

NELSON DZIRUTWE
versus
DAIRIBOARD ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 10 March 2016 and 27 April 2016

Opposed Matter

ZT Chadambuka, for the applicant
AK Maguchu, for the respondent

MTSHIYA J: This is an opposed application for the registration of an arbitral award. The actual relief sought reads as follows:

“IT IS HEREBY ORDERED THAT:-

1. The arbitration award attached hereto and granted in favour of the applicant on the 15th September 2015 be and is hereby registered as an order of this honourable court.
2. The Respondent be and is hereby ordered to pay the Applicants **US\$60 563-00 (Sixty thousand Five hundred and sixty three dollars only)**.
3. Respondent shall pay costs of this application at a higher scale if it opposes the application but if it does not oppose the application each party to bear its own costs.

The above award (the second award) was preceded by another award dated 18 November, 2010 (the first award). The first award read as follows:

- “1. That the employee was underpaid and he must be paid a total of \$38 295 as underpayment during the period 1999 to 31 August 2010.
2. That the employee was not paid productivity incentive for quarter two and three and hence must be paid the same totaling \$3 273-04.
3. That there was constructive dismissal when the employee tendered his resignation letter and he must be reinstated on his job without loss of salary and benefits and if reinstatement is no longer tenable to be paid damages amounting to \$41 040.
4. That in total he be paid \$82 608-04
5. That the employee be allowed to purchase the vehicle he was using in terms of the company vehicle.

6. That he be allowed to stay in the company house and in (sic) an event that the employer (sic) found reinstatement no longer tenable he only vacate the same after at least half of his benefits are paid.”

The brief background to this case is that on 15 June 2010, the applicant, who was then employed by the respondent as a Human Resources Officer, tendered his resignation in the following terms:

“I think I have had enough of your disciplinary threats which have become a health risk to me since I took over office responsible of Chipinge and Mutare as Human Resources Officer East in 1999. In culmination of these threats, I am now permanently living on drugs to manage low hypertension.”

The respondent later alleged that he was constructively dismissed and had not received all his benefits. The matter was placed before an arbitrator who came up with the first award reproduced above.

For the proper determination of this case, it is important to note that, in the first award, the arbitrator ruled that there was constructive dismissal when the employee tendered his resignation letter and ordered his reinstatement to his job without loss of salary and benefits. He also ruled that if reinstatement was no longer tenable, the respondent was to be paid damages amounting to \$41 040-00.

On 17 December 2010, the applicant appealed to the Labour Court against the arbitrator’s award (the first award). However, pending the appeal, the applicant reinstated the respondent. It, however, turns out that the respondent never tendered any services to the applicant upon reinstatement.

Notwithstanding the non rendering of services, a dispute again arose relating to payment of salary upon reinstatement. On 15 September 2015 the arbitrator, in the second award, recorded the dispute in the following terms:

“The claimant was employed as a Human Resources Officer by the Respondent and sometime in 2010 claimant resigned and went to claim constructive dismissal against the Respondent. The matter was heard by a Labour Officer who later referred the case for arbitration. The arbitral award was in claimant’s favour which ordered reinstatement or payment damages in lieu of reinstatement. Respondent opted for reinstatement but has not given claimant work despite him being available and also neglecting paying his salary. Which prompted the claimant to approach the Labour officer to register a complain (sic) of unfair labour practice against the Respondent and conciliation did not achieve anything and the case was referred for arbitration.

It is important to restate that, in finding in favour of the respondent, the arbitrator, in the first award, ruled that there was constructive dismissal. The above passage confirms the ruling in the first award. Reinstatement was ordered because a finding of constructive dismissal had been made.

However, on 11 December 2015, the Labour Court, upon hearing the appeal filed on 17 December 2010, declared that there was no constructive dismissal. The operative part of the Labour Court Order reads as follows:

- “1. The appeal be and is hereby upheld.
2. The matter be and is hereby referred back to the same Arbitrator to receive evidence and make proper assessment of the productivity bonus and underpayments within thirty (30) days of this order.
3. There was no constructive dismissal.”

The above order of the Labour Court remains extant.

When parties first appeared before me on 3 March 2016, Advocate *Chadambuka*, for the applicant, applied for a postponement so that he could study the judgment of the Labour Court dated 11 December 2015 and assess its impact on the present application. This arose when Mr *AK Maguchu*, for the respondent, had informed the court that the applicant’s appeal in the Labour Court had succeeded.

In my view, Mr *Maguchu* was correct in submitting that the success of the appeal in the Labour Court effectively set aside the first award. Apart from that, Mr *Maguchu* also raised the issue that the applicant was not properly before the court because it had approached the court through a chamber application instead of a court application. He also argued that the award was a nullity because, in the main, it offended public policy and could not therefore be registered.

As for the format of the procedure followed in filing this application, I believe the interests of justice dictate that the court uses its discretion by invoking r 229 C which provides as follows:

- “Without derogation from rule 4C but subject to any other enactment, the fact that an applicant has instituted -
- (a) A court application when he should have proceeded by way of a chamber application; or
 - (b) A chamber application when he should have proceeded by way of a court application;
Shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that-
- (i) Some interested party has or may have been prejudiced by the applicant’s failure to institute the application in proper form; and

- (ii) Such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs” (My own underlining for emphasis)

No prejudice was suffered in *casu*.

Although no procedure is laid down under s 98 (14) of the Labour Act [*Chapter 28:01*] with respect to how an application for the registration of an arbitral award is to be made to this court, the High Court has, as a matter of practice, always demanded that the other interested parties be served with the application. In *casu*, without any directive from this court, on 27 October 2015, the applicant served the application on the respondent’s legal practitioners. Any possible prejudice on the part of the respondent was therefore avoided and hence the filing of opposing papers on 2 November 2016.

Whilst I fully agree that rules of court must strictly be adhered to, I take note of the fact that the law has, in the interest of justice, seen it fit to temper with the rigid application of that principle. Accordingly there is merit in invoking r 229 C. The point in *limine*, raised by the respondent, regarding the procedure adopted the applicant in approaching the court, therefore falls away.

In seeking to have the award declared a nullity, the respondent dwelt at length with proceedings before, the labour officer, arbitrator, and the Labour Court. It is true that this court cannot just rubber stamp decisions of lower courts/tribunals. However, in registering awards or orders of those tribunals, the High Court does not assume a review or appeal role. In the main, this court only determines whether or not the award is registrable. In doing so it satisfies itself that the award does not violate the laws of the state, is extant and remains enforceable against the other party.

The Arbitration Act [*Chapter 7:15*] (the Act) enables a party seeking to have an award set aside to do so. It sets out the grounds available to the party seeking to set aside an award. Article 34 of the Act provides as follows:

“ARTICLE 34

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 –

(a) the party making the application furnishes proof that –

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or
- (ii) 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; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

[subparagraph amended by Act 14/2002]

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law;

or

[Subparagraph amended by Act 14/2002]

(b) the *High Court* finds, that –

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of *Zimbabwe*; or
 - (ii) the award is conflict with the public policy of *Zimbabwe*.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the and or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The *High Court*, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.
- (5) 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) the making of the award was induced or effected by fraud or corruption; or
 - (b) a breach of the rules of natural justice occurred in connection with the making of the award.

Indeed, if in *casu*, the respondent felt the award offended public policy, the above law allows it to have the award set aside. There is no such application before the court. However, as already indicated, the setting aside of the award has already been done by another court of law, namely the Labour Court.

I totally agree with the applicant that:

- (a) The appeal was based on the first award; and
- (b) The registration applied for relates to the second award.

However, I do not agree that the Labour Court leaves the second award, the award sought to be registered, intact. The Labour Court set aside the first arbitral award. The second award is grounded on the first award. The Labour Court, as already stated, dismissed the first award and actually pronounced that: “There was no constructive dismissal.” That pronouncement meant that the relief of reinstatement was never available to the respondent and confirmed his resignation with effect from 31 August 2010. The matter, in my view, ends there in that there is no ward to be registered.

It is common cause that the reinstatement, pending appeal, did not result in the payment of any salary. However, the dispute relating to that issue is not for determination by this court. That issue does not arise in *casu* because this is not an appeal or review application. The law demands that the Labour Court Order of 11 December 2015 be complied with. In my view, that order, which remains extant, sets aside both the first and second awards. The two awards cannot be delinked. There is therefore, nothing for registration before this court.

Given the circumstances of this case, where I believe the applicant genuinely thought the awards were totally separate, I do not think it would be fair to order costs on a higher scale.

The application is dismissed with costs.

Chambati Mataka & Makonose, applicant’s legal practitioners
Dube, Manikai & Hwacha, respondent’s legal practitioners