

MAIN PROTECTIVE CLOTHES (PVT) LTD

Versus

NIMROD NCUBE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 1 JUNE AND 14 JULY 2022

Opposed Application

P. Madzivire, for the applicant
Respondent in person

TAKUVA J: To say this case has had a tortuous journey is an understatement.

This is an application for condonation of late filing of an application for setting aside an Arbitral Award in terms of Article 34 of the Arbitration Act Chapter 7:15. Both parties travelled an arduous journey to reach where they are today. Numerous judgments by this Court and the Labour Court were penned by different Judges. After a protracted dispute concerning the appointment of an impartial arbitrator to quantify the damages earlier on awarded by Mr M. L. Sibanda, the Registrar of this court was ordered to appoint an Arbitrator from his roll – See HC 1271/19.

After painstakingly going through the background facts, the parties submissions and the legal principles applicable to the issues, the Arbitrator produced a 25 page well reasoned arbitral award that culminated in the following order;

“AWARD”

138. IN LIGHT OF THE ABOVE, I AWARD AS FOLLOWS;

- 138.1 The Claimant is awarded as damages *in lieu* of reinstatement, 36 months salary. This includes back pays and any cash *in lieu* of leave that is applicable.
- 138.2 The rate of pay is US\$202-46.
- 138.3 The Claimant is therefore awarded the equivalent of a total of US\$7 288.56 in damages *in lieu* of reinstatement to be paid in local currency at the interbank rate utilized by the Commercial Bank of Zimbabwe (CBZ) as at the date of payment.
- 138.4 The costs of this arbitration shall be paid by the parties in the agreed ratio being 60% to be paid by the respondent and 40% by the Claimant.”

This Award was granted on 11 December 2019.

Dissatisfied with the Award, applicant herein improperly appealed to the Labour Court. Improper in the sense that that Court had no jurisdiction to determine an appeal from an Arbitrator appointed in terms of the Arbitration Act (Chapter 7:15). It can only deal with appeals from any decision of an arbitrator appointed in terms of section 98 (10) of the Labour Act (Chapter 28:01). In this application the applicant sought to justify its error of law that

caused the delay as reasonable therefore concluding that the delay was not inordinate.

I find this explanation devoid of merit. I am in agreement with MATHONSI J (as he then was)'s characterization of applicant's conduct in the following words;

“Although this might be so, there can be no doubt that the respondent's woes and the untenable situation it finds itself in is self-created. Through a string of errors and poor judgment, the respondent finds itself unable to mount any meaningful contest in this application for registration of an arbitral award issued by an independent arbitrator, M. Sibanda on 14 July 2015, in terms of which the arbitrator ordered the reinstatement of the applicant by the respondent.” (my emphasis) See *Nimrod Ncube v Main Protective Clothing (Pvt) Ltd* HB 212-16.

The applicant which was legally represented simply failed to follow the law that was readily available. Its lawyers chose to act on presumptions. In my view, this does not amount to a reasonable explanation for the delay.

As regards prospects of success, applicant submitted that the prospects of success if the application is granted are high in that the Arbitrator granted an Award sounding in United States Dollars contrary to Public Policy as the Finance Act (No. 2) of 2019, recognised the Zimbabwe Dollar as the official currency and legal tender in all transactions, hence the granting of an Award in United States Dollars is against Public Policy, clearly this falls under the provisions of Article 34 (2) (b) (ii), “the award is in conflict with the Public Policy of Zimbabwe.”

The Arbitrator considered sections 44 C of the Reserve Bank of Zimbabwe Act as read with section 22 of the Finance (No. 2) Act No. 7 of 2019 (the Finance Act) and concluded that;

“From the above definitions, it is my humble conclusion that section 22 (1) (d) and 22 (4) of the Finance (No. 2) Act of 2019 contemplate a situation such as prevailed in *Temprac supra* in which the debt, or obligation was clearly quantified and stated in United States Dollars as at the first effective date, or immediately before that date. That is not the case in the present matter.” (my emphasis)

In casu the damages had not been quantified, stated or expressed in United States Dollars as at 22nd February 2019. Therefore, there was no debt immediately before the first effective date, valued and expressed in United States Dollars. Had that been the case, then quantified damages would have been payable in the local currency, falling squarely within the provisions of sections 44 C of the RBZ Act and 22 of the Finance (No. 2) Act of 2019. I find therefore that section 22 of the Finance (No. 2) Act is of no application to the present matter.

Further the applicant’s submission that it has good prospects of success because the Arbitrator misread or misapplied the provisions of the Finance Act is surprising. I say so because on the question of currency, the Arbitrator found thus;

“136. It is politic to record that the parties agreed in the event that damages sounding in US Dollars were awarded, that payment would be in local currency at the interbank rate utilized by CBZ, the respondent’s bankers, as the date of payment.

137. The parties must be taken to agree that CBZ is an authorized dealer, and that the interbank rate represents the rate at which CBZ as an authorized dealer exchanges the RTGS dollar for the United States dollar on a willing-seller, willing-buyer basis.” (my emphasis)

Unable to shake off the impact of the authorities on the point, the respondent conceded that the Arbitrator correctly awarded damages sounding in US dollars. However, respondent insisted that the rate should be that utilized by the RBZ.

In other words, the contention is that the “correct rate” is the “RBZ” rate. The so called RBZ rate is the auction rate used to sell foreign currency for bidders. Section 4 of the Finance Act refers to the interbank rate. This is the rate used by banks to exchange currencies including CBZ. *In casu*, the “auction rate” is inapplicable.

Accordingly the Arbitrator properly found that the amount should be paid in local currency at the interbank rate utilized by the Commercial Bank of Zimbabwe as at the date of payment. This is in line with the spirit of the Finance Act. In the result the applicant’s prospects of success are certainly not good.

Accordingly, it is ordered that;

1. The application be and is hereby dismissed.
2. The applicant be and is hereby ordered to pay respondent’s costs.

6
HB 192/22
HC 1398/20
XREF HC 184/16
XREF HC 1271/19
XREF HC 996/20

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