Judgment No. HB 163/12
Case No. HC 1478/11
X REF HC 1524/09; 1534/09;
1031/10; 1136/09

ZIMBABWE AMALGAMATED RAILWAY WORKERS UNION **APPLICANT**

Versus

BEITBRIDGE BULAWAYO RAILWAY (PVT) LTD **1ST RESPONDENT**

And

ARBITRATOR (GLADYS MPEMBE) N O **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
CHEDA AJ
BULAWAYO 20 MARCH & 12 JULY 2012

V Majoko for applicant
S Hwacha for respondents

Judgment

CHEDA AJ: Applicant is a registered union that represents employees in the employ of the respondent.

The background of this matter is that in June 2009 it was agreed at a meeting of the parties that a committee of the parties would meet to decide whether a case was made out for retrenching some workers. Because no agreement was reached it was agreed that the respondent would have to proceed in terms of the Labour Act if it insisted in retrenching. A notice to retrench was prepared and a list of the employees to be retrenched was prepared together with the reasons thereof. The notice was presented to the workers' committee. A further meeting was arranged by management and retrenchees at which agreement was reached and it was decided that the matter be referred to the Retrenchment Board but the Board suggested that the matter be referred to a labour officer. Finally, it was decided that the matter be referred to arbitration. The parties agreed to appoint an arbitrator whose terms of reference were to determine whether the respondent had followed the correct procedure in seeking to effect the retrenchment. A hearing was eventually held before the arbitrator and her determination was handed down on 23 September 2009.

The applicant was unhappy with the determination and launched an application for the review of the determination. They challenged the determination mainly on the basis that the arbitrator exceeded her mandate and proceeded to determine issues that were not in the agreed terms of reference. She also determined that employees who had not been part of the

agreement be retrenched on the same conditions as those who had agreed to the retrenchment. The application was opposed by the respondent who raised a number of points *in limine*. The respondent submitted that:

1. Voluntary arbitration awards are not reviewable by the High Court.
2. The applicant has no *locus standi* to bring the proceedings and is not properly authorized to do so.
3. The application has disputes of fact which render it unsuitable to proceed by way of affidavits.
4. Grounds have not been established for the relief sought.
5. The applicant's members have been paid the retrenchment packages and are estopped or have waived their rights to bring an application.

It was agreed that the parties should argue on the points *in limine* then proceed to deal with the merits instead of dealing with the matter piece meal.

On the point of *locus standi* Mr *Hwacha* had said that the applicant was not properly authorized to represent the union members. Mr *Majoko*, for the applicant countered this by submitting that the union was the applicant who represented the employees at all times. He cited the case of *Tel-One* vs *Comm Services Workers Union* 2006 (2) ZLR 136 where it was held that Trade Unions have a right to sue and be sued in terms of section 29 of the Labour Act [Chapter 28:1]. The applicant also had the authority of its members to bring the application.

On the issue whether a voluntary arbitration award could be reviewable Mr *Majoko* argued that this could be done in terms of Article 34 of the Arbitration Act [Chapter 7:02].

Article 34 of Chapter VII of the Act provides as follows:

"Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
(2) An arbitral award may be set aside by the High Court only if-
    (i) …
    (ii) …
    (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration provided that, if the

decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside, or …

(iv) … or

(b) the High Court finds that –

(i) the subject matter is not capable of settlement by arbitration under the laws of Zimbabwe or

(ii) the award is in conflict with the public policy of Zimbabwe.

The issue that had been forwarded to arbitration which was in dispute was as follows:

"The arbitrator is requested to determine whether or not the employee followed right procedure in wanting to retrench."

The submissions made in detail by the parties dealt with the above issue which was in dispute. However, instead of only providing the answer to the issue raised, the arbitrator went on to order retrenchment of employees who were not involved in the agreed retrenchment negotiations. It has been submitted that these employees have been prejudiced by their inclusion in this award.

The arbitrator stated as follows in her award:-

AWARD

It is ordered that

1. The employer (Beitbridge Bulawayo Railways (Pvt) Ltd) followed the correct procedures in wanting to retrench and even coming up with Terms and Conditions of such retrenchment.

The above is all that the arbitrator was expected to determine. Whether that conclusion was correct or not is not the issue. The applicants having committed themselves to be bound by the arbitrator's determination would not have been permitted to challenge that conclusion despite the argument that the arbitrator is alleged to have contradicted herself. The

fact is that she would have made the determination in terms of the issue referred to her, and the correctness or wrongfulness of the determination was not the issue.

But the arbitrator went on to say:

2. The employer is hereby authorized to retrench the remaining thirty five (35) employees on the same Terms and Conditions stated herein with effect from 23rd September 2009.

Herein lies her error. This part of the award was not within the terms of reference or issue referred for her determination. This is what Article 34 prohibits. It is on this basis that the applicant requests that the determination be set aside. This finding resolves the issue that this court has to deal with. Once this main issue is resolved the other issues are merely academic but I nevertheless deal with them briefly as follows:

Clause 1 (iii) authorizes the separation of a decision which is not part of what was referred to the arbitrator, but in this case it is argued that even the determination on the issue referred to her was contradictory in that having pointed out where the correct procedure was not followed she then concluded that the correct procedure was followed.

For that reason I do not consider it appropriate to set aside the determination on the issue not referred to her and save the confused determination which was contradictory.

It was submitted that a voluntary arbitration determination is not appealable. This is not an appeal but a review in order to set aside the determination and is permitted in terms of the Arbitration Act.

It was argued that there are only narrow grounds for review, but the point in this case, though initially referred to as a review, was for an order to set aside the determination.

The arbitrator said she wished to bring the matter to finality as it had been going on for a long time. I agree in principle with her desire to bring the matter to finality, but even finality can only be achieved by making the correct decision.

It was submitted that the employees waived their right to contest the determination when they received their retrenchment packages. However, depositing their packages into their bank accounts without their knowledge cannot amount to waiver of their rights to contest the determination. They have since tendered the return of the money.

It was submitted by Mr *Hwacha* that the applicant should have referred the matter to the Labour Court on the basis of section 89 of the Labour Court Act. Article 34 deals with the setting aside of the determination by the High Court and not the Labour Court.

It was submitted that the beneficiaries of the determination is not determinable because of vagueness. This point falls away if the determination is set aside. It was submitted by Mr *Hwacha* that there was no record of proceedings and submissions. Before making the AWARD the Arbitrator summarized and analyzed the submissions made by the parties.

The argument about the number of affidavits does not make any difference as the point that is challenged is not relevant to individuals but affects the principle concerning the making of the award. Whether it is one or more applicants the wrong determination would still be set aside.

Order

1) In conclusion I am satisfied that the determination made by the arbitrator in this case should not be allowed to stand and it is set aside.
2) The 1st respondent is to pay the costs.

Majoko & Majoko, applicant's legal practitioners
Dube, Manikai & Hwacha, respondents' legal practitioners