REPORTABLE: (26)

(1) GODFREY TAPEDZA (2) ANGELICA MAGODORA (3) CHRISTINA MOYO (4) GRANT GARANDI (5) TAFADZWA NGWENYA (6) NDAIZIVEI MKUNYADZE (7) GRACE NYABANGA (8) RODNEY RUSHAMBWA (9) JUSTIN MAILOS (10) TONDERAI NYAMWEDA (11) ZIMBABWE ENERGY WORKERS UNION

v

(1) ZIMBABWE ENERGY REGULATORY AUTHORITY (2) NATIONAL EMPLOYMENT COUNCIL FOR THE ENERGY INDUSTRY

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA, & PATEL JA
HARARE, MAY 26, 2017 & FEBRUARY 28, 2020

R Chingwena, for the appellants

No appearance for the first respondent

E Matinenga with *A Moyo,* for the second respondent

HLATSHWAYO JA: The sole issue for determination in this case is whether the first respondent is an employer within the energy industry and is thereby bound by the Collective Bargaining Agreement: Zimbabwe Energy Industry, Statutory Instrument 50 of 2012 (the CBA). The issue was placed before the Labour Court for determination and it found that the first respondent is not an employer in the energy industry and is thus not bound by the requisite CBA. This is an appeal against that decision.

The factual and legal basis upon which the appeal is founded is as follows: The first to tenth appellants are members of the eleventh appellant, a worker's union which is a party to the CBA. The first respondent is a statutory body established in terms of s 3 of the Energy Regulatory Authority Act [*Chapter 13:23*] (the Act). The functions of the first respondent are spelt out in s 4 of the Act and, in short, the first respondent`s mandate is to regulate the energy industry. The phrase "energy industry" is defined in s 2 of the Act as follows:

> "energy industry' means the persons in Zimbabwe who, in the private or public sphere are concerned with the generation, procurement, distribution, transportation, transmission and production of energy to consumers thereof."

On 27 January 2012, a CBA was reached between the Zimbabwe Energy Industry Employers' Association, the eleventh appellant and the ZESA Technical Employees` Association, for the period 1 January 2012 to 31 December 2012. The salary scales flowing from the CBA were produced on 27 February 2012 and they were circulated to all employers, including the first respondent, for implementation. The first respondent communicated to the eleventh appellant that it had fully complied with the CBA in August 2012. However, the first respondent later reneged from such compliance arguing that it did not belong to the energy industry and thus it could not be bound by the energy industry CBA.

The first respondent`s refusal to implement the CBA ignited a dispute between the parties, which dispute was referred to conciliation. No settlement was reached and the matter was referred for arbitration. The arbitrator found that the first respondent was bound by the CBA. The first responded appealed against that decision on the ground that the arbitrator dealt with a dispute which fell under the exclusive jurisdiction of the Labour Court by virtue of s 46(a) of the Labour Act [*Chapter 28:01*] which provides that any dispute as to the extent or

description of any undertaking or industry shall be referred to the Labour Court for determination. The appeal was allowed and the arbitral award was set aside.

The appellants then made an application in term of s 46 of the Labour Act for the determination of whether the first respondent falls within the energy industry. The application was dismissed after the court had found that the first respondent does not fall within the energy industry and is not bound by the CBA. The present appeal was noted against the decision of the court *a quo*. The appellants raised two grounds of appeal. At the hearing of the matter one of the grounds was abandoned leaving only one ground, that is:

> "The court *a quo* erred at law in not making a finding that the first respondent is at law an employer within the energy industry and accordingly bound by the Collective Bargaining Agreement for Energy Industry".

At the centre of the dispute between the parties is a CBA which the first respondent refused to implement. It was argued on behalf of the appellants that the definition of energy industry in s 2 of the Act must be interpreted purposively to include the first respondent, a regulator of the energy industry. It was further contended that the first respondent is an employer in the energy industry and is thus bound by the CBA in terms of s 82 of the Labour Act.

On the other hand, it was argued on behalf of the first respondent that the CBA was not binding on it because it was not party to the CBA. It was contended that the first respondent is not a member of any of the trade unions that participated in crafting the CBA. It was further argued that the first respondent does not fall within the energy industry because the definition

of energy industry does not include 'regulation' which is the cardinal function of the first respondent.

While the nub of the appellants' contention in this Court is that s 2 of the Act must be interpreted purposively to include the first respondent, the court is not convinced by that contention and below are the court's reasons for the position taken.

It is an established principle of law that when interpreting a statute, the first cannon of interpretation to be applied is the golden rule of interpretation. This rule is to the effect that where the language used in a statute is plain and unambiguous, it should be given its ordinary meaning unless doing so would lead to some absurdity or inconsistency with the intention of the legislature. A provision of a statute should be given a meaning which is consistent with the context in which it is found. This position was laid down in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at 264 D-E, where McNALLY JA said:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord WENSLEYDALE said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

See also See *Mudada v Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (S) at 377.

The same principles were expressed by this Court in *Endeavour Foundation & Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356 F-G to 357 A where GUBBAY CJ said:

> "The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the legislature as shown by the context, or such other *indicia* as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result. See *Stellenbosch Farmers' Winery Ltd* v *Distillers' Corp* (SA) *Ltd & Anor* 1962 (1) SA 458 (A) at 476 E-F."

The circumstances in which the court may depart from the golden rule of interpretation were authoritatively laid down by Innes CJ in *Venter v R* 1097 TS 910, at 915 in the following terms:

> "... it appears to me that the principle we should adopt may be expressed somewhat in this way - when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature, where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature."

In the instant case, the meaning of "energy industry" as contained in s 2 of the Act is axiomatic, clear and unambiguous. The energy industry consists of persons who are concerned with the 'generation, procurement, distribution, transportation, and production of energy to consumers'. The ordinary meaning of this definition is that the persons covered by it must be in the business of providing the services listed therein to consumers. Clearly, the list does not include the regulation of the energy industry which is the key role of the first respondent. A reading of s 4 of the Act shows that the first respondent deals with the players in the energy industry. This is in contrast to the definition as the envisaged members deal with and provide services directly to the consumers.

The next enquiry then is, whether such an interpretation results in absurdity or an inconsistency with the intention of the Legislature warranting the court to adopt the purposive

approach to interpret the statute as suggested by the appellants. This question is answered in the negative. What the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. This was well captured in *Mukwereza v Minister of Home Affairs & Anor 2004 (1) 445 (S)* in the following words:

> "E A Kellaway, the learned author of "Principles of Legal Interpretation of Statutes, Contracts & Wills" looked at a number of British and South African authorities on what is meant by "Legislative intention" and concluded as follows at pg 175:
>
> > "In summary, the purpose of the rules of construction is to discover the intention of the law-giver, and such intention should be deduced from the actual words used by the legislating body, its general plan and its objects."
> >
> > GM Cockram expanded on this theory at pg 45 of his "Interpretation of Statues" third edition and stated that such objects must be gathered from 'a comparison of its (the law's) several parts, as well as from the history of the law and from the circumstances applicable to its subject matter."" (*my emphasis*)

To the same effect but put refreshingly differently, in the case of *Buchanan & Co v Babco Ltd (C.A.)* [1977] QBD 208 at 213 Lord Denning followed the method of interpretation adopted by the European Court of Justice at Luxenburg, thus:

> "They adopt a method which they call in English by strange words – at any rate they were strange to me – the "schematic and teleological" method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter- of the legislation, they solve the problem by looking at the design and purpose of the legislation – at the effect which it was sought to achieve. They then interpret the legislation so as to achieve the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? To our eyes –shortsighted by tradition – it is legislation, pure and simple. But to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended."

In *casu*, it is no mistake that the legislature did not include the first respondent in the definition. The legislature had a good appreciation of what it intended to include in the definition of the energy industry. This is so if regard is had to the fact that the creation of the first respondent through s 3 of the Act was not novel. Rather, the first respondent is a successor of the Zimbabwe Electricity Regulatory Commission and the Petroleum Regulatory Commission. This is provided for in s 29(1) of the Act. It follows that if the legislature intended the first respondent to be a member of the energy sector then it would have included it in the definition of "energy industry."

On the principle of *expressio unius est exclusio alterius*, the fact that s 2 of the Act does not mention the persons concerned with regulation of the energy sector in the definition means that the first respondent does not fall within the energy industry. In *Eagle Insurance Co Ltd* v *Grant* 1989 (3) ZLR 278 (SC) at 280F, KORSAH JA commenting on the operation of the maxim said:

> "A rule which is variably resorted to in the interpretation of statutes, the *expressio unius* rule – is that the mention of one or more things of a particular class may be regarded as silently excluding all other members of the class".

Furthermore, in *Nkomo & Anor* v *Attorney-General & Ors* 1993 (2) ZLR 422 (SC) at 434D-E GUBBAY CJ stated:

> "To ascribe a sensible meaning to subs (5) and to avoid superfluity necessitates the legitimate recourse of construing the general words "any sentence" in subs (6) as excluding the specific reference to "a sentence of death" in subs (5). This is no more than an application of the rule embodied in the maxim "*expressio unius est exclusio alterius*". It draws attention to the fairly obvious linguistic point that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded. See Maxwell on *The Interpretation of Statutes* 12 ed at p 293."

In light of the above, the court is of the view that had the Legislature intended that the first respondent be a player in the energy industry, it would have expressly provided for it. The fact that the legislature omitted the first respondent from the definition means that it does not fall within the energy industry. The legislature did not include the word "regulation" in the definition and such a gap cannot be filled by the court under the guise of interpreting s 2 purposively as suggested by the appellants. In this regard, this Court in *Car Rental Services (Pvt) Ltd v Director of Customs & Exercise* 1988 (1) ZLR 402 (SC) at 409 had the occasion to comment on this aspect in the following manner:

> "It is not for the courts to legislate or attempt to improve on the situation achieved by Parliament through the language it has chosen in its enactment. Effect must be given to what the Act says or permits and not to what it may be thought it ought to have said or prohibited. If there is a *casus omissus* in the Act, and if it could lead to undesirable consequences, the court has no power to fill it. It is a matter for the Legislature."

The above quoted words are particularly apposite in the instant case because the literal meaning of the provision in question leads to no absurdity and it is not inconsistent with the intention of the legislature. The definition expressly spells out the persons who constitute the energy industry with the exclusion of the regulator, which is a clear indication that the first respondent was not intended to be part of the energy industry. The first respondent does not fall within the energy industry and, by extension, it is not bound by the CBA for the energy sector.

DISPOSITION

The interpretation of s 2 of the Act shows that the first respondent does not fall within the energy industry. This means that the CBA is not binding on the first respondent. The court *a quo* did not fall into any error in holding that the first respondent is not an employer in

the energy industry and therefore is not bound by the CBA. This appeal is without merit and there being no reason to depart from the general rule that costs follow the result, the general rule on costs shall prevail.

Accordingly, it is ordered as follows:

"The appeal be and is hereby dismissed with costs."

GWAUNZA JA : I agree

PATEL JA : I agree

Matsikidze & Mucheche Commercial and Labour Law Chambers, appellants' legal practitioners

Kantor and Immerman, 1st respondent's legal practitioners