REGINA TENDAI
versus
ECONET WIRELESS (PVT) LTD

HIGH COURT OF ZIMBABWE
MTSHIYA J
HAARE, 18 January 2016and 3 February 2016

Opposed Application

C Kuhuni, for the applicant
T Sibanda, for the respondent

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

With the parties, having consented to the upliftment of the bar that was operating against the respondent, I proceeded to hear the matter.

The relief sought in this application is couched in the following terms:

"IT IS ORDERED THAT:

1. The Arbitral Award granted by the Arbitrator J. Mambara dated 8th September 2015, a certified copy of which is annexed hereto marked "A" be and is hereby registered as an order of the High Court of Zimbabwe.
2. Respondent shall pay costs of suit."

Following a labour dispute, the parties went to arbitration.

On 17 April 2015, the arbitrator granted the following award in favour of the applicant:

"In the result my findings are as follows;

(a) That the Claimant was constructively dismissed
(b) That the Respondent be and is hereby ordered to pay the Claimant damages for constructive dismissal. The parties are to agree on the quantum failing which either party may approach this tribunal for quantification of the damages.
(c) Each party to pay its own costs."

As can be seen from the above award, the damages were not quantified because, as the arbitrator noted, "the terms of reference are for the determination of whether or not the claimant was unfairly dismissed and to determine the appropriate remedy."

The arbitrator, upon making a ruling that the applicant was unfairly dismissed, identified payment of damages as the remedy. The damages were, however, not quantified but the award allowed the parties to re-approach the arbitrator for quantification of damages in the event that they failed to agree on same. It appears the parties never discussed the quantum of damages but instead, on 12 June 2015, the respondent filed an appeal in the Labour Court against the award in its unquantified form. The notice of appeal was served on the applicant's legal practitioners on the same day (i.e. 12 June 2015).

The said notice of appeal was also followed by an application in the Labour Court on 17 June 2015, wherein the respondent sought the following interim relief:

> "The second respondent be and is hereby ordered to suspend any further proceedings ancillary to the award."

The second respondent referred to above is the arbitrator who was cited in the application for interim relief which was filed in terms of s. 92 E (3) of the Labour Court Act [*Chapter 28:01*] (the Act).

Notwithstanding the notice of appeal and the application for the suspension of further proceedings in the arbitration process, on 24 July 2015, (i.e. just over a month after the granting of the award), the applicant, through its legal practitioners, filed an application for quantification of the award.

It must be pointed out from the outset that, without being quantified, the award would not be registrable because the initial award of 17 April 2015 did not sound in money. It was therefore imperative that, if the applicant and the respondent did not conclude the dispute by way of agreed damages, quantification of damages had to be done. The award said so.

Upon the receipt of the notice of the quantification proceedings on 5 August 2015, the respondent, through its legal practitioners, responded in the following manner:

"REGINA TENDAYI vs ECONET WIRELESS (PVT) LTD

1. We refer to the above matter and letter from Kuhuni & Attorneys.

2. We are instructed to object to the set down of the matter before you as to do so would overtly violate the Labour Court's jurisdiction which is now seized with the application for interim relief of the appeal itself.
3. As appears from the draft for interim relief our client prays for an order that the second Respondent (the Honourable Arbitrator) be ordered to suspend any further proceedings ancillary to the award as to proceed otherwise would breach the due process of proceedings in the Labour Court and unduly prejudice our client.
4. We trust you will be guided accordingly.

Yours faithfully

Chinawa Law Chambers"

The above response was directed to the arbitrator who, on the same date responded as follows:

"**RE: REGINA TENDAYI vs ECONET WIRELESS (PVT) LTD**

Your letter dated 05 August 2015 refers.

Whilst I appreciate your plea not to set down the matter for quantification on the basis of an application for interim relief that is pending before the Labour Court there is nothing, in terms of the law or a court order, that prohibits the quantification process.

It would have been a different matter had your application been finalised in your favour.

In the premises I don't seem to have much of a choice but to set the matter down for the quantification hearing.

Please find attached the notice of set down.

Yours faithfully

JOEL MAMBARA"

Let me hasten to say at the hearing the parties conformed that on 21 October 2015, the Labour Court dismissed the respondent's application for interim relief referred to in the second paragraph of the above letter.

Unmoved by the contents of the above letter on 12 August 2015, the respondent again wrote to the arbitrator saying:

"**RE: REGINA TENDAYI vs ECONET WIRELESS (PVT) LTD**

1. We acknowledge receipt of your letter on 6th August 2015 and the notice of set down attached thereto for the 14th of August 2015.
2. Consistent with our earlier objection to the abovementioned set down of quantification proceedings we bring it to your attention that the Labour Court has set down the application for interim relief on 14 September 2015 (see attached).

3. Our client is concerned that there seems to be a sense of desperation in the office of the Arbitrator to override the jurisdiction of the Labour Court notwithstanding the due process in that Appellant Court.
4. In light of the recent correspondence from the Labour Court, kindly advise us no later than close of business today (12th August 2015) if your office insists on proceeding on 14th August 2015.

Yours faithfully

Chinawa Law Chambers"

It appears after further correspondence, the matter was finally set down for 25 August 2015. Both parties attended and the respondent raised the issue that, given the application for stay of execution pending in the Labour Court, the arbitrator had no jurisdiction to proceed with the application for quantification of damages. The issue was argued.

The arbitrator dismissed the objection with reasons and thereafter re-set the matter for hearing on 4 September 2015.

On 28 August 2015, prior to the hearing, the respondent's legal practitioners wrote to the arbitrator continuing to argue, among other things, that the pending proceedings in the Labour Court (i.e. appeal and application for stay of execution) prevented the arbitrator from proceeding with the quantification application. It was argued, in part, that:

> **"Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires"** (emphasis added)

j. For the record, our client is not disentitling the arbitral tribunal from completing the matter and has simply asked for due process of appeal to be obeyed first in light of the scheduled hearing before the Labour Court on 14th September 2015. The tribunal is subject to this process.
k. The prejudice is incalculable and was expressed in oral submissions but omitted in the award. Our client's right to appeal together with its due process is a matter of natural justice and will be rendered nugatory by insisting on these proceedings.
3. In light of the above observations, our client respectfully maintains its reasonable apprehension that it stands to be prejudiced by the tribunal's persistence with the proceedings.
4. In these premises, we are accordingly instructed to request, as we kindly hereby do, that the arbitrator recuses himself from this matter in accordance with the peremptory provisions of the *proviso* to the Code of Ethics in s 7 (1) (c) of the Labour (Arbitrator) Regulations, 2012 which reads:

   'Provided that if the parties to the dispute or conciliator, request the arbitrator to rescue himself or herself, he or she shall do so'

5. By a copy of this letter we are kindly referring the matter to the Principal Labour Officer for the appointment of a new independent arbitrator."

On 31 August 2015 the applicant's legal practitioners responded to the above arguments as follows:

"**RE: Mrs REGINA TENDAYI vs ECONET WIRELESS (PVT) LTD**

We refer to your letter dated the 28th August 2015 and have read the interim arbitral award referred to in your letter.

We not only disagree with the views expressed in your letter but also find no basis whatsoever for demanding the recusal of the arbitrator. We shall in our appearance before the arbitrator on the 4th September 2014 not only oppose his recusal but also proceed with the quantification of damages as agreed with your Mr Sibanda when we appeared before the arbitrator on the 25th August 2015.

Yours faithfully,

C Kuhuni Attorneys"

The above was responded to by the respondent on 1 September 2015 in the following manner:

"RE: REGINA TENDAYI vs ECONET WIRELESS (PVT) LTD

We thank you for your letter dated 31st August 2015.

We consider Honourable J Mambara disentitled from proceeding with the matter by operation of the strict provisions of the Arbitrator's Regulations. For the avoidance of any doubt, the Labour (Arbitrator/Regulations), 2012 do not give any arbitrator the discretion to proceed with a matter where his recusal is sought. He is automatically disentitled from proceeding. As such, the hearing proposed to take off on 4th September 2015 has already been overtaken by events. Currently, we await ode tails of the new Independent Arbitrator from the office of the Principal Labour Officer.

Please be advised that we will not be making any appearances or submissions before him in this matter. We await appointment of a new Arbitrator.

Yours faithfully

Chinawa Law Chambers"

As indicated in para 4 of the respondent's letter of 28 August 2015, the request for the arbitrator's recusal was first communicated to him in that letter. That, I believe, was because of the ruling he made on 25 August 2015. In his ruling he correctly stated that the appeal and application for stay of execution did not prevent him from proceeding with quantification.

Finally on 1 September 2015 the applicant's legal practitioners wrote to the respondent's legal practitioners as follows:

"**RE: REGINA TENDAYI vs ECONET WIRELESS (PVT) LTD**

We refer to your letter of even date the contents of which we have noted.

We reiterate that you have not set out any meaningful basis for recusal of the arbitrator and shall as agreed with your Mr Sibanda on the 25th August 2015 appear before the arbitrator on the 4th September 2015 at 14:30 hours for quantification of the damages due to our client.

There is no legal basis for appointment of a new arbitrator for quantification of the Honourable Arbitrator Mr Mambara's award.

Yours faithfully

C Kuhuni Attorneys"

Indeed, on 4 September 2015, the matter was heard and on 8 September 2015, the arbitrator granted the following quantified award in favour of the applicant.

"In the result it is ordered that the Respondent pay the Claimant the following;

i) Backpay in the sum of $60 000-00 together with interest at 5% per annum from 17 April 2015 to date of payment in full.
ii) Damages in lieu of reinstatement in the sum of $120 000.00 with interest at the rate of 5% per annum from 17 April 2015 to date of payment in full.
iii) Punitive damages in the um of $30 000.00
iv) Cash in lieu of leave in the sum of $5000.00."

It is the above quantified award that the applicant seeks to register as an order of this court for the purpose of enforcement. The award is still extant.

The respondent is opposed to the registration of the award mainly on the ground that the arbitrator, having been asked to recuse himself had no jurisdiction to proceed with the quantification of the interim award before the Labour Court had finalised the appeal and application for stay of execution.

I have already indicated that the application for registration would only apply to an award sounding in money and so the application, for stay of execution in this particular case was clearly premature. In any case the application, as already noted, was dismissed by the Labour Court on 21 October 2015.

Furthermore the appeal in the Labour Court did not suspend the award. The law is clear on that point. In *DHL International (Pvt) Ltd* v *Clive Madzikanda*, HH 51/2010 where Makarau JP, (as she then was) said:

> "Finally, Mr *Kadzere* has further submitted that in view of the provisions of s 92 E of the Act, the respondent stands dismissed from employment as the noting of an appeal to the Labour Court does not suspend the decision appealed against. Again Mr *Kadzere* is correct.
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> Sections 92 E of the Act provides:
>
> "(1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.
> (2) An appeal in terms of subsection (1) shall not have effect of suspending the determination or decision appealed against.
> (3) 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 my view, the amendment to the law in 2005 to provide that appeals to the Labour Court would suspend the decision appealed against was clearly meant to vary the common law position that was prevailing prior to the amendment. That for the purposes of the Act the employee is regarded as dismissed pending the determination of the appeal appears to me to be beyond dispute."

I fully agree with the above interpretation of the law. Thus, as the law stands, the appeal had no effect on the unquantified award of 17 April 2015.

The award provided:

> "The parties are to agree on the quantum failing which either party may approach this tribunal for quantification of damages."

Accordingly on 24 July 2015, in the absence of agreement on damages and whilst the award remained extant, the applicant, as one of the parties, applied for the quantification of the damages. That was a proper exercise of her right resulting in the award of 8 September 2015. She now seeks to register that award as an order of this court for purposes of enforcement. There is nothing that should stop her from registering the award.

Having so ruled, what remains to be determined is: whether or not the arbitrator should have recused himself before 4 September 2014 as had been requested by the respondent on 28 August, 20115.

In advancing its case on the issue of recusal, the respondent has relied on s 7(1) (a) (b) & (c) of the Labour (Arbitrators) Regulations, 2012, (the regulations) which provides as follows:

> "7. (1) It shall be the duty of every arbitrator to act in such manner as to ensure that-

(a) all significant aspects of arbitration are treated by the arbitrator as confidential unless this requirement is waived by both parties;
(b) impartiality and principles of natural justice are observed at all times;
(c) he or she shall disclose to the parties or the conciliator any current or past managerial, representational, or employers' organization, trade union or a federation that is involved in the dispute at hand:

Provide that if any of the parties to the dispute or the conciliator request the arbitrator to recuse himself or herself, he or she shall do so;"

It is important to note that under s 98(9) of the Act the legislature, in arbitration matters, saw it fit to clothe the Arbitrator with the same powers as enjoyed by the Labour Court when determining any labour dispute as was the case in *casu*. The section provides as follows:-

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

Under ss 2 A (3) and 98 (2) the Act also says:

"2 A (3) This Act shall prevail over any other enactment in consistent with it.
98 (2) Subject to this section, the Arbitration Act [*Chapter 7:15*] shall apply to a dispute referred to compulsory Arbitration"

Section 5 of the Arbitration Act [*Chapter 7:15*] also provides as follows:

"5. Application of Act to arbitration under other enactments

(1) Subject to subsection (2), where an enactment requires any matter to be determined by an arbitrator or by arbitration in accordance with any law relating to arbitration, such requirement shall be deemed to be an arbitration agreement for the purposes of this Act.
(2) Where an enactment provides for the determination of nay matter by arbitration, the provision of that enactment, to the extent that they are inconsistent with this Act, shall prevail."

The two Acts are clearly not in conflict. They complement each other. Generally our guidelines and principles on arbitration are embodied in the Arbitration Act and hence the above provisions in our law.

The Labour Court, as a formally constituted court, has rules of operation and can, where necessary, give directions to facilitate the effectiveness of its own functions. I want to believe that in order to properly discharge its constitutional mandate the labour court should, like the Supreme and High Courts, be able to manage and regulate its own processes. That is why it has its own rules. Likewise Arbitrators, in labour matters, operate under certain guidelines and should, in my view be able to give directions where necessary. In terms of the Act as arbitrators, they enjoy the same powers as the Labour Court.

In *casu*, the arbitrator directed that, instead of a mere "request" through a letter, a formal application for his recusal should have been made. That directive was ignored. Upon that directive having been ignored, my view is that the Arbitrator was correct in ignoring the "letter request."

There must always be valid reasons for a party to request for the recusal of an arbitrator and indeed the section of the regulations relied upon spells out the grounds upon which such a request must stand. If those grounds are met then it becomes mandatory for the arbitrator to recuse himself/herself. Surely the grounds are issues for argument by both parties before the Arbitrator and hence the need for a formal application.

We have, in this case, a situation where, upon making a ruling on a preliminary issue raised by the respondent, the conclusion reached by the respondent is that the arbitrator was biased and should therefore recuse himself. The arbitrator was asked to give reasons for dismissing the preliminary issue which was anchored on the argument that he could not proceed with quantification when proceedings in the Labour Court were still pending. He did and reasoned thus:

> "On 25 August 2015 the parties appeared before the tribunal for a hearing.
> The respondent had not yet filed its papers.
>
> The respondent proceeded to raise a point *in limine* grounded on lack of jurisdiction of the Tribunal due to the application for an interim relief that is pending before the Labour Court. The respondent explained to the Tribunal that the Labour Court had set the appeal down for hearing on 14 September 2015 but upon advice from the respondent had instead replaced the appeal hearing with the hearing of the application for an interim relief. In the circumstances, according to the respondent, it would be proper for the Tribunal to allow the jurisdiction of the Labour Court to be exhausted.
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> I dismissed the point *in limine* and advised the parties that the reasons for dismissing the point *in limine* shall be included in the final award. The respondent requested for the reasons and I acceded to the request. These are they.
>
> In our jurisdiction a practice of hearing arbitration matters in two stages has evolved. This followed the handing down of the judgment in *Mandiringa and Others* – v – *National Social Security Authority 2005* (2) ZLR 329 (S). In particular Makarau J (as she was then) expressed that view that;
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> In my view, the wording of s 98 (4) strongly suggests that the award submitted for registration in terms of the section should sound in money either in the main or in the alternative.
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> A further point was made in the Mandiringa case supra that, "It is therefore, the settled position in our law that, in ordering reinstatement in terms of the Labour Act, the Labour Court, labour

> officers and arbitrators appointed under the Act are duty bound to assess damages in lieu of reinstatement. Any judgment, determination or award by these officials that fails to do so is liable to be interfered with as a misdirection or as failing to comply with the Act in a material way." (emphasis mine)
>
> A reading of this judgment places it beyond doubt that an arbitrator is duty bound to quantify his award. It is a statutory duty that can only be interfered with by a court order. In the instant case there is no such court order directing me to suspend the quantification."

The Arbitrator went further to say:

> "The Arbitrator's jurisdiction is clearly laid out. He/she must hand down legally competent awards. That is, awards where necessary, sounding in money. By so doing he/she won't be encroaching on the jurisdiction of the Labour Court. The process of quantification even where there is a pending application for an interim relief or an appeal cannot not, by the widest description, be described as an instance of bring multiple proceedings to the courts. The boundaries are clearly defined and all that I was asked to do was to quantify the award."

The above enunciation of the law by the arbitrator cannot be faulted. One cannot read bias, particularly in the above interpretation of the law. There is nothing to justify a request for the arbitrator to recuse himself, and worse still on the basis of an instrument called "a letter."

It cannot be denied that the arbitrator directed that a formal application be made. This was also emphasized by the applicant's legal practitioners. That directive of the arbitrator ought to have been followed. Admittedly the arbitration process was based on the consent of both parties and logically the withdrawal of consent by one of the parties would terminate the process. However, a process of withdrawing the consent must exist and such process cannot exclude the involvement of the other party. The application process would certainly bring both parties onto the scene to debate the merits of the request for recusal. That process was rejected by the respondent. The process would have revealed whether or not impartiality and principles of natural justice were observed (i.e. s 7 (1) (b) of the regulations).

I have already indicated that the arbitrator's ruling which led to the request for his recusal was a correct pronouncement of the law. Accordingly, even if a proper application for recusal had been placed before the arbitrator, the allegation of bias could not, in my view, have been sustained. The arbitrator merely pronounced the law correctly and then proceeded to complete the arbitration process as was his mandate. The award is not a nullity.

The foregoing clearly militates against any refusal to register the award as applied for by the applicant.

I therefore order as follows:-

"1. The Arbitral Award granted by the Arbitrator J. MAMBARA on 8th September 2015, be and is hereby registered as an order of the High Court of Zimbabwe; and

2. The respondent shall pay costs of suit."

C Kuhuni Attorneys, applicant's legal practitioners
Chinawa Law Chambers, respondent's legal practitioners