IN THE LABOUR COURT OF ZIMBABWE **JUDGMENT NO LC/MC/16/14**

HELD AT MUTARE 5TH FEBRUAY 2014 **CASE NO MC/04/13**

& 28TH MARCH 2014

In the matter between:-

DIAMOND MINING CORPORATION **Appellant**

And

FOSTER MUKWADA & 2 OTHERS **Respondents**

Before The Honourable E Muchawa, Judge

For Appellant **Mr H.B.R. Tanaya (Legal Practitioner)**

For Respondent **E Mvere (Legal Practitioner)**

MUCHAWA, J:

Before me is both an application for review and an appeal.

Respondents were in the employ of the applicant/appellant on fixed term contracts since October 2010. The last such contracts were effective from 1 March to 30 June 2012 and were not renewed. Respondents lodged a claim for unfair dismissal alleging that they had a legitimate expectation to be reengaged. That matter ended up before arbitration where the award was in favour of respondents ordering reinstatement and damages in lieu of reinstatement.

The Review Application

In the application for review, applicant has raised the following grounds:

1. That there was gross irregularity in the proceedings and passing of the decision as they were not fully heard. The award was issued after applicant had advised and requested the arbitrator to set down the matter for hearing.
2. The arbitrator seems to have had an interest in the cause or was biased as he decided the matter on the papers without consulting on the need or otherwise, of an oral hearing and proceeded to ignore the request by applicant of an oral hearing. Further the arbitrator served the applicant directly with the award yet applicant was duly represented by legal practitioners.

   Respondents deny all the allegations and aver that the arbitrator followed due process and was not biased. Instead it is argued that this application is nothing short of delaying tactics by respondent.

   Article 24 (1) of the Model Law to the Arbitration Act [Chapter 7:15] provides as follows:

   > *"Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party."*

In casu the arbitrator did not call for an oral hearing but proceeded to issue the award after the filing of a statement of claim, a statement of defence

and a replication . It had been agreed at the pre-arbitration meeting of 31 August 2012 that the parties would in consultation with the arbitrator, decide on the need for an oral hearing.

The timeline as alleged by appellant and not rebutted by respondent was:

i) A pre-arbitration meeting was held on 31 August 2012 at which respondent filed its claim

ii) On 26 September 2012 applicant filed heads of argument

iii) On 21 November 2012 respondents filed a replication.

iv) On 13 December 2012 applicants delivered to the arbitrator a letter requesting an oral hearing.

v) The arbitrator issued out an arbitral award on the 14 December 2012.

I find that the parties never agreed that there would be no oral hearing. The letter requesting the oral hearing is quoted in the relevant sections:

> *"Meanwhile, we note that applicant filed a "Replication" to which is attached certain documentary evidence. That evidence should have been filed with the statement of claim/initial submission. That evidence is challenged by our client, a formal oral hearing of this matter is therefore necessary and we request that the matter be duly set down."*

In the replication respondents made certain factual allegations as follows"

> *"... the following employees were engaged instead of the applicants in the case in casu – Livingstone Buta, Warren Mberi, Serena Godfrey Kusena, Lawrence Kabaira, Muzama Tendai just to name a few. The cited employees and other unnamed were recruited soon after applicant contract termination and some replaced their duties. An inspection in locu buttress this evidence." (sic)*

An oral hearing was clearly necessary as applicant in casu had not had an opportunity to respond to the alleged evidence. The prejudice suffered was

evident at the appeal hearing as respondents led evidence from the bar and were clearly unsure of who of the alleged replacements had replaced which respondent and who the other unnamed replacements were and whom they had been employed in place of. This should have happened at the oral hearing. If it had, then the facts would have been clearly before the court.

I believe it was grossly irregular for the arbitrator to proceed to issue the award without the oral hearing, or at least an explanation as to why it was not necessary in the circumstances. I am particularly disturbed that the arbitrator notes that he held an oral hearing on the 31 August 2012, which however turns out to be the pre-arbitration meeting as further documents were filed thereafter and so reflect.

Applicant alleges bias on the part of the arbitrator. In this, the question is whether facts exist that would cause a reasonable lay litigant or lay observer to think that the presiding officer is biased against him. (See **BTR Industries v Allied Metal Workers Union and Anor** 1992 (3) SA 673). The alleged facts are the arbitrator's failure to establish the need for an oral hearing from the parties, the failure to hold one when requested and failure to serve the award on the applicant's lawyers. My reading of the facts is that there had been no agreed timeline for the filing of relevant papers. The parties generally took up to a month to file papers. By the time the request for an oral hearing was made, the arbitrator had already written the award which was then issued out on the following day. It is therefore reasonable for applicant to think that the arbitrator was biased and would still be so biased if he was to proceed with a hearing in this matter as he would be called upon to review a decision he had already made.

In the circumstances the application for review succeeds so as to give applicant an adequate opportunity to be heard. There is no need to proceed to the appeal in the circumstances.

I therefore order as follows

1. The arbitral award be and is hereby quashed with costs.
2. The matter is remitted for a hearing before a different arbitrator within 60 days of this order.

Mugadza, Chinzamba & Partners, appellant's legal practitioners

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