

**REPORTABLE** (19)

**T. M. SUPERMARKETS (PRIVATE) LIMITED**

**v**

**(1) ITAYI NKOMO (2) THEMBINKOSI NYATHI (3) NICHOLAS  
KHUMBULA TSHILI**

**SUPREME COURT OF ZIMBABWE  
GARWE JA, GOWORA JA & BERE AJA  
BULAWAYO: NOVEMBER 28, 2016 & MAY 8, 2018**

*T. Mpfu*, for the appellant

Respondents in person

**GOWORA JA:** This is an appeal against the whole judgment of the Labour Court which dismissed an appeal against an Arbitral award issued in the respondents' favour.

The salient facts in this matter are the following. In 1995 the appellant employed the respondents as shelf packers and they rose through the ranks. At the commencement of the dispute they were employed as Section managers at TM Supermarket, Lobengula Street, Bulawayo under the M2 grade in terms of the appellant's grading system. Their remuneration was paid in accordance with their contracts of employment and in conformity with the relevant Collective Bargaining Agreement.

In 2009 the appellant offered increments to all its section managers in the fifty branches it operated nationwide based on monthly sales performance of the respective branches. In order to give effect to this the appellant grouped the branches into four categories. The branch which recorded the highest sales would earn its managers a 20 percent bonus, the second highest 15 percent, the third 10 percent with the lowest earning 5 percent. Based on this formula the Lobengula branch received a bonus of 15 percent during the period in question.

On 22 November 2011, the respondents addressed a letter to the appellant's Managing Director in which they alleged that they had discovered that since January 2010, some section Managers were being paid a monthly salary that was higher than what the respondents were earning. They also stated that they had previously written to the Human Resources Officer-Southern Region and the Human Resources Manager concerning their grievance but they had not received a response.

There was no response from the Managing Director and in January 2012 the respondents lodged a complaint of unfair labour practice with a Labour Officer. They claimed the difference between their salaries and what the highest performers were being paid. The parties were invited to attend conciliation proceedings which failed to achieve a positive result and consequently a certificate of no settlement was issued. Thereafter, the matter was referred to compulsory arbitration for the arbitrator to determine whether the respondents were entitled to back-pay and the *quantum* thereof.

Before the arbitrator, the respondents contended that in November 2011, most Section Managers under the M2 grade were earning salaries ranging from US\$400.00 - US\$450.00 per month whilst they were earning US\$360.00 per month. They argued before the arbitrator that there was no rational basis for the distinction. They also suggested that in November 2011 following their complaint, each of their accounts was inexplicably credited with the sum of US\$40.00. It was also the respondents' contention that in February 2012 they were demoted to grade 10 without consultation. In the result, the respondents claimed back-pay in the sum of US\$2 390.00 each and prayed that the appellant be ordered to stop acting unilaterally in violation of the labour laws.

Per contra, the appellant averred that initially the Section Managers were paid equitably and the decision to pay them based on branch performance was reached sometime in December 2010. The appellant also submitted that the respondents were in grade C2 in terms of the "Patterson" grading system and that, as they were managerial employees, their salaries were negotiated on an individual basis. Contrary to the respondents' contention, the appellant claimed that the US\$40.00 deposited in the respondents' accounts were given to every employee of the appellant. It submitted that there was no back-pay due to the respondents because it was gravitating towards the normal payment system where employees are paid the same regardless of performance.

The arbitrator found that, in the circumstances in *casu*, the performance-based bonus constituted a contravention of the *audi alteram partem* principle as the respondents had not been afforded an opportunity to be heard concerning the new grading salary scales. He therefore held

that the appellant was committing an unfair labour practice in terms of s 6 of the Labour Act in that the respondents were being underpaid for the period in question. In addition he held that the appellant's conduct in this regard was criminal which rendered it liable for prosecution.

As a consequence, he ordered that each of the respondents be paid US\$2 390.00 as back-pay. He also ordered that the appellant should normalise the compensation system for the respondents.

The appellant was aggrieved and appealed against the Arbitral award to the Labour Court. In essence, the grounds of appeal were that the arbitrator erred in finding that the appellant committed an unfair labour practice by implementing a performance-based incentive bonus scheme. It also argued that the Arbitrator exceeded his terms of reference when he ordered it to normalise its payment scheme.

The Labour Court upheld the finding by the arbitrator that the appellant had committed an unfair labour practice by implementing a performance-based bonus scheme. On the issue relating to the Arbitrator exceeding his terms of reference, the court *a quo* found that it was inconceivable that the appellant would raise such a ground of appeal when it was common cause that it had, subsequent to the arbitration proceedings, started a process towards normalising its remuneration system. In the result, the appeal was dismissed in its entirety.

Aggrieved by the decision, the appellant, with the leave of this Court, has appealed on the following grounds:

1. The court *a quo* erred in law in effectively coming to the conclusion that it was unlawful for appellant to pay its employees performance-based salaries.
2. Having come to the conclusion that what the respondents were being paid was in accordance with their contracts of employment, the court *a quo* erred in law in holding as valid an award which entitled them to be paid on a salary scale that was not contractual and which related to different employees.
3. The court *a quo* erred in failing to make a determination on whether the arbitrator was entitled to stray from the terms of reference in the manner that he did and whether he was at large to afford relief which had not been motivated.

From the grounds of appeal, there are essentially two issues for determination and these are:

1. Whether the court *a quo* erred in holding that it was unlawful for the appellant to pay its employees performance-based bonuses.
2. Whether the court *a quo* erred by failing to make a determination on whether the arbitrator strayed from his terms of reference.

**Whether the court *a quo* erred in holding that it was unlawful for the appellant to pay its employees performance-based bonuses**

The appellant contends that the court *a quo* erred in holding that it was unlawful for it to implement a performance-based bonus scheme because there was nothing unlawful about the measures it adopted in putting in place such a scheme as long as the emoluments which

the employees are paid as a minimum comport with what is set out in the relevant Collective Bargaining Agreement. The respondents, per contra, contend that putting in place a performance-based salary system is unfair as it contravenes s 5 (d) of the Labour Act [*Chapter 28:01*], (the “Act”) which prohibits discrimination on matters relating to employment, wages and benefits.

A bonus is what can generally be termed a benefit. The implication that can be drawn is that the grant of a bonus *per se* is not illegal and an employer cannot generally be held to have committed an unfair labour practice by setting up a bonus scheme. The rationale to this principle is that every employee has the right to a performance based incentive and if they work well, they will be paid well without any reference being made to their class, race, tribe or any other factor on the basis upon which discrimination can competently be committed. Thus, the grant of a performance based bonus is therefore not proscribed by law.

It is only where the awarding of the bonus constitutes an unfair labour practice that would render the bonus illegal. It should be noted however, that a court will interfere with a decision which involves the exercise of discretion in very limited circumstances. These were set out by this Court in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at p 62-63, where the Court said:

“The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion – may only be interfered with on limited grounds. See *Farmers’ Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant

consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court”.

It is trite that the grant of a benefit is at the discretion of the employer and cannot be interfered with unless the employer has, in granting the benefit exercised his discretion capriciously or on a wrong principle. This position was buttressed in *First Mutual Life Ltd v Muzivi* SC 09-07 where CHEDA JA stated:

“Payment of an annual bonus, is generally discretionary on the part of the employer. It could not be said that the employee would have been awarded a bonus under all circumstances. A bonus would have depended on a clear record of performance. Having been suspended, it could not be said that the employee performed so well that he would have been entitled to a bonus.”

The above *dictum* amplifies the principle that the decision to grant or award a bonus to its employee is entirely within the employer’s discretion and is dependent on the employee’s performance.

What can be gleaned from the above is that the Arbitrator as well as the court *a quo* could only interfere with the appellant’s decision to implement a performance-based bonus scheme if it was found that an error had been made or if the employer, in implementing the scheme, had acted on the wrong principle or if the employer allowed extraneous or irrelevant factors to guide or affect it or if it did not take into account some relevant consideration.

Regarding the performance-based bonus system, the Labour Court held as follows;

“I agree with the arbitrator that failure to appraise employees of putting such a system in place and go on and base the salaries on the system is unfair and unjust and not in keeping with the Labour Act. Section 5 of the Labour Act prohibits discrimination on any other matter related to employment and in any matter relating to wages and benefits. The employer has an obligation to advise the employee in writing of the remuneration and how it shall be arrived at.”

It is evident from the remarks above that the court *a quo* upheld the Arbitrator’s decision that declared the bonus illegal on the premise that the respondents were not informed about the scheme prior to it being implemented. It is my view that the finding by the court *a quo* cannot be assailed because employees have a right to be informed about decisions pertaining to their employment conditions of service even if the decisions are made in the exercise of an employer’s discretion. The appellant as the employer had a duty to notify all employees about its decision to start a performance-based bonus scheme before implementing it.

However, that said, the court *a quo* erred in upholding the order awarding the respondents back-pay. As correctly argued by the appellant, once the court *a quo* found that the performance-based bonus scheme was illegal, it should not have upheld an order awarding back-pay based on an illegal scheme. A finding that an arrangement is turpious is incompatible with an order enforcing the same as was done in *casu* by requiring that the employees be paid in terms of an allegedly unlawful arrangement. This is what is referred to as the *ex turpi causa* principle. The order of the arbitrator and that of the court *a quo* upholding the former, contravenes this principle, and as a consequence, the principle is offended by an order enforcing what has been



held to be illegal. In addition a court cannot lend itself to an illegality. See *Dube v Khumalo* 1986(2) ZLR 103; *Foroma v Min of Public Construction & Anor* 1997(1) ZLR 447(H).

The court *a quo* failed to appreciate the point that an Arbitral award cannot be founded on an illegality. An illegal act is void and cannot be enforced. As LORD DENNING stated in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The above dictum is apposite. In *casu*, once the Labour Court found that the performance based scheme was illegal, which bonus scheme the Arbitrator had declared illegal, it was incumbent upon it as an appeal court to set aside the arbitral award upon which the back-pay was awarded. The court however, notwithstanding its finding of illegality, went ahead to uphold the award. In this respect, the court *a quo* erred.

In an appeal this Court will not simply deal with the direct dictates of an order but also its effects. In *Williams & Anor v Msipa N.O. & Ors* SC 22/10, the court said:

“The court must be able to intervene not only against the direct dictates of the judgment of the lower court but also against its effects. See *Macdonald v Canada (AG)* (1994) I SCR 311@329”.

The effects of the judgment of the court *a quo* is to sanction an illegality. The judgment does not serve the law. Rather it enforces what it has itself found to be void. There is a patent contradiction. Accordingly its decision should be set aside on that basis.

**Whether the court *a quo* erred by failing to make a determination on whether the arbitrator strayed from his terms of reference.**

The appellant submits that the court *a quo* erred in failing to make a determination on the issue whether the Arbitrator went outside his terms of reference. This issue was raised as a ground of appeal in the court *a quo* and the court stated the following regarding the same:

“It is inconceivable that the Appellant argues that the arbitrator erred in delving into the issue of normalising the compensation system when it was not asked to do so, yet the employer tried to normalise the system before going to arbitration by paying unexplained \$40.00 to each employee that would put the respondents’ salary at \$400.00 from \$360.00.”

The only issue on the terms of reference to the arbitrator was whether or not the respondents were entitled to back-pay. A perusal of the ruling by the arbitrator shows that he indicated that the appellant was gravitating towards “a normal payment system. Thereafter the arbitrator ordered the appellant to normalise its remuneration system. This was not part of his terms of reference.

A reading of the remarks by the learned Judge shows that she failed to appreciate the issue that was before her. The court *a quo* presumed that the appellant was aggrieved by the fact that it was ordered to normalise the system. In making that presumption, it failed to appreciate that the grievance was that the arbitrator did not have the power to make such an order as the issue had not been placed before the arbitrator for determination.

The court *a quo* fell into the same error as the arbitrator. Instead of determining the ground of appeal raised on the arbitrator's alleged departure from his terms of reference, the court *a quo* found that the order granted by the arbitrator was already being implemented. It commented that the employer was already gravitating towards a normal payment system. It in effect refused to deal with the issue placed before it.

The gravamen of the complaint by the appellant was that the arbitrator had given an award on a matter that was not placed before him. He had departed from his terms of reference and the order that he gave was in breach of the law. It had no basis in law. It behoved the court *a quo* to consider that ground and properly find that the order was unlawful and as a consequence set it aside. In consequence, the court *a quo* did not determine the issue that was before it. This was a serious misdirection that warrants interference by this Court. The failure by a court to appreciate the issues before it is a just cause for setting aside its order.

It follows that the judgment of the court should be set aside in its entirety.

In the result, the following order will issue:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and in its place is substituted:
  - (i) "The appeal be and is hereby allowed with costs.
  - (ii) The arbitral award by the learned arbitrator I Bonda dated 23 October 2012 be and is hereby set aside."

**GARWE JA:** I agree

**BERE AJA:** I agree

*Coghlan & Welsh*, appellant's legal practitioners

*ZFTU*, for the respondents