IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL NO. 141/2002

(CIVIL JURISDICTION)

B E T W E E N:

TROPICAL DISEASES RESEARCH CENTRE	APPELLANT
AND	
UNIVERSITY OF ZAMBIA AND ALLIED WORKERS UNION	RESPONDENT

CORAM: LEWANIKA, DCJ., CHIBESAKUNDA, SILOMBA, JJS
On 5th December, 2002 and 1st June 2004

For the Appellant: W.E. MWALE & Musonda Associates
For the Respondent: J.M. KAPASA of J.M. Kapasa & Co.

JUDGMENT

LEWANIKA, DCJ, delivered the Judgment.

This is an appeal against the decision of the Industrial Relations Court relating to an application by the Appellant to the court to determine certain matters.

The short history of this matter is that the parties were involved in negotiations for a new collective agreement to cover the salaries of the Appellant's unionised workers. The evidence on record is that the negotiations commenced some time in 1998. The evidence on record is that the parties were not able to reach an agreement mainly because the Appellant operates wholly on grants from government and the Appellant's position

was that it would agree to an increase for unionised workers of 33% which would fall within the approved grant of K52,000,000.00 per month whilst the Respondent was adamant on a higher percentage which would bring the total wage bill to K89,200,000.00 per month. The Appellant's position was that it was not able to go outside the approved monthly grant from Government and on 16th February, 2000 the negotiations were stalemated and a dispute declared by the parties in line with Section 76(6) of the Industrial and Labour Relations Act. Following the declaration of the dispute, the Respondent threatened to go on illegal strike and if the strike took place it would disrupt, if not completely paralyze the operations of the Appellant. The Appellant's position was that it was a provider of medical services and that in terms of Section 107(10) (n) all its employees are essential workers.

The Appellant then made application to the Industrial Relations Court for the following reliefs:-

1. a declaration, that it is a provider of essential services and its unionised employees cannot therefore go on strike;

2. Resolution of the collective dispute; and

3. The grant of a restraining Order until the application is heard.

The Industrial Relations Court declined to grant the declaration that the Appellant is a provider of essential services and further ordered the Appellant to pay the Respondent's members who were its employees the amounts that were agreed upon, hence the appeal now before us.

Counsel for the Appellant has filed three grounds of appeal namely:

1. that the court below erred by failing to find that the Appellant is a provider

of an essential service, i.e. health and therefore its unionised employees cannot engage in strike action, lock out or picket;

2. that the court below erred by failing to find that the Appellant's funding is from government and as such whatever salary increase can be awarded to its employees has to be within the funding;
3. that due to a general increase in salaries in medical institutions by government in 2001, the increase sought by the Respondent in the negotiations for a new collective agreement had already been exceeded and it was therefore a serious error by the court below to order that the Appellant awards increased salaries to its unionised employees in line with the stalled negotiations.

In arguing the first ground of appeal Counsel said that in terms of Sections 3(1) and 4(2)© of the Act which established the Appellant and spelt out its functions, that it cannot be doubted that the appellant provides a health service. He further said that Sections 75, 76 (b) and 107 (10) (b) of Cap 269 set out the requisites upon which an institution will be considered an essential health provider and he submitted that the Appellant met the criteria and that the court misdirected itself in law and fact when it failed to find that the Appellant is a provider of an essential service. That the tab of an essential service provider does not lie in the procurement of a certificate as to the provision of the service but rather on the function and that it cannot be doubted that the Appellant is a provider of an essential service, i.e. medical services.

As to the second ground of appeal, Counsel said that the Appellant's operations are wholly funded by government and the court should have found that any salary increase to employees could only be awarded within the funding. He said that during the course of the hearing of the matter in the court below, there was evidence from both the Appellant and the Respondent that at the time when the negotiations for salary increase commenced, the negotiations proceeded on the basis of the hope that the grant out of

which the salary increase would have emanated was K72,000,000.00 but it turned out that the grant from government was only K44,000,000.00. That there was also evidence that at the time a dispute in relation to negotiations for salary increase was declared between the Appellant's management and the union, no agreement on the level of the salary increase had been reached and yet the court below was able to find that there was an agreement and ordered the Appellant to implement a salary increase outside the Appellant's ability to pay. He said that the reason why the matter went to court was for the court to adjudicate on the dispute reached in the negotiations and by ordering the Appellant to implement what had caused the stalemate amounts to failing to resolve the dispute. Further, he said that there was evidence on record that the salary increase of 33% which was offered by management and rejected by the Respondent during the negotiations was in fact implemented in November, 2000. That it was therefore a serious error for the court below to order that the Appellant implements the salary awards canvassed by the Respondent in the negotiations when same had already been implemented.

As to the third ground of appeal Counsel asked us to take judicial notice of the general salary increase which was awarded in mid 2001 to all employees working in government institutions. He said that the unionized employees of the Appellant all benefited from this increase and the court below ought to have taken this into account when it was delivering its judgment on 20th December, 2001. That another increase for the Appellant's unionized employees emanating from the stalled negotiations would not

only cripple the Appellant but also unjustly enrich these employees and he urged us to allow the appeal and set aside the judgment of the court below.

In reply, Counsel of the Respondent said that with regard to the first ground of appeal, the court below properly addressed itself by calling to mind the enabling Act. That in calling to mind the said Act the court below explained that the Appellant being a creature of statute, the Appellant's powers and functions are set out in the Act. After outlying the relevant sections of the Act, the court below established and found that the main function and purpose is that of research. And that even though the Appellant might provide some medical services to the community in carrying out the main function, that does not take away from the fact that it is primarily a research institution. He submitted that there is no other authority that can describe the functions of the Appellant other than its creator. He further submitted that by its failure to provide an essential service certificate to its employees as required by Section 107(1) of the Industrial and Labour Relations Act, the Appellant is deemed to have established its position that it was not obliged to do so since it was not the provider of essential services.

As to the second ground of appeal, Counsel said that during meetings that took place between the collective bargaining unit involving the management of the Appellant and the union held on 11th November, and 12th November, 1999, the proposals in respect of the awards of salary increment came from the management and not the union. That it cannot be said therefore that the Appellant was not aware of its ability to meet the costs of this increment. He said that the bargaining unit was a responsible agency of the Appellant which was acting within the scope of its authority. That the court below was

on firm ground by making a finding to the effect that *"to allow management to use the excuse of the Board and avoid implementing that which they had agreed to and more so in a situation where they themselves had actually made proposals, would be wrong and an injustice to the Respondent."*

As to the third ground of appeal, Counsel said that the issues which were before the court below were confined to a period between January to December, 1999 and that it was the Appellant's position that there would be no further negotiations until the outcome of the proceedings below. That even assuming that there was a general increase to all government institutions in mid 2001 as contended by the Appellant, that was not done within the frame work of the negotiations.

He said that this was more so given the evidence of the Appellant's first witness to the effect that the last increment awarded to the Appellant's unionized employees was in 1997. He urged us to dismiss the appeal.

We have considered the submissions of Counsel for the Appellant as well as the evidence on record. The first ground of appeal relates to the refusal by the court below to grant the Appellant a declaration that it was a provider of an essential service. It is common cause that the Appellant was created by the Tropical Disease Research Centre Act, Cap 301 of the Laws of Zambia. Section 3 of the Act provides as follows:-

> *3(1)* ***There is hereby constituted the Tropical Disease Research Centre for the purposes of conducting research and training in tropical diseases and related matters.***

Section 4 of the same Act establishes the Board of the Appellant and Section 6 sets out the functions of the Board as follows:

6(1) *The functions of the Board shall be to conduct research and training in tropical diseases and to do all such acts and things as are necessary for or conducive to the attainment of that purpose;*

(2) without prejudice to the generality of subsection (1) the Board may:-

(a) formulate plans and policies for the center

(b) conduct research and develop research methodologies

(c) support research programmes relating to disease control and primary health care;

(d) train sceintists in research related to tropical diseases

(e) provide facilities for international research and training

(f) liaise with other scientific brochures within and outside Zambia

(g) collect and disseminate scientific information including the publication of scientific reports, journals and other such documents and literature relating to the work of the centre.

In terms of Section 107(10)(b) of the Industrial and Labour Relations Act, ***"essential service"***, for our purposes is ***"any hospital or medical service"***. From the provisions of Section 6(1) of the Tropical disease Research Center Act, there can be no doubt that the primary function of the Appellant is to provide facilities for research and training in the control of tropical diseases. The fact that it provides medical services to the community as an adjunct of its primary function cannot qualify it to be *"a hospital or medical service."* In our view the court below was on firm ground in refusing to grant the declaration sought and the first ground of appeal cannot succeed.

As to the second ground of appeal, the parties herein had referred this collective dispute to the court in terms of Section 76(6) of the Industrial Labour Relations Act. The evidence on record is that the two parties who were negotiating for a salary increase were

not able to agree on the level of the salary increase. What was offered by the management of the Appellant was rejected by the Respondent. Admittedly, there was evidence on record that at one time the parties had reached an agreement but the Board of the Appellant could not sanction the increase because it was beyond the funding level of the Appellant by the government. What is not disputed is that the collective agreement was not signed by the parties. The parties in taking the collective dispute to court were expecting the court to adjudicate on the dispute. In our view the court below abrogated its responsibility when it held as follows:-

> *"Accordingly we find and hold that it would amount to denying the parities substantial justice if we allowed that and therefore we find that management had the mandate to negotiate and there was indeed an agreement reached between the parties and we award the Respondents what was negotiated less what they were given. This will be from the date the last collective agreement expired."*

Needless to say, no such agreement was reached by the parties and the finding flies in the teeth of the evidence. The second ground of appeal succeeds and we would allow the appeal and set aside the award of the court below. Having allowed the appeal on the second ground, it would be otiose for us to consider the third ground of appeal. As the appeal has succeeded in part, we make no order as to costs.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

L.P. Chibesakunda
SUPREME COURT JUDGE

S.S. Silomba
SUPREME COURT JUDGE