

**DISTRIBUTABLE** (25)

**JOSEPH LUNGU & OTHERS**  
v  
**RESERVE BANK OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE**  
**GUVAVA JA, MAVANGIRA JA & MAKONI JA**  
**HARARE: 12 JUNE 2020 & 1 APRIL 2021**

*T. Mpofo*, for the appellants

*T. Magwaliba*, for the respondent

**MAKONI JA:**

On 26 January 2017, this Court in SC 1/17, adjudicating over the parties' dispute, remitted the matter to the Labour Court (the court *a quo*) for a determination of the following issues:

“To determine, on the basis of specific provisions of the Works Council Agreement concluded in September 2010 and the minutes accompanying the Agreement, and having regard to sworn evidence from the signatories to the agreement, whether or not the salaries and benefits stipulated in that agreement were intended to apply to the appellants.”

After considering the parties' submissions and evidence led, the court *a quo* dismissed the appellants' claim against the respondent. The court *a quo* held that the appellants failed to discharge the onus on them of proving that they were covered by the Works Council

Agreement upon which their claim of salaries and benefits was founded. This is an appeal against that judgment.

## **FACTUAL BACKGROUND**

The appellants are 153 former employees of the respondent who were employed as security guards on fixed-term contracts renewable every three months. The period of employment ranged from 2007 and 2008 up until January and April 2011 when their contracts expired by effluxion of time and were not renewed. In July 2010, the respondent, 1078 of its employees and its workers' committee approached an arbitrator (Nasho) in a bid to negotiate the regularisation of the employees' contracts in line with the new multi-currency regime and to ascertain the salary arrears due to the respondent's employees.

Arbitrator Nasho ordered the payment of back-pay from 1 March 2009 to the date of the award, in line with the multi-currency system. In accordance with that award, the parties concluded a Works Council Agreement, on 15 September 2010, which set the back pay due to all employees of the respondent and the salary structure for non-managerial employees from 1 January 2010 onwards. It was agreed that all employees across the board, for the period of 1 March 2009 to 31 December 2009, were to be paid a net salary of \$500 per month.

Following this agreement, and in a different matter, the appellants challenged the termination of their employment on the basis that their contracts had become permanent upon repeated renewal. A second arbitrator, (Mugumisi) dismissed their claim of unfair dismissal on 4 April 2012. On appeal, the arbitral award was upheld by the Labour Court.

On 10 December 2012, following the dismissal of their claim by arbitrator Mugumisi and as confirmed by the Labour Court, the appellants filed another claim for the payment of arrear salaries and benefits which was dealt with by the third arbitrator (Mambara) who awarded the payment of arrear salary and benefits, in accordance with the 2010 Works Council Agreement, from 1 January 2010 to the date when each claimants' contract of employment was terminated.

Dissatisfied by that decision, the respondent applied to the Labour Court for a review of the award. The Labour Court upheld the review on 12 September 2014 and dismissed the appellants' claim. Irked by that decision, the appellants appealed to this Court which remitted the matter to the court *a quo* for a comprehensive analysis of whether the appellants were covered by the 2010 Works Council Agreement.

In making that order, the court noted that although both the arbitrator and the Labour Court, in its review proceedings, referred to the minutes and the agreement of September 2010, the relevant portions of the agreement were not reproduced. Additionally, the court reflected that the Labour Court, failed to call evidence from the signatories to the agreement to explain its provisions and clarify its scope of coverage. It further did not proceed to consider the precise ambit of the agreement and its implications for the appellants' claim before the arbitrator. As a result it did not make a finding on this critical aspect of the matter despite noting some causal nexus between the Nasho award and the 2010 Agreement. The court further reasoned that it appeared common cause that the present appellants were part of the 1078 claimants who were beneficiaries to the Nasho award and that since the Works Council Agreement was made in September 2010, they would have a justifiable claim to the benefits accruing from that agreement. The court concluded as follows:

“In the circumstances, it seems just and equitable that this matter be remitted to the court *a quo* to clearly determine whether or not the scope of the 2010 Agreement extended to all of the respondent’s employees, including the appellants *in casu*. This will not only serve to ensure that justice is attained but also to secure finality to the protracted and costly litigation between the parties.”

Hence the proceedings in the court *a quo* which are the subject of this appeal.

### **PROCEEDINGS IN THE COURT A QUO**

The remittal proceedings commenced with the appellants’ statement of claim, to which the affidavit of Joseph Lungu, the first appellant was attached. Mr Lungu averred that the appellants were part of the 1078 workers in whose favour the arbitral award by Nasho was made. In support of this position, Mr Lungu relied on a list attached to a memorandum which was addressed to one Mr Rwatirera on 5 September 2012.

The respondent’s notice of opposition was supported by affidavits from different personnel in the respondent’s employ. The first deponent was Mr Rwatirera, a member of the respondent’s Works Council that negotiated the September 2010 Works Council Agreement. He averred that there was no list of the claimants who appeared before Arbitrator Nasho as none was furnished or attached to those arbitral proceedings. As such, he argued that the list produced by the appellants was tailor-made for the proceedings. He thus, denied approving or signing the list produced by the appellants.

Mr Rwatirera further indicated that the employees who were covered by the 2010 Agreement were permanent non-managerial employees and not fixed-term contract employees since the latter’s terms and conditions were regulated by their individual contracts of employment and were not subject to any Work’s Council negotiations nor Worker’s Committee representation. He also averred that it was generally accepted by the respondent, the then

Worker's Committee representatives, the general body of the respondent's permanent employees and most of the fixed-term contract employees that fixed-term contract employees were not within the scope of the arbitral proceedings before Nasho and the subsequent Agreement of 2010. He also asked the court to note that the appellants signed fixed term contracts of employment providing for a salary of \$250.00 per month well after the September 2010 Agreement was concluded.

The second deponent, Mr Mugabe, the chairman of the Workers Committee and a member of the Works Council in September 2010, attested that the salaries and benefits of the Work's Council Agreement were intended to apply to permanent employees in grades 1 to level 2 and not to fixed-term contract employees. The third deponent, E Makaha, a former vice-chairman of the Worker's Committee and a member of the Works Council confirmed Mr Mugabe's averments.

The fourth deponent was Mr Mavengano, the former Vice Secretary of the Worker's Committee and a member of the Works Council who authored the list dated 12 September 2012. He disputed the authenticity of the list produced by the appellants. The fifth and sixth deponents, A. Saburi and T. Hungwe, respectively, who were management representatives in the Works Council Agreement, averred that the Worker's Committee did not, at any time, represent fixed-term contract employees in negotiating their salaries and benefits. In response, the first appellant disputed the respondent's averments in their totality.

At the hearing, the respondent took a point *in limine* that the founding affidavit of Mr Lungu, was improperly before the court as he was not a signatory to the Works Council Agreement of 2010 as required by the remittal order. To the contrary, counsel for the appellants

argued, that the order in SC 1/17, which remitted the matter to the court *a quo*, was not restrictive, but left it open for the court to receive any other sworn evidence apart from that of signatories to the Works Council Agreement. The court *a quo* upheld the preliminary objection and expunged the affidavit of the first appellant from the record.

Thereafter, two witnesses testified for the appellants. The first witness, Mr Muronzi, averred that the applicants participated in the proceedings before arbitrator Nasho and contributed \$2 towards arbitration costs. However, he stated that he was not a member of the Workers Committee and was not a signatory to the September 2010 Agreement and was cognisant of patent irregularities on the appellants' list. The second witness, Mr Mushayabasa averred that he was on a specific term contract and was one of the employees who contributed \$2 for arbitration costs before Arbitrator Nasho, following an address by one Ziki, a member of the then Worker's Committee.

The respondent led evidence through Mr Rwatirera who, apart from reiterating the averments in his founding affidavit, testified that it had always been the respondent's practice that fixed-term employees were excluded from the Works Council. Work's Council members were voted into office by permanent members of staff only. He also testified that the Workers Committee only represented permanent members of staff. He further confirmed the fact that the applicants signed further contracts of employment, with a different salary from that of permanent employees, long after September 2010 Works Council Agreement was concluded. He reiterated that all the employees on fixed term contracts were not part of the Nasho proceedings.

## DETERMINATION OF THE COURT *A QUO*

The court *a quo* dealt with the issue of whether or not the appellants had discharged the *onus* on them of proving that they were included in the September 2010 Works Council Agreement. The court had regard to the specific provisions of the September 2010 Works Council Agreement, the minutes accompanying that Agreement and sworn evidence from the signatories to the Agreement. The relevant clause on which the appellants base their claim provides as follows:

“The Works Council resolved to recommend to the board that

- A net salary of \$500 per month be paid to all employees across the board for the period 01 March 2009 to 31 December 2009. (This is inclusive of transport allowance of \$50 per month and rental support of \$200 per month.)
- A thirteenth cheque should be paid to all employees for the same period.” (emphasis added)

Regarding the September 2010 Works Council Agreement, the court *a quo* found that the reference to “all employees” in the agreement was not determinative of whether or not the applicants were entitled to the salaries and benefits stipulated under that agreement. This was because the respondent had several employees ranging from fixed-term, permanent term to those contracted for casual work or seasonal work. Accordingly, it posited that the use of the term “all employees” was vague and it was unable to decide which of the meanings applied by both parties was correct. The court then held that the provisions of the September 2010 works council agreement did not assist the appellants to discharge their *onus*.

Concerning the minutes accompanying the Agreement, the court *a quo* found that they were no different from the Works Council Resolutions in that there was no indication whether or not the mentioned employees were on fixed-term or permanent employment. Accordingly, it was unable to decide whether the appellants were included in the term

‘employees’ as it appeared in the minutes. Therefore, the court ruled that the minutes of the Works Council meeting did not assist the appellants to discharge the *onus* on them.

As regards the sworn evidence from the signatories to the Agreement, the court noted that the two witnesses who testified for the appellants were not signatories to the agreement or members of the Works Council. It proceeded to disregard their evidence for non-compliance with clause 3.1 of the order for remittal. The court *a quo* further found that in any event, the evidence before it was that of sworn affidavits of members of the Works Council who were present when the agreement was reached stating that the appellants were not covered by the agreement. Further, the authenticity of the list of names relied upon by the appellants was put in issue.

After analysing the list tendered by the appellants, the court remarked that on a balance of probabilities, the appellant’s names were interposed on an existing list. It opined that the list on which the appellant’s names appeared might have been a combination of documents that were prepared for different purposes. In the result, it held that the document could not be taken as proof of the people who were involved in the arbitration proceedings before Arbitrator Nasho. The court concluded that the appellants had not been able to discharge the *onus* of proving that the salaries and benefits stipulated in the September 2010 Works Council Agreement were intended to apply to them. It then dismissed the appellants’ claim with costs.

This decision prompted the appellants to note the present appeal on the following grounds:

1. “The court *a quo* erred in coming to the conclusion that the founding affidavit of Joseph Lungu was not properly before it and accordingly striking it off and in



consigning the viva voce evidence given on behalf of the appellants to the same fate.

2. A fortiori, the court *a quo* erred in renouncing the essence of the responsibility that had been placed upon its shoulders by the Supreme Court.
3. The court *a quo* seriously misdirected itself such misdirection amounting to an error in law in not requiring respondent to account for the 1079 claimants who were before Arbitrator Nasho and in not requiring it to show how it could be said the appellants were not part of those claimants, all the circumstances of the matter (*sic*).
4. Having found that the agreement on which appellants sued and the minutes giving birth to it related and made reference to “all employees”, the court *a quo* erred in coming to the conclusion that such reference was not determinative of the issue and that it still left room for the conclusion that the appellants were not contemplated by the words “all employees”.
5. The court *a quo* erred in not coming to the conclusion that though appellants could not lead the evidence of the signatories to the agreement and that for reasons that were beyond them, all the objective evidence which the Supreme Court had related to and directed be taken into account led to the inexorable conclusion that appellants were covered by the agreement.
6. The court *a quo* erred in not coming to the conclusion that appellants were on the list of employees which formed part of the Supreme Court record and which respondent had dishonestly tried to amend after the fact that there had accordingly never been a dispute as to their inclusion in the agreement.
7. The court *a quo* seriously misdirected itself, such misdirection amounting to an error in law in not concluding that the discrepancies on the numbers of the employees appearing on the lists were explicable on the basis that some of the employees who had made their contributions had not appeared in the Nasho list.”

## **SUBMISSIONS BEFORE THIS COURT**

Mr *Mpofu*, for the appellants, argued that the court *a quo* misdirected itself in ignoring the fact that the only list that contained the names of the 1079 employees that were covered by the September 2010 Works Council Agreement was the list provided by the appellants. He submitted that the failure by the respondent to produce the original list of 1079 employees, covered by that Agreement that it relied on, but instead attaching a list with 237 employees indicated that the only list of employees that could be relied on was that produced by the appellants. He further submitted that since the respondent had not disputed the

authenticity of the list of 1079 employees produced by the appellants in this Court when the matter initially came on appeal, it could not seek to do so during remittal proceedings.

Mr *Mpofu* also argued that the phrase “all employees” as used in the resolution of the Works Council Meeting and the Minutes that followed was unambiguous and applied to all the respondent’s employees without discrimination. This, he submitted, was supported by the fact that during the dollarisation period, all the respondent’s employees were getting allowances instead of salaries and the object of the arbitration proceedings, held before Arbitrator Nasho, was to discuss the regularisation of all employees’ contracts of employment regardless of whether they were permanent or on fixed term contracts. As such, he contended that there was no justifiable basis upon which the respondent could exclude the appellants. Further, that regard being had to s 5 of the Labour Court Act [*Chapter 28:01*], which provides for the protection of employees against discrimination, there was no justification in distinguishing the salary payable to fixed term employees and permanent term employees in the regularisation process.

Mr *Mpofu* also submitted that the court *a quo* erred in taking a rigid approach in resolving the matter leading it to irregularly striking out part of the appellants’ evidence. He submitted that the fact that the evidence was unnecessary does not mean that the appellants did not have a valid claim. He also submitted that the court *a quo* should not have found that the list of 1079 employees produced by the appellants was doctored in the absence of expert evidence to that effect.

He also submitted that the Works council minutes refer to “all employees”. There was no application to rectify the minutes and it leads to one conclusion that they applied to all

employees. He further contended that there was uncontroverted evidence that the appellants contributed money towards the costs of the arbitration.

Conversely, Mr *Magwaliba*, for the respondent, submitted that the court *a quo* could not be faulted in finding that the appellants had failed to discharge the *onus* upon them of proving that they were included as beneficiaries in terms of the September 2010 Works Council Agreement. He contended that the *onus* was on the appellants to prove that they were covered by the Agreement.

He submitted that the court *a quo* was correct in restricting itself to the parameters set by this Court when it remitted the matter, hence, part of the appellants' evidence was struck out. It was also his argument that the court *a quo* had made a factual finding that the list of employees provided by the appellants had patent irregularities and that such factual finding could not be upset by this Court unless the appellants established that such a finding was grossly unreasonable.

Furthermore, he submitted that the court *a quo* having found that the text used in the Works Council Meeting and the subsequent Minutes did not help the appellants' case, correctly determined that no evidence had been put before it by the appellants to prove that they were part of the 1079 employees who appeared before Arbitrator Nasho.

#### **ISSUE FOR DETERMINATION**

Although the appellants have raised several grounds of appeal, I take the view that the appeal can be determined on the following issue:

**WHETHER THE COURT A *QUO* ERRED IN FAILING TO MAKE A SPECIFIC FINDING ON WHETHER OR NOT THE APPELLANTS WERE COVERED BY THE WORKS COUNCIL AGREEMENT OF SEPTEMBER 2010.**

In determining this issue, it is necessary to first consider the import of the order in SC 1/17 remitting the matter to the court *a quo*. That order enjoined the court *a quo* to determine whether or not the salaries and benefits stipulated in the September 2010 Works Council Agreement of 2010 were intended to apply to the appellants and if so, the quantum thereof. Put differently, the court *a quo* had to determine if the appellants were included in that Agreement.

An examination of the court *a quo*'s ruling reflects that the court *a quo* did not make this finding. Having considered the specific provisions of the September 2010 Works Council Agreement and the Minutes accompanying the Agreement as directed by this Court under SC 1/17, the court *a quo* remarked that it was unable to decide whether or not the appellants were included under the agreement. The court *a quo* then invoked the principle of *onus* to the effect that the appellants failed to prove that they were covered by the 2010 agreement. The court *a quo*'s decision was premised on the inability to resolve the issues in dispute. I regurgitate the relevant portions of the court *a quo*'s judgment:

(1) The Specific provisions of the Works Council Agreement of September 2010

“In our view the text of the Works Council meeting Resolutions of September 2010 does not resolve the issue.” **The use of “all employees” leaves the Court unable to decide which of the two meanings propounded by the parties is correct.** It therefore follows that provisions of the Works Council Agreement of 2010 does not help the Applicants to discharge the onus upon them.”

2) The Minutes Accompanying the Agreement

“The minutes of the Works Council meeting of 16 September 2010 leaves the court in the same position as after considering the Works Council Resolutions of September 2010. **The Court is unable to decide whether the Applicants were included in the term employees as it appears in the minutes.** The minutes of the Works Council meeting of 16 September 2010 therefore do not assist the Applicants to discharge the onus upon them” (emphasis added)

It follows that the court *a quo* failed to make a determination on the pertinent issue upon which the matter was remitted. The court *a quo*'s inability to make a finding is a serious misdirection. It is tantamount to not making a decision at all.

In *PG Industries (Zimbabwe) Limited v Bvekerwa & Ors* SC 53/16 at pages 7-8, the court opined on the effect of a court's failure to determine an issue in dispute as follows:

"The position is settled that where there is a dispute on a question, be it on a question of fact or point of law, there must be a judicial decision on the issue in dispute. The failure to resolve the dispute vitiates the order given at the end of the proceedings. Although the learned judge may have considered the question as to whether or not there was an irregularity in the citation of the employer, there was no determination on that issue. In the circumstances, this amounts to an omission to consider and give reasons, which is a gross irregularity."(Emphasis added)

In *casu*, the court *a quo* whilst accepting the parties' dispute regarding the import of the September 2010 Works Council Agreement and the minutes thereto, did not make a finding on whether in light of this evidence, the appellants were included in the September 2010 Agreement. The court could not have failed to determine this crucial issue as the relevant facts upon which it could reach an objective decision were before it.

The irregularity is apparent in the court *a quo*'s assessment of the specific provisions of the September 2010 Works Council Agreement and the minutes accompanying that Agreement.

The finding by the court *a quo* that the appellants failed to discharge the *onus* placed on them to prove that they were covered by the 2010 agreement did not dispose of the matter. This is so because the question remained whether or not the appellants were covered by the agreement regard being had to the evidence placed before the court *a quo*. This was not

an issue the court *a quo* could ignore. The court was obliged to making a finding. It failed to do so.

Having found that the court *a quo* grossly misdirected itself in failing to make a clear cut determination, the pertinent question that arises is whether the subsequent finding by the court that the appellants failed to discharge the *onus* cast upon them, to prove that they were covered by the September 2010 which Agreement, was correct. In *Pillay v Krishna & Another* 1946 AD 946 at 952-953, the court made the following remarks regarding the burden of proof in a matter:

“... the duty which is cast on the particular litigant, in order to be successful of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case) so that he can never be asked to do anything more in regard thereto; but the onus which then rests upon his opponent is not one which has been transferred to him: it is an entirely different onus, namely the onus of establishing any special defence which he may have.” (Emphasis added)

From these remarks, one can note that the burden of proof is the obligation upon a litigant to establish facts which persuade the court to rule in his or her favour. It invariably involves a court’s weighing of an applicant's claim together with the probabilities which arise from the circumstances of the case to decide whether he is entitled to the relief sought. Therefore the question of whether or not a party has discharged the onus upon it cannot be determined by a court’s indecision. This is particularly so in an instance where the court can evaluate the facts and evidence and decide which version is more likely than not to be true. It

is on this basis that I have concluded that the court *a quo* did not correctly apply the principle of onus of proof to the matter before it.

Mr *Mpofu* urged the court to consider that on a holistic approach to the matter there was sufficient material for this court to make a finding that the appellants were part of the September 2020 Works Council Agreement. That would be tantamount to asking this Court to be a court of first and last instance. This Court cannot do so for the reason that the general position of law is that for the Supreme Court to consider a case, a lower court or tribunal must have made a relevant order. Its duty is to determine whether those decisions should be confirmed, changed or reversed. This is because the Supreme Court exercises appellate jurisdiction which is conferred on it by ss 9 & 21 of the Supreme Court Act [*Chapter 7:13*] and s 169 of the Constitution of Zimbabwe, 2013.

The undesirability of having an appellate court sitting as a court of first instance was put across in *Dormehl v Minister of Justice and Others* [2000] ZACC 4; 2000 (2) SA 825, where the court dealing with issues of direct access to the Constitutional Court of South Africa stated:

“b) It is not ordinarily in the interests of justice for a court to sit as a court of first and last instance, without there being any possibility of an appeal against its decisions...”

In any event there is need for the leading of evidence which the court *a quo* is best suited to do as is provided in terms of ss 89 (2) (a) (i) & 89 (5) of the Labour Act [*Chapter 28:01*].

## DISPOSITION

The court *a quo*'s failure to determine whether, in terms of the specific provisions of the September 2010 Works Council Agreement and the Minutes accompanying the Agreement, the appellants were entitled to the benefits therein, constitutes a material misdirection justifying interference by this court. It is also a matter which the court *a quo* is in as good a position to address, thus, a remittal is appropriate in the circumstances. The matter would be remitted to be heard before a single judge who shall not be any of the judges who determined the matter previously.

In the result the appeal succeeds in respect of ground 2 and is dismissed in respect of the rest of the grounds. It would be fair in the circumstances of this case that each party bears its own costs.

It is accordingly ordered as follows:

- (1) The appeal be and is hereby allowed.
- (2) The judgment of the court *a quo* be and is hereby set aside.
- (3) The matter be and is hereby remitted to the court *a quo*, before a different Judge, for a proper determination of whether on the basis of specific provisions of the Works Council Agreement concluded in September 2010 and the minutes accompanying the Agreement, the salaries and benefits stipulated in that agreement were intended to apply to the appellants.
- (4) If the answer is in the affirmative, to quantify the salary and benefits due to each appellant in terms of the Agreement, from 1 March 2009 to the respective date of termination of each appellant's contract of employment, subject to the deduction of such payments as each appellant may have received by way of salary and benefits during the relevant period.
- (5) Each party shall bear its own costs.



**GUVAVA JA:** I agree

**MAVANGIRA JA:** I agree

*T. H. Chitapi & Associates*, appellant's legal practitioners

*Messrs Muringi Kamdefwere*, respondent's legal practitioners.