DETERGENTS, EDIBLE OILS, FATS
EMPLOYERS ASSOCIATION
versus
DETERGENTS, EDIBLE OILS, FATS
WORKERS UNION
and
ARBITRATOR P.SHAWATU

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 17 September & 10 November 2021

Opposed Court Application

N.Moyo, for the applicant
1st Respondent in person
No appearance for the 2nd respondent

MUZOFA J: This is an application for setting aside of an arbitral award in terms of Article 34 (2) of the Model Law, in that it is in conflict with the public policy of Zimbabwe.

The applicant and the first respondent are associations in the detergents, edible oils and fats industry. The applicant represents the interests of the employers in the industry while the first respondent represents the interests of the workers. Both parties are a progeny of the Labour Act [*Chapter 28:01*] 'the Act'.

In terms of Part X of the Act the applicant and the first respondent periodically engage on issues incidental to the employment relationship involving the conditions of service, wages, salaries and benefits. In line with the mandate, the parties engaged in wage negotiations for the industry through their National Employment Council. In order to cushion the workers in this hyper inflationary environment, the parties agreed to adopt a US dollar linked wage payable at the prevailing auction rate at the time of payment. They also agreed to a three month negotiation period. However they could not agree on the actual figures and the currency of payment for the housing allowance. As a result a deadlock was declared and the matter was referred to voluntary arbitration.

The parties subsequently appeared before the second respondent whose terms of reference were to determine the following:-

1. The minimum wage for the period July to September 2020

2. Whether or not housing allowance should be paid in hard currency (USD),if so or not ,to determine the appropriate figure for the July to September 2020 period
3. The transport allowance for the period July to September 2020.

Submissions before the second respondent

The first respondent, the claimant before the second respondent's proposal was for a basic wage of US $ 198.00, a housing allowance of US$30.00 and a transport allowance of $22.00.

As a starting point the first respondent anchored its submissions on Article 3 of the International Labour Organisation which advocates for the need to balance the needs of the workers, the general level of wages in the country cost of living and the general living standards of other social groups on one hand and on the other the economic factors . The point made was that during the national lockdown pronounced in terms of Statutory Instrument 83 of 2020 most businesses were not operating but the detergents, edible oils and fats industry was declared an essential service. The industry produced essential goods required like detergents and sanitizers. The reprieve by the Government in terms of Statutory Instrument 85 of 2020 resulted in the industry selling its goods in foreign currency. This factual background meant the industry did not suffer much loss, infact it made profits. It can pay the proposed wages and allowances. On the other hand the high month on month inflation and general increase in the cost of goods has eroded the workers' salaries. A comparison was drawn with other industries that were paying more than the industry.

In respect of housing allowance the point made was that generally the workers are the tenants in the high density areas. Rentals are charged in US dollars. The housing allowance must therefore be paid in US dollars to cushion the workers.

In respect of the transport allowance it was submitted that the public transport provided under the ZUPCO is inadequate for the general public. Workers resort to other forms of transport that charge in US dollars. Even though such a submission was made the proposal was for the amount to be paid in local currency at the prevailing rate on the date of payment.

The applicant being the respondent therein submitted that a basic wage of US$69, 50, a transport allowance of $17, 50 and a housing allowance of $24, 50 payable at the prevailing rate on the date of payment was appropriate in the circumstances.

In support of the proposal the applicant argued that despite the industry being declared an essential service, the industry's performance was crippled by a number of challenges like

high operating costs, legacy debts low plant utilisation and non-availability of local currency. Further to that most of its goods were sold in local currency contrary to the respondent's belief that the goods were sold in foreign currency. The foreign currency received from the sale of limited stock was used to import raw materials. A market comparison was referred to as proof that the applicant's offer was within the range of the market. According to the applicant there was no basis to justify a 124% increase in wages in US dollar terms. Nothing had changed from June to justify the proposed increase. It also referred to the official statistics showing that by August 2020 the month on month inflation was decreasing. The gist of the applicant's case was the need to raise salaries gradually in line with production levels. The proposed increments would effectively lead to the shutdown of some of the companies in the industries. Most are still struggling.

In respect of the housing and transport allowances it was submitted that this is only an allowance .It is not a reimbursement or meant to fully cover the full costs of housing and transport. In any event workers have different circumstances, some do not even use transport .The proposed allowances must therefore be payable in local currency which currency would always be available.

In coming to its decision the tribunal noted the turbulent operating environment that the applicant's members are operating in. It also took note of the fact that the industry was an essential service provider which gave it an edge over other industries. Besides these the tribunal noted the plight of the workers, that the workers' salaries must be a living wage. Despite the official use of the local currency, the reality on the ground is that most goods and services are sold in foreign currency and the parallel market exchange rate is used. The official rate is not used at all. The workers cannot access foreign currency at the official auction, it is the companies that access it. The companies are therefore cushioned and the workers remain exposed. The tribunal also took what it termed the practical and reality approach that rentals are charged in foreign currency so is the transport. The workers therefore must be cushioned by awarding a living wage. It also considered that a balance must be struck between the survival of the employers and the employees.

On that basis the second respondent awarded a basic wage of US$ 140-00 and transport allowance of US$20-00 payable in local currency at the prevailing rate on the date of payment. In respect of the housing allowance the applicant's members were given an option to either pay US$25 payable in foreign currency or US$30-00 payable in local currency at the prevailing rate on the date of payment.

Grounds for review

The sole ground for review is that the award is contrary to the public policy of Zimbabwe.

In support of the ground for review, what emerges from the applicant's founding affidavit, heads of argument and the oral submission is that the applicant's members are still operating below capacity. There are various factors inhibiting profitability. The parties' agreement to have a US dollar linked wage was meant to primarily cushion the workers from the knock on effects of the high inflationary environment. Increasing the wages to the levels awarded will result in the closure of some companies. In respect of the transport and housing allowance it was submitted that the second respondent's order and reasoning is contrary to section 6(2) of Statutory Instrument 85 of 2020. Where an award is contrary to the law it can be set aside, the applicant relied on the leading case of *ZESA v Maposa*[1] that the award goes beyond faultiness it constitutes a palpable inequity in its effect. Therefore it is contrary to public policy.

In opposing the application the first respondent argued that no cogent reasons have been placed before the court to justify an interference in terms of Article 34 of the Model Law. The applicant's submission lacks proof of the averments .It has failed to show that the reasoning and conclusion in the making of the award was induced by fraud, corruption or a breach of natural justice. It also relied on the *ZESA v Maposa c*ase (supra) that courts must be slow to interfere with arbitral awards to give effect to finality to ligation except where a fundamental principle of the law or morality or justice has been violated.

The Law

Sub-article (3) of article 36 of the Model law gives some examples of aspects that would plainly be perceived as being contrary to the public policy of Zimbabwe. It reads:

"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the High Court only if –

(a) ……; or

[1] 1999 (2) ZLR 452 (S)

(b) the High Court finds, that –

(i) ……; or

(ii) the award is in conflict with the public policy of Zimbabwe.

(3) For the avoidance of doubt and without limiting the generality of paragraph (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 in connection with the making of the award."

The import of the section was expounded in the *ZESA* case (supra) where Gubbay CJ (as he then was) stated;

> "Under article 34 or 36, the court does not exercise an appeal power and either 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 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. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above.
>
> The substantive effect of an award may also make it contrary to public policy, if, for example, it endorsed the breakup of a marriage or some criminal act."

In *Beazley NO,* v *Kabell & Anor*[2] and *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* [3]the point was reiterated that the court will interfere with an award where the award goes beyond faultiness .Despite this elaborate exposition on what constitutes public policy the court's quandary is to draw the line between ordinary faultiness and a defiance of logic. The court has to make a value judgment considering that it is not sitting as an appeal court. Bearing in mind the principles set out l address the issues.

Basic Wage

Is trite that where the effect of an award may result in the closure of companies, it cannot be upheld. A balance must be struck between the two parties. Both parties need to

[2] 2003 (2) ZLR 198 (S)
[3] 2007 (2) ZLR 81

survive. It is common cause that the economic fundamentals for companies to operate profitably are at the low side of the spectrum. The second respondent's decision considered the plight of the workers. There was not much consideration of the effect of an increment in US dollars to the applicant's members. The second respondent noted that companies access foreign currency through the official auction system while the workers access it on the parallel market. This therefore means that the workers access goods denominated in US dollars at a premium. The second respondent based its consideration on an illegality. It is illegal to access foreign currency through the parallel market. By recognising it and basing his decision on such a market the second respondent effectively sanitized and condoned an illegality. A harsh economic environment is no excuse to condone anarchy. In the case of *Ndabezinhle Mkwananzi and Thokozile Mkwananzi* v *Angelus Mkwananzi and Assistant Master of the High Court*[4] at p 5 of the cyclostyled judgment had this to say;

> "Generally, it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect……This is a general proposition, but it is not a hard and fast rule universally applicable, if however, the court is satisfied in a particular case that the legislature did not intend to render the act invalid, it would not be justified in holding that it is….."

I am satisfied that it is not the intention of the legislature to render the exchange of money on the parallel market valid at all. It is actually an offence.

On that basis alone the award can be vacated.

Housing allowance

The second respondent accepted the respondent's submission that it is common cause that rentals in the high density are charged in US dollars. Statutory Instrument 85 of 2020 which the applicant relies on does not support the second respondent's award. It provides

> 'any person may pay for goods and services chargeable in Zimbabwe dollars, in foreign currency using his or her free funds at the ruling rate'

In terms of the section, the law gives the option to the payee to pay either in foreign currency or local currency where the goods or services are chargeable in Zimbabwe dollars. In terms of the law no one is forced to pay for services in US dollars. The official legal tender remains the local currency. By accepting the first applicant's averments without substantive evidence that rentals are payable in US dollars the second respondent adopted a position not provided for at law.

Transport allowance

[4] HB 125/06

The law recognizes transportation of passengers by the Zimbabwe Passenger Company. In addition it recognizes transport provided by employers for the transportation of their employees and other services in terms of s4 (2) of the Public Health (COVID 19 Prevention, Containment and Treatment) (National Lockdown) Order 2020.Any other transport service provider would be operating illegally. The second respondent therefore took into account what he termed the reality on the ground which in fact is conduct contrary to the law. An award that purports to advance and sanitise an illegality is susceptible to be set aside on review.

In its draft order, the applicants requests the court to set aside the award and substitute it with an order for a minimum wage of US$ 69.50 , housing and transport allowance of US$24.50 and US$ 17.50 respectively which was the applicant's proposal before the second respondent. It is trite that the court cannot make a determination in the place of a tribunal. That prayer is incompetent.

From the forgoing the following order is made.

1. The application be is hereby granted with costs.
2. The Arbitral award dated 7 October 2020 be and is hereby set aside.

Coghlan, Welsh & Guest, applicant's legal practitioners