PATRICIA MAPINI
versus
OMNI AFRICA (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 November and 18 December 2013

Opposed Application

Applicant in person
Advocate F. Mahere, for the respondent

TSANGA J: This is an opposed application for rescission of judgment which has its genesis in the dismissal of the applicant Patricia Mapini, from employment by the respondent, Omni Africa. The applicant was engaged as a Sage Pastel Sales Executive by the respondent. The working relationship soured when the respondent terminated the applicant's contract of employment on the basis of certain allegations it made against her. Aggrieved by what she considered to be unfair dismissal, the applicant sought resolution of the matter through compulsory arbitration. She obtained a default judgment for the sum of **US $36 064.00** on 29 June 2012. The present application for rescission has its foundations in this initial default judgment obtained by the applicant.

Since two different sets of default judgements, one at the instance of the present applicant, and the other at the instance of the respondent, inflame this dispute it is important to capture the details of both. Furthermore, in resolving disputes, the devil is often in the factual details ultimately examined against whatever the law provides.

The first default judgement that resulted in the granting of the arbitral award, was spawned by two postponements of the arbitrator's hearing. Initially set for hearing on 9 February, the matter could not take place as the arbitrator was away on that day. Further postponed to 15 February, it again still failed to take off on that day. This time, the respondent's lawyer, Mr *Mazhande*, was unable to attend due to the need to attend a funeral. He however requested a representative from another law firm to inform the arbitrator. The evidence on file suggests that this was duly done.

The papers filed of record further reveal that the arbitrator after receiving word from the emissary, dutifully postponed the matter to 21 February. This was by written notice to both the applicant and respondent. The information in the papers placed before the court in addition confirms that respondent's receptionist signed and received the notification of this new date, on 16 February. Nonetheless on the re-appointed day, February 21, the respondent did not show up which resulted in the granting of a default judgement by the arbitrator in favour of the applicant. This judgement was subsequently finalised on 29 June. The evidence placed before the Honourable Court also shows that in carrying out the necessary processes for the finalisation of the award, the respondent was accordingly notified at every stage. Applicant proceeded to register the arbitration award on 6 July 2012. The registration was granted on 4 December 2012. It is against this order that the High Court issued a writ of execution on 29 January 2013. This has also spawned yet a pending matter of stay of execution.

Parallel to the above processes, the respondent who had not been present at the hearing on 21 February, filed an application on 1 October 2012 in terms of Article 34 of the Arbitration Act [*Cap 7:15*], seeking the setting aside of the arbitral award which was granted on 29 June 2012. The respondent's primary argument was that the award made by the arbitrator in its absence violated the dictates of natural justice in that it had not been granted a hearing. The respondent succeeded in setting aside the arbitral award. This was not on the basis of consideration of any merits but as a result of a default judgement granted in an unopposed matter.

It appears that applicant did respond to the application on the 18 October, (also confirmed by stamped documents in file HC / 11439/12) attaching documents challenging the respondent's averment of lack of notification. However, she sent her documents to the respondent's previous lawyers Muchandibaya and Associates. These lawyers had indeed at some stage, as evidenced by correspondence, represented the respondent in the matter. There is some dispute as to when exactly they assumed agency. No record was on file regarding this aspect. They were however no longer acting for the respondent at the time of the application for rescission as the application was issued by Mawere and Sibanda Legal Practitioners.
A default judgment was granted on 21 November 2012. It is this default judgement that the applicant seeks to rescind. Applicant states that she only got to know of the default judgement on 15 July 2013. This was after she was served with an urgent chamber application for stay of execution. She filed her application for rescission on 23 July 2013.

She avers in support of her application for rescission that she was unaware at the time that the respondent had since changed practitioners. She also disputes that the respondent was not aware of the arbitration award until its registration on the basis that the evidence from process shows that the respondent was informed at all times and generally chose to ignore correspondence. Applicant also challenges the setting aside of the arbitral award on the grounds that the High Court lacked the necessary jurisdiction to hear this matter. She maintains that the setting aside of an arbitral award is the exclusive jurisdiction of the Labour Court in terms of the Labour Act [*Cap 28:01*]. Reference was made to several judgements which I will canvass more fully later in this judgement in addressing this issue.

The respondent opposes the application for rescission on the basis that none of the acceptable grounds for rescission are met by the applicant. These include a reasonable explanation for the default; the *bona fides* of the application to rescind; and the *bona fides* of the defence to the claim which must have some prospect of success at the trial. Cases referred to include *Stockhill* v *Griffiths 1992* (1) ZLR 172 (S); *Rolland and Anor* v *Donell* 1986 (2) ZLR 216 (S*)*; *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 201 (S) and *Barclays bank of Zimbabwe* v *CC International (Pvt) Ltd* S 16-86. Counsel for the respondent also argued that the applicant has to bear responsibility for not being vigilant. See *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S).

Applicant's reasons for her default HC / 11439/12 are credible. Order 2 r 5 (2) of the High Court Rules requires a party who has changed legal practitioners to file a notice of change with the Registrar and to advise **all other parties** to the proceedings of the change. It is unreasonable and most certainly irregular to simply expect that the applicant should have picked the change of address from the fact that the application came from Mawere and Sibanda Legal Practitioners. There is nothing on record that shows that the applicant was advised of the sea of changes in practitioners representing the respondent at various turns. These include the take over from Mr *Mazhande* who is said to have been unable to attend the hearing on 15 February by Muchandibaya and Associates who subsequently came into the picture sometime thereafter. Then there is the notification of the takeover by Mawere and Sibanda from Muchandibaya and Associates the respondent's current practitioners that is also not on file. In the result, applicant assumed, albeit erroneously, that Muchandibaya and Associates were still handling the matter. Her opposition did not find its way to Mawere and Sibanda and the matter was heard as unopposed. Once she got knowledge of the judgement

she acted swiftly to seek its rescission. I find that the default was not wilful and that the applicant is bona fide in her application to rescind.

On the *bona fides* of the applicant's defence to the claim and whether it has some prospects of success if the matter is rescinded, again I find that the weight of the evidence appears to favour her claim. The basis of respondent's application against which rescission is sought, was that it had not been accorded a right to be heard. As I have earlier remarked, this is not supported by the papers placed before the court since the arbitrator put the postponement in writing. The notice was received and signed for at the respondent's offices. Applicant in my view has some prospects of success in challenging the respondent's claim.

I proceeded in my analysis of this application on the basis that the matter against which rescission is sought was properly brought before the High Court by the respondent. Applicant in her heads of argument also argued that the primary matter had been improperly brought before this court. The crux of her averment is that the proper forum for an application to set aside an arbitration award is the Labour Court. Indeed various decisions of this court have canvassed the increased jurisdictional issues as well as the specialist nature and positioning of the Labour Court in labour matters in relation to the High Court. This followed in particular amendments to the Act such as No. 17 of 2002 and Amendment No. 7 of 2005. See *Tuso* v *City of Harare* 2004(1) ZLR 1 (H); *Zimtrade* v *Makaya* 2005 (1) ZLR 427; *Delta Corporation t/a Delta Beverages* v *Lovett Mabhumbo* HB 34/07. *Dlodlo* v *Deputy Sherriff of Marondera & Ors* HH -76-11; *Benson Samudzimu* v *Dairiboard Holdings* HH 204-10.

Where specific statutes apportion responsibility and authority for hearing certain matters, it is indeed vital for the swift administration of justice that the jurisdiction accorded any specific courts be recognised, respected and enforced. Clarity on the part of the legislature in according such jurisdiction is equally important as its absence can result in overlapping jurisdiction. A key issue in this regard is whether the jurisdiction of the High Court pertaining to setting aside arbitration awards in labour matters is now indisputably the strict preserve of the Labour Court or whether the High Court maintains its jurisdiction. This issue arises in light of the wording of the applicable provision that deals with this issue.

The relevant provisions of Article 34 of the Unicitral Model Law, Arbitration Act [*Cap 7:15*] upon which the respondent brought the matter to the High Court reads as follows:

"Application for setting aside as exclusive recourse against arbitral award

1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article
2) An arbitral award may be set aside by the ***High Court*** only if …..
   i)….
   ii) the party making the application was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case; or….
   iii) ………………..
3) ………..
4) …………
5) …………
6) For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –
   a) ………
   b) a breach of the rules of natural justice occurred in connection with the making of the award.

Section 5 (2) of the Arbitration Act which addresses the application of the Arbitration Act under other enactments is also vital. It is couched as follows:

> (2) Where an enactment provides for the determination of any matter by arbitration, the provisions of that enactment, to the extent that they are inconsistent with this Act, shall prevail."

The provisions of Article 34 have found specific commentary in case law. For instance CHIWESHE JP, in the case of *Benson Samudzimu (supra)* remarked a*s* follows with specific reference to Article 34 and 36 of the Arbitration Act:

> "I agree with the applicant that the correct interpretation would be that, with regards the law, the Labour Act takes precedence over the Arbitration Act or any other enactment. The intention of the legislature was to have all labour matters initiated and resolved to finality in terms of the Labour Act. Equally, the legislature must have intended that such matters be dealt with by the Labour Court to the exclusion of any other court. Sections 34 and 36 of the Arbitration Act are not applicable in cases where the award sought to be challenged is a labour dispute. The mechanisms for challenging awards are provided for in the Labour Act and may be accessed through the medium of the Labour Court. No other court has jurisdiction to entertain such matters."

This approach towards interpreting the enhanced powers of the Labour Court occasioned by legislative intervention helps to streamline and direct labour matters towards this court. However, Article 34 still specifically mentions the High Court in no uncertain terms as the forum for applying for the setting aside of an arbitral award. The purported ouster of the High Court's jurisdiction in labour matters while the provision remains couched as it is, is doubtful. In my view there is no inconsistency between the jurisdictional provisions of the Labour Act on issues relating to arbitration and the provisions of Article 34 that would

justify the invocation of s 5 of the Arbitration Act. I say this because the issues envisaged in Article 34 for setting aside an award are not dealt with elsewhere in the Labour Act.

Indeed it is for this reason that Munyaradzi Gwisai, a labour scholar, attempts to argue at p 234 of his book on Labour Law in Zimbabwe that appeals on questions of law as stipulated in s 98(10) of the Labour Act, encompass the kind of issues envisaged by Article 34.[1]

To quote him:

> "Where the making of an award is in violation of grounds specified under article 34 of the Model law, discussed above, such violation qualifies the appeal as being on a question of law"

The essence of his interpretation is that it is to the Labour Court, under appeals on question of law, that any matter relating to the award under article 34 should be brought. In my view such an interpretation, while clearly recognising the specialist role of the Labour Court, is nonetheless a contortionist way of locating jurisdiction within the Labour Court for setting aside arbitral awards. Given its specific wording, and in the absence of a specific ouster through an amendment clarifying the non-application of Article 34 to labour matters, the jurisdiction of the High Court in such issues cannot be said to have been ousted. There is nothing that stops the legislature from effecting the desired clarity in the interests of the smooth administration of justice in labour matters if indeed its intention was and is to exclude these from the ambit of the provision of Article 34 in favour of the Labour Court. See *De Wet* v *Deetlefs* 1928 AD 286 at p 290 where SOLOMON CJ remarked as follows:

> "It is well a recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court flaw, it must be clear that such was the intention of the legislature".

Pending such clarity to the application of Article 34 in labour matters, litigants such as the respondent who have sought audience in the High Court to set aside an arbitral award cannot be said to be accidental, unwelcome visitors.

In the result, I therefore make the following order:

1. The judgement of this Honourable Court under case No. HC 11439/12 be and is hereby rescinded.
2. There is no order as to costs.

[1] Munyaradzi Gwisai **Labour and Employment Law in Zimbabwe: Relations of Work under Neo Colonial Capitalism** (Harare: Zimbabwe Labour centre and Institute of Commercial Law, UZ 2006) at p 234

Mawere & Sibanda, Respondent's legal practitioners.