ISDORE HUSAIHWEVHU
and
WALTER MUTOWO
and
FUNGAI ZINYAMA
versus
UZ – USF COLLABORATIVE RESEARCH
PROGRAMME

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 31 August and 20 October 2010

A Moyo, for the applicants
H Mutasa, for the respondent

GOWORA J: This is an application for the registration of an award issued in favour of the applicants under the Labour Act on 30 March 2010. The registration is sought in terms of s 98 (14) of the Labour Act [*Cap 28*01] ("the Act"). The respondent opposes the granting of the relief being sought.

In his heads of argument Mr *Moyo* had as a point in *limine*, submitted that the respondent had been found by the Lobour court to have dirty hands and that this court should also find the same and should not hear the respondent. Mr *Moyo* advised from the bar that the point in *limine* had been abandoned and the matter then proceeded on the merits.

The background to this dispute is as follows: The applicants were employed by the respondent on the basis of written contracts which determined the terms and conditions of their employment. The contracts were then terminated by the respondent and the dispute was referred to N A Mutongoreni, an arbitrator who made an award in favour of the applicants on 31 August 2007. The terms of his award were as follows:

1. First issue in dispute is answered as follows
   The contracts of employment between the respondent and complainants were not terminated in accordance with the provisions of the contracts of employment between the parties
2. Second issue in dispute is answered as follows

Complainants had a legitimate expectation for the automatic renewal of their respective contracts of employment.

3. Third issue in dispute is answered as follows
   Complainants were unfairly dismissed.
4. Fourth issue in dispute is answered as follows
   Contracts of employment should be deemed automatically renewed on the same conditions with effect from 1 July 2007
5. Fifth issue in dispute is answered as follows
   Contracts of employment were unlawfully terminated
6. Sixth issue in dispute is answered as follows
   Complainants must be deemed to be under respondent's employment from the date of the purported termination to the date of this arbitration i.e. 31 August 2007 (being a period of two months).

Aggrieved by the award the respondent noted an appeal to the Labour court which again found in favour of the applicants and dismissed the appeal. The dispute was then referred to another arbitrator for the determination of salaries and benefits payable to the applicants. The arbitrator, Matsikidze, then made an award on 31 March 2010 which is the subject matter of the dispute before me.

The respondent in seeking to oppose the registration of the award, has argued firstly that the award is the subject matter of an appeal in the Labour court and has attached a copy of the Notice of Appeal to its opposing papers. However the respondent concedes in the same affidavit that the noting of an appeal does not suspend the operation of the award.

Section 92E of the Act provides:

1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.
2) An appeal in terms of subs (1) shall not have the effect of suspending the determination or decision appealed against.
3) N/A.

In my view, this section does not require interpretation or amplification. The language is clear and unambiguous and it is probably the reason why Mr *Mutasa* did not dwell on the noting of the appeal either in his heads of argument or in his oral address.

The second issue raised in the opposing affidavit was that the respondent had applied to the Labour court for an order staying execution of the arbitral award. The applicants have attached to the answering affidavit filed on their behalf an order issued by the Labour court on 17 May 2010 refusing the application for an order for a stay of execution. The opposing affidavit did not touch on any other ground for opposing the grant of the order sought before me.

In the heads of argument filed before this court, Mr *Mutasa* submitted that if the award were enforced, the respondent would be practically deprived of a right to challenge the content of the award despite the fact that the respondent is entitled to such challenge. He submitted further that this court is entitled to look into the content of the award itself and in this regard he adverted to the appeals pending in the Labour court. He cited *Pamire & Ors* v *Dumbutshena N O & Anor* 2001 (1) 123 (H). It is a judgment by MAKARAU J (as she then was). The passage referred to me is at p 128 B-C and reads as follows:

> "… To therefore grant the full reward in the absence of complete performance by the second respondent does make justice turn on its own head, in my opinion. It is a violation of Zimbabwe's notion of elementary justice and constitutes a palpable inequity that would hurt the conceptions of justice in Zimbabwe. Justice in Zimbabwe ought to be conceived as fair, even - handed and non discriminatory between the rich and poor. To recognize the award would have the effect of dispelling this notion".

Mr *Mutasa* in pursuing his argument further submitted that in terms of Article 36(1)(b)(ii) this court should refuse to register the award on the basis that it is contrary to public policy. He contended further that once there were unfair provisions in the award that would be contrary to public policy and the award could not stand that test. He argued that the arbitrator had wrongly read the judgments and had ruled that the applicants would be deemed as respondent's employees until their contracts were lawfully terminated.

When Mr Matsikidze determined the level of salaries and benefits due to the applicants he stated as follows:

> "The question I used to ask myself is what- did the Labour court rule in this particular case. Clearly from the paragraph quoted above, the Labour court made it clear that these employees remain employees of the respondent 'until their contracts were lawfully terminated'. The question which naturally follows is: "Are the contracts in question lawfully terminated? The answer is no. In that regard my hands are tied. I cannot alter the judgment of the Labour court. What I can simply do is to interpret or effect its meaning. In that view my task will be to determine salaries and benefits up to the date of lawful termination".

Clearly the status of the employees vis-à-vis their employer was not determined by the arbitrator whose award is before me, but by NA Mutongereni on 31 August 2007 and confirmed by the Labour court on 12 March 2009. The pertinent paragraph in the judgment reads thus:

> "What are the terms and conditions referred to herein? Obviously the arbitrator is referring to the same terms and conditions of the contracts of employment previously signed by the respondents. In those contracts the appellant is obliged to give 90 days notice should appellant intend to terminate contracts due to lack of funding. Therefore paragraph 6 of the award cannot be interpreted to mean what the appellant submitted, that the respondents were only reinstated for two months. The arbitrator was only emphasizing that respondents are deemed to have been in appellant's employment for the past two months. The contracts were renewed for 12 months. I am not satisfied therefore that appellant has complied with the arbitrator's ruling. Appellant has not complied with the arbitrator's ruling as appellant has not re-instated respondents neither has appellant been paying respondents' salaries."

The respondent herein was not happy with the judgment of the Labour court and sought leave to appeal which leave was denied on the basis that it was approaching the court with dirty hands due to non payment of the award by the arbitrator and refusal to re-instate the applicants. The respondent did not seek for leave from the Supreme Court. The judgment of the Labour court has therefore not been set aside. It is trite that a judgment or order of a court is binding on the parties thereto unless and until it has been set aside.

In addition to the above, the respondent has not, in its opposing affidavit set out the facts upon which it alleges that the award is contrary to public policy. Mr *Mutasa* sought for the first time to raise the issue in his heads of argument and not in the affidavit opposing the order being sought. It is trite that facts on which a party relies on should be averred in an affidavit and should not be argued from the bar as that is tantamount to counsel giving evidence from the bar. Mr *Moyo* however did not object and I will therefore lay out the gist of the argument by Mr *Mutasa*.

He contended that the arbitrator had wrongly read judgments and had consequently, ruled that the applicants would be deemed as respondent's employees until their contracts were lawfully terminated. He further complained that the arbitrator had then awarded what he deemed to be arrear salaries and future salaries instead of assessing damages that would result from a finding that a contract had been unlawfully terminated. He submitted that that finding on its own was patently wrong in two respects – firstly that it had never been in dispute that

the contracts were fixed term contracts and that when the Labour court ruled that they were deemed renewed it could not have been for a period exceeding twelve months. He further submitted that the arbitrator has not indicated on the award that he reminded himself or took into account that the applicants had an obligation to mitigate damages. He contended that if an arbitrator ignores or disregards a provision of law such award may not be enforced. For this proposition he referred me to *Delta* v *Omgen* SC 86/07.

In opening his submissions Mr *Mutasa* made reference to Article 36 (1)(b) which enforces a court to refuse to register an arbitral award if the court finds that –

(i) …

(ii) the recognition or enforcement of the award would be contrary to the public policy(police) of Zimbabwe.

This subclause should be read with Article 36 (3) which provides:

> For the avoidance of doubt and without limiting the generality of para (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if –
>
> 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 with the making of the award.

As stated earlier, this defence of public policy was not pleaded by the respondent but even in his submissions Mr *Mutasa* did not mention fraud, corruption or the violation of the rules of natural justice. Paragraph (3) of Article 36 does not however limit the court to these grounds in determining the issue of the defence of public policy. The manner in which I understood Mr *Mutasa'*s argument is that he was alluding to error on the part of the arbitrator.

The question then is whether the alleged error alluded to by Mr *Mutasa* can be such as to cast the award as one contrary to the public policy of Zimbabwe. The meaning of the phrase "contrary to public" was extensively discussed by GUBBAY CJ in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S). This is what the learned CHIEF JUSTICE stated at 465C – 466D:

> "What has to be focused on is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign form would be prepared to recognize and enforce it".

In my opinion the approach to be adopted is construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objectivity 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. This is illustrated by dicta in many cases, of which the following are impressive:

In *Paktila Investment Ltd* v *Klockner East Asia Ltd* reported in (1994) 19 Yearbook of Commercial Arbitration 664, the Supreme Court of Hong Kong remarked at 674:

> "The public policy defence is construed narrowly and I deprecate any the attempt to wheel it out on all occasions. As the US court of appeals for the, second circuit said in *Parsons & Whittemore* v *RAKTA* 508 F 24 969 (2d Cir 1974):
>
> > '… the convention's public defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and public justice. (my emphasis)
> >
> > Similarly, in *Leopold Lazarus Ltd* (UK) v *Chrome Resources SA* (Switz), reported in (1979) 4 Yearbook of Commercial Arbitration 311, the Court de Justice, Canton of Geneva, at 312 underscored that before the defence of public policy can be upheld:
> >
> > > 'There must be a violation on fundamental principles of the Swiss legal order, hurting intolerably the feeling of justice … This exception of public order should not be twisted in order to avoid application of international conventions which are signed by Switzerland and which form part of Swiss law (my emphasis)'"

Finally, in *Remisager Power Co Ltd* (*India*) v *General Electric Co* (*US*) reported in (1995) 20 Yearbook of Commercial Arbitration 681, the Supreme Court of India at 702 concluded that enforcement of an award:

> "… would be refused on the grounds that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".

The difficulty then, is not with the formulation of an appropriate and acceptable test. It is with the application of that test in an endeavour to determine whether the arbitral award should be set aside or enforcement of it denied, on the ground of a conflict with the public policy of Zimbabwe.

I am conscious, as emphasized by Sir Michael Kerr in his article entitled "Concord and Conflict in International Arbitration" published in (1997) 13 Arbitration International 121 at 140 that:

> "In most countries, the spirit of the New York convention has rightly been upheld to require what a US Circuit Court of Appeals has referred to as 'etc general pro-enforcement bias'".

In *casu*, the effect of an enforcement of the arbitral award will be to allow Maposa to take advantage of a position that he deliberately engineered. Counsel for Zesa submitted that this "turns justice on its head' the error of the arbitrator being so fundamental as to make a refusal to set aside the award, or, to permit the enforcement of it, a violation of Zimbabwe's elementary notions of justice".

Mr *Moyo* contended that the failure by the respondent to plead Article 36 of the Arbitration Act would result in the court declining to consider the defence of public policy thus leaving the court to register the award under the provisions of s 98 (14) of the Labour Act. The view I take is that the defence is been provided for in a statute and if indeed the papers that are placed before me establish the defence, it would be an injustice not to afford the respondent the benefit of the defence merely because it was not specifically pleaded but is manifest from the record. If indeed the registration of the award would be contrary to the public policy of this country and there is clear evidence on the record, I would venture to say with respect that the court would have to consider the defence and afford the respondent the protection under the Arbitration Act.

Mr *Mutasa* argued that the arbitrator had awarded arrear salaries and future salaries instead of damages. It seems to me that the import of the defence under Article 34 and 36 is not to imbue the court before whom the award is to be registered or set aside with powers of appeal to determine the correctness of the decision by the arbitrator. This court is not in this instance sitting as a court of appeal to adjudicate the correctness or erroneous nature of the reasoning of the arbitrator. Its task is to consider whether the award by the arbitrator is one that should not be register able having regard to the requirements of Articles 34 and 36 of the Arbitral Act. I am persuaded that an award by an arbitrator is not contrary to public policy merely because the arbitrator was wrong in law or in fact in reaching the conclusion that he arrived at. It is also clear from an examination of the papers that the respondent has not placed before the court the basis upon which it seeks to rely on the defence of public policy under the Arbitration Act. This court would only intervene and uphold the defence of public policy

where it is established that the reasoning or conclusion in the award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable 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; per GUBBAY CJ in *Zimbabwe Electricity Supply Authority* v *Maposa* (*supra*).[1]

The courts in this country have construed the defence of public policy very restrictively so that the objective of finality to arbitration is achieved. It follows therefore that the grounds upon which an award may be set aside or those on which a court may refuse to register the award are very narrow. Whether or not the arbitrator erred is not an issue that should concern this court in deciding whether or not the award should be registered in terms of the statutory provisions providing for registration. The issue to be decided is whether or not the respondent has shown that its registration would be contrary to the public policy of Zimbabwe and in my view the respondent apart from a mere bald statement has not shown that it would be. The respondent referred me to Delta *Operations* (*Pvt*) *Ltd* v *Origen Corporation* (*Pvt*) *Ltd* (*supra*) which re-affirmed the principles that had been set out by GUBBAY CJ in the case of *Zimbabwe Electricity Supply Authority* v *Maposa* (*supra*). He did not advance any cogent argument as to how the authority he cited supported the defence that was proffered on behalf of the respondent. There had been no facts placed before the court on which legal argument supporting the defence could then be premised. In my view the point raised by Mr *Moyo* that the defence had not been pleaded had merit as the defence lacked foundation and could not be advanced further than to argue error on the part of the arbitrator. I find therefore that the respondent has not established that the reasoning by the arbitrator was so outrageous in its defiance of logic and acceptable moral standards as to lead me to conclude that an injustice was done to the respondent. I find, consequently, that registration of the award is not contrary to public policy.

In the premises an order in favour of the applicants as well as costs will issue in terms of the draft.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Kantor & Immerman, respondents' legal practitioners

[1] 465D-E