HB 212-16
HC 184-16

NIMROD NCUBE
versus
MAIN PROTECTIVE CLOTHES (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 22 JULY 2016 AND 28 JULY 2016

Opposed Application

Applicant in person
P Mukono for the respondent

MATHONSI J: It is true that the respondent has faced a very plucky opponent in the applicant who has fought tenaciously throughout and has not shied away from using even unauthodox means if not every means possible, to try and have his way. He has complained and demanded the recusal first of the designated agent of the National Employment Council for the Clothing Industry who was assigned to adjudicate over the dispute. He has repeated those antics against the arbitrator appointed by the Ministry of Labour S. Ndlovu who quickly recused himself.

Having accounted for one arbitrator, the independent arbitrator M. Sibanda was seized with the respondent's application for rescission of judgment which he had set down for hearing on 4 March 2016 when the applicant again raised issues with the competence of the arbitrator. Through his labour representative from Zimbabwe Federation of Trade Unions (ZFTU) the applicant threatened to file an application for an interdict barring him from determining the matter. Again M Sibanda was forced to capitulate and recused himself leaving the application for rescission of judgment hanging in the air.

Although this might be so, there can be no doubt that the respondent's woes and the untenable situation it finds itself in is self-created. Through a string of errors and poor judgment the respondent finds itself unable to mount any meaningful contest in this application for registration of an arbitral award issued by an independent arbitrator, M. Sibanda on 14 July 2015, in terms of which the arbitrator ordered the reinstatement of the applicant by the respondent.

What is clear is that when the labour dispute between the parties could not be resolved by conciliation, an arbitrator S Ndlovu was appointed by the Ministry of Labour. ZFTU who represented the applicant made a lot of noise and lodged an application in the Labour Court seeking directions which the court found to lack clarity. In its order of 30 January 2015 the Labour Court, per KABASA J, stated:

> "Whereupon after reading documents filed of record, the application for directions is hereby declined for the following reasons:
>
> 1. Lack of clarity on whether certificate of no settlement was issued or not due to conflicting averments in papers filed of record.
> 2. The directions sought are not within the purview of the court.
> 3. An application for recusal of an adjudicating authority should be made before such authority with no reference from the Labour Court."

After the Labour Court washed its hands clean of this matter, it is not clear whether an application for recusal was made before the arbitrator appointed by the Ministry of Labour. What is clear though is that the arbitrator recused himself and communicated such recusal to the parties by letter dated 6 February 2015. An independent arbitrator, M. Sibanda, was then assigned to the dispute.

Arbitrator Sibanda set the matter down for hearing on 26 June 2015 at 1400 hours at Cillas Conference and notified the parties. The respondent responded to the notice of set down by letter dated 23 June 2015 addressed to the arbitrator in the following:

> "<u>RE: N. NCUBE vs MPC</u>
>
> We acknowledge receipt of your communication on the above dated 22nd June 2015. Our position remains the same. The employer will not take part in any defiance of a standing Labour Court judgment by the Hon Arbitrator and N. Ncube who was the one who appealed to the Labour Court in the first place now disobeying the judgment thereto. As such we will not submit any responses before an illegally constituted hearing outside the dictates of the same law you are purporting to uphold. One would expect the esteemed Arbitrator to direct appellant to follow the correct channels per judgment in force.
>
> Be guided accordingly
>
> Yours sincerely
>
> S. P Musumbu
> Human Recources Manager-MPC"

Although the arbitrator implored the respondent to avail itself for the hearing it would not burge. But then the only Labour Court judgment then subsisting was the one I have referred to above. It certainly did not direct that the parties should appear before the NEC Arbitrator. It merely dismissed an application for directions on the grounds *inter alia* that if the applicant was unhappy with the arbitrator, he should make the application for recusal before that arbitrator. Indeed the arbitrator in question recused himself and another arbitrator was appointed.

I have said that the independent arbitrator had set the matter down but the respondent elected not to appear. As a result an arbitral award was made in default on 14 July 2015. It is that award which the applicant seeks to have registered for enforcement purposes in this application. The application is opposed by the respondent on the ground that the matter was improperly referred to the arbitrator contrary to the order of KABASA J and that the award having been granted in default, the respondent has now filed an application for rescission of judgment before the arbitrator. For that reason registration "should therefore be put on hold."

I must mention for completeness that on 18 August 2015 the respondent filed an application for condonation of the late noting of an appeal against the arbitral award in the Labour Court. For some reason that application was withdrawn on 5 February 2016. Although the filing of the notice of withdrawal was noted by the Labour Court, that did not stop that court dismissing the application on 9 February 2016, per MOYA-MATSHANGA J.

Back to the application for rescission filed with the arbitrator on 10 February 2016. I have said that the arbitrator recused himself and communicated that decision by letter dated 14 March 2016 to the parties, to wit;

> "REF: APPLICATION FOR RESCISSION
>
> In respondent's urgent chamber application allegation(s) are made that this arbitrator may not be impartial in handling this matter. After careful thought I write to recuse myself from the case for this reason.
>
> Yours faithfully
>
> M. C Sibanda (Arbitrator.)"

What we have therefore is a situation where no one is going to determine the application for rescission of judgment, an application which, in my view may have been improperly made to the arbitrator in the first place. See *Victoria Falls Municipality* v *Mutare N.O and Another* HB 160/16.

More importantly the applicant has not sought a suspension of the arbitral award in terms of s92E (3) of the Labour Act [Chapter 28:01]. Neither has it appealed against the award. It has not even sought to have it set aside on the basis that the respondent was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case as provided for in Article 34 (2) (a) (ii) of the Model Law in the Arbitration Act [Chapter 7:15]. The respondent just wants this court to refuse registration.

That the court cannot do. Article 36 of the Model Law sets out the only grounds for refusal to recognize or enforce an arbitral award which a party against whom the award is invoked can rely upon. They do not include the ground relied upon by the respondent in this matter, namely that an application for rescission of judgment has been lodged with the arbitrator.

In his heads of argument Mr *Mukono* for the respondent tried to rely on a ground not contained in the opposing affidavit, that is, that the subject matter of the dispute is not capable of settlement by arbitration under Zimbabwean law. Apart from that proposition being glaringly incorrect in light of the fact that the dispute involved an alleged unlawful termination of employment which is determinable by arbitration in our law, counsel was leading evidence from the bar. Nowhere in the opposing affidavit is reliance placed on such ground in opposing the application. I therefore reject that ground.

I have said that the respondent has brought its predicament upon its self by its alarming levels of tardiness. For a start it was very unwise to refuse to appear before the arbitrator and present its case after being notified not only of the appointment of an arbitrator but also of the date of set down. For that reason it willfully defaulted resulting in an award being, made in default.

If the award had been made without notice to the respondent, it would have been entitled to challenge the award on that basis in terms of 34 (2) (a) (ii) of the Model Law. If the respondent was doing something about the award as it claims, it was entitled in terms of s92E(3) of the Labour Act [Chapter 28:01] to approach the Labour court for an interim determination of a

stay or suspension of the arbitral award pending that. See *Tapera and Others* v *Field Spark Investments (Pvt) Ltd* HH 102/13 (unreported).

The respondent did none of that. Instead it sought leave to appeal out of time. Before that application was determined the respondent withdrew it. It then sought a rescission of judgment several months down the line without seeking to suspend the operation of the award. The rescission of judgment application remains in limbo. Accordingly the arbitral award is still extant and there is therefore no basis upon which its registration can be refused.

The biggest challenge is that the applicant has proceeded rough shod over the rights of the respondent to be heard taking advantage of a slip up by the respondent wherein it refused to appear before the arbitrator and is clinging onto an arbitral award which is not sounding in money while shutting out the respondent from contesting the award. In his wisdom, but certainly in his lack of it, the applicant has forced the arbitrator to recuse him himself even before quantifying his damages in lieu of reinstatement, it being trite that the employer cannot be compelled to reinstate a dismissed employee.

It is not the province of this court to decide what the applicant has to do with the award in its present form but merely to register it. The difficulty he will face thereafter is pretty obvious. He does not have an arbitrator to quantify his damages and may be unable to enforce the registration order in its present form. The only way out may be to start all over again.

In the result, it is ordered that:

1. The arbitral award of M C Sibanda an arbitrator dated 14 July 2015 is hereby registered as an order of this court.

2. Each party shall bear its own costs.

Danziger and Partners, respondent's legal practitioners