducted a re-grading exercise in determining what was due to the appellants.
- in concluding that there was a reviewable issue raised before the court.

Jurisdiction to Review Arbitral Awards

In his heads of argument and at the hearing of the appeal, Adv. *Mpofu*, for the appellants, embarked upon an excursus outside the stated grounds of appeal into the review jurisdiction of the Labour Court. He submits that s 89(1) (d1) of the Labour Act [*Chapter 28:01*] limits that court to the same review powers as are exercisable by the High Court. Therefore, since the review of arbitral awards cannot be instituted in terms of the High Court Act [*Chapter 7:06*] but only under the Model Law scheduled to the Arbitration Act [*Chapter 7:15*], it follows that the Labour Court, being a creature of statute and having no inherent jurisdiction, cannot review the decisions of arbitrators. Adv. *Mpofu* relies for this proposition upon the decisions in *Catering Employers Association of Zimbabwe* v *Zimbabwe Hotel and Catering Workers Union & Another* 2001 (2) ZLR 388 (S) and *National Social Security Authority* v *Chairman, National Social Security Authority Workers Committee & Others* 2002 (1) ZLR 306 (H).

In the *Catering Employers Association* case, it was held that Article 34(2) of the Model Law sets out the sole grounds on which the High Court may set aside an arbitral award. The court cannot therefore rely on the grounds set out in s 27 of the High Court Act to set aside an arbitral award on review. This position was adopted in the *National Social Security Authority* case on the somewhat questionable basis that the general power to review proceedings conferred by s 26 of the High Court Act does not extend to arbitral awards because an arbitrator does not fall into any of the stipulated categories, *i.e.* inferior courts of justice, tribunals or administrative authorities. In any event, it was reaffirmed that the narrow grounds on which an arbitral award may be set aside are set out in Article 34 of the Model Law, and recourse to the courts against an award may only be made by way of an application under that article. The legislature had in enacting the Model Law, so it was held, deprived the High Court of its inherent jurisdiction to review the conduct of an arbitrator.

Adv. *Magwaliba*, for the respondent, submits that s 89(1) (d1) of the Labour Act was inserted by Act No. 7 of 2005. Therefore, the earlier authorities cited on behalf of the appellants do not apply. This position is placed beyond doubt by the decision of this court in *Zimasco (Pvt) Ltd* v *Marikano* 2014 (1) ZLR 1 (S) to the effect that the Labour Court has full powers of review in addition to those of the High Court. Moreover, s 92EE(1) of the Act, inserted by Act No. 5 of 2015, makes it very clear that the Labour Court can exercise review powers over the decisions of arbitrators. I entirely agree with these submissions.

Section 89 of the Labour Act prescribes the functions, powers and jurisdiction of the Labour Court. In particular, s 89(1) in its relevant portions provides that:

> "(1) The Labour Court shall exercise the following functions—
> (*a*) hearing and determining applications and appeals in terms of this Act or any other enactment;
> (*b*) ……;
> (*c*) ……;
> (*d*) ……;
> (*d*1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters."

The interpretation of this provision was lucidly elaborated by Garwe JA in the *Zimasco* case (*supra*) at 6F-7D, as follows:

> "The above provisions are, in my view, clear and unambiguous. In respect of labour matters, the Labour Court shall exercise the same powers of review as does the High Court in other matters. The jurisdiction to exercise these powers of review is in addition, and not subject, to the power the court has to hear and determine applications in terms of the Act. …….
>
> The suggestion …….. that the Labour Court has been given the same power of review as would be exercisable by the High Court in respect of labour matters is, in my considered view, incorrect and inconsistent with the provisions of the Act. I say this for two treasons. Firstly, the Act is clear that no court, other than the Labour Court, shall have jurisdiction in the first instance, to hear and determine any application, appeal or matter referred to in s 89(1) of the Act – see s 89(6) of the Act. …….. Secondly, it is clear that the interpretation given relies on a superficial reading of thewording of s 89(1)(d) [*sic*]. The section should be understood to mean 'the same powers of review in respect of labour matters as would be exercisable by the High Court' or alternatively 'the same powers of review, as would be exercisable by the High Court, in respect of labour matters'. Any other reading of the paragraph would clearly result in an absurdity."

I fully endorse the above reasoning. The only possible meaning and effect to be ascribed to s 89(1) (d1) of the Labour Act is that the Labour Court has the same power to review any inferior proceedings in labour matters on the same grounds of

review as may be invoked by the High Court in the exercise of its powers of review in relation to other matters not embraced by the Labour Act. The interpretation propounded by Adv. *Mpofu* is not only specious in that it divests the Labour Court of the full breadth of its oversight in labour matters but also absurd in that any procedural or other irregularity committed by an arbitrator would be rendered wholly unreviewable, whether by the Labour Court or the High Court. That surely could not have been the intention of Parliament in the enactment of s 89 of the Labour Act.

In any event, any possible room for misconstruing s 89(1) (d1) has been inescapably shut down by the recently enacted s 92EE which provides as follows:

> "**92EE Grounds of review by Labour Court**
>
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision conducted or made in connection with this Act may be brought on review before the Labour Court shall be –
>
> (a) absence of jurisdiction on the part of the arbitrator or adjudicating authority concerned;
>
> (b) interest in the cause, bias, malice or corruption on the part of the arbitrator or adjudicating authority concerned;
>
> (c) gross irregularity in the proceedings or the decision of the arbitrator or adjudicating authority concerned.
>
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

The purpose of s 92EE, as I perceive it, is to bolster the review powers of the Labour Court under s 89(1) (d1) by spelling out in unambiguous terms the specific grounds upon which those powers may be exercised, *viz.* the same grounds as are enumerated in s 27 of the High Court Act. Moreover, the provision makes it clear, *ex abundante cautela*, that the review powers of the Labour Court are exercisable over arbitrators and adjudicating authorities in all labour matters.

To conclude on this aspect, I take the view that the appellant's legal point *in limine* challenging the jurisdiction of the Labour Court to review arbitral awards, is utterly unmeritorious. It is accordingly dismissed.

The Merits

Adv. *Mpofu*, for the appellants, submits that the arbitrator did not go outside his terms of reference. The Mambara award found that the 2010 Works Council Agreement (the 2010 Agreement) applied to all of the respondent's employees, including the appellants, in conformity with the Nasho award. It did not re-grade the appellants but simply provided that each claimant be paid in accordance with the 2010 Agreement from 1 January 2010 to the date of termination. As regards the actual wording of the operative part of the award, he proffers the strange argument that the reference to 1 January 2010 is a mere typographical error and should have been a reference to 1 February 2009, which was the commencement date for payment claimed by the appellants. He further argues, equally startlingly, that the use of the term "retrenched" in relation to the closing date for payment in the Mambara award is of no significance and must be regarded as being inconsequential. Rather, it must be read and construed as relating to the respective date of termination of employment of each appellant.

Adv. *Magwaliba* counters that the arbitrator clearly went beyond the terms of reference set out at the beginning of his award. Moreover, he erroneously applied the terms of the 2010 Agreement to the appellants by conflating various claims. The 2010 Agreement was confined to permanent employees and did not extend to the appellants

who were employees on fixed term contracts. Finally, he notes that the references to 1 January 2010 and retrenchment in the operative part of the arbitral award should not be regarded as mere typographical errors.

On the question of re-grading, arbitrator Mambara rejected the respondent's argument that the appellants had no specific grade in terms of their contracts of employment. Instead, he applied the Nasho award, which ordered that the salaries of the respondent's employees be regularised, coupled with the salaries specified in the 2010 Agreement. The court *a quo* found that the arbitrator misdirected himself in re-grading the appellants and thereby going outside his terms of reference.

It is common cause that the arbitrator's terms of reference raised an unfair labour practice in the respondent's alleged failure to pay arrear salaries and benefits due to them from 1 February 2009 to the date of termination of their respective contracts of employment. The arbitrator dealt with this question by following the Nasho award and adopting the lowest salary figure payable as stipulated in the 2010 Agreement. In my view, this did not entail any re-grading of the appellants but simply involved applying the sums derived from the exercise conducted by the Works Council. I am therefore unable to agree with the finding of the court *a quo* that the arbitrator exceeded his terms of reference. The appeal accordingly succeeds in this particular inconclusive respect.

On the other hand, the operative part of the order delivered by the arbitrator is extremely problematic. It states:

> "That the Respondent be and is hereby ordered to pay to each and every Claimant arrear salaries and benefits per the 16 September 2010 Works Council Agreement from 1st January 2010 to the date each and every claimant was retrenched.´ (The emphasis is mine).

I have no doubt that the learned arbitrator was alive to the fact that he was called upon to deal with claims for salaries and benefits from 1 February 2009 to the date of termination of each appellant's contract of employment. This emerges clearly from his stated terms of reference and his comments at the beginning and end of his award. I also have no quarrel with the trite proposition that technicalities should not be allowed to impinge upon or obstruct the delivery of justice in labour matters. Nevertheless, I take the view that the order made by a judicial tribunal constitutes the decisive gravamen of its adjudicative process. Moreover, it is that order that must be capable of obedience and practical enforcement by the parties concerned. Its precise wording and exactitude of expression are therefore of paramount importance. Consequently, where it is recklessly mispronounced, as it was *in casu*, it fails to achieve its fundamental purpose and cannot be condoned or endorsed by an appellate court. To use the celebrated *MacFoy* phraseology, it is an arrant nullity and everything founded upon it must collapse.

In the instant case, the miscitation of the date from which the appellants' entitlement to their claims arose, *i.e.* 1 January 2010, is patently erroneous inasmuch as it fails to address the preceding period from 1 February to 31 December 2009. Again, the reference to the date when each claimant was "retrenched" is entirely misplaced in the context of termination of contracts of fixed duration by effluxion of time. As was quite correctly observed by the court *a quo*, the Mambara award operates to alter the earlier

findings of the Mugumisi award, as confirmed by the Labour Court, that the appellants had not been unfairly dismissed. The attendant implication of permanent employment status results in lack of certainty and the potential creation of other unnecessary claims.

In the event, I take the view that the two critical errors in the operative part of the order delivered in the impugned award are so fundamental to its validity that they cannot be disregarded and swept away as mere technicalities or typographical errors. This conclusion effectively entails the dismissal of the remaining three grounds of appeal.

Scope of 2010 Agreement

Having disposed of the stated grounds of appeal, I still think it necessary, in the interests of justice and the finality of litigation, to consider a crucial aspect of the matter that was canvassed before the arbitrator and the court *a quo* but not properly addressed or determined by either tribunal. This aspect concerns the exact scope of the 2010 Agreement and its possible extension to the appellants.

The arbitrator noted that the Nasho award required the appellants' contracts to be regularised in line with the multi-currency system from 1 March 2009 onwards. He then turned to the 2010 Agreement and concluded that it applied to the appellants. In so doing, he referred to the minutes confirming the Agreement and signed by the parties on 27 September 2011. However, he did not reproduce the relevant portions of the Agreement or the confirmation minutes to explain or justify his conclusion that the benefits accruing from the Agreement extended to the appellants.

The court *a quo* also noted the operative part of the Nasho award that called upon the respondent to regularise its employees' contracts. It then referred to the subsequent 2010 Agreement in which "it was resolved that a net salary of $500 per month be paid to all employees across the board for the period 1 March 2009 to December 2009". It further noted that "the Works Council agreed to a salary structure for 1 January 2010 to date for its non-managerial grades" ranging from $500 to $1 092. Again, the court did not reproduce the relevant clauses of the 2010 Agreement. Nor did it call for any evidence to be adduced, as it was statutorily empowered to do, from the signatories to that Agreement to clarify or explain its provisions and scope of coverage. In the event, the court did not proceed to consider the precise ambit of the Agreement and its implications for the appellants' claims before the arbitrator. Indeed, it made no finding whatsoever on this critical aspect of the matter, despite having recognised some sequential and causal nexus between the Nasho award and the 2010 Agreement.

It appears to be common cause, although even this may need clarification, that the present 153 appellants were part of the 1078 claimants and beneficiaries of the Nasho award rendered in July 2010. That award also ordered the parties involved to reconvene through the Works Council to regularise the employees' contracts in line with the multiple currency system with effect from 1 March 2009. Thereafter, the Works Council was convened in September 2010 and concluded the Agreement presently under consideration. If this sequence of events is correct and if the 2010 Agreement was designed to embrace all of the respondent's employees, it would follow that the

appellants have an eminently justifiable claim to the benefits accruing from that Agreement.

In the circumstances, it seems just and equitable that this matter be remitted to the court *a quo* to clearly determine whether or not the scope of the 2010 Agreement extended to all of the respondent's employees, including the appellants *in casu*. This will not only serve to ensure that justice is attained but also to secure finality to the protracted and costly litigation between the parties.

As regards costs, in view of the partial success coupled with the partial failure of the appeal, as well as the impending remittal of the matter to the court *a quo*, I think it fitting that each party should bear its own costs.

In the result, it is ordered as follows:

1. The appeal succeeds in respect of Ground 3 and is dismissed in respect of Grounds 1, 2 and 4 in the Notice of Appeal.
2. The judgment of the court *a quo* is set aside insofar as it relates to Ground 3 in the Notice of Appeal.
3. The matter is remitted to the court *a quo*:
   (i) to determine, on the basis of the specific provisions of the Works Council Agreement concluded in September 2010 and the minutes accompanying the Agreement, and having regard to sworn evidence from the signatories to the Agreement, whether or not the salaries and benefits stipulated in that Agreement were intended to apply to the appellants; and

(ii) if the answer to that question is in the affirmative, to quantify the salary and benefits due to each appellant in terms of the Agreement, from 1 March 2009 to the respective date of termination of each appellant's contract of employment, subject to the deduction of such payments as each appellant may have received by way of salary and benefits during the relevant period.

4. Each party shall bear its own costs in respect of this appeal.

GWAUNZA: I agree

MAVANGIRA JA: I agree

Muringi Kamdefwere, appellants' legal practitioners

Chitapi & Associates, respondent's legal practitioners