

**DISTRIBUTABLE (20)**

**ZIMBABWE POSTS (PRIVATE) LIMITED**  
v  
**COMMUNICATION AND ALLIED SERVICES UNION**

**SUPREME COURT OF ZIMBABWE**  
**MALABA DCJ, GOWORA JA & HLATSHWAYO JA**  
**HARARE, JULY 1, 2013**

*T Mpofo*, for the appellant

*L Uriri*, for the respondent

**GOWORA JA:** As a result of runaway inflation and the sliding value of the local currency, in February 2009 the Government of Zimbabwe adopted the multi-currency regime as a mode of conducting financial transactions. Salaries that had been pegged on the local currency lost buying power in the hands of the recipients. It became necessary to renegotiate salaries and benefits across the board with the unions representing the appellant's employees. In *casu* the parties were unable to agree on a minimum wage and allowances. It was resolved to submit the dispute to voluntary arbitration through the Commercial Arbitration Centre.

On 13 January 2010, the Commercial Arbitration Centre in Harare appointed M P Mahlangu ('the arbitrator') to arbitrate the dispute between the parties. After hearing the parties, on 23 February 2010 the arbitrator issued an award in the following terms:

“For the period between 1 May and 31 August 2009, the salary of the lowest earning employee of the respondent company should receive an adjustment of US\$25 in respect of each month, and for the period between 1 September and 31 December 2009 a further US\$25 adjustment should be effected. The effect of this on the lowest earning employee of the respondent is that in total the back-pay payable to him or her will be US\$300. **In doing this I realise that further financial strain will be added to the respondent but believe that this is necessary in fairness to the claimant.**” (my emphasis)

The appellant was aggrieved by the award and on 17 May 2010 it filed a Court Application in the High Court. Attached to the court application under separate cover was what was termed an Application For Review. One of the grounds upon which the review was sought was “that the arbitral award was in conflict with the public policy of Zimbabwe”. (My underlining).

The respondent filed papers in opposition in which it raised a number of preliminary issues on alleged procedural irregularities appearing on the papers. When the matter was heard, the High Court upheld the objections raised by the respondent and on 1 December 2010 the court *a quo* dismissed the application without determining the merits of the dispute. This appeal is against the dismissal.

In the court *a quo*, the respondent relied on the following points *in limine*:

- 1) that the application was fatally defective in that it was not clear whether or not it was a court application or an application for review;
- 2) that in the event that it was an application for review, the application did not comply with the provisions of Order 33 of the rules of the High Court and the court should find that it was filed out of time;
- 3) that if it was a review the arbitrator ought to have been cited as a party to the proceedings;

- 4) that in any event, an arbitral award is not subject to review and the High Court lacks the jurisdiction to review an arbitral award outside the provisions of the Arbitration Act [*Chapter 7:15*], (the “Act”).

In upholding the preliminary issues the learned judge in the court *a quo* said:

“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 HC 4120/10 seeking condonation for the late filing of this 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 was 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. The applicant *in casu* did not cite the arbitrator. This omission is fatal to a review application. In para 4.3 of its answering affidavit, applicant lamely tried to defend this omission saying “citing the arbitrator 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”.

Further, an application for review *in casu* would also have been hamstrung by being lodged outside the 8 week period permitted by the rules. The application does not comply with the requirements for an application for review in that it does not state shortly and clearly the grounds upon which an application for review would be sought in terms of Order 33 of the Rules of the High Court.

The criticism that the learned judge in the court *a quo* placed more emphasis on form rather than substance cannot be denied. It is true that the format adopted in launching

the application does indeed cause confusion. The applicant appears to have merged two applications into one. There is a court application to which is annexed an application for review, thus creating the impression that the applicant to the process is not confident of what form the intended proceedings should take. Nevertheless the application for review lists as one of the grounds of the application that the arbitration award was in conflict with the public policy of Zimbabwe. That is a ground for review which is peculiar to the Arbitration Act and in particular Article 34(2)(b)(ii) of the Model Law incorporated in the Act. To show the confusion under which the appellant's counsel was labouring under, in the answering affidavit it is averred that the application is one for review in terms of the said rules. It was only in the heads of argument that reference was made to the Model Law.

Notwithstanding reliance by the appellant on the Model Law as a basis for the application, the court *a quo* was persuaded to find that what was before it was an ordinary review which had been brought in defiance of the provisions of Order 33 of the rules of the High Court. Order 33 does not set out the grounds upon which a review may be launched. It merely sets out the form an application should take and sets out time limits for bringing such application.

The grounds upon which a review may be brought are set out in the High Court Act [*Chapter 7:06*], in particular s 27 thereof which reads in relevant part:

**“27 Grounds for review**

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
  - (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
  - (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
  - (c) gross irregularity in the proceedings or the decision.

(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.”

An examination of the additional grounds upon which the applicant sought reliance for relief points to those grounds as being an amplification of the first ground rather than grounds of review under Order 33 of the rules of the High Court. None of those grounds are such as contemplated by the High Court Act as being grounds upon which the court could set aside any decision on the basis of its powers of review. The conclusion by the court *a quo* to the effect that what was before it was an ordinary review was therefore a misdirection.

The issue that begs an answer is how the court *a quo* should have dealt with the matter given the apparent confusion that had been created by the appellant in settling its papers. An application must be disposed of on the basis of the founding affidavit. The only ground for review referred to in the affidavit is that the award is contrary to the public policy of Zimbabwe. Granted, there is an averment within the affidavit to the effect that the decision of the arbitrator was irrational but the statement is made in the context of justifying the claim that the award was in conflict with the law. The court *a quo* overlooked the dicta in *ZESA v Maposa* 1999 (2) ZLR 452 (S) wherein GUBBAY CJ stated:<sup>1</sup>

“Certainly, for some reason not easy to comprehend, the application purported to be in the nature of a review to the High Court rather than one brought pursuant to article 34(2)(b)(ii) of the Model Law. Consequently, the ground justifying an order that the award be set aside was specified as “gross unreasonableness in the decision arrived at.” However, one of the particulars given of such unreasonableness was that the arbitrator had erred “in holding that ZESA did not comply with s 13(2) of the code of conduct.” This was to be read in conjunction with the earlier explanatory statement of the chief executive that the application in which Mapos sought an order that the looming disciplinary proceedings be held before an independent arbitrator as opposed to the disciplinary committee of the Board, caused such proceedings to be stayed. When so viewed it seems to me that the complaint by implication, sets out the factual basis for the application to set aside the award as a breach of article 34(2)(b)(ii). This

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<sup>1</sup> At 462 B-E

is how the learned judge understood the contention and I do not think he was wrong. Accordingly, I am not persuaded that the objection raised is valid.”

In my view, these remarks apply with equal force to the facts of this case. The facts as contained in the founding affidavit cried out for the setting aside of the award on the basis that it was contrary to the public policy of Zimbabwe. Here, rather than an implication of the relief being sought, there was a statement identifying the basis upon which the award was being challenged. There was no need for further amplification and the fact that the applicant thereto described the application as one for a review to the High Court did not change the substance of what it was.

The applicant might have been confused as to the form that it was meant to take but the legal principle upon which the award was challenged was clearly stated and identified in the founding papers. The heads of argument filed in support of the application state clearly and succinctly that the challenge to the award was predicated on the ground that recognition of the award would be contrary to the public policy of Zimbabwe. The essence of the application was not lost upon the learned judge who commented that “..... the gravamen of the application is essentially for the setting aside of an arbitral award.” (my underlining.)

It becomes obvious that the learned judge understood the contention of the application and premise upon which it had been brought. It is then difficult to fathom the rationale for refusing to entertain the same on the premise that it was a review to the High Court.

The view I take is that there was no application for review before the court *a quo*. What was filed was an application to set aside an arbitral award under the Model Law. It was for these reasons that we allowed the appeal and issued an order in the following terms:

“It is ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside.
3. The matter is remitted for a determination on the merits by the same judicial officer.”

**MALABA DCJ:** I agree

**HLATSHWAYO JA:** I agree

*Mbidzo, Muchadehama & Makoni*, appellant’s legal practitioners

*Honey & Blanckenberg*, respondent’s legal practitioners