ROBERT KUDAKWASHE KAREMBA
versus
THE ZIMBABWE MINING DEVELOPMENT CORPORTION

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 28 July 2016

**Opposed Matter**

*O Matizanadzo*, for the applicant
*T Zhuwarara*, for the respondent

MATANDA-MOYO J: This is an application for registration of an arbitral award granted in favour of applicant on 28 November 2014. The brief facts are that the applicant was employed by the respondent. The applicant was charged with various offences by the respondent and dismissed from employment. He challenged the dismissal through conciliation by the Labour Officer. The mater was subsequently referred for compulsory arbitration. Whilst the arbitral proceedings were still pending the parties entered into a mutual agreement whereby they agreed to the termination of the employment contract and payment of a package to the applicant. The terms are captured in the agreement termed "Agreement of Mutual Termination of Contract of Employment." Such agreement was concluded on 31 March 2014. On 28 November 2014 the agreement was registered as an arbitral award upon request by the applicant. The applicant now seeks registration of such award in terms of s 98 (14) of the Labour Act [*Chapter 28:01*].

Counsel for the respondent raised a point *in limine* that this court should refuse to deal with the matter. The parties entered into an agreement, which agreement provided for referral of disputes arising from the agreement to arbitration. That has not been done. The respondents argued that when the agreement was entered into, the arbitral proceedings pending before the arbitrator were terminated. The proceedings did not remain pending before the arbitrator. In any

case the section relied upon by the arbitrator in registering the award did not give him such powers. He argued that such arbitral award is thus a nullity which is unregisterable.

Counsel for the respondent on the other hand submitted that this court has a function to register the arbitral award. It is not the mutual agreement which is under scrutiny but the arbitral award. He argued that when the mutual agreement was consummated, the arbitral proceedings remained pending. Reducing the agreement to an award was only a means of finalising the proceedings. In any case the respondents were aware that the applicant had referred the agreement for registration as an award and did nothing to stop that. Effectively that meant the respondent acquiesced to such process and could not be allowed to challenge same. The appropriate forum to raise the issue was before the arbitrator and not before this court. He urged this court to dismiss the point *in limine*.

It is common cause that the dispute between the parties was referred for compulsory arbitration after the conciliation process failed. Whilst the arbitral proceedings were pending the parties entered into an agreement termed, "Agreement of Mutual Termination of Contract of Employment."

The said agreement did not specifically terminate the pending arbitration proceedings. What it did was provide a separate paragraph on "Resolution of Disputes." Paragraph 19 of the agreement provides:

> "Resolution of Disputes
>
> 19. Any dispute between the parties arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by Arbitration. The parties hereby irrevocably agree that the decision of the Arbitrator in any such arbitration shall be final binding upon them.
> ----------"

I need to examine and determine whether by entering into the agreement, the parties terminated the pending arbitral proceedings. Section 98 (2) of the Labour Act provides that "the Arbitration Act [*Chapter 7:15*] shall apply to a dispute referred to compulsory arbitration." Article 32 of the Arbitration Act deals with termination of arbitral proceedings. It provides:

> "32 (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
> (2) the arbitral tribunal shall issue an order for the termination of the arbitral proceedings when-

a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest in his part in obtaining a final settlement of the dispute:
b) The parties agreed on the termination of the proceedings:
c) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of article 33 and 34 (4)."

From a reading of the above it is clear that the arbitration proceedings can only be terminated by an order of the arbitral tribunal. The arbitral tribunal must give an order to the effect that the proceedings have been terminated. Without such an order the proceedings remain pending before the arbitrator. See Article 32 (1) above. Subparagraph (2) lists the various circumstances entitling the arbitral tribunal to terminate proceedings. In the present case the respondent did not argue that there is such an order terminating the proceedings. It is accordingly clear that the arbitral tribunal which was seized with the matter never terminated the proceedings and according to the arbitrator such matter remained alive before him. I do not therefore agree with the submissions made on behalf of the respondent that the arbitrator's powers to hear the dispute ended with the agreement between the parties. The parties had an obligation in terms of the law to ensure the proceedings were lawfully terminated. It is my view therefore that when the agreement was forwarded to the arbitrator with the respondent's knowledge, the arbitrator was still seized with the matter. It was within the arbitrator's powers to proceed to reduce the agreement to an award.

Article 30 of the Arbitration Act deals with settlements whilst proceedings are pending. it provides:

"(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement award on agreed terms. …"

Again this article presupposes knowledge by the arbitrator of the settlement entered between the parties. Once it is clear to the arbitrator that the dispute has been settled, again the arbitral tribunal shall terminate the proceedings. The proceedings are again terminated by the arbitral tribunal. There is no automatic termination. It is the arbitral tribunal which terminates the proceedings in terms of Article 30.

Vein Huber (4.21.13) states; "When arbitrators have accepted reference, they must take the case in hand and dispose of it …" Indeed in *Telecall (Pty Ltd)* v *Logan* [2000] ZASCA 97; 2000 (2) SA 782 (SCA) para 12, which approved the dictum of DIDCOLT J, PLECOMAN JA reiterated that general principle in these terms:

> "I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist, and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of a dispute. It also follows that some care must be exercised in one's use of the word "dispute" …."

Where there is a dispute and where an arbitrator has accepted a reference, such arbitrator must ensure he disposes of such matter. In the present case the parties had agreed on the referral and on the arbitrator disposing of the matter. It was therefore envisaged by the parties that whatever agreement they reach could be made an award in terms of Article 30 of the Act. Only when a final order was made did his authority come to an end.

I have also perused the award by the arbitrator and I am satisfied that he did not depart from the agreement by the parties. He merely reduced the same agreement by the parties into an award. I therefore agree with submissions made on behalf of the respondent that the court or tribunal could not depart from what the parties agreed upon. The award is not in any way in conflict with the agreement. The respondent argued that Clause 19 of the agreement ousted the arbitrator's powers to further deal with the matter. I do not agree. The arbitrator's mandate ended with the granting of the award. In any case the arbitrator simply made the agreement an order of the arbitrator. He did not determine any issues arising from the agreement.

I find therefore that the point *in limine* has not been well taken and is dismissed.

This is an application for registration of an arbitral award in terms of s 98 (14) of the Labour Act. The parties are in agreement that the award has not been set aside. The respondent having failed to provide any justification for not registering the award, the award is hereby registered. The respondent acknowledges having entered into the agreement. It acknowledged not having complied with the award.

Accordingly it is ordered as follows:

1. The arbitral award of the Honourable Arbitrator Mr Zakeyo Mutimutema issued at Harare on 28 November 2014 be and is hereby registered as an order of this honourable court.

2.1 The respondent shall pay to the applicant the sum of US$453 271.00 less tax and other permissible statutory deductions.

2.2 The respondent shall pay the applicant's pension in the sum of US$49 397.00 to a pension fund of the applicant's choice.

3. All payments to be made by the respondent in terms of the arbitral award shall be paid in accordance with the provisions of Clause 10 of the Arbitral award.

4. The respondent shall pay the applicant's costs.

*Matizanadzo & Warhurst*, applicant's legal practitioners
*Mutamangira & Associates*, respondent's legal practitioners