SOFT DRINKS MANUFACTURING EMPLOYERS ASSOCIATION
versus
SOFT DRINKS MANUFACTURING WORKERS UNION
and
HONOURABLE M. GWISAI (NO)
and
HONOURABLE G. MAKINGS (NO)

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 23 September 2015

Opposed Matter

T. Mpofu, for the applicant
L Uriri, for the respondent

MATANDA-MOYO J: This is an application for setting aside of an arbitral award in terms of Article 34 (2) (b) (ii) of the Schedule to the Arbitration Act [*Chapter 7:15*] on the basis that it is contrary to the public policy of Zimbabwe. The applicant attacks the award on four grounds namely:

‘(1) That the Arbitrators failed to give reasons for their decision;

(2) That the award results in a palpable inequity;

(3) That the arbitrators failed to properly apply their minds to the issues and to give regard to the evidence which was placed before them; and;

(4) that the award was not impartial;

Failure to give Reasons

Counsel for the applicant argued that the arbitrators failed to give reasons for their decision. He argued that a closer look at the arbitral award shows that the arbitrators engaged in a mediation exercise and did not adjudicate over the matter. That explains why the decision is not explained. There is no explanation on why they increased salaries by 10% and not by any other margin.

On the other hand counsel for the first respondent argued that reasons for decisions were given. He referred me to page 59 of the record para (vi) which reads:

> "Both arbitrators felt that the respective position of both parties were not triable and that some movement from the last demand and the last offer on the table needed to be made. Finding common ground as to where that movement should be, to come up with an award that in the opinion of the Arbitrators is suitable in this dispute was not an easy task, but in order to come up with an award both Arbitrators were prepared to put their signatures to the following was agreed. The basis on which these figures were arrived at was a combination of looking at the need to pay somewhere near the PDL while at the same time not overburdening the respondent with increases that could not be met in the current climate".

The underlined is what counsel for the first respondent termed adequate reasons for the decision. I do not agree. The Arbitrators were enjoined to explain their decisions more so as to be understood, not only by the parties but by anyone reading the award. In *BHP Billion Ltd* v *Dil Basins Ltd* (2006) VSC 402 Justice Hargrave set aside an arbitral award on the grounds that it did not disclose adequate reasons and thus constituted a manifest error of law. The Model Law contains a requirement that an arbitral award must stipulate the reasons on which it is based. The Model Law does not provide for the setting aside of an arbitral award on inadequate reasons. Article 34 (3) provides:

> "The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given".

This provision can be compared to the provision of s 29 of the Commercial Arbitration Act which requires that an award shall be "in writing" and "include in the award a statement of the reasons for making that award". In *Oil Basins Ltd* v *BHP Billiton Ltd and Ors* (2007) VSCA 255 the court said:

> "And in point of principle, there is not a great deal of difference between that idea and the imperative that those who make binding decisions affecting the rights and obligations of others should explain their reasons. Each derives from the fundamental conception of fairness that a party should not be bound by a determination without being apprised of the basis on which it was made. So in arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has been given. To that extent, the scope of an arbitrator's obligation to give reasons is logically the same as that of a judge".

The court was looking at a situation where the arbitrator had legal training. The court did not look at situations where an arbitrator may be chosen due to his expertise in a particular trade or calling and has no legal training. In that scenario all that is expected is nothing more than basic identification of issues and reasoning from the evidence to the facts and the facts to the conclusion. I am of the opinion that reasons of a judicial standard are not required. An award simply requires a statement of factual findings and other reasons which led the arbitrator to make such finding.

In *NSSA* v *Chairman, NSSA Workers Committee and Ors* HH 51/02 the court was of the view that the failure of the award to comply with Article 31 (2) of the Model law did not make it a nullity. The appropriate remedy was to approach the court for an order for mandamus. The court was also of the view that failure to state reasons did not mean the arbitrator had not applied his mind to the issues. The arbitrator made a decision halfway between what was claimed by the workers and what was offered by the employer. This was found not to be far reaching and outrageous in its defiance of logic or accepted moral standards that it could not be accepted by a sensible, fair-minded person. Generally our courts are reluctant to set aside arbitral awards. The *locus classicus* appears in *ZESA* v *Maposa* 1999 (2) ZLR 452 (5) where the Supreme Court held that the setting aside of arbitral awards on the basis of being contrary to public policy should be interpreted restrictively so as to limit the scope of setting aside arbitration awards.

See also *Pioneer Transport (Pvt) Ltd* v *Delta Corporation Ltd & Anor* HH 18/12 and *Chanakira* v *Mapfumo* 2010 (1) ZLR 178.

Counsel for the applicant referred me to various cases which dealt with the undesirability of a judicial officer in making a decision without giving reasons. Various cases have reiterated that such failure to give reasons subjects the decision to criticism of being arbitrary, unreasonable and illogical. I agree with such submission but I do not agree that failure to give reasons should result in nullification of the process. As reiterated above applicant has the right to seek detailed reasons from the arbitrators. Herein the arbitrators tried to strike a balance between the two parties competing interests that is trying to match employees' salaries to the poverty datum line and at the same time not over burdening the employers with increases that would be difficult to maintain, consideration having been taken of the current economic circumstances. The applicant could only argue that reasons were inadequate not that no reasons were given.

The applicant also argued that the arbitral award should be set aside as it produces a palpable inequity, whose effect is to conflict with the public policy of this country. Counsel for the applicant referred me to the case of *Telone (Pvt) Ltd* v *Communication and Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 H where it was held that:

> "In assessing the award, it is inevitable that one has to consider the substantive effect of the award and determine whether or not it is contrary to public policy in its effect. One can conceive of the many examples given by Gubbay CJ in Maposa's case *supra* and many more. In *Pamire & Ors* v *Dumbutshena NO* 200(1) ZLR 123 (H), this court held that it was against public policy to grant to a party, in spite of its failure to meet all its obligations under the contract as it would violate the elementary notions of justice.

> There is no doubt in my mind that the spirit of collective bargaining between the employers and employee is to arrive by consensus or, if that fails, by arbitration, at what a fair wage is. The idea is to preserve the employer- employee relationship. The employee makes his labour available for a fee .. an award that plunges the apple cart over the cliff could act, in my view, not to be said to be in the best interest of the general good of Zimbabwe."

The applicant argued that it's members lack the capacity to effect the award. It is the applicant's submission that once its established that the award produces this inequity, it should be set aside.

The first respondent on the other hand argued that there has been no evidence placed before the court establishing such inequity. In order to establish such inequity this court should have regard to the evidence placed before the arbitrators.

I do not agree with the submissions by the first respondent's counsel. The applicant herein is challenging the award itself and it is permissible to bring such evidence before court to show that such award is contrary to public policy. The mere fact that such evidence was not placed before the arbitrators is irrelevant. The first respondent had ample opportunity to challenge the averments in the applicant's affidavits but chose not to. This leaves applicant's evidence uncontroverted. Without evidence to the contrary I am of the view that the applicant has shown that the award has the potential of sending members of the applicant insolvency. In *Zimbabwe Posts (Pvt) Ltd* v *Communication and Allied Services Workers Union* HH 60/14 the court held that;

> "The substantive effect of the arbitral award upon the applicant - never mind the awarded increments were not substantial- would be to drive it into insolvency, with the inevitable consequence of liquidation with massive loss of jobs for all its employees …. Certainly this would constitute a palpable inequity and the conception of justice in Zimbabwe would be intolerably hurt by this substantive effect of the award. That the award would be viewed as being in conflict with the public policy of Zimbabwe would be beyond cavil"
> See also *Affretain (Pvt) Ltd & Another* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S).

Lastly the applicant argued that the arbitrators were biased in their approach to the matter. The arbitrators themselves admitted that they were largely influenced by their backgrounds-the arbitrator chosen by employees was largely influenced by employees interest and the other chosen by employers' interest. The applicant's counsel referred me to the case of *Masedza and Ors* v *Magistrate Rusape & Anor* 1998 (1) ZLR 36 (HC) where the court held;

> "If an allegation of bias has been proved the proceedings are a nullity"

Counsel for the first respondent argued that there is no evidence supporting the allegations of bias. The applicant has the onus to prove bias and has failed to do so.

The test of bias has been discussed in the case of *Leopard Rock Hotel Co (Pvt) Ltd and Anor* v *Wallen Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S). Kosah J at p 273 G-H quoted with approval Lord Goff in *R* v *Gough* (1993) 2 ALLER 724;

> "But it is not necessary that actual bias be proved; and in practice the enquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand….These include….cases in which a member of the tribunal has an interest in the outcome of the proceedings which falls short of direct pecuniary interest. Such interests may vary widely in nature, in their effect and in their relevance to the subject matter…Each case falls to be considered on its own facts"

The test to be applied is an objective one. Applying such test to the present matter I am of the view that the applicant has failed to prove bias. The mere fact that one of the arbitrators had a background which favours employees and the other employers is not the bias envisaged by law. The parties chose the arbitrators well aware of such backgrounds and cannot be allowed to use such information which was in their domain at the onset of the proceedings to prove bias. There being no proof of bias the matter ends there.

In conclusion I am of the view that the award offends the public policy of Zimbabwe in so far as it failed to consider the financial effects of the award on the applicant.

In the result the award constitute a palpable inequity contrary to the public policy of Zimbabwe.

In the result it is ordered as follows:

The award is set aside with costs

Wintertons, applicant's legal practitioners
Makuwaza & Associates, 1st respondent's legal practitioners