Judgment No. HB 7/06
Case No. HC 2133/04

NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY

Versus

NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY ACADEMIC STAFF

And

NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY NON-ACADEMIC STAFF

And

MINISTER OF HIGHER AND TERTIARY EDUCATION

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 23 JUNE 2005 & 3 FEBRUARY 2006

Adv. P Dube for applicant
B Ndove, for respondent

Judgment

CHEDA J: Applicant seeks a declaration in the following terms:

"It is ordered that:

1. The award of the arbitrators by necessary implication was conditional upon the adequate funding by the 3rd respondent being provided to applicant to finance the salary increases as provided for in the award.
2. The arbitration award is unenforceable against applicant.
3. The respondents be ordered jointly and severally to pay the costs of this application only if they oppose it."

Applicant is a universitas established by a University Charter.

First respondent is an association of academic staff of

applicant. Second respondent is an association of applicant's non-academic

staff while 3rd respondent is the Minister of Education responsible for the running of applicant and funds it as well.

The historical background of this matter is that applicant and 1st and 2nd respondents were involved in a salary dispute which ended up at the Labour Court wherein a disposal order by consent was issued. The terms of the said order were, among others, that the parties should go for voluntary arbitration which they did on 24 November 2003. The arbitrators determined in favour of 1st and 2nd respondents. Applicant is not happy with that determination.

Firstly, it is clear that the determination is final and binding to the parties. Applicant therefore has decided to approach this matter on review on the grounds that it has no financial capacity to honour the determination since 3rd respondent is responsible for funding it.

It is trite law that a review process is designed to check proceedings of inferior courts and tribunals for irregularities. *In casu,* applicant's contention is the perceived incapability of 3rd respondent in complying with the arbitrators' order. Applicant is not satisfied with the determination of the arbitrators for the reason that

3rd respondent, who is responsible for their finances is unable to pay, because the increase in salaries is neither sustainable nor affordable. In other words the grant allocated to applicant is inadequate.

The parties are in a contractual relationship and each party has a duty to fulfil that contract unless it is impossible to do so.

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In casu applicant's position is that it has been inadequately funded. The question then is, is this a legal reason enough to excuse it from fulfilling its part of the bargain. The impossibility envisaged in law can either be temporary or final. In my view it is only where the impossibility is final that the other party is exempted or excused from performance e.g if the other party required to perform dies or there has been intervention
by a *vis major or actus del* but where the impossibility is temporary the offending party can not and should not be excused. This is the correct
legal position see *Peters Flamman &* the *Co* v *Kokstad Municipality* 1919 AD 427. In Wessels, *The Law of Contract* Vol I page 773 paragraph 2634 the learned author stated:

> "If the impossibility of performance is not final but only temporary the obligation may according to the nature of the contract only be suspended and not extinguished."

In casu, applicant has not proved on a balance of probabilities

that the responsibility of performance is final, therefore it can only be construed that it is temporary. I hold the view that as it is temporary it can therefore be cured by subsequent budgetary allocations.

Legal contracts should be performed and should not be breached at the mere convenience of the other party. If the courts allow this, then it means that contracts will never be fulfilled at all.

With regards to costs, I find that applicant lacked *bona fides* in this matter. Firstly, they were aware that 3rd respondent is responsible for their funding but did not join it in the proceedings earlier on. Secondly, they

agreed that the decision of the arbitrators was final but have now chosen to ignore it. Applicant's conduct and behaviour has been therefore one of dishonesty. In acting in this manner, they have no doubt put 1st and 2nd respondent in unnecessary financial expenses of which justice dictates that they should not be put out of pocket because of limitations inherent in the
usual party and party costs, see *Engineering Management Services* v *SA Cape Corp* 1979 (3) SA 1341.

This application is accordingly dismissed with costs at attorney and client scale.

Lazarus & Sarif, applicant's legal practitioners

T Hara & Partners, respondent's legal practitioners