

**Judgment No. SC 32/18
Civil Appeal No. SC 807/16**

REPORTABLE (27)

**ZESA HOLDINGS (PRIVATE) LIMITED
v
ITAYI UTAH**

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA; GUVAVA JA; MAVANGIRA JA
HARARE, SEPTEMBER 22, 2017 AND JUNE 12, 2018**

S. M. Hashiti, for the appellant

M. Gwisai, with *C. Mahlangu*, for the respondent

GWAUNZA JA: This is an appeal against the whole judgment of the Labour Court handed down on 20 February 2015.

FACTUAL BACKGROUND

The respondent was employed by the appellant as an Apprentice Distribution Electrician on 17 September 1984. He rose through the ranks until he was promoted to the position of Technical Services Director in terms of a contract dated 27 August 2004. In July 2007 the appellant's Managing Director wrote to the respondent advising him of a restructuring exercise being underway, and that his post had to be abolished. He also notified him of an intention to work out his retrenchment package. On 30 July 2007 the Group Company Secretary of the

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appellant wrote a letter to the respondent in which he outlined the appellant's proposal for a retrenchment package.

The respondent, through his legal practitioners, indicated that he was not agreeable to the proposals concerning the date of termination of the employment relationship, the housing loan, performance bonus, personal loan, foreign travel, purchase of a replacement motor vehicle and furniture.

After some correspondence, the parties failed to agree on the appropriate package and eventually the matter was referred to arbitration before Arbitrator Bvumbe in terms of s 93 of the Labour Act [*Chapter 28:01*]. His terms of reference were the following:

1. "Whether or not ZESA Holding Private Limited was in breach of the terms and conditions of the contract of employment in respect of Itayi Utah who is employed by the applicant as Technical Services Director. Employment contract dated 7 August 2004 in respect of the non-fulfilment of the following benefits:
 - a. Housing loan
 - b. Personal loan
 - c. Performance bonus
 - d. Replacement Motor Vehicle
2. Whether or not the respondent Itayi Utah is entitled to:
 - a. Foreign Travel
 - b. Office FurnitureBenefits as part of his retrenchment package."

Before the Arbitrator, the parties had agreed that the effective date of the 'retrenchment' would be the date of the arbitral award (and this agreement was captured in the arbitral award by Arbitrator Bvumbe). In addition, the arbitrator held that the respondent was not

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entitled to foreign travel and office furniture as well as the housing loan which he claimed. In respect of a motor vehicle benefit that had been withdrawn, the arbitrator held that the respondent should be paid damages and he also ordered three months' worth of salary as compensation for the personal loan.

On 24 June 2009, the appellant calculated the severance package which the respondent signed "without prejudice". The money was subsequently deposited into his account. In an apparent *volte face*, the respondent later contended that the package had not been properly calculated and that his date of termination should change from 31 March 2009 to the date he would be paid what he contended he was entitled to. He also at this stage questioned the lawfulness of the 'retrenchment' process even though it had resulted in him signing for and accepting, a package in terms of Arbitrator Bvumbe's award.

This new challenge to a process that had been concluded between the parties was referred to a different Arbitrator, Mr Manase. His terms of reference encapsulated the respondent's challenge to the earlier 'retrenchment' process concluded through Arbitrator Bvumbe's award.

They read as follows:

- “(i) Whether or not respondent's purported retrenchment of applicant and the process that followed was lawful, and
- (ii) Whether or not applicant is still an employee of respondent in terms of the law.”

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Arbitrator Manase held that the purported retrenchment of the respondent was null and void as it had not been approved by the Minister and therefore the respondent was still an employee of the appellant. He ordered that he be reinstated to his former employment with the appellant.

Aggrieved by this decision, the appellant appealed to the Labour Court on the grounds that the Arbitrator erred in not finding that acceptance of the retrenchment package even on a purported “without prejudice” basis destroyed any future claims in that respect, by the respondent. The appellant also averred that the Arbitrator erred grossly at law in holding himself to have jurisdiction to determine the conclusiveness or otherwise of the award by Arbitrator Bvumbe. The Labour Court dismissed the appeal. Having unsuccessfully sought leave to appeal to this Court, in the Labour Court, leave was sought and granted by this Court on 14 December 2016. This Court is now seized with the appeal.

It has been noted that in the Labour Court the appellant unsuccessfully argued that Arbitrator Manase lacked the jurisdiction to determine the lawfulness or otherwise of the award by Arbitrator Bvumbe. In other words, Arbitrator Manase, who at law enjoyed parallel jurisdiction with Arbitrator Bvumbe, could not competently interfere with the latter’s award. The appellant, on appeal to this Court, did not directly allude to the matter in its grounds of appeal. In my view however, the question of Arbitrator Manase’s jurisdiction to hear the matter is an important question of law whose determination may effectively dispose of the appeal. In any case it is also important to consider the effect his award had on Arbitrator Bvumbe’s award. It was also helpful

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to the court that detailed submissions on the matter were made by both parties in their heads of argument and in argument during the hearing of this appeal.

Relying on the case of *Williams & Anor v Msipha NO & Ors* SC-22-10, the appellant correctly argued in its heads of argument that an appeal court:

“must be able to intervene not only against the direct dictates of a judgment of the lower court, but also against its effect¹”

However, before addressing the issue of Arbitrator Manase’s jurisdiction to hear the matter, it is my view that the nature and effect of the process of ‘retrenchment’ that the parties negotiated and acted upon, must be determined first.

The appeal therefore raises two issues for determination:

- 1 . Did the parties negotiate a retrenchment package in the manner dictated by the applicable law, and
- 2 . Did Arbitrator Manase have jurisdiction to determine the lawfulness or otherwise, of the process that culminated in the package of benefits being paid to the respondent?

In his heads of argument, the respondent correctly outlines the retrenchment procedure then applicable, as follows:

“Thus, in case of agreement and forwarding of the agreement to the Retrenchment Board, the effective date of retrenchment would more or less coincide with the date of the final award However, if there was no agreement within one month, the provisions of s 3(8) of S.I. 186/2003 would kick in, with the dispute to be resolved in terms of s 12 (C) of the Act. That is assessment of the matter by the Retrenchment Board and its recommendations to the Minister and finally the approval of the retrenchment package by the Minister,

¹ See *macDonald v Canada (AG)* (1994) 1 SCR 311 at 329

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subject to any modifications she or he may make in terms of s 12 (C) (9) of the Act. Until then, the employees remain employees of the employer and entitled to their salaries and benefits”

It is not in dispute that this process is not what the parties *in casu* engaged in. As indicated above the genesis of the dispute was a letter written to the respondent in June 2007, informing him of a restructuring exercise within the appellant, and the abolishment of his post. Thereafter the parties engaged in a process that they termed ‘retrenchment’ and in terms of which a package of benefits payable to the respondent, was negotiated. When a dispute arose as to the total package due to the respondent, the parties by agreement, referred the matter to Arbitrator Bvumbe, whose terms of reference have been set out above. According to the respondent’s own outline of the correct process to follow in the event of a retrenchment, this was the stage at which the parties would have referred the matter to the Retrenchment Board. They chose not to do so.

Arbitrator Bvumbe prefixed his award with the following comment:

“On this occasion (5 April 2008 the date of referral of the matter to him) the parties endorsed the referral to me as a single arbitrator. They also agreed on the terms of reference which were to be considered for the finalisation of the dispute between the parties, which were

The parties concurred that the effective date of retrenchment would be the date of the arbitration award.” (*my emphasis*)

This statement by the arbitrator significantly refers to ‘finalisation of the dispute’ between the parties. This suggests clearly that neither side contemplated engaging in the

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retrenchment process alluded to above. Their intention was to have the dispute relating to the benefits on which agreement had not been reached, finally determined by Arbitrator Bvumbe.

That this was the parties' clear intention is borne out by their subsequent conduct. Firstly, following Arbitrator Bvumbe's award, dated 24 October, 2008, the appellant on 30 March 2009 addressed a letter to the respondent's legal practitioners, to the following effect:

"Re: Retrenchment Package

The above matter refers:

Please find attached to this letter the Retrenchment offer for your client, Itayi for his signature. May we have your response as a matter of urgency so that we put this matter to rest. *"(my emphasis)*

This letter, as is evident, reinforced the intention to have the dispute resolved in terms of the arbitral award of Mr Bvumbe.

Secondly, the respondent accepted the offer on 24 June 2009, in a letter² written on his behalf by his legal practitioners. The letter in relevant part read as follows:

"We write to advise that our client has since accepted the retrenchment package by signing the letter. We attach herewith a signed copy of your offer from our client for immediate processing, without prejudice Payment should be processed and deposited in our client's account by 30 June 2009, failure which(*sic*) interest and damages shall be raised against Zesa Holdings in terms of the law. We are also instructed to remind you to immediately communicate our client's termination of employment on 31 March 2009 to his pension managers in order to facilitate immediate pension payments from two pension funds..." *(my emphasis)*

² The letter erroneously states that the offer letter was received on 24 June, 2009, when the legal practitioners' date stamp on the latter document clearly indicates it was received on 30th March 2009

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The content and tone of this acceptance letter by the respondent in my view admits of no doubt as to the intention, by him as much as by the appellant, to bring finality to the dispute in this manner. This is regardless of some indications in the letter that the respondent had signed the ‘retrenchment’ package on a ‘without prejudice basis’³. It is also significant that the only recourse that the respondent at that point contemplated in the event of the appellant’s failure to pay the package in question, was to sue the latter for ‘interest and damages’. Sight must also not be lost of the fact that the respondent accepted the termination of his employment and expected immediate notification thereof to his two Pension Funds.

Finally, it is not in dispute that the appellant thereafter paid, and the respondent received, the package that the parties had signed for.

Against this background I have no doubt in my mind that the process engaged in by the parties, as outlined above, clearly speaks to:

- Negotiations for a package to be paid to the respondent following the abolition of his employment post with the appellant;
- Agreed referral for final resolution of the dispute, to Arbitrator Bvumbe
- An offer made by the appellant to the respondent, of a package worked out in terms of the arbitral award;
- Acceptance in clear terms of the offer, by the respondent; and
- Implementation of the agreement through release of the relevant benefits, into the respondent’s bank account.

³ This would, in any case not have changed the character and effect of the agreement, for that is not capable of being concluded on a “without prejudice” basis . See *Yakub Mahomed v John Arnold Bredenkamp HH 130/16* where it was held as follows;

“I also find persuasive the submission made on behalf of the plaintiff that an agreement cannot be without prejudice or privileged, only the negotiations can...”

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The issues listed above bear all the hallmarks of a contract negotiated, signed and perfected. Despite the parties' loose usage of the term 'retrenchment' package, I am satisfied that the parties negotiated for and signed, an agreement for the termination of the respondent's employment with the appellant. The agreement was entered into between two consenting parties and was signed freely and voluntarily. It was a contract like any other contract and can, therefore not be said to be unlawful, as the respondent now seeks to argue.

Accordingly, I find that the parties neither contemplated nor engaged in a retrenchment process as outlined in the relevant law.

This brings me to the second issue to be determined in this matter:

“Did Arbitrator Manase have jurisdiction to determine the lawfulness or otherwise, of the process that culminated in the package of benefits being paid to the respondent?”

Neither the parties nor Arbitrator Manase dispute that no appeal was filed against Arbitrator Bvumbe's award. This was the award on the basis of which the package terminating the employment of the respondent was worked out, paid and accepted. The award is therefore extant, and has been fully implemented. In para (c) of his award, Arbitrator Manase correctly stated as follows:

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“Given the fact that Arbitrator Bvume’s award was neither challenged and set aside, it remains binding... I as an Arbitrator, cannot properly set aside a subsisting arbitral award by a brother arbitrator. The award however, was not conclusive and there were outstanding items for resolution and clarification.” (*my emphasis*)

He clearly was aware of the legal position regarding his competency or lack thereof, to interfere with a fellow arbitrator’s decision. Despite this, he seemed to have entertained the notion that he could vary, amend or supplement the latter’s award. This is evidenced by the latter part of the statement cited above. This is clearly not permissible at law, as illustrated by the authorities cited below.

Section 98(9) of the Labour Act [*Chapter 28:01*] provides that:

“(9) In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court.”

Thus when an arbitrator makes an award, his position is akin to that of a court of law. A court is defined to mean all its judges sitting alone or with other judges. This is because they have the same powers and exercise parallel jurisdiction. Arbitrators are no different in this respect. Accordingly, the *res judicata* and *functus officio* legal principles will apply should the matter be brought before the same or a different judge, or in this case, arbitrator.

The learned authors Herbstein & Van Winsen “*The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*” 5th Ed state that:

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“The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.”

In the case of *Kassim v Kassim* 1989 (3) ZLR 234 (H) at p 242 C-D the court held that:-

“In general, the court will not recall, vary or add to its own judgment once it has made a final adjudication on the merits. The principle is stated in *Firestone South Africa (Pvt) Ltd v Genticuro Ag* 1977 (4) SA 298 (A) at 306, where TROLLIP JA stated:

‘The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.’”

Furthermore, in *Unitrack (Pvt) Ltd v Telone (Pvt) Ltd* SC 10/18

MAVANGIRA AJA (as she then was) held as follows:

“It is a general principle of our law that once a court or judicial officer renders a decision regarding issues that have been submitted to it or him, it or he lacks any power or legal authority to re-examine or revisit that decision. Once a decision is made, the term “*functus officio*” applies to the court or judicial officer concerned.” (*my emphasis*)

In his award, Mr Manase sought to reinstate into his former employment, an employee (the respondent) who had freely and consciously signed an agreement to terminate such employment, and accepted the benefits agreed to between the parties. He thus purported to revive a moribund employment contract as well as reverse the import of Arbitrator Bvumbe’s

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determination on the benefits payable to the respondent in terms of the supposed retrenchment agreement signed by the parties. No evidence was tendered that the respondent had paid back the amounts that he received. Arbitrator Manase's award, therefore would have resulted in the respondent being paid essentially the same benefits, twice.

Since Arbitrator Manase was not sitting as an appeal court, it was clearly not open to him to do as he purported.

More confounding, in my view, is the fact that the parties in this matter agreed to refer the dispute to Arbitrator Manase. This was notwithstanding the common understanding by all that an Arbitrator who enjoys parallel jurisdiction with any other arbitrator can at law, neither set aside nor interfere in any manner with the award of another arbitrator. They also did this in full knowledge of the fact that the first arbitral award was extant, and that the agreement based on it had been fully implemented by the parties to the dispute.

The respondent attempts to differentiate between the two arbitral awards as follows:

“... The court *a quo* did not err because the two awards dealt with separate and distinct causes of action. The Manase award dealt with the lawfulness of the retrenchment while the Bvumbe award dealt with a dispute over claimed contractual benefits and benefits to be included in a retrenchment package....” (*my emphasis*)

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There can be no doubt that the ‘retrenchment’ referred to in this submission is the process, based on Arbitrator Bvumbe’s award, that culminated in the signing of the termination of employment agreement by the parties. As already stated it is evident that the parties loosely used the term ‘retrenchment’ when in fact all they signed was an agreement terminating the respondent’s employment with the appellant. This is the process that Arbitrator Manase was to review and whose lawfulness or otherwise he was to determine.

I have found that the process did not amount to a retrenchment. I must make the point that even if it had been a retrenchment process, Arbitrator Manase would still have lacked the jurisdiction to determine its lawfulness or otherwise. Following upon the arbitral award handed down by Arbitrator Bvumbe, the matter became *res judicata*. By virtue of the fact that both arbitrators were endowed with the same jurisdictional powers, Arbitrator Manase was accordingly *functus officio* in relation to the same dispute. The first arbitral award could only be reviewed or set aside by a court of higher jurisdiction. Because that did not happen, that award stands as the one that finally determined the dispute, leaving no basis for interference therewith, by the second Arbitrator, Mr Manase. His attempt to do so was therefore of no force or effect.

I find in the result that the court *a quo* misdirected itself in upholding Mr Manase’s award. The appeal therefore has merit and ought to succeed.

Having determined that the parties effectively signed and honoured an agreement to terminate the employment of the respondent with the appellant, and that this circumstance

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constituted a final resolution of the dispute between them, it becomes unnecessary to consider the alternative ground of appeal relating to whether or not the respondent repudiated the employment contract.

DISPOSITION

In the premises, it is ordered as follows:

1. The appeal succeeds with costs
2. The judgment of the court *a quo* is set aside and substituted with the following:
 - “(i) The appeal succeeds with costs.
 - (ii) The arbitral award by Arbitrator Manase dated July, 2013 be and is hereby set aside.”

GUVAVA JA: I agree

MAVANGIRA JA: I agree

Dube Manikai Hwacha, Appellant`s legal practitioners

Munyaradzi Gwisai and Partners, Respondent`s legal practitioners