

ZIMBABWE NATIONAL WATER AUTHORITY

versus

TENNYSON TIZAI SHUMBA NYAMBI

and

MANHAMBARA HERRY

and

PAUL SOUL CHABATA

and

MARTIN WALTER CHINDOVE

and

OLIVER EDIAS NYAGUWO

and

TEDIAS TICHAONA MARUTA

and

JOHN CHIRADZA

and

LEO MANHAMBARA

and

WISEMAN GANIZANI

and

STANLEY CHAMUNORWA CHIRENJE

and

DICKENS MUNYORO

and

SHAKESPEAR NYAMBI

and

JOSHUA MUZAMANI

and

KENNARD NYABONDE

and

CITY OF HARARE

HIGH COURT OF ZIMBABWE

CHAREWA J

HARARE, 19 and 25 September 2017 & 11 October 2017

Application for rescission of judgment

Mr J Dondo, for the applicant

Mr N Chikowore, for the 1st - 14th respondent

Mr C Kwaramba, for 15th respondent

CHAREWA J: This is an application for the rescission of an order of this court granted on 10 April 2017 in HC 5623/09.

Background

The applicant was the employer of 1st - 14th respondents who were subsequently transferred to the 15th respondent.

On 6 November 2007, the 1st - 14th respondents obtained an arbitral award against the applicant, wherein the arbitrator found that the applicant had committed an act of unfair labour practice prior to the transfer of the employer – employee relationship to 15th respondent. The applicant appealed the arbitrator’s decision but subsequently withdrew its appeal. The arbitration award therefore remains extant.

The 1st - 14th respondents caused the quantification of the award on 14 September 2009 and thereafter filed a chamber application for the registration of the award on 12 November 2009 in HC 5623/09. The applicant opposed the registration.

On 26 November 2009, 1st - 14th respondents filed their heads of argument. The applicant did not file its own heads of argument.

The matter was thus referred to the unopposed roll as applicants were automatically barred for failing to file heads of argument. The order of registration of the arbitral award was subsequently granted on the unopposed roll on 10 April 2017 aforesaid.

Parties’ submissions

15th Respondent advises that it will abide by the judgment of the court and makes no submissions.

The applicant avers that it is entitled to an order of rescission as it was not in wilful default because:

1. It did not file heads of argument as it believed that the matter “did not proceed any further” “as far as (it) was concerned”.
2. It received no response to its legal practitioners’ letter dated 15 August 2016 seeking respondent’s indulgence in the face of the bar operating against it.
3. 1st - 14th respondents had not served, upon applicants’ legal practitioners, the court’s directive dated 14 March 2017 referring the matter to the unopposed roll as directed by the Court. Further, no notice of set down on the unopposed roll was served on the applicant. This resulted in default judgment being entered against applicants on 10 April 2017.

On the merits, applicant believes that it has a good defence to the application for registration in that:

1. Its withdrawal of its appeal was not predicated on the merits of the 1st - 14th respondents' case for registration of the arbitral award, but on the fact that the respondents had been transferred to 15th respondent which was not party to the arbitration proceedings.
2. The arbitral award was not sounding in money as it merely ordered applicant to comply with s16 of the Labour Act.
3. The schedule of calculations used to quantify the award was based on non-existent grades and imaginary salaries unilaterally computed by 1st - 14th respondents.
4. The schedule forming the basis of the registered award contains glaring errors and the arbitrator's certificate was wrongfully and unlawfully issued without calling the parties to a hearing.
5. The arbitrator's mandate terminated on 6 November 2007 and he therefore had no business quantifying his award.

On their part, 1st - 14th respondents contend that the applicant is barred for failure to file heads of argument and is therefore improperly before the court as it has not sought upliftment of the bar. They assert that they did inform the applicants telephonically in August 2016 that they would oppose any application for upliftment of the bar and condonation of late filing of heads of argument.

1st - 14th respondents also submit that the directive by the court to have the matter set down on the unopposed roll for failure by applicant to file heads of argument was communicated to all parties by the registrar. The registrar's letter dated 14 March 2017 refers. They admit that they did not serve the notice of set down on the unopposed roll as there was no legal requirement to do so.

Further, they dispute that the applicant has any reasonable explanation for its default as, in its founding affidavit, it has not explained why it failed to file heads of argument, the consequence of which was an automatic bar permitting the matter to be dealt with as an unopposed application.

In addition, they argue that applicant does not have a good defence on the merits as an arbitral award which has not been set aside or stayed is registrable as a matter of course, as long as the award is regular on the face of it. The issues raised by the applicant regarding the computation of the award as well as the procedural propriety of the arbitration process are irrelevant in the determination of whether an award should be registered or not as those are

issues to be dealt with by the Labour Court in terms of the Labour Act. Therefore the applicant has failed to meet the basic requirements to rescind the registration of an arbitral award.

The law

The law regarding rescission of judgment is so trite and both parties have aptly stated the requirements, that it is not necessary to restate them, except briefly as follows:

- 1 Whether the applicant has given a reasonable explanation for the default;
- 2 Whether the application is bona fide; and
- 3 Whether there is a bona fide defence on the merits.¹

The law with respect to registration of arbitral awards in labour disputes is also well settled. For purposes of registration of an arbitral award, it is not the function of the High Court to inquire into whether or not the procedure followed in arriving at the award was proper, or whether the law governing the subject of the award was complied with or whether the computation was erroneous or wrongful and unlawful. The only valid defences on the merits, to the registration of an arbitral award are whether:

1. the award was granted by a competent arbitrator;
2. the award is still extant and has not been set aside or suspended;
3. the award sounds in money;²
4. the litigants are the parties subject of the award;
5. there exists a certificate by the arbitrator validating the award; and
6. the award is contrary to public policy.

That an arbitral award is contrary to public policy

“can only be shown where the reasoning or conclusion in an 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 accepted 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. In such a case, it would be contrary to public policy to uphold the award.”³

Therefore issues of unfairness or impropriety in arriving at the award, unless they are raised in an application for setting aside of the award itself, rather than its registration, are within the purview of the Labour Court.⁴ This is so, because it is trite that registration of an award is merely an administrative process to allow for the award to operate.

¹ *Stockil v Griffiths* 1992(1) ZLR 172 (SC). See also *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (SC)

² *Muchenje & Ors v Stuttafords Removals (Pvt) Ltd* HH-374-13

³ *Wei Wei Properties (Pvt) Ltd v S & T Export & Import (Pvt) Ltd* HH-336-13

⁴ *Vasco Olympio & 4 Ors v Shomet Industrial Development* HH 191/12

Analysis

Has the applicant given a reasonable explanation for its default?

In its founding affidavit, the applicant proffered no explanation at all for its failure to file heads of argument, yet this was the reason why 1st -14th respondents were directed by the court to set the matter down on the unopposed roll in order to obtain judgment. Eventually two explanations were improperly given in the answering affidavit, the heads of argument and in the submissions at the hearing of this application:

The first explanation by the applicant for its default was that it believed the matter was no longer proceeding. Now in the absence of a notice of withdrawal by the 1st-14th respondents, or a deed of settlement between the parties, or at the very least on-going negotiations, the applicant's belief was without basis. It was clearly unreasonable for the applicant to believe that the matter was not proceeding when it very well knew that the 1st-14th respondents held in their favour an arbitral award which was extant.

The second explanation was that the applicant did nothing to protect its interests because it received no response to its letter dated 15 August 2016 seeking 1st - 14th respondents' indulgence to uplift the bar operating against it. Like the first explanation, this was an extremely unreasonable attitude to take. I would have thought that the absence of a reply granting the applicant the indulgence it sought would have spurred it into action rather than inaction. In any event, 1st - 14th respondents intimated that applicant's legal practitioners were telephonically advised that any application for upliftment of the bar would be opposed, and it seems to me that this is a more reasonable explanation for applicant's failure to pursue the matter at that time.

It seems that, as shown in its founding affidavit, the applicant was more concerned in explaining why it did not appear in motion court. Clearly this was an erroneous course to take. Judgment was not entered against the applicant because it failed to appear in motion court proceedings: judgment was granted because applicant was barred for failure to file heads of argument leading the court to direct that 1st - 14th respondents should set the matter down on the unopposed roll. Because applicant was already under a bar, there was no legal obligation for 1st - 14th respondents to serve it with a notice of set down, and even if that had been done, that would not have given the applicant the right of audience to oppose the application for default judgment.

Further, and in any case, that the directive to set the matter down on the unopposed roll was not served on the applicant is irrelevant. It is clear on the face of the directive that the court

did not direct 1st - 14th respondents to serve that directive on the applicant. Rather, the registrar wrote to all parties informing them of the directive.

From the foregoing, I can only conclude that the applicant does not have a reasonable explanation for its default.

Is the application bona fide?

It seems to me that the applicant's legal practitioners "dropped the ball" so to speak, and failed to act when it was necessary to do so. The applicant itself appears to have sat back on its laurels and made no attempt to seriously protect its rights. In any event, the applicant has not averred or shown that the fact that the 1st - 14th respondents were absorbed by 15th respondent meant that all prior benefits and rights which accrued before such inclusion were assumed by 15th respondent. This is more so when regard is had to the fact that the arbitral award referred to the employment relationship covering the period prior to absorption of 1st - 14th respondents by 15th respondent on 1 February 2009. To that extent, it is doubtful that the application is *bona fide*.

My doubts are further confirmed by the fact that the defences being raised by applicant against the registration of the arbitral award are by and large, issues for determining whether the award should be set aside or suspended as will more fully appear below.

In addition, Mr Dondo, for the applicant, was not able to satisfactorily explain to the court the legal basis upon which the applicant seeks to set aside proceedings in which it is barred without first obtaining upliftment of the bar.

I am therefore not persuaded that this application is *bona fide*.

Is there a bona fide defence on the merits?

Applicant avers that it withdrew its appeal only because 1st - 14th respondents had been transferred to 15th respondent. The logical follow up question is, then, why did the applicant not apply to have the award set aside, if it had been overtaken by events? This is more so when regard is had to the fact that the noting of an appeal is not a valid defence to an application for registration of an arbitral award. The issue of the appeal or its withdrawal is therefore irrelevant in the circumstances.

Further, the applicant contends that the arbitral award does not sound in money. Clearly this is erroneous as quantification was done on 14 September 2009. Applicant raises challenges with the manner in which the quantification was done, but that is not a valid defence for the court to consider in deciding whether or not to register arbitral awards. If the applicant had problems with the manner in which quantification was done, or whether the schedules used

were erroneous, or whether the arbitrator had jurisdiction to carry out the quantification, or whether his mandate terminated at the time he made the original award, then it should have applied for review or sought an order setting aside such quantification or such award, which it did not do. It is instructive to note that from 2009 up to today, the applicant has still not sought to set aside the award or to query the quantification, only to improperly raise these issues as defences to registration of the arbitral award.

Furthermore, in so far as the prospects of success in setting aside the registration of the award is concerned, the applicant has failed to show that the arbitrator was not a competent arbitrator. More so when regard is had to the fact that it is standard that parties always go back to the arbitrator for quantification, thus belying the argument that the arbitrators mandate terminates prior to quantification.⁵

In addition, the applicant submits that as a matter of public policy, and in terms of s 34 (2) (b) (ii) of the Arbitration Act No. 6/96, the registration of the arbitral award should be set aside as the original award did not sound in money. I can only conclude that the applicant is grasping at straws. As already stated, quantification was subsequently done, and this is standard practice. If the applicant had a problem with the fact that 1st - 14th respondents had gone back to the arbitrator for quantification, then it ought to have contested the quantification.

In any event, my reading of s 34 is that it applies to the setting aside of the arbitral award as a matter of public policy, rather than setting aside of registration. While I agree that registration could be refused or set aside on public policy grounds, the bench mark to be met has already been set in our jurisdiction: mere incorrectness or faulty computation of an award is not enough. There must be

“palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted 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.”⁶

Applicant has not adduced, in its founding affidavit, any evidence that comes close to meeting this benchmark. Consequently, I am not persuaded that the applicant has a *bona fide* defence to the respondent’s claim for registration of the arbitral award.

Cumulatively therefore, I find that this application lacks merit. There exists an award granted by a competent arbitrator which is sounding in money. No relevant and valid defences against registration have been raised. The applicant was served with heads of argument and

⁵ See *Muchenje & Ors v Stuttafords*(*supra*)

⁶ *Wei Wei Properties (Pvt) Ltd v S & T Export & Import (Pvt) Ltd*(*supra*)

failed to file its own heads within the time limits and is barred. It has advanced no reasonable explanation for its failure to file heads of argument timeously, nor made a consanguineous application for upliftment of the bar and condonation of late filing of heads. The relief sought would thus be a *brutum fulmen* as an order of rescission will not assist the applicant which remains barred.

DISPOSITION

In the event, it is ordered that:

1. The application for rescission of judgment be and is hereby dismissed with costs.

Dondo & Partners, applicant's legal practitioners

Gwaunza & Mapota, 1st -14th respondent's legal practitioners

Mbidzo Muchadehama & Makoni, 15th respondent's legal practitioners