TREVOR PILIME
and
LENIX MAJURU
and
GIFT DAMAGE
and
ZORORO MATOTOTE
and
EMMANUEL MANYERUKE
and
ABINEL NYEMBA
and
LEVISON MAZINYANI
and
KUFAKUNESU MUDHIRIDZA
versus
MIDRIVER ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE 24 October 2013 & 23 July 2014

Opposed matter

B. Nyamwanza, for the applicants'
R. Ranchhod, for the respondent

ZHOU J: This matter was instituted as a chamber application for registration of an arbitral award in terms of s 98(14) of the Labour Act [*Cap 28:01*]. The respondent filed opposing papers, hence the matter was referred to be dealt with as an opposed application. The arbitral award rendered by D. Mudzengi is dated 20 November 2012. It reads as follows in the operative part thereof:

> "In view of the above, below is my award:
>
> 1. Claimants deserved a salary increase after the probationary period.
> 2. I therefore order that claimants be paid a salary increase for the period April 2012 to July 2012 when their contracts were terminated.
> 3. I further order that claimants meet the respondent and negotiate for the post probation increase and that if (the) parties fail to reach an agreement, they can approach the arbitrator for quantification of the increases within 14 days of receipt of this award."

On 6 December 2012 the respondent noted an appeal in the Labour Court against the award. Notwithstanding the noting of the appeal, the applicants approached the arbitrator for quantification of the increases awarded to them. At the hearing of the matter before the arbitrator the respondent objected to the quantification on the basis that it had appealed against the award. There is a dispute as regards the position taken by the arbitrator, with the respondents alleging that at an initial hearing the arbitrator had upheld the objection. That allegation is disputed by the arbitrator who states that there was no such hearing as alleged by the respondent. The arbitrator refers to a meeting of 19 December 2012. According to him that meeting never upheld the objection by the applicant. Accordingly, he proceeded to quantify the figures on the basis that an appeal to the Labour Court does not suspend the operation of the award appealed against.

I have previously lamented the undesirable situation which is created by dealing with labour disputes before arbitrators or the Labour Court piecemeal. Such an approach, whereby an arbitrator or the Labour Court makes an award and sends the parties to try and negotiate the figures failing which they then return for quantification creates a multiplicity of cases. It even raises the issue of whether such an award is a final order which is appealable or only becomes final upon the parties agreeing on quantum or after the arbitrator has quantified the loss following disagreement between the parties. The result is that there may be an appeal noted against the first part of the award as, on the face of it, it purports to be complete. That is what happened in the instant case. When there is another award quantifying the loss to the employees that aspect of the award is equally susceptible to an appeal. Thus there may end up being more than one appeal in respect of what is in essence one dispute. The stark reality which confronts the labour procedures is that while they were meant to be as flexible and as informal as possible they are now equally subject to the normal rules of procedure insofar as they result in orders (or awards) that are executable like orders of ordinary courts and are subject generally to the same rules relating to appeals. In my view, the time has come for arbitrators and the Labour Court to give final awards or orders unless the parties themselves have asked for an opportunity to negotiate the terms of the orders or awards.

In opposing the application for the registration of the award the respondent objected *in limine* to the seeking of the relief through a chamber application. The respondent contended that the applicant should withdraw the application and institute the proceedings by way of a court application. At the hearing of the matter Mr *Ranchhod* for the respondent did not make any submissions on that point. Order 32 r 229C specifically provides that the fact

that an applicant has instituted a chamber application when he should have proceeded by way of a court application shall not in itself be a ground for dismissing the application unless some interested party has or may have been prejudiced by the use of that procedure and such prejudice cannot be remedied by directions for the service of the application on that party, with or without an appropriate order of costs. In the instant case the application was dealt with as an opposed application after the respondent filed opposing papers. Both parties filed heads of argument. There was, therefore, no prejudice which was suffered by the respondent.

On the merits, the respondent opposes registration of the award on the ground that the award is contrary to the public policy of Zimbabwe. The respondent submits that no evidence was submitted by the applicants in support of the figures claimed, which were accepted by the arbitrator.

The meaning of the expression "contrary to the public policy of Zimbabwe" is explained in the Act as well as in numerous judgments, and requires no further discussion. See art 36(3) of the first schedule to the Arbitration Act [*Cap 7:15*]; *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452(S) at 465C-466D; *Husaihwevhu & Ors* v *UZ-USF Collaborative Research Programme* 2010 (1) ZLR 448(H) at 453G-455G; *Chanakira* v *Mapfumo & Anor* 2010 (2) ZLR 178(H) at 182B-183B What is clear from the above authorities is that not every fault or mistake of the arbitrator, be it of law or fact, would fall within the ambit of the expression "contrary to the public policy of Zimbabwe". See also *Conforce (Pvt) Ltd* v *City of Harare* 2000 (1) ZLR 445(H) at 451B; *Walenn Holdings (Pvt) Ltd* v *LIoyd & Anor* 1996 (2) ZLR 383(H) at 359. For it to qualify to fall within the meaning of that expression the arbitrator's reasoning or conclusion must go beyond mere faultiness or incorrectness, and must constitute 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 would be intolerably hurt if the award was upheld or enforced. *Pioneer Transport (Pvt) Ltd v Delta Corporation & Anor* 2012 (1) ZLR 58(H) at 66B-E; *Zimbabwe Electricity Supply Authority* v *Maposa* (*supra*) at 466F-467A.

An award that contravenes a fundamental principle of law would be contrary to the public policy of Zimbabwe. *Chanakira* v *Mapfumo*(*supra*).

In casu the applicants led no evidence to justify the figures which they claimed as the salary increases to be awarded to them. The arbitral award does not postulate any basis for accepting the figures given by the applicants other than that the respondent did not suggest alternative figures. In the arbitrator's reasoning:

> "On the merits, the respondent has not suggested any figures apart from claiming that claimants cannot just pluck figures from the air. In the absence of such figures, claimants' claim will succeed."

In the case of *American Friends Service Committee* v *Irene Chauke* SC 1/12 the Court was confronted with a case in which an award for damages had been given in the absence of evidence to prove the loss. At pp. 2-3 of the cyclostyled judgment the court remarked as follows:

> "The second issue for determination is whether or not the court *a quo* misdirected itself in confirming the award made by the arbitrator on the quantum of damages due to the respondent. The record shows that there was no evidence upon which the arbitrator based his award other than an unsubstantiated statement of claim by the respondent. The Labour Court accepted the claim on the basis that the appellant had not opposed it. There can be no doubt that the Labour Court fell into error in coming to this conclusion as it is settled law that damages in these circumstances must be properly proved by the party seeking the same."

The concept of quantification of loss entails some assessment of the loss which is based on determinable factors. There can be no quantification when there is neither evidence nor a basis tendered to justify the figures being awarded. In the instant case the amounts awarded by the arbitrator were not based on any evidence or some other valid ground. They were awarded merely because the respondent did not put forward its own figures. Such an approach, in my view, constitutes a palpable inequity that subverts our conception of justice.

Based on the above, it seems to me that the award *in casu* is contrary to the public policy of Zimbabwe and should, accordingly, not be registered for enforcement.

In the result, the application is dismissed with costs.

Mageza & Nyamwanza, applicants' legal practitioners
Hussein Ranchhod & Co, respondent's legal practitioners