VICTORIA FALLS MUNICIPALITY
versus
S. C MUTARE N.O
and
DICKSON MUKOMBWE AND 16 OTHERS

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 JUNE AND 16 JUNE 2016

Opposed Application

K. Ngwenya for the applicant
1st respondent in default
P. Ngulube for the 2nd respondent

MATHONSI J: Lawyering, especially for young and upcoming legal practitioners, is a very exciting, satisfying and indeed adrenalin pumping prospect as it helps the lawyer achieve the childhood dreams they had after many bitter years of travail at University. It can however be a nightmarish and disconcerting undertaking for those unable to quickly understand the problem faced by a client, know where to find the law under which the problem falls and to make the right choice of the course of action to take in pursuit of a remedy.

The applicant has gone knocking at the door of an arbitrator and finding no joy, it has been to the Labour Court where it was rebuffed and it has now come here with a humdinger of an application for "relief in the form of a declaratory order and a mandamus" against the arbitrator. Very high sounding and involved terminology but in aid of what really? A simple remedy has always been sitting and awaiting the applicant in Article 34 of the Model Law in the Arbitration Act [Chapter 7:15].

The applicant is a local government authority constituted in terms of the Urban Councils Act [Chapter 29:15]. It used to employ the 17 former employees who are cited interestingly only as "Dickson Mukombwe and 16 others." A labour dispute between the applicant and the

employees could not be resolved through conciliation. It was referred to the first respondent, a labour arbitrator appointed in terms of the Labour Act [Chapter 28:01].

The second respondent set the matter down for arbitration on 22 July 2014 but only the employees attended while the applicant defaulted. The applicant says the notice was not brought to its attention. For some unexplained reason the arbitrator did not adjudicate on the matter on that date, although the arbitrator was later to claim that the arbitration hearing proceeded in terms of Article 25 (c) of the Model Law. What is common cause though is that the employees only applied for "default judgment" much later on 22 October 2014 and the arbitrator obliged by an award issued on 3 November 2014 in terms of which she directed the applicant to pay backpay and "dirt allowances" to the employees in the sum of $41443,90.

The applicant then commenced the laborious process of having the arbitral award set aside and made all the wrong choices. On 11 November 2014 the applicant filed an application for rescission of judgment before the arbitrator on the basis that it was not in willful default on 22 July 2014, the set down date, and that it had prospects of success on the merits. The arbitrator did not set the matter down for hearing, neither did she entertain the parties. Instead she addressed a letter to the applicant on 9 February 2015 in the following:

> "RE: Application For Rescission of Arbitral Award in the matter: Dickson Mukombwe and 16 others v Victoria Falls Municipality.
>
> The above matter refers.
>
> The office is in receipt of an application for rescission of the arbitral award in the above mentioned matter. However, the arbitrator after issuing an award ceases to have any authority to deal with such matter unless it is remitted back by a higher court. The arbitrator can only make a correction on errors in computation, clerical or typographic errors, see Article 33 of the Arbitration Act. Appeals, reviews and rescissions lie with the Labour Court or the High Court as the case may be. The application has therefore been lodged with the wrong office. Applicant is advised to approach the Labour Court."

The danger with the court or a tribunal rendering legal advice is that it may give completely wrong advice which the litigant may then take as a statement of the law and act upon it to his detriment. Of course lawyers have always been reluctant to render free advice. The arbitrator may not have been entirely wrong in her conclusion as shall be demonstrated hereunder given that an arbitrator ordinarily does not give default judgment and would therefore

be unable to rescind his or her own judgment. It was the advice that the applicant should approach the Labour Court which was unfortunate.

Although the applicant was of the view that the arbitrator had capacity to deal with the application and stated as much in a letter from its legal practitioners, *Dube and Company*, dated 16 February 2015, it still lodged an application for rescission of judgment at the Labour Court. That court was unmoved. By judgment delivered on 10 June 2015 the court, per KABASA J, dismissed the application on the basis that the Labour court, as a creature of statute, could only rescind its own judgment, and not that of an arbitrator, in terms of s92C (1) (a) of the Act.

The applicant was shattered. Crest fallen, it then launched this application seeking an order declaring unlawful the decision of the arbitrator to decline jurisdiction and directing her to determine the rescission of "the default arbitral award" as provided for in s98(9) as read with s92C (1) (a) of the Labour Act [Chapter 28:01]. Talk of going round and round in circles with no solution in sight. So all that the applicant requires is for the arbitrator to hear its application for rescission and decide whether to grant it or not. Assuming she grants it, she would presumably start hearing the merits of the dispute, and hopefully sooner than the after life, she would resolve the dispute between the parties. Barring appeals and reviews perhaps the matter will be put to rest.

There is no provision in the Labour Act providing for the grant of default judgment by an arbitrator. The applicant has inferred such power from the provisions of s98 (9) of the Act which provides:

> "In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court."

It has been submitted that because s92C (1)(a) of the Act empowers the Labour Court to rescind its own default judgment, then it must follow that the arbitrator has such power as well. In terms of s92C (1) (a):

> "Subject to this section, the Labour Court may, on application, rescind or vary any determination or order which it made in the absence of the party against whom it was made."

The powers of the Labour Court are provided for in s89 and are; hearing and determining applications and appeals in terms of the Act or any other enactment; hearing matters referred by

the Minister in terms of the Act, referring a dispute to a labour officer; appointment of an arbitrator from the panel of arbitrators and exercise the same review powers as the High Court in respect of Labour matters.

The grant of default judgment is only provided for in r30 of the Labour Court Rules, which provides:

> "Where a party or witness fails to appear at a hearing the court may, according to the nature of the case, or as the justice of the case requires—
>
> (a) proceed with the hearing on the merits; or
> (b) postpone the matter; or
> (c) upon application by the party in attendance, enter default judgment."

That provision makes it clear that the grant of a default judgment is alternative to proceeding with the hearing on the merits. They are two different procedures.

In terms of r33 an application for rescission of judgment on the grounds set out in s92C (1) (a); (b) or (c) shall be made within 30 days from the date the applicant became aware of the offending order or judgment.

But then an arbitrator of labour disputes is also governed by the Arbitration Act [Chapter 7:15] which domesticated the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade. Those two pieces of legislation must be read in conjunction with one another. Article 25 deals with default by a party to arbitration and provides in relevant part:

> "Unless otherwise agreed by the parties, if, without showing sufficient cause –
>
> (a) ---
> (b) the respondent fails to communicate his statement of defence in accordance with Article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
> (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."

In my view the arbitrator cannot grant default judgment if by that expression we mean a decision granted without consideration of the merits. The arbitrator must conduct a hearing even if it is by one party and decide the matter on the merits all the time. To that extent therefore where an arbitral award has been made the arbitrator would have nailed his or her colours on the mast as it were, given that the merits would have been determined. It occurs to me therefore that

the arbitrator who has made an award is *functus officio* and cannot entertain the same matter again.

I am of the view that it is for that reason that Article 34 provides a party against whom an arbitral award has been made in his or her absence, with a remedy to approach the High Court for the setting aside of the award on that basis alone. Article 34 (2) (a)(ii) provides:

> "An arbitral award may be set aside by the High Court only if the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case."

Mr Ngulube who appeared on behalf of the respondents and also deposed to an opposing affidavit on their behalf chose not to address the issue at all in his affidavit. He focused on the fact that the applicant is forum shopping and should have noted an appeal against the decision of the arbitrator to decline jurisdiction. After we had exchanged some views he was quick to concede that in the interest of a speedy resolution of the matter, the arbitral award should be set aside in order for the parties to resolve the merits once and for all.

I am aware that an application stands or falls on its founding affidavit which, in the present case, seeks only a declaratory order I am disinclined to grant. See *Mobil Oil Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70.

However, apart from its inherent jurisdiction, this court can set aside an arbitral award where the applicant was not given proper notice or otherwise was unable to present his case. So even if I am wrong in concluding that an arbitrator cannot rescind an award where he has dealt with the merits and determined the dispute in the absence of a party, I am empowered to set aside the award in terms of Article 34, except that the application before me is not for such relief.

Considering that this is a labour dispute in which equity demands that it be resolved with a dash of speed and without too much regard to the trappings of rules of procedure and that *Mr Ngulube* consented to the setting aside of the award in the interest of expediency, I am satisfied that I should exercise my discretion in favour of the applicant. It must follow therefore that such a course of action disentitles the applicant to an award of costs occasioned by its lack of diligence.

In the result, it is ordered that:

1. The arbitral award issued by S. C. Mutare, an arbitrator, on 3 November 2014 in case number 72/11/14 is hereby set aside.
2. The matter is remitted to the Labour Officer for the appointment of another arbitrator to arbitrate the dispute between the applicant and the respondent employees.
3. Each party shall bear its own costs.

Dube and Company C/o T. J Mabhikwa & Partners, applicant's legal practitioners
Muzvuzvu Law Chambers, 2nd -18th respondents' legal practitioners