

RUMBIDZAI MUSIYIWA  
versus  
METBANK LIMITED

HIGH COURT OF ZIMBABWE  
CHATUKUTA, J  
HARARE, 12 & 19 July 2017

### **OPPOSED APPLICATION**

*T Marume*, for the applicant  
*R Mabwe*, for the respondent

CHATUKUTA J: On 9 October 2014, an award was issued by the Honourable Zimbudzana (the arbitrator) with the consent of both parties, in which he ordered that the applicant had been unfairly dismissed by the respondent and she was entitled to back pay and damages in lieu of reinstatement. The parties were ordered to calculate the back pay and negotiate the damages within 30 days of the award failing which either party could apply to the arbitrator for quantification of both the back pay and the damages. It appears the parties did not agree, leading to the applicant applying for quantification on 7 January 2015. It is common cause as set out by the arbitrator in the award that the matter was set down for hearing on 27 February 2015, 6 March 2015, 12 June 2015, 30 September 2015. The hearing failed to take off on all four occasions because the respondent sought a postponement on each date. The last date of hearing was 22 March 2016. Again the respondent sought a postponement, this time unsuccessfully. The arbitrator issued an award on 15 April 2016 setting out the back pay and the damages.

On 27 April 2016 the applicant filed the present application seeking the registration of the arbitral award. The applicant submits that the award is extant and there is no legal impediment to its registration.

The application is opposed on two grounds, firstly that there is a pending application for review and an application for stay of execution before the Labour Court under case number LC/H/REV/39/16. Secondly, it was submitted that the award is not registrable because the arbitrator proceeded to determine the matter on a date he agreed to only with the applicant. The procedure agreed between the parties was that the parties would agree on a date of hearing. The parties did not agree to have the matter heard on 22 March 2016 and the respondent had indicated its unavailability on that date. The arbitrator proceeded with the arbitration contrary to the provisions of Article 36 (1) (a) (ii) of the Model Law to the Arbitration Act [*Chapter 7:15*] which require that proper notice of the arbitral proceedings be given and a party be given an opportunity to make representations.

The respondent abandoned the first ground of opposition and rightly so. Despite the abandonment, it is my view that it is necessary that I comment on the respondent's conduct regarding the issue. At the commencement of the hearing, Ms *Mabwe* submitted that she abides by the heads of argument filed of record. She did not indicate that she was abandoning the preliminary point. During the hearing I inquired from the respondent's counsel the status of the application for review. Her response was that she too had made similar inquiries with the instructing attorneys and she was advised that they were not aware of the status of the application and they are still making inquiries with the Registrar of the Labour Court. It however, emerged through Mr *Marume*, that the application was struck off the roll on 2 December 2016.

Two things arise from the exchange with the respondent's counsel. Firstly, the preliminary point is not sustainable because of a plethora of case authority that the mere filing of an application for review or the noting of an appeal before the Labour court does not suspend an award. Secondly, it is a matter of concern that the respondent, who was the applicant in the application before the Labour Act, was not aware of the fate of its application eight months after it was struck off the roll. It appears the respondent has simply opposed this application in a bid to delay its finalisation.

Turning to the second issue, the applicant referred the court to a plethora of decisions of this court where it was held that the court need only be satisfied that the jurisdictional facts set out in s 98 (14) of the Labour Court Act [*Chapter 28:01*] have been met. (See *Greenland v Zimchre* HH 93/13, *Tapera v Fieldspark (Pvt) Ltd* HH 102/2013, *NSSA v Mandiringa* HH 98/2005, *Mvududu v Agricultural and Development Authority (ARDA)* 2011 (2) ZLR 449

*Samudzimu v Dairibord Holdings Ltd* 2010 (1) ZLR 357. In *Mvududu v Agricultural and Development Authority (ARDA)* BHUNU J (as he then was) remarked at 451 F – 452 B that

“The respondent is resisting the registration on the basis that the applicant cannot seek to enforce a judgment he has appealed against. There are two cardinal issues for determination in this application. The first issue is whether the applicant is automatically as a matter of right entitled to register an award upon satisfying the conditions specified in s 98 (14) of the Act. In order to qualify for registration all what an applicant has to do is to satisfy the court that:

- a) He is a party to the arbitral proceedings.
- b) The award relates to him.
- c) The copy he is presenting for registration has been duly certified by the arbitrator in terms of subs (13).

Once the applicant has satisfied the above three requirements he is entitled as of right to register the arbitral award in terms of s 98 (14) as read with subs (13).

Any opposition to registration is therefore limited to showing that the applicant has not satisfied anyone or more of the three prescribed requirements for registration.”

The applicant ventures a fourth requirement that the award must be extant. (See *Tapera v Fieldspark (supra)* & *Elvis Ndlovu v Higher Learning Centre* HB 86/10).

It is common cause that the applicant has satisfied all the four requirements. As rightly submitted by Mr *Murume*, the merits of the award are not for my determination. It appears that the respondent had raised the merits of the award in its application for review before the Labour Court. That was the proper forum to raise the merits of the award. It did not succeed because it was decided that it had adopted the wrong procedure in proceeding by way of review. It appears it has not shown an interest in whether or not it was successful. The Labour Court is the proper court where the respondent is supposed to challenge the merits of the award. It now seeks to do so through the back door. As observed by MATHONSI J in *Elvis Ndlovu v Higher Learning Centre (supra)* on p 2:

“None of the reasons for opposing the application for registration are sustainable. It is common cause that there is an arbitral award in existence which award was made in terms of the law. That award has not been set aside and indeed nothing has been done by the respondent to challenge that award as it is entitled to do by the Labour Act. It is common cause that there is nothing pending in any court putting to question that award.”

I am in agreement with the applicant that the grounds advanced by the respondent do not constitute an impediment to the registration of the award. I therefore do not consider it necessary to consider in detail the issues raised by the applicant.

Out of abundance of caution and assuming that I have erred, the registration of the award cannot be said to be contrary to public policy by reason that the respondent was not

afforded the right to make representations. As apparent from the award, the respondent was afforded every opportunity to have its case heard. As alluded to earlier, the matter was set down on four occasions and could not proceed after the respondent sought postponements. The matter was only heard on the fifth occasion on 22 March 2016, thirteen months after the first set down date. The argument by the respondent that it was not afforded the right to be heard is tantamount to saying two things; firstly, that a postponement should be granted upon the mere asking. The arbitrator therefore does not have a discretion to determine an application for postponement regardless of any opposition to the postponement by the other party. Secondly, if the respondent did not agree to a date, the proceedings could not continue. The quantification could only proceed at the pleasure of the respondent, irrespective of the time it took the respondent to find a suitable date. In *David Moyo v Rural Electrification Agency* case number SC 4/14 (a case cited with approval by MAXWELL J in her judgment under case number LC/H/REV/39/16 (LC/H/760/16) being the application for the review of the arbitrator's decision, it was remarked that a person who deliberately absents himself without leave from a hearing waives his right to challenge the proceedings. The respondent denied itself the right to challenge the proceedings and cannot be seen to be crying foul.

In the result, it is accordingly ordered that:

1. The Arbitral Award delivered by the Arbitrator T Zimbudzana dated 15 April 2016 be and is hereby registered as an order of this court.
2. The respondent be and is hereby ordered to pay costs.

*Matsikidze & Mucheche*, applicant's legal practitioners  
*Messrs Manase & Manase*, respondent's legal practitioners