

REPORTABLE (37)

BANKING EMPLOYERS ASSOCIATION OF ZIMBABWE
v
ZIMBABWE BANK AND ALLIED WORKERS UNION

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & GUVAVA JA
HARARE, MARCH 2, 2015 & JULY 9, 2015

T. Magwaliba for the appellant

T. Mpofo for the respondent

GUVAVA JA: It never ceases to amaze how parties to an agreement happily append their signatures to an agreement then a few months later fail to agree on the interpretation of their written word and require some other person, in this instance the court, which was not part of the negotiations, to tell them what they meant.

This is an appeal against the whole judgment of the Labour Court which was granted on 14 February 2014.

The facts giving rise to the dispute between the parties are mainly common cause and may be summarised as follows.

The appellant is the employers association for the banking industries. The respondent is the union which represents the workers for the banking industry. Following protracted negotiation they signed an agreement on 10 June 2011. This was later reduced into a Collective Bargaining Agreement which was subsequently published as Statutory Instrument S.I. 150 of 2013. However when the parties tried to implement the Collective Bargaining Agreement a dispute arose on its interpretation. A certificate of no settlement was duly issued and the matter was referred to arbitration. It was the contention of the employers association that the workers would be awarded a salary increment which would be in line with the inflation figures for that year in order to stop any further disputes. On the other hand the workers union was of the view that the inflation figure would form the basis of any future negotiations that they would have with the employer.

After hearing submissions from both parties the arbitrator found in favour of the workers union and made the following award:

- “ 1. The parties i.e. Zibawu and Beaz, are hereby ordered that clause 6 of the July 2010 to December 2011 Collective Bargaining Agreement means that the year on year inflation figure for every Collective Bargaining Cycle was to be used as the starting point in negotiating salary increases in each and every Collective Bargaining Cycle.
2. The parties are further ordered that the appropriate percentage is 10 per cent which should be used to adjust the salaries for the period 1 January 2012 to 31 December 2012.”

The appellant, aggrieved by the award, appealed to the Labour Court which dismissed the appeal. It also ordered that each party bear its own costs.

The appellant, still dissatisfied, has approached this Court on the following grounds of appeal:

1. “The court *a quo* erred and misdirected itself in law in failing to find that the arbitrator acted *ultra vires* the agreed Terms of Reference between the parties, to wit, the determination of a costs of Living Adjustment for the period January 2012 to December 2012.
2. The court *a quo* erred in law in failing to find that in the context of Clause 6 of the Collective Bargaining Agreement, the parties had agreed to effect future salary reviews based on verifiable inflation figures from the agreed sources.
3. The court *a quo* erred and grossly misdirected itself on the facts and in law in confirming a salary increase of 10 per cent when there was no factual and/or legal basis to justify such an increase.”

An examination of the wording of the Statutory Instrument, in my view, seems to indicate that the parties were intent upon removing any uncertainty when determining future salary increments. It is apparent that the parties, in setting out what should be taken into account in determining the inflation figure were agreed that the best way to resolve the dispute was to come up with a scientific formula upon which they would in future implement salary reviews for workers in the banking sector.

At the hearing, it was apparent that the parties were of the view that the main bone of contention was the interpretation of clause 6 of the collective bargaining agreement. In particular they were of the view that it was necessary to interpret the meaning of the word “base” in clause 6 of the agreement.

In interpreting this clause the court *a quo* agreed with the award made by the arbitrator. The court was of the view that the agreement entailed the application of a value judgment which meant that the parties would start negotiations from the inflation figure. At page 2 of the judgment the court *a quo* stated as follows:

“I consider that the word base was used advisedly. It contemplated a foundation or starting point. It was not the structure or end point. It was to be used for salary reviews. In other words the arbitrator in *casu* was not obliged to set increments tallying with the inflation figure. He would naturally consider it as a baseline. I therefore find that he did not stray beyond his mandate....”

I respectfully disagree with the interpretation of the court *a quo*. In my view the Court fell into the error of interpreting one of the provisions of the agreement without taking into account the other provisions of the Collective Bargaining Agreement. In order to give a proper interpretation to the intention of the parties, it was incumbent upon the court to examine the whole agreement and not just to rely on a single word. It is necessary to set out the relevant provisions in full.

3. “With effect from first January, 2011 going forward, the NEC has agreed to combine the basic salary, housing and transport allowances to come up with a basic salary. For the avoidance of doubt there will be no separate negotiations for housing and transport allowances going forward.
4.
5. With effect from first January, 2012, the negotiating cycle shall be January to December.
6. Furthermore, the parties have agreed to base salary reviews on year-on-year inflation figures prevailing at the relevant time and the sources of the inflation figures shall be the Ministry of Finance and Economic Development, Central Statistical Office and IMF.
7. The parties agree that this agreement resolves the dispute in respect of July, 2010 to June 2011 salary negotiations currently pending in the Labour Court and represents a full and final settlement of the said dispute.
8. Parties have agreed to withdraw all pending disputes related to salary reviews involving individual employers and their worker representatives as well as ZIBAWU and BEAZ which may be at various levels of dispute resolution mechanisms such as Works Councils, the Ministry of Public Service, Labour and Social Welfare, arbitrators and the Labour Court. This clause relates to cases as from July, 2010 to date.
9. Parties agree that the issue of actual(s) will be dealt with by individual institutions.”

It was common cause that at the relevant time the inflation figure, taking into account the factors set out in paragraph 6 of the Collective Bargaining Agreement, was 4.9 per cent. In accordance with paragraph 8 of the Collective Bargaining Agreement the parties decided to withdraw all cases that were pending from the year 2010. Paragraph 5 of the Collective Bargaining Agreement stated that it would be inclusive of the period to be covered which was an eighteen month period.

The decision to award a 10 per cent salary review completely defeats the intention of the parties in coming up with a formula to implement future salary increments. It seems to me that if the parties had intended to introduce other factors in determining future salary reviews they would have said so in no uncertain terms. The fact that they agreed on a unitary yardstick to determine future salary reviews means that they had no intention of introducing other factors which would introduce uncertainty in the determination of their salary reviews. Clearly, in my view, the inflation figure was to be used during the agreed period to effect all salary increments.

I am fortified by the views expressed in the case of *Sagittarian (Pvt) Ltd v Workers Committee, Sagittarian (Pvt) Ltd* 2006 (1) ZLR 115 at page 118 -119 where the Gwaunza JA relied upon the case of *Director of Education (Transvaal) v McCageie & Ors* 1918 AD 616 where Innes CJ stated that;

“Where general words have a wide meaning, their interpretation must be affected by what precedes them; general words following and connected with specific words are more restricted in their operation than if they stood alone They are coloured by their context and their meaning is cut down so as to comprehend only things of the same kind as those designated by specific words- unless there is something to show that a wider sense was intended.”

It seems, having regard to the wording of the collective bargaining agreement, that an interpretation which would include other factors such as cost of living, the prevailing wage and the take home pay would be doing violence to the ordinary grammatical meaning of the word “base” and would be clearly out of context with the other provisions of the agreement. The Collective Bargaining Agreement was meant to put an end to all future negotiations as salary increments would be certain.

The award of a salary increment of 10 per cent which was granted by the arbitrator and confirmed by the Labour Court was not substantiated. The appellant had offered 4.9 per cent salary increase and the respondent was claiming 23.5 per cent. The 10 per cent award appears to have been a thumb suck between the two conflicting amounts. In my view the award was clearly *ultra vires* the terms of the Collective Bargaining Agreement.

A proper reading of Paragraph 9 of the Collective Bargaining Agreement – namely that the parties were agreed that the actual banks could award a salary increment which was higher than the 10 per cent agreed to in the agreement - suggests that it was meant to cater for institutions which were performing better than the others financially and were thus in a position to pay a salary increment which would be higher than the one agreed to by the ZIBAWU and BEAZ. In my view, a higher rate could not be said to be binding on the two organizations as they had negotiated the minimum rate applicable to all institutions that fall under them.

In view of the poor performance of the economy and the rampant company closures due to high operating costs, the umbrella bodies had negotiated a minimum amount which would be paid by all institutions without straining their business operations. It was therefore the obligation of workers who had evidence that their institution were performing better than the others to then negotiate with their employers for a salary increment which was higher than the basic inflation rate. Such amounts could not be said to be binding on the parties before me which were bound by the terms of the Collective Bargaining Agreement.

Accordingly I find that there is merit in the appeal. In my view the appellant has been successful and there is no basis upon which it should not be awarded its costs both before this Court and the court *a quo*.

In the result I make the following order:

1. The appeal is upheld with costs.
2. The judgment of the court *a quo* is hereby set aside and substituted with the following:
 - (i) “The appeal is allowed with costs.
 - (ii) The Arbitral Award by Arbitrator P. Shawatu dated 5 July 2012 is hereby set aside.”

ZIYAMBI JA: I agree

GARWE JA: I agree

Kantor & Immerman, Appellant’s Legal Practitioners

Mwonzora & Associates, Respondent’s Legal Practitioners