CARNAUD METAL BOX (PRIVATE) LIMITED
versus
CONSTANTINE CHIYANIKE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 12 June 2014 and 20 August 2014

Opposed application

N. Mutasa, for the applicant
C. Kwaramba, for the respondent

MTSHIYA J: The applicant seeks the following relief:-

"**IT IS ORDERED THAT:-**

1. The Arbitral Award issued by the Honourable Arbitrator Ms E. Maganyani dated 8 August 2012 be and is hereby set aside.

2. In the event that this application is opposed the Respondent shall pay the Applicant's costs of suit."

The background to the relief sought is that the respondent who is employed by the applicant but currently on suspension without pay and benefits was on 2 August 2012 granted the following Arbitral Award by Arbitrator E. Maganyani:-

"**AWARD**

1. a) Carnaud Metal Box (Pvt) Ltd reinstate Mr Constantine Chiyanike without loss of salary and benefits.

b) If reinstatement is no longer an option parties should negotiate on damages in lieu of reinstatement. In the event of parties failing to reach an agreement, any party can approach the Arbitrator for quantification."

The above award arose from the fact that 14 October 2011, the respondent who prior to that date was a secretary of the applicant's workers committee, applied for permission to attend a Labour Court hearing. The Labour Court hearing was scheduled for 17 October

2011. He was denied permission to attend. This was mainly because his term of office as secretary of the workers committee had expired on 30 September 2011. A new committee had, however, not been appointed and so he sought to continue attend to unfinished matters at the labour Court.

Notwithstanding refusal by the applicant for the respondent to attend the Labour hearing, he proceeded to attend. That led to disciplinary proceedings against him. In its founding affidavit the applicant states as follows:-

> "5. On 27 January 2012, the Local Joint Committee of the National Employment Council sat as a disciplinary committee to hear allegations of misconduct against the Respondent as clearly appears on Annexure "B" hereto.
>
> 6. No decision was made at the conclusion of that hearing because there was a deadlock amongst the committee members.
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> 7. Faced with that deadlock, the Local Joint Committee purported to refer the matter to the General Engineering Committee of the National Employment Council, which committee also purported to refer the matter to full Council following another deadlock as appears on Annexure "C".
>
> 8. On 21 March 2012, the full Council upon being advised that the two Parties were maintaining their positions ordered that the matter be referred to Arbitration.
>
> 9. Pursuant to the order of the full Council, the matter was arbitrated on by the Honourable Arbitrator Ms. Maganyani. The Arbitration proceedings in question culminated in an Award, copy of which is attached hereto marked Annexure "D"."

The applicant now seeks to have the award set aside on the ground that since it objected to the matter being referred to arbitration the award "violates the law of Zimbabwe". Its main reason is that there was no agreement between the parties to have the matter referred to arbitration and therefore the award is contrary to the public policy of Zimbabwe.

In its submissions the applicant maintained that there was never any agreement for referral to arbitration and that it was only the "Parties to the national Employment Council for the Engineering Industry" that agreed to do so. The applicant went on to say the power to resolve the dispute lay in the hands of the Local Joint Committee of the Engineering and Iron and Steel Industry" (the Local Joint Committee). The applicant said it was improper for the arbitrator to "take over the responsibility" of the Local Joint Committee and conclude the matter.

In making that submission, the applicant mainly relied on *Zimbabwe Revenue Authority* v *Mpindiwa* SC 85/06, (a matter handled in the Labour Court as the then Senior President), where SANDURA, JA said:-

> "…… I will consider the second issue, which is whether it was competent and proper for the Labour Court to determine Lindiwe's appeal which should have been determined by the Appeals Committee. There is no doubt in my mind that it was not".

Let me hasten to say in *Zimbabwe Revenue Authority*, (*supra*), the Appeals committee had made no decision at all. In *casu* the Local joint Committee made a decision and that decision was to refer the matter to arbitration. That distinguishes the case from this one.

In response to the applicant's submissions, the respondent, in paras 23-25, appears to have hesitantly raised the issue of jurisdiction. I say hesitantly because the issue is not directly raised as a preliminary issue and was never pursued at the hearing. However, in those paragraphs the respondent states as follows:-

> "23. Firstly such disputes should no longer be brought before this court as the Labour Court has now been clothed with exclusive jurisdiction to deal with labour court disputes. The relevant section provides as follows;
>
> 89(1) The labour court shall exercise the following functions:
> (d) exercise the same powers of review as would be exercised by the high Court in respect of labour matters.
>
> 24. The import of this section is to vest in the labour court total review powers in labour matters, such that it would be improper to seek a review of a labour dispute in the High Court."

However in terms of s 13 of the High Court Act [*Cap* 7:06], as read together with s 171 (1) (a) of the Constitution of Zimbabwe Amendment (No 20) Act 2013, this court has jurisdiction to entertain this matter.

Section 13 of the High Court Act provides as follows:-

> "Subject to this Act and any other law, the High Court shall <u>have full original</u> <u>civil jurisdiction over all persons and over all matters within Zimbabwe.</u>" (My own underlining)

In like manner s 171 (1) (a) of the constitution of Zimbabwe provides as follows:-

> "The High Court has jurisdiction over <u>all civil</u> and criminal matters throughout Zimbabwe." (my own underlining).

In view of the above provisions of the law, the issue of jurisdiction raised by the respondent falls away.

The respondent had further argued that the review grounds were not properly stated as required by the rules. My reading of the papers is that the award was made in violation of the law and therefore offends public policy. That was the sole ground which, in my view, is very clear. The point taken was that, for arbitration proceedings to take place, there must be agreement between the parties.

Article 34 of the Arbitration Act [*Cap* 7:15] (the Act) provides as follows:

"(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) the party making the application furnishes proof that-

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model law;

or

(b) the High Court finds, that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

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

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The High Court, when asked to set aside an award, may where appropriate and s requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for grounds for setting aside.

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with 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 applicant, contends that the matter should not been referred to arbitration (see (34(2)(b) above). I therefore believe the application meets the criteria. The review grounds are clear. If the award violates the law, it would indeed be capable of being set aside for being contrary to the public policy of Zimbabwe.

Guided by authorities cited by the respondent, I find it unnecessary to delve in detail into the reasons behind the award. All I can say is that I find nothing to suggest that "the reasoning or conclusion in the 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 acceptable 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" (See *Zesa* v *Maposa* 1999 (2) ZLR 452 (59).

I further associate myself with the position taken by GOWORA J, as she then was, in *Husaihwevhu & 2 Ors* v *UZ-UCSF Collaborative Research Programme* HH 237/10 wherein she said:-

> "It seems to me that the import of the defense under Article 34 and 36 is not imbue the court before whom the award is to be registered or set aside with powers of appeal to determine the correctness of the decision by the arbitrator. This court is not in this instance sitting as a court of appeal to adjudicate the correctness or erroneous nature of the reasoning of the arbitrator".

Although it is denied that the parties gave their consent to the arbitration route, I find it difficult to doubt the Arbitrator when he states:-

> "I have been appointed to arbitrate the matter in terms of Article 7 of the Arbitration Act after parties to the National Employment Council for the Engineering Industry agreed to refer the dispute to Arbitration and appointed this Arbitrator to handle this issue".

The parties herein participated, either directly or through their representatives, in the inconclusive deliberations of earlier tribunals. Furthermore, in its submissions the respondent pointed out that the agreement to refer the matter to arbitration was in writing. That was never disputed and thus lending support to the Arbitrator's statement on the issue of consent by the parties.

Accordingly, given the fact that the issue of agreement is the sole reason for the applicant to reject the award, I find no merit in this application.

I have, also indicated that, *in casu*, a decision was made and that decision, in my view, is in keeping with s 62(1) of the Labour Act [*Cap 28:01*] which provides as follows:-

> "62. (1) An employment council shall, within the undertaking or industry and in the area in respect of which it is registered-
>
> (a) assist its members in the conclusion of collective bargaining agreements or otherwise prevent disputes from arising, or settle disputes that have arisen or may arise between employers or employer's organisations on the ne hand and employees, workers committees or trade unions on the other and shall take such steps as it may consider expedient to bring about the regulation or settlement of matters of mutual interest to such person or bodies".

The Local Joint Committee found it expedient to refer the matter to arbitration. Its decision was aimed at resolving the dispute between the parties as permitted in the above provision of our law. The court should not interfere with the right of the Local Joint Committee to make decisions as provided for in law, unless such decisions violate the law.

In view of the foregoing I am unable to grant the relief sought.

The application is dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practitioners
Mbizvo Muchadehama & Makoni, respondent's legal practitioners