

A TIMELY AND WELCOME DECISION ON EMPLOYER
LIABILITY FOR PENSION ARREARS UNDER SECTION 13 (1)
LABOUR ACT [CHAPTER 28:01]

Case on *Misheck Ugaro v African Banking Corporation*
SC 298 17 [REF - LC/H/681/16]

BY MUNYARADZI GWISAI¹

FACTUAL BACKGROUND

The decision of the Supreme Court in the case of *Misheck Ugaro vs African Banking Corporation* SC-298 17 concerning employers' liability for arrears accrued *viz* pension contributions for their ex-employees is an important decision for the benefit of one of the most vulnerable sections of workers: pensioners. The court affirmed in an order by consent the liability of employers under s 13 (1) of the Labour Act to pay arrears for pension contributions accrued during a former employee's employment.

In doing so, the court also provided a timely clarification on a matter that has caused much suffering for former employees, as lower tribunals like National Employment Council Designated Agents and labour officers have been declining to hear disputes concerning pension arrears by employees. They declared that they lacked jurisdiction and argued that such disputes did not qualify as unfair labour practices under s 13 of the Labour Act and that the former employees had to sue the pension fund and not their former employers.

Consequently former employees were restricted to initiating action against pension funds in the civil courts. Court action is not only costly but involves cumbersome and sophisticated procedures requiring legal representation which is beyond the reach of most workers and pensioners. Even then, the obstacle that confronted litigants was that the Pension Fund would plead that it could not grant a full pension benefit because the employer had not remitted the necessary contributions.

¹ Munyaradzi Gwisai is a registered legal practitioner and lectures in Labour Law and Labour Relations, Faculty of Law, University of Zimbabwe, and Briggs Zano Working Peoples College.

This is exactly what happened in the instant case. Appellant was a former employee of Respondent who joined in 2002 and resigned on 31 December 2014. A dispute arose over, *inter alia*, his pension entitlements. Appellant argued that Respondent was in arrears with contributions for the period 2002 to 2009, resulting in undue prejudice to him. In terms of the contract of employment, Appellant was obliged to be a member of the employer-specified pension fund, the African Banking Corporation Zimbabwe Pension Fund. In terms of rule 5.1 of the Fund Rules the employer was obliged to effect deductions equivalent to 6% of the employee's annual salary and make employer contributions to a total equivalent to 15% of the employee's salary and remit such contributions to the Pension Fund on a monthly basis. The employer had failed to effect deductions or remit contributions and did so belatedly after the employee's resignation. A dispute arose as to the pension benefits that the former employee was entitled to; details of which are not relevant for this article.

The employee referred the dispute to a labour officer in terms of s 93 (1) of the Labour Act alleging an unfair labour practice by his former employer. Conciliation failed and the dispute was referred to an arbitrator. The arbitrator ruled in favour of the employee holding that the employer was liable under the Labour Act to effect pension contributions arrears to the Pension Fund for the period in arrears.

The employer appealed to the Labour Court submitting that the award was a nullity because an arbitrator acting under the Labour Act lacked jurisdiction to hear the matter, as the dispute did not qualify as an unfair labour practice under section 13 (1) of the Labour Act. It was argued that the proper party to be sued was the Pension Fund, which was a separate legal entity, and the ex-employer merely an agent for the pension fund.

MUSARIRI J upheld the appeal and reversed the award on the basis of two grounds. First, that the arbitrator erred in holding the employer liable for pension claims, whereas the proper party to sue was the pension fund. He held:

The Fund being a legal entity, is itself answerable for pension claims made against it. Its Rules clearly say so. Thus the arbitrator fell into grievous error when he held the appellant accountable instead of the Fund. In the normal course the employer acts as the agent for the Fund. Certainly that is so during the currency of the employment contract. But once the contract is terminated as in casu, the employee should deal directly with the Fund. As

it turns out the appellant obtained an account from the Fund on behalf of the respondent. If the respondent was dissatisfied therewith he ought to have confronted the Fund directly.”[page 2 of the Unreported Judgment].

The second reason was that a former employer was not liable under s 13 of the Labour Act because the section deals with the liability of the former employer concerning wages and benefits upon termination of the employment contract, but does not deal with the liability of a pension fund. He rejected the submission that a former employee had option to sue both the former employer and the Pension Fund. He held:

I pressed the respondent’s attorney to explain why they did not deal with the Fund. He sought to argue that the employer and the Fund have joint liability. In such scenario the employee can opt to claim from either of the two. He referred to section 13 of the Labour Act ... However, none of the six subsections was cited. My reading of all of them indicates that they deal with the employer’s liability concerning wages and benefits upon termination of the employment contract. None deal with the liability of a pension fund.” [page 2, Unreported Judgment].

Appellant appealed to the Supreme Court citing two grounds. First, that contrary to the judgment of the Labour Court, an ex-employee has the right to sue his ex-employer for failure to remit contributions to a pension fund in terms of s 13(1) of the Labour Act, as such failure amounted to an unfair labour practice. Secondly, that contrary to the Labour Court’s judgment, pensions arrears were elements of terminal benefits that an ex-employee could sue his ex-employer for under s 13 (1) of the Act. The Supreme Court upheld the appeal by consent ordering:

IT IS ORDERED BY CONSENT THAT:

1. The appeal be and is hereby allowed with each party bearing its own costs.
2. The judgment of the court a quo be and is hereby set aside.
3. The matter be and is hereby remitted to the Labour Court for it:

To determine the actual period during which the appellant was employed by the respondent and in respect of which the respondent was contractually obliged to remit pension contributions to the relevant Pension Fund.

To compute the exact amount of the contributions payable in respect of both employer's and employee's contributions, less the amounts already paid by the respondents for the period of actual employment determined in terms of paragraph (a) above.

The decision of the Supreme Court is significant and welcome for two major reasons: namely, in relation to the *locus standi* of former employees to sue their former employers for pension arrears under the Labour Act and secondly as a guide to the kind of terminal benefits covered under s 13 (1) of the Labour Act.

LOCUS STANDI OF EX-EMPLOYEES TO SUE EX-EMPLOYERS UNDER THE LABOUR ACT

The first significance of the Supreme Court decision is that it affirmed that an ex-employee has the right to sue their former employer as regards unpaid or unremitted pension contributions under s 13 (1) of the Labour Act as an unfair labour practice and is not restricted to only suing the appropriate pension fund. Section 13 (1) provides:

13. Wages and benefits upon termination of employment

1. Subject to this Act or any regulations made in terms of this Act, whether any person;
 - (a) Is dismissed from his employment or his employment is otherwise terminated; or
 - (b) Resigns from his employment; or
 - (c) Is incapacitated from performing his work; or
 - (d) Dies;

he or his estate as the case may be, shall be entitled to the wages and benefits due to him up to the time of such dismissal, termination, resignation, incapacitation or death as the case may be, including benefits with respect to any outstanding vacation and notice period, medical aid, social, social security and any pension, and the employer concerned shall pay such entitlements to such person or his estate; as the case may be, as soon as reasonably practicable after such event, and failure to do so shall constitute an unfair labour practice.”(my emphasis).

Although an order by consent without reasons, the Supreme Court order effectively affirms earlier decisions that the effect of s 13 (1) of the Act is to render continuation of the employment relationship between the employer and former employee for the specific purposes specified under the section, beyond termination of the contract.

The continuity of the employer-employee relationship was well enunciated in the case of *Nyanzara v Mbada Diamonds (Pvt) Ltd*² where it was held:

The relationship of Employer/Employee can loosely be said to continue after termination of employment as envisaged in s 13(1) of the Labour Act is only for the purposes of giving effect to or enforcement of payment of terminal benefits.

The *Ugaro* decision has reaffirmed the above line of cases by the Superior Courts.

SECTION 13 (1) OF THE ACT COVERS BROADER TERMINAL BENEFITS THAN "WAGES AND BENEFITS."

The second significance of the *Ugaro* case lies in that the Supreme Court has effectively affirmed that the terminal benefits protected under s 13 (1) of the Act are not confined to "wages and benefits" as had been held by the Labour Court. The ambit of terminal benefits covered under s 13 (1) of the Act is broader than wage arrears or benefits which should be paid directly to the former employee as part of her/his terminal benefits. But the section is broader and encompasses other terminal benefits which may not necessarily be paid directly to the former employee but to contributions which the former employee/employer should have paid to relevant third party service providers in terms of the contract of employment. The section specifically mentions "*medical aid, social security and any pension.*" Thus where an ex-employer has failed to remit necessary contributions, the employer commits an unfair labour practise under s 13 (1) of the Act, entitling the ex-employee to initiate proceedings in terms of s 93 (1) of the Labour Act seeking an order compelling the former employer to pay the arrear contributions.

The Labour Court had adopted an unnecessarily restrictive approach to s 13 (1) which subverted the purpose of the section and that of the Labour Act under s 2A (1) and (2). The Supreme Court endorsed the broader purposive approach required under s 2A (2) of the Act. This provides that

² HH-63-15. See also, *PTC V Zimbabwe Posts Telecommunications Workers Union & Ors* 2002 (2) ZLR 732 (S) AT 727 D-E; and *African Banking Corporation Zimbabwe Ltd v Karimazondo & Ors* SC-368-15.

- (2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).

In terms of s 13 (1) of the Act, an employer has a duty to pay its former employees "such entitlements" as are due to him or her, as soon as reasonably practicable after the termination.

The entitlements referred therein are provided at the start of the paragraph, namely,

... the wages and benefits due to him up to the time of such dismissal, termination, resignation, incapacitation or death as the case maybe, including benefits with respect to any outstanding vacation and notice period, medical aid, social security and any pension...

The employer has an obligation to pay the former employee their other terminal benefits besides the wages. Such benefits may include medical aid, social security and pension benefits. This paragraph must be interpreted in a manner that is reasonable and attains the objectives of the Act. Section 13 (1) is clearly meant to ensure that the former employee gets their entitlements in relation to wages and any other benefits accrued as a result of the contract of employment. Such benefits may include medical aid, social security and pensions.

The overwhelming industrial practice is that for social security or social insurance schemes, it is not the employer who provides the direct benefit but benefits are provided by a third-party service provider, on payment of the necessary contributions and premiums by the member/employer.

Where an employee is entitled or obliged to be a member of such a scheme, his/her "entitlement" or "benefit" is that the employer makes the necessary contributions and remits them to the third-party service provider, so that the employee can subsequently access the benefits provided by the third party. In that case, the employer has a separate and independent liability to that of the third party service provider. The employer's liability is to remit the deductions it would have made on the employee's salary, to the third party service provider. The deductions are actually part of the employee's remuneration.

The liability of the Pension Fund is separate and distinct. It is to provide the benefits in terms of the applicable Fund Rules. A member has a separate and distinct cause of action as a member against the third party service provider if it fails to provide the service. But where one

has failed to meet their obligations, such as failure to pay the necessary contributions, a member has no right to sue the third service provider for the benefit. He or she has to clean their “dirty hands” by making up to date payments of contributions to the third party service provider.

The above is what the former employee in the *Ugaro* case sought to do by forcing the ex-employer to effect the payments to which it was contractually obliged. The interpretation to s 13 (1) of the Act that had been adopted by the Labour Court of denying such ex-employees *locus standi*, led to absurd and unjust results which were contrary to the clear legislative objective underlying s 13 (1) of the Act. It would allow employers not to pay deducted contributions for pensions, NSSA, medical aid, funeral policies, which duties they have directly under the contract of employment, but the former employee would have no cause of action under the Labour Act to challenge such unlawful conduct by the former employer.

Yet in the case of contributory schemes like pensions, medical aid, funeral schemes and so forth, the deductions made by the employer would be actual deductions on the salary of the employee, which salary is guaranteed under s 6(1) (a) of the Act. But the restrictive position adopted by the Labour Court would not allow the former employee to claim for this as an unfair labour practice under s 13 (1) of the Act. Nothing could be further from the clear intention of s 13 (1) and the Labour Act, in general. Such an interpretation and approach does violence to the established canons of interpretation of statutes and to the Labour Act in particular.

The cardinal rule of interpretation of statutes is that words must be given their ordinary grammatical meaning except where that meaning leads to an “absurdity so glaring that it could never have been contemplated by the legislature.”³

Interpreting the word “entitlements” in s 13 (1) as excluding pension contributions deducted from the employee’s salary, would clearly lead to absurd and unjust results to former employees. Even if it was assumed that the term “entitlements” is capable of more than one meaning, the same result would apply by operation of appropriate maxims of interpretation of statutes. In particular, the presumption

3. *Venter v R* 1907 TS 910 at 915. Also, *NEC Catering Industry v Catering and Hospitality Industry Workers Union* 2008 (1) ZLR 311 (S) at 316B-D; and *G E Devenish Interpretation of Statutes JUTA* 1992 at 177

that the legislature does not intend that which is harsh, unjust or unreasonable. Where there is ambiguity, or doubt or where more than one interpretation is possible, "it is obvious that the intention which appears to be the most in accordance with convenience, reason, justice and legal principles, should ... be presumed to be the true one."⁴

The above presumption is consistent and has been codified under s 2A (2) of the Act. One of the specified purposes of the Labour Act is the promotion of fair labour standards. Section 6 provides specified labour standards, which include the right to be paid a wage or in terms of an agreement under the law or an Act.

In *casu*, the employee's contract of employment provided him with a right to participation in a pension scheme and for the employer to make deductions to be remitted to the appropriate pension fund. The employer breached such duty, not as an agent but a party to the contract and an employer under the Labour Act. It was therefore correctly held liable.

CONCLUSION

It is only right that the Supreme Court in the *Ugaro* case put right a major injustice done against some of the most vulnerable members of society _ pensioners _ especially considering the historic injustice that this group suffered at the dawn of dollarization in February 2009, when pension funds and employers made arbitrary and unfair conversions of Zimbabwe Dollar pensions into paltry US Dollar pensions. One hopes that the case marks the beginning of justice for these marginalized members of society.

4. P St Langan Maxwell's Interpretation of Statutes 1969 at 199. See also, *Borcheds NO v Rhodesia Chrome and Asbestos Ltd* 1930 AD 112 at 121; *Dadoo Ltd & Ors v Krugersdorp Municipal Council* 1920 AD 530 at 552.