SHAME MANGOMA
versus
ZIMBABWE EDUCATIONAL SCIENTIFIC
AND CULTURAL WORKERS UNION

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 23 November, 2021 and 19 January 2022

Opposed Application

Mr *S Chako*, for the applicant
Mr *M Ndlovu,* for the respondent

DEME J: The applicant has approached this Court in terms of S 98(14) of the Labour Act [*Chapter 28:01*] for registration of an arbitral award. The draft order for the present application is as follows:

> "1. The arbitral award dated 28 May 2012 by the Arbitrator Ms L. Chibvongodze and quantified by the Arbitrator Mrs L. Sigauke on 1 March 2016 be and is hereby registered as an order of this Honourable Court.
> 2. The respondent shall pay the applicant a total sum of $72 000.00 (Seventy-two thousand Dollars) in terms of arbitral award.
> 3. Here shall be no order as to costs."

The 2012 arbitral award ordered ZESSCWU to reinstate the applicant to his position. In the event of failing to reinstate the applicant, ZESSCWU was given an option for payment of damages to the applicant *in lieu* of reinstatement. I am avoiding referring to ZESSCWU as the respondent for a simple reason that the respondent is denying that ZESSCWU is its other name. Parties were not able to reach an agreement in relation to reinstatement and whereupon four years later, they re-engaged the arbitration services for quantification of damages. On 1 March 2016, ZESSCWU was ordered to pay compensatory damages for reinstatement in the sum of $72 000 subject to tax directions.

The applicant previously filed an application for registration of the same arbitral award under HC 3701/20. The applicant averred that after some deliberations with the respondent, he chose to withdraw the application and made an undertaking of addressing the issues raised by the respondent. After withdrawing the case under HC 3701/20, the applicant engaged the respondent with a view of amicably resolving the dispute according to the applicant's

averments incorporated in his founding affidavit. The engagement, according to the applicant's averments, did not yield any result.

Against the present application, the respondent raised three points *in limine* namely:

1. That the arbitral award has prescribed in terms of the Prescription Act, [*Chapter 8:11*].
2. That the arbitral award is citing a non-existent entity.
3. That the arbitral award cannot be registered without the tax directive.

In relation to the issue of prescription, Mr *Ndlovu,* on behalf of the respondent, submitted that the arbitral award has prescribed in terms of the Prescription Act [*Chapter 8:11*]. He further submitted that the arbitral award is a debt and therefore prescribes after three years. He referred me to the case of *Nhidza v Unifreight Ltd*[1], where the court held that the arbitral award is not a civil judgment and hence prescribes after three years as it is a debt. The applicant's counsel, Mr *Chako,* submitted that the arbitral award is a civil judgment and hence prescribes after thirty years. He referred me to the case of *Elephant College v Chiyangwa and Another*[2].

In the case of *Nhidza v Unifreight Ltd* (*supra*), the court held that:

> "But apart from these equitable and procedural hurdles, there remains one insurmountable hurdle for the appellant, and that is prescription. A civil judgment in one's favour is prescribed only after thirty years. (Prescription Act [*Chapter 8:11*] s 15(a) (ii)). But Nhidza's right under the determination of the RHO dated 14 June 1991 was not a civil judgment. It was potentially a civil judgment. But until it became a civil judgment it was no more than a right, incapable of enforcement until it was registered in terms of the appropriate version of the Labour Relations Act. As such it qualifies as a "debt" under the very wide definition of that word in the Prescription Act, and becomes prescribed within three years. Prescription would have begun to run as soon as the "debt" was "due" (s 16(1) of the Prescription Act). In this case it would have run from the date of the order in favour of Nhidza. The right therefore became prescribed on 14 June 1994."

It is apparent that the labour law that was in force in 1991 when the arbitral award in favour of Nhidza was handed down is significantly different from the labour law that was in existence at the time when the arbitral award was handed down in favour of the Applicant. An appeal against the decision of the labour relations officer or senior labour relations officer was not to be on a question of law alone. Thus, the appeal against the decision of the labour relations officer or senior labour relations officer could be on question of fact or law or on both fact and law. Section 97(1) of the Labour Relations Act, (hereinafter called the Labour Relations Act) provided as follows:

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[1] SC 27/99.
[2] HH485/19.

"Any person who is aggrieved by --
a) the confirmation, variation, substitution or setting aside of a determination by a senior labour relations officer, or
b) the conduct of the investigation of a dispute or unfair labour practice by a labour relations officer or senior labour relations officer;
may, within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Tribunal."

On the other hand, the Labour Act, [*Chapter* 28:01] (hereinafter called the Labour Act) provides for the noting of the appeal against the arbitrator's decision on a question of law. Section 98(10) of the Labour Act is as follows:

> "An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

Under the Labour Act, the mandate of the arbitrator is to make a finding on questions of facts and law. The finding of fact by the arbitrator may not be appealed against save in exceptional circumstances. Reference is made to the cases of *Misihairambwi and Others v Africare Zimbabwe*[3], *Tirivangani v University of Zimbabwe*[4], *Sable Chemical Industries Ltd v David Peter Easterbrook*[5]. The labour relations officers and senior Labour relations officers were also charged with the responsibility of making a finding on questions of law and fact under the Labour Relations Act. Any person dissatisfied by the decisions of the labour relations officer or senior labour relations officer would appeal on both questions of law and fact.

Arbitration, unlike the proceedings before the labour relations officer or senior labour relations officer, is more judicial. Arbitral award, unlike the determination by the labour relations officer or the senior labour relations officer, has the characteristics of the judgment of the court. Arbitrators do exercise powers of the Labour Court in hearing disputes. This is established in terms of s 98(9) of the Labour Act. The labour relations officers and senior labour relations officers did not enjoy this privilege. They were not supposed to exercise the powers of the Labour Relations Tribunal in hearing the disputes. These marked distinctions justify the departure from the case of *Nhidza v Unifreight Ltd* (*supra*). MANGOTA J., in the case of *Elephant College v Chiyangwa* (*supra*) commented as follows:

> "The question which begs the answer is whether or not an arbitral award is a debt as defined in s 15 (d) or it is a judgment debt as stipulated in s 15 (a) (ii), of the Act. To answer the above question one has to unpack the meaning and import of what an arbitral

[3] SC 22-17.
[4] SC21-13.
[5] SC 18-10.

award is. An arbitral award, it is trite, is the result of a judicial or quasi-judicial process. The procedure which brings about the result which is referred to as an arbitral award falls substantially into that of the civil court. WIKIPEDIA, The Free Encyclopedia defines an arbitration award as a determination, on the merits, by an arbitration tribunal in an arbitration. It stresses that the arbitration award is analogous to a judgment in a court of law. It states that, in most jurisdictions, the tribunal which pronounces the award has the same power as a court to:

(i) order a party to do or refrain from doing something; or
(ii) order specific performance of a contract; or
(iii) order the rectification, or setting aside or cancellation of a deed or other document.

The above –stated matters are in tandem with s 98 (9) of the Labour Act. It reads:

> "In hearing and determining any dispute, an arbitrator shall have the same powers as the Labour Court."
>
> Section 98 (10) of the Labour Act allows a party who is aggrieved by the decision of the arbitrator, on a question of law, to appeal the same to the Labour Court."

There are more features which make arbitral award resemble a civil judgment. In addition, In the case of *Elephant College v Chiyangwa* (*supra*), the court further observed as follows:

> "Both statements are filed with the office of the arbitrator who calls the parties to a hearing of the dispute. The hearing, more often than not, resembles the procedure of a civil trial. The arbitrator whom the law recognises in the Labour Act and the Arbitration Act presides over the dispute of the parties. He plays the role of an uninterested umpire. The decision which he makes at the conclusion of the hearing of the parties' case is the arbitral award. It is a judgment or a ruling and not a debt as is stipulated in s 15 (d) of the Act. What falls under s 15 (d) of the Act is the claimant's statement of claim. That is, more often than not, a debt which may be sued for or claimed by reason of an obligation which arises from statute, contract, delict or otherwise. The arbitral award is not such. It is, in my view, a judgment. It is so because it is enforceable upon its registration. It is appealable, reviewable, decisive and final. It is for the mentioned reasons that, once it is issued, the court which registers it is not permitted to go into the merits of how it came to be issued in favour of the party who seeks its registration."

Before the matter is referred to the arbitrator, it qualifies to be treated as a debt defined in terms of the Prescription Act [*Chapter 8:11*]. Once the arbitrator has handed down the arbitral award, it ceases to be the debt specified in the Prescription Act. The same matter cannot continue assuming the shape of the debt in terms of the prescription Act. It should assume the scope of the civil judgment. It becomes a judgment debt and ceases to be the debt in the ordinary sense.

I find no merits in the submissions for Mr *Ndlovu* with respect to prescription for the reasons highlighted before. Resultantly, I dismiss the point *in limine* raised in relation to prescription.

The respondent also raised the issue of citation of the respondent. The arbitral award does bear the name of ZESSCWU. The applicant instituted the present application against Zimbabwe Educational Scientific Social and Cultural Workers Union, an entity which is different from the one specified in the arbitral award. The Respondent's counsel, Mr *Ndlovu*, submitted that ZESSCWU is an unknown entity. He further submitted that there is nowhere in the arbitral award where it is stated that the acronym of ZESSCWU represents the respondent. He also submitted that the applicant cannot seek the correction of the citation before this court since the duty of this court is purely to register the arbitral award and not to amend the citation of parties. Mr *Ndlovu* also argued that the present application must be dismissed for citing a party which is not in existence. The applicant's counsel, Mr *Chako* submitted that the acronym represents the respondent. However, there is nothing which Mr *Chako* did bring to my attention which proves that the two names refer to the same entity.

It is apparent that ZESSCWU and the respondent are two different entities. Although there is a possibility that the acronym may refer to the respondent, without evidence from the arbitral award, it is difficult for this court to verify whether the acronym refers to the respondent.

The correct citation is also beneficial to the tax authorities. The tax authorities will be in a better position to identify the respondent for purposes of enforcing outstanding tax from the arbitral award. If the arbitral award is registered in its state, the Zimbabwe Revenue Authority will have challenges in recovering its tax.

In the case of *Elephant College v Chiyangwa* (*supra*), MANGOTA J. held that the court, during the hearing of the application for registration of the arbitral award, must, among other factors, ensure that the parties mentioned in the application for registration of the arbitral award must be similar to the ones specified in the award. He commented as follows:

> "All it requires to satisfy itself of it that:
> (i) the arbitral award emanated from a court of competent jurisdiction;
> (ii) the award is extant;
> (iii) it has not been set aside on appeal or review;
> (iv) the parties to the award are the same as are cited in the application which registers the award –."

In the present case, the parties are different. That must be remedied. . I am sure that it is not an insurmountable task to have the arbitral award corrected by the arbitrator with respect to the citation of the respondent. Without this, this court may not be able to register the arbitral award that has a different name from the actual and legal name being used by the respondent.

It was emphasized in the case of *Elephant College v Chiyangwa* (*supra*) that the court, in the process of registering the arbitral award, is not supposed to direct its efforts on the merits. Determining the merits of the matter is the responsibility of the arbitrator. Where a party has noted an appeal, the Labour Court or Supreme Court may deal with the merits of the labour matter. In addition, s 98(14) of the Labour Act which gives powers to this court to register arbitral awards does not empower this court to hear the merits of the award. Thus, this court cannot order the amendment of the citation of parties as doing so would deal with the merits of the arbitral award. For this reason, I uphold the point *in limine.*

In relation to the tax direction, the respondent's counsel argued that the applicant's attempt to register the arbitral award without complying with the tax laws is illegal. Mr *Ndlovu* argued that the applicant is supposed to get the tax clearance from the tax authorities. He further argued that the respondent needs to know the amount that is due to the tax authorities. He also submitted that the arbitral award cannot be registered without complying with tax directions. On the basis of non-compliance with tax laws by the applicant, Mr *Ndlovu* submitted that the present application must be dismissed. Mr *Chako*, on behalf of the applicant, argued that the tax directions can still be complied with after registration. He further submitted that the draft order can be amended to reflect that the amount due in terms of the arbitral award must be taxed. Upon being asked by the court, Mr *Chako* was not able to explain how the applicant will manage to comply with the tax directions after the registration of the arbitral award.

The arbitral award, in its operative clause, reads as follows:

> "The respondent, ZESSCWU is be and is hereby ordered to pay Shame Mangoma, within thirty days of receipt of this award, an amount of 72 000 (subject to taxation) that is, 12 months damages *in lieu* of reinstatement and backpay for the 6 months period of suspension."

All citizens earning income in Zimbabwe are under the legal obligation to pay income tax in terms of the Income Tax Act [*Chapter* 23:06]. It is difficult to ensure compliance with the tax laws after registration of the arbitral award. The Deputy Sheriff enforcing the arbitral award will need to execute the judgment in favour of the applicant for the amount due to the applicant after tax deductions. The court must ensure that what is due to the tax authorities is

calculated and appropriately subtracted from $72 000. In light of this, it is imperative that the Applicant submits the arbitral award to the Zimbabwe Revenue Authority for him to verify the amount due to the Authority. The applicant must take appropriate steps to ensure that he furnishes the court with all necessary documentation that proves final amount due to him after tax deductions. In the circumstances, I do uphold the point *in limine*.

The defects of application for non-compliance with tax directions and wrong citation of parties are remediable matters. For that reason, it is not appropriate to dismiss the present application. Dismissing the present application is unconstitutional as it will take away the Applicant's right to be heard by this court after the necessary corrections. The right to be heard, established in terms of Section 69 of the Constitution, is a fundamental cornerstone in the national justice delivery system. In the circumstances, the appropriate decision is to strike the application from the roll to allow the Applicant to take necessary corrective measures before resetting down the application for hearing.

In relation to costs, the Applicant had suggested that there be no order as to costs. On the other hand, the respondent prayed for costs on an attorney and client scale. The basis for the Respondent's claim for punitive costs is that the respondent has been put to unnecessary costs by the present application. The respondent's counsel further submitted that the Applicant has failed to remedy the defects highlighted in the withdrawn application under case number HC 3701/20. The Applicant remedied some of the issues raised. I am not convinced by the justification of the respondent with respect to costs. Costs are the sole discretion of the court. *Hebstein and Van Winsen*[6], in relation to costs commented as follows:

> "The award of costs in a matter is wholly with the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at."

Punitive costs will deter litigants from accessing the justice system. Therefore, punitive costs can only be ordered in exceptional circumstances. Costs on an ordinary scale are just and equitable in the circumstances. This will continue to deter the applicant and other potential litigants from prematurely filing applications with this court. Such costs are reasonably sufficient.

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[6] ***Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5th Ed, Vol 2 p954***

Consequently, it is ordered that the application be and is hereby struck from the roll with costs.

Mushangwe and Company, applicant's legal practitioners
Mutamangira and Associates, respondent's legal practitioners