NEWTON MADZIKWA

versus

TWENTY THIRD CENTURY SYSTEMS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

MAFUSIRE J

HARARE, 16 September 2013 & 29 January 2014

**Opposed application**

*T. Tandi*, for the applicant

*Z. T. Chadambuka*, for the respondent

**MAFUSIRE J**: This was an application for the registration of an arbitration award. It was opposed. At the end of the hearing I granted the application.

The facts were these: at all relevant times the applicant had been a former consultant of the respondent. He had resigned in July 2010. On 31 August 2012 the arbitrator had awarded him $57 144.14 as his outstanding terminal benefits due by the respondent. The amount would be paid within 21 days. The respondent had not paid. On 7 September 2012 the applicant applied to this court to register the arbitrator’s award as an order of this court in terms of s 98(14) of the Labour Act, *Cap 28:01*. The respondent opposed the application. The overall ground of objection was that the arbitration award was contrary to the public policy of Zimbabwe.

The respondent raised numerous reasons. But they were not crisply synthesised. It was difficult to pick out exactly the manner in which the public policy of Zimbabwe was said to have been breached by the award.

In a nutshell, and in my own words, the respondent’s major grounds of opposition, as I perceived them, were these:

1. That the arbitrator had erroneously interpreted the relevant provision of the then contract of employment between the parties to mean that the applicant had been entitled to 30% of ***all*** the revenue earned by the applicant as opposed to only that revenue that the respondent had earned in respect of those projects under his supervision.
2. That the arbitrator had wrongly decided the dispute without receiving evidence from the applicant but had merely relied on the submissions made by his legal practitioner.
3. That the arbitrator had committed a gross error by finding that the Labour Act was still applicable to the parties when in fact their relationship was no longer that of employee and employer after the applicant had resigned. In this regard the respondent relied on the case of *Blue Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146 (S) as authority for its claim that the Act allegedly “… has no jurisdiction between former employers and former employees” (sic).

In his papers the respondent made an oblique reference to an appeal or an intention to appeal the arbitrator’s award as a reason why the award should not be registered. However, it appeared that no appeal had been filed.

I found the respondent’s opposition lacking in merit. In my view, none of the reasons for the objection amounted to a breach of the public policy of Zimbabwe. Those were grounds for an appeal or a review. Whether or not the applicant was entitled to 30% of all or part of the revenue earned by the respondent for the period in question was a question of fact. The arbitrator could properly deal with it. Also, whether or not the arbitrator could decide the matter on the basis of the submissions by the legal practitioners for the parties without the aid of *viva voce* evidence depended on the agreement of the parties and the arbitrator at the pre-arbitration stage. This appears to have been the case from the record. But this is besides the point. It was incompetent for the respondent to have mounted an objection on that basis.

In an application for the registration of arbitral awards in terms of s 98(14) of the Labour Act this court is not called upon to determine the merits of the arbitrator’s decision or the propriety of the proceedings before him. Sub-section (14) of s 98 of the Labour Act reads:

“(14) Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subsection (13) to the court of any magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court.”

Sub-section (2) provides that the Arbitration Act, *Cap 7:15,* shall apply to disputes referred for compulsory arbitration. This case was one such. Article 35 in the Schedule to the Arbitration Act provides for the manner of the registration of an arbitral award with the High Court. Article 36(1) provides two sets of grounds on which the registration of an arbitral award may be refused. The first set, in paragraph (a), sub-paragraphs (i) to (v), has five grounds. These can be invoked by the party against whom the application for registration is made. None of these grounds was applicable in this matter. The second set, in paragraph (b), sub-paragraphs (i) and (ii), has two grounds.

In terms of the first ground in the second set this court can refuse registration of an arbitral award if it finds that the subject-matter of the dispute is not one capable of settlement by arbitration under the law of Zimbabwe. As mentioned above one of the respondent’s grounds of objection was that the Labour Act does not apply to ex-employees. I do not know whether by this it was meant to say that if that Act was no longer applicable then the dispute between the parties was one not capable of resolution by arbitration. The argument was never developed properly. But whatever the respondent meant the objection was ill-conceived. A dispute between an ex-employee and his ex-employer would still be one capable of resolution by arbitration under the law of Zimbabwe, whatever the Labour Act provides.

But more importantly, the Labour Act does apply to disputes between ex-employees and ex-employers in respect of rights and obligations that accrued during the subsistence of the employment. Firstly, contrary to respondent’s understanding of the Supreme Court judgment in the *Blue Ribbon Foods* case, the *ratio decidendi* of that judgment was that an employee whose employment had ceased did not lose his rights as an employee which had vested during the time of employment and that he would be entitled to a remedy in terms of the dispute resolution mechanism set up by the then Labour Relations Act.

The facts of the *Blue Ribbon Foods* case were that one Gonyora, an employee of Blue Ribbon Foods, had found alternative employment after he had noted an appeal against the decision of the labour relations officer (“**LRO**”) who had granted permission for his dismissal, but before such appeal had been heard. The appeal before the LRO had eventually succeeded. However, because Gonyora had found alternative employment the RHO had ordered reinstatement only up to the time he had found the alternative employment. Blue Ribbon Foods took the decision of the RHO on review to this court. One of the grounds of review was that the RHO had lacked jurisdiction to deal with the matter because Gonyora had taken up alternative employment elsewhere. Having lost in this court Blue Ribbons Foods took the matter on appeal to the Supreme Court. The appeal succeeded. It was held that although Gonyora had taken up alternative employment elsewhere and had therefore ceased to be an employee of Blue Ribbon Foods nevertheless his rights as employee had existed up to the time he had noted his appeal against the decision of the LRO. Once that right had vested in him Gonyora had been entitled to an order from the RHO. At pp 151 – 152 of the judgment, McNALLY JA said:

“Gonyora’s rights as an employee existed at the time he noted his appeal against the decision of the Labour Relations Officer. He was entitled to a full re-hearing in terms of s 17 of SI 368/85, as read with s 15 of the same Statutory Instrument. Once that right vested he is entitled to an order, whether or not his status is subsequently altered. Obviously reinstatement would not at that stage be a viable option, but an order that back-pay be paid up to the time of the termination of employment could be made in terms of s 111 (2)(a) of the Act.”

The *Blue Ribbon Foods* case was decided in 1993 under the then Labour Relations Act. Since then this Act has undergone numerous changes. The issue of vested rights of ex-employees is put beyond issue in s 13 of the current Act. It reads:

“**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 –
2. is dismissed from his employment or his employment is otherwise terminated; or
3. resigns from his employment; or
4. ………………………………….
5. …………………………………..

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 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.”

In the circumstances, in no way could the respondent have mounted an objection to the registration of the award on the ground of a breach of the public policy of Zimbabwe based on an alleged lack of jurisdiction by the arbitrator by reason of the termination of the contract of employment between the parties. But that is not the end of the matter.

The second set of grounds in paragraph (b) of sub-article (1) of article 36 in the Schedule to the Arbitration Act on which this court can refuse the recognition of an arbitral award is if the recognition or enforcement of that award would be contrary to the public policy of Zimbabwe. In this connection the respondent referred to a number of cases that have dealt with the test to be applied in determining whether or not an award would be in conflict with the public policy of Zimbabwe. The cases are *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S); *Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZLR 81 (S); *Francina Zimayi* v *Burdock Investments (Pvt) Ltd and 2 Ors* HH-64-07.

According to the test as set out in the *Maposa* case, (per GUBBAY CJ, at pp 465 – 466):

“An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside. Under article 34 or 36, the court does not exercise an appeal power by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.”

Curiously, respondent made no reference to sub-article (3) of article 36. It gives some examples of aspects that would plainly be perceived as being contrary to the public policy of Zimbabwe. It reads:

“(3) For the avoidance of doubt and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if –

1. the making of the award was induced or effected by fraud or corruption; or
2. a breach of the rules of natural justice occurred in connection with the making of the award.”

Responded did not make out the case that by invoking the test in the *Maphosa* and other cases it felt that its situation fell outside the example in article 36(3). But obviously it was not the respondent’s case that the making of the award in the case between itself and its ex-employee had been induced or effected by fraud or corruption. It was also not its case that the *audi alteram partem* rule had been breached.

On the other hand, where the contract of employment between the parties provided: “*[i]n summary, as a revenue earning employee, you will be paid 30% of all revenue earned over and above your basic salary*” and the arbitrator ruled that the applicant was entitled to 30% of the revenue earned by the respondent during the relevant period, I saw no “*faultiness or incorrectness*” that constituted “*a palpable inequity*” in the arbitrator’s reasoning or conclusion. I saw nothing “*so far reaching and outrageous in its defiance of logic or accepted moral standards*”. I saw nothing that “*a sensible and fair minded person*” would consider a misconception of justice in Zimbabwe. I saw nothing intolerably hurtful. In short I saw nothing contrary to the public policy of Zimbabwe.

In the premises I dismissed the respondent’s objection and granted the application with costs.

*Kantor & Immerman*, applicant’s legal practitioners

*Dube, Manikai & Hwacha*, respondent’s legal practitioners