TEL-ONE (PVT) LIMITED
versus
COMMUNICATIONS AND ALLIED SERVICES WORKERS UNION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 3 July and 24 October 2007

Opposed Application

Mr *S Hwacha*, for the applicant
Mr *T Biti*, for the respondent

HUNGWE J: In this application, the applicant seeks an order setting aside an arbitral award made on 29 March 2004 in terms of section 34(2) (b) (ii) of UNCITRAL Model Law as incorporated into our domestic law by the Arbitral [*Chapter 7:15*].

The dispute in this matter arose out of a series of salaries and wages negotiations. Since 2003 it had become applicant's policy to review the salaries and wages of members of the respondent on a quarterly basis. This was in response to the inflationary trends and in accordance with the median Market Quarterly ("MMQ"), or, cost of living adjustment. The last of such negotiations had been concluded in October 2003.

Between 28 January 2004 and 12 February 2004 the parties had met on no less than eight occasions without agreement as to what the applicable MMQ for that quarter was. According to the applicant the deadlock resulted from disagreement on whether the MMQ was a forecast of what the next quarter's salary would be, or whether the figure those figures provided in the MMQ are the actual salary increments. Applicant's management contented for the former and respondent for the latter.

A deadlock was declared and the matter referred to the appropriate national employment council ("NEC"). With the agreement of both parties the council appointed an arbitrator to determine the matter. He is now second respondent in the proceedings.

The council furnished the arbitrator with the following:

Minutes of the collective bargaining process which ended in a stalemate but did not identify the issues for determination;

Respondent's submissions on the issues as it understood them;

Applicant's submissions on the issues.

For his part, the arbitrator did not invite the parties to set out a joint set of issues for determination but proceeded to deal with the matter as he perceived it. He considered the minutes as well as the submissions made to him by the parties. He then made his award. On receipt of the award, applicant wrote to the NEC seeking clarification on certain aspects of the award. This provoked a response from the arbitrator. Two days later he volunteered yet another unsolicited response on the same subject.

Applicant contends that the award is liable to be set on the basis that in its effect the arbitral award violates the public policy of Zimbabwe.

At paragraph 11 of its founding affidavit the applicant put its case in the following terms:

> "I am convinced and respectfully contend that the general sense of justice of the Zimbabwean community is that employees should at all times be paid the best possible salaries. The very same community appreciates that in any employment arrangement, salaries and wages are limited by a company's ability to pay. As such, where a company's cash flow can afford to sustain poverty datum line or higher salaries then such should be paid. If clearly, the balance sheet cannot support such payments then common and sensible notions of justice require that reasonable salaries be paid. The community's sense of justice expects that affordability by the employer is always a crucial consideration in the consideration of salaries payable. Failure to fully recognise this consideration is grossly irregular and turns upside down the society's considerations of justice.
>
> I am also of the view, with respect, that the general sense of justice demands clarity, certainty and confidence that the arbitral authority does not overlook important averments or circumstances and that his/her determination must reason through the contentions of the parties. To overlook important features of a case damages public confidence and is thus against public policy."

Applicant illustrates the point it is at pains to make in the following paragraph thus:

> "12. The arbitrator's award is capable of more than one interpretation. One possible interpretation of the arbitrator's award is that the salary of the lowest paid employee (grade 16) be moved to MMQ monthly salary of between $354 445.00 and $531 667.00 with the mid-point being $443 056.00 and this constitutes the base upon which a percentage increment is to be applied to the MMQ figure in order that the net salary of a grade 16 employee excluding allowances becomes at least $861 241.00 after subtracting statutory deductions of PAYE, pension and NSSA contributions."

If this interpretation is adopted, as it is contended for by the respondent, it would require a 266% increase of salary and wages throughout all grades. The effect of this on the salaries and wages bill for the applicant would be devastating. It will simply cripple all applicant's operations and drive it into insolvency. It is for this reason that applicant contends that the award, in that form, threatens the very existence of the applicant.

Applicant demonstrates the effect of the other possible interpretation. This interpretation will result in an increase of 83% the effect of which will be bearable to applicant. The respondent contends for the interpretation whose effect would be to award 266% across the board. Applicant's income is determined by the tariffs it charges which in turn are controlled by the state. At the time applicant had had its application for a tariff increase rejected by government. As such clearly it could not meet the award as set out above.

On the other hand the respondent haughtily disputes that the award is ambiguous, or that in its effect it will cripple the operations of the applicant. Respondent categorically states that the balance sheets relied on by the applicant are not a true reflection of the financial position of the applicant. It has attached to its opposing papers as annexure "CC" what it terms as the true financial position of the applicant. Further the respondent denied that the arbitral award failed to take into account public policy considerations of keeping applicant in business in making the award. On behalf of the respondent it was contended that the arbitrator properly took into account the reality of the situation in Zimbabwe based on the poverty datum line, the consumer price index as well as the applicant's ability to pay.

In my view the issue for determination is whether on the papers before me the applicant has made a case for the setting aside of the award in terms of section 34(2) (b) (ii) of the Model Law.

The question as to the requirements to be met before a court could lawfully set aside an arbitral award has exercised the minds of these courts before.

In *Wallen Holdings (Pvt/) Ltd v Lloyd and Another* 1996(2) ZLR 383 CHINHENGO J considered the question and affirmed that the courts will always be most reluctant to interfere with the award of an arbitrator. In that case the learned judge was considering an application for a stay of proceedings among other issues.

The question as to when an award could be held to be in conflict with the public policy of Zimbabwe was dealt with by GUBBAY CJ (as he then was) in *Zesa v Maposa* 1999(2) ZLR 452(S).

From the cases it is trite that what the court must consider is whether the award is contrary to public policy of Zimbabwe. The concept of public policy is en elusive one depending on transient and sometimes subjective views on what is or what is not in the public benefit or what constitutes Zimbabwean public good. In assessing the award it is inevitable that one has to consider the substantive effect of the award and determine whether it is not contrary to public policy in its effect. One can conceive of the many examples given by his lordship GUBBAY CJ in *Maposa's* case and many more.

In *Pamire and Others v Dumbutshena no* 2001(1) ZLR 123 this court held that it was against public policy to grant full damages to a party in spite of its own failure to meet all its obligations under the contract as it would violate the elementary notions of justice.

There is no doubt in mind that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, what a fair wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a fair fee. The employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the eggs for their mutual benefit continues to do so. Society expects these mutually beneficial

outcomes. The economy thrives and so does the community generally and its members in particular. An award that plunges the apple-cart over the cliff in my view could not be said to be in the best interest of the general good of Zimbabwe.

Applicant has demonstrated that the award in effect will result in it being obliged to pay or commit 130% of its income as at January 2004 to salaries and wages. In all work situations salaries and wages are limited by an employer's ability to pay. The courts and indeed all tribunals delegated with decisions of a financial nature would be failing in their duty if they were to will-nilly give awards whose effect would be to drive corporations into insolvency thereby destroying the economic fabric of the nation. Such awards would defeat the very purpose they are meant to serve. As such they are liable to be set aside as being in conflict with the public policy of Zimbabwe.

I am satisfied therefore that the application ought to succeed. I issue the following order:

1. The application is granted with costs.
2. The award of the arbitrator dated 29 March 2004 be and is hereby set aside in terms of Article 34(2) (b) (ii) of the Model Law.

Dube, Manikai & Hwacha, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners