

RICHARD MATTHEWS
versus
CASTER INTERNATIONAL (PRIVATE) LTD

HIGH COURT OF ZIMBABWE
CHATUKUTA, J
HARARE, 29 March & 26 July 2017

OPPOSED APPLICATION

T Chagudama, for the applicant
K Kachambwa, for the respondent

CHATUKUTA J: The applicant is an ex-employee of the respondent. A dispute between the applicant and the respondent was referred for arbitration. On 28 June 2012, Justice Smith issued an arbitral award in favour of the applicant. The award set the amounts due to the applicant as salary for August 2007 and severance package in the sum of US\$7 000.00 and US\$42 000.00 respectively. The applicant was also awarded cash-in-lieu of leave. However, the amount due was not quantified in the award. The applicant filed an application in 2012 under case number HC 11614/12 seeking the registration of the arbitral award. The application was dismissed with costs on 19 August 2015 on the basis that the arbitral award, in so far as it related to payment of cash-in-lieu of leave, was not sounding in money. The award was not severable and therefore not capable of registration. The applicant referred the matter to Justice Smith for quantification of the award. On 13 October 2015, the arbitrator amended the award with the addition of the amount due as cash-in-lieu of leave in the sum of US\$ 26 329.55.

This is an application for the registration of the amended award. The draft order reads:

“1. The arbitral award issued on 28 June 2012 by Arbitrator L G Smith and as amended by his award of 13 October 2015 be and is hereby registered.

2. The Respondent shall pay net of PAYE the following amounts:-
 - a) US\$ 7 000.00 being Applicant's salary for August 2007.
 - b) US\$ 42 000.00
 - c) US\$ 26 329.55 being cash in lieu of leave.
3. The Respondent shall pay interest on the above amounts from the date of registration of the award to the date of full payment.
4. The Respondent shall pay the costs of this application."

The applicant contended that P.A.Y.E was required to be deducted from the award as the award arose from his employment with the respondent. The amounts awarded were therefore deemed to exclude P.A.Y.E. The applicant abandoned this argument and sought an amendment to the draft order with the deletion of any reference to P.A.Y.E in paragraph 2 of the draft. The abandonment was, in my view, proper as the award issued by the arbitrator did not include any reference to P.A.Y.E. Consequently, it serves no purpose to consider the arguments by both parties on the issue.

After the abandonment of the question of P.A.Y.E, the application was opposed on the ground that it was contrary to public policy as envisaged in Article 36 of the Model Law in the Arbitration Act [*Chapter 7:15*]. The respondent submitted firstly, that the arbitrator did not have the jurisdiction to render the arbitral award. In terms of Article 33 of the Model Law, he could only interfere with his award upon request by either party within 30 days of the issuance of the order failing which he could only do so with the consent of both parties. The award was handed down on 28 June 2012. The amendment was effected on 15 October 2015, over three years later. The respondent did not give its consent to the amendment. The arbitrator was *functus officio*. The award was therefore a nullity and not registrable. Secondly, it was not clear which order the applicant sought to be registered, the award issued on 28 June 2012 or the amendment of 15 October 2015. Thirdly, the claim for cash in lieu of leave had prescribed and that the award not being an order of court and having been issued on 28 June 2012 had superannuated.

In response, the applicant submitted that he had met the requirements for registration of the award. The application before the arbitrator was not for the amendment or correction of the award issued on 28 June 2012. The arbitrator therefore had jurisdiction to proceed with the quantification. It was for quantification following the decision by MAFUSIRE J in case number HC 11614/12 that the award was incomplete. The amount due as cash-in-lieu of leave was common cause as it would be derived from a pay slip issued to the applicant by the respondent. The award that was sought to be registered is apparent. It was the award issued

on 28 June 2012 as quantified on 13 October 2015 following the decision by MAFUSIRE J in HC 11614/12. The claim had not prescribed as a determination had been made by the arbitrator and the applicant had been awarded cash in lieu of leave. The entitlement of the applicant to cash-in-lieu of leave had been asserted and determined. Only the quantification thereof remained which quantification was supposed to be common cause.

There is a prethora of decisions of this court that deal with the requirements for registration of an arbitral award as set out in s 98 (4) of the Labour Court Act [*Chapter 28:01*]. (See *Greenland v Zimchre* HH 93/13, *Tapera v Fieldspark (Pvt) Ltd* HH 102/2013, *Nssa v Mandiringa* HH 98/2005, *Mvududu v Agricultural and Development Authority (ARDA)* 2011 (2) ZLR 449, *Samudzimu v Dairibord Holdings Ltd* 2010 (2) ZLR 357. In *Mvududu v Agricultural and Development Authority (ARDA)* BHUNU J (as he then was) remarked at 451 F – 452 B that

“The respondent is resisting the registration on the basis that the applicant cannot seek to enforce a judgment he has appealed against. There are two cardinal issues for determination in this application. The first issue is whether the applicant is automatically as a matter of right entitled to register an award upon satisfying the conditions specified in s 98 (14) of the Act. In order to qualify for registration all what an applicant has to do is to satisfy the court that:

- a) He is a party to the arbitral proceedings.
- b) The award relates to him.
- c) The copy he is presenting for registration has been duly certified by the arbitrator in terms of subs (13).

Once the applicant has satisfied the above three requirements he is entitled as of right to register the arbitral award in terms of s 98 (14) as read with subs (13).

Any opposition to registration is therefore limited to showing that the applicant has not satisfied anyone or more of the three prescribed requirements for registration.”

In fact, the respondent referred with approval in paragraph 22 of its supplementary heads of argument to the following remarks of CHIWESHE JP in *Samudzimu v Dairiboard Holdings Ltd* (*supra*) at 360D-E that:

“Accordingly, 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 registration of the same.”

It is my view that the three requirements for registration, with an additional requirement that the award must be extant, have been met in the present application. It is not in issue that all the issues raised by the respondent in the present application are issues that it raised before the arbitrator. The arbitrator deliberated on the issues and made a finding that

they all lacked merit. The course of action available to the respondent ought to have been to challenge the decision of the arbitrator on appeal. It failed to do so and it is an abuse of court process for the applicant to circumvent that process by raising the same issues through the back door. Both parties rightly submitted that in the event that this court was to decline to register the award, the same would remain extant. The respondent would still be required to comply with the award. The submission by the respondent that the award is extant is inconsistent with its submission that the award is a nullity. In any event, it is surprising that the respondent has not taken the initiative to take the appropriate action to challenge the award. Its inaction and its opposition to the registration of the award is clearly an attempt to avoid the unavoidable.

The question of cash-in lieu of leave has been resolved by the quantification by the arbitrator. The respondent has not appealed against the award or sought its setting aside.

It is accordingly ordered that:

1. The Arbitral Award issued by Justice Smith on 28 June 2012 and fully quantified 13 October 2015 be and is hereby registered as an order of this court.
2. The respondent be and is hereby ordered to pay costs.

Atherstone & Cook, applicant's legal practitioners
Messrs Dube, Manikai & Hwacha, respondent's legal practitioners