

OBADIA GIYA  
versus  
RIBITIGER T/A TRIANGLE TYRES

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 4, 15 December 2015 & 13 January 2016

### **Opposed application**

*C Kwiriri*, for the applicant  
*Ms M Kenende*, for the respondent

CHITAPI J: The applicant seeks an order for the registration of an arbitral award granted by the arbitrator on 24 April, 2014 in a labour matter dealt with under the Labour Act, [*Chapter 28:01*]. The application is made in terms of s 98 (14) of the Labour Act. The respondent has opposed the application.

When the matter was initially set down for hearing on the opposed roll on 4 December, 2015, *Ms Kenende* for the respondent was barred in default of filing of heads of argument in terms of r 238 (2) (b) of the rules of this court. Consequent upon the bar being in operation, *Ms Kenende* could not be heard on the merits. She made an oral application in terms of r 84 (b) of the rules for upliftment of bar. She explained that she had encountered difficulties with accessing the file after the respondent's representative had taken away the file and did not return it with all documents pertaining to the case. She also submitted that she faced challenges of communication with the respondent's representative because of language barriers, the respondent's representative being Chinese.

Rule 84 (1) (b) allows a party who has been barred to make an oral application at the hearing of the matter for the removal of the bar and the court in its discretion may allow the application on such terms as to costs and otherwise as it thinks fit. Rule 84 (1) (a) provides for the barred party to make a formal application for the upliftment of bar. The rules prior to amendment No 33/96 required that a barred party files a court as opposed to a chamber application for upliftment of bar.

The bias of the court in preferring that applications for upliftment of bar be made formally in terms of r 84 (1) (a) is based upon the considerations which are taken into account in determining whether a bar should be uplifted or not. The considerations or factors which are taken into account cumulatively are based on the requirement that the applicant should show good or sufficient cause for the removal of the bar. These considerations entail providing a reasonable or satisfactory explanation for the default coupled with showing that the applicant has a *bona fide* case or defence. The application for upliftment of bar is therefore not there for the giving. Whilst a *bona fide* case or defence may appear *ex facie* the filed pleadings, the same cannot be said of the explanation for the default which is a factual consideration. Being a consideration based on a factual explanation, the explanation would have to be a sworn one for it to carry weight. The barred party would have to give sworn testimony which for practical purposes would be done by deposing to an affidavit to which the respondent responds by affidavit. Short of this, the applicant would then have to give sworn oral evidence with the respondent doing the same in rebuttal hence turning application proceedings unnecessarily into action proceedings. I have used the word unnecessarily because in terms of r229B, the court or judge may permit or allow the giving of oral evidence if it is in the interest of justice to hear such evidence in any application. If one however considers the provisions of rr 226 and 227, applications are generally made in writing, be they court or chamber applications except for applications made during the course of a hearing. Lest, I am misunderstood as laying a rule that in oral applications for upliftment of bar, r 229 B may be utilized, an applicant who may seek to test the waters will do so at his/her risk because the reference in r 226 to applications “made orally during the course of a hearing” presuppose that these would be ones made during a hearing on the merits.

By contrast in an application to uplift the bar, such an application cannot be said to be made “during the course of a hearing” because a barred party cannot be heard in the application in which a bar is operational until it is uplifted. Therefore it would be a misnomer to hold that an application for upliftment of bar would be covered under the situation envisaged in s 229 B where evidence can be lead at the discretion of the court. In my view r 229 B should be read as referring to applications being heard on the merits and not TO applications in which the applicant will be seeking condonation for non-compliance with the rules so that the applicant is then heard on the merits.

Notwithstanding, the general approach of this court to prefer that a party who intends to have a bar uplifted should make a formal chamber application in terms of r 84 (i) (a), I

granted the application made orally in terms of r 84 (1) (b). I was persuaded to grant the application because Mr *Kwiriwiri* for the applicant did not oppose the application. He could have moved the court to deal with the application in terms of r 238 (2) (b) in terms of which the application should have been dealt with on the merits without the respondent's heads of argument or referred the matter to the unopposed roll. Mr *Kwiriwiri*'s attitude which I found to be informed and progressive was motivated by the fact that he wanted the matter determined to finality without unnecessary hurdles which would lead to delays caused by a further application and/or appeals which would be concerned with technicalities of procedure to the prejudice of his client who wanted to enforce the arbitral award as his uppermost aim.

In granting the application, I then ordered the respondent to file its heads of argument by 9 December 2015 and postponed the matter to 15 December, 2015. I further made an order that if the respondent failed to file its heads of argument as ordered, I would proceed to deal with the matter in terms of r 238 (2) (b) and determine the application on the merits without the aid of the respondent's heads of argument. The respondent subsequently filed its heads of argument as ordered on 9 December, 2015.

On 15 December, 2015 I heard the parties in argument. Mr *Kwiriwiri* adopted his heads of argument and submitted that the duty of this court was not to determine the validity of the award but to register it for enforcement purposes. He added that the respondent had not appealed against the award to the Labour Court which was the competent court to which appeals by parties dissatisfied with arbitral awards granted in terms of the Labour Act, should appeal. Ms *Kenende* submitted that she abided by her heads of argument and had nothing meaningful to add to them.

Sections 98 (14) and 98 (15) of the Labour Act provide as follows:

- “(14) Any party to whom an arbitral award relates to may submit for registration, the copy of it furnished to him in terms of section 13 to the court of any magistrate which would have 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 magistrate court, the High Court.
- (15) Where arbitral award has been registered in terms of subsection (4) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court”.

Before dealing with the respondent's opposition, it is important that I outline the functions of the Magistrates and High Court *vis-à-vis* the provisions of s 98 (14). There have been a number of decisions of this court which have dealt with the matter. Despite the many decisions which legal practitioners should surely be aware of, the court continues being called

upon to repeat itself. There is no need to continue to test the waters because the position of the law is well settled and only a change in legislation will make this court change its approach.

I can do no better than repeat the instructive analysis of Chiweshe JP in deciding an application for registration of an arbitral award in *Vasco Olympio & 4 Ors v Shomet Industrial Development* HH 191/12, a case also cited by Mr *Kwiriwiri*. The Judge President stated as follows on p1 of the cyclostyled judgment.

“.. The registration of an arbitral award does not in any way affect the substantive rights of the parties concerned. The purpose of registration is merely to facilitate the enforcement of such an order through the mechanism availed to the High Court or the magistrate court, namely the office of the Deputy Sheriff or the messenger of court, respectively. Thus, whether registered or not, an arbitral award remains binding on the parties who may fulfil its terms even in the absence of registration. Where one of the parties is reluctant to fulfil his obligations in terms of the award, the legislature through s 98 (14) of the Labour Act, has provided for its registration with those clothed with the power to enforce judgment in order that the aggrieved party may through the powers given to such courts, enforce the award.

In an application such as the present one, this court is not required to look at the merits of the award. All that is required of this court is that it must satisfy itself that the award was granted by a competent arbitrator, that the award sounds in money, that award is still extant and has not been set aside on review or appeal and that the litigants are the parties, the subject of the arbitral award. There must also be furnished, a certificate given under the hand of arbitrator validating the arbitral award.

.....

For as long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no basis upon which this court may decline its registration.

See also *Tapera and 17 Ors v Field Spark Investments* HH 103/13, *Brian Muneka & 5 Ors v Manica Bus Company* 2013 (1) ZLR 81, *Dhlomo-Bhala v Lowveld Rhino Trust* 2013 (2) ZLR 179, *Ndlovu v Higher Learning Centre* HB 10/86”.

It would appear to me that where the requirements for registration have been met as set out in the decided cases which I have adverted to, registration of the award becomes a formality. It is more of a clerical function and one hopes that the legislature will review s 98 (14) in a manner it sees best so that this court is not saddled with applications for registration of arbitral awards for purposes only of enforcement. Whilst the legislature’s intentions were obviously noble, the unfortunate result which has come to pass is that most respondents against whom arbitral awards have been granted default in satisfying them and there has been a proliferation of applications for registration to enable enforcement. Such applications have met with spurious defences leading to courts having to hear fully fledged applications unnecessarily and yet what the legislature really intended was to enable a party holding an

arbitral award to utilise the services of the Deputy Sheriff or Messenger of Court who can only act upon the issuance of writs authorised by the court. Under the present set up, the Labour Court cannot issue writs of execution to enforce its judgments or orders for payment of money.

In the present application, the background to it is that the applicant and respondent had a dispute concerning non-payment of wages and unlawful dismissal determined by the Arbitrator in terms of the Labour Act. The Arbitrator found in favour of the applicant and subsequently quantified damages *in lieu* of reinstatement which he ordered the respondent to pay to the applicant. The quantification award was issued on 24 April, 2014. The date of arbitration is shown as 9 September, 2013. The operative part of the award reads as follows:

“Award

In light of the above, I make the following disposition that claimant be paid:

Back Pay (December 2009 – November, 2011)	= US\$6 849.00
Notice Pay	= US\$1 098.00
Cash in lieu of leave	= US\$ 793.00
Damages in lieu of reinstatement (2 years’ salary at \$401.00)	= US\$9 624.00
Total	<u>US\$18 364.40</u>

The respondent is ordered to pay this in two installments starting 30 May, 2014. The last installment to be paid by 30 June, 2014.

I so award

M Darikwa  
ARBITRATOR”

In his founding affidavit, the applicant averred that the respondent had refused or neglected to pay the quantified amount despite several requests. He stated further that it was proper and expedient for the award to be registered with this court so that the respondent could be compelled to comply with the award. The applicant attached as annexures to his application the following documents:

- (a) Form L.R.9 headed “Certificate in Terms of s 98 (13) of the Labour Relations Act”.

The certificate reads as follows:

“In terms of section 98 (13) of the Labour Relations Act, I hereby certify that the attached arbitration award is a true copy of the award issued by me on 2 November 2011 (date) in the matter involving Obadiah Giya and Ribit Tigers t/a Triangle Tyres (parties to the dispute). And that the award is registrable with the Magistrates/High Court. Name of arbitrator – M Darikwa: Signature of Arbitrator (signed) Date: 02/ 11/2011 Place: Harare.”

The form is on p 7 of the applicant's papers. The applicant does not say anything with regards the said form, its significance or what it is. The applicant further annexed form LR 4 and marked it Annexure "A". The form is headed NEC FOR THE MOTOR INDUSTRY..... Reference to Arbitration. The form is completed by a Mr Dururu and addressed to the Honourable Memory Darikwa. Mr Dururu is described as Chief Designated Agent and Honourable Memory Darikwa is described as the arbitrating authority. The said annexure appears on p 8 of the applicant's papers and refers to the two parties dispute which dispute is recorded as "alleged non-payment of wages and unlawful dismissal". It also lists 3 issues for determination which I will not repeat. The form is not dated. In para 5 of his founding affidavit, the applicant states:

"5. The arbitral award was granted on the 24 April 2014 a copy of which is attached hereto as Annexure "A" in the amount of US\$18 364.40"

In the index to the application the applicant lists as item 4, arbitral award pp 7-17. Under item 7 he lists the assumption of Agency by Kwiriwiri Law Chambers pp 23-24: Annexure "A". I have already indicated that on p 7 is a certificate in terms of s 98 (13). I have also commented on form LR4 at p 8 which is marked Annexure "A". On p 9 of the applicant's papers appears a document headed form LR7: Arbitration Award. At the top of the form it is written SI 217 of 2003. The form reads: three copies of this form shall be completed by the arbitrator concerned of which –

- (1) One copy shall be retained by the arbitrator
- (2) The others shall be served on the parties to the arbitration.

"Name, designation and address of arbitration

M Darikwa - Designated Agent  
NEC for Motor Industry  
77 Central Avenue  
Harare

Name and address of parties to matter in dispute

Obadiah Giya	vs	Ribi Tiger t/a Triangle Tyre
12a Nelson Mandela Avenue		c/o Tavenhowe & Machingauta
Harare		2 <sup>nd</sup> Floor, ZTA House
		95 Nelson Mandela A
		Harare

Date on which matter heard..... (not completed and left blank)

Issue(s) in dispute

Quantification of Damages in lieu of reinstatement.

Award by arbitrator(s)

Find Attached."

The form LR7 is franked with an NEC Motor Industry date stamp bearing the date 2014/04/24. On pp 10 – 17 appears the award which I have commented upon and endorsed thereon is the date of arbitration as 9 September, 2013 and the date of award as 24 April 2014.

The applicant's presentation of its case and bunching of documents without referring to or explaining them or their relevance in this matter has simply provided me with a dog's breakfast or dinner where I am supposed to formulate an opinion on what the applicant really intends to prove. I refuse to do this because it is not the court's function to make out a case for a party. Whilst a judge should not complain as a public servant about what lands on his plate (see *Esther Mawanyisa v Eneti Jumbo and Others* HH 3/2010, *Morris v Morris and Another* HH 71/2011). *Tetrad Holdings Ltd v SIZY Security (Pvt) Ltd and Others* HH 258/2015 where the applicant presents his case in such a shoddy manner that the judge cannot make sense of the documents even if he was to attempt to tidy the mess, the applicant should not cry foul if his case is dismissed. It is in any event trite that in an application, the applicant's case succeeds or fails on the papers that he falls to make out or prove his case for the relief he seeks.

I would have granted the application in this case but for the shoddy presentation of the case. The applicant's legal practitioner approached the case very casually and in a perfunctory manner. The presentation shows a cavalier, casual and careless approach. This court is a superior court of record which entails *inter alia* that all proceedings it deals with are recorded, open and available to the public and may be published unless the court has ordered that there be no publication. The applications filed before the court as with the present one therefore are open to public scrutiny. If one were to scrutinize the present application, it presents a sad indictment on the legal profession and the approach of legal practitioners to their work.

The applicant in this matter failed through carelessness to present a simple matter chronologically. Form LR9, the certificate issued in terms of s 98 (13) of the Labour Act is a prerequisite to an application for registration of an arbitral award in terms of s 98 (14). The court before registering the award must be satisfied that the award it is being asked to register is the authentic award which the arbitrator granted. In *casu* the certificate form LR9 on page 7 refers to an award issued by the arbitrator on 2 November 2011, yet in his founding affidavit the applicant seeks the registration of an award issued on 24 April, 2014. There is no corresponding certification of the award as required by s 98 (13). Section 98 (13) is very clear

that the arbitrator should submit to the parties copies of his award duly certified by him. I do not read anywhere on form LR7 on p 9 of the applicants' papers nor on pp 10 – 17 to indicate or satisfy me that there has been certification of the award that I am being asked to register. I do not know if it is authentic or genuine. Even if the applicant were to state on oath that the award is the correct one, this would not be sufficient because s 98 (13) requires that the arbitrator submits certified copies. The provision is peremptory.

In passing, I note that the respondent has sought to oppose the registration of the award by delving into the merits of the award arguing that the Arbitrator's decision was wrong as she should have found that the applicant was not an employee but an independent contractor. The respondent had further sought to argue that the application for registration of the award was premature because it had been filed on 20 June 2014 and yet the period for payment given by the arbitrator was expiring on 30 June 2014. I will not detain myself dealing with the merits because in respect of the first ground of opposition, the remedy available to the respondent would have been to file an appeal to the Labour Court whilst with respect to the second ground, the issue raised becomes academic because I have ruled that the application is a shambles and not compliant with the provisions of the Labour Act with regards to requirements of registration.

It leaves me to deal with the issue of costs. The respondent's opposition is not based on sound or valid grounds in law and the determination of this application did not derive from issues raised in the notice of opposition. If anything the respondent owes it to the court for noting the discrepancies and deficiencies in the applicant's papers and cannot blow a trumpet that it has won the case. It appears to me that a proper order with regards to costs is the one which I will give hereunder.

I therefore dispose of this application as follows:

The application is hereby dismissed with no order as to costs. It is so ordered.

*Kwairiwiri Law Chambers*, applicant's legal practitioners  
*Tavenhave & Machingauta*, respondents' legal practitioners