**REPORTABLE (53)**

**AFRICAN BANKING CORPORATION ZIMBABWE LIMITED t/a BANC ABC**
**v**
**(1) SHIRLEY KARIMAZONDO (2) RUWO HAMADZIRIPI (3) RURAMAI MAZIVA (4) EVELYN SIBANDA (5) FORTUNE KAMUTENGA (6) BRIGHTON MUYEMEKI (7) MUSEMURE CHOGUMAIRA**

**SUPREME COURT OF ZIMBABWE**
**MALABA DCJ, GWAUNZA JA & GUVAVA JA**
**HARARE, NOVEMBER 11, 2016**

*T. Mpofu for the appellant*

*M. Gwisai for the respondent*

**GWAUNZA JA**: This is an appeal against the judgment of the Labour Court, handed down on 19 December 2014. After hearing argument on this matter the court dismissed the appeal with costs and indicated that the full reasons for the judgment would follow in due course. These are the reasons.

The facts of the matter are as follows:-

The respondents are former employees of the appellant. They either resigned or had their contracts of fixed terms terminated sometime in 2012. During the period of their employment, the respondents' representative union entered into salary negotiations with the

Banking Employers' Association. However, the negotiators only managed to conclude a Collective Bargaining Agreement ("CBA") after the respondents' contracts had been terminated. The CBA was gazetted and published on 18 October 2013 and it set minimum salaries applicable to each grade in the sector in which they had been employed. The period in respect of which the CBA was to be effective was stipulated in the agreement as 1 July 2010 to 31 December 2011. It is not in dispute that during this period the respondents were still employees of the appellant. The appellant however rejected the claims submitted by the appellant for the amounts due to them in terms of the adjustments captured in the CBA. The parties failed to reach agreement and, in January 2014, lodged a complaint with a labour officer. The matter was subsequently referred to compulsory arbitration. The arbitrator dismissed the respondents' claim on the same basis that the appellant had rejected them, that is, that the rights to salary adjustments in terms of SI 150 of 2011 accrued to employees and not ex-employees.

The respondents were aggrieved by the arbitrator's decision and noted an appeal to the Labour Court. Their notice of appeal before the court a *quo* cited the parties as "*Shirley Karimazondo & 6 Others"*. The appellant as respondent raised a point *in limine* to the effect that the notice of appeal was defective as it made reference to unidentified appellants. The respondents, who were not legally represented, then applied for amendment of their notice of appeal so that it cited their full names. The court entertained the application and granted the order sought. It went on to hear argument on the merits of the case and after allowing the appeal, remitted the matter to the arbitrator for quantification of the arrear salaries and benefits sought.

Aggrieved by that determination, the appellant applied for leave to appeal to this court. The leave was granted on the 1 July 2015, hence this appeal.

The appeal is premised on grounds that raise two issues for determination, as follows:-

1. whether or not the court a *quo* erred in allowing the respondent's application for amendment of their notice of appeal, and
2. whether or not the court a *quo* erred in finding that the respondents should be paid their arrear salaries in terms of Statutory Instrument 150 of 2013.

Whether or not the court *a quo* improperly exercised its discretion in entertaining and allowing the application for amendment of the notice of appeal.

It was the appellant's submission before the court a *quo* that only one respondent, namely Shirley Karimazondo was properly before the court. This was because the notice of appeal failed to properly identify the '6 others.' The appellant contended further that since there was no legal person by the name '6 others,' the said six respondents were not properly before the court and lacked the *locus standi* to apply for the amendment in question. Rather they should have filed an application for the late noting of their appeal and then properly filed it.

In granting the respondents' application for an amendment to include the names of the other six, the court *a quo* opined as follows:-

> "The court dismissed the respondent's point *in limine* in respect of citation and allowed the application for an amendment. Having indicated reasons were to follow in the main judgement the reasons are these, the record of proceedings in the hearing *a quo* clearly showed the identity of the 6 appellants referred to as 6 others in the present matter. Before the arbitrator for example, the record showed all seven appellants individually cited. It was clear therefore that even though appellants had erred in the present matter by failing to identify individually the 6 others, the appellants were known and could be easily identified. This was clearly distinguishable from the two cases that were referred to by the respondent where the parties cited were clearly non-existent legal persona. In the City Bolts[1] matter for example the respondent was a Workers Union Committee

[1] City Bolts vs Workers' Committee SC 16\12

> whereas in the FMI Energy[2] matter the respondent were 'employees' who were unidentified. In those two cases the court correctly found the proceedings to be a nullity. It was on this basis I dismissed the point *in limine* and allowed the application for an amendment to the citation".

Before this court the appellant persisted with the same objections and argued in addition that the court a *quo* erred in allowing the amendment in disregard of the principle that parties who appear before the court must be described by their full names. Further, that the six respondents were, by the time they made the application in question, well out of time in relation to their filing of a proper appeal. Accordingly, the amendment ordered by the court *a quo* effectively allowed them to file an appeal out of time without benefit of a court order granting them an extension of time to note the appeal in question.

It is evident from what is cited above that the court *a quo* accepted that the respondents had "erred" by failing to identify the "6 others" in the notice of appeal. That notwithstanding, the court and for the reasons it gave, took the view that the respondents were for all intents and purposes properly before it. It decided to hear the respondents on their application to have the defect in their papers, rectified. It is argued for the respondents that in so proceeding the court *a quo* judiciously exercised its discretion, and further, that the appellant has not challenged the exercise of that discretion, nor has it shown that the court grossly misdirected itself in reaching the decision it did.

I find that there is merit in this submission. The court *a quo* clearly exercised its discretion and, having taken a position on the respondents' situation, allowed them to be heard.

[2] FMI Energy Zimbabwe (Pvt) Ltd vs Employees of FMI Energy LC\H\33\14

That being the case the appellant in my view ought to have, but has not, challenged the court's exercise of this discretion, on the accepted grounds of the court having,

1) acted on a wrong principle;
2) allowed extraneous or irrelevant matters to guide it in its decision;
3) mistaken the facts;
4) failed to take relevant considerations into account; or
5) or grossly misdirected itself[3]

The appellant not having challenged the exercise by the court *a quo* of its discretion in finding that the respondents were part of the appeal and in proceeding to hear their application, has thus laid no proper ground for this court to interfere with the exercise of such discretion.

The respondents have in any case advanced another, in my view, compelling ground upon which the impugned decision should be justified. It is argued that on the basis of case authorities, an example being *Dalny Mine v Banda*[4] and cases cited therein, it is generally considered undesirable that labour disputes be decided on the basis of procedural irregularities. In the *Dalny* case (*supra*) the learned judge, in reference to such irregularities, stated as follows:-

> "By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right…".

It seems to me that this is exactly what the court *a quo* did. It clearly did not regard the irregularity in question as being fatal to the proceedings before it, hence its entertainment

[3] See for instance, Barros & Anor v Chimphonda 1991 (1) ZLR 58 (SC) 62G-63A
[4] 1999 (1) ZLR 220 S

of an application to amend the notice of appeal and thereby cause the defect in question to be rectified. I do not find that the court *a quo* misdirected itself in doing so.

There is therefore, in my view and when all is told, no merit in the appellant's first ground of appeal.

Whether or not the court *a quo* erred in finding that the respondents should be paid their arrear salaries in terms of Statutory Instrument 150 of 2013.

This issue relates to the question of whether or not the CBA, SI 150 of 2013, applied to the respondents who were no longer employees of the appellant when it was concluded. What is clear from the facts filed of record is that when the respondents were engaged by the appellant, allegations of underpayment of salaries had already been raised. Further to that, the respondents in their turn raised this grievance whilst still employed by the appellant. The respondents' representative trade union then entered into salary negotiations with the Banking Employers' Association and the parties managed to conclude a Collective Bargaining Agreement in October 2013, by which time the respondents' contracts of employment had been terminated. In terms of SI 150 of 2013, the agreement was deemed to have come into effect on 1 July 2010, and was applicable until 31 December 2011.[5] SI 150 of 2013 therefore applied to those who were employees of the appellant between July 2010 and December 2011. The fact that the respondents were no longer employees of the appellant when the CBA was concluded should not deprive them of their right to the salary adjustments in question. The right clearly accrued to them during the time they were still employees of the appellant. Some significance must in my view attach to the fact that SI 150 of 2013 specifically provided for

[5] . Page 112 of the record.

dates that coincided with the time the respondents were still employees of the appellants. Had the intention been to exclude the respondents from benefitting from the CBA, that surely would have been specifically stated.

This court has held that where rights to salaries have accrued to the parties, termination of a contract does not affect those rights. In point is the case of *Hem Granite Industries (Pvt) v Keeley Granite (Pvt) Ltd SC 18/09,* where MALABA DCJ (as he then was) said the following:-

> "The general rule of the law of contract is that termination of a contract operates *ex nunc, de futuro* only and does not affect rights which have accrued to the parties. Termination or extinction of the obligation to perform is restricted to the executory portion of the contract leaving intact rights which were accrued due and enforceable before termination"

Also apposite to the circumstances of the matter at hand are the following remarks made by the court in the case of Posts and Telecommunications Corporation v Zimbabwe Posts and Telecommunications Workers' Union and 2 Others SC 107/02:-

> "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."

Given the foregoing and on the basis of the law authoritatively laid out in the case authorities cited, I find that the court a *quo*'s finding that the respondents were entitled to be paid their arrear salaries in terms of SI 150 of 2013 cannot be faulted.

It was for these reasons that we made the order dismissing the appeal with costs.

**MALABA DCJ** (as he then was) I agree

**GUVAVA JA** I agree

*Kantor & Immerman*, the appellant's legal practitioners

*Munyaradzi Gwisai & Partners*, the respondents' legal practitioners