

REPORTABLE (04)

JOSEPH LUNGU AND OTHERS
v
RESERVE BANK OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & MWAYERA JA
HARARE, MAY 8, 2023 & JANUARY 18 2024

T. Mpofo, for the appellants

T. Magwaliba, for the respondent

GUVAVA JA:

Judgment No. SC 04/24
Civil Appeal No. SC 625/22

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[1] This is an appeal against the whole judgment of the Labour Court (the ‘court *a quo*’) dated 6 May 2022, judgment number LC/H/108/22 in which it dismissed the appellants’ application seeking an order that the Works Council Meeting and Resolution of 15 September 2010 related to the appellants who were on fixed term contracts.

FACTUAL BACKGROUND

[2] This matter has been raging in our courts for the past 13 years and going back and forth between this Court and the court *a quo* for the past 6 years. The facts that have given rise to this endless litigation may be summarised as follows.

[3] The appellants were all employed by the respondent on fixed-term contracts. They were employed as security guards between the period 2007 and 2008. Their employment contracts with the respondent were terminated at various times between January and April 2011 due to effluxion of time. The respondent is the county's bank and is established by the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. Its functions are *inter alia* to regulate the monetary policy of the country and supervise other banking institutions.

[4] In 2010, a dispute arose between the respondent and its employees concerning salaries following the multi-currency regime that had just been introduced. The dispute, which involved 1079 of respondents' employees, was referred to Arbitrator Nasho for resolution. Although disputed, the appellants argue that they were part of this group. In his determination, Arbitrator Nasho ordered that all employees of the respondent must be paid back pay from March 2009 in line with the new multi-currency system.

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[5] Following the award by Arbitrator Nasho, and on 15 September 2010, the respondent's Works Council converged and deliberated on the issue of the payment of salary arrears for the employees. The Works Council Meeting agreed as follows:

“A net salary of \$500 per month be paid to all employees across the board for the period of 01 March 2009 to 31 December 2009 (This is inclusive of transport allowance of \$50 per month and rental support of \$200 per month)

A thirteenth cheque should be paid to all employees for the same period.”

The meeting was adjourned to 26 September 2010 when the Works Council again convened and held discussions on the salary structure for employees from 1 January 2010 going forward. A resolution was subsequently made by the Works

Council covering the salaries and benefits of the respondent's employees including the issue of retrenchment.

[6] Following this decision two disputes arose. In the first one, the appellants challenged the termination of their contracts with the respondent arguing that, due to repeated renewals of their contracts they had become permanent employees. They claimed that they should have been retrenched and received retrenchment packages in accordance with the Works Council Agreement instead of having their contracts terminated due to effluxion of time. The parties to this dispute appeared before Arbitrator Mugumisi who dismissed the appellants' claim on 4 April 2012. The appellants were aggrieved by the decision and appealed to the court *a quo* which upheld the arbitrator's decision. Leave to appeal to this court was made. It is not clear from the record whether or not leave was granted.

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[7] The second dispute that arose between the respondent and the appellants' was on the issue of whether or not they were entitled to payment of the salaries set out in the agreement and if they were, whether they were owed salary arrears for the period which the September 2010 Works Council Agreement ('the Works Council Agreement') pertained. On 10 December 2010, the appellants filed a claim for arrear salaries and benefits based on the Works Council Agreement. Their claim succeeded before Arbitrator Mambara. He ordered that they were entitled to arrear salaries and benefits in terms of the Works Council Agreement.

[8] The respondent was aggrieved by the award by Arbitrator Mambara and applied for review in the court *a quo*. The court *a quo* allowed the application for review and set

aside the whole award due to the procedural irregularities cited. As expected, the appellants were unhappy with the decision and noted an appeal before this Court under case number SC 94/16. PATEL JA (as he then was) under judgment number SC 1/17 allowed the appeal and ordered the remittal of the matter to the court *a quo* for a determination of the following questions:

- “(i) ...whether on the basis of specific provisions of the Works Council Agreement concluded in September 2010 and the minutes accompanying the Agreement, and having regard to sworn evidence from the signatories to the Agreement, whether or not the salaries and benefits stipulated in that Agreement were intended to apply to the appellants, and
- (ii) If the answer to that question is in the affirmative, to quantify the salary and benefits due to each appellant in terms of the Agreement, from 1 March 2009 to the respective date of termination of each appellant’s contract of employment, subject to the deduction of such payments as each appellant may have received by way of salary and benefits during the relevant period.”

[9] The parties thereafter appeared before the court *a quo* which proceeded to hear the parties on the issues remitted to it by this Court. The court **Judgment No. SC 94/24** **Civil Appeal No. SC 625/22** 4
appellants’ claim and held that the appellants had failed to discharge the onus placed upon them of proving that they were indeed covered by the Works Council Agreement as their claim for arrear salaries and benefits was founded upon that agreement. Buoyed by their earlier victory in SC 1/17, the decision of the court *a quo* gave fertile ground for another appeal to this Court by the appellants under case number SC 548/19.

[10] MAKONI JA in judgment number SC 26/21 found that the court *a quo*’s failure to determine whether, in terms of the Works Council Agreement and the Minutes accompanying the Agreements, the appellants were entitled to the benefits and salaries contained therein, amounted to a misdirection on the part of the court. As a result of this finding, this Court allowed the appeal, set aside the judgment of the

court *a quo* and remitted the matter to a different judge for a proper determination of the following issues:

“Whether on the basis of specific provisions of the Works Council Agreement concluded in September 2010 and the minutes accompanying the Agreement, the salaries and benefits stipulated in that agreement were intended to apply to the appellants.

If the answer is in the affirmative, to quantify the salary and benefits due to each appellant in terms of the Agreement, from 1 March 2009 to the respective date of termination of each appellant’s contract of employment, subject to the deduction of such payments as each appellant may have received by way of salary and benefits during the relevant period.”

[11] It is pertinent to note that this order had the effect of doing away with the requirement for the court *a quo* to consider evidence from the office bearers and signatories to the Works Council Agreement as had previously been ordered by PATEL JA. The determination of the dispute was thus to be resolved on the interpretation of the **Judgment No. SC 04/24** Works Council Agreement of 2010. **Civil Appeal No. SC 625/22**

[12] At the hearing before the court *a quo*, the appellants submitted that they were included in the arbitral award by Arbitrator Nasho as they were part of the 1079 workers represented by the Workers Committee and as such were entitled to arrear salaries and benefits in terms of the Works Council Agreement.

[13] The appellants further averred that the respondent could not dispute that they were covered by the Agreement due to the fact that they had participated in and paid for the holding of proceedings before Arbitrator Nasho. This was based on the fact that the award showed that they were party to the proceedings and were part of the 1079 employees before him. The appellants also submitted, that the memo listing the

number of non-managerial employees of the respondent and which list was approved and confirmed by the Director, of Human Resources and Support Services, Mr. E.S. Rwatirera comprised of their names. The appellants further claimed that the Works Council Agreement covered **all** non-managerial employees of the respondent without discrimination. The appellants, therefore, urged the court *a quo* to find in their favor.

[14] The appellants' claim was opposed by the respondent which argued that they were not part of the 1 079 employees that were covered by the decision by Arbitrator Nasho and that there was no proof that they had contributed towards the legal costs of placing the matter before him. It was submitted that the respondent's director of Human Resources and Support Services denied having confirmed the contents of the memorandum which the appellants claimed to include their names as beneficiaries of the arbitral award and the subsequent Works Council Agreement.

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[15] The respondent insisted that only permanent employees were covered by the Works Council Agreement. Further, it argued that the appellants' terms and conditions of fixed-term employment were regulated by their contracts and were not subject to any Works Council or related Workers Committee representation during the September 2010 negotiations. The respondent added that the appellants' jobs were ungraded and fell outside the scope of the Works Council Agreement which expressly provided for salaries and terms and conditions of the respondent's employees on permanent contracts of employment in grades G1 to G12. The respondent, however, did not comment on the arrear salaries of US\$500 which were awarded across the board by the Works Council Meeting between 1 March and 31 December 2009 and upon which the appellants' claim was based.

[16] The respondent further averred that representatives of the Workers Committee who represented the permanent non-managerial employees at the arbitral proceedings and who were also formerly members of the Works Council that negotiated the September 2010 Agreement, confirmed that the appellants' were not covered by the arbitral proceedings.

[17] The court *a quo*, in dealing with the matter, found that the minutes accompanying the Works Council Agreement made reference to "all employees for the same period", and that those employees meant staff, managerial and non-managerial employees. The court also found that there was no distinction in the minutes between contract and permanent employees or that the contract employees were not included or represented by the Workers' Committee. The court further found that the minutes of the Works Council Agreement stated that the salary package was for ~~all employees~~ without specific mention of the inclusion or exclusion of contract workers. The court *a quo* also found that the Works Council Agreement referred to "all employees" and did not distinguish between contract and permanent employees and that if the intention had been to exclude contract employees it would have done so in express terms.

[18] However, after making the above findings the court *a quo*, held that the appellants' conditions of service were spelt out in their contracts and that such conditions were not subject to Works Council negotiations. It held that a thirteenth cheque, transport and housing allowances were not applicable to the appellants' conditions of service unless expressly mentioned in their contracts.

[19] The court *a quo* thus concluded that awarding the appellants a thirteenth cheque would be synonymous to creating new contracts between the parties. In the result, it held that the Works Council Agreement as read with the Works Council Minutes did not include the appellants. The court *a quo* dismissed the application on the basis that the salaries and benefits in the Works Council Agreement did not apply to the appellants.

[20] The appellants were aggrieved by the decision and appealed to this Court on the following grounds:

- “1. Having come to the conclusion that both the Works Council Agreement as well as the minutes preceding it were designed to cover all employees, the court *a quo* erred in effectively coming to the conclusion that the word “all” as used in the agreement was to be construed as meaning “some”.
2. The court *a quo* seriously misdirected itself in misunderstanding the facts of the matter by failing to appreciate that at the time the agreement was concluded, the object was to set out a remuneration structure in the wake of the change in the operational currency of the republic.
3. The court *a quo* erred in incorrectly concluding that there is at law any difference between the substantive contents of a fixed terms contract on the one hand and a permanent contract on the other.
4. The court *a quo* erred in coming to the conclusion that recognizing what appellants were contractually entitled to would amount to it creating contracts for the parties.”

APPELLANTS’ SUBMISSIONS ON APPEAL

[21] Mr *Mpofu*, on behalf of the appellants’, submitted that the court *a quo* erred when it made a finding that the word ‘all’ did not include the appellants. It was counsel’s argument that the minutes and the resolution of the Works Council both related to an increase for ‘all’ employees and this included the appellants’. He argued further, that

a list was placed before the court, which list, consisted of 1 079 employees. The list included the appellants’.

[22] Counsel maintained that the Supreme Court, per MAKONI JA, directed that the court *a quo* should have regard to the Works Council Agreement and the Minutes to the Agreement before making a finding on whether the appellants were included in the decision of the Works Council. The Court was urged to consider the purpose of the Works Council negotiations and the resolution passed thereof. It was argued that it would have been absurd to exclude the appellants’ from the salary negotiations for the sole reason that they were on fixed term contracts. Counsel further argued that the Court should be guided by paragraph 1 of the Works Council Agreement which gave ‘all’ the employees across the board a salary increment of US\$500.

[23] With regards to the import of the remittal order by MAKONI JA, the court should be directed to consider that it had departed from the initial order by PATEL JA (as he then was) when he asked the court *a quo* to refer to affidavits on record and if necessary the calling of oral evidence from the signatories of the Works Council Agreement for a determination of the issue of whether the appellants were part of the employees covered by the Works Council Agreement. Counsel invited the court to interpret the MAKONI JA judgment as having simply called upon the court *a quo* to interpret the Works Council Agreement without having regard to evidence in oral or affidavit form. It was on this basis that counsel prayed for the appeal to succeed with costs.

RESPONDENT’S SUBMISSIONS ON APPEAL

[24] *Per contra* Mr Magwaliba for the respondent, argued that clause 2.3 of the appellants’ contracts of employment specifically stated that the contracts were fixed term for

three months. The salary to be paid to the appellants was provided for in clause 6.3 of the contracts and was provided as a standard salary of \$250. Counsel argued that, as fixed-term contract employees, the appellants' were not entitled to the thirteenth cheque nor were they entitled to benefits like transport and housing allowances, which allowances could only be enjoyed by permanent employees of the respondent.

[25] Counsel further argued that the Works Council Agreement had to be read as a whole and not piecemeal. In this regard, counsel maintained that the Agreement could not include the appellants' who had no grading system and had contracts with specific provisions of their conditions of service. He submitted that the Works Council's resolution did not alter the specific provisions of these contracts and did not refer to the appellants who were fixed-term employees of the respondent hired for a specific period and a specific project. He maintained that the Works Council Agreement referred to 'all' employees and that the court *a quo* correctly interpreted the Agreement and the Minutes before it in arriving at the finding that 'all' employees meant all non-managerial permanent employees of the respondent excluding contract employees. Counsel also maintained that the memo, with the list of names on which the appellants based their argument for inclusion, had been refuted by the Human Resources Manager who suggested that it had not originated from the respondent. As such there was no proof that the list included the names of the appellants.

[26] With regards to the import of the order by MAKONI JA when remitting the matter to the court *a quo*, counsel accepted that the Court in that matter excluded the need for the court *a quo* to examine affidavits and to call for oral evidence as had been ordered by PATEL JA. He however submitted that the MAKONI JA's judgment did not

absolve the court *a quo* from considering the affidavit evidence that was on the record in making its determination. He submitted that the appeal was devoid of merit and should be dismissed with costs.

ISSUE FOR DETERMINATION BEFORE THIS COURT

[27] When one has regard to the grounds of appeal and the submissions made by counsel before this Court one issue lends itself for determination. The issue is whether or not the court *a quo* misdirected itself in finding that the Works Council Agreement as read with the Minutes to the Agreement did not include the appellants.

ANALYSIS

[28] The starting point for the resolution of the present matter is an interpretation of the Works Council Agreement and Minutes to the Agreement. **Judgment No. SC 04/24** **Civil Appeal No. SC 025/22** on 15 September 2010, the respondent's Works Council resolved to pay:

“A net salary of US\$500 per month to be paid to **all** employees across the board for the period of 01 March 2009 to December 2009.”(Emphasis added)

It is trite that words in any document, statute, or contract must be given their ordinary dictionary meaning unless this would lead to an absurdity. In the absence of a contrary definition within the document, statute, or contract such words must be given their plain, ordinary and literal meaning. This is the literal or golden rule of interpretation. Only when ambiguity arises in the interpretation of such words can there be a departure from this rule. In *Tapedza & Ors v Zimbabwe Energy Regulatory Authority & Anor* SC 30/20 HLATSHWAYO JA (as he then was) had occasion to discuss the import of the literal rule of interpretation. At p 4 of the cyclostyled judgment, it was held as follows:

“It is an established principle of law that when interpreting a statute, the first cannon of interpretation to be applied is the golden rule of interpretation. This rule is to the effect that where the language used in a statute is plain and unambiguous, it should be given its ordinary meaning unless doing so would lead to some absurdity or inconsistency with the intention of the legislature. A provision of a statute should be given a meaning which is consistent with the context in which it is found. This position was laid down in *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264 D-E, where McNALLY JA said:

“There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord WENSLEYDALE said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, ‘unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.’” See also See *Mudada v Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (S) at 377.”

[29] In discussing the principle to be applied by a court in interpreting the statute, MALABA CJ dealt extensively with this point in *Zambezi Gas (Pvt) Limited v NR Barber (Pvt) Ltd & Anor* SC 437/19. He stated the following:

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“It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given the ordinary grammatical meaning. However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning. There is enough authority for this rule of interpretation. In *Endeavour Foundation and Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356F-G the Supreme Court stated:

‘The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is, as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result.’” (See also In *Chihava and Others v The Provincial Magistrate Francis Mapfumo N.O and Another* 2015 (2) ZLR 31 (CC) at pp 35H-37B)”

[30] Although the above authorities were discussing the interpretation of statutes, in my view, the principles enunciated therein apply with equal force to the interpretation of documents and contracts which find their way before the court for interpretation. In *casu*, an interpretation of the resolution passed at the Works Council meeting calls for

a look at the meaning of the word ‘all’ in the context of the respondents’ employees. The word ‘all’ connotes completeness and wholeness. Black’s Online Law Dictionary 2nd Ed. defines ‘all’ as:

“Collectively, this term designates the whole number of particulars, individuals, or separate items; distributively. It may be equivalent to ‘each’ or ‘every.’” State v. Maine Cent. R. Co., 66 Me. 510; Sherburne v. Sischo, 143 Mass. 442, 9 N. E. 797.”

[31] This Court in *Endeavour Foundation and Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) quoted with approval the words of MARGO J in *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G-H, noted as follows:

“Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute or in a contract or in a will. Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context, in the enactment or contract or other document.”

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[32] It must be noted the Minutes of the Works Council Meeting give background and flesh on how the amount of USD\$500 was arrived at for all employees. They reflect that the amount was arrived at after an initial suggestion of the sum of \$800 had been made by the Workers Committee as being the basic pay for the lowest paid employee after taking due regard to the poverty datum line. The amount of USD\$800 was only varied downwards to USD\$500 after the Governor (who was the Works Council Chairman) highlighted that the Council’s suggestion of USD\$800 was unfair to the respondent considering the budget of the respondent from the fiscus during the current year. The Chairman went on to suggest that a nett salary of USD\$500 should be paid across the board for both management and non-managerial staff including the Governor himself.

[33] The Minutes are indicative of one important point, that the amount of the net salary of USD\$500 was not arrived at in a vacuum but rather was arrived at after serious deliberations and considerations had been made. It is pertinent to note that the 15 September 2010 Agreement was entered into following an arbitral award by Arbitrator Nasho who had made an award in favour of the respondent's employees. A close examination of the Works Council Minutes reflects that the driving force around the discussions of the salary adjustments was based on arriving at a net salary that was above the poverty datum line of \$496 net per month. Upon reading the Works Council Minutes it is clear that it was on this basis that the resolution of the Works Council was crafted. It was applying to 'all' the employees of the respondent as each employee was affected by the change in the economic environment. The agreement was supposed to remedy a mismatch in the salaries that the employees were receiving following the introduction of the new multi-currency system. Additionally, it was intended to rectify the issue of salaries that were below the poverty datum line.

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It follows that, when one has regard to the word 'all' as used in the Works Council Agreement it must include all employees.

[34] In determining whether indeed the appellants were entitled to the award of USD500, this Court has been asked by the respondent to consider that the appellants did not prove that the list was generated by the respondent and as such they were not part of the 1 079 employees. However, a reading of the issue for determination which was remitted to the court *a quo* by MAKONI JA shows that the issues requiring calling of oral evidence and affidavits of signatories to the Works Council (which issue had been initially raised by PATEL JA) were no longer subject to the inquiry before the

court *a quo*. The court *a quo* was simply directed by MAKONI JA to have regard to the import of the September 2010 Works Council Agreement and Minutes on the appellants'. Without any evidence to the contrary it must therefore be accepted that the appellants, being on the list of employees who appeared before Arbitrator Nasho were part of the 1 079 employees upon whom the award was made.

[35] In any event, even if they were not part of the 1079 employees, the appellants' nevertheless qualify for inclusion by virtue of the definition of the word 'all' that is contained in the minutes and agreement of the Works Council. There is no doubt that they were employees of the respondent when the Works Council Agreement was signed. It is not in dispute that the appellants were contractual workers of the respondent on fixed-term contracts. While contracts between the appellants and the respondent had a life span of three months, it was accepted that these contracts were renewed on numerous occasions during the period from 2007 to 2011.

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[36] The interpretation of the word 'all' must not be construed in isolation (*in vacuo*). The context of the matter that the Works Council Agreement was made to deal with the salary issues that had arisen due to the multi-currency system must be regarded. The multi-currency system had affected 'all' the employees of the respondent. Lastly, the measures taken to deal with the effects of the multi-currency system had to be applied across the board to benefit all the employees. Based on the above interpretation the appellants' were part of the Works Council Agreement and have a right to the salary increment. Indeed, the court *a quo* correctly found that they were so included.

[37] However, the point of departure was that the court found that it could not create a contract for the appellants as they were bound by the agreement signed with the respondent. This is where the court *a quo* erred. It must be noted that the effect of the Workers Council Agreement and Resolution was to create new obligations on the respondent with respect to each employee regardless of the original agreement upon assumption of office. As may be gleaned from the wording of the Works Council Agreement and Minutes, the agreed position was that the multi-currency regime had affected all employees and therefore the intention was to regulate the problem across the board.

[38] This position finds confirmation if one has resorted to the definition of employee found in the Labour Act [*Chapter 28:01*] ('the Labour Act'). Section 2 defines an employee as:

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“Any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person—

- (a) in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or
- (b) in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services”

The Act is all encompassing and acknowledges that there are different types of employment relationships which are formed on different terms and conditions.

[39] This Court was not persuaded by the issue raised by counsel for the respondent that the appellants' do not have a grading structure and that therefore the Works Council

Agreement could not apply to them. In our view, such an argument does not find merit with the court. The Works Council Agreement was two pronged. The first part was to award an increment of US\$500 across the board. This aspect included salary arrears from 1 March to 31 December 2009. This cannot be said to involve a grading system as it was awarded across the board. The grading system was only introduced from 1 January 2010 and provides for a salary of US\$500 for the lowest paid worker. It is apparent from the papers before me and following on the decision by Arbitrator Magumise (when he dismissed the appellants' claim for retrenchment following their termination of their employment) that the thrust of the appellants claim is the basic salary of US\$500 which was awarded to all employees across the board. The Works Council Agreement, which related to grading of employees and other benefits could not have applied to the appellants'. In my view what was applicable to the appellants was the decision to award a salary of USD\$500 to all employees regardless of whether they were permanent or contract workers and whether they were graded or ungraded.

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DISPOSITION

[40] The court *a quo* correctly found that the word 'all' in the Works Council Agreement and Minutes was in respect to all employees of the respondent. It then fell into error by failing to appreciate that the reference to the word 'all' employees in the Works Council Agreement encompassed the appellants as they were duly employed by the respondent at the time when the Agreement was consummated and resolved. In the circumstances, the appeal must succeed. With respect to costs, there is no reason why the costs should not follow the cause.

Accordingly, it is ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
 - ‘(i) The application be and is hereby allowed with costs.
 - (ii) The parties shall agree on the quantification of the arrear salaries for each appellant within 30 days of this order.
 - (iii) In the event that the parties fail to agree on the *quantum*, either party may approach the Labour Court for quantification.’

UCHENA JA : I agree

MWAYERA JA : I agree

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Muza & Nyapadi, appellants’ legal practitioners

T. H Chitapi & Associates, respondents’ legal practitioners