

**REPORTABLE** (47)

**CLOTHING INDUSTRY PENSION FUND**  
v  
**(1) MERCY DARE N.O (2) IVYN ABRIEL MBATHA**

**SUPREME COURT OF ZIMBABWE**  
**BHUNU JA, KUDYA JA & MUSAKWA JA**  
**HARARE: 11 SEPTEMBER 2023 & 31 MAY 2024**

*R. T Mutero*, for the appellant.

*A. Mufari*, for the second respondent

**BHUNU JA:**

1. This is an appeal against the entire judgment of the Labour Court (the court *a quo*) sitting at Harare which confirmed the arbitrator's award against the appellant.

**BRIEF SUMMARY OF THE FACTS**

2. The second respondent was employed by the appellant way back in 1982. The employment relationship still subsists. He has since risen to the position of Senior Pensions Officer. He sometimes acts as the Principal Pension's Officer in the absence of the incumbent.

3. Owing to outstanding grievances, respondent approached the Labour Officer on 16 December 2008 complaining of unfair labour practices against the appellant. He complained of unfair and unprocedural transfer and unlawful unilateral withdrawal of contractual benefits. The Labour Officer attempted to conciliate the dispute without success.

4. Upon failure to reach an amicable settlement the Labour officer issued a certificate of no settlement and referred the dispute for arbitration in terms of s 93 (5)(a) to (c) of the Labour Relations Amendment Act 17/2002.

5. The terms of reference were:

- (1) Whether the transfer was fair or not.
- (2) Whether the transfer was procedural or not.
- (3) Whether the employer's unilateral decision to withdraw contractual benefits is lawful or not.

6. On 8 April 2009 the Arbitrator made an award in the following terms:

“1. The withdrawal of contractual benefits as set in table 1- 4 of the Claimant's submission was unlawful and therefore should be reinstated and paid to the Claimant forthwith. I observe that conditions of employment cannot be amended or withdrawn by the employer without obtaining consent from the employee concerned. This rule was held by the High Court in the case of Mangosho versus UDC, where it was decided that any changes to conditions of service must be negotiated upon between the parties often with some form of other concessions by the employer to compensate the employee for the loss. In this case no form of compensation was offered to the Claimant as substitute of the loss.

2. In the issue of transfer...

In view of the points stated above, I make the following orders:

- a. That the contractual benefits withdrawn by the respondent be reinstated and paid out forthwith in the manner outlined in table 1- 4 as attached within the period of seven (7) working days from the date of receipt of this award.
- b. That the transfer be halted and the parties be allowed to discuss openly and reach an amicable agreement. Parties are thus urged to act reasonably and professionally in the interest of the organization.”

7. On 16 July 2009, upon consideration of the arbitral award, the appellant unequivocally accepted it as correct and binding. It thereafter proceeded to notify the respondent that it was complying with the award. It acknowledged that the respondent was entitled to a company car preferably with 60 litres fuel capacity. It then undertook to promptly remedy

the anomaly by restoring the unilaterally and unlawfully withdrawn benefits. It further undertook not to appeal against the arbitral award.

8. The letter under the hand of appellant's former Principal Officer Mr Baloyi dated 16 July 2009 at p 52 of the record, reads in part:

**“Dear Sir**

**RE: ARBITRAL AWARD I G MBATHA & C. I.P.F.**

**I write on behalf of the Clothing Industry Pension Fund in connection with the labour matter which was referred to Arbitrator I. M Gabilo in terms of section 93 (5) (a): (c) of the Labour Relations Amendment Act Number 17/2002.**

**In compliance with the Arbitral Award handed down on the 8<sup>th</sup> of April 2009 in favour of your client, the contractual benefits have been restored and outstanding amounts paid in full. Medical aid will also be adjusted accordingly. We want to handle the labour matter in a prompt and amicable manner. The Clothing Industry Pension fund has made a decision not to appeal the arbitral award.**

**With the concurrence of the Trustees of the Clothing Industry Pension Fund the memorandum of Friday, 15 May 2009 is withdrawn unconditionally. For avoidance of doubt your client who acts as Acting Principal Officer during my absence is entitled to a company car inclusive of weekly 60 litres of fuel commensurate with his senior position. As part of his contractual benefits he is allowed to travel anywhere within Zimbabwe using the car.**

**Please confirm receipt of this letter.**

**Yours faithfully**

**CLOTHING INDUSTRY PENSION FUND**

**SIGNED  
E. BALOYI  
PRINCIPAL OFFICER.”**

9. Having said so, the appellant proceeded to comply with the arbitral award in terms of the above letter. It however later had a change of heart in respect of provision of the company car and fuel. It thus reneged from its undertaking in this regard.
10. Aggrieved, the second respondent approached the first respondent, the Labour Officer, complaining of unfair labour practice arising from the appellant's unilateral withdrawal of the motor vehicle, fuel and medical aid benefits.
11. The appellant resisted the respondent's claim on the basis that it had prescribed. It further contended that the respondent was not entitled to a company car and fuel benefits in terms of his contract of employment. It argued that benefits were awarded solely at the employer's prerogative.

**DRAFT RULING BY THE LABOUR OFFICER.**

12. In his draft ruling the Labour Officer dismissed the preliminary objection of prescription on the basis that the running of prescription had been interrupted by an acknowledgement of debt made by the appellant. He further ruled that prescription did not begin to run because s 94(2) of the Labour Act [*Chapter 28:01*] proscribes the running of prescription where the unfair labour practice is continuing.
13. On the merits the Labour Officer upheld the respondent's claim and made the following order:

*"I therefore order that Clothing Industry Pension Fund should provide Ivyn Gabriel Mbatha with a Twin Cab Motor Vehicle for both business and private use.*

*Clothing Industry and Pension fund should pay the claimant 60 litres of fuel per week or the equivalent in monetary terms for the fuel they have not been providing him from November 2009 to date.*

*Clothing Industry pension fund should reinstate the private medical aid benefit.*

*The respondent should also stop unilaterally varying the claimant's contract. The respondent should not issue a new contract where the current contract without limit of time is still subsisting. No variation of the respondent's contract should be done without the consent of the claimant.*

*This ruling should be implemented within 30 days from the date of its issue.”  
(My italics)*

14. The appellant did not comply with the Labour Officer's draft ruling thereby prompting her to refer the draft order for confirmation in terms of the Act. The court *a quo* confirmed the draft ruling hence the appeal to this Court.

### **THE GROUNDS OF APPEAL**

15. The appellant appealed to this Court on the following grounds:

- “1. The court *a quo* erred and misdirected itself when it dismissed the appellant's preliminary point on prescription on the basis that the cause of action for twin cab motor vehicle and fuel allowance was continuing because a continuing cause of action does not interrupt the running of prescription in terms of the Prescription Act.
2. The court *a quo* erred and misdirected itself when it dismissed the appellant's preliminary point on prescription on the basis that the cause of action for the twin cab motor vehicle and fuel allowance was continuing because the cause of action in issue was not an unfair labour practice and as such s 94(2) of the Labour Act does not apply.

3. The court *a quo* erred and misdirected itself when it dismissed the appellant's preliminary point on prescription on the basis that the cause of action for twin cab was continuing in terms of section 94 (2) of the Labour Act."

### **THE RELIEF SOUGHT.**

16. On the basis of the above grounds of appeal, the appellant sought the following relief:

- "1. That the instant appeal succeeds with costs.
2. That the decision of the court *a quo* is hereby set aside and substituted with the following:
  - "1. The application for confirmation of the ruling made by the applicant in respect of (the) twin cab motor vehicle and 60 litres (of) fuel allowances from November 2009 be and is hereby dismissed.
  2. The Registrar to set the matter down for determination of the registration of the ruling in respect to the reinstatement of the private medical scheme.
  3. The costs of this matter shall be in the cause."

### **CONCESSION BY COUNSEL FOR THE APPELLANT.**

17. At the onset of his submission Mr *Mutero* conceded that the second ground of appeal is invalid. He accordingly abandoned the ground of appeal and consequently it was struck off the record by consent of the parties.

### **ISSUES FOR DETERMINATION.**

18. The remaining two grounds of appeal raise the sole issue of whether or not the respondent's claim had prescribed.

### **SUBMISSIONS BY COUNSEL**

19. At the appeal hearing Mr *Mutero* sought to argue that the court *a quo* erred in not determining that the respondent's claim had prescribed. He postulated that the issues for determination on appeal before us were:

1. Whether what was referred to the Labour Officer was a dispute or an unfair labour practice for purposes of s 8 of the Labour Act.
2. Whether the alleged unfair labour practice was continuing.

20. Having formulated what he perceived to be the issues before us on appeal, Mr *Mutero* went to town arguing with reference to precedents to the effect that as the respondent's cause of action was not continuing it was subject to prescription and had prescribed in terms of the Prescription Act. He further sought to persuade the court that what was referred to the Labour Officer was a dispute and not an unfair labour practice. For that reason the dispute was not protected from prescription by s 94 (2) of the Labour Act.

21. On the other hand Mr *Mufari* for the respondent countered that the appellant's grounds of appeal did not raise the issue of unfair labour practice. He further submitted that the issues now being raised by the appellant had been determined by the Arbitrator and the appellant had accepted the award. It thus had undertaken to comply with the award. It had already partially complied with the award and settled the respondent's claim for fuel.

### **ANALYSIS AND DETERMINATION**

22. It is correct and a matter of common cause that the arbitrator's award which dismissed the appellant's preliminary objection based on prescription was never contested on appeal. The award was also never challenged on appeal on the merits. On the contrary, the appellant

accepted that the award was correct and undertook to comply with it as clearly stated in its letter of 15 July 2009 at p 52 of the record of proceedings.

23. It is not in dispute that the appellant did not plead prescription both before the Labour Officer or the court *a quo*. Asked by the court whether prescription should not have been specifically pleaded both before the Labour officer and the court *a quo*, Mr *Mutero's* response was, "*Yes but concession does not mean it has been unpleaded.*" With all due respect, this is legal tomfoolery which does not take the appellant's case anywhere.

### **DISPOSITION**

24. The appellant sealed its own fate when it accepted the arbitrator's award and partially complied with it. It cannot therefore be found in the appellant's mouth that it cannot be bound by the award when it stands undisturbed, valid, extant and binding. In the case of *Mkize v Swemmer* 1967 SA 186 at p 197 C - D it was held that judicial decisions are binding until set aside on appeal or review. In this case the award is extant. It was never set aside either on appeal or review.

25. The appellant sought to resile from its undertaking to comply with the award arguing that the award did not specifically cover the issue of the company car. Unfortunately the iron is that in its letter of 16 July 2009 the appellant freely admitted liability to provide the respondent with a company car and fuel in terms of his contract of employment. That admission is firm and binding on the appellant.



26. Given the appellant's admission of liability and failure to plead prescription, the court *a quo* cannot be faulted at all in confirming the Labour Officer's draft award which was in essence only an enforcement procedure of the arbitral award. That being the case the appeal can only fail.

27. Costs follow the result.

28. It is accordingly ordered that the appeal be and is hereby dismissed with costs.

**KUDYA JA** : I agree

**MUSAKWA JA** : I agree

*Mtewa & Nyambirai Legal Practitioners*, appellant's legal practitioners

*Mawire & Associates Legal Practitioners*, 2<sup>nd</sup> respondent's legal practitioners.