ANDREW MUZAMHINDO
versus
ZIMBABWE CRICKET

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15October 2018 & 2 November, 2018

Opposed Matter

B Ngwenya, for the plaintiff
B Diza, for the defendant

MANG0TA J: On 17 July 2009 Honourable J.T Mawire, the arbitrator, granted an arbitral award of $103 208.35 to the plaintiff. The award enjoined the defendant to pay the stated sum to the plaintiff as the latter's arrear commission.

The plaintiff registered the arbitral award on 11 October 2012. He did so under HC 5479/09.

The registration of the award compelled the defendant to pay the arrear commission to the plaintiff. It commenced payment in 2012 and completed the same in 2015.

On 17 August 2017 the plaintiff issued summons against the defendant. He did so under HC 7584/17. He claimed:

i) Payment of $30 962.52 which he said was/is interest which, according to him, accrued on the sum of $103 208.39;
ii) Interest on the claimed sum calculated at the prescribed rate reckoned from the date of the summons to the date of payment– and
iii) Costs of suit on an attorney and client scale.

The defendant entered appearance to defend and excepted to the plaintiff's summons. It

stated that the plaintiff's claim was based on an arbitral ward. The award, it insisted, did not award interest on the sum of $103 208.39. It averred that the court did not have the power to award relief which was outside the arbitral award. Its exception forms the basis of these proceedings. It moved the court to dismiss the plaintiff's claim with costs on an attorney and client scale.

It is trite that no one has the authority to alter an order of court which is properly issued. The only circumstances where such can be altered occur when the same has been successfully reviewed or appealed. The other circumstance through which an order of court may be interfered with occurs where the aggrieved party successfully applies for its rescission.

The principle which is to the effect that court orders which are made after due process cannot be interfered with is sacrosanct. It is immutable. It is immutable in the sense that even the court which makes the order cannot arrogate to itself the power to alter the order which it has made except in some very limited and very exceptional circumstances such as are stipulated under r 449 of the High Court Rules, 1971. The court becomes *functus officio* the moment that it makes a pronouncement of the order.

Regardless of the inferiority of the court which makes it, the order can only be altered through the process of appeal, review or rescission. The meaning and import of the mentioned processes are clear and unambiguous:

> '(a) the appeal tests the correctness of the decision of the court *a quo*;
>
> (b) the review tests the procedural aspects which the court *a quo* employs to reach the decision it makes – and
>
> (c) the rescission aims at restoring the parties to the *status quo ante* the decision of the court *a quo*.

The above are the circumstances by means of which a court order, properly issued, may be interfered with. I have not known of any other instance where the alteration of the order is permitted apart from the stated set of circumstances.

Where, as *in casu,* the arbitrator, sitting as such, makes an award, the same assumes the status of a court order. The assumption emanates from the fact that it is made after due process.

A party in whose favour the award is made, more often than not, intends to realise some benefit from it. It, therefore, calls upon the party against whom the award is made to comply with the award.

The party against whom the award is made can, if such is its intention, satisfy the same by complying with the award. Where it fails to do so, as the law enjoins it to do, the award winning party is allowed, by law, to register the same with this court or with the court of the magistrate. The *quantum* of the award determines the appropriate court for its registration.

The registration of the award serves no purpose other than to allow the party in whose favour the award is made to enforce the same through the mechanisms of enforcement which are available to the award registering court. The functions of the registering court were aptly stated by CHIWESHE JP who in *Vasco Olympio* v *Shonnet Industrial Development* HH 191/17 remarked as follows:

> "In an application such as the present one, the court is not required to look at the merits of the award. All that is required of this court is that it must satisfy itself that:
> (a) the award was granted by a competent arbitrator;
> (b) the award sounds in money;
> (c) the award is still extant;
> (d) the award has not been set aside on review or appeal;
> (e) the litigants are the parties— and
> (f) a certificate given under the hand of the arbitrator validating the arbitral award has been furnished to the registering court"

The above stated six matters place a stamp of authority for the registration of the award. Any matter which falls outside the stated stamp of authority cannot be considered.

The award which the plaintiff registered with the court appears at page 19 of the record. It reads:

> "It is ordered that
>
> 1. The award in the arbitration matter of *Andrew Muzamhindo and Zimbabwe Cricket Union* held before the Honourable T.T Mawire dated 17 July 2009 be and is hereby registered as an order of the High Court of Zimbabwe in the following terms:
>
> 1.1 Respondent shall pay to applicant the sum of $103 208.39 as arrear commission.
>
> 1.2 Respondent shall bear costs of this application"

The arbitral award which the plaintiff registered with the court on 11 October 2012 is clear and unambiguous. It directs the defendant to pay to the plaintiff arrear commission and costs of

the application for registration of the award only. It does not mention the aspect of interest at all. It is silent on that issue.

Paragraph 3 of the plaintiff's declarations is a mis-statement of the correct position of the matter. It is not correct for him to state, as he did, that in 2009 he obtained an arbitral award of $103 708.39 with interest against the defendant. The component which relates to interest was not part of the arbitral award. Paragraph (a) of his prayer is also misplaced. It is not correct that the interest which he is claiming from the defendant is anchored on the arbitral award as registered at this court.

The court cannot offer to him what the arbitrator did not award to him. It cannot, in short, alter the award which the arbitrator entered in his favour. Doing so would go against the principle which the court correctly stated in the *Vasco Olympio* case.

The plaintiff misdirected himself in an irredeemable manner when he sought to premise his claim on the order which registered the arbitral award. The registered order cannot confer interest upon him at all. His claim for interest based on HC 5479/09 cannot stand. It is devoid of merit.

The defendant is, in the circumstances of the above mentioned matters, correct to except to the plaintiff's claim. It states, and correctly so, that the court does not have the power to award a relief which is outside the arbitral award. Its statement is the correct position of the law.

The plaintiff realised the unpalatable situation which he created for himself when he filed the suit. It was out of that realisation that he filed an amended summons and declaration. These appear at p 87 of the record.

A reading of the amended summons and declaration shows that he revised the *quantum* of the interest which he is claiming from the defendant downwards to $25 400. The same shows, further, that he anchors his claim on Article 31 (6) (b) of the Arbitration Act as read with s (5) of the Prescribed Rate of Interest Act.

Article 31 (6) (b) of the Arbitration Act [*Chapter 7:15*] ["the Act'] remains applicable in respect of an arbitral award which is silent on interest. Paragraph (a) of subsection (6) of s 31 of the Act deals with the situation where the arbitrator has, in his discretion, awarded interest in specific terms to an award winning party. Paragraph (b) which is relevant to the case of the plaintiff deals with the situation where interest is silent in the arbitral award. It reads:

> "(b) where the award does not specify otherwise, a sum directed to be paid by the award shall carry interest from the date of the award to the date of payment at the same rate as a judgment debt." [emphasis added]

It requires little, if any, effort to observe that the case of the plaintiff does not fall under paragraph (a) of subsection (6) of s 31 of the Act. It falls under para (b) of the same. In terms of that paragraph, therefore, interest was awarded to the plaintiff on the day that the arbitral award was entered in his favour by the arbitrator. It is recoverable as if it forms part of the judgment debt on which it is due.

The plaintiff wasted a lot of time, energy and effort when he sued to recover what was already awarded to him. He did not, and does not, have to sue to recover his interest. All what he should have done, and should do, is to calculate the interest and enforce its recovery through the normally accepted mechanisms of recovering what is, by law, due to him.

The interest which the learned arbitrator awarded to him in terms of s 31 (6) (b) of the Act is extant. It remains part and parcel of the arbitral award. It is recoverable by him from the defendant. The registration of the award does not in any way adversely affect his right to recover his interest. He does not even require to revert to s (5) of the Prescribed Rate of Interest Act as he is suggesting in his amended prayer. Section (5) of the mentioned Act has no bearing at all on what the arbitrator lawfully awarded to him in terms of the Act which remains relevant to his case.

The defendant cannot, at law, stand in his way towards his effort to recover what the law confers upon him. It cannot change the law at all particularly regard being had to the fact that the arbitral award of 2009 was not appealed, reviewed or rescinded.

The summons which the plaintiff issued is not only bad. It is incurably bad. It should not have been issued at all.

The plaintiff missed the point when he sought to support his claim by invoking Article 31 (6) (b) of the Act as read with s 5 of the Prescribed Rate of Interest Act. He also missed the point when he placed reliance on the Prescribed Rate of Interest Act. That Act has no relevance at all to what he must obtain from the defendant in terms of s 31 (6) (b) of the Arbitration Act.

The defendant likewise missed the point when he excepted to the claim on the basis that the same had prescribed. Prescription does not come into the matter at all. Interest which is due to the plaintiff was awarded in the arrear commission which the plaintiff recovered from it. What the

plaintiff remains to recover, through the process of enforcement, is that interest which he cannot now claim.

The court has considered all the circumstances of this case. It is satisfied that the plaintiff failed to do justice to his own side of the case. It is further satisfied that the defendant's exception succeeds in part.

The plaintiff's claim is, accordingly, struck off the roll with costs.

Chinawa Law Chambers, plaintiff's legal practitioners
Mhishi Nkomo Legal Practice, defendant's legal practitioners