

TENDAI MUKURUVA
versus
HONOURABLE MS E MAGANYANI
(ARBITRATOR)
and
SPORTS & RECREATION COMMISSION

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 28 October 2016, 1 November 2016 & 8 February 2017

Opposed Matter

W Muchengeti, for the applicant
Z T Chadambuka, for the 2nd respondent

DUBE J: The relief sought in this application is that of a declaratur. The applicant is a former employee of the Sports and Recreation Commission, (hereinafter referred to as the Commission). He was employed as a Sports Development Officer. His application is based on the following facts. Sometime in the year 2010, the Commission which is the second respondent, commenced disciplinary proceedings against him on allegations of fraud in terms of its code of conduct. The dispute was referred to a labour officer for conciliation. A certificate of no settlement was issued resulting in the dispute being referred to arbitration. The applicant elected to have the dispute referred to a government arbitrator and a government arbitrator, Mr. Mawodza was appointed. He did not become aware of this fact until at a subsequent stage. The applicant avers that the Commission managed to have the arbitrator removed and the first respondent an independent arbitrator was appointed in his place. When the applicant realized this fact, the arbitral proceedings had already commenced.

When the arbitration commenced, the applicant enquired about the status of the arbitrator. He says that he remembers that the arbitrator said she was a government arbitrator. He participated in the process which began on 29 May 2012, thinking that the first respondent was a

government arbitrator. It was only in April 2015 that he realised that the first respondent was an independent arbitrator and that Mr. Mawodza had originally been assigned the task and was later removed. On 7 May he wrote a letter to the arbitrator citing the irregularities. The first respondent proceeded with the determination of the dispute and recommended the applicant's dismissal.

The applicant takes issue with the fact that an independent arbitrator was appointed in place of a government arbitrator as agreed and replaced Mr. Mawodza without his knowledge and consent. He alleges that there was collusion between the appointing authority and the respondent to appoint an independent arbitrator. The applicant contends that the first respondent did not have the mandate to act and hence had no jurisdiction to deal with the dispute, which fact renders the proceedings conducted incurably bad. The arbitrator was receiving payments from the Commission only. He contends further that a real likelihood of bias exists. He maintained that the appointment was irregular and was occasioned unilaterally and without due process of law. The applicant seeks an order declaring the award of the first respondent null and void. He seeks an order in the following terms;

Terms of the Order Sought

IT IS DECLARED:

- 1) That the arbitral proceedings conducted by the first respondent be and are hereby declared null and void and that consequently, the applicant is still in the second respondent's employ.
- 2) That the respondents shall pay the costs of suit on the attorney client scale jointly and severally, the one paying the other to be absolved.

The second respondent, henceforth referred to as the respondent, took up four points *in limine*. The respondent argued that the labour officer who appointed the first respondent as an arbitrator, the appointing authority, has an interest in the proceedings and ought to have been joined to these proceedings. The respondent made the following submissions. There are serious allegations of corruption levelled against the officer. The order sought if granted would have the effect of invalidating the act of the labour officer. A party cannot be allowed to challenge an

exercise of administrative powers and insist that it need not cite the party that exercised that power. The respondent contended that the failure to cite the appointing authority is a fatal irregularity to the application. The second point relates to the jurisdiction of this court. The respondent submitted that the matter before the court is a labour matter which ought to be dealt with by the Labour Court, which court has exclusive jurisdiction over labour matters in terms of s 89 (1) of the Labour Act. It contended that the applicant is trying to rig the matter into the court's jurisdiction by calling this application one for a declaratory order, when it is in fact a matter for review. The respondent also argued that the applicant is challenging his dismissal through a disguised application for a declaratory order. It insisted that the applicant should have pursued the remedies of either review or appeal in the labour court system.

The respondent challenges the declaratory order sought on the basis that it raises factual issues. It contended that declaratory relief should raise specific rights. The respondent avers that various averments about the appointment of Mr. Mawodza were made and not substantiated. The averments are speculative and amount to hearsay evidence and should be struck off. The court was asked to strike out paragraphs 8 to 10 and 7 to 18 of the applicant's founding affidavit. Lastly, the respondent took the point that the applicant's challenge fails to comply with the time lines prescribed by the Arbitration Act, [*Chapter 7:15*], hereinafter referred to as the Act. The respondent submitted that Article 13 (2) of the Act provides that a challenge related to appointment of an arbitrator should be made within 15 days of the discovery of the facts giving rise to that challenge. The applicant failed to comply with the time limits laid out. The respondent argued that he applicant had notice of the status of the arbitration via an invoice dated 30 March 2015 delivered to him. He does not say when he received the invoice. The applicant carried on with the arbitration without comment or complaint, only to suddenly decide to challenge the appointment of the arbitrator after conviction and when submissions had already been made.

On the merits, the respondent confirmed that the applicant wanted a government arbitrator to preside over the disciplinary hearing to ensure an expeditious settlement of the dispute. The respondent submitted that he was advised that there was a serious backlog at the time and that it was going to take about a year for the government arbitrator to be assigned to their matter. The respondent wrote to the Principal Labour Officer concerning the delay in

finalization of the matter and appealed for appointment of a private arbitrator. The applicant did not object to the appointment. The respondent offered to pay all the costs of the arbitrator. An independent arbitrator was appointed and the applicant was aware of this fact. A pre-hearing meeting was arranged and no challenge was raised concerning the independent arbitrator's appointment. The respondent maintained that it had no role in the appointment of the first respondent and that the appointment was above board. The respondent refutes that the parties agreed that a government arbitrator be appointed to preside over the disciplinary hearing. The applicant insisted on a government arbitrator. The respondent is not aware how Mr. Mawodza was appointed to determine the dispute.

In response to the preliminary points, the applicant submitted that the appointing authority is not a necessary party as the order sought does not affect him. He submitted that this court has original *jurisdiction* in any matter and hence can deal with the declaratory order sought. On the issue regarding the appointment of Mr. Mawodza, he submitted that it is a fact that Mr. Mawodza was appointed and then substituted. The question regarding whether it was A or B that was appointed instead of C is immaterial. He maintained that no material dispute of fact exists on the papers and that it does not change what his argument is about, thus, whether the arbitrator was properly appointed. On the point related to failure to comply with prescribed time limits, the applicant submitted that Article 13 (2) of the Act applies only if one intends to challenge the arbitration which the applicant is not doing. The applicant submitted that the respondent makes the assumption that sometime in April was more than 15 days from the date the applicant made the challenge. The applicant contended that it has not been shown that the applicant failed to meet the requirements of Article 13.

Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5 Ed, p 1428, defines a declaratory order as,

“An order by which a dispute over the existence of some legal right or obligation is resolved. The right or obligation can be existing, prospective or contingent and no specific consequent relief need be claimed.”

Section 14 of the High Court Act, [*Chapter 7: 06*] provides for a declaratur. Section 14 reads as follows:

“14 High Court may determine future or contingent rights

The High Court may, in its discretion, at the instance of any person, inquire into and determine an existing future or contingent right or obligation, notwithstanding that, that person cannot claim any relief consequential upon such determination.”

Section 14 gives the High Court power to entertain, existing, future, contingent rights or obligations. It provides for declaratory relief. In *Mushoriwa v Zimbank* 2008 (1) ZLR 125 (H), the court held that the power to grant declaratory orders is specific to the High Court and that the Labour Court has not been specifically empowered to issue declaratory orders. Further, that the power of the High Court to issue declaratory orders in labour matters has not been ousted by statute. Another case in point is the case of *Agribank v Machingaifa* 2008 (1) ZLR 244 (SC) where the court said the following of the court’s power:

“The High Court’s inherent jurisdiction to grant declaratory orders in labour matters has not been ousted. The only issue for determination was whether the case was a proper one for the exercise of the discretion under s 14 of the High Court Act. The fact that the dispute could well have been determined in the Labour Court was not the determining factor.”

It is now settled that the Labour Act, [*Chapter28:01*] does not make specific provision for the Labour Court to entertain applications for declaratory orders. The Labour Court has no jurisdiction to issue declaratory orders. The High Court exercises such powers by virtue of its inherent and original jurisdiction. The High Court will exercise its power in all civil matters in Zimbabwe unless its power is expressly ousted. The jurisdiction of the High Court to deal with applications for declaratory orders in labour matters has not been ousted. The power of the High Court to grant declaratory relief extends to labour matters. A party who has a labour dispute who is in search of declaratory relief is entitled to approach the High Court for such relief.

The next enquiry is the propriety of the declaratory relief sought. In *Johnson v AFC* 1995(1) ZLR 65(H) the court at p 77B, dealt with the requirements of a declaratory order and stated as follows:

“Firstly the applicant must satisfy the court that he is a person interested in an existing future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it.”

The court made it clear that a litigant seeking a declaratory order must firstly satisfy the court that he has an interest in an existing future or contingent right or obligation. He must have a direct and substantial interest in the subject-matter of the suit. It is only after a court is satisfied that these requirements have been met, that the court may proceed to consider if there is a proper

case for the court to exercise its discretion in the matter in deciding to refuse or grant the order sought. Whilst this application is presented as an application for a declaratory order, the grounds raised in support of the application are for review. It is trite that bias, impartiality and unprocedural appointment are all grounds of review. The applicant is challenging procedures adopted in appointing an arbitrator and the manner in which the arbitrator conducted himself. The applicant is not asking the court to declare rights or the law. He asks the court to declare facts. The application is misplaced. The applicant ought to have approached the Labour Court for review. This application fails on this point alone. However, I wish to explore some of the points raised by the respondent.

The first respondent was appointed by the Principal Labour Officer. The applicant seeks an order declaring the arbitral proceedings conducted a nullity on the basis that he was irregularly appointed. The issue before the court is capable of resolution without reference to the appointing authority. The Principal Labour Officer has no real and substantive interest in the issues to be determined. The appointing authority if cited would only be a nominal respondent and would not be expected to respond to the application. It is likely that he would, if cited, abide by the court's order. No remedy is sought against the Principal Labour Officer. The order sought does not affect him. There was no need to join the appointing authority, to this application. Citation of the Principal Labour Officer may have been convenient but it was not necessary. The failure to give the Principal Labour Officer is not fatal to the proceedings.

Article 12 (2) of the Arbitration Act, [*Chapter 7:15*] makes provision for one to challenge an arbitrator and provides grounds for bringing such a challenge. An arbitrator may be challenged where there are justifiable doubts as to his impartiality, independence or if he does not possess the qualifications agreed to by the parties. Independence refers to issues concerned with the relationship between the parties and the arbitrator. Impartiality on the other hand, has to do with the arbitrator's correlation with the elements of the dispute. The grounds provided are widely framed. The intention must have been to ensure that all manner of challenges against an arbitrator likely to arise are covered by these grounds. A litigant who is aggrieved by the appointment of an arbitrator can make an application to have him disqualified, for as long as the challenge raises grounds outlined in Article 12. The mischief behind the article is not to address the merits of the dispute under arbitration. The article deals with appointment of arbitrators and

challenges thereto. It provides for challenges to the office of an arbitrator only. A separate procedure for challenging an award is provided for in Article 34, which provides for recourse against an award. Article 12 as a whole strives to achieve transparency, independence, impartiality of arbitrators and efficacy of the arbitration process.

The applicant challenges the appointment of the arbitrator on the ground firstly that he was irregularly appointed. He also asserts that there was collusion concerning the appointment and further that the arbitrator is biased. An arbitrator is required to conduct arbitration proceedings fairly and impartially. Any party who is in doubt about the arbitrator's objectivity and, fairness, independence and impartiality is entitled to challenge the arbitrator. The applicant's concerns have a bearing on the impartiality and independence of the arbitrator. The challenge falls within the ambit of Article 12.

Article 13 provides a procedure to challenge an arbitrator. It reads as follows:

“Article 13

Challenge to Procedure

- (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
- (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”

Article 13 provides a challenge procedure for disqualification of an arbitrator. Article 13 (1) provides that the parties may agree on a procedure to be adopted in a challenge against an arbitrator. In the absence of an agreement over the procedure to be adopted, the procedure provided for under Article 13 (2) applies. A written statement must be made to the arbitral tribunal within 15 days of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), outlining the reasons for the challenge. The arbitral tribunal is required to rule on the challenge. Any party who is aggrieved by the arbitrator's ruling may request the High Court to decide on the challenge within 30 days after receiving notice of the decision or ruling in terms of Article 13 (3). The High Court may, on good cause shown, set aside the ruling or confirm the ruling. The time limits set in Article 13 are binding. A party who

is unhappy with the appointment of an arbitrator and knowingly fails to bring the challenge within the prescribed time frame loses his right to bring the challenge.

On 8 May 2015, the applicant's legal practitioner delivered a letter raising concerns about the appointment and conduct of the independent arbitrator. The letter records that a preliminary point regarding whether the arbitrator was a government appointed arbitrator or an independent arbitrator was raised at the commencement of the proceedings. It is not clear what the ruling of the arbitrator was. The applicant seems to suggest that he was told that the first respondent was a government arbitrator. The applicant says he is not sure of the position articulated himself. The applicant is not being candid with the court. He would know what the response of the arbitrator was. It is unlikely that the arbitrator would give out that she was a government arbitrator when she was not.

There is an allegation that the arbitrator showed that he was partial to the respondent when it failed to file closing submissions by 20 October 2014 and only did so in December 2014. The applicant alleges that the arbitrator did nothing about the failure to file submissions on time but started to rush the applicant to file his submissions and gave him a deadline. The applicant asserts that this incident demonstrates bias on the part of the arbitrator. The applicant formulated this impression during proceedings and as early as late 2014 and early 2015, that the arbitrator was biased and impartial. He did not do anything until 7 May 2016 when he wrote a letter of complaint. What this letter does is to reveal that the applicant was aware of circumstances giving rise to this application during the arbitral proceedings. Despite the complaint of bias and impartiality, he allowed the arbitrator to carry on with the arbitration process without comment or complaint. The challenge ought to have been brought then. Once aggrieved by the appointment of the arbitrator, the applicant was required to bring the challenge regarding her appointment, to the arbitrator within 15 days of him becoming aware of the appointment. He chose to leave the challenge to the close of the arbitration proceedings. Article 13(2) allows a party aggrieved by the appointment of an arbitrator or other circumstance giving rise to a challenge, to challenge the arbitrator at any stage of the arbitral proceedings. Instead of challenging the arbitrator, he raised his concerns in a letter. He fell afoul of Article 13(2) which requires written submissions to be made to the arbitrator.

This application was only lodged on 12 June 2015. The challenge was misrouted as it ought to have been directed to the arbitrator. Even assuming that this court was the right forum for the challenge, the application was filed way after the 15 days envisaged by the article. The arbitrator was simply not challenged. The applicant seems to be insinuating that he filed a challenge with the arbitrator by way of the letter. Even if it is taken that the letter was infact the challenge, then the applicant should be pursuing his ruling.

An invoice dated 30 March 2015 was delivered after final submissions to the applicant. This was way into the arbitration. The invoice ought to have alerted him of the appointment of the independent arbitrator. The applicant says he saw it but deliberately refrains to say when he saw it. It is reasonable to assume that the invoice was received shortly after this date. He fails to explain why he did not challenge the appointment of the arbitrator at all these stages. It is only after he was convicted that he decided to challenge the appointment of the arbitrator. He was expected to challenge his appointment the moment he realized these anomalies. The applicant failed to assert himself timeously. The applicant fell foul of Article 13 (2) and he cannot cry foul.

A party who knowingly fails to challenge an arbitrator within the time frames stipulated by Article 13 on the basis of the grounds laid out in Article 12 cannot bring such a challenge in the ordinary courts. This is especially so in a case where the parties entered into an agreement over the procedure to be adopted when challenging an arbitrator and timelines are set. When regard is had to the fact that these timelines are provided for in the Act, these timelines bind all courts dealing with arbitration issues. It does not appear that such a failure to meet timelines can be condoned for the simple reason that there is no provision for condonation of late filing of the challenge. A litigant who fails to challenge the arbitrator within the time frame prescribed in Article 13 (2) waives his right to raise the challenge at a subsequent stage. He may not cure the situation by approaching the court under cover of an application for a declaratory order simply because he failed to meet the time limits set in the Act. He must at the outset, take his challenge to the arbitrator. Once this is done, he may be able to approach and request the High Court to determine the challenge, only in terms of Article 13 (2), thus if discontented with the arbitrator's ruling.

The applicant has decided to take a shortcut and pull a quick one. Litigants who are keen to take shortcuts only have themselves to blame when their causes are scorned at. The applicant

misdirected himself by filing this application with this court. The point *in limine* succeeds. It will not be required for the court to delve into the rest of the preliminary issues raised. Ultimately the application fails.

As regards costs, the applicant failed to challenge the arbitrator within the set time in the Act. In order to cure that shortcoming, he decided to have another bite at the cherry and bring the challenge disguised as an application for a declaratur. This sort of conduct amounts to an abuse of court processes. Courts frown at this sort of conduct. Such conduct deserves to be penalized with an order of costs on a higher scale.

In the result, it is ordered as follows:

The application is dismissed.

The applicant is to pay the costs of this application on a client attorney scale.

Muchengeti & Company, applicant's legal practitioners
Gill Godlonton and Gerrans, respondent's legal practitioners