GODFREY TATENDA GURIRA
and
ESTATE LATE PROFESSOR OBERT NDAWI
and
DR HILTON CHIKUYA
and
DR LAZARUS NEMBAWARE
versus
ZIMBABWE COUNCIL FOR HIGHER EDUCATION (ZIMCHE)
and
ROSELINE NHAMO
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 2 October 2014 & 4 March 2015

Opposed Application

D C Kufaruwenga, for the applicants
J R Tsivama, for the first respondents

ZHOU J: This is an application for the setting aside of an arbitral award rendered by the second respondent in a contractual dispute between the applicants and the first respondent. The application is being made in terms of art 34 (2) (b) (ii) of the schedule to the Arbitration Act [*Chapter 7:15*]. The application is opposed by the first respondent.

The first, third and fourth applicants are employees of the first respondent, a statutory body constituted in terms of the Zimbabwe Council for Higher Education Act [*Chapter 25:27*]. The now deceased Professor Obert Ndawi whose deceased estate is cited as the second applicant, was also an employee of the first respondent prior to his death. The applicants were employed in terms of written contracts of fixed duration which terminated by effluxion of time at the end of December 2012 and January 2013 for that of the third applicant. The contracts were signed in 2008. After the termination of their employment contacts the applicants remained in employment on the same terms and conditions as the

expired contracts. They were assured that their employment would be extended and that they would be made to sign new contracts of employment. A letter addressed to the first applicant dated 9 January 2013 stated the following:

> "Dear Mr Gurira
>
> **RENEWAL OF CONTRACT**
>
> It is with great pleasure that I write to inform you that your application for the renewal of your contract has been approved.
>
> This is very good news for ZIMCHE, and we will do our best to ensure that the signing of the new contract is expedited."

The letter was signed on behalf of the first respondent by Professor Emmanuel Ngara in his capacity as the Chief Executive Officer.

The other three applicants received the same letter.

By letter dated 29 April 2013 the first respondent advised the applicants that as a consequence of a directive addressed to the Ministry of Higher and Tertiary Education by the Ministry of State Enterprises and Parastatals the salaries of Principal Directors and Directors were to be reviewed as illustrated in the schedule attached to the letter addressed to the applicants. The applicants were given up to 10 o'clock in the morning of the following day to choose one of two options presented to them. The first option was for a four-year employment contract based on amended packages with the effective date being 1 January 2013. An assurance was given that remuneration already received from 1 January 2013 to 30 April 2013 would not be deducted from the applicants' packages. The second option was a contract for a period of one year up to 31 December 2013 on the same terms and conditions which prevailed then. Upon termination of the contract the positions would be advertised and the applicants would be entitled to apply for them together with any other persons who might be interested in the same positions. The applicants chose the first option which was for four-year contracts.

New contracts were signed by the applicants in June 2013. The contracts signed in June contained less favourable conditions than the expired ones. The applicants allege that they signed the new contracts under duress. According to them a Mrs Muguti from the Ministry of Higher and Tertiary Education had given information to the Chief Executive Officer of the first respondent to the effect that if the applicants did not sign the written contracts presented to them in June then they would be without employment the following Monday. That statement, according to the applicants, was repeated by Mrs Muguti to the first respondent's Deputy Chief Executive Officer at Gwanda. The applicants stated that some of

them "overhead" the conversation between Mrs Muguti and the first respondent's Deputy Chief Executive Officer. The applicants alleged that they attempted to resolve the issue of the contracts internally before they signed the contracts. They subsequently signed the agreements.

The arbitrator rejected the applicants' contention that they signed the contracts in June 2013 under duress. That is the conclusion which the applicants contest on the basis that it is in conflict with the public policy of Zimbabwe.

In terms of article 34 (2) of the Schedule to the Arbitration Act:

> "An arbitral award may be set aside by the High Court only if –
>
> (a) . . .
> (b) The High Court finds that –
> (i) . . .
> (ii) The award is in conflict with the public policy of Zimbabwe."

Article 34 (5) provides as follows:

> "For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –
>
> (a) the making of the award was induced or effected by fraud or corruption; or
> (b) a breach of the rules of natural justice occurred in connection with the making of the award."

The public policy provisions referred to above must be interpreted restrictively consistent with the need for finality in arbitration proceedings. See *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S) at 465 C-D; *Beezley NO* v *Kabell & Anor* 2003 (2) ZLR 198(S); *City of Harare* v *Harare Municipal Workers Union* 2006 (1) ZLR 491 (H) at 493A-C. This court is mindful of the fact that it is not sitting as an appellate court to consider the merits of the decision of the arbitrator. The mere fact that the decision of the arbitrator is incorrect in some respects does not per se justify the setting aside of the award in terms of art 34. The authorities have consistently held that it is only when "the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award" that this court would set aside the award on the grounds contained in art 34. See *Zimbabwe Electricity Supply Authority* v *Maposa,* (*supra*), at 466 E-G; *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007 (2)

ZLR 81 (S) at 85C-D; *Beezley NO* v *Kabell & Anor*, (*supra*), at 201 D-E; *Muchaka* v *Zhanje & Anor* 2009 (2) ZLR 9 (H) at 11 E-G. Put in other words, the incorrectness must not only be serious; it must constitute an affront to our conception of justice and fairness.

Before I consider the merits of the application I should say something about the draft order which sets out the relief being sought by the applicants. The relief being sought goes beyond merely seeking the setting aside of the arbitral award. The draft order also seeks a declaration that the contracts which were signed by the applicants in June 2013 are invalid, null and void, as well as an order that the applicants be declared to be permanent employees of the first respondent on the basis of the contractual terms and conditions contained in the contracts which expired in December 2012 and January 2013. The draft order is an invitation to the court to substitute its own decision for that of the arbitrator as if the court is sitting in an appeal against the arbitrator's decision. That relief falls outside relief which this court would be entitled to grant in terms of order 34. See *Zimbabwe Electricity Supply Authority* v *Maposa*, (*supra*), p 467 B-C. Further, it is difficult to understand how the applicants would want a deceased estate which is cited as the second applicant to be declared a permanent employee of the first respondent. Quite apart from the fact that a deceased estate should be represented in proceedings by an executor, the relief being sought would be incompetent in relation to it. Legal practitioners and litigants must apply their minds to the relief which they set out in the draft orders and not merely attach draft orders to the papers as a matter of course. The relief set out in a draft order must be based on the papers filed and must seriously reflect the cause of action as pleaded in those papers.

Turning to the merits of the application, the arbitrator came to the conclusion that no duress had been established by the applicants to warrant the setting aside of the contracts which they signed in June 2013. The arbitrator noted that the alleged threats were not communicated to the applicants by Mrs Muguti but by a third party and, in another instance, some of the applicants stated that they had simply overheard a conversation between Mrs Muguti and some other person. Also, the applicants unreservedly signed the contracts. They did not sign the contracts under protest because of the pressure which they alleged had been put to bear upon them. The arbitrator noted, too, that the applicants were aware as long ago as January 2013 that they would be required to sign new contracts. Even the option that they chose on 29 April 2013 already contained terms and conditions which were less favourable than the earlier contracts which had terminated. They were therefore aware that the contracts

that they would be signing in due course had terms and conditions different from their first contracts. I do not believe that the above conclusions can be characterised as manifestly wrong to the extent of constituting a palpable inequity. The contracts may have been prejudicial to the applicants but the arbitral award is not wrong in its conclusions on the facts and evidence presented. The applicants are not ordinary persons but highly educated professionals. The first applicant is a Principal Director, Human Resources and Administration. He would be the first person to appreciate the implication of signing a contract of employment without reservations. It does not follow that whenever a person is not happy about the terms of a contract which he or she is signing then the conclusion must be that the person is signing the contract under duress or undue influence. If that approach was to be adopted then most contracts would be invalidated as they in most cases follow negotiations in which the parties do not always get everything that they would want to get out of the contracts. Nothing is said about who Mrs Muguti is in relation to the contracts of the applicants such that they would not be able to inquire directly from her as to the situation surrounding their contracts. There is also no explanation as to why the applicants did not approach the court on an urgent basis to protect their interests if they genuinely believed that they were being unduly pressured to sign unfair or oppressive contracts. The issue of legitimate expectation does not arise as the applicants were notified in January that renewal of their employment contracts had been approved. They had no legitimate expectation to have their contracts renewed on the same terms as the expired one as they were told that they would be signing new contracts. In fact, in April they were even told and they accepted that those contracts would have less favourable terms in terms of remuneration than their first contracts. The arbitrator adequately considered the principles of law applicable to cases of duress in the context of contracts, and came to the correct conclusion that the contracts signed by the applicants could not be impeached on the ground of duress. Every other argument which the applicants raised depended upon a determination on the question of the validity of the contracts which they signed in June 2013. Once the arbitrator concluded that the contracts were validly signed the issue of whether the letter of 9 January 2013 constituted an offer became irrelevant.

For the above reasons, I find no ground for the award rendered by the second respondent to be set aside. The application must accordingly fail. No submissions were made as to why the costs should not follow the result.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The applicants shall pay the costs jointly and severally the one paying the others to be absolved.

Dzimba Jaravaza & Associates, applicants' legal practitioners
Sawyer & Mkushi, first respondent's legal practitioners