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Judgment No. SC 8/04
Civil Appeal No. 401/02

UNIVERSITY OF ZIMBABWE v

UNIVERSITY OF ZIMBABWE STAFF ASSOCIATIONS

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 12 & 23, 2004

T Biti, for the appellant

S V Hwacha, for the respondent

SANDURA JA: This is an appeal against a judgment of the Labour Relations Tribunal (now the Labour Court) ("the Tribunal") which dismissed with costs the appeal by the University of Zimbabwe ("the University") against the determination made by the senior labour relations officer. The senior labour relations officer had dismissed the University's appeal against the determination made by the labour relations officer in terms of which the University was ordered to increase the salaries of its employees by forty *per centum*.

The background facts are as follows. On 10 June 1998 the representatives of the University and the respondent associations ("the associations") met and discussed various proposed increases in the salaries and allowances payable to the members of the associations from 1 July 1998 to 31 December 1998. The meeting was chaired by the Vice-Chancellor, Professor Hill ("Hill").

What was agreed at that meeting was recorded in the minutes as follows:

> "The meeting recommended the following:
>
> 4.1.1. 60% salary increase.
>
> 4.1.2. 50% increase in allowances. Association Presidents (to) be invited to make (re)presentations to Salaries and Conditions of Service Committee.
>
> 4.1.3. That the effective date for the proposed increase be 1 July 1998 and that in December 1998 there be fresh negotiations for increases to be effective from January 1999." (emphasis added)

Subsequently, on 27 July 1998 the Salaries and Conditions of Service Committee met and was chaired by Hill. Its decision was recorded in the minutes as follows:

> "33.2 The Committee was recommending a 40% across the board salary adjustment on salaries (*sic*) and allowances." (emphasis added)

After that recommendation had been conveyed to the Secretary for Higher Education and Technology ("the Secretary"), the Secretary wrote to the Ministry of Finance ("the Ministry") requesting it to approve the recommended increase in salaries and allowances.

On 10 September 1998 the Ministry replied to the Secretary's request as follows:

> "Treasury has considered your request and approved a salary increase of 5% to 21% on a sliding scale for the six months from 1 July to 31 December 1998. However, allowances have been retained at existing levels. …
>
> Given the financial constraints the Government is facing, it is incumbent upon the Universities to seriously consider broadening and intensifying their revenue generating programmes/activities. We believe there is a lot of potential to raise revenue at the Universities which have (*sic*) remained largely untapped."

Later, a salary increase of 15% to 21% on a sliding scale was substituted for 5% to 21%.

Thereafter, on 19 September 1998 the Council of the University held a meeting at which various matters were discussed. With regard to the cost of living adjustment, the minutes of the meeting indicate that the following report was made to the Council and noted:

> "The University had submitted to the Ministry of Higher Education and Technology a request for a 40% across the board cost of living adjustment. The University had also submitted the recommendations on new salaries made by the Ernst & Young Human Resources Consultants. Responses to both submissions were awaited."

Two days later, on 21 September 1998, the Secretary wrote to Hill, informing him that the Ministry had approved a salary increase of only 5% to 21% on a sliding scale. Annexed to the Secretary's letter was a copy of the memorandum dated 10 September 1998 which the Secretary had received from the Ministry.

In his reply to the Secretary, dated 1 October 1998, Hill expressed his deep sense of shock and extreme disappointment at the cost of living adjustment approved by the Ministry, and requested that the award be urgently reconsidered. He denied the allegation by the Ministry that the University had not done much to raise

its own revenue, gave examples of how the University had raised large sums of money, and said the following:

> "The above are just a few examples of a serious revenue generation campaign at the University. It is disheartening to allege that the institution has not exploited its potential in that area. We have not relied on the exchequer for all our operational requirements. It is only in those areas where donor and other external support are not yet possible, such as in the area of salaries, that we have naturally relied on government funding." (emphasis added)

I have set out this part of Hill's letter because, in my view, the Tribunal misinterpreted it and relied upon that misinterpretation when it concluded that the University could pay its employees the difference between the salary increase approved by the Ministry and the salary increase of forty *per centum* recommended to the Ministry by the University. I shall deal with that issue later in this judgment.

However, Hill's request that the salary increase approved by the Ministry be revised upwards was unsuccessful. As a result, the University paid the employees the salary increase approved by the Ministry.

Subsequently, on 18 November 1998, the legal practitioners representing the associations wrote to the labour relations officer complaining that the University had committed an unfair labour practice, the allegation being that it had reneged on the agreement to pay a salary increase of forty *per centum*.

In her determination, the labour relations officer ordered the University to pay its employees the difference between the salary increase approved by the Ministry and the salary increase of forty *per centum* recommended by the University to the Ministry. That decision was later confirmed by the senior labour relations

officer and by the Tribunal. Aggrieved by that result, the University appealed to this Court.

Two issues arise for determination in this appeal. The first is whether the agreement between the University and the associations was subject to a suspensive condition, and the second is whether the Tribunal erred when it determined the salary increase to be paid by the University. I shall deal with the two issues in turn.

A suspensive condition, also known as a condition precedent, suspends the operation of all or some of the obligations arising out of an agreement until the occurrence of a future uncertain event. See *The Law of Contract in South Africa* 4 ed by R H Christie at p 159. Once that event occurs, the agreement becomes operational and binding on the parties.

Looking at the facts of this case, there can be no doubt that the parties agreed that the salaries were to be increased by forty *per centum*. That is why the University requested the Secretary to increase the salaries by that percentage.

However, there is no doubt in my mind that when the parties agreed on the salary increase of forty *per centum* they knew that their agreement was subject to a suspensive condition, i.e. the approval by the Ministry. I say so for two main reasons.

Firstly, the parties have in the past negotiated salary increases on the understanding that whatever percentage increase they agreed upon was subject to

approval by the Government. Thus, in a matter similar to the present one and between the same parties, the Tribunal said the following at p 1 of its judgment, Judgment No. LRT/H/5/97, which was handed down on 31 January 1997:

> "This is a curious case whereby both litigants have had to resort to litigation when in fact there is no material dispute between the parties. The apparent dispute arose simply because of a third party's disapproval of what the parties had agreed upon as an appropriate salary increase for the year 1992-1993.
>
> The background to this case is that during the 1992-1993 wage increase negotiations the parties agreed that non-academic staff be awarded a salary increase of 11% to 34% on a sliding scale subject to government approval which is responsible for funding the employees' salaries.
>
> Upon the agreement being referred to government for approval government turned down the agreed recommended salary increase and proceeded to make a unilateral and arbitrary salary increase of 2.5% to 10% on a sliding scale." (emphasis added)

Secondly, in the present case it is clear from what the Tribunal said in its judgment that the associations were aware that the agreement by the University to increase the salaries by forty *per centum* was subject to a condition precedent. The relevant part of the judgment reads as follows:

> "It is trite that for there to be a binding agreement the acceptance by the offeree must be unqualified and unequivocal. In this case it is self-evident that the appellant through its Vice-Chancellor made it clear to the respondent that it agreed with the recommendation but needed to consult the Ministry of Finance before adopting and implementing it. There was therefore no firm agreement that could be enforced. The execution of the tentative or provisional agreement was dependent upon the outcome of the appellant's consultations with the Ministry of Finance." (emphasis added)

The finding by the Tribunal that the "Vice-Cnancellor made it clear to the respondent that it agreed with the recommendation but needed to consult the Ministry of Finance before adopting and implementing (the recommendation)", has not been challenged in this appeal. In my view, that is significant.

In the circumstances, I am satisfied beyond doubt that the agreement on the salary increase was subject to approval by the Ministry, and that as that approval was not granted the agreement is unenforceable.

I now wish to deal with the second issue in this appeal, which is whether the Tribunal, having found that the agreement was unenforceable, erred when it determined the percentage by which the salaries were to be increased.

In determining the salary increase, the Tribunal relied upon the provisions of s 91(1) of the Labour Relations Act [*Chapter 28:01*], now the Labour Act [*Chapter 28:01*] ("the Act"). That section, in relevant part, reads as follows:

> "In determining an appeal in terms of this Part, the Tribunal may confirm, vary or set aside the determination appealed against, or substitute its own determination for the one appealed against …".

Relying upon these provisions, the Tribunal substituted its own determination for that appealed against. However, as the percentage increase determined by it was the same as the one determined by the labour relations officer and confirmed by the senior labour relations officer, i.e. 40 *per centum*, the Tribunal dismissed the appeal by the University.

In my view, the Tribunal erred. I say so for two reasons.

Firstly, the sole issue before the labour relations officer, the senior labour relations officer and the Tribunal was whether the parties had concluded a

binding and enforceable agreement in terms of which the University was to increase the salaries by forty *per centum*. As the Tribunal's answer to that question was a negative one, that should have been the end of the matter. The Tribunal should have simply set aside the determination appealed against, and left it to the parties to decide whether or not to resume the negotiations on the salary increase, bearing in mind the decision made by the Ministry on the matter.

Secondly, the Tribunal should not have substituted its own determination for that appealed against, unless there was evidence before it on the basis of which it could determine the appropriate percentage increase. In this regard, the only evidence before the Tribunal was the agreement between the parties that the salaries were to be increased by forty *per centum*, which agreement had been reached on the basis that the salary increase would be paid out of funds provided by the Government and not by the University. In reaching the agreement the parties had not, therefore, taken into account the University's inability to pay the salary increase or any part thereof as alleged by Hill.

In my view, there was no evidence before the Tribunal which indicated that the University was able to pay the salary increase. In this regard, the chairman of the Tribunal seriously misdirected himself when, after referring to the allegation by the Ministry that the University had a lot of potential to raise revenue which had largely remained untapped, he said:

> "I did not hear the appellant (i.e. the University) to dispute the assertions of facts made by its principal donor. That being the case I find as a fact proven that the appellant has the capacity to meet the balance of 25 to 19 percentage increase (*sic*) cost of living adjustment for the period 1st July to 31st December 1998."

This was a serious misdirection because in his letter to the Secretary, dated 1 October 1998, Hill made it quite clear that as far as salaries were concerned the University relied upon Government funding. As already indicated, after setting out examples of the way in which the University had generated revenue he said:

> "We have not relied on the exchequer for all our operational requirements. It is only in those areas where donor and other external support are not yet possible, such as in the area of salaries, that we have naturally relied on government funding."

The letter was part of the record before the Tribunal.

In the circumstances, there was no evidence before the Tribunal on the basis of which it could have determined the appropriate percentage increase in salaries. In addition, the matter had not been argued before the labour relations officer, the senior labour relations officer and the Tribunal. The Tribunal, therefore, erred when it substituted its own determination for that appealed against.

Finally, I would like to comment on the provisions of s 97(4) of the Act. The section was repealed by the Labour Relations Amendment Act, No. 17 of 2002. However, as the section was in force at the time the Tribunal determined the present matter, Mr *Hwacha*, who appeared for the associations, submitted that the Tribunal had the power, in terms of that section, to determine as it did the appropriate percentage increase in salaries. I respectfully disagree.

The repealed s 97(4) reads as follows:

"Upon receiving notice of an appeal, the Tribunal may –

(a) proceed with the appeal by way of a hearing; or

(b) decide the appeal on the record; or

(c) remit the matter to the senior labour relations officer concerned for further investigation and, upon the conclusion of such investigation, proceed with the appeal by way of a hearing or decide the appeal on the record."

In my view, whether the Tribunal proceeded with the appeal by way of a hearing or decided the appeal on the record, it was restricted to the determination of the issue between the parties. In the present case, the sole issue between the parties, from the labour relations officer to the Tribunal, was whether the agreement to increase the salaries by forty *per centum* was subject to a suspensive condition. That was the sole issue which the Tribunal was supposed to determine, whether it proceeded with the appeal by way of a hearing or decided the appeal on the record. And that was the sole issue which brought the parties before the labour relations officer in the first place.

It, therefore, follows that the Tribunal erred when it substituted its own determination on the appropriate percentage increase in salaries. Having concluded that the agreement was subject to a condition precedent which had not been fulfilled, the Tribunal should have allowed the appeal and set aside the determinations of the labour relations officer and the senior labour relations officer.

In the circumstances, the following order is made –

1. The appeal is allowed with costs.

2. The order of the Labour Relations Tribunal is set aside and the following is substituted –

> "1. The appeal is allowed with costs.
>
> 2. The determinations of the senior labour relations officer and the labour relations officer are set aside with costs."

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners