

**IN THE LABOUR COURT OF ZIMBABWE
HARARE ON 15th JANUARY, 2014
AND 31ST JANUARY, 2014**

**JUDGMENT NO. LC/H/33/14
CASE NO. LC/H/140/12**

In the matter between

FMI ENERGY ZIMBABWE (PVT) LTD. – APPELLANT

And

EMPLOYEES OF FMI ENERGY ZIMBABWE (PVT) LTD - RESPONDENT

**Before The Honourables L. Hove J.
E. Muchawa J
F.C. Maxwell J.**

For Appellant : Mr I. Chagonda (Legal Practitioner)

For Respondent: Mr D.C. Kufaruwenga (Legal Practitioner)

MAXWELL J,

This matter arose from the change of ownership from BP and Shell Private Limited to the Appellant as a going concern with a clause inserted in the agreement guaranteeing the conditions of service of the employees. It is alleged the said clause was violated by the Appellant. After initial attempts to resolve the matter failed, it was referred to compulsory arbitration. The award cover bears the following:-

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CASE 2036/2011
ARBITRATION
IN THE MATTER BETWEEN
FMI EMPLOYEES (CLAIMANTS)
AND
FMI ENERGY PRIVATE LIMITED (RESPONDENTS)
Held at Harare
Before L.M. Gabilo – Arbitrator”

The Arbitrator ruled in favour of the employees. The award was handed down on 21st December 2011. Page 19 of the award shows that the issue of claimants' legal capacity was raised by the Respondent. The Arbitrator dismissed the issue on the grounds, firstly that the Respondent was only raising the issue in his closing submissions and secondly that it is a technical issue not raised during cross examination of witnesses. The Arbitrator quoted the case of *Dalny Mine v Musa Banda* and decided to proceed to the merits of the matter on the basis of the general rule that it is undesirable that labour matters be decided on the basis of procedural irregularities.

On 6th March 2012 Appellant noted an appeal against the Arbitrator's decision. The first ground of appeal, which is the subject of this judgment is ;

“The Arbitrator erred on a question of law in failing to find that the Respondent has no legal capacity to institute legal proceedings as they did.”

The response to the appeal filed on 16th October 2013 cites the names of 10 Respondents and raises a point *in limine* that the appeal is improperly before the court owing to the Appellant's failure to properly cite the parties to the dispute. The response states that initially there were 81 employees who commenced arbitration proceedings against the Appellant and that a list of the employees participating in the arbitration proceedings was submitted to the Arbitrator. Further the response states that before Arbitration proceedings were conducted a total of 71 employees abandoned the arbitration proceedings after reaching a settlement with Appellant, leaving the 10 named employees pursuing the arbitration process. The response makes reference to Annexure B which shows 13 claimants and further explains that after Annexure B was submitted 3 more employees reached settlement with the employer leaving the listed 10. The 10 registered the award in the High Court and Annexure C confirms that position.

At the hearing of this matter the court decided to deal with the first ground of appeal as a preliminary issue. Appellant, in its heads of argument and in oral submissions on its behalf stated that there was no Respondent to the proceedings as the record does not bear the names of the employees concerned. Appellant further submitted that it was not proper to put in names of people not named in the proceedings as had been done in the Notice of Response. Appellant referred to cases including *CT Bolts (Pvt) Ltd v Workers Committee* SC 16/12 in which the court stated that an unincorporated association is not a legal *persona* and cannot, as a general rule, sue or be sued in its name apart from the individual members, whose names

have to be cited in the summons. The court held that the proceedings before the Labour Court and prior to that were void as the Respondent was not a legal *persona*.

It was submitted in response that 81 individual employees appeared before the Arbitrator. This is reflected in the opening sentence of the award. It was further submitted that the names of the employees were on a piece of paper given to the Arbitrator at the commencement of arbitration. The court was urged to allow the calling of the Arbitrator to testify on the names furnished to him. Further it was submitted that it was undisputed that only 10 employees remained after others had settled with the employer and those 10 proceeded to quantify the award. They are listed in the quantification proceedings before the Arbitrator. It was suggested that subsequent proceedings before the Arbitrator and the High Court in which the employees were listed amended the initial error.

Mr Kufaruwenga sought to distinguish between the present case and the authorities cited by the Appellant on the basis that the cited cases involved Workers Committees which was not the case *in casu*. He also distinguished the case of *Zimbabwe Bata Shoe Company Ltd v Bata Shoe Company Middle Management* SC 30/12 in that a title rather than individuals was cited.

It is trite that an appeal lies on the record of proceedings. In *Sirdars Manufacturers (Pvt) Ltd v Chinya* – MCNALLY JA (as he then was) states that a proper record sets out, among other things, the names of the parties. The award states the claimants as “*FMI Employees*”. Even though the first sentence makes reference to “*FMI’s 81 Employees*” there is no reference to any attachment that would reveal the identities of the 81. Even though a Workers’ Committee was not involved in this case, there is no legal or natural person answering to the name “*FMI Employees*”.

This issue was canvassed in the case of *Zimsec Employees v Zimsec* HH-430-12 in which it was conceded that the citation of the Applicant as ZIMSEC EMPLOYEES was wrong. In that case the record of proceedings contained names and signatures of some of the employees comprising the Applicant. Nevertheless the court held that Zimsec Employees is not a *Universitas*. It is not a juristic person and lacks capacity to represent the 245 employees before the Arbitrator and the High Court. The proceedings in that name before the Arbitrator and before the High Court were declared void.

This court has decided on this issue in the case of *Packaging One (Sparkling Beverages Employees) v Delta Beverages* LC/H/645/13 wherein the Appellant was not properly before the court and the matter was struck off the roll.

It is immaterial that *in casu* there is no citation of a Workers Committee or a title. The fact remains that “FMI Employees” is not a juristic person and therefore lacks capacity to represent the employees concerned. It is not properly before this court and the first ground of appeal therefore succeeds.

Accordingly the matter is struck off the roll.

..... I agree
Hove J.

..... I agree
Muchawa J.

Atherstone & Cook – Appellant’s Legal Practitioners

Dzimba Jaravaza & Associates – Respondent’s Legal Practitioners