

IN THE LABOUR COURT OF ZIMBABWE
HELD AT HARARE ON 15TH NOVEMBER 2012,
21ST MARCH, 2013 AND 31ST JANUARY, 2014

JUDGMENT NO. LC/H/50/14
CASE NO. LC/H/573/11

In the matter between

NORTON TOWN COUNCIL

Appellant

And

**NORTON TOWN COUNCIL MIDDLE MANAGEMENT
EMPLOYEES**

Respondent

Before The Honourable B.T. Chivizhe: Judge

For Appellant : Mr A Muchadehama (Legal Practitioner)

For Respondent : Mr T.D. Muskwe (Legal Practitioner)

CHIVIZHE, J

The appeal was noted as against the arbitral award handed down on 19th January 2012.

The background facts to the matter are as follows;-

The Respondent are full time employees of the Appellant who were occupying ranks in the middle management. The Respondent were in 2006 through a council resolution awarded allowances based on their gross salary being retention allowances 30%, professional allowances 40% and housing allowances 20%. The allowances which were meant to cushion against hyper-inflation were paid religiously until May 2009 when Appellant abruptly cut off the allowances. Various attempts were made to resolve the issue including meetings and negotiations. The Respondent then referred the complaint to a labour officer in June 2011. Conciliation failed and the matter was subsequently referred to compulsory arbitration.

At arbitration the terms of reference were to determine whether the Appellant committed an unfair labour practice by scrapping the allowances and the appropriate remedy. The Respondent's (*claimants in arbitral proceedings*) position was Appellant had unlawfully unilaterally resiled from a valid agreement between the parties by cutting off allowances for the Respondent from May 2009. The Appellant (Respondent in arbitral proceedings) raised

points *in limine* that; Respondent's legal practitioner having represented Appellant before could not represent the Respondent as there would be a conflict of interest. Secondly the Respondent had not been properly identified and since there was no entity referred to as Norton Town Council Middle Management the matter was improperly before the Arbitrator; thirdly the original complaint had been referred by both senior and middle management but the claimants had not sought and obtained a certificate of settlement in respect of senior management who had withdrawn their claims. The points *in limine* were all dismissed by the Arbitrator.

On the merits the Appellant's position was that the alleged benefits were not part of the Respondent contractual benefits or conditions of service; after the introduction of multi-currency in March 2009 the Respondent's contract were varied. It was also Respondent's position that the allowances being claimed were too excessive or in the alternative the Appellant could not afford to pay the huge bill. The payment of the amount claimed would also go against Ministerial directive and public policy.

The Arbitrator dismissed all the points raised *in limine*. On the merits he found that the parties had voluntarily entered into an agreement where the Appellant would pay the Respondents the allowances as stipulated. The allowances had been introduced in 2006 at the peak of the hyper inflationary era. The Arbitrator found that Respondents submission that its financial state was strained could not alter the conditions of the lawful agreement entered into. The Appellant also could not unilaterally alter the conditions of the contract of employment to remove a benefit already granted.

The Arbitrator also found that the Ministerial directive sought to be relied on by the Appellant that stipulated the salaries should not exceed 30% of revenue collected had no place or bearing on the agreement lawfully entered between the parties. It was up to the parties to re-engage and negotiate new terms but the Appellant would still need to correct the breach by paying out the outstanding allowances. The Arbitrator also dismissed the submission that there was novation of the contract of employment, when there was introduction of multi-currency regime in March 2009. The Arbitrator found that Appellant had committed an unfair labour practice by unilaterally cutting off the Respondents allowances. He consequently ordered the Appellant to pay the Respondents their allowances with effect from May 2009 to the date of his award (i.e. 13th September 2011). The Appellant was dissatisfied with the award and noted the present appeal.

The appeal was noted on the following grounds;

- “1. The Honourable Arbitrator grossly misdirected himself in dismissing the points *in limine* raised by the Appellant without giving any reasons for his determination.
2. The Honourable Arbitrator ought to have found that the Norton Council Middle Management is not legal person and has not right whatsoever to sue and be sued on its own.
3. The Honourable Arbitrator also grossly misdirected himself in finding that there was no conflict of interest and allowing *Mr Muskwe* to represent the respondent.
4. The Honourable Arbitrator grossly misdirected himself in his finding that the benefits which were introduced during, the hyperinflation trends o cushion employees against the hyperinflationary environment in 2006 – 2008 are still applicable in the multi-currency regime.
5. The Honourable Arbitrator ought to have found that upon the introduction of the multi-currency regime. The employment relationship was now governed under the multi-currency regime. The benefits which applied in the Zimbabwean dollar era were no longer applicable. The Honourable Arbitrator ought to have found that the Zimbabwean dollar contracts had been novated upon the introduction of the US dollar contracts.
6. The Honourable Arbitrator also grossly misdirected himself in ruling that the Appellant should pay the benefits when the Appellant does not have resources to pay such amounts. The Arbitrator having satisfied himself that the resources to pay the benefits, he ought to have dismissed the claimant’s claim.
7. The Honourable Arbitrator also grossly misdirected himself in his finding that labour matters should not be decided on technicalities without giving reasons as to why this principle applied in the matter before him.
8. Wherefore Appellant prays that the Arbitration award by Honourable J. Ndomene be set aside and in its plea it be ordered that:
 - (i) The appeal be and hereby succeeds
 - (ii) The claimant’s claim is dismissed with costs

On the date of hearing, after presenting arguments the parties attention was drawn by the Court to the case of *Air Zimbabwe (Pvt) Ltd vs. Zendera and Others 2002 (1) ZLR 132 (S)*. The parties were then invited to make further submissions and file with the Court. Regrettably it took another six months before the submissions found their way into the record.

The first issue before the Court is whether the Arbitrator misdirected himself when he dismissed the point *in limine* raised by the Appellant without giving reasons. In dismissing the preliminary points the Arbitrator concluded that the issues were mainly technical issues that are divorced from the merits of the matter. The Arbitrator further observed that it is a general rule that labour issues should be decided on merits rather than on technicalities. He referred to *Dalny Mine vs. Banda 1999 (1) ZLR 220 SC*. He therefore dismissed the issues of

conflict of interest and the impropriety of having the matter placed before him. The Appellant's submission before this Court is that the Arbitrator misdirected himself at law in dismissing the contention that the Respondent – Norton Town Council Middle Management not being a legal *persona* was improperly before the Arbitrator.

The argument clearly has merit. It is clear from a perusal of the record that the Respondent who is cited as Middle Management Employees is not a legal *persona*, capable of suing and being sued. There is essentially no entity referred to as Norton Town Council Middle Management. It is not clear how and why the employees decided to identify themselves in that way. The Respondent were after all legally represented throughout the proceedings.

It is now settled at law that 'Workers Committees' not being legal *persona*, cannot sue or be sued See *C.T. Bolts (Pvt) Ltd. vs. Workers Committee* SC 16/12. Whilst the decision referred to 'Workers Committee' I believe the principles laid therein do apply with equal force in this matter.

As stated by GARWE J. in the above mentioned judgment;

"Under the common law, an unincorporated association, not being a legal *persona*, 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. A *universitas* on the other hand has the capacity, apart from the rights of the individuals forming it, to acquire rights and incur obligations. The position is also established that a body that has no constitution is not a *universitas* for it is the constitution that determines whether an association is or is not a *universitas*."

It is very clear from the perusal of the record that the Respondent is not *universitas*. To compound the matter the names of the individuals forming the group have not even been identified in these proceedings. In the circumstances the Court has to find the Respondent, not being a legal *persona*, was not properly before the Arbitrator. By extension the Respondent is also not properly before this Court. There being no Respondent before the Court it is only proper that there be no order as to costs.

The proceedings are accordingly struck off the roll with no order as to costs.

Mbidzo, Muchadehama & Makoni, Appellant's legal practitioners

Muskwe and Associates, Respondent's legal practitioners