

DISTRIBUTABLE (26)

(1) HONEST CHAPANGURA (2) OVERAGE KUVHEYA (3)
MAXWELL MTAKIWA (4) JOSIAH DHOBHA (5) COSMAS
GACHA (6) FREDDIE MANYATERA
v
(1) KWEKWE CITY COUNCIL (2) DELIWE MAKOTA

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & UCHENA JA
HARARE: JULY 14, 2020 & APRIL 1, 2021**

G. Masikati for the appellants

J. Nyarota for the first respondent

**Judgment No. SC 27/21
Civil Appeal No. SC 650/19**

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UCHENA JA: This is an appeal against the whole judgment of the Labour Court handed down on 1 August 2019, dismissing an application for the confirmation of a draft ruling of a labour officer (second respondent), to the effect that transfer of the employees (appellants) from Kwekwe Brewery to the first respondent constituted a transfer of an undertaking in terms of s 16 (1) of the Labour Act [*Chapter 28.01*].

FACTUAL BACKGROUND

The detailed facts of the case can be summarised as follows;

The appellants are former employees of Kwekwe Brewery a company duly incorporated in terms of the laws of Zimbabwe. The first respondent (Kwekwe City Council) is Kwekwe Brewery's sole shareholder. As a result of Kwekwe Brewery's financial

difficulties the first respondent entered into a management agreement with Limsol Trading which was to manage the affairs of Kwekwe Brewery for five (5) years between 2010 and 2015. As early as 2011, Limsol Trading started experiencing viability problems in its management of Kwekwe Brewery. In 2012, the first respondent applied for and was granted a Bank loan to support the financial position of Kwekwe Brewery. According to minutes of a meeting of 6 May 2016 on Kwekwe Brewery's financial position the Brewery owed the Bank USD 53 000 and was making a loss of USD 23 000 per month. A decision was made to lay off all casual employees and reduce working hours of permanent employees with immediate effect. Kwekwe Brewery was eventually closed. To avoid loss of employment due to the Brewery's closure, the appellants entered into and signed contracts of employment on transfer from Kwekwe Brewery to the first respondent. They were on 5 September 2016 offered jobs totally different from those they had with Kwekwe Brewery. For example, the first appellant who was a Marketing Manager with Kwekwe Brewery was employed as a debt collection Supervisor grade 4. The fourth appellant who was a Production Manager with Kwekwe Brewery was employed as a Municipal Policeman Grade B3. They worked for the first respondent from 5 September 2016 to 19 October 2017 when they raised an issue of unfair labour practice with a labour officer.

The appellants lodged a complaint of unfair labour practice with the second respondent alleging that they had been transferred to the first respondent on less favourable terms and conditions in contravention of s 16 (1) of the Labour Act [*Chapter 28:01*]. They alleged that the first respondent had unilaterally altered their contracts of employment upon transfer of an undertaking and that they were put under less favourable terms which had resulted in their salaries and other benefits being reduced. They prayed that they be reinstated

in their former jobs and the terms and conditions which applied to them before the transfer be restored.

In response to the complaint, the first respondent denied that there had been a transfer of an undertaking as envisaged by s 16 (1) of the Labour Act. It submitted that the undertaking, (Kwekwe Brewery) had closed due to viability challenges. It, therefore, submitted that there was no undertaking which could be transferred in the circumstances. It averred that s 16 (1) of the Labour Act was intended to apply to a situation where an undertaking or business is transferred to another person and that it was not intended to apply to a situation where employees are transferred to another organisation following the closure of the undertaking by which they were employed. Alternatively, it was submitted that if indeed there had been a transfer of an undertaking, it had been one in which the appellants voluntarily agreed to terms and conditions which were less favourable than those they enjoyed before the transfer.

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In determining the dispute between the parties, the second respondent found that there had been a transfer of an undertaking and ruled that the first respondent pay the appellants salaries equivalent to those they enjoyed before the transfer. Thereafter, the second respondent in compliance with the provisions of s 93 (5a) (a) and (b) applied to the court *a quo*, for the confirmation of her draft ruling. The first respondent opposed the application, arguing that there had been no transfer of an undertaking from Kwekwe Brewery to it. The first respondent argued that it was not legally possible for Kwekwe Brewery, which it owned, to be transferred to it. It argued that there was no change of ownership of the Brewery.

After perusing documents filed of record and hearing the parties, the court *a quo* held that the facts of the matter did not support the claim that there had been a transfer or alienation of Kwekwe Brewery as an undertaking to the first respondent. It further held that it was not proved that the first respondent acquired the assets, liabilities and total operations of Kwekwe Brewery, but that there had been a transfer of employees by way of the contracts of employment entered into by the parties. As a result, it held that there had been no transfer of an undertaking and dismissed the application for the confirmation of the draft ruling.

Aggrieved by the decision of the court *a quo*, the appellants noted an appeal to this Court on the following grounds:

GROUND OF APPEAL

- “1. The court *a quo* erred at law in holding that there was no transfer of an undertaking when this is clear in the circumstances of the case as envisaged in terms of s 16 (1) of the Labour Act [Chapter 28:01]. **Judgment No. SC 27/21**
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2. The Court *a quo* erred at law in giving s 16 (1) of the Labour Act [Chapter 28:01] an unreasonable restrictive interpretation which interpretation defeats or contradicts the purpose the section was enacted to achieve when the Court ruled that:-
 - i. There was a transfer of employees and not a transfer of assets which transfer of employees on its own is transfer of an undertaking.
 - ii. First Respondent acquired no assets, no liabilities and no total operation of Kwekwe Brewery but such transfer of employees is transfer of assets and liabilities. No question was in issue on this.
 - iii. There was a distinction between the facts in *Mutare Rural District Council v Chikwena* 2000 (1) ZLR 534 (S) when in actual fact there was no such distinction.”

The appeal raises two issues for determination.

1. Whether or not the court *a quo* correctly found that there was no transfer of an undertaking in terms of s 16 (1) of the Labour Act?

2. Whether or not if a transfer took place the appellants accepted less favourable terms than those they enjoyed before the transfer.

SUBMISSIONS MADE BY THE PARTIES.

Ms *Masikati* for the appellants submitted that the court *a quo* erred by failing to give s 16 (1) of the Labour Act a broader meaning in light of the words “in anyway whatsoever”. Counsel for the appellants contended that the words “in anyway whatsoever” demonstrated that a transfer of an undertaking may take any form as long as there is a change of hands. She argued that a transfer of employees from Kwekwe Brewery to the first respondent constituted a transfer of an undertaking as held in the case of *Mutare Rural District Council v Chikwena* 2000 (1) ZLR 534 (S). She further averred that the first respondent unilaterally varied the appellants’ conditions of employment to less favourable conditions without consultation. Counsel for the appellants asserted that this constituted a breach of s 16 of the Labour Act and prayed that the decision of the court *a quo* be vacated.

Mr. *Nyarota* for the first respondent submitted that Kwekwe Brewery was not alienated or transferred as a going concern as it merely ceased operations due to viability challenges. He contended that the transfer of employees alone did not constitute a transfer of an undertaking as envisaged by s 16 (1) of the Labour Act. He further submitted that the court *a quo* did not decide on whether or not the appellants had agreed to less favourable terms and conditions than those they enjoyed before the alleged transfer which he submitted had a bearing on the relief sought by the appellants and was an issue which the court *a quo*

was seized with. Counsel for the first respondent prayed that the appeal be dismissed with costs as it was devoid of merit.

THE LAW

The law which the court *a quo* had to interpret and apply in determining whether or not to confirm the draft ruling related to, the question in what circumstances can an undertaking be said to have been alienated or transferred in terms of s 16 (1) of the Labour Act. Section 16 (1) of the Labour Act reads as follows:

“16 Rights of employees on transfer of undertaking

- (1) Subject to this section, **whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking** on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted. (emphasis added)

The critical words which determine the issue and have to be interpreted are, **“whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking”**.

Section 16 (1), therefore simply means, when an undertaking/business is alienated or transferred, its employees whose employment is not otherwise lawfully terminated, are deemed to have been transferred with it to the transferee. This means the undertaking/business must first be alienated or transferred to the transferee, before the employee's rights to continued employment can be deemed to have been transferred to the transferee. The employees' rights to continued employment under the transferee are, therefore, activated by the alienation or transfer of the undertaking/business to the transferee. The words **“whenever any undertaking in which any persons are employed is alienated or transferred”** are significant. It is the undertaking's/business' alienation or transfer which triggers the simultaneous transfer of the employees to the transferee. The employees' transfer arises from their being employees of the alienated or transferred undertaking/business.

The law on what is an undertaking and how it is alienated or transferred was discussed in the case of *Mutare Rural District Council v Chikwena* 2000 (1) ZLR 534 at p 537C-E, where GUBBAY CJ said:

“The word undertaking is of variable meaning. Basically, the idea it conveys is that of a *business or enterprise*. In the Australian case of *Top of the Cross (Pty) Ltd v Federal Commissioner of Taxation* (1980) 50 FLR 19, Woodward J said at 36:

‘Frequently, the word undertaking is used in circumstances where it could be interchanged with either the word *business or enterprise* and with varying shades of meaning. Sometimes it is used alone, sometimes by way of distinction from the assets of the owner and sometimes as a synonym for business. Sometimes it is used to embrace the property which is used in connection with the undertaking as well as the debts and liabilities which have arisen in relation thereto.’

In this matter, **it is indisputable that what was transferred to CIG was the appellant's viable and separate business, the Mutare Furniture and Hardware factory. It had its own set of employees under the control and supervision of production and factory managers. It was an undertaking as contemplated and sanctioned by s 16 (1).**”

At p 537F to 538C GUBBAY CJ compared our s 16 (1) with s 197 of the South African Labour Relations Act 1995, which was interpreted in *Manning v Metro Nissan* (1998) 19 ILJ 1181 (LC) at 1189 as follows:

“What these subsections provide for is that a business , trade or undertaking is sold as a going concern, the purchaser for all intents and purposes, vis-a –vis the employees of the business, trade or undertaking purchased, puts himself in the place of the seller. Consequently, all the rights and obligations that existed between, the seller and its employees are transferred by operation of this section to the purchaser.” (emphasis added)

The phrase “in any way whatsoever,” concerning alienation or transfer of an undertaking in s 16 (1) does not connote a broader interpretation as submitted by counsel for the appellants because the mere transfer of the employees cannot be said to be a transfer of an undertaking. Several considerations must be taken into account. This was aptly illustrated in *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* 2012 (1) SA 321 (CC), where it was held that “for a transfer to be established, there must be components of the original business which are passed on to the third party”. These components would include, but not be limited to, the taking over of employees, assets (tangible or intangible), customers, debtors and the business would maintain or continue its activities whilst retaining its identity.

Therefore, the mere transfer of employees from one employer to another on its own cannot be taken to constitute a transfer of an undertaking. While the Labour Act seeks to protect the rights of both the employer and the employee, for s 16 (1) to apply there must be an alienation or transfer of an undertaking/business in any way whatsoever and such transfer is not of employees alone.

In *Mutare Rural District Council*, (*supra*), this Court held that a business, trade or undertaking must be transferred as a going concern, “that is to say, what is taken over must be an active and operating business, trade or undertaking.” These sentiments were fortified in the South African case of *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 (CC), where the Constitutional Court stated that:

“...in deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not the workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation...” (emphasis added)

Similar sentiments were echoed in the case of *Spijker Gebroeders Benedik* **Judgment No. SC 27/21**
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Abattoir v Alfred Benediken Zonen [1986] 2 CMLR 296, where it was stated that:

“The decisive criterion is whether the business in question retains its identity. Consequently, a transfer of an undertaking; business or part of a business does not occur merely because its assets are disposed of. **Instead, it is necessary to consider whether the business was disposed of as a going concern, as would be indicated, *inter alia* by the fact that its operations were actually continued or resumed by the (new) employer, with the same or similar activities...**” (emphasis added)

The provisions of s 16 (1) are subject to the provisions of the whole section.

Subsections 2 to (3) provide as follows:

“(2) Nothing in subsection (1) shall be deemed—

- (a) to prevent the employees concerned from being transferred on terms and conditions of employment which are more favourable to them than those which applied immediately before the transfer, or from obtaining terms and conditions of employment which are more favourable than those which applied immediately before, or subsequent to, the transfer;

- (b) to prevent the employees concerned from agreeing to terms and conditions of employment which are in themselves otherwise legal and which shall be applicable on and after the transfer, but which are less favourable than those which applied to them immediately before the transfer:
Provided that no rights to social security, pensions, gratuities or other retirement benefits may be diminished by any such agreement without the prior written authority of the Minister;
 - (c) to affect the rights of the employees concerned which they could have enforced against the person who employed them immediately before the transfer, and such rights may be enforced against either the employer or the person to whom the undertaking has been transferred or against both such persons at any time prior to, on or after the transfer;
 - (d) to derogate from or prejudice the benefits or rights conferred upon employees under the law relating to insolvency.
- (3) It shall be an unfair labour practice to violate or evade or to attempt to violate or evade in any way the provisions of this section”.

A reading of the whole section besides adding that employees can get more favourable conditions or agree to less favourable conditions and ~~judgment No. SC 27/21-~~ **Civil Appeal No. SC 650/19** diminution of rights to social security, pensions, gratuities or other retirement benefits, without the Minister’s authority, and the non-derogation of employees’ rights under the law of insolvency, does not change the interpretation discussed above. The meaning remains that, it is the alienation or transfer of the undertaking/business which triggers the transfer of employees.

There must, therefore, be alienation or a transfer of an undertaking before employees of the transferred undertaking can claim to have become employees of the transferee in terms of s 16 (1).

WHETHER OR NOT THE COURT A QUO CORRECTLY FOUND THAT THERE WAS NO TRANSFER OF AN UNDERTAKING IN TERMS OF S 16 (1) OF THE LABOUR ACT?

Ms Masikati for the appellants sought to rely on the case of *Mutare Rural District Council (supra)* to advance an argument that the transfer of employees of an undertaking can on its own, constitute the alienation or transfer of an undertaking. She also argued that the facts of this case are on all fours with those of the *Mutare Rural District Council* case (*supra*). She did not correctly understand the facts of the case. In that case *Mutare Rural District Council* formed a limited liability company known as Council Income Generator (Private) Limited (CIG) to which it transferred its interests in Mutare Furniture and Hardware factory. Mutare Rural District Council held all the shares in CIG. It, however, eventually sold all its shares in CIG to third parties who became the transferees of CIG and took over its employees.

In this case, Kwekwe City Council (the first respondent) did not sell its shares in Kwekwe Brewery. It remains the sole shareholder of Kwekwe Brewery. As explained above Kwekwe Brewery was closed and stopped operating without being alienated or transferred to a third party. Its employees signed new contracts of employment with the first respondent which are totally different from those they had with Kwekwe Brewery. The undertaking that the appellants worked for before their new contracts with the first respondent was not transferred to the first respondent. There was, therefore, no alienation or transfer of Kwekwe Brewery to the first respondent. As a result, there was no transfer of its employees to the first respondent in terms of s 16 (1).

A reading of the record establishes that Kwekwe Brewery has always been owned by the first respondent, therefore, it is not correct to say that the business changed hands. The first respondent could not be both a transferor and a transferee of Kwekwe Brewery. It could not alienate or transfer its business to itself.

The court *a quo*, therefore, correctly dismissed the application to confirm the second respondent's draft ruling to the effect that the appellants had been transferred to the first respondent in terms of s 16 (1) and were entitled to the salaries and benefits that they enjoyed as employees of Kwekwe Brewery.

WHETHER OR NOT IF THE TRANSFER TOOK PLACE THE APPELLANTS ACCEPTED LESS FAVOURABLE TERMS THAN THOSE THEY ENJOYED BEFORE THE TRANSFER.

In view of the definitive finding that there was no transfer of an undertaking this issue need not be determined. The determination of whether or not there was a transfer of an undertaking also determines this issue as an employee can only exercise the option of accepting less favourable terms if the institution he was working for has been transferred to a new employer. The court *a quo*, therefore, correctly abstained from determining this issue.

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DISPOSITION.

The appeal has no merit and must be dismissed. Costs will follow the result.

In the result the appeal is dismissed with costs.

GWAUNZA DCJ

I agree

GUVAVA JA

I agree

Mavhiringidze & Mashanyare, appellants' legal practitioners

Wilmot & Bennett, first respondent's legal practitioners

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