RODWELL JARIREMOMBE
And
EDINA CHINYAMA
And
MASHOKO BERE
And
EVA JAKATA
And
PRISCILLA CHIDO JEKWA
And
BLESSING MHLANGA
And
FIDEOUS GOWERA
PORTIA KACHETO MUKARATE
And
CHARLMERS MTAMBAZIKO
And
JOSIAH BUGEDE
And
SINDISO MACHINGURA
And
ROSEMARY MASHONGANYIKA
And
CONWELL MAKUWE
And
KUDZAI CHITUNHU
And
WINNIE MABANGA
And
ESTHERY NYAKUNUWA
And
DANIEL GWENZI
And
PINIEL CHIVAVIRO
And
VITALIS MANGADZA
And
TAWANDA MASVINYANGWA
And
LIVINGSTONE RWAFA
And
PHILIP SHEREN
And
KOLEN MATIZA
And
LORIETTE MURUNGWENI
And
AVERAGE MUTUZUNGARI

And
HAPPINESS KASVOSVE
And
DANIEL MHIRIPIRI
And
ROBERT CHARUMA
And
AGNES TSAHA
And
SHINGIRAYI NYONI
And
FANUEL KWARAMBA
And
LYDIA FARANSIKO
And
VIMBAI MUCHINERIPI
And
TINEI MUNETSI
And
SEKAI MUCHENJE
And
FELICIA MARUMBA
And
JULIETH DYAKA
And
STELLA ZIBUBGA
And
LAZARUS MANDIZHA
And
PAUL GOSHA
And
DAVID MUPATSI
And
PRISCILA ZHOU
And
PRECIOUS KAPONDA
And
VINCENT SAMSON MBELECHI
And
JOSEPHAT MUCHERERA
And
EDIMONT AMON
And
VENGESAI MUTAPIRI
And
PHIONAH CHIMBWERO
And
TARWIREYI CHAKANYUKA
And

RICHARD CHOKUNONGA
And
EDMOND KASEKE
And
SIMON CHITENDE
And
EXEVIER MUKUDZAVHU
And
PAUL ZULU
And
TRYMORE KANYEMBA
And
VENGESAI CHIRUME
And
JOHNSON CHIMUNASHA
And
MARY MATINENGA
And
MOSES MAREWANGEPO
And
MARK CHISANGO
And
AUXILIA MASAWI
And
MARTIN JANI
And
GAMUCHIRAI DZIMIRI
And
GELIEN MUSANGAVANYE
And
SANDRA SITSHA
And
PENIAS MARUNGA
And
OSBORN TAKUNDA GURURE
And
NELRA MURANDA
And
REGINALD DOZVA
And
EDMUND DENHERE
And
OWEB MUNYU
And
HLENGIWE MUTUBUKI
And
ROLLAND MAPOWO
And
RUTH SITHOLE

And
REGINA KUTAUDZIRA
And
SHUPIKAI MASVIKENI
And
R. I. TANYANYIWA
And
MUVENGWA DZARAMBA
And
CLARA SIDINDI
And
MAGRET CHIMBEWA
And
VICTOR MOYO
And
ZVIDZAI KAMUTI
And
SHUPIKAI MASVEYA
And
M. MAHACHI
And
LUCY DOROTHY MUGOBOGOBO
And
LIYASA SWEDI
And
MARK CHISANGO
And
DANIEL PAYASI
And
TICHAONA MAPURU
And
ISAAC NYABADZA
And
NHAMO MANWERE
And
CHARLES KANJANDA
And
MUNYARADZI DODO
And
THEMBEKILE DUMBU
And
JESSINAH DANDIRE
And
GRACE NYAMIDZI
And
THOMSON CHAITA
And
PHILLIP GOTAM
And

NICHOLAS TENDERERE
And
NORMAN GWEZUVA
And
EMMA MACHEKANYANGA
And
W. KASUKUSA
And
RICHARD NYAHOMBWE
And
GRACE NYEBERA
And
SARAH MHAZO
And
GRACE KUNDIONA
And
GARI MBANDA
And
RUMBIDZAI MUTAMBA
And
FARAI MAPUNDA
And
PAIDAMOYO MUDZENGI
And
SHADRECK DANIEL NCOZANA
And
ZEBBY ZEBEDIAR MABVUU
And
JULIET GOMWE
And
CLEVER NJERERE
And
NYARAI KALOTA
And
SINIKIWE BANDAMA
And
EMMANUEL FAMBISA
And
JOSEPH CHIMHANDA
And
GODFREY MADZIVA
And
PHILLIPA MUDEREDA
And
REWARD SAMBOKO
And
JAMES LOVEMORE
And
TAKESURE KARENYI

And
MAWANEYI AGATHA DONDO
And
ELINA CHIVENDE
And
EUNICE MUSHORE
And
AMBROZIA CHRISTINE CHIWAYA
And
LIFE CHIDEU
And
BEAULLAH MBARA
And
TAFADZWA PINDURA
And
MIKE KAZOMBE
And
WONDER CHOTO
And
RODWELL KAMWENDO
And
STANLEY BANDA
And
PAUL MAGWAGWA
And
ALICE GANDARI
And
REJOICE MAKASI
And
DESMOND CHIPFUNDE
And
TICHAONA KANDOTO
And
TINASHE MUSHURE
And
ALEXIOUS NYAKUDYA
And
DANIEL MUKONOWESHURO
And
ELDRIGE MANDAZA
And
DANIEL KUREWA
And
NORMAN NDORO
And
HAPPYSON MAHAMBISE
And
HILDAH MUNATSI
And

CHAMUNORWA TSOMONDO
And
TONY MILLER
And
NOMUSA DUBE
And
LOVEMORE MAKETO
And
DESMOND SINOIA
And
CUTHBERT TEMBO
And
ROBERT MANGWENDE
And
SIMBARASHE CHINEMBIRI
And
CLARA MAGORIMBO
And
SHAW MASUKA
And
JAMES CHIMAHWINYA
And
ABSOLOM ZENGEYA
And
PATRICK DZUKWA
And
GODWIN HOVE
And
GEORGE MUVIRIMI
And
RACHEL MAPONGA
And
VIVIAN KASINAMUNDA
And
MERCY MURARE
And
MUCHANETA MAKOMBE
And
RASHIRAI CHITAVATI
And
SEKAI MUSHAYAHEMBE
And
LAMECK NYAFESA
And
MADZIVIRE SPEARS MANYAMBA
And
NYARAI CHRISTINA NYAMBUDZI
And
MARGRET PHIRI

And
STANLEY NYATALA
And
FUNGAI MABEKA
And
CYNTHIA NYAKUSANDUKA
And
VINCENT MUNDAWARO
And
PATRICIA CHIDZERO
And
TAKURA CHATONGOZA
And
WISDOM SAMURIWO
And
AARON KUUDZEREMA
And
CHARITY MUCHANINGA
And
GODWIN TSVANGIRA
And
CYRUS GOTORA
And
NEWTON CHIBAYAMAURO
And
SUEDE WHISKY
And
PRIVILEDGE SIMIYONI
And
CELEBRATE MHLANGA
And
BRENDA MANDISHONA
And
MOLLY CHINZVENDE
And
LOICE MANYIKA
And
TSITSI CHITAPURE
And
TRACE GWENZI
And
MALVIN BALENI
And
PORTIA GARABA
And
CAROLYN CHAKAFANA
And
PATIENCE PENDUKA
And

MARVELLOUS MAPASURE
And
JOHNSON GWAUYA
And
MASHOKO BORE
And
NYASHA TACHIONA
And
EDMORE MADEKWANA
And
NGWENYA MZINGAYE
And
MUCHENGETI MARUFU
And
FARAI MUCHEKEZA
And
EGINA MKUDU
AND
HENRY MANYIKA
And
FRADRECK MUHWATI
And
TSITSI PRETTY MAJONGOSI
And
BEAUTY MAKOPE
And
BELINDA MARUFU
And
MANDY CHENGETA
And
LAZAROUS MAGUNGU
And
TAFADZWA MUCHAKA
And
COLLEN MANDHLAZI
And
JENETH NGWENYA
And
LYDIA NGWENYA
And
PORTIA DUBE
And
MACHISA MAPIRIMO
And
PATRONELLA MUKWENYA
And
ELINGAH YEUKAI MAGADA
And
BUSANG MUNATSI MBEDZI

And
COSMAS GWAUYA
And
CONCILLIAR MADAVIRE
And
SAMSON CHIMWANDA
And
MAGRET MANDEBVU
And
BENSON KUCHERERA
And
GORERENGONI NYABVURE
And
JULIAS KAMURAI
And
KAREN MANYADZE
And
PASCAL MAGARE
AND
SIMBARASHE CHIN'ANGA
And
NICHOLAS SHERENI
And
CHIRADZA CHAWADA
And
SONIKA CHIKATI
And
EVANS DZAPATA
And
SAURO MARVELOUS
And
AGNES MUZEMBE
And
NOWEL RUBARA
And
GODFREY MUGANHU
And
ANNA MBUVA
And
DONALD MASUNDA
And
CANIAS MARECHA
And
MARGRET MKWAKWAMI
And
OWEN NYABADZA
And
CHIEDZA ZENDA
And

NYARAI MUKUNDIDZE
And
TENDAI ZHANJE
And
FORNARD MUPAMHIDZE
And
MOSES KULETI
And
PIOS MUDANDA
And
THOBIAS MAKUWATSINE
And
BLESSING MATEYISANWA
And
PAUL MACHAKA
And
WIMBAYI ZIYERA
And
JOHN NDEDZU
And
TAFARANASHE NHONGO
And
DAVID CHALUMIKA
And
MUCHANETA MUPAZI
And
SAMUEL MAGWEGWE
And
CHENGETAI NECHIORA
And
ENEST MAUMBA
And
ELINAH MAKOKO
And
JOE CHIKOSHA
And
GARIKAI KAMBARAMI
And
M. MKWAMWALOPA
And
KUDZANAI NDORO
And
NYASHA HLATYWALO
And
LOVEMORE SITHOLE
And
ELISHA KATSIRU
And
LILLIAN MUTUMWA

And
LOVEMORE OYAVO
And
BENSON MUTYAVAVIRI
And
MORRIS ZENDERA
And
CEDRIC KUDAKWASHE MUCHANYEREI
And
RACHEL DZIKITI
And
TENDAI GODO
And
LIVISON MUTHONGA
And
PARADZAI MUNDANDISHE
And
TAFADZWA MUGUMISI
And
ZONDAI MADHLAZI
And
CHERYL NETSAI ZVIUYA
And
CHRISPEN CHAUKE
And
TANGAI NKONDE
And
RACHEL MANGOMBE
And
DAVID MUSHANAWANI
And
FUNNY HUHUYANA
And
HAPPYSON CHIRINDA
And
VERONICA MUKWECHENI
And
VICTOR MUTENDE
And
LOCARDIA MUKURU
And
NYASHA EDWARD NYAKATSAPA
And
ABIGAIL CHIRONGOMA
And
BURSARY MACHINGAMBI
And
PRINCE MARONDERA
And

FARAI JENJE
And
RUTENDO MPANDE
And
PHILLIP CHITIMBIRE
And
JULIANA MBUWA
And
IRENE CHINWADA
And
TAMBUDZAI SAMAMBWA
And
TUTOS DAMBIKO
And
DANIEL MOYA
And
KUWADZANA KIMBINI
And
CUTHBERT CHINGOBO
And
SIMBA MAKIWA
And
MOTTO NDAKARWIRWA
And
SAMUEL MAKOTORE
And
MAKAVA TAPEDZA
And
ELIAS RUTANIRA
And
BUSHAI MOYO
And
MATANI MKWANANZI
And
SHERPHERD BALOYI
And
EMMANUEL GUKWA
And
SIMON TADERERA
And
SIHLE NCUBE
And
THEMBINKOSI NDLOVU
And
REMIGIO MAKONI
And
CHAMUNORWA MAGAVHA
And
ANCELINA D. DAMBUDZO

And
COURTSON MUTUKWA
And
MANDLENKOSI MANGENA
And
EMILY SEULAH
And
SAMMUEL BANHWA
And
RICHARD MOYO
And
WITNESS GAMA
And
ANGELA MPALA
And
CHINHAZU JOHNSON CHIPFUNDE
And
LOUIS GREMU
And
LOVEMORE NYANDORO
And
MELULEKI NDLOVU
And
LUNDILE MHURU
And
FARA CAROL MFANYANA
And
CHESMORE MWAPAURA
And
LAWSON KANDORO
And
TENDAI KAMBA
And
TAFADZWA MATIRANGANA
And
INNOCENT SHOKO
And
GRACE MANDA
And
SHINGIRAI MUPANGANYAMA
And
SIMON MATARAUKA
And
JACOB RUNDOFA
And
NYASHA MERCEY HOMERAI
And
ITAI SIKWECHE
And

KUDZAI MUTAMBUDZI
And
WILLIAM CHAZA
And
WELLINGTON MUKONDO
And
TERERAI MADZIMA
And
NOMAZULU MOYO
And
GWYNETH MASHUDE
And
MARTIN MAPOSA
And
TAFUNGWA CHIWESHE
And
SENANIWE CHISENWA
And
NTOMBIZODWA SIBANDA
And
SYLVIA MUKADAH
And
DIANA MUTASA
And
ATIYATU MOYO
And
BENJAMIN NDIWONEYI
And
VITALIS PHIRI
And
WITNESS SHONAYI
And
CHRISPEN CHIKWATURE
And
XOLISA BANDA
And
NHLANHLA MATHE
And
XOLANI DUBE
And
LINOS SITHOLE
And
MUNYARADZI MUZA
And
NICHOLAS SIBANDA
And
SHOBI KURAMBA
And
BENSON KAMINZA

And
RODWELL GOPITO
And
EDMORE MHURU
And
DESCENT NKOMO
And
PHILILE GUMPO
And
LOVEMORE MPOFU
And
SITHEMBISO NCUBE
And
ABSOLOM ZIMUTO
And
LAZARUS MAOCHE
And
SITABILE SIBANDA
And
EVELYN MUTOMBENI
And
LLOYD MABHII
And
EMMANUEL CHIBANDA
And
LENTSOE NOKO
And
CHIPO MAFUNDA
And
THOKOZANI TSHUMA
And
SIKHUMBUDZO MAVHINJEVA
And
LUNGISWA NDLOVU
And
IRENE DUBE
And
ETHEL NUNGU
And
MELODY NDEBELE
And
SALLY NDLOVU
And
WITNESS NDLOVU
And
EMMAH MAGUMBO
And
FARAI NCUBE
And

MAVIS MOYO
And
MERCY DUBE
And
DUMISANI NCUBE
And
MICHEAL MABVERA
And
KUKHANYA DUBE
And
PATRICIA MOYO
And
SITHEMBISO CHIWANZA
And
JOHNSON MUTERO
And
MAXWELL L. PFACHI
And
SHADRECK BUWU
And
KOMBORERO HOVE
And
BRIAN MTISI
And
NOAH MUMPANDE
And
SABELO KHUPE
And
ROBERT WOYO
And
MOSES MUTUVI
And
VIRGINIA NYIKA
And
NOMANKOSI MLILO
And
GWEBU MDUDUZI
And
SIPHIWE LUCIA SITHOLE
And
OMEGA SAMBOKO
And
DIDINAH MHLOPE
And
SITHABISO MPOFU
And
SICELESILE NKALA
And
RUNESU TOPERA

And
SIMON NDLOVU
And
COLLEN DHOBHANI
And
CHARITY NGWENYA
And
NONHLANHLA N. YALALA
And
CALISTO MPOFU
And
MEMORY MOYO
And
IGNATIUS MAKONI
And
INNOCENT CHINHERERA
And
LUCKMORE CHIVANDIRE
And
ELIZABETH MAKUNDE
And
FENNIE MUTSIKAMAHWE
And
PATRICIA MUTYAMBIZI
And
MEMORY MUNYOKOVERI
And
NOLWAZI NGWENYA
And
WILLARD MANDAZA
And
RITA CHONZI
And
GIVEN MANDIYANIKE
And
NEWTON CHINDIKA
And
FIONA NYAMARIVA
And
LEARNMORE CHABAYA
And
GEORGE NGONO
And
TINASHE NHONGO
And
CAROLYNE TODZAISHE ZIJENA
And
ELIZABETHE TSHUMA
And

TOGARASEI EPHRAIM MUTIPI
And
GLADYS KATAMBO
And
CONCILLIA ZENGWA
And
EVERMORE MUROMBO
And
JESCA NDLOVU
And
JANIFER MOYO
And
PATIENCE MUDHUMO
And
JOSEPH SIBUSISO MHAGAH
And
FAITH MHLABA
And
BLESSED MHARI
And
JUDITH NECHIBVUTE
And
MUSA MLEYA
And
MOREBLESSING CHAERERA
And
SABINA RAZIKA
And
WINGSON NYONI
And
BOBYMORE MAPFUMO
And
INNOCENT MATARIRANO HAKUROTWI
And
DARLINGTON CHIKWIRA
And
BARNABAS KUCHEKENYA
And
SINDISO NDABA
And
FARAI SHIKU
And
LEORNARD TAPFUMA
And
RUEBEN JOKA
And
MICHEAL MWANZA
And
DAVISON PONDIWA

And
JERIAS MACHIMBIRA
And
ROSENA MBEWE
And
CHAKANETSA MUKWENHA
And
ANSA SITHOLE
And
OMEGA MUVIMI
And
RODWELL DZINOREVA
And
SIMBARASHE EDMORE BANGURE
And
TAWANDA CHIVAURA
And
EMMANUEL MATARUSE
And
KILLIPO MUTIGWE
And
SIPIWE MANIKA
And
JOSEPH M. GARWE
And
MUSEKIWA VAMBE
And
DAVISON CHIHAMBAKWE
And
PATRICIA CHIWETA
And
VICTOR MANYOWA
And
LOREEN RWODZI
And
KENNEDY CHARAKUPA
And
MARTHAR NAME
And
ERASMUS MAVONDO
And
MEMORY MUTASA
And
SOLOME MUNDIYA
And
NAISON TAGARIRA
And
COLLEN BENHURA
And

SAMSON DHAKAZHE
And
LOTTY CHIPADZE
And
KUDAKWASHE GODWILL MAPFUMO
And
PARTSON MASIYA
And
MARTIN CHIGUMBU
AND
ELIZABETH NYAMADZAWO
And
OTTILIA CHINYAMA
And
REGINA MATAPI
And
CHIRWIRE SIZH
And
GERALD SIMBARASHE GUMBO
And
OLIVIA MUZEMBE
And
CHRISTINA TARUPIWA
And
T. NDLOVU
And
IRENE RONDAI
And
TANDIWE SANYABUTA
And
GLADYS HWINGWIRI
And
LAWRENCE MUNHINDI
And
EUGENIA MAKAHUSHAYA KUENGWA
And
SHEPHERD CHINYOKA
And
SNODIA DUBE
And
SARAH MATSIKA
And
OPPA MAGIDI
And
TATENDA DZIROVE
And
PATIENCE MUGUREYI
And
COURAGE RABI MUTERO

And
RACHEAL PRISCILLA CHIKOSHA
And
ANGELINE MUZANENHAMO
And
ZAKARIA KUFANDADA
And
CUTHBERT NDAWANA
And
AGNES CHIKARI
And
NERERSI NYAMUSHONYONGORA
And
JEFFRIES MAYENGA
And
WONDER KAZAKA
And
EDWIN GWEZA
And
CONCILIA CHIRENDA
And
CHRISPEN CHINHOYI
And
ENGULA GANOUYA
And
JACOB NYASHA CHARANGWA
And
ABISHA CHISENYE
And
SHINGIRAI SITOTOMBE
And
SALIWE NCUBE
And
TONGESAYI JAMU
And
KUNDAYI MUTEBUKA
versus
NATIONAL SOCIAL SECURITY AUTHORITY

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 February 2018 & 11 July 2018

Opposed Application

C. Mucheche, for the applicants
A. Moyo, for the respondent

MUREMBA J: The applicants are all employees of the respondent. Their application is for a declaratory order necessitated by the respondent's failure to pay the applicants their 2016 annual bonuses. The applicants believe it is mandatory that they be paid bonus. The order the applicants seek is as follows:

"It is ordered that:

1. The respondent is legally obliged to pay the applicants as its employees their annual bonus in terms of clause 32 of the National Social Security Authority Employment Conditions of Service and consequently the respondent is liable to pay the applicants their respective 2016 annual bonuses as defined by the board.
2. The respondent's board shall define the terms for the payment of the applicants' 2016 annual bonus within 7 days of the granting of this order which shall not be less than a 13th cheque, failure of which the respondent shall proceed to pay each of the applicants at least a 13th cheque as annual bonus for 2016.
3. The respondent shall pay costs of suit on a legal practitioner client scale."

In their founding affidavit the applicants averred the following. It is an express and peremptory provision of the respondent's employment condition of service as stipulated in terms of clause 32 that the respondent shall pay its employees annual bonus as per the terms defined by the board from time to time. When the respondent was created over 2 decades ago, the right of the respondent's employees to be paid an annual bonus was embedded in the respondent's subsisting and applicable employment conditions of service. In terms of clause 32 the respondent has over the years consistently paid its employees their annual bonus with the exception of the 2016 annual bonus which it unilaterally withheld without any legal basis. On 5 December 2016 in breach of clause 32, the respondent's General Manager, Liz Chitiga released a written memorandum in terms of which the respondent unilaterally made a decision not to pay its employees their 2016 annual bonus. In turn the respondent's workers committee wrote a memorandum to the General Manager requesting the employer to pay the 2016 annual bonus. The respondent did not budge and the parties continued to exchange memorandums over the issue. They failed to agree resulting in the applicants filing the present application.

It is the applicants' averment that the respondent's reason for failing to pay their 2016 annual bonus basing on harsh economic conditions is legally baseless because the respondent

has not been declared insolvent by a court of law. The respondent is financially healthy and must comply with its mandatory obligation to pay them their bonus. The applicants averred that the respondent budgeted for the payment of the employees' 2016 annual bonus and that budget was approved by the responsible authorities. They attached proof of the respondent's budget that included the 2016 annual bonus as Annexure G3. The applicants further averred that the respondent's healthy financial status is further confirmed by the respondent's chairman's 2017 first quarter and 2016 last quarter reports which contain several financial ventures and investments by the respondent and payment of bonus to pensioners. The reports were attached as Annexures G 41 and G 42.

The applicants averred that before the creation of the respondent as a legal entity some of its employees were previously employed as Public Service employees who enjoyed the right to be paid an annual bonus. The applicants averred that sometime in 2010 the respondent's board attempted to replace the employees' entitlement to be paid bonus with a performance related bonus resulting in the dispute spilling into compulsory arbitration and an arbitrator delivered an arbitral award on 28 July 2011 ordering the respondent to pay its employees a 13th cheque as annual bonus as opposed to a performance related bonus. Since 2011, the respondent has religiously paid its employees annual bonus which is not less than a 13th cheque.

Elizabeth Chitiga, the respondent's General Manager deposed to the respondent's opposing affidavit. She made the following averments. The respondent is a statutory body established in terms of s 4 of the National Social Security Authority Act [*Chapter 17:04*]. Its administration is reposed in the Board in terms of s 5 of the Act. In terms of s 10 of the Schedule to the Act the Authority is entitled:

> "To pay such remuneration and allowances and grant such leave of absence and, with the approval of the Minister, to make such gift, bonuses and the like to its employees as it considers fit."

In terms of s 23 (c) of the Act, the Authority in the discharge of its functions is supposed to:

> "Keep its expenses as low as is consistent with the provision of efficient services to contributors and beneficiaries of any scheme."

In 2016 the Board having considered the prevailing economic factors and with a view to efficiently discharge its functions resolved to suspend the payment of a 13th cheque bonus to its employees. The employees were engaged in the process through the Works Council established for this purpose in accordance with the provisions of the Labour Act [*Chapter 28:01*]. After the engagement of the Works Council official communication was then made to

the employees as per the memorandum dated 5 December 2016. The memorandum set out the basis upon which the Authority considered it fit not to grant a bonus for the year ending 2016. Subsequent engagements between the Authority and the employees yielded a deadlock resulting in the present application by the applicants.

Elizabeth Chitiga further made the following averments. The respondent opposes the relief sought by the applicants on the premises detailed below.

(a) Non exhaustion of domestic remedies

The dispute is a labour matter falling to be determined upon the correct interpretation of clause 32 of the conditions of service. The applicants' contention that they are legally entitled to an annual bonus constitutes a claim of right. Section 93 of the Labour Act provides a mechanism for the resolution of labour disputes relating to claims of rights by employees. The applicants without reason advanced in their papers simply decided to abandon and ignore local remedies available to them for the resolution of the dispute. As such the application is not ripe for determination by this court as the applicants ought to have exhausted the local remedies available to them. Consequently, this court should decline jurisdiction with costs on a higher scale.

(b) Payment of annual bonus is not mandatory in terms of the Act and the Schedule

The powers and the functions of the Authority are spelt out in the provisions of the Act and the Schedule which repose discretion to the Board regarding the grant or payment of bonus to the employees. Put differently, the enabling provisions do not make it mandatory for the Board to pay an annual bonus to its employees.

The declaratur and subsequent relief sought in these proceedings are therefore *ultra vires* the provisions of the Act and schedule.

(c) Clause 32 of the conditions of service not mandatory

Elizabeth Chitiga averred that clause 32 which the applicants rely on for the contention that the respondent is legally obliged to pay an annual bonus reads:

> "32 Annual Bonus
> Authority employees shall be paid annual bonus as *per* terms defined by the Board from time to time."

She averred that the correct interpretation of this clause is that the Board retains the discretion whether or not to pay an annual bonus and the quantum thereof. For the year ending 2016 the Board decided, as it was entitled to do, that there was zero bonus. In any event, clause

32 must of necessity be subservient to the Act and to the schedule otherwise it becomes *ultra vires* thereby becoming null and void.

(d) Payment of annual bonus is not mandatory

It is the respondent's understanding that by its very nature an annual bonus is a privilege and not a legal entitlement as contended by the applicants. Put differently, the payment of bonus is discretionary on the part of the employer. The effect of the declaratur and relief sought is to take away such discretion from the employer. Such relief is incompetent.

In response to the averments made by the applicants, Elizabeth Chitiga contended the following. It is not necessary for the respondent to seek an order of insolvency. The Board reached the decision that due to the adverse economic factors, the authority would not be able to pay the 2016 annual bonus. A budget may well have been prepared inclusive of the bonus, but still this did not take away the discretionary powers of the Board regarding the payment thereof. A budget is still subject to review taking into account prevailing economic factors. The references to the chairperson's statements or reports are of no relevance to the disposition of the disputes at hand. The statements capture a short periodic moment in time. The payment of bonus to the pensioners (which is the core business of the respondent) was made possible by cost-cutting measures including a restructuring exercise which was undertaken by the respondent in 2016. The respondent has never varied the conditions of service for its employees except that it used its discretion in terms of clause 32 in not granting an annual bonus in 2016. It is and remains the prerogative of the Board to decide on the issue of the payment of annual bonus taking into account all prevailing factors from time to time. The respondent's primary duty is to operate sustainably and contain its costs in order to meet its payment obligations to the beneficiaries. The declaration and relief sought is ill-conceived as it has no legal basis.

In their answering affidavit the applicants made the following averments. The issue for determination falls under the purview of this court since the relief sought is a declaratur which cannot be granted by the Labour Court. The provisions of clause 32 are peremptory because of the use of the word 'shall' in the clause. As such the applicants are entitled to their bonus. It is improper for the respondent's board to take away vested rights unilaterally. The board is only entitled to regulate the terms of payment from time to time. It is not entitled to decide that there will be zero bonus for any given year. Clause 32 is not *ultra vires* the Act. The applicants averred that no prior consultation was made with employees prior to the board withdrawing the granting of annual bonus in 2016. The declaration and relief sought is legally competent.

I now turn to deal with the issues raised.

Non exhaustion of domestic remedies

Mr *Moyo* for the respondent submitted that it is not disputed that the Labour Court has no jurisdiction to grant *declaraturs*. Mr *Mucheche* submitted that the applicants filed the application in this court because they are seeking a *declaratur* which the Labour Court has no jurisdiction to grant. I am in agreement with both counsels that the Labour Court has no jurisdiction to grant *declaraturs*. There is no provision in the Labour Act or in any other enactment authorising the Labour Court to issue declaratory orders. See *Sibanda* v *Chinemhute* N.O HH 131-04, *UZ-UCSAF Collaboarative Research Programme in Women's Health* v *David Shamuyarira* SC 10/10 and *Agricultural Bank of Zimbabwe t/a Agribank* v *Machingaifa & Another* SC 61/07.

Citing the case of *Mushoriwa* v *ZBC* HH 23/2008 Mr *Moyo* submitted that it does not matter that the applicants call their application a *declaratur*, the court in an application for such a relief will look at the substance of the application not the name given. Mr *Moyo* submitted that *in casu*, looking at the draft order of the applicants, what they are seeking is not a *declaratur* but a substantive order. Mr *Moyo* submitted that the applicants misclassified their application as a *declaratur* when it is not.

Mr *Mucheche* argued that the application is for a *declaratur*.

The issue that this court must determine is whether the application is for a declaratory order or not. A declaratory order is an order by the court stating what the position of the law is in relation to a concrete dispute between the parties, but it is not necessarily an order for execution or enforcement[1]. The requirements for the issuance of a declaratory order are[2]:

- The applicant must have an interest in an existing, future or contingent right or obligation;
- The interest must not be an academic or abstract one;
- There must be an interested person (not necessarily an 'opponent' as such) on whom the declaratory order would be binding;
- The remedy is available at the discretion of the court and the applicant must satisfy the court that the case is a proper one.

In the instant case, the founding papers of the application clearly show that the application meets the requirements for issuing a *declaratur*. I say this because the applicants have an

---

[1]Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* at p 138.
[2] *Ngulube* v *Zesa & Ors* S-52-02.

interest in what they believe to be an existing right to them, the right to a bonus. Their interest is neither academic nor abstract. They have always enjoyed a bonus over the years from the time the respondent was formed except for the year 2016. If issued, the *declaratur* will be binding on the respondent, the applicants' employer. This is a case where this court, if satisfied that clause 32 of the employment conditions of service makes it peremptory that bonus be paid to the respondent's employees, it will grant or issue a *declaratur* to the effect that the applicants are entitled to bonus.

However, whilst the founding papers of the application show that the application meets the requirements for the issuance of a declaratory order, the applicants failed to properly couch the declaratory relief in their draft order. The purported declaratory order reads as follows.

"It is ordered that:

1. The respondent is legally obliged to pay the applicants as its employees their annual bonus in terms of clause 32 of the National Social Security Authority Employment Conditions of Service and consequently the respondent is liable to pay the applicants their respective 2016 annual bonuses as defined by the board."

This paragraph shows that the applicants combined what is purportedly a declaratory order and a consequential relief which is an order *ad factum praestandum,* namely an order to the respondent to perform some act, which is to pay bonus for the year 2016 to the applicants. The purported declaratory order is the bit which reads, "It is ordered that the respondent is legally obliged to pay the applicants as its employees their annual bonus in terms of clause 32 of the National Social Security Authority Employment Conditions of Service." The applicants failed to seek a *declaratur* which would in the circumstances of this case be an order simply declaring that they are entitled to a bonus in terms of clause 32 of the respondent's employment conditions of service. Such an order if given by the court will not be for execution or enforcement. It will simply state the position of the law *vis a vis* the applicants' entitlement to bonus. If the applicants wanted consequential relief, they could have sought it separately in the subsequent paragraph(s).It is the applicants' failure to properly couch the *declaratur* they are seeking in the draft order that the respondent has sought to capitalize on. It is on this basis that the respondent has advanced the argument that the application is not for a *declaratur* and that as such this court should decline jurisdiction in the matter. It must be noted that the respondent never argued that the substance of the application as averred in the founding papers does not meet the requirements for the issuance of a *declaratur*. As I have already discussed above, the substance of the application as averred in the founding papers meets the requirements for the

issuance of a *declaratur.* The fact that the applicants failed to properly couch the declaratory order in the draft order cannot render the application fatally defective. In any case a draft order is a draft order. The court is not bound by it; it can correct it so that it reads correctly. It stands to reason that if this court is satisfied that clause 32 of the conditions of service makes it peremptory for the respondent to pay bonus to its employees, it will make corrections to the draft order by granting or issuing a declaratory order stating the position of the law i.e. that the applicants are entitled to a bonus.

In the result, despite the draft order being defective, the application is for a declaratory order. As such it is properly before this court.

Even if I am wrong in my conclusion, the fact that the applicant did not exhaust domestic remedies in terms of s 93 of the Labour Act does not oust this court's jurisdiction. This court can still determine the matter. I will thus proceed to determine the matter.

Payment of bonus.

In the contract of employment the employee is obliged to be remunerated for work done. The payment of remuneration is the employer's principal obligation[3]. Remuneration includes wages plus the allowances, bonuses and other benefits that the employee receives[4]. At common law, wages are distinguishable from allowances and bonuses[5].The employer has a duty to pay wages, but not necessarily bonuses and allowances[6]. Allowances and bonuses are commonly called 'benefits'. These benefits come in two categories: contractual and discretionary[7]. Usually payment of allowances and bonuses is discretionary on the part of the employer[8]. In such cases the bonus and the allowances are a privilege and not a right. Past practice does not take away the employer's discretion to withdraw an allowance or a bonus

---

[3]Lovemore Madhuku *Labour Law in Zimbabwe* p 63

[4] Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* at p 81.

[5] Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* at p 81.

[6] Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* at p 81; *ZIMTA & Anor* v *Chairman, PSC & ors*1997 (1) SA (9) – S 70-96 (The bonus case).

[7] Lovemore Madhuku *Labour Law in Zimbabwe* p 66.

[8] Lovemore Madhuku *Labour Law in Zimbabwe* p 66; Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* at p 81, *Zimta* case supra; *Crossely* v *Union Government* 1921 NPD 114 @123; *Art Corporation Ltd* v *Moyana* 1989 (1) ZLR 304 (S); *Alison Forms (Pvt) Ltd* v *Makwanya* – S – 9 – 96 and *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S).

unless the circumstances are such that there is a legitimate expectation on the part of the employee to be paid the bonus or allowance[9]. A discretionary benefit remains discretionary despite having been previously granted. In his book *Labour Law in Zimbabwe*, Lovemore Madhuku at p 66 states that:

> "A privilege is not converted into a right merely on account of past practice. In other words, continuous practice does not take away the employer's discretion."

However, where a benefit has become vested by contract or statute it is mandatory for the employer to pay[10]. In such a case the benefit is not a privilege but a right.

The question now is in the instant case; is the bonus a right as the applicants contend? The answer to the question revolves around the meaning or interpretation of clause 32 of the conditions of service. I will now endeavour to interpret the clause; the interpretation thereof being the bone of contention between the parties. The applicants interpret it to mean that the bonus is a right whilst the respondent says it is a privilege.

Clause 32 reads,

> "Authority employees shall be paid annual bonus as per terms defined by the Board from time to time."

Mr *Mucheche* for the applicants hinged his argument on the use of the word 'shall' in the clause. He submitted that the use of this word makes it mandatory, peremptory or obligatory that bonus be paid. He argued that the word means that the employees are entitled to be paid bonus thereby making it a legal right to them and that the board is only enjoined to set out the terms and conditions of how the bonus is paid from time to time.

Mr *Moyo* submitted that the respondent is a statutory body deriving its powers from the Act and the schedule. He submitted that the respondent's interpretation of the Act and sections 9 and 10 of the schedule to the Act which the applicants have not challenged, is that the Board which is mandated to run the operations and administration of the respondent, has the discretion to pay bonus to the employees. Section 9 of the schedule states that the Authority (respondent) is entitled:

> "To employ, upon such terms and conditions as the Board may consider fit, such persons as may be necessary for conducting its affairs and to suspend or discharge any such persons."

---

[9] *Minister of Information* v *PTC Managerial Employees Workers Committee* 1999 (1) ZLR 128 (S).

[10] Lovemore Madhuku *Labour Law in Zimbabwe* p 66; Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* at p 81and *Art Corporation Ltd* v *Moyana* 1989 (1) ZLR 304 (SC).

In terms of s 10 the Authority is entitled:

> 'To pay such remuneration and allowances and grant such leave of absence and, with the approval of the Minister, to make such gift, bonuses and the like to its employees as it considers fit." (My emphasis)

Mr *Moyo* submitted that the respondent's interpretation of the Act and the schedule that payment of bonus is discretionary is correct since it was not challenged by the applicants. It was his further submission that the conditions of service being subservient to the Act and the schedule cannot be contrary to them. Citing the case of *Abednico Bhebhe & ors* v *The Chairman of Zimbabwe Electoral Commission N.O & Ors* HH 139/11 he argued that the mere use of the word 'shall' does not result in a peremptory directive. Mr *Moyo* further submitted that even if the applicants are correct in their interpretation of clause 32, the last part of the clause which says "as per terms defined by the Board from time to time" means that if the Board defined zero bonus in 2016, it should be accepted that id did define the bonus for that year.

Clearly the Act and the schedule do not make it mandatory for the respondent to pay its employees bonus. Payment thereof is discretionary as the Board considers fit. It is trite that the mere use of the word 'shall' in a provision does not mean or make the provision peremptory. See *Abednico Bhebhe & Ors* v *The Chairman of Zimbabwe Electoral Commission N.O & Ors supra*. In that case it was further held that;

> "It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute concerned to be construed….The court must carefully examine the object of the Act…."

The court went on to state that from the facts of the case, the interpretation of the word "shall' was therefore directory.

According to the English illustrated Dictionary by the Oxford University Press, the third definition of 'shall' means (in all persons) obligation, intention, necessity, etc

The last part of clause 32 which reads, "… *as per terms defined by the Board from time to time* shows that it is the intention part of 'shall' and not the obligation part which is relevant. This is because it is the Board that is defining the terms. Had it been the obligation meaning of 'shall' the clause would not have gone on to say "*as per the terms defined by the board from time to time.*" The intention in terms of clause 32 is that the employees are to be paid bonus on the terms defined by the Board subject to its judgment. This means that there is discretion on the part of the Board to define terms as it deems or considers fit. The discretion in defining the

terms would include determining the amount payable, when and how it is to be paid. This means that if it settles for zero amount in a given year that is it. It is this flexibility which gives the Board the discretion to either pay a bonus in a particular year or not to pay as it considers fit.

It is my conclusion that clause 32 is in sync with the Act and the schedule which make the payment of gifts and bonuses discretionary, the payment of which should be approved by the Minister. The payment of bonus is therefore a privilege and not a right in the instant case. This being the case, this court cannot issue a *declaratur* that the applicants are entitled to bonus as a right in terms of clause 32 of their conditions of service.

I am not persuaded to grant costs against the applicants on a higher scale because I see no justification thereof. Past practice of having been awarded bonus for a period spanning over a decade and the wording of clause 32 which uses the word 'shall' made the applicants believe that they are entitled to a bonus as a right. Their application cannot be classified as an abuse of the court process.

In the result, the application is dismissed with costs.

Matsikidze & Mucheche, applicants' legal practitioners
Kantor & Immerman, respondent's legal practitioners