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Judgment No. SC 35/18
Civil Appeal No. SC 519/17

ZESA HOLDINGS (PRIVATE) LIMITED
v
ZESA MANAGERS ASSOCIATION

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & PATEL JA
HARARE, 24 OCTOBER 2017 & 19 JUNE 2018

A. K. Maguchu, for the appellant

T. Magwaliba, for the respondent

PATEL JA: This is an appeal against part of the judgment of the Labour Court wherein the appellant was partially successful. In particular, the appellant challenges those parts of the judgment relating to the payment of school fees and fuel allowances and the allocation of personal issue motor vehicles to certain members of the respondent association.

The appellant is the holding company of various state owned entities engaged in the importation, generation and distribution of electricity in Zimbabwe. The respondent represents, *inter alios*, managers of grades D3 and D4 employed by the appellant and its subsidiaries. The dispute between the parties relates to the managers' claims for various allowances and benefits payable by the appellant. The matter was referred to an arbitrator who found in favour of the respondent in respect of all the managers' claims. On appeal

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from the arbitral award, the Labour Court rejected two and upheld three of those claims. The present appeal lies against the latter decision. There was no cross-appeal by the respondent.

The Decision of the Labour Court

The court *a quo* found that the arbitrator's award of an outstanding 5 per cent salary allowance was unclear and that, as was conceded by the respondent, the arbitrator fell into error in that respect. The court also reversed the award of an engineer's allowance on the basis that the payment of this allowance to some but not all employees was not arbitrary but premised on a rational differentiation in skills and the exigencies of the appellant's business.

As regards the school fees allowance, the court found that this allowance was introduced by a Collective Bargaining Agreement concluded in 2009 (the 2009 CBA) and had become a vested contractual entitlement. The appellant could not unilaterally withdraw it and the arbitrator's decision to restore this allowance was therefore correct.

With respect to the claim for an increase in the fuel allowance, the court noted that the arbitrator did not allow or dismiss the claim but simply ordered the parties to negotiate a reasonable quantum within 30 days. The ground of appeal in this connection was unmeritorious and accordingly dismissed.

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As regards the allocation of personal issue motor vehicles, the court found that this claim was justified by dint of a letter written in April 2008 by the Managing Director of one of the appellant's subsidiaries, coupled with a motor vehicle policy document issued by the appellant in May 2011. The arbitrator was therefore correct in allowing this claim.

The final question before the court *a quo* pertained to the appellant's plea of financial incapacity. The court found that this issue was not directly placed before the arbitrator nor specifically addressed by him. In any case, the appellant had not availed the evidence necessary to show that it was in fact insolvent.

In the event, the court *a quo* dismissed the claims for outstanding salary and engineer's allowances. The claim for an increase in the fuel allowance was referred back to the parties to negotiate a reasonable increment. As against the appellant, the court ordered that the school fees allowance should be paid with effect from 2009. It also held that the personal issue motor vehicle benefit was applicable to all D3 managers in all of the appellant's subsidiaries. There was no order as to costs.

<u>Grounds of Appeal</u>

In its grounds of appeal, the appellant avers that the court *a quo* erred in the following respects:

- in concluding that the 2009 CBA pertained to the respondent which was not a party thereto and which had not been formed as at 2009;

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- in allowing the respondent's claims for school fees and increased fuel allowances and personal issue motor vehicles for D3 managers;
- in not concluding that the appellant had objectively demonstrated its inability to satisfy the respondent's claims of interest on account of its insolvency; and
- in upholding an irregular award against the appellant's subsidiaries which were not parties before the arbitrator or the court.

Relevance and Applicability of 2009 Collective Bargaining Agreement

The original Collective Bargaining Agreement for the Zimbabwe Electricity Supply Authority Undertaking (General Conditions), S.I. 1 of 2008, provides that emoluments and allowances for all staff employed by the appellant would be negotiated through collective bargaining. The 2009 CBA, which appears to have been the basis for the allowances claimed before the arbitrator and the Labour Court, is an adjunct to the original 2008 Agreement. However, at the hearing of this appeal, it became evident that the 2009 CBA did not specifically address or provide for those allowances. A perusal of the instrument concluded on 17 February 2009 (as contained in the record) shows that it is confined to the payment of a fixed sum of US$190 (to cascade from grade A3 through to grade D2) and the commitment to pay a transport allowance (of an unspecified amount) in advance. It contains no reference whatsoever to the school fees allowance and the fuel allowance increase presently under consideration.

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When questioned by the court, Mr *Magwaliba*, for the respondent, attempted to sidestep the issue by arguing that the 2009 CBA was not the principal basis of the respondent's case. However, this position is totally belied by the contents of the respondent's statement of claim, dated 25 July 2012, as claimant in the arbitration proceedings. In particular, it is stated in para 23.1 that:

> "In 2009, through a Collective Bargaining Agreement …., the employees were awarded the following salary allowances …. .
> On the 27th of April 2009, through an internal correspondence, the Respondent unilaterally reduced the said allowances …. ."

With specific reference to the school fees allowance, the following appears at paras 24.1 to 24.3:

> "In the 2009 CBA, claimants were awarded a 75 per cent recoupment of school fees for their children after production of invoices.
> The allowance was again unilaterally suspended in the memorandum of 27 April 2009 … .
> Up to date, the claimants have not received the same notwithstanding that it was agreed and captured in a binding CBA and more so that this benefit was not introduced for the first time in 2009 but had already been an existing benefit which however had been mutually stayed during the turbulent economic times of 2007-2008."

The same position is captured in the respondent's prayer before the arbitrator, where it is prayed for:

> "(a) Payment of the 5 per cent outstanding salary allowance which is contained in 2009 Collective Bargaining Agreement to all Claimants in Respondent's employ at the time when the salary allowances were due for payment and were unlawfully withdrawn.
> (b) Payment of the school fees allowances to all Claimants who are entitled to the same in terms of the said CBA of 2009."

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It is abundantly clear from the foregoing that the respondent's claim for unpaid allowances was founded upon the 2009 CBA. However, as I have already observed, the 2009 CBA of 17 February 2009 is deafeningly silent on the allowances that are the subject of these appeal proceedings. It is common cause that there is no other agreement that was concluded in 2009. Indeed, as counsel for the respondent was constrained to concede, although the benefits claimed might have been in existence, it is not clear where the benefits granted were recorded.

What then emerges is that the respondent's cause of action in respect of the school fees allowance and fuel allowance increase was founded on an instrument which is either irrelevant or non-existent. It is therefore absolutely unclear what agreement or document was presented to and considered by the arbitrator and the court *a quo* to support the respondent's claims for those allowances. These claims are simply not sustainable on the papers before this Court. However, for the sake of completeness, I will proceed to consider the additional submissions made by counsel in respect of those allowances.

In any event, in light of the above findings, it becomes unnecessary to determine the applicability aspect of the third ground of appeal, to wit, whether the court *a quo* erred in concluding that the 2009 CBA pertained to the respondent which was not a party thereto and which had not been formed as at 2009. Indeed, at the hearing of the appeal, this aspect was not ventilated at all by either counsel, as it became obvious that it had been rendered otiose.

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School Fees Allowance

Even though the actual legal basis of the school fees allowance claimed by the respondent is unclear, it is common cause that it was in existence and was being paid at some stage. This seems to be relatively clear from an internal memorandum, dated 27 April 2009, from the Managing Director of the Zimbabwe Electricity Transmission and Distribution Company (ZETDC), a subsidiary of the appellant, to all members of its staff. Amongst other things dealt with in the memorandum, the school fees allowance was suspended with immediate effect, ostensibly "to support government efforts towards the economic recovery programme [and] … need for sacrifice on our part to bring back the economy to reasonable levels".

As noted earlier, this allowance had been mutually stayed in 2007 to 2008. The respondent's position is that it was then reintroduced through the 2009 CBA until it was unilaterally and unlawfully withdrawn on 27 April 2009. Mr *Magwaliba* also alluded to an arbitral award rendered in 2011 by a different arbitrator, setting aside the decision taken in April 2009 to reduce certain benefits, which were then reinstated by the appellant through an internal memorandum dated 2 December 2011. However, these documents and related events are of no assistance to the respondent's case inasmuch as they pertain to managers in grade D5 only and to other contractual allowances not presently in dispute. More importantly, as I have already found, there is no agreement in existence showing a

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contractual right or entitlement to the school fees allowance. Consequently, the respondent's claim in this respect is legally unsustainable.

Fuel Allowance Increase

As regards the claim for a fuel allowance increase, it is clear that the arbitrator did not award any increase. He recognised that this was a dispute of interest and not a dispute of right and accordingly directed the parties to continue to negotiate the issue and revert to him in the event of their failure to settle. Similarly, the court *a quo* simply referred this claim back to the parties to negotiate a reasonable increment.

At the conclusion of his submissions, Mr *Maguchu*, for the appellant, agreed that the effect of the court *a quo*'s judgment in this respect was simply to confirm the arbitrator's directive. He therefore conceded that this was not an appealable issue and did not persist with this aspect of the appeal.

Personal Issue Motor Vehicles

The respondent's claim in respect of personal issue motor vehicles relates only to grade D3 managers. The claim is founded on an internal memorandum, dated 14 April 2008, from the Managing Director of ZESA Enterprises (ZENT), another subsidiary of the appellant. It was addressed to one Mervis Ngwenya, advising him/her that, as a result of an ongoing restructuring exercise, grade D3 managers now qualified for the company car benefit, and that he/she would therefore be allocated a suitable vehicle.

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The respondent's argument, which was accepted by the court *a quo*, is that this benefit should not be limited to employees of ZENT but should extend to all grade D3 managers employed by all of the appellant's subsidiaries. In its statement of claim in the arbitration proceedings, the respondent averred that the policy should bind all subsidiary companies, and that ZENT had "deliberately flouted this policy thus creating an unnecessary schism between employees of the same grade". The appellant denies that the Managing Director of ZENT had the authority to vary the appellant's motor vehicle policy. It argues that his memorandum of 14 April 2008 cannot be extended to all grade D3 managers.

It is common cause that the allocation of personal issue vehicles is governed by a policy document, dated 13 May 2011, setting out the appellant's vehicle allocation scheme. It is also not in dispute that, in terms of clause 4.2 of this policy:

> "Only members of staff in D4 and above are eligible for allocation of company vehicles under this scheme. …. All members of staff in grade D4 and above shall contractually be entitled to be issued with company vehicles on a personal-to-holder basis for both business and personal use."

In light of the unequivocal terms of the appellant's policy, I am entirely in agreement with Mr *Maguchu* that the supposed right conferred by ZENT on one of its managers must be confined to its own grade D3 managers and cannot be extended to their counterparts in other subsidiaries. As is apparent from the respondent's submissions before the arbitrator, its cause is based on equity and fairness rather than any legal right. There is

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absolutely no contractual basis for the respondent's claim in this respect and the court *a quo* clearly erred in upholding it.

Insolvency of the Appellant

The court below found that the appellant had not directly raised the issue of financial incapacity and that the arbitrator himself had not addressed this issue. Consequently, it held that a ground of appeal could not arise where there was no decision on the issue.

It is clear from the foregoing that the court *a quo* did not make any appealable determination as to the appellant's inability to satisfy the respondent's members' claims on account of its insolvency. In any event, counsel for the appellant did not advance any submissions on this ground of appeal. It must therefore be taken as having been abandoned.

Award against Appellant's Subsidiaries

Mr *Magwaliba* submits that the appellant's practice was to apply common policies across the board, governing the terms and conditions of employment for its own staff as well as the staff of all its subsidiaries. This is evidenced by various memoranda and resolutions issued by the appellant, between 2010 and 2011, pertaining to salary scales, personal issue motor vehicles, and housing, retention and non-pensionable allowances.

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This shows that the appellant and its subsidiaries were not separate units but one economic entity. Thus, on the basis of the decision in *Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd & Anor* 2011 (1) ZLR 548 (H), the ground of appeal on this question is unsustainable.

Mr *Maguchu* counters that there is no justification *in casu* for overriding the well-entrenched company law principle of separate legal personality and liability as between distinct corporate entities. The judgment in the *Trinpac* case makes it clear that the one entity principle is only applicable in limited circumstances, none of which is applicable on the facts of this case.

This first ground of appeal relates, in essence, to the orders of the arbitrator and the court *a quo* requiring the appellant to apply its personal issue motor vehicles scheme to all grade D3 managers employed by all of its subsidiaries. Given my conclusion in respect of that specific issue, it is not necessary to delve into the merits of this particular ground of appeal.

In any event, it seems unnecessary to broach the scope of the single economic entity principle canvassed in the *Trinpac* case, since it is fairly obvious that the court *a quo* erred in upholding an award against the appellant's subsidiaries which were not parties before the arbitrator or the court. Whether or not it would have been proper to regard these subsidiaries as operational appendages of the appellant, they themselves should have been separately cited as parties in the proceedings below.

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Disposition

In the result, the appeal must succeed in respect of all the substantive claims erroneously upheld by the Labour Court. Additionally, as is the norm, the costs of the appeal should follow the cause.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is amended by the deletion of paragraphs (iii) and (v) and the substitution of the following:

   "(iii) The claim for payment of the school fees allowance be and is hereby dismissed."

   "(v) The claim for personal issue motor vehicles for all grade D3 managers be and is hereby dismissed."

GARWE JA: I agree.

GOWORA JA: I agree.

Dube, Manikai & Hwacha, appellant's legal practitioners

Makuwaza & Magogo, respondent's legal practitioners