

JOSEPH NYARARAI & 16 OTHERS

Versus

SINO-ZIMBABW COMPANY (PVT) LTD

**AND
NATIONAL EMPLOYMENT COUNCIL FOR THE
CEMENT AND LIME INDUSTRY**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 11 SEPTEMBER 2018 AND 23 JANUARY 2020

Opposed Application

M Gwisai, for applicants
L Nkomo, for 1st respondent
No appearance, for 2nd respondent

TAKUVA J: 1st to 16th applicants are all employees of the 1st respondent and they all subscribe to the 17th applicant, a trade union duly registered in terms of the Labour Act (Chapter 28:01) (The Act). In this application they seek the following relief:

- “1. The application for a declaration of rights be and is hereby granted.
2. The Collective Bargaining Agreement National Employment Council for the Cement & Lime & Allied Industry, 2004, be and is hereby declared to be lawful and binding on the 1st and 2nd respondents.
3. The variation of the contracts of employment of 1st to 16th applicants by 1st respondent removing their right to a personal to holder entitlement be and is hereby declared unlawful.

4. The 1st respondent be and is hereby ordered to reinstate the status of personal to holder basis on the contracts of employment of 1st – 16th applicants and relevant wage scales effective from the date of unlawful variation .
5. The 1st respondent to pay interest at the prescribed rate on all amounts due from the date of unlawful variation of the contracts of employment.
6. The 1st respondent to pay costs of suit.”

Applicants’ gripe with 1st respondent is that it has unlawfully suspended the Collective Bargaining Agreement (‘CBA’) negotiated and agreed by the employer’s organisation to which the 1st respondent is a member and the 17th applicant representing the employees. According to the CBA, the 1st to 16th applicants were entitled to retain their salaries in the wake of a downgrading pursuant to a job evaluation exercise or a redeployment. The suspension was accentuated by reason of non-publication of the CBA in terms of section 80 as read with section 82 of the Act. This position was communicated to the applicants through correspondences filed of record.

Aggrieved, applicants challenged the development before a Labour Officer. However, the challenge hit a snag as referral in terms of section 93 (1) of the Act was ruled to be improper for want of exhaustion of domestic remedies in terms of the Company Code of Conduct. As a result, the Labour Officer declined to issue a certificate of no settlement. Further attempts to compel the Labour Officer to issue same through an application to the Labour Court was unsuccessful and applicants then filed this application.

The specific background facts leading to the dispute *in casu* are that sometime in 2013, parties agreed to a job evaluation exercise to which 1st – 16th applicants participated through their trade union and was subsequently carried out by the 2nd respondent. The 1st – 16th applicants are employed by the 1st respondent in different capacities and are graded according to the Patterson grading system in terms of the Collective Bargaining Agreement National Employment Council for the Cement and Lime & Allied Industry. The job evaluation was carried out in terms of this CBA which is registered with the Ministry of Labour but not published as required by section 80 of the Act.

The results of the job evaluation exercise were implemented in light of section 4 (vi) (c) of the CBA. This provides that if according to the final classification an employee is

upgraded, that employee would be paid not less than the maximum wage prescribed for such higher grade with effect from the date upon which he/she commenced performing the operation concerned. Similarly, a downgraded employee will on a personal to holder basis, be paid wages they were receiving prior to the job evaluation exercise. Effectively, the downgrading could only affect the employee's work station and not salary.

In the present matter, the principal applicants were all downgraded, and from 2013 to 31 December 2016, they would receive salaries equivalent to the applicable rate prior to the evaluation exercise on a personal to holder basis until the 28th December 2016. Applicants were then informed by the 1st respondent that as from the 1st of January 2017, they were to receive salaries commensurate with their new grades as the CBA was not binding for want of publication in terms of section 80 of the Act. It is not in dispute that the aforementioned CBA had governed the employer-employee relations since 2004 to the extent that the grading processes are based thereon and that it provides basis upon which the evaluation exercise was propagated.

In brief, the applicants seek a declaratory order to the effect that the CBA is lawful and binding on the 1st and 2nd respondents.

Although the application was brought against two respondents, only the 1st respondent has filed its opposition. The 1st respondent objects to the jurisdiction of this Court on two fronts. Firstly, it argues that the applicants have by-passed the internal grievance procedure provided in the Company's Code of Conduct. Secondly, it avers that applicants ought to have proceeded by way of referral in terms of section 93 (2) of the Act once the Labour Officer declined to issue a certificate of no settlement. It was also contented that after their application to the Labour Court had failed, applicants ought to have appealed to the Supreme Court pursuant to section 92 of the Act.

In response to the points *in limine* Mr Gwisai for the applicants summarized his submissions in the following manner;

1. This Court has jurisdiction to entertain the present application as it is predicated on common law as opposed to a claim of unfair Labour practice or Labour dispute.

2. Alternatively, he submitted that the suggested exploitation of internal remedies in terms of the Code of Conduct and Labour Act, would have resulted in an ineffective remedy and at law, this justifies the present stance.

It is accepted that the 1st to the 16th applicants seek to enforce an agreement negotiated by the 17th respondent on behalf of all employees who were members at the material time and as was ratified by those who were not members of the 17th applicant at the material time or those who had not been employed. This could only be in terms of the common law as opposed to the Labour Act.

Applicants' argument is that this court has jurisdiction because the cause of action is at common law. The question of when the jurisdiction of this Court is ousted in favour of the Labour Court has been before this Court in a number of instances. In *Medical Investments Ltd v Pedzisayi* HH 26/2010 it was held that in matters where a cause of action and the remedy is at common law, the jurisdiction of this Court is not ousted, but that of the Labour Court. The court in interpreting sections 89 (1) (6) of the Act concluded that;

“In interpreting these two sections of the Act, this court has, in the authorities I have cited above, held that the Labour Court has exclusive jurisdiction in all applications and matters that are not only defined but are determinable in terms of the Act. In other words, the Labour Court has jurisdiction in all matters where the cause of action and the remedy for that cause of action are all provided for in the Act. In all other matters, where the cause of action and the remedy are at common law, the jurisdiction of this Court is not ousted.”

The question then becomes, does the Act provide for a cause of action similar to the present? In this regard, it is pertinent to note that the jurisdiction of a Labour Officer or designated agent is founded on a Labour dispute or an act of unfair labour practice. These terms are defined in section 2 of the Act as “a dispute relating to any matter concerning employment governed by the Labour Act and unfair Labour practice specified in Part 111, or declared to be so in terms of any other provision of the Labour Act.” See also section 93 (1) of the Act. Considered together, these definitions point to the fact that a dispute or an act of unfair labour practice can only be in terms of what the Labour Act provides. The synonym being the expression “matters in terms of the Act” which literally entails that nothing outside the Act can be entertained- *Makone & Another v Zimbabwe Electoral Commission Chairperson & Another* HH 38/08.

What then is the status of Collective Bargaining Agreements *visa vis* the Act? Section 2 defines a Collective Bargaining Agreement as; “collective bargaining agreement” means agreement negotiated in accordance with this Act which regulates the terms and conditions of employment of employees”. It follows that a Collective Bargaining Agreement thrives in the context provided in the Act. In this regard it should be noted that the Act provides for a two tier system of CBAs. A CBA negotiated by the workers committee and the employer in terms of section 25 of the Act and an agreement negotiated by a registered trade union and employer (s) or employer’s organization. The former is binding once approved by the registered Trade Union for the undertaking whereas the latter is binding after registration and subsequent publication in terms of section 80 of the Act. The CBA *in casu* is susceptible to the whims of section 80 which provides”

“80 PUBLICATION OF COLLECTIVE BARGAINING AGREEMENTS

- (1) Upon registration of a collective bargaining agreement the Minister shall publish the agreement as a statutory instrument.
- (2) The terms and conditions of a registered collective bargaining agreement shall become effective and binding.
 - (a) From the date of publication of the agreement in terms of subsection (1) or
 - (b) From such other date as may be specified in the agreement.”

Section 82 states;

“82 BINDING NATURE OF REGISTERED COLLECTIVE BARGAINING AGREEMENTS

- (1) Where a collective bargaining agreement has been registered it shall:
 - (a) with effect from the date of its publication in terms of section eighty five or such other date as may be specified in the agreement, be binding on the parties to the agreement including all the members of such parties, and all employers, contractors and their respective employees in the undertaking or industry to which the agreement relates;
 - (b)
 - (i)
 - (ii)
 - (iii)
 - (c)
 - (2)
 - (3)
 - (a)
 - (b)

In casu, the present CBA was registered but not published. In view of section 80 and 82 it is not a fully compliant CBA, but remains a binding common law agreement *inter partes*: Quite obviously, the mere registration of a CBA does not elevate it to the status of a statutory CBA. This means that there are therefore no consequent rights or duties under the Act. Accordingly, the claim of unfair labour practice in terms of section 8 (e) and 82 (3) (a) does not follow. Neither does this attract criminal liability in terms of section 82 (3) (b) in the event of non-compliance with it. What constitutes an act of unfair labour practice or a labour dispute is formulated by section 80 as read with section 82 of the Act. Non satisfaction of threshold set there under effectively does away with the claim of unfair labour practice and or labour dispute. Applicants accept this position.

What I find however, to be the incontrovertible truth is that there is a valid agreement between the parties. This view is consummated by the fact that the 1st respondent does not deny association with the employer's organization that negotiated the agreement and association with the agreement from the agreed date. Once this is not in issue, it is trite law that what has not been denied in an affidavit is deemed to have been admitted – see *Fawcett Security Operations (Pvt) Ltd v Director Of Customs & Excise & Others* 1993 (2) ZLR 121 (S) at 127.

It follows therefore that the inescapable conclusion is that the cause of action *in casu* lies outside the provisions of the Labour Act. As such, a grievance committee by virtue of being a creature of the employment Code which in itself is a creature of the Labour Act does not have jurisdiction and the same applies to a Labour Officer and the Labour Court. What is in issue here is the enforcement of a non-statutory collective bargaining agreement. Put differently, an agreement albeit a collective one where the applicable law is the common law. Also, the remedy lies in the common law – *Nyahora v CFI Holdings* SC 81/14. This court has jurisdiction over the dispute both in terms of its original jurisdiction and in terms of section 14 of the High Court Act (Chapter 07:06).

As regards section 14, its import was fully expounded in *Munnpublishing (Pvt) Ltd v ZBC* 1994 (1) ZIR 337 (S) at 343 where GUBBAY CJ held as follows;

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court The interest must relate to an existing, future or contingent right. The court

will not decide abstract, academic or hypothetical questions unrelated to such interest. ... But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction Nor does the availability of another remedy render the grant of a declaratory order incompetent. – see *Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt) Ltd* 1969 (2) RLR 120 (G) at 128A-B; 1969 (3) 8A 142 ® at 144D – F.”

These are the legal requirements for a declaratory order. To this end, 1st respondent’s view that a declaratory order should relate to “future contingent rights only” is misplaced as it relies only on the heading of the provision which makes reference to future contingent rights devoid of existing rights whereas the ensuing provisions comprise of all the three. A heading is inserted in a statute for convenience’s sake and as such it does not form the basis for substantive rights. – see section 7 (a) of the Interpretation Act (Chapter 1:01). In my view, the applicants’ case is properly constituted and can only be entertained by this court as has been re-affirmed by the following cases:

In *Sibanda & Another v Chinemhute N.O & Another* HH 131/2004 at page 7 of the cyclostyled judgment, it was stated:

“The power to issue a declaratory order is not available in all courts. It is specific to this court It is common cause that the Labour Court has not been specifically empowered to issue declaratory orders as this court has been. It cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction.”

This court in *Mushoriwa v Zimbank* HH 23/08 at page 2 reaffirmed the position and went on to say; “.... if the relief that an applicant seeks is in the nature of a declaratory order, the High Court would have original jurisdiction as that power has not been specifically ousted by statute.” See also *NRZ v Zimbabwe Railway Artisans Union & Others* 2005 (1) ZLR 341 (S) *Agribank v Machingaifa* 2008 (1) ZLR 244 (S).

It follows therefore that, if applicants had taken the grievances procedure and Labour Act route, the outcome would have been incompetent. Applicants are justified in by-passing same. In *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H) at 173 the court per MALABA J (as he then was) said;

“A court will not insist on an applicant first exhausting domestic remedies where the appeal created by the Code of Conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision appealed against undermined the domestic remedies. In the present case, the domestic remedy was not better and cheaper than the court remedy.”

All in all, the jurisdictional challenge is not well taken. It is misplaced in that it invites applicants to chase against the wind. The points *in limine* have no merit and are hereby dismissed.

I now turn to the merits of this case. The sole issue is the lawfulness and validity of the CBA. The applicants' contention is that the parties entered into an agreement outside the provisions of the Labour Act. This agreement is governed by common law which was not altered by the Labour Act. In the absence of a clear and express provision or by necessary implication, there is no room to hold that the common law right of parties in the employment relationship to enter into collective industry agreements was ousted by sections 80 and 82 of the Act. Same has the effect of bolstering it for those that comply with the provisions, whilst those that do not remain under common law.

Applicants further argued that the CBA *in casu* is a lawful one which is binding on the 1st respondent and the applicable employer's association. Therefore 1st – 16th applicants enjoy the benefits of such CBA as members of the 17th applicant which negotiated the CBA which has been in force and applied by the 1st respondent to all its employees since November 2004.

On the other hand, the 1st respondent's argument is that this matter is not a proper one for the Court to exercise its discretion under section 14 of the High Court Act (Chapter 7:06). The basis of this submission is that the declaratur sought by the applicants invites this court to override the provisions of section 80 (2) of the Act by declaring to be valid and binding an unpublished CBA which the Act provides can only be effective and binding after publication as a statutory instrument by the Minister of Labour pursuant to section 80 (1) of the Act. As a result, so the argument went, the declaratur sought is incompetent and cannot be granted.

It was also contented that applicants *in casu* do not have any existing, future, or contingent right arising from either the unpublished 2004 CBA or the common law which can be the basis of the declaratur in this application. It therefore follows that, as long as the CBA was never published, it never commenced and the personal to holder basis when being downgraded never accrued as a right to the applicants.

In my view the resolution of the main issue in *casu* requires one to have a broad and deep appreciation of labour law judispentence relating to the concept of CBAS in our jurisdiction and elsewhere. The material facts *in casu* are common cause. These are they;

1. The applicants are employees of the 1st respondent
2. The applicants' terms and conditions of employment are governed by CBAS entered into by the employer's representatives and the employees' representatives in the industry in accordance with the provisions of PART X of the Act.
3. In 2004, the relevant parties negotiated a CBA to govern various aspects of the terms and conditions of employment of employees in the industry, applicants included.
4. The negotiated CBA was registered with the Registrar of Labour but was never published as a Statutory Instrument by the Minister of Labour as required by section 80 (1) of the Act.
5. In 2013 the 2nd respondent carried out a job evaluation exercise in conjunction with the trade union which represents the applicants. The job evaluation exercise resulted in the applicants being downgraded to lower grades than those they occupied prior to the job evaluation exercise.
6. The results of the job evaluation exercise were implemented on a personal to holder basis in accordance with section 4 (ii) (vi) (c) of the CBA whose import is that a downgraded employee will on a personal to holder basis be paid wages they were receiving prior to the job evaluation exercise. Effectively, the downgrading could only affect the employee's workstation and not salary.
7. *In casu*, all the principal applicants were downgraded from 2013 but continued to receive salaries equivalent to the applicable rate prior to the evaluation exercise on a personal to holder basis up until December 2016.
8. On 8 December 2016, the 1st respondent wrote letters to the applicants informing them that their conditions of service would be varied with effect from the 1st of January 2017 in line with their respective new grades. The 1st respondent adopted this stance pursuant to legal advice it had received casting doubt on the validity and binding effect of the unpublished CBA. First respondent actually referred to the CBA as "illegal" for want of publication in terms of section 80 (1) (2) of the Act.
9. The applicants then filed this application for a declaratur after they unsuccessfully approached the Ministry of Labour and the Labour Court.

What is in dispute is the effect of non publication of a CBA on its validity. This is a question of law. The starting point is that since there is an agreement between the parties, that

agreement is the voice by all the parties involved which ought to be heard. This is consistent with the principle that a party cannot renege from a position that it had previously adopted – *State v Marutsi* 1990 (2) ZLR 374 the Supreme Court warned that a person cannot be allowed to approbate and reprobate a step taken. It can only do one or the other, not both. It is trite that a person cannot get rid of liability when he/she discovers that the position of the law is not as he/she thought. In *Ncube v Ndlovu* 1985 (2) ZLR 281 (SC) at 285 the court quoted with approval the following ratio in *Sampson v Union Rhodesia Wholesale Ltd* 1929 AD 481

“The general proposition of law is that if you think the meaning of a clause is such and such, you cannot get rid of your liability when you discover that the true legal meaning is different from what you thought, for you cannot be heard to say that you did not know the law. And if the other party innocently expresses as his opinion that the legal meaning of the clause is the same as you read it, then if both put a wrong legal construction on the clause you are still bound because the law is presumed to be equally within the knowledge of both parties.”

I take the view that the true reason of publication is to transform an otherwise normal contract or agreement into a statute which binds all persons in the industry regardless of whether they were party to the agreement or not. That is why it is called a Statutory Instrument. In this regard it becomes clear that the concept of a statutory CBA arose to deal with problems of enforcement of common law CBAS and free rider problems in industrial relations. For instance, under the principle of privity of contract, a contract is only binding to those who are party to it.

The basic idea of contract being that people must be bound by the contracts they make with each other, it would obviously be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected. The doctrine that prevents this ridiculous situation arising is usually known as the doctrine of privity of contract; parties who are not privy to a contract cannot sue or be sued on it – see R H Christie *Christie’s Law of Contract In South Africa* at 302.

The enforcement of common law CBAS created immense problems in industrial relations due to the resultant uneven and different pay scales that applied in industries between employees covered by a common law collective bargaining agreement and those who were not. To resolve this difficulty, the concept of the statutory CBA arose to enhance principles of social justice in the workplace. The collective bargaining process was done through a sufficiently representative and registered Trade Union and Employer’s Association. The terms of the

statutory CBA applied across the whole industry, to all employees, regardless of whether they were party to the CBA or not.

This position has its genesis in the earliest labour statutes of this country. See section 100 (1) of the Industrial Conciliation Act, No. 29 of 1959 that provided that;

“100 (1) Upon receipt of a request to declare an agreement binding under section ninety-nine or at any date after an agreement has been made binding in terms of that section, the Minister may, if he deems it expedient and he is satisfied that the parties to the agreement are sufficiently representative of the undertaking, industry, trade, occupation concerned, declare by notice in the Gazette that from such date and for such period as shall be specified by him in such notice, all the terms of the agreement, or such terms thereof as he may specifically indicate, shall within the area defined by him in such notice be binding upon all employers and employees in that undertaking, industry, trade or occupation who are not parties to or are not members of the trade union or employers’ organizations which were parties to that agreement.” (my emphasis)

The same provision was carried through under section 114 of the Industrial Conciliation Act (Chapter 267) and subsequently section 87 of the Labour Relations Act, 1985, the predecessor of section 82 of the Labour Act. Over and above, the overall purpose of achieving industrial peace, social justice and democracy at the workplace by extending coverage of the collective bargaining agreement to the whole industry, the statutory CBAS also provided a system of checks and balances to ensure that the exercise of this policy power was not applied unjustly and unfairly, especially to non parties.

Since its introduction, all the relevant statutes have required that before a CBA could attain the status of a statutory CBA, it had to be negotiated by a registered Trade Union sufficiently representative of the industry. The process of registration and publication avails the State with a supervisory role and authority. In the event that the CBA is deemed unjust, unfair to a party or section of the society the Minister can intervene by ordering parties to revise it in terms of section – 81 of the Act. See *Posts & Telecom Corporation v Zimbabwe Posts & Telecom Workers Union & Others* 2002 (2) ZLR 722 (S) at 726 H – 727 A-C.

In my view the above provision was not meant to remove the right of trade unions and employers, including unregistered ones to conclude CBAS which may not conform to the requirements of registration and publication in terms of the Act. If they so do such CBAS are binding as common law agreements but denied the privileges granted to a statutory CBA, in particular universal application to the entire industry. This view is shared by eminent labour

scholars- see for instance J Grogan, *Workplace Law, 11th edition Juta* 2014, page 407 wherein he opines; “Like all agreements, whether agreements concluded by councils bind only the signatory parties.” A.R Rycroft and B. Jordan put it thus; “Collective agreements entered into outside of the statutory framework do not enjoy the same statutory status. However, provided they do not fall fowl of the provisions of section 31A of the Act.... they are contractually enforceable.” See Rycroft A and Jordan B, *A Guide to South African Labour Law, 2nd edition, Juta*, 1992 page 145.

Therefore to interpret non-statutory CBAS as unlawful and not binding would be to subvert the fundamental right of employees to form trade unions and to collective bargain enshrined in section 65 (2) (5) of the Constitution of Zimbabwe. It follows that in this context, an agreement outside the Act remains possible because the common law stands unaltered by the Labour Act. Where a statute intends to outlaw a common law position it should specifically say so. In the absence of an express provision or necessary implication otherwise, the common law stands unaltered. *In casu*, the common law right of parties in the employment relationship to enter into collective industry agreements was not ousted by section 80 and 82 of the Act. See *Van Herden & Others N.O v Queens Hotel (Pvt) Ltd & Others* 1973 (2) 8A15 (RA) at 23, where BEADLE CJ explained the position as follows;

“..... I cannot see how statutory rights can be regarded as more sacrosanct than a common law right.....as the rights of man are founded on the common law and as the common law is less subject to change than statutory law, which may vary from year to year according to the whim of a particular Legislature, common law rights must be more jealously guarded than statutory ones.” See also the recent Supreme Court’s decision in *D & N Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15.

In the Zuva case, the court stated the following;

“The critical issue that falls for determination in this matter is therefore what meaning should be ascribed to sections 12B and 12 (4) of the Act. In particular whether section 12B of the Act, on a proper reading of that section, abolishes the employer’s common law right to terminate employment on notice. I am satisfied that section 12B of the Act does not abolish the employer’s common law right to terminate employment on notice in terms of an employment contract for a number of reasons..... It is also an established principle of statutory interpretation that a statute cannot effect an alteration of the common law without saying explicitly.” (my emphasis)

On the basis of the above, I find that the applicants' contention that the CBA *in casu* is a lawful one and therefore binding on the 1st respondent and the applicable employer's association has merit. Once it is so found, it follows that the contention that the applicants do not have any existing, future or contingent right arising from the CBA falls away. Equally so, the argument that the declaratur is an incompetent relief is meritless.

As regards the 11th, 12th and 13th applicants, the 1st respondent has argued that they were not affected by the job evaluation exercise since they were only redeployed. However in the same affidavit, 1st respondent avers that the job evaluation was carried out by the 2nd respondent for the whole industry on behalf of 1st respondent and other employers. Those two averments are conflicting in that the 2nd respondent would not have carried out a job evaluation exercise for the whole industry to the exclusion of the three applicants. In any event, those employees who were redeployed are still entitled to the personal to holder basis pursuant to clause iv of the CBA. Those applicants were entitled to retain their salaries in the aftermath.

DISPOSITION

In the circumstances, it is ordered that;

1. The application for a declaration of rights be and is hereby granted.
2. The Collective Bargaining Agreement, National Employment Council for the Cement & Lime & Allied Industry, 2004, be and is hereby declared to be lawful and binding on the 1st and 2nd respondents.
3. The variation of the contracts of employment of 1st to 16th applicants by 1st respondent removing their right to a personal to holder entitlement be and is hereby declared unlawful.
4. The 1st respondent be and is hereby ordered to reinstate the status of personal to holder basis on the contracts of employment of 1st – 16th applicants and relevant wage scales effective from the date of unlawful variation.
5. The 1st respondent to pay interest at the prescribed rate on all amounts due from the date of unlawful variation of the contracts of employment.
6. The 1st respondent to pay costs of suit.

Munyaradzi Gwisai & Partners, applicants' legal practitioners
Messrs Danziger and Partners, 1st respondent's legal practitioners