

VAKIM NYONI AND 21 OTHERS  
versus  
FREDA REBECCA GOLD MINE HOLDINGS LTD

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 3 October 2017 and 10 November 2017

### **Opposed application**

*J Bamu*, for the applicants  
*T Mpfu*, for the respondent

MANGOTA J: The applicants raised certain claims against their employer which is the respondent *in casu*. They claimed payment of the following allowances: medical, housing, utilities, shift and underground, cafeteria, production bonuses and food hampers. They took their case to arbitration. The learned arbitrator heard submissions from the applicants and the respondent which the applicants cited as Freda Rebecca Gold Mine. He entered judgment for the applicants. The arbitral award as quantified came to a staggering figure of \$1 494 450.64.

On 24 March, 2017 the applicants filed the present application. They applied for registration of the arbitral award. They, in the application, cited the respondent as Freda Rebecca Gold Mine Holdings. They submitted that the respondent was a registered company which was situated at the 86 km peg on the Harare- Bindura Highway.

The respondent opposed the application. It, however, did not raise any issue which related to the name by which it was cited. It, in fact, acknowledged its identity as such. It stated in paragraph 2 of its opposing affidavit that it was a duly registered legal entity. The paragraph reads:

“2. The respondent is a duly registered company in terms of the laws of Zimbabwe and its address of service for purposes of these proceedings is care of its legal practitioners, No. 20 Mayo Place, off Norwich Avenue, Estelea, Harare.” [emphasis added].

The deponent to its opposing affidavit, one Munyaradzi Peter Chingara, stated that he was the respondent’s senior human resources officer. He submitted that the respondent

authorised him, through a Board resolution, to depose to the opposing affidavit on its behalf. He attached to the respondent's opposing papers a copy of the notice and grounds of appeal which the respondent filed with Labour Court against the arbitral award. In the mentioned notice, the respondent cited itself as Freda Rebecca Gold Mine.

The application for registration of the arbitral award was set down for hearing at 12 noon of 18 September, 2017. At the commencement of the hearing Mr *Mpofu*, whom the respondent's legal practitioners had briefed, requested for a postponement. He informed the court that he wanted to file supplementary Heads. The hearing was, therefore, postponed to 3 October, 2017 to allow both parties to file their supplementary Heads which, as the court was advised, related to some points of law.

The points of law which the respondent raised in the supplementary heads were that the proceedings which brought about the arbitral award were invalid. The award, it submitted, was made against Freda Rebecca Gold Mine. It said the application for the registration of the arbitral award cited the respondent as Freda Rebecca Gold Mine Holdings Limited. It said the applicants could not seek to register an award against an entity against which that award was not made. It insisted that none of the respondents had an award made against it. It stated that no company answered to the name Freda Rebecca Gold Mine Holdings Limited. It submitted that the respondent which was before the court had nothing to do with the arbitration proceedings or with the registration of the award which was made against the applicants' employer. It stated that the respondent whose name appeared in the arbitral award was non-existent. It stated that Freda Rebecca Gold Mine was a place which had no legal personality. It submitted that, as a place, it could not be made the subject of legal proceedings.

The long and short of its submission was that the arbitral award which the applicants sought to register was invalid. It said it was invalid because there was no respondent to it. It submitted that the current application was, by extension, also invalid. Its invalidity centred on the fact that it had one party and not two parties to it.

The respondent referred me to a number of case law authorities which it said supported the position which it took of the matter. Amongst the cases which it said supported the submissions it made were those of *CT Bolts (Pvt) Ltd v Workers Committee*. SC 16/12 and *Gariya Safaris (Pvt) Ltd v van Wyk*, 1996 (2) ZLR 246 (H).

The other matters which the respondent included in its supplementary Heads dealt with the substance of the arbitral award. Such matters were, therefore, not relevant to the application which was before me.

The applicants' supplementary Heads took a contrary position to those of the respondent. They submitted that what was pertinent was the registration of the award. They stated that the matter which the respondent raised would be dealt with after registration of the award had taken place. They referred me to the case of *Pearlman (Veneers) SA (Pvt) Ltd v Bartels*, (1954) 3 ALL ER 659 (CA) which they said supported their position on the matter at hand. They submitted that the law allowed correction of the wrong name without changing the identity of the party to a judgment. They contended that the respondent did not dispute its identity as a party to the dispute. They stated that, in various decisions which came before the courts in the past, the respondent's citation had been mutating. They cited the following cases in which the respondent, according to them, had been differently cited:

- *Freda Rebecca Gold Mining Holdings t/a Freda Rebecca Mine v Phillipah Njarava and 10 Ors*, HH 287/17
- *Freda Rebecca Gold Mine Holdings v Bwanali Tambuli & 21 Ors*, HH 478/16
- *Freda Rebecca Gold Mine Limited t/a Freda Rebecca Mine v Associated Mine Workers Union of Zimbabwe (AMWUZ)*, SC 36/14.

They insisted that, whilst the respondent's citation changed, its identity remained constant. They submitted that it was that constant identity which precluded prejudice if the respondent's name is corrected to reflect the name by which it is registered as a legal *persona*.

The respondent's argument, as contained in its supplementary heads, does, on the face of it, appear to carry some weight. However, a close study of the matter shows the contrary to be the case. The respondent, in my view, premised its submissions on form as opposed to substance.

The record shows that, when the applicants took their claims to arbitration, they cited the respondent as Freda Rebecca Gold Mine. The respondent, it is evident, did not raise any preliminary matter as regards the name by which it was cited. It, if anything, went along with the name as was given to it by the applicants. It argued its case before the learned arbitrator and, unfortunately for it, judgment was entered against it. The applicants applied for quantification of the arbitral award.

The record shows, further, that the respondent whom the applicants cited as Freda Rebecca Gold Mine applied to this court, as cited, to have the quantified order set aside. The court returned the matter to the learned arbitrator for a fresh quantification.

The record shows also that, when the fresh quantification had been completed, the respondent, as cited, appealed the award to the Labour Court. It, as cited, made part- payments

of the applicants' claims. It did so in January, 2015. Proof of the part payments which it made was, according to the learned arbitrator, attached in the form of RTGS deposits dated 8 January, 2015. The learned arbitrator stated in his statement which appears at page 10 of the record that the respondent, as cited, attached to the proof of payments a schedule of names, the amounts it paid as well as bonuses which it availed to the applicants.

It is, in view of the foregoing, a futile exercise for the respondent to argue as it did in its supplementary heads. It might have been incorrectly named. However, its conduct before and after the arbitration proceedings confirms its existence as a party which did all it could not only to defend itself but also to protect what it holds dear to it. The matter does not end there.

The record shows that, when it was served with the current application, it wasted no time. It filed its opposing papers using the name by which the applicants cited it. It also filed its heads of argument using the same name. It gave no explanation as to why it was raising what it stated in its supplementary heads only at the eleventh hour. The respondent is, therefore, estopped from raising the matter which it did in its supplementary heads given its previous conduct on the same matter. The view which I hold of the matter finds fortification from the remarks which the court made in *Smith v Hughes*, LR 6 QB 597 at 607. The remarks read:

“If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.”

Whilst *Smith v Hughes* related to contracting parties, the principle which lies at the centre of the remarks is of relevant importance. The respondent, throughout the arbitration proceedings, led the applicant to believe that it was happy with the name by which they had cited it. It went as far as using that same name in its appeal against the arbitral award. Throughout the current application, the respondent led the applicants to believe that it did not quarrel with the name by which they cited it. That was so notwithstanding the fact that the name in question was different from the name which the parties went by in the arbitration proceedings. It, in fact, went to file its opposing affidavit as well as its main, and supplementary, heads of argument using the name which the applicants had cited in their application. To the stage that it filed its main heads, it did not raise any issue which related to the name by which the applicants cited it in the application.

That the respondent was existent as a party to the arbitration proceedings required little, if any, debate. It made submissions before the arbitrator. It also appealed his decision. It engaged its legal practitioners of record who, in furthermore of its cause, briefed Mr *Mpofu* to argue its case before me.

That the respondent is existent as a party *in casu* is evident from the role which it played in the same. It opposed the application for registration. It advised the court that it is a legal *persona*. It gave its address of service as being that of the law firm which it engaged to defend its cause. It requested the law firm which is representing it to brief counsel to argue its case in a more effective manner than otherwise. Its identity is, therefore, without question. What remained questionable was/is its correct name which, as the applicants stated, could easily be corrected without any prejudice being visited upon it.

The argument which the respondent made in its supplementary heads prompted me to make the observations which I made shortly after I had heard submissions. I repeat part of the observations to bring out the sting of it. I said:

“This is a labour turned into a High Court matter. Minus the apparent confusion thrown at it by crafty and extremely intelligent legal minds, the parties know each other in a very big way. They, for probably a considerable length of time, maintained between them an employer-employee relationship. The paymaster, therefore, knows its payees and these, in turn, know the entity which buttered their bread from one month to the other prior to arbitration.”

I subscribe to the applicants’ view which was to the effect that the citation of the respondent changes but its identity is a known reality which cannot be confused by the citation which appear in this application or in any other court process which preceded the current application. The respondent is a clearly defined legal entity which has all the faculties of such a person.

Given the history of the parties and their relationship with each other, the respondent cannot successfully argue that the applicants cited the wrong party making their application invalid. The cases which the respondent cited in support of its position tended to show that there was no defendant or respondent who was being sued. They showed that the identity of the defendant was not known and, by extension, that there was no party who answered to the plaintiff’s or applicant’s claim. To the stated extent, therefore, the case authorities which were cited cannot be faulted.

*In casu*, however, there is a respondent which might either have been incorrectly cited or was cited by its trade name. The applicants stated, and correctly so, that it would apply to have the correct name of the respondent cited after registration of the arbitral award. No

prejudice would be visited upon the respondent by the application, in my considered view. The applicants would not, at any rate, be able to enforce the order once the arbitral award has been registered if they do not apply to have correct citation of the name of the respondent made.

Most of what the respondent raised in its supplementary heads related more to arbitration proceedings than it did to their application for registration of the arbitral award. The appeal which it filed with the Labour Court will, in my view, address such matters.

What is before me is an application for registration of the arbitral award. The award is extant. Neither the appeal which the respondent filed nor its application for stay of execution stands in the way of registration of the award. Application for stay of execution can, in terms of r 34 of the Labour Court Rules, be properly considered after the arbitral award has been registered.

On the basis of the foregoing, therefore, the application is granted as prayed.

*Messrs Gill, Godlton and Gerrans*, appellant's legal practitioners  
*Mbidzo, Muchadehama & Company*, respondent's legal practitioners