ZIMBABWE POSTS (PVT) LTD
versus
COMMUNICATION AND ALLIED SERVICES
WORKERS UNION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUTEMA J:
HARARE, 22 October, 2010 & 1 December 2010

Opposed Application

Mr *Kwaramba*, for the applicant
Miss *Njerere*, for the respondent

MUTEMA J: This application is redolent with irregularities. This, understandably, constrained the respondent to raise a number of points *in limine* praying for its dismissal.

The irregularities complained of, which were not fully conceded by the applicant, are these:

1. the application does not comply with R 227(3) in that when it was filed, it did not contain a draft of the order sought;

2. it offends against R 227(2)(d) in that it has more than 5 pages but does not have an index attached;

3. it is unclear whether the application is being brought in terms of Order 32 (ordinary Court application) or in terms of Order 33 (an application for review). Applicant has prefaced its founding papers with a document titled "Court Application" and another titled "Application for Review" both prepared by applicant's legal practitioners on 4 May, 2010 and filed on 17 May, 2010.

4. if it be taken as an application for review, it is fraught with deficiencies in that it fails to comply with R256, 257 and 259 by not citing the arbitrator whose award is sought to be reviewed, by not stating shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and by not having been filed within the stipulated 8 week period. Further, this Court does not have review jurisdiction in respect of arbitration proceedings. On the basis of the foregoing alleged irregularities, the respondent moved the court to dismiss the application with costs on a higher scale.

The gravamen of the application is essentially for the setting aside of an arbitral award. The applicant's legal practitioner while making half-hearted concessions in respect of the above cited irregularities, through skilful manipulation that is not taught in law school but

acquired naturally thereafter, endeavoured to persuade the Court to invoke R 4C(a) and condone the departure from the provisions of the rules flouted.

Regarding the non-attachment of the draft order he insisted that one was attached to the application. He submitted that in any event, when the objection pertaining thereto was raised in the respondent's Opposing Affidavit, one was attached to the Answering Affidavit in case respondent was truthful in objecting. I am not persuaded that respondent would have been that naïve to raise an objection of this nature merely for the "heck" of it if such documents were attached. If that were the sole flouting of the rules the Court would not have any difficulty in invoking R 4C(a). There are numerous others which are more material.

As regards the non-indexing of the application, this was conceded with the qualification that it was subsequently cured by the filing of a consolidated index thereby rendering the initial non-indexing irrelevant. He asked the Court to invoke R 4 and condone the departure from the provisions of the rules in the interests of justice. For the same reason given when dealing with non-filing of the draft order *supra* I am not persuaded to condone. Over and above that that consolidated index being alluded to was not prepared by applicant's legal practitioners but by the respondent's legal practitioners, *ex mero motu*, who are not the *dominus litus*.

Regarding the issue that the application was made using the wrong form of review instead of in terms of Article 34(2) of the Model Law in terms of the Arbitration Act, [*Cap 7:15*], the legal practitioner conceded the error and attributed it to a genuine but mistaken belief of law on his part. This, quite apart from being utterly footling at law, for lawyers are presumed to know the law, the alleged mistake of law is so gross and persistent as to render it not only not genuine but inexcusable.

Here is a terse recital of the legal practitioner's blunders of the law which culminated in the one at hand:

> (a) in what is titled "Application For Review" (p 3), it is stated "TAKE NOTICE THAT on a date to be set by the Registrar, an application will be made for the review of an arbitrary (*sic*) award made by the Honourable Mr Mordecai P. Mahlangu, on the 23rd of February 2010 but received by the applicant on 3 March 2010….. on the following grounds".

Six grounds for the review are then enumerated. The Founding Affidavit clearly deals with an application for review. In spite of being alerted to the irregularities alluded to *supra* by the respondent in the Opposing Affidavit, including the wrong form of the application, the

applicant did not "reck". It remained obdurate in its Answering Affidavit that the application for review was the proper one. In para 4.1. "The long and short of it all is that this is a Court Application for review. This is quite apparent on the papers. The document says it's a Court application and the other defines it as one for review. No magic is required to discern this much".

> "4.2. The basis for the application for review could not have been stated in better terms than what it is in the founding affidavit. In summary and in simple terms, the award is being challenged on the grounds that it is contradictory, it is unreasonable and it offends against public policy"
>
> "4.3. Citing the Arbitrator as a party to the proceedings is not a rule cast in concrete. Such non-joinder is not fatal to the proceedings ….."
>
> In para 5.1. the applicant reiterates that the application was one for review by averring,
>
> "Again I should emphasis (*sic*) that there is no magic in how the grounds for review should be stated as long as they are stated with sufficient clarity to enable the Court to appreciate their substance" (my emphasis).

In para 6 of the Answering Affidavit, the applicant attempts to defend why the review application was filed outside the required 8 week period. It avers that it first filed an application for review in the Labour Court within the 8 week period and alleges that a copy of that application is attached marked 'A'. However, no such copy is attached! After being awakened to the fact that only the High Court had exclusive jurisdiction to set aside an arbitral award made in terms of the Arbitration Act by way of application it then withdrew that application from the Labour Court. It alleges also that a copy of such withdrawal is attached marked 'B'. Again no such copy is attached!

In para 7.1 applicant avers that it believed that "respondent is wrong in its view that the High Court has no review jurisdiction in respect of arbitration proceedings". And in para 8.2 applicant alleges that "our Courts have dealt with applications for setting aside such awards as ones for review".

The foregoing recital displays what I may call an orgy of legal blunders on the part of the applicant's legal practitioner. At the hearing, while conceding that this application should not have been brought by way of review, Mr *Kwaramba* submitted that this Court is perfectly

entitled to condone the use of the incorrect form of application seeking to rely on the case of *Moyo v Forestry Commission* 1996(1) ZLR 173 (a case not cited in his Heads of Argument)

That case does not support the applicant's cause because it was overturned on appeal in the case of *Forestry Commission v Moyo* 1997 (1) ZLR 254. In the earlier case, the point had been made *in limine* that a wrong procedure had been used and that the decision complained of should have been brought on review instead of an ordinary court application. The court *a quo* had held that the relief susceptible to review could be granted even though the proceedings had not been brought under the review procedure provided in the rules. The court had also condoned the delay of over 2 years, although there had been no application for condonation or explanation for the delay. The reason for so doing was that the decision to dismiss the respondent from employment was null and void because of gross procedural irregularities by the disciplinary enquiry and so to dismiss the application would constitute a failure to redress an injustice. The Supreme Court, in overturning the decision of the court *a quo*, held *inter alia* that though the rules of court are not an end in themselves, to be slavishly applied for their own sake, they are there to regulate the practice and procedure of the High Court and, in general, strong grounds would have to be advanced to persuade the court or judge to act outside them.

In *casu* have strong grounds been advanced to persuade the court to act outside the rules? The answer must be perfectly in the negative. The orgy of legal blunders recited *supra* speaks for itself and admits of no other answer.

In spite of it having been pointed out that a wrong format has been employed in the launch of this application, the applicant persevered undaunted in its argument in futility that the application was one for review and that 'No magic is required to discern this much' and that the High Court has 'review jurisdiction in respect of arbitration proceedings'. It was only in the applicant's Heads of Argument that the legal practitioner made an unexplained about turn stating that the application is one in terms of Article 34 of the Model Law, a review *sui generis* to be understood as one for setting aside in terms of Article 34(2)(b)(ii). Article 34(2)(b)(ii) of the Model Law provides that the High Court can only set aside an arbitral award if it finds that the award is in conflict with the public policy of Zimbabwe.

The mere fact that the arbitral award is alleged to be 'in conflict with the public policy of Zimbabwe', as one of the grounds for review in the application *per se* does not imbue the

review application with the nuance to transform it into an application in terms of Article 34 of the Model Law.

That an application under Article 34 of the Model law must be made in terms of Order 32 and not Order 33 of the High Court Rules, 1971 was put beyond doubt by GWAUNZA JA in *Mtetwa and Anor v Mupamhadzi* 2007 (1) ZLR 253(S) at pages 254 G-H and 255 A-C. The words of the learned Judge of Appeal in that case bear useful repetition for clarity. She said,

"It is contended for the appellants that they were perfectly within their rights to file an application for review/setting aside of the decision of the arbitrator in terms of Order 33 r 256 of the High Court Rules since there is nothing in that rule which precluded them from bringing such an application. This contention, I find, has no validity. As discussed below, the Model Law, in its Article 34(1), makes it clear that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) thereof. Specifically, the relevant provision reads as follows:

> "ARTICLE 34
>
> Application for setting aside an exclusive recourse against arbitral award
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of this article" (my emphasis).
>
> The use of the words "exclusive" and "only", in my view, suggest that there is to be no compromise when it comes to an attempt to have an arbitral ward set aside. The application must be made in terms of the provision cited. That provision quite simply and effectively precludes the applicants from filing their application for the setting aside of an arbitral award, otherwise than in terms of paras (2) and (3) of Article 34".

Further, the learned Judge of Appeal also found that the contention that there is nothing in Order 33 r 256 of the High Court Rules that prevented them from making the application in question under that order was misplaced. Article 34, being part and parcel of a statute, the Arbitration Act, should hold dominance over Order 33 of the High Court Rules, which is subsidiary legislation. In any case, so the learned Judge found, the purported application in question failed to satisfy even the provisions of Order 33. Rule 256 of Order 33 makes it imperative by the use of the word "shall", for an applicant to "direct" his application to the person whose decision is to be reviewed, as well as to all other parties affected.

In the instant case, the application, as already pointed out above, was one for review of the arbitral award up until the stage of the applicant's Heads of Argument when a u-turn was made in a vain endeavour to clothe it with a semblance of one made in terms of Article 34 of

the Model Law. Indeed, the respondent avers that there is even an application before this court in case no. 4120/10 seeking condonation for late filing of the review. I did not hear the applicant to dispute this assertion. It goes without quarrel that a wrong form for this application was adopted.

Even assuming that the application were permissible in terms of Order 33 of the High Court Rules it would still fail to scale the insurmountable difficulty besetting it for flagrantly flouting provisions of Order 33. Rule 256 of Order 33 makes it imperative by the use of the word "shall" for an applicant to "direct" the application to, *inter alia*, the person whose decision is to be reviewed, viz the arbitrator. This omission to cite the arbitrator is fatal to a review application. Applicant *in casu* did not cite the arbitrator. In para 4.3 of its Answering Affidavit, applicant lamely tried to defend this omission saying "citing the Arbitrator as a party to the proceedings is not a rule cast in concrete. Such non-joinder is not fatal to the proceedings. In any event the relief sought is against the respondent only". This argument does not hold water for it merely amounts to digging in the ashes.

Further, a review application *in casu* would also have been hamstrung by it being lodged outside the 8 week period permitted by the rules. It also does not state shortly and clearly the grounds for review.

In the result, on the totality of the numerous fundamental irregularities alluded to *supra,* I am satisfied that the application was improperly brought and is ill-conceived. I have no option but to dismiss it with no need to delve into the merits, with costs on the scale of legal practitioner and client. It also behoves me to remark that I hope that Mr *Kwaramba* will not charge his client any fees regarding this aborted application.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners