ZIMBABWE TEXTILE MANUFACTURERS ASSOCIATION
versus
ZIMBABWE TEXTILE WORKERS UNION
and
DR. GODFREY KANYENZE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 04 OCTOBER 2012 and 9 January 2013

Advocate Girach, for the applicant
Gasa for the respondent

MTSHIYA J: In this application the following relief is sought;-

"It is ordered that:-

1. The award of quantification of damages made by the second respondent on 28 October 2011 be and is hereby set aside.
2. The first respondent pay the costs of suit."

The background to this application is that in August 2011 the applicant and the first respondent reached a deadlock in their negotiations for minimum wages/salaries in the textile industry for 2010. The parties then agreed to refer the matter to Voluntary Arbitration. Messrs Mordicai Mahlangu and Munyaradzi Gwisai were appointed arbitrators. A letter dated 12 August 2011 and addressed to the two arbitrators reads as follows;-

"RE: Deadlock on Wage/ Salary Negotiations for the Appropriate Minimum Wage/ Salary in the Textile Industry for 2010

1. The employees of the Textile Industry, represented by the Zimbabwe Textile Workers Union, (ZTWU), and the employers of the Textile Industry, represented by the Zimbabwe Textles Textile Manufacturers Association, (ZIMTA), have deadlocked in their negotiations for minimum wages for the Textile Industry for 2010 and they have agreed to have the matter settled by means of Voluntary Arbitration.
2. The Trade Union (ZTWU) have demanded that the minimum wage/salary for the industry be increased from US$150.00 per month to $211.00 i.e 40.6% per month for Level 1, with the same percentage

increase across the board effective from 01 January 2011, for 12 months.

3. The employers association (ZIMTA) have stated that even though the Textile Industry is still severely distressed they could offer to increase across the board, with effect from 01 July 2011, for 12 months.

4. Each party agreed to nominate their own arbitrator and both Honourable arbitrators will meet to agree a common position.

5. Both parties agreed to deliver their position papers to the Honourable Arbitrators, and the other party, on or before 8:00am on 05 September 2011.

6. The decision of the Honourable Arbitrators is required within 14 days of this date i.e 19 September 2011.

7. Should the Honourable Arbitrators be unable to agree on a common position they are to agree on a third arbitrator and to appoint the same who shall endeavour to get the Honourable Arbitrators to agree on a common position within the above period.

8. Each party shall be responsible for the costs of their nominated arbitrator.

9. Should it be necessary to appoint the third arbitrator, the costs will be met by the NEC.

10. It is agreed that no decision will be released to any part by any arbitrator until such time as all arbitration debts have been paid in full. Both parties agree to settle their own arbitration fees by the due date of the award.

11. The Employers Association and the Trade Union hereby bind each other to the terms and conditions as set out in the Arbitration award and that the decision of the Arbitrators shall be binding on both parties."

Although dated 12 August 2011, the above letter was signed by both the applicant and the first respondent on 15 August 2011.

The two appointed arbitrators reached a deadlock. That led to the appointment of the second respondent as the third arbitrator. That appointment was in accordance with paragraph 7 of the above letter.

On 28 October 2011, the second respondent delivered his award, which for the sake of clarity, I produce here below in full. The said award was couched in the following terms;-

"Arbitral Award

5.1 While the distress characterizing the Textile Industry is acknowledged, it is also important to bring some relief to the workers, especially given the long delay in finalizing the negotiations. How to achieve a mutually beneficial outcome in a typical catch 22 situation that faces the industry is not an easy task. However, guided by the fact that ordinarily, the award granted in April 2009 would have applied for 12 months, it means some adjustment should be factored in to cover the cost of living adjustments experienced in 2010 (May-December), 2011 and the projected levels for 2012. On average, inflation increased by 4.3% between May and December 2010, rising to a projected 4.6% in 2011 and is anticipated between 5% and 6% in 2012. This gives a cumulative cost of living adjustment of almost 15%.

5.2 It is therefore resolved that the minimum wage be increased by 15% from US$150.00 to $173.00 per month and that the levels for the other grades be reworked based on existing differentials.

5.3 The next challenge is to set the effective date, bearing in mind the state of the industry and problems, associated with backdated awards. We are guided by the suggestion of the employers' association as indicated in its position paper of September 2011 addressed to the two arbitrators, where it was proposed that the effective date be 01 July 2011 (page19). One would therefore expect that there has been some anticipation on the employers' side of such an eventuality.

5.4 Since there appears to be consensus between both parties that the collective bargaining agreement should run for 12 months, it is taken that the agreement is effective from 1 July 2011 and will be in force until end of June 2012 when a new agreement is implemented.

Conclusion

The challenges facing the Textile Industry associated with the influx of imports, shortages of working capital, absolete equipment among others cannot be resolved by the two parties alone as it requires government involvement. We therefore pray that the stakeholders come together to find lasting solutions to the problems bedeviling the sector as a matter of urgency to salvage an already difficult situation. Useful lessons could be drawn from other experiences such as South Africa where the parties have adopted a mutual gains approach to addressing the problems facing the sector."

Although the applicant is already complying with the terms of the above award, it believes the award is contrary to the public policy of Zimbabwe.

In paragraphs 7.1, 7.2, 7.3 and 9 f its founding affidavit the applicant argues as follows:-

"7.1 The Arbitrator awarded a 15% increase, on the basis that this was a cumulative cost of living adjustment for the relevant period.

7.2 The 15% was stated as the cumulative cost of living adjustments from 01 April 2010 to 30 June 2012, when, he was required to give an award for a twelve month period from the date of his award. His award was accordingly outside the scope of his terms of reference.

7.3 The arbitrator also wrongly calculated 15% of US$150 as taking the minimum wage to US$173, when it really is US$172,50.

9. The arbitration award is therefore incorrect on the figures, and it would be contrary to the public policy of Zimbabwe to uphold an award which is clearly incorrect on the figures."

It is mainly on the basis of the above arguments that the applicant has therefore filed this application seeking to have the award set aside in terms of section 34 of the Arbitration Act [*Cap 7:15*].

At the commencement of the hearing, Advocate Girach for the applicant, submitted that the respondents had filed their heads out of time and were therefore barred.

I however, allowed parties to present full argument covering both the preliminary issues and the merits of the matter.

Advocate Girach noted that the applicant's heads of argument were filed on 17 April 2012. He said in terms of the High Court Rules 1971 the respondents' heads of argument were only filed on 26 June 2012. He said in terms of the Rules the heads of argument were supposed to have been filed within 10 days after receipt of the Applicants' heads of argument.

Mr Gasa for the respondents disagreed with Advovate Girach. He correctly submitted that the heads of argument were filed 5 days before the hearing of the application as required by the rules. He said the main intention when the rules were drafted was to ensure that the respondents' heads of argument are filed at court 5 days before the matter is head.

Rule 238 (2a) of the High Court Rules 1971 which regulates the procedure of filing heads of argument in applications of this nature, provides as follows ;-

> "2(a) Heads of Argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of subrule (1):-
>
> Provided that:-
>
> (i) No period during which the court is on vacation shall be counted as part of the ten-day period;
>
> (ii) The respondent's heads of argument shall be filed at least five days before the hearing."

My reading of the above rule is that it is possible for an applicant to obtain an early date before the expiry of the normal 10 days. In such a case the rules would then require a respondent to file heads of argument at least 5 days before the matter is heard. I believe that the thrust is that the heads of argument must be before the court five days before the hearing. If that is achieved, then there is compliance. That being the case, I would therefore agree with Mr Gasa that the heads of argument were indeed filed in terms of the rules and therefore the respondents are not barred.

I am therefore, in view of the above, unable to uphold the point *in limine* raised in *casu* by the applicant.

On the merits of the matter, I note that in the opposing affidavit filed on 14 February 2012, the respondents had raised a number of points *in limine*, Those were, however, abandoned in the heads of argument. I believe this was mainly because the respondents firmly took the view that "this application has since been superceded by events particularly in that the very arbitration award being challenged has since been gazetted as Statutory Instrument 77 Of 2012." That position was not disputed. The applicant accepted that the award was now law.

However, notwithstanding the fact that the award was gazetted on 11 May 2012 and was now law, the applicant insisted that the matter be heard. It was argued that the gazetting of the award did not deny the Court the right to hear the matter. In the main, it was submitted, there was evidence that the Chairman of the relevant National

Employment Council had indicated that the award should not have been registered. To that end Advocate Girach then sought to hand in, from the bar, a letter supporting the position of the Chairman of the National Employment Council. That was, with my agreement, resisted. I refused to have the letter submitted as evidence because, as I shall show later in this judgment, the Labour Act [*Cap 28:01] (*the Labour Act) sets out the procedures to be followed in objecting to the registration of an award with the relevant Ministry before its gazetting. The Labour Act further allows for possible amendments to a gazetted statutory instrument and in so doing spells out the procedure to be followed. In any case, the handing in of the letter was contrary to the rules of Court. Furthermore, the gazetted registered award was signed for by the Chairman of the National Employment Council.

Given the fact that the award is now law, I see no need in delving into the merits or reasons proferred for setting it aside in terms of the Arbitration Act. This court has no jurisdiction to do that. The award was properly registered in terms of the laws of the country. I find no legal basis for the argument that this court can proceed to consider the merits of the case. The opportunity to challenge the award was lost when the applicant did not take advantage of the provisions of the Labour Act. (See *Posts and Telecommunications Corporation v Zimbabwe Post and Telecommunications Workers Union* and two others, 107/02 SC).

Furthermore, the interpretation Act *(Cap 1:01*) defines statutory instrument as follows:-

"statutory instrument" means any proclamation, rule, regulation, by-law, order, notice or other instrument having the force of law, made by the President or any other person or body under ant enactment."

The applicant correctly concedes that the award is now law as defined above.

The applicant can still have recourse through the Labour Act. In terms of that Act, the applicant, if it so desires, can apply for the amendment of Statutory Instrument 77/2012.

In casu, the relevant provisions of the Labour Act are sections 80 and 81 which provide as follows:-

"80 Publication of collective bargaining agreements

1) Upon registration of a collective bargaining agreement the Minister shall publish the agreement as a statutory instrument.
2) The terms and conditions of a registered collective bargaining agreement shall become effective and binding:-
   a) From the date of publication of the agreement in terms of subsection (1); or
   b) From such other date as may be specified in the agreement.

81. Amendment of registered collective bargaining agreements by Minister

(1) Where a collective bargaining agreement which has been registered contains any provision which is or has become:-
   a) Inconsistent with this Act or any other enactment; or
   b) …….
   c) Unreasonable or unfair, having regard to the respective rights of the parties; the Minister may direct the parties to the agreement to negotiate within such period as he may specify for the amendment of the agreement in such manner or to such extent as he may specify.

(2) Where the Minister has made a direction in terms of subsection (1), it shall be the duty of the parties to the collective bargaining agreement concerned to negotiate in absolute good faith for the amendment of the agreement and report back to the Minister within the period specified in the direction as to the extent to which they have been unable to agree in amending the agreement.

(3) Upon receipt of the report of the parties in terms of subsection (2), the Minister shall consider the same and may thereafter amend the collective bargaining agreement in accordance with the report of the parties or in such other manner as is consistent with the considerations specified in paragraphs (a), (b) and (c) of subsection (1).

(4) Where the Minister amends a collective bargaining agreement in terms of subsection (3), he shall direct the Registrar to register such amendment and section eighty shall apply, *mutatis mutandis*, in relation thereto.

(5) Any person who is aggrieved by any action taken by the Minister in terms of this section may appeal to the Labour Court."

The applicant is free to use the above provisions of the law in order to address the alleged short comings in the award.

In view of the foregoing, I believe it will be totally irregular for this court to delve into the merits of this application. That would constitute a challenge to the law of the land and such a challenge cannot be brought in this manner.

The applicant, despite being aware of the publication of Statutory Instrument 77/2012, persisted with this application. That conduct, in my view, justifies for an order of costs on a higher scale.

I therefore order as follows;-

1. The application be and is hereby dismissed; and
2. The applicant shall pay costs on a legal practitioner and client scale.

Messrs Coghlan, Welsh and Guest, the applicant's legal practitioners
Messrs Gasa Nyamadzawo & Associates, the respondents' legal practitioners