THE CITY OF HARARE
versus
HARARE MUNICIPAL WORKERS UNION

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 June 2006

Mr *Mandizha*, for the applicant
Mr *J. Mambara*, for the respondent

Opposed Application

CHITAKUNYE J: The applicant applied for the setting aside of an arbitral award of 13 October 2005 in favour of respondent. The applicant's main ground was that the substantive effect of that award makes it contrary to public policy.

The applicant argued that a proper appreciation of the substantive matter of the award, its substantive effect, its impact on the welfare of the general citizenry of Harare, its impact, inevitably, on the nation, in short, its practical financial, social, political and economic welfare of the capital city, and the nation, makes it contrary to public policy.

The respondent contended that the substantial effect of the award is not contrary to public policy.

Both parties appeared agreed that the major contention regarded the applicant's ability to pay the increased salaries. There is no dispute that the arbitrator gave both parties the opportunity to fully argue their cases before making the determination. In that determination the arbitrator, as acknowledged by the applicant, referred to the need to cater for the welfare of both parties. It is common cause that the respondent was demanding a 330% salary increase. It was instead awarded 120%.

On page 9 of the Award under "Findings" the arbitrator articulated very well how he eventually came to the decision he did. He recognised the need for an employer to award meaningful increments, increments that must be seen to alleviate his employees' hardships. He also recognised the need for employees not to make the sort of demands that the employer clearly

cannot meet. Further on he lamented that 'the fact that' in this case the employer's stance of offering nothing on all but one of the allowances is tantamount to refusing to face the reality on the ground.'

It is thus necessary to ascertain whether the award that the arbitrator eventually made can be said to be contrary to public policy in light of what was presented before him and his analysis thereof.

In their Heads of Arguments it is clear that what constitutes public policy is not clearly defined. It must however be narrowly construed. A number of decided cases were cited.

In *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 AT 465 GUBBAY CJ opined that:-

> "In my opinion, the approach to be adopted is to construe the public policy defence as being applicable to either foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated."

In *Cone Textiles (Pvt) Ltd v Redgment & Others* 1983 (1) ZLR 88 at p 89 the Honourable FIELDSEND CJ stated that:-

> "The starting point is that the parties have chosen to go to arbitration instead of resorting to the courts, they have specifically selected the personnel of the tribunal, and they have agreed that that award shall be final and binding..... It is for these reasons that a court will always be most reluctant to interfere with the award of an arbitrator."

Article 34(2)(b)(ii) of the Model Law which is part of the Arbitration Act 6/96 provides that an arbitration award may be set aside by the High Court only if the award is in conflict with the public policy of Zimbabwe.

Article 34(5)(a) points at what may meet the above as

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

One may also allude to the decision as being repugnant to basic notions of justice, such as to say the arbitrator virtually considered extrinsic factor and not those before him in arriving at his decision.

In this case neither (a) nor (b) above is alleged. Instead it is the substantive effect of the award being contrary to public policy of Zimbabwe.

In *ZESA v Maposa* (*supra*) at page 465 the court accepted that "the substantive matter of the award may also make it contrary to public policy. For example, an arbitral award which, after consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the Public Policy Zimbabwe."

I associate myself with the above view. It is for the applicant to show that some fundamental principle of the law or morality or justice was violated. This is especially so in that in terms of Article 34 and 36 of the Model Law of Arbitration this court does not exercise any appeal power and neither uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. where, however, the reasoning or conclusion in an award goes beyond a mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award then it would be contrary to public policy to uphold it. See page 466 *ZESA v Maposa* (*supra*).

In *Catering Employers Association of Zimbabwe v the Deputy Chairman Labour Relations Tribunal and Another* HH 206/2000 CHINHENGO J emphasized the point when he said that:-

> "Even where the arbitrator made a finding that was erroneous or unreasonable the court should not interfere but it could only interfere if the decision was attended by a gross irregularity or it resulted in a failure of justice."

A perusal of the award in question reveals that the arbitrator carefully considered the interests of both parties as portrayed by the parties before him. The applicant's argument of inability to pay was well considered. There is nothing to faulter the arbitrator's reasoning in this regard. The substantive effect of the award was simply to awake the applicant to the realities of today's economy.

The applicant's argument before this court seemed to be more directed at the category of employees represented by respondent and arguing that respondents should not concern themselves with what is being awarded to other employees or officers of applicant. But surely respondents are entitled to point out that those other categories of employees or officials are getting astronomical salaries which may in fact be eating more into the applicant's revenue than the paltry salaries and allowances the lowly paid workers are getting. Applicant appeared not comfortable to deal with this argument and appeared consent to brush it aside. But surely if you have an entity that pays astronomical salaries to its top heavy management/officers but that same entity is reluctant to pay its lowly paid workers a living wage, can such an entity sincerely cry bankruptcy if ordered to pay its lowly graded workers a meaningful salary. There was simply nothing to fault the arbitrator in arriving at the decision he did given what was placed before him.

I accordingly rule that no meaningful case has been made for the setting aside of the Arbitrator Award.

The application is dismissed with costs.

Mandizha & Company, the applicant's legal practitioners
J. Mambara & Partners, the respondent's legal practitioners