CHAMUNORWA CHIGORA
and
ZVINAMAKONO CHENGETA
and
ALICE MANDAZA
versus
FREDA REBECCA GOLD MINE HOLDINGS
t/a FREDA REBECCA MINE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 21 March 2018

Opposed motion – Registration of an arbitration award

A.K Maguchu, for the applicants
Z. Chandambuka, for the respondent

MUSHORE J: On 9 October 2017, I granted applicants an order registering an arbitral award in terms of s 98 (14) of the Labour Act [*Chapter 28:01*]. The arbitral award had been granted in their favour by the Honourable Arbitrator B. Matongera on 15 January 2016. My reasons for granting the order follow.

The applicants were part of a group of 57 applicants who were owed outstanding salaries and benefits from the respondent. The whole case started because of a labour dispute which had arisen between the applicants and others and the respondent. The applicants were successful in obtaining a first award in their favour, which was initially for the period of March 2010 to January 2011. The applicants then filed a further claim for payment of their back pay for the period from February 2011 to September 2013. The claim was also granted in their favour. What then remained was for the award to be quantified. The claim was submitted to Hon Matongera for quantification resulting in Matongera awarding them awards which when combined amount to US$ 23,806-89. The combined total amount of the award for all 57 applicants were US$ 625 729-50. The present proceedings are for the applicants award in the amount of US$23 806-09 to be registered.

<u>The respondent's position on the merits of this application</u>.

The respondent opposed the registration of the award for many reasons. The respondent submitted that the award is against public policy and in violation of the Arbitration Act [*Chapter 7:15*] and that therefore its registration would legitimize an illegality. The respondents submitted that Article 23 (1) read together with Article 32 (2) (b) of the Arbitration Act provides that once the arbitrator and the parties agree to the period of time within which a claim should be filed, then the arbitral tribunal will terminate the proceedings if the claimant does not communicate his statement of claim within that agreed time. The respondent submitted that in such circumstances, the arbitrator would have no discretion. The respondent understood Article 25 provided that termination of the proceedings would be automatic.

The respondent submitted that if the court agreed with it that the proceedings before the Arbitrator were tainted with illegality that it would be against public policy for this court to condone the arbitrator's actions by proceeding to register the awards.

Further respondent submitted that a registration of the entire award for all 57 employees which amounts to US$ 625 729-00 would lead the respondent into liquidation and that consequently employees who were still employed by the respondent would be rendered jobless.

Finally respondent suggested that the awards could not be registered because that there was a pending appeal in the Labour court against the award made on the 15th January 2016 be set aside.

Applicants points as to the merits.

The applicant submitted that they were part of the first group out of the 57 awardees which had filed its claim in time.

The applicants stated that even if they had not filed their claim in time (which their counsel emphasised was not the case), any such delay would not have been against public policy because the claimants had shown sufficient cause for the arbitrator proceeding to quantify their award, as is borne out by the fact that the arbitrator proceeded to determine the claim. The applicants stated that the respondent never argued that there was insufficient cause for the quantification exercise to proceed.

The above analysis reflects the submissions made by the parties on the merits of the matter.

Points taken *in limine*.

At the hearing, the respondent raised preliminary points.

Firstly that the High Court lacked the jurisdiction to determine the matter because s 98 (14) of the Labour Act provides that an arbitration award may be registered with a Magistrates' Court and that combined with a reading of SI 163/2012 which provides the Magistrates Court with a limited jurisdiction to determine claims of up to US$10 000-00, the registration of first and third respondents awards which are each below the US$10 000-00 mark fall to be determined by the Magistrates Court.

Secondly that because the award was made against Freda Rebecca Gold Mine, which entity was different to the entity being sued in the present proceedings, (Freda Rebecca Gold Mine Holdings), then the present and latter respondent is not obligated at law to pay or to refuse to pay the award. As a result, suggested respondent, applicants could not seek to register the award against the respondent.

Thirdly, that the respondent who is described on the award as FREDA GOLD MINE was not a proper party to the quantification proceedings because FREDA GOLD MINE is a place and not a legal entity; and that therefore it could not be subject to legal proceedings.

Fourthly by reason that the initial arbitrator, one Dangarembizi not completing his task, it was improper for another arbitrator (MANHIRE) to have proceeded with adjudication of the arbitration process. Therefore respondent submitted that the award sought to be registered in the current matter is void.

I will deal with the preliminary points. Firstly respondent submitted that the High Court cannot entertain the current application for want of jurisdiction, and that it is the Magistrates' Court which has the jurisdiction to register the awards which are less than $10,000-00 (1st and 3rd applicant's awards). The point taken is absurdly without merit. It is trite that the High Court "*enjoys original civil jurisdiction over all persons and over all matters in Zimbabwe". *It is an obviously competent court for registration of arbitration awards irrespective of the amount of the award *per* s 13 of the High Court Act [*Chapter 7:06*]. The point fails.

The second point taken regarding the citation of the respondent cannot succeed. In The respondent would like to have the court to accept that applicant's citation of the respondent as "FREDA REBECCA GOLD MINE HOLDINGS", in circumstances where the award was made against FREDA REBECCA GOLD MINE", meant that applicants were not entitled to registration of the award. The suggestion made by the respondent is that the presence of the word "HOLDINGS' in the current citation meant that there were now two distinct entities; one with the word HOLDINGS and the other without. As a result, suggested respondent' registering the award with the current citation was fatal to the application for registration. The point taken

is preposterous. Surely respondent cannot in all sincerity hold this out to be a point with is worthy of the court's circumspection and agreement. In *Nuvert Trading (Private) Limited t/a Triple Tee Footwear* v *Hwange Colliery* HH 791/15, MATHONSI J was faced with a similar issue. In that case the plaintiff sought an amendment of the defendant as cited because it had omitted the word "Limited". Respondent opposed the amendment sought on the basis that "Hwange Colliery Company" did not exist and that plaintiff had sued a non-existent entity. MATHONSI J determined that nothing turned on the mis-description and the omission of the word "Limited". Hwange was recognizable. I am going to borrow heavily from the learned Judge citation of the dicta of WESSELS J in *Van Vuuren* v *Braun and Summers* 1910 TPD 950, in order to demonstrate how meaningless respondent's point is. On p 955 WESSELS J stated:

> "Now in order to bring a defendant legally into court a summons is required. In order that the summons may be valid it must comply with the requirements of r 6. It must purport to be a mere summons, a mere request or a letter to the effect that the defendant is kindly requested to appear in court on a certain day is an invalid citation. Next the summons must specify the defendant. It is true that it will not be described as accurately as he should be. If a man is baptised "George Smith" it is no effect at all to call him "John Smith" because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all in the summons would be a wholly worthless document and could not be amended by inverting the defendant's name in court."

CHEDA J applied WESSELS J's reasoning in the case of *Masuku* v *Delta Beverages* HB 172/12 and stated:

> "*In casu* the entity whom applicant has sued is said to be non-existent. The argument is grounded on the fact that the citation omitted the full description of the respondent. The crucial question that [irresistibly] begs the answer is to what extent does the omission affect the identification of the respondent? Respondent is a well-known blue-chip company whose fleet of cars are all over our national and domestic roads and its commercial advertisements need no introduction. In other words Delta Beverages is known here and beyond. To me, applicant may have technically erred in her description, but has described respondent with sufficient clarity to an extent of eliminating any mistake, either legal or factual of respondent's identity. Applicant sufficiently described respondent".

In the present matter I find that the respondent is splitting hairs. Applicants are very aware of the identification of their previous employer and so too is the court. The point which has been taken here by the respondent is made more absurd because this is a labour matter wherein the applicants are suing their employer. The addition of the word "HOLDINGS" does not transform the respondent into a non-existent entity, neither does the addition render the award which was made void *ab initio* as has been suggested by the respondent. Furthermore, the citation or misdescription emanated from the respondent throughout the arbitration process. It was not created by the applicants. Importantly, none of these objections raised here *in limine*,

were taken throughout the arbitration process and taking into account the futility of the points made, I apprehend that the respondent is trying to postpone the finality of the matter. In the result I find the points taken by the respondent wholly lacking in merit.

Merits

On the merits themselves, respondent's submitted that the award cannot be registered because it is against public policy due to the fact that the arbitrator should have made 'one composite award' and not issued the awards in instalments of two. The criticism levelled against the arbitrator by the respondent is that because the arbitrator made partial awards, the arbitrator thus failed to 'complete the hearing of the matter'; thus rendering the proceedings a nullity. There is no rationale at law which supports such a proposition. In my view, even if it were within the scope of the registering court to examine such an issue, (which scope is denied) the test for arriving at a conclusion that such proceedings are a nullity is whether it can be said that the conclusion reached by the arbitrator was so far removed from the issues or facts being led that it defies logic and is irrational, that it cannot be countenanced as being a judicious decision. In the present matter, the respondent is complaining about MATONGERA's work. MATONGERA presided over the quantification of the award which involved him engaging in simple mathematics on the arbitral award which had been issued by arbitrator KABASA. Accordingly there is no basis in raising any argument relating to an irrational conclusion. After KABASA made the award, the respondent participated in the quantification exercise without objecting to the awards already made.

It should have been obvious to the respondent that the public policy argument it has raised would have only pertained the proceedings relevant to the statement of claim, itself and not the quantification of such a claim. According to *Black's legal Dictionary* 2nd Edition a claim means "facts which give rise to a legally enforceable right or action" and quantification gives right to an award. Articles 23, 25 and 32 referred to by the respondent are only relevant with respect to the timing of the applicants' statement of claim only. ARTICLE 23 reads:

> **"ARTICLE 23**
>
> **Statement of claim and defence**
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> (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider

to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it"

Articles 25 and 32 also do not apply in the present matter because those articles govern the proceedings surrounding the statement of claim itself, and not the quantification thereof.

"ARTICLE 25

Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause—

(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence; the arbitral tribunal may continue the proceedings and make the award on the evidence before it;

(d) the claimant fails to prosecute his claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim"

"ARTICLE 32

Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when—

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4) "

Thus Articles 23, 25 and 32 are irrelevant insofar as the present proceedings are concerned.

There were 57 claimants in total. It would be unrealistic to imagine that all 57 claimants would have provided the arbitrator with a co-ordinated response. It is equally important to understand that it is against the rules of natural justice to penalise some of the claimants who may have met the time deadline, and deprive them of an award just because there were other claimants who were not as organised. The primary procedural safeguards of administrative law find their expression in the twin principles of natural justice: *audi alterem partem* ("*the audi principle*") and *nemo iudex in causa sua* that is, that a public official should hear the other side and that one should not be a judge in his own cause. *Laubscher* v *Native Commissioner, Piet Retief* 1958 (1) SA 546 (A). A failure to observe these rules would be unconstitutional.

In any event, in terms of s 4 of the Arbitration Act the defence of public policy applies only in circumstances where a party to the arbitration proceedings objects to the arbitration taking place *ab initio*. Respondent never raised an objection on the basis of public policy, before the commencement of the arbitration proceedings in preventing the awarding of a claim which may have been contrary to public policy. The present registration proceedings discount the need for the court to look at the merits of the award. Section 4 reads:

> **"4 What may be arbitrated?**
>
> (1) Subject to this section, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.
>
> (2) The following matters shall not be capable of determination by arbitration—
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> (a) an agreement that is contrary to public policy; or
>
> (b) a dispute which, in terms of any law, may not be determined by arbitration; or
>
> (c) a criminal case; or
>
> (d) a matrimonial cause or a matter relating to status, unless the High Court gives leave for it to be determined by arbitration; or………………."

There is no substance in the respondent's attempts at resisting the inevitable and lawful registration of the awards.

Finally, in applications for the registration of an arbitration awards, the court does not enquire into the merits of the application. See *Elvis Ndhlovu* v *Higher Learning Centre* HB 86/10; *Jeremiah Jaja* v *National Employment Council for the Engineering, Iron and Steel industry* HH 100/16.

Accordingly, I find no merit in respondent's opposition to the registration.

In the result, and having heard the parties, I ordered as follows:

1. The arbitral award dated 15th January 2016 issued by the Honourable Arbitrator Matongera in favour of the applicants be and is hereby registered as an order of this court in terms of s 98 (14) of the Labour Act [Chapter 28:01]

2. In terms of the said award, the respondent is hereby ordered to pay the applicants the following amounts:
   2.1.Chamunorwa Chigora US $ 7,368-90
   2.2.Zvinamakona Chengeta US$ 10,283-13
   2.3.Alice Mandaza US$ 6,154-06

3. The respondent shall pay the applicants' costs of suit.

Dube Manikai & Hwacha, applicants' legal practitioners
Gill Godlonton & Gerrans respondent's legal practitioners