

MAZOWE MINING COMPANY
versus
ASSOCIATED MINE WORKERS UNION OF ZIMBABWE
and
REGGIE SARUCHERA
and
CECIL MADONDO
and
THE MASTER OF THE HIGH COURT
and
THE HONOURABLE MOSES CHINHENGO NO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 January 2022 and 15 May 2023

Opposed Court Application

T Mpfu with *M Tshuma*, for the applicants
T Chinyaka, for the respondents

CHITAPI J: This judgment disposes of two applications involving the same parties filed under case numbers. HC 1381/21 and HC 1497/21. In case number HC 1381/21, the applicant is Associated Mine Workers Union of Zimbabwe. The respondents seriatim are Mazowe Mining Company (Pvt) Ltd (Under Corporate Reserve); Reggie Saruchera; Cecil Madondo and Master of High Court. Reggie Saruchera and Cecil Madondo were both appointed by this court as respectively lead and subordinate corporate rescue practitioners of Mazowe Mining Company (Pvt) Ltd. The Master was also made a respondent to comply with procedural law.

The applicant in case number HC 1381/21 is the holder of an arbitral award in its favour wherein it claimed against the respondent's payment of outstanding wages which it described as being due to its members who were employees of the first respondent Mazowe Mining Company (Pvt) Ltd. The operative part of the award is contained in s 44 of the award and it reads as follows:

“44. Accordingly, my award is:

- (a) The respondent shall pay to its employees in Grade 1 to Grade 13, herein represented by the claimant, the amounts owed by it to each of them totalling US\$14 049 737.00, which amounts and total sum are subject to verification by the corporate rescue practitioner(s).
- (b) The respondent shall have the option to pay amounts verified in terms of paragraph (a) in United State dollars or in Zimbabwe dollars, if respondent pays in Zimbabwe Dollars the amounts payable shall be converted from United States dollars to the Zimbabwe dollars at the ruling auction exchange rate on the date of payment.
- (c) The costs of this arbitration and the arbitrator’s fees shall as provided for in paragraph 3 of the Arbitration Submission Agreement between the parties dated 20 November 2020.”

The award was dated 21 January 2021. On 21 April 2021 the applicants in the said case filed an application HC 1381/21 as a chamber application for registration of the arbitral award aforesaid as an order of court for execution in terms of s 35(1) and (2) of the Schedule to the Arbitration Act, [*Chapter 7:15*] as read with r 226(1)(b) and (2) (c) of the High Court Rules, 1971 (then in force). The application was opposed by the first respondent, the employer and all necessary papers were filed including heads of argument.

In the meantime, the first respondent (the employer) or applicant filed an application under case number 1497/21 on 15 April 2021 for an order to set aside the arbitral award whose registration was sought in case number 1381/21. The application was opposed by the first respondent (applicant in case no. HC 1381). The rest of the respondents namely the corporate rescue practitioners, the Master and the Arbitrator did not oppose the application. The two applications were by order of MANGOTA J given in case number HC 3267/11 dated 17 November 2021 consolidated for purposed of hearing.

At the hearing the parties agreed that a rolled up approach would be most appropriate to adopt in the order of hearing. In terms thereof the parties would address both applications starting with HC 1497/21 next HC 1381/21 with one judgment given to dispose of both cases. In logic it did make sense to hear arguments in that order because if in the assessment of the applications starting with case number HC 1497/21, it is found that there has been established

good ground to set aside the award, once set aside, it cannot be registered as an order of court as there would be nothing to register.

In support of the application to set aside the award, the applicant relied upon on Article 34 of the Model Law which is a schedule to the Arbitration Act [*Chapter 7:15*]. In particular the applicant averred that the award should be set aside on the basis that it was in conflict with the public policy of Zimbabwe. The facts which the Arbitrator had to deal with were largely common cause. They can be summarized as follows from the statement of agreed facts before the arbitrator:

- (a) It was common cause that the first respondent union represented the workers concerned or covered in the arbitration. Specifically, the parties agreed in para 2 of the agreed facts that the first respondent's union was authorized by the employees of the applicant to represent the employees.
- (b) It was agreed that the corporate rescue practitioners had authorized that the salary dispute between the applicant and the employees represented by the first respondent should be determined by arbitration.
- (c) It was agreed that the first respondent represented workers in Grade 1 to Grade 13.
- (d) It was also common cause that the workers were individually owed various amounts of money and that a tendered amount to settle the amounts owed was rejected by the employees who argued that the tendered amount did not include compensation for lost value of the arrear salaries which had been tendered.
- (e) Employees submitted a claim for payment of the sum of USD\$14 009 737.00 which the fourth respondent provisionally accepted at the first creditors meeting of the applicant (under corporate rescue). However, the corporate rescue practitioners were to verify them.
- (f) The purpose of the arbitration was as argued by the parties "a part of the verification exercise".
- (g) The employee contracts executed in 2015 provided for payment of salaries in United States dollars.
- (h) The parties agreed that the gazetting of the "Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and issue of Real Time Gross Electronic Dollars (RTGS Dollars) Regulations; S I 33/2019 which was

gazetted on 22 February 2019 and subsequently leading to the passing of the Finance Act No. 2 of 2019, Act No. 7/2019 superceded the regulations.

- (i) The employment contracts of 2015 were not varied. The applicant company at the time of arbitration was paying salaries in Zimbabwe dollars.
- (j) It was an agreed fact that there was a collective bargaining agreement of October 2020 which provides for minimum wages and for payment of a portion of wages in United States dollars where the employer generates foreign currency. Where the employer does not generate foreign currency. The United States dollars portion of wages is paid in Zimbabwe dollars at the prevailing rate of exchange. In this regard, parties accepted that there were no mining activities being carried out by the company since 2018 although plans to revive operations were under way.
- (k) The agreed facts in para(s) 23 and 24 summed up the parties' contention as:

“23. The claimant contends that arrear salaries owed to the employees are payable in United States Dollars. In the alternative it contends that the arrear salaries are payable in Zimbabwe dollars at the rate of exchange applicable on the date of payment.

24. The first respondent's contention is that arrear salaries owed are payable in Zimbabwe at the rate of 1:1.”

The issues which it was agreed the Arbitrator was to determine were:

- (a) Whether the employees of the first respondent are entitled to have their arrear salaries incurred before 22 February 2019 paid in United States Dollars
- (b) Whether the arrear salaries from 1 March 2019 to February 2020 should be paid in United States Dollars or at the ruling rate of exchange or at 1:1.

In relation the above issues, the arbitrator stated as follows in para 7 of the arbitral award:

“7. Questions for my decision; needless to say, are questions of law. The position of the claimant on these questions is that the amounts arising from the first period are payable in US\$ and those from the second period are also payable in US\$ or alternatively in Z\$ at the prevailing exchange rate on the date of payment. The respondents' position is simply that all the amounts owing are payable in Z\$ at the rate of 1:1.”

The arbitrator then discussed the law by going through the relevant legislations and case law and made the determination in the operative part as set out herein (supra).

The applicant has attacked the arbitral award on the grounds that it is in conflict with the public policy of Zimbabwe. The applicant averred that the arbitrator made "... baseless findings..." not supported by the provisions of S I 33/2019 and the Finance Act (No. 2) 2019. The applicant averred that the arbitrator erred at law in holding that local obligations denominated in foreign currency were like foreign loans, exempt from conversion to RTGS dollars. The applicant averred further that the effect of the arbitrator's erroneous finding was to negate the substantive effect of S I 33/2019. It was submitted that the arbitrator's finding had the effect of making S I 33/2019 redundant from the inception in that accepting the arbitrator interpretation would mean that all liabilities were exempt from the effect of the law".

In particular the applicant averred that the arbitrator had negated the law which was clear that local obligations denominated in foreign currency were converted to RTGS Dollars at 1:1 as at 22 February 2019, applying the parity principle that payment of the arrear salaries due to the employees of the applicant be paid at the rate of exchange of the United States Dollars to the RTGS dollar on the date of payment. The applicant contended that the parity principle had been rejected by the Supreme Court in the case *Zambezi Gas Zimbabwe (Pvt) Ltd v N B Barber (Private) Limited & Anor* HC 3/20. It was also the applicant's contention that the arbitrator was wrong to refer to a rate of exchange between the United States dollar and the RTGS dollar because upon the 1:1 conversion taking force, the liability of arrear salaries ceased to be a foreign currency debt. In short, the applicant contended that the award conflicted with the public policy of Zimbabwe in that the arbitrator departed from the prevailing law with deliberation as he was conscious of the law and chose to rewrite the law, so to speak.

The first respondent both in the opposing affidavit and heads of argument did not squarely address the issue of whether or not the arbitrator had misinterpreted the law as set out in s I 33/2019 and the Finance Act (No. 2), 2019 in applying it to the facts. It instead averred that it was equitable for the arbitrator to make the order as stated in paragraph '4.16 of the first respondents' heads of argument:

"4.16. *In casu* the arbitrator considered the fact that employees have a right to be remunerated for their work and if an employer makes an undertaking to pay employees in a certain currency, that understanding should materialize because there are peoples livelihoods at stake and a contract in Zimbabwe is sacrosanct hence should be formed to its entirety."

It was also the first respondent's argument that it was a claimant "prerogative to claim in a currency that must truly express his loss and accordingly; most fully and exactly compensates him for that loss". In so stating the first respondent borrowed from the words of OMERJEE J (as he then was) in the case of *Stan Marker Mining (Pvt) Ltd v Mettalon Gold Corporation* HC 3074/04. On this I should quickly say that the statement is correct. However, this is subject to the rider that in so claiming, one cannot seek relief which the law does not allow.

Before dealing with the issue of whether the arbitral award conflicts with the public policy of Zimbabwe, there is an issue that arose for determination but was not raised before the arbitrator nor in the founding affidavit. The issue was raised for the first time in the applicant's heads of argument. The applicant's counsel submitted that the first respondent did not have a legal standing at law to make a claim on behalf of its members. Counsel submitted in the heads of argument that the issue of the locus standi of the first respondent to sue on behalf of its members was a matter of law which could be raised at any stage of legal proceedings. Reference was made to the cases of *Muskwe v Nyajima & Ors* SC 17/12 and *Muchakata v Netherburn Mine* 1996(1) ZLR 153(S). There is no debate on this trite statement of the law. That said, it must equally be taken as trite that the point of law is not then raised a matter of course or informally. The party seeking to raise the point should give formal notice to raise the point of law to the court and all interested parties so that other parties are not taken by surprise and are accorded an opportunity to study, reflect and research on the point and prepare to adequately address on it by commenting or presenting counter submissions.

The point law in the matter was not properly raised and would have been improperly before the court, had the applicant not addressed it in substance the court should deal with the point. The applicant on the strength of the Supreme Court judgment in the case *Gweru Water Workers Committee v City of Gweru* 2015(2) ZLR 67(S), it is stated by Malaba DCJ (as he then was):

"Only a Trade Union can represent its members before a determining authority or in the Labour Court. It cannot arrogate to itself as was done by the "Gweru Water Workers Committee", the cause of action and the employees and sue on their behalf. It is clear that the rights provided for under s 16 of the Act accrued to the employees in their individual capacities.

The appellant claimed on behalf of the employees. A worker's committee can only represent the interests of the employees who appointed or elected it at the workplace. It cannot substitute itself for the employees and claim their rights in litigation. The right to sue accrues to the employers and the employees in their individual capacities. The employees would be claiming rights under contracts of employment with their employer. A *universitas personarum* would not have a right to sue for the rights when it is not privy to any of the contracts of employment. Representation in terms of s 24(1) of the Act does not mean that a person or body would have the right to substitute itself in place of the employees as a party to proceedings."

Mr *Mpofu* for the applicant submitted that the arbitration proceedings were therefore a nullity because "there were no two parties to that cause to give rise to the existence of a cause of action. Counsel cited a number of authorities including *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246(H) to the effect that a summons only has legal force and effect if issued by the plaintiff against an existing natural person or legal persona; *JDM Agro Consult & Marketing (Pvt) Ltd v Editor of the Herald Newspaper & Anor* 2007(2) ZLR 71 where the court declared a summons a nullity because there were no existing persons answering to the names of the Listed defendants.

The court further stated that such a summons could not be amended or substituted because a nullity cannot be amended or substituted; and in *The Zimbabwe Bata Shoe Company Limited v Bata Shoe Company Middle Management* SC 30/12, the following extract from the judgment was aptly quoted by Mr *Mpofu*.

"The appellant has taken the point that although, the Bata Shoe Company Middle Management is cited as the respondent, it is not a legal persona at law, with the capacity to sue and be sued. Therefore, there is no respondent before this court. Similarly, there was no respondent before the Labour Court or a claimant before the arbitrator ...

In the light of the recent decision of this court in *CT Bolts (Pvt) Ltd v Workers Committee* SC 16/12 this court is of the unanimous view that the respondent is not a legal persona. Consequently, there is no respondent before this court. Neither was there a respondent before the Labour Court nor a claimant before the arbitrator. Both proceedings before the arbitration and the Labour Court were a nullity at law....."

In response, Mr *Chinyoka* for the first respondent submitted that it was incompetent for the applicant to seek to raise a point of law at this stage – which it did not raise before the arbitrator. He placed reliance for this argument on the Supreme Court case of *Gold Union Investments (Pvt) Ltd v Tel One (Pvt) Ltd & Anor* SC 9/2013 a judgment of MALABA DCJ (as he then was). The *dicta* of the court in that case was that whilst a point of law could be raised at any stage of legal proceedings, with reference to the facts of that case, where a party raised

it before the arbitrator, the point had to be raised in terms of the provisions of Article 23(2) of the Arbitration Act which did not provide for exception to the procedure set out therein. In that case, the arbitrator had refused to allow the introduction of a point of law which the respondents sought to raise for the first time in heads of argument. The point of law related to an alleged illegality of the contract under dispute, being the subject matter of the arbitration. The respondents has also not formally applied to amend its defence in terms of Article 23(2) aforesaid. The arbitrator refused to accept the respondents' arguments that the principle that a point of law could be raised at any stage had an overriding effect on Article 23(2). The learned Deputy Chief Justice as noted, agreed that the Arbitrator was justified to refuse to entertain the point of law on grounds of non compliance with Article 23(2) and the prejudice that would arise from belated introduction of the point of law.

After referring to the *dicta* of KORSAH JA in *Machikata v Netherburn Mine* case (*supra*) to the effect that generally speaking, a point of law can be raised at any stage of proceedings including on appeal if here is no unfairness to the party against whom it is raised, the learned Deputy Chief Justice stated at p9 of the cyclostyled judgment:

“The theme that runs through the principles is that a question of law can be raised at any stage of the proceedings provided and it does not occasion prejudice to the other party. These principles are subject to the absence of clear provisions governing procedures in particular proceedings. It is particularly applicable where the procedure in question does not provide a sufficient remedy for raising of questions of law. In this case Article 23(2) is comprehensive and clearly takes case of the appropriate procedure by which a point of law may be raised in arbitral proceedings. There is no exception to the procedure which was provided for the legislature which would allow the arbitrator to decide the question of raising of points of law outside Article 23(2) on the ground that one of the parties considers the matter to go to the root of the dispute.”

The case of *Gold Driven Investments* is therefore not authority for the advanced proposition that a point of law cannot be raised post arbitration if it was not raised for determination before the arbitration during the arbitration proceedings. The issue bails down to ascertaining whether there is a set procedure which governs the raisings of a point of law in proceedings post arbitration, be it on review, application for recognition/ registration of award or setting aside thereof. None was advanced nor is any such procedure provided for in our law, at least to my knowledge.

In the absence of such procedure being provided for, the principles in the *Muchakata v Netherburn* case apply. The overriding issue is whether prejudice will arise if the point of law is allowed. In this regard, the nature of the point of law intended to be raised is a relevant consideration. If it goes to the root of the validity of the arbitral award, then in my view the

point must be taken as significant and must be allowed to be introduced and argued. *In casu* Mr *Mpofu* argued that it would offend the public policy of Zimbabwe were the court to allow an invalid award at law to stand. Mr *Chinyoka* did not argue contra the submission that a Trade Union cannot substitute itself for its members and take their place as plaintiffs, claimants, applicants or respondents as the case may be. He did not argue that there was some other ground like substantial interest in the cause to entitle the first respondent to substitute itself as a party. In my view, the fact that the parties including the arbitrator may have missed the issue of *locus standi* or acquiesced in the misapprehension does not validate expressly or by estoppel an illegality. The problem will then be simply whether or not the court can recognize an award which gives rights or places obligations upon a non-suited party at law. I think not. To do so would conflict with the public policy of Zimbabwe wherein courts are guided by and must apply the law. A nullity cannot be recognized by the court and a fortiori an award which cites a legally incompetent entity as a party to arbitration proceedings. See *CT Bolts (Pvt) Ltd (supra)* would be a nullity too.

Mr *Chinyoka* did not argue that there would be any prejudice to be suffered by the first respondent were the point of law to be admitted for argument. As I have already noted, the nature of a point of law may render the question of prejudice academic because proceedings that are a legal nullity if proved so, necessarily means that there are no proceedings to refer to and prejudice does not arise. In the circumstances, I make the finding that the arbitral proceedings and consequent award are a nullity because the applicant/claimant could not competently at law substitute itself for the workers affiliated to it.

The applicant has prayed for the setting aside of the award. The award is a nullity as I have determined. To set it aside is done for convenience and certainly because a nullity implies that there is nothing arising from the proceedings. It is as if the arbitration proceedings were never held. In the celebrated judgment of Lord Denning case of *Benjamin Leonard Macfoy v United Africa Company Ltd* (1961) 3 All ER 1169; the learned judge stated at page 1172.

“if an act is void, then it is in law a nullity. It is not onlybut incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is found on it is also bad and incurably bad. You cannot put something on it and expect it to stay there. It will collapse.....”

In casu, there is need for certainty given that there is a workforce directly affected in that their issue of the currency of payment still remains outstanding and undecided. It is convenient to grant the order setting aside the award as forcuality and it shall be so ordered.

In the second argument, the applicant submitted that the issue of conversion of debts had been settled by S I 33/19 as further incorporated in the Finance Act No. 2 of 2019. Mr *Mpofu* submitted that the Finance Act had extended the ambit of transactions to which the 1:1 conversion of USD\$ or RTGS would apply. It included liabilities described as including “financial and contractual obligations. It was also argued that the case of *Zambezi Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd and Anor SC 3/20* had settled the issue of currency conversion and endorsed the 1:1 USD to RTGS party of the money in relation financial and contractual obligations. The arbitrator however adopted the parity principle and adopted a moralistic approach to the issue by considering lost value on unpaid salaries already accrued. Both counsels were agreed on the import of the *Zambezi Gas* judgment which remains precedent. The arbitrator was bound to follow the judgment in so far as it settled the question of the conversions. It undoubtedly offends the public policy of Zimbabwe to allow an arbitral award in which the arbitrator interprets the law contrary to precedent of the highest court of the land in all matters not constitutional to stand. I would further set aside the award on the second ground advanced as well.

The court must consider case No HC 1381/21. Counsel were agreed that if the arbitral award sought to be registered is set aside in case No HC 1497/19 that puts paid to the application for registration or recognition of the award. In the light of my finding of nullity of the arbitral proceedings and consequent award, there is no award in existence to register.

Even assuming for argument that the arbitronial award had been upheld in the application for setting aside, I would still refuse to register it and agree with Mr *Mpofu* that the applicant there in did not properly settle its papers in that it did not comply with the provisions of Article 35 (2) of the Arbitration Act, which provides as follows:

“35(2) the party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof.....”

In casu, the applicant did not supply the authenticated original award nor a certified copy thereof. Section 35(2) is peremptory and elaborate in listing what the applicant should provide to the court. Absence compliance the application for registration will be destined to fail and susceptible to being struck off the roll. See *National Social Security Authority v*

Housing Corporation Zimbabwe (Private) Limited & Anor SC 20/22 where the Supreme Court stated that the arbitral award had to be authenticated for purposes of registration.

In that case the court stated:

“In our view to authenticate means to confirm or verify that the existing award is the one issued to the parties by the arbitration. Authentication does not take place on the signing of the award; Authentication is endorsed on the signed original award...”

The registration sought in the application would still face the hurdle of the want of the authenticated award.

That leaves the question of costs. Costs are in the discretion of the court and as a general rule they follow the event. I have taken note that both the applicant and respondent by choice and improperly advised participated in a process of arbitration which was a nullity for want of *locus standi* of the first respondent to participate in the proceedings as the claimant. It does not appear right nor justified for the applicant/respondent, Mazowe Mining Company (Pvt) Ltd to seek to make advantage of a win in this court after having participated in a nullity. Were it not for the sharpness of its counsel’s legal brains in this case Mr *Mpofu* who took note of the *locus standi* issue, the applicant/respondent aforesaid would have been content to let the issue lie as it did not occur to it to be a problem factually or legally. It appears to me as well that since the arbitration was also voluntary and between employer and employee, there is no justification given the point I have made that the applicant/respondent should not benefit from a cheap blow thrown after the fight has ended to award it costs. The fairest order is to make no order of costs in respect to both applications.

The following order ensues to dispose both case No HC 1497/21 and 1381/19.

IT IS ORDERED THAT:

1. In relation to case No HC 1497/21, the arbitral award of the fifth respondent, the Honourable M Chinhengo (N.O) dated 21 January 2021 is set aside.
2. In relation to case No HC 1381/19, the application for registration of the same award referred to in para (1) above is dismissed.
3. In respect to both case Nos HC 1497/21 and HC 1381/19, there be no order of costs.

Scanlen and Holderness, applicant’s legal practitioners
Gumbo and Associates, first respondent’s practitioners