Judgment No S.C. 107\2002
Civil Appeal No 220\2001

POSTS AND TELECOMMUNICATIONS CORPORATION v ZIMBABWE POSTS AND TELECOMMUNICATIONS WORKERS' UNION AND TWO OTHERS

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA AJA
HARARE JULY 9 & NOVEMBER 26, 2002

J.C. Andersen S.C., for the appellant

T. Biti, with him Mr *Zhou*, for the respondents

CHEDA JA: The appellant is the Posts and Telecommunications Corporation, the organisation responsible for postal and telephone services in Zimbabwe.

The respondents are the Workers' Union which represents the employees of the appellant, and the two others are former workers of the appellant who took voluntary retirement packages, represented by one Emmanuel Kasaki.

Although the respondents filed different applications at the High Court, the two cases were dealt with together because of the common background and overlapping issues involved.

This appeal is against the decision of the High Court in which it ordered the appellant to pay the respondents' salaries and allowances in accordance with the agreement reached by the parties and recorded in Statutory Instrument No 26 of 2000.

Before I go into the merits I prefer to set out the background to this case and the events that led to the dispute.

It is the practice of the appellant to hold meetings every year and negotiate with the respondent Union's representatives, new salary increases and other benefits for each coming year in accordance with section 74 of the Labour Relations Act [Chapter 28:01].

Once an agreement is reached, it is referred to the National Employment Council (NEC) of that particular industry. If accepted by the NEC the agreement is published in a statutory instrument and forms the basis of new salaries and other allowances for the workers in the following year. The agreement is then binding on all the parties, that is, the employer and employees.

In March 1999 the appellant decided that its employees should be paid on the basis of the median quartile of the market. This decision was made by the appellant's Board.

Following this decision, negotiations were held between the appellant's management and the respondents' representatives on the increases to be made to the various grades of the appellant's employees.

Several meetings were held and several issues were raised for discussion.

By January 2000 the negotiating committee was able to present its findings to the NEC.

Still in January, the appellant announced to its employees that agreement had been reached and there was a new salary structure based on the median quartile as opposed to the lower quartile in which they had been before. It was also agreed that the 1st October 1999 was to be the date on which the new salaries would be made effective.

A statutory instrument was then published, S.I. 26 of 2000 to record and make the agreement official.

The appellant proceeded to pay the respondents, in service, according to the new salary structure, from October 1999 to March 2000.

In March, the appellant advised the respondents that it could no longer continue to pay salaries in accordance with S.I. 26 of 2000 as the salary bill had proved to be beyond its means.

The respondents did not accept this and resorted to collective job action.

The matter was referred to a Labour Officer who issued an order that the respondents return to work and the appellant pay them according to what was agreed pending new negotiations. The negotiations failed and the respondents resorted to collective job action once more. The matter was also referred to the Minister of Labour and Social Welfare whose decision I shall deal with later.

When the appellant would not pay the respondents according to the agreement, the respondents approached the High Court in order to enforce payment by the appellant at the agreed salary levels.

The High Court ordered the appellant to comply with S.I. 26 of 2000.

In its appeal against this decision the appellant raised the following issues:

(a) its refusal to pay the respondents on the basis of S.I. 26 of 2000 is lawful because of the decision of the Minister who ordered that the appellant pay the respondents according to the previous salary levels with the added 45% across the board;

(b) incorrect figures had been used in the negotiations;

(c) the approval of the appellant's Board had not been obtained for the figures used at the negotiations.

When the respondents resorted to collective job action because of the disagreements and the matter was referred to the Minister, the Minister responded by issuing a directive in which she stated:-

> "The Collective Bargaining Agreement as reached to us is very clear and in all our calculations it will show that the agreement does not need to be amended. What seems to be in dispute are the salary figures to be applied when implementing the Agreement … the parties to the agreement are to appear before the Hon. Justice H.B. Hwacha who has been appointed as an Independent Mediator to resolve the dispute in terms of section 100(2). Arbitration costs are to be borne by P.T.C. Justice Hwacha will contact you directly on the arbitration proceedings.
>
> In the interim, workers will continue to be paid current reduced salaries. Any further adjustments for the salaries will be done after the decision of Justice Hwacha."

The Minister was responding to a request to amend the agreement on S.I. 26 of 2000. She refused to amend it. Having so refused she sought to amend it by directing the appellant to ignore the contents of the agreement. She was wrong. She could not direct the appellant in that way unless she amended the instrument. She was supposed to act in terms of section 81 which she did not do. Accordingly the agreement remained intact and effective. Her directive was wrong and was properly set aside by the court *a quo*.

The allegation that the figures used were wrong is not convincing. The appellant was asked during negotiations to provide the respondents with the actual figures instead of just referring to the median quartile.

The appellant's experts and technocrats were tasked to produce the figures. They did. The figures were accepted by the appellant and presented to the negotiating committee.

There were available by then, figures produced by Lorimak at the request of the appellant. The appellant chose to work out and produce its own figures. It is only when the appellant was faced with an enormous salary bill that the issue of the figures was raised. It has not been explained how the figures are erroneous. There is no satisfactory explanation on how the error was actually made. There is no evidence from the persons who compiled the figures to explain the error they made, bearing in mind that the appellant's experts were tasked to produce the figures. They acted for and on behalf of the appellant.

I could even go as far as saying even if one accepted that the figures were a result of an error it cannot be regarded as a *justus* error. See *University of Zimbabwe v Gudza* 1996 (1) ZLR 249 and cases cited therein. If it was, it would have been noticed when the figures were discussed by the negotiating committee. The error would have been noted when the figures were discussed with the National Employment Council. It would have been noticed by the Board. It would have been noticed when the salaries of the workers were being prepared.

I cannot believe that the appellant and its experts could simply agree on the new salaries without bothering to find out what the resultant salary bill would be.

In fact, during the negotiations, the minutes show that this issue was raised by one of the participants in the meeting who asked them to consider the Corporation's ability to pay. Another councillor asked the meeting:-

> "… to consider the fact that in real terms the Corporations payable burden would increase by 85% if C.B. is put together with the market adjustment."

Such issues raised at the meeting would clearly attract the attention of the appellant's experts. It is highly improbable that such reminders could have been ignored by the appellant. If this was ignored then it cannot be said that there was a *justus* error.

The appellant also raised the issue that the authority of the Board had not been obtained for the figures presented to the NEC. There is nothing to suggest that the authority was a requirement. In any case, the Board was represented in the negotiations at a very high level. The appellant could not have gone as far as presenting the figures to the NEC, advising the workers of the result of the negotiations, publishing S.I. 26 of 2000 and paying the new salaries for some months without getting the Board's approval if such approval was necessary. I consider that the Board must have known, and authorised the payments, or if they did not authorise them, then such authority was not a requirement.

This is because, having decided that the workers should be moved to the median quartile, the Board would have been kept up-to-date with discussions and progress made towards what they resolved.

There is nothing to suggest that the Board complained of anything done without its authority. I do not believe that management could determine new salaries and even pay them without the Board knowing about them. S.I. 26 of 2000 was gazetted and they would have seen it.

The Minister's powers on the agreement are regulated by the Labour Relations Act. She could only exercise powers given to her by the Act. I agree with the respondents' submission that once she decided that the agreement was correct and did not need to be amended, she had no powers to refer to a mediator an agreement which was correct. What would the mediator be doing if the agreement was correct?

The Minister did not find that the agreement fell under any of the provisions of Section 81 where she is empowered to amend it.

It seems to me the proper opportunity to put things right was missed when the matter was referred to the Minister. Had the Minister acted in terms of the powers conferred on her by the Act, the agreement on S.I. 26 of 2000 could have been amended.

A good opportunity for the appellant to mitigate its problem on the heavy salary bill was not taken advantage of when parties were asked to re-negotiate the agreement. The minutes show that the respondents did offer certain compromises which were not taken advantage of by the appellant. Instead the appellant chose to unilaterally vary the agreement without authority. In so doing the appellant was wrong.

The voluntary retirees simply want the appellant to pay them whatever was the difference between what they were paid and what they should have been paid. This is because the increases were back-dated to the time when they were still in service. What it means is that those who remained in service were paid better salaries while those who left were paid less but for the same months, especially the back-dated salaries. I see no reason why they should not be paid that difference. The fact that the decision to increase the salaries and back-date them was made when they had left, or left soon after that, should not be a reason to exclude them.

I therefore see no reason to interfere with the decision of the court *a quo*.

Negotiations were held on the instruction of the appellant's Board that the workers be placed on the median quartile. Figures were worked out by the appellant's experts and technocrats. The appellant's Board was represented on the negotiating committee. Agreement was reached and published in the Statutory Instrument. The new salaries were paid for several months. It was only when the appellant realised the enormity of the resultant wage bill, that it reneged on the agreement.

It was only then that the appellant turned round, sought to dispute its authority and raised the issue of errors in the figures.

It must be pointed out that having previously asked some consultants to work out figures for it, the appellant abandoned those figures and asked its own experts to produce figures which the appellant then chose to rely on. The appellant cannot now turn round and say there was an error in the figures. The appellant was simply negligent in not checking what effect the increases would have on its wage bill despite the fact that its ability to pay was raised during the negotiations. Even when the wage bill proved too high the appellant continued to pay it for five months until the banks advised that they would not continue to accept further withdrawals on the over-drafts.

There was clearly no *justus* error in what the appellant did. The point is illustrated by *University of Zimbabwe v Gudza, supra*.

The same point is dealt with in *Horty Investments v Interior Acoustics* 1984 (3) SA 537. In *George Fairmead and National and Overseas Distributors v Potato Board* 1958 (2) SA 465A at 471 FAGAN CJ stated the following:-

> "When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term?
>
> As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in fact, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?"

The above is also supported by the case of *Mabhena v Harare Polytech College* HB-22-94 where it was held that "… the College could not resile from the contract on the basis of its unilateral mistake".

I see no merits in the appeal and it is dismissed with costs.

SANDURA JA: I agree

GWAUNZA AJA: I agree

Coghlan Welsh & Guest, appellant's legal practitioners

Honey & Blankenberg, first respondent's legal practitioners

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