AMOS MAKONO & 32 OTHERS
versus
FREDA REBECCA GOLD MINE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 11 October 2017 & 11 July 2018

**Opposed matter-registration of arbitral award**

*A C Muguchu*, for the applicants
*Z T Chadambuka*, for the respondent

CHATUKUTA J: The applicants were discharged from employment by the respondent resulting in a labour dispute presided over by the Honourable Arbitrator Dangarembizi in 2010. The Honourable Dangarembizi ordered the reinstatement of the applicants and payment of back-pay for the period March 2010 to January 2011. The respondent appealed against the award but paid the applicants the back-pay. Following the decision by the respondent not to reinstate them, the applicants successfully claimed before the Honourable Arbitrator Kabasa reinstatement and payment of back-pay from February 2011 to 13 September 2013. The parties could not agree on the quantification of the back-pay resulting in the appointment of the Honourable Arbitrator B. Matongera. The Arbitrator convened a pre-arbitration meeting at which he directed the parties to file their arbitration papers by 14 October 2014. In the event that the applicants failed to file the papers by that date, their claim would be deemed abandoned. The applicants did not file their papers by that date. The arbitral proceedings were however commenced resulting in the Honourable Matongera issuing an award on 15 January 2016 in favour of the 33 applicants. The applicants now seek the registration of the award in terms of s 98 (14) of the Labour Act [*Chapter 28:01*] arguing that there is nothing that precludes the registration of the award. The respondents opposed the application contending that the award is contrary to the public policy of Zimbabwe and therefore it should not be registered. It was contended that the award is in violation of the Arbitration Act [*Chapter 7:15*] in that the arbitrator having directed the filing of papers by 14 October 2014, and the applicants having

failed to do so the arbitrator was enjoined to dismiss the claim by virtue of section 25 of the Labour Act. The arbitrator therefore acted contrary to the provisions of the law and consequently the award is contrary to public policy.

At the commencement of the proceedings, the respondent raised a preliminary point that the application was a nullity as the applicant had cited a non-existent entity "Freda Gold Mine".

The respondent opposed the preliminary point on the basis that the citation was merely a mis-description of the respondent which was not fatal to the application and should be pardoned by the court. It was contended that the respondent has been so cited in the arbitration proceedings from 2010 and in the present application, and it has not objected to the citation. Further, the preliminary point was a point of fact and not law and therefore could not be raised in the heads of argument.

The contention by the applicant that the point raised by the respondent is a question of fact is misplaced and clearly a red herring. It is clear from all the authorities relied on by both parties that the issue was considered as a point of law. (see *Masuka* v *Delta Belverages* HB 2012 (1) ZLR 112, *Masukume* v *Treston Enterprise (Pvt) Ltd* HH 416/15, *Nuvert Trading (Pvt) Ltd* v *Hwange Colliery* HH 791/15, *CT Bolts (Pvt) Ltd* v *Workers' Committee* 2012 (1) ZLR 363 (S), *Gariya Safaris (Pvt) Ltd* v *van Wyk* 1996 (2) ZLR 246 (H) all referred to by the applicant; *Marange Resources (Private) Limited* v *Core Mining & Minerals (Private) Limited (in liquidation) & Ors* SC 37/16 and *Stewart Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S).) The submissions by the applicant were terse, lacking the conviction that the court should seriously consider the issue. There is a plethora of case authority on what constitutes a point of law. In *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) GUBBAY CJ remarked at 220 C- F that:

> "The twin concepts, questions of law and questions of fact, were considered in depth by E M GROSSKOPF JA in Media Workers' Association of South Africa & Ors v Press Corporation of South Africa Ltd ("Perskor") 1992 (4) SA 791 (A). Approving the discussion of the topic in Salmond on Jurisprudence 12 ed at 65-75, the learned JUDGE OF APPEAL pointed out at 795 D-G that the term "question of law" is used in three distinct though related senses. First, it means "a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter". Second, it means "a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter". And third, any question which is within the province of the judge instead of the jury is called a question of law. This

> division of judicial function arises in this country in a criminal trial presided over by a judge and assessors.
>
> I respectfully adopt this classification, although the third sense is of no relevance to a matter such as this." (See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S), *Farm Community Trust* v *Claudious Chemhere* SC 22/13, *Sable Chemical Industries Limited* v *David Peter Easterbrook* SC 18/10, *Norman Mutsuta & Anor* v *Cagar (Private) Limited* SC 47/09).

It needs no saying that the question regarding the legal personality of a party cited in court proceedings is a point of law which a court can raise *mero motu* as transpired in *CT Bolts (Pvt) Ltd* v *Workers' Committee* (*supra*).

Turning to the question whether or not the application is a nullity, the applicant did not dispute that there is no legal entity called "Freda Rebecca Gold Mine". It is therefore common cause that Freda Rebecca Mine is an occasional appellation of Freda Rebecca Mine Limited which ought to have been cited as a party in these proceedings. The applicant's opposition is simply a request that the court overlooks the mis-description because the respondent has not previously questioned the citation. The cases alluded to by the applicant in support of its request are all persuasive authorities in the face of recent case of *Fadzai John* v *Delta Beverages* SC 40/17 cited by the respondent.

In that case, the Supreme Court was seized with a matter almost on all fours with the present application. The applicant had filed in the Supreme Court an application for leave to appeal against the decision of the Labour Court. The background to the application was that the applicant, who was employed by Delta Beverages (Private) Limited had been dismissed from employment after disciplinary proceedings. The applicant, aggrieved by the dismissal, unsuccessfully appealed to the Labour Court.

During the hearing of the application before the Supreme Court, the respondent raised as one of the preliminary issues, that the application was fatally defective as the applicant had cited a non-existent respondent "Delta Beverages Limited" as opposed to Delta Beverages (Private) Limited. GUVAVA JA observed at page 4 that:

> "In *Gariya Safaris (Pvt) Ltd* v *van Wyk* 1996 (2) ZLR 246 (H) it was stated as follows:
>
> > "A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio.*"
>
> In this case the applicant cited a non-existent respondent. Thus in the same vein the application was a nullity." *Marange Resources (Private) Limited* v *Core Mining &*

*Minerals (Private) Limited (in liquidation) & Ors* (*supra*), *CT Bolts (Pvt) Ltd* v *Workers' Committee* (*supra*), *Stewart Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd* (*supra*)

In *Marange Resources (Private) Limited* v *Core Mining & Minerals (Private) Limited (in liquidation) & Ors* (*supra),* which again is similar to the present matter, the appellant had wrongly cited the first respondent as "Core Mining and Minerals (Pvt) Ltd" instead of "Core Mining and Mineral Resources (Pty) Ltd". The omission of the word "Resources" and the use of "Pvt" as opposed to "Pty" was found to have altered the legal personality of the respondent.

The simple question is therefore whether there is a legal or natural person answering to the name Freda Rebecca Mine. There is no such legal person. There is however a legal person called "Freda Rebecca Mine Limited". The omission of the word "Limited" altered the legal identity of the proper respondent. The applicants therefore cited a non-existent respondent.

By virtue of the *stare decisis* doctrine, this court is bound by the plethora of Supreme Court cases on the issue including *Fadzai John* v *Delta Beverages*. The present application therefore suffers the same fate as in those cases. In the result, the preliminary point is upheld.

The respondent prayed for dismissal of the application with costs. As the application is a nullity there is nothing for the court to dismiss. Despite the respondent having succeeded, I am of the view that it is not entitled to costs. It led the applicants on to believe that they were citing an existing entity from as far back as 2010 when the arbitration proceedings commenced, paid the applicant's their back-pay for the period from March 2010 to January 2011 and belatedly raised the preliminary point unnecessarily incurring the costs it seeks to recover.

The application is accordingly struck off the roll with no order as to costs.

*Dube Manikai & Hwacha*, applicant's legal practitioners
*Gill, Godlonton & Gerrans*, the respondent's legal practitioners