

REPORTABLE (61)

STARAFRICA CORPORATION LIMITED
V
ZIMBABWE SUGAR REFINERY WORKERS UNION

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, BHUNU JA & BERE JA
HARARE: 15 OCTOBER 2019 AND 24 MAY 2021.

D. D. Ochieng, for the appellant

L. Madhuku, for the respondent

BHUNU JA: This is an appeal against part of the judgment of the Labour Court (the court *a quo*) handed down on 26 January 2018. The appeal is against that part of the judgment which upheld the arbitrator's award granting the respondent's members an 11 percent wage increase.

FACTUAL BACKGROUND OF THE CASE.

The facts giving rise to this appeal are by and large common cause. The undisputed facts are that the appellant is the owner of a group of companies whereas the respondent is a trade union representing employees of Gold Star, a trading division of the appellant.

The parties deadlocked during collective bargaining negotiations for wage increases for the period 1 January 2011 to 30 June 2011. The respondent was claiming a basic

salary increase from US\$157 to US\$180 per month. It did not claim any increase for housing allowance on behalf of its members. On the other hand the appellant objected to the respondent's members being awarded any increase pleading economic hardship.

Both parties proffered evidence before the arbitrator. Having carefully considered the evidence before him, he issued the following order:

“I herein award as follows:

- a) Basic salary is increased from US\$157 by 11% to US\$174.27 per month for the lowest paid employee.
- b) Housing allowance is increased from US\$50 by 11% to US\$56.50
- c) The total award per lowest paid employee is US\$230.77.”

In coming up with that award the arbitrator took into account the employees' basic needs and weighed them against the employer's economic hardship. In exercising his discretion he came to the conclusion that although the company was in economic dire straits, with proper management and realignment of its operations it could afford an increase of 11 percent across the board for both wages and housing allowances. This is what the arbitrator had to say at p 2 of his award:

“The 2011 financial statement also showed a loss of US\$16 375 557. Clearly the fortunes of the company are not that bright. The cost of employment seems to be on the higher side but, it appears the management salaries chew also a huge chunk. Those are some of (the) things that also need alignment. The other costs were for was sugar (*sic*) production which seems to be on the higher side.

However the cost should be recovered from sale through proper pricing.”

In assessing the basic needs of the employees the arbitrator accepted and took into account that it was common cause that rentals in the high density suburbs were pegged at US\$60 to US\$80 per month. He also found that it was common cause that groceries amounted to US\$100 per month per person.

The arbitrator also took into account the comparative evidence placed before him that employees in related subsectors earned a total of between US\$250 to US\$281 per month. In conclusion he remarked that:¹

“For the avoidance of doubt, I have taken into consideration the harsh environment the employees are in and the company... However had the company been performing, I would have awarded a US\$300 basic salary increase and housing allowance of over US\$100 but that would be to bury the company.”

Aggrieved by the arbitrator’s award, the appellant appealed to the court *a quo* with partial success. Its complaints were that the arbitrator erred in relying on financial statements of the entire group of companies instead of only on those of Gold Star. It further complained that the arbitrator awarded the employees an increase in housing allowance which they had not asked for.

The court *a quo* upheld the appellant’s complaint that the arbitrator had misdirected himself in awarding an increase in housing allowances which no one had asked for. It however dismissed the appellant’s appeal against the award on wage increases of 11 percent.

The appellant’s grounds of appeal raise a single issue for determination by this Court. The sole issue for determination is whether or not the court *a quo* erred in upholding part of the award granting the employees an 11 percent salary increase.

ANALYSIS OF THE FACTS AND THE LAW.

Whether or not the court *a quo* erred in upholding the arbitrator’s award of an 11 percent wage increase is a question of fact. It is trite and a matter of elementary law that for the appellant to succeed it must prove on a balance of probabilities that the award was so

¹ Page 4 of the record.

irrational in its defiance of logic such that no arbitrator properly exercising his or her discretion would have made such an award. See *Hama v National Railways of Zimbabwe*² and *Sable Chemical Industries Ltd v Easterbrook*³.

THE LAW

The appellant's appeal is premised on the well-known principle of company law to the effect that a company has a separate and distinct existence from other personalities as enunciated in the familiar case of *Salomon v Salomon & Co Ltd*⁴. In that case Lord HALSBURY LC had this to say:

“It seems to me impossible to dispute that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself. And that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

The principle of law laid down in *Salomon v Salomon (supra)* has found wide recognition in our jurisdiction in a *plethora* of cases. In *Deputy Sheriff Harare v Trinpac Investments (Pvt) Ltd & Anor*⁵ PATEL J as he then was, restated the legal principle as follows:

“The cardinal principle of company law, as enunciated in *Salomon v Salomon & Co Ltd [1897] AC 22 (HL)* and *Dadoo Ltd & Others v Krugersdop Municipal Council 1920 AD 530 at 550* is that a company is a separate entity distinct from its members.”

Applying the timeless *dictum* laid down in *Salomon v Salomon (supra)* it is plain that entities comprising a group of companies maintain their separate and distinct legal personalities although they fall under one umbrella or legal owner. Latching onto that doctrine learned counsel for the appellant argued that as the appellant had a separate and distinct legal

² 1996 (1) ZLR 64 (S)

³ 2010 (2) ZLR 342 (S)

⁴ [1897] AC 22 (HL)

⁵ HH 121 – 11

personality, the arbitrator erred in having regard to the financial statements of the whole group. He ought to have restricted himself to the financial statements of Gold Star. So the argument goes.

The rule in *Salomon v Salomon (supra)* is however not cast in stone. It is only a general rule subject to exceptions particularly in labour matters where the courts and tribunals are enjoined to dispense equitable social justice. In *DHN Food Distributors Ltd v London Borough of Tower Hamlets*⁶ the court observed that:

“Professor Gower in his book on company law says: ‘there is evidence of a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group’. This is especially the case when the parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must just do what the parent company says. ... This group is virtually the same as a partnership in which all the three companies should, for present purposes be treated as one and the parent company should be treated as that one.”

The principle that emerges quite clearly from the *DHN Food Distributors case (supra)* is that in appropriate cases involving group or holding companies and their subsidiaries, the court or tribunal is not strictly bound by the dictates of the doctrine of separate corporate legal personality. This enables them to look at the economic outlook of the whole group in order to do real and substantial justice between the parties as the economic perspective of the group and its subsidiaries may be intricately interwoven and difficult to unravel unless holistically considered.

It is ironic that the appellant is objecting to being treated as a partner of Gold Star when it sowed the seeds of implied partnership by intervening on behalf of Gold Star and

⁶ [1976] 3 All ER 462 (CA) at 467

litigating on its behalf. By so doing it became the employer in partnership with Gold Star which was not a party to the proceedings.

At p 17 of the record of proceedings, learned counsel for the appellant acknowledged that the appellant was legally obliged to produce the questioned statements in terms of s 76 (1) of the Act. The section provides as follows:

“76 Duty of full disclosure when financial incapacity alleged

(1) When any party to the negotiation of a collective bargaining agreement alleges financial incapacity as a ground for his inability to agree to any terms or conditions, or to any alteration of any terms or conditions thereof, it shall be the duty of such party to make full disclosure of his financial position, duly supported by all relevant accounting papers and documents, to the other party.”

It is common cause that it is the appellant that was pleading financial incapacity to pay the increased wages claimed by the respondent. Thus by virtue of s 76(1) of the Act, it was obliged to produce its own financial statements to justify financial incapacity to pay the amounts claimed. Gold Star was not obliged to produce any financial statements as it was not a party to the proceedings and had not pleaded incapacity to pay the amounts claimed.

In any case, at p 12 of the record of proceedings, the appellant makes it clear that there were no separate financial statements for Gold Star. Learned counsel for the appellant submitted that:

“There is need for full disclosure we have consolidated accounts for the whole group it does not make individual company (statements) financials.”

That statement puts this case squarely within the ambit of the *DHN Food Distributors* case (*supra*). This is for the simple but good reason that the appellant was in absolute control of the group’s finances to the exclusion of its subsidiaries including Gold Star. This explains why it litigated in its capacity as the employer without joining Gold Star

which it now alleges is the real employer separate and distinct from it. Had it been so, then the appellant would undoubtedly have joined Gold Star to the proceedings considering that it was ably represented by counsel at every stage of the protracted proceedings. This it did not do, thereby exposing itself as the real employer. Had it not been the real employer it could not have fought Gold Star's battles in its absence and without its mandate.

Section 3(1) of the Act, only applies to employers and employees except those excluded under ss (3). The appellant not being one of those excluded by the Act, it is fully bound by the Act as the employer. Thus the arbitrator's award binds the appellant and not Gold Star which was not a party to the proceedings.

That being the case, we find no merit in the appellant's protestations that the arbitrator improperly pierced the corporate veil. We come to that conclusion because the appellant appeared before the arbitrator and argued the case in its capacity as the employer and not a proxy of Gold Star thus the arbitrator correctly treated it as such.

The appellant's reliance on the cases of *Mkombachoto v Commercial Bank of Zimbabwe & Anor*⁷, *Sheriff & Ors v Dube & Ors*⁸ and *Pacific Ltd v Lubner Controlling Investments (Pty) Ltd & Ors*⁹ is misplaced as the award had nothing to do with ordering the appellant to pay anyone's debts or piercing the corporate veil. The appellant was simply being ordered to pay in its personal capacity as the employer.

⁷ 2002 (1) ZLR 21

⁸ 2014 (2) ZLR 688 at p 690

⁹ 1993 (2) SA 784 ©

WHETHER THE ARBITRATOR'S AWARD WAS IRRATIONAL

We now turn to consider whether the arbitrator's award was irrational as alleged by the appellant or at all. The appeal is premised on the argument that the award is irrational in that it was made in circumstances where the appellant was in financial distress and in no capacity to pay the salary increase of 11 percent as ordered by the arbitrator.

On the other hand the respondent countered that the appellant was obliged to pay a decent living wage to its employees. In argument it was submitted that Zimbabwe having ratified the United Nations instrument on the Universal Declaration of Human Rights 1948, it was bound by its provisions. It is pertinent to note that Zimbabwe has not ratified this Universal Declaration of Human Rights. However, it is an instrument that is universally recognised and applied in this jurisdiction. Article 23(3) states that:

“Every person who works has a right to just and favourable remuneration ensuring for himself and herself an existence worthy of human dignity, and supplement if necessary by other means of social protection.”

Further reliance was placed on Article 11(1) of the International Covenant on Economic, Social and Cultural Rights 1966, which provides that:

“The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

The principles set out in the two instruments are of fundamental universal importance bidding the judiciary and tribunals to uphold and preserve human integrity and the dignity of workers.

Although acknowledging that the respondents are entitled to a living wage the arbitrator found it imperative to balance the employee's interests against the employer's capacity to pay the increased wages.

As alluded to elsewhere in this judgment, the arbitrator made a careful analysis of the facts before him and arrived at a delicate balance of the two competing interests before him. He finally came to the conclusion that although the appellant had made a loss, its employees were entitled to a modest 11 percent wage increase. Comparative evidence proffered by the respondent shows that even after the increase its members were some of the least paid in the industry.

It appears that the appellant is labouring under a serious misapprehension that an employer who makes a loss cannot be ordered to pay its employees any increase in wages. The mere fact that an employer is operating at a loss is no licence for it to pay slave wages not worthy of human dignity. We are of the considered view that an employer operating at a loss may still be ordered to pay a reasonable wage increase to its employees to avoid them falling into destitution and loss of human dignity.

An employer who cannot pay decent wages pertaining to the industry has no business continuing to operate subjecting its employees to slave wages. The appellant's plea of incapacity to pay lacks merit in circumstances where it was unable to rebut the respondent's allegation that its management were being paid huge salaries. It also failed to rebut the evidence to the effect that it could afford the increase if it were to shed excess labour in the form of casual labour.

It is also ironic that the appellant accuses the arbitrator of irrationality by suggesting that one of its subsidiaries Country Choice which made a profit could prop up Gold Star. This is because Country Choice was already financially assisting another distressed unit of the respondent in Bulawayo. This prompted the Arbitrator to remark at p 149 of the record of proceedings that:

“The respondent submitted that its business is facing viability challenges since the inception of the US dollar in 2009 to the effect that its Bulawayo Plant was forced to close. **The Bulawayo Plant’s financial burdens are being incurred** by the Harare Plant and Country Choice Foods...” (*My emphasis*).

There is therefore no irrationality in the suggestion that Country Choice Foods could assist its distressed sister company financially.

DISPOSITION

In the result we come to the conclusion that there is absolutely no merit in this appeal. Costs will follow the result. It is accordingly ordered that:

1. The appeal be and is hereby dismissed with costs.
2. The appellant bears costs of the appeal.

GWAUNZA DCJ:

I agree

BERE JA:

(No longer in office)

Coghlan, Welsh & Guest, the appellant's legal practitioners.

Lovemore Madhuku Lawyers, the respondent's legal practitioners.