BRIAN MUNEKA
and
DADIRAI RWANZA
and
JANIES TIMOTHY
and
EDMOND MULEYA
And
MUSEKIWA MUZANENHAMO
and
TSITSI DHLIWAYO
versus
MANICA BUS COMPANY

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 11 October 2012, 7 January 2013, 10 January 2013,
17 January 2013, 24 January 2013, 29 January 2013 & 6 February 2013

E. Mutandiro, for the applicants
O. Shava, for the respondent

MTSHIYA J: This is an application for the registration of an arbitral award. The application is opposed.

There are purportedly six applicants involved. I indicated to the parties that the powers of attorney filed on behalf of second to fifth applicants were defective in that they were not signed by the said applicants. The powers of attorney were only signed by the Commissioner of Oaths. That being the case there was only one applicant before the court. The Legal Practitioners representing the applicants agreed with that observation and asked me to proceed on the basis that there was only one applicant before the court, namely the first applicant..

Furthermore, before writing this judgment, the parties confirmed to me that the second, fourth, fifth and sixth applicants had since settled the matter with the respondent. That means the respondent still has to comply with the award in respect of the first and third applicants only. As already indicated the third applicant is not properly before the court and accordingly this judgment shall relate to the first applicant only.

Notwithstanding settlement with its other former employees, the respondent did not withdraw its opposition to this application.

The first applicant was an employee of the respondent and was laid off from employment in 2009 without benefits. The applicant, together with other employees who are not before the court, approached an arbitrator through the Labour Court. That approach appears to have led to referral to compulsory arbitration in terms of the Labour Act [*Cap 28:01*] ("the Labour Act")

On 11 February 2011 the arbitrator made an ward in favour of the applicant and his fellow employees. In terms of the said award the respondent was ordered to pay a total of US$40 103-81 in respect of benefits covering the applicant and other former employees. Under the award, the first applicant was to be paid as follows:-

"5) **Brian Muneka Senior Inspector Grade (8D) $50-87/wk**

Period of engagement March 1999 to October 2009

a)	Notice pay 3 months' salary	$220-41 x 3months =$661-23
b)	Leave days. Due 3 years	$66 days x $8-47 =$559-02
c)	Employee was paid 43.33/month instead of $220.41/month giving a shortfall	$177-08 x 17months =$3 010-36
d)	Housing allowance from October 2009 at $25/Mnths x 10 months	$250-00
e)	Transport allowance from Feb 2009 to October 2009 at $25/months x 10 months	$250-00
f)	Damages for loss of employment (2) month's salary for every completed year giving a total of 20 months' salary thus	$220-44 x 20 months =$4 408-20
g)	Gratuity for 10 years	$220-41 x 15% 10yrs =$330-61
h)	Unpaid off days = 24 days (At Time and half)	$12-70 x 24 =$304-80
Total		**=$9 774-22**

The respondent was served with the award in March 2011 but has not yet paid the amount owing to the first applicant.

The respondent, in its opposing papers, avers that the company collapsed when negotiations to settle with the first applicant were in progress. It goes on to state that the

award was given in default and applications for rescission and stay of execution are before the Labour Court. The respondent also disputed the quantification of the amount owing to the first applicant.

The applicant raised a point *in limine* arguing that the respondent's Legal Practitioner was not competent to swear to the opposing affidavit.

On the point *in limine,* the respondent correctly submitted that r 227 of the High Court Rules 1971 permits a Legal Practitioner to sign or swear to an affidavit on behalf of his/her client.

I think the important issue here is for the deponent to be 'a person who can swear positively to the facts or averments set out' in the affidavit. A fully instructed Legal Practitioner should, in my view, be able to do so. I think the rules only require the legal practitioner to have the necessary mandate, full facts and full instructions to act on behalf of his/her client so as to be able to sign and swear to documents on behalf of his/her client. In the face of r 227 of the High Court Rules 1971, I am unable to uphold the point *in limine*. The relevant r 227(4) provides as follows:-

> "(4) An affidavit filed with a written application-
>
> (a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and
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> (b) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents". (My own underlining).

The respondent is correct in saying this application is being made in terms of Sub-Sections (14) and (15) of s 98 of the Labour Act. The subsections provide as follows:-

> "(14) Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subs (13) to the court of any magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court.
>
> (15) Where arbitral award has been registered in terms of subs (14) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court".

In his founding affidavit the first applicant clearly states that he approached the arbitrator through the Labour Court. The award was certified in terms of the Labour Act. I therefore believe the arbitrator was appointed in terms of the Labour Act.

True, the arbitrator makes reference to Article 35 of the Arbitration Act [*Cap 7:15*] with respect to the enforcement of his award. However, if the matter was referred to him in terms of the Labour Act, as reflected in the founding affidavit, then the correct provision of the law applicable is s 98(14) of the Labour Act. This was compulsory arbitration. There is no averment to the effect that registration is being sought in terms of Article 35 of the Arbitration Act [*Cap 7:15*] which provides as follows:-

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36.
>
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in the *English language*, the party shall supply a duly certified translation in the *English language".*

I agree that in terms of s 98(2) of the Labour Act, the procedures provided for in the Arbitration Act applies to labour disputes referred to compulsory arbitration. The section provides as follows:-

> "(2) Subject to this section, the Arbitration Act [*Cap 7:15*] shall apply to a dispute referred to compulsory arbitration".

I believe the above attaches mainly to arbitration procedures and therefore *in casu*, the relief sought is clearly in terms of subs(s) (14 and (15) of s 98 of the Labour Act.

In view of the above, I take the position that the reasons for opposing the registration of an award granted in terms of the Labour Act are not necessarily those stipulated in the Arbitration Act. Voluntary awards granted in terms of the Arbitration Act are governed by the provisions of that Act and in like manner awards granted through compulsory arbitration in terms of the Labour Act are governed by the provisions of the Labour Act. That is why the respondent says it has approached the Labour Court for redress.

In *Benson Samudzimu* v *Dairiboard Holdings Ltd*, HH 204/10, CHIWESHE JP, said:-

> "Section 98 provides for *inter alia* the referral of matters to compulsory arbitration, the appointment of arbitrators, appeals against decisions of arbitrators, reviews and other remedies. These provisions are detailed and comprehensive. Clearly it could not have been the intention of the legislature that parties aggrieved by the decision of an arbitrator in a labour dispute seek remedy in terms of s 34 or 36 of the Arbitration Act.

I agree with the applicant that the correct interpretation would be that, with regards the law, the Labour Act takes precedence over the Arbitration Act and any other enactment. The intention of legislature was to have all labour matters initiated and resolved to finality in terms of the Labour Act. Equally, the legislature must have intended that such matters be dealt with by the Labour Court to the exclusion of any other court.

Sections 34 and 36 of the Arbitration Act are not applicable in cases where the award sought to be challenged relates to a labour dispute. The mechanisms for challenging such awards are provided for in the Labour Act and may be accessed through the medium of the Labour Court. No other court has jurisdiction to entertain such matters.

Accordingly, for as long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same".

I fully agree with the above enunciation of the legal principles involved.

In terms of the Labour Act, the registration an arbitration award envisaged under s 98(14) of the Act is for purposes of enforcement only. (See s 98(15) quoted at p 3). The same applies to a decision, determination or order of the Labour Court registered with this court in terms of s 92B of the Labour Act (See s 92B(4) quoted here below). The award or order, in my view, remains an award/order of the Labour Court and is to be managed and controlled in terms of the Labour Act. That is why the Labour Court can vary or amend such an order even after it has been registered with this court. The award is only registered with this court simply because the Labour Court has no enforcement mechanism for its orders.

Subsections (3), (4) and (5) of s 92B of the Labour Act provide as follows:-

"(3) Any party to whom a decision, order or determination relates may submit for registration the copy of it furnished to him in terms of subs (2) to the court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it, or, if the decision, order or determination exceeds the jurisdiction of any magistrates court, the High Court.

(4) Where a decision, order or determination has been registered in terms of subs (3) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court.

(5) If any order which has been registered in terms of subs (4) has been rescinded or altered by the Labour Court in terms of section *ninety-two C*, the clerk or registrar of the court concerned shall make the appropriate adjustment in his register.

The above, in my view, applies to all arbitral awards obtained through compulsory

arbitration in terms of the Labour Act. This is so because s 98(9) of the Labour Act gives the Arbitrator the same powers as the Labour Court in determining a labour dispute. The relevant section (i.e. 98(9) provides as follows:-

> "(9) In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court".

Clearly above provision of the law places an arbitral award obtained in terms of the Labour Act at the same level with an order of the Labour Court.

Like in subs (14) in s 98, subs (3) above does not spell out the procedure to be followed in registering a decision, order or determination of the Labour Court with the High Court or Magistrates Court. The practice in the High Court, however, has always been through application, which application is then served on the other party (the respondent). Respondents have, in the majority of cases, opposed applications for the registration of arbitral awards. The general argument put forward is that the award will have been appealed against or is facing a rescission application.

I do not believe that in providing for registration for enforcement purposes, the legislature envisaged a procedure where the applicant would be denied the registration of a certified award as we normally witness. My view is that the other party is at liberty to oppose the process of execution or enforcement on any legal or reasonable grounds.

Furthermore, the other party can also seek interim relief in terms of s 92E(3) of the Labour Act which provides as follows:-

> "Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires".

In *Standard Chartered Bank of Zimbabwe Ltd* v *Muganhu* 2005(1) ZLR 43(5) MALABA JA, as he then was, said:-

> The object of an interim determination made under s 97(4) of the Act is to give a party in whose favour the determination appealed against was made an interim right which he would otherwise not have because of the noting of the appeal. It may also be to grant the party against whom the judgment was made temporary relief from the burden of the obligation imposed by the determination which he would otherwise not have because of the appeal". (Section 97(4) was repealed by s 34 of Act 7 of 2005 but provision was retained under s 92E(3)).

The above clearly indicates that upon an award being made, both parties have equal choices.

The registration of an award in terms of the Labour Act is, in my view, is a matter of course as long as the award remains enforceable or unsatisfied. In *casu*, what is before the court is not a review process but a mere application for the registration of an award, which process, I believe, can be done through a register in the High Court with a certificate of registration being granted to the beneficiary of the award.

I am in agreement with CHIWESHE JP, where in Benson Samudzimu, *supra*, he further states as follows:-

> "Accordingly, for as long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same".

In view of the foregoing, I have no reason to decline the registration of the arbitral award as prayed for.

It is therefore ordered as follows:-

1. The arbitral award by Conrad V. Chinembiri dated 11 February 2011, to the extent it applies to the first applicant, be and is hereby registered as an order of this Court; and
2. The respondent shall pay costs of suit.

C. Nhemwa & Associates applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondents' legal practitioners