

REPORTABLE (67)

EDMORE MAPONDERA AND 55 OTHERS
v
FREDA REBECCA GOLD MINE HOLDINGS LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA & CHITAKUNYE JA
HARARE: 3 JULY 2021 AND 14 JULY 2022

A. K. Maguchu, for the appellants

T. Mpofu, for the respondent

BHUNU JA:

INTRODUCTION

[1] This is a partial appeal against the judgment of the Labour Court, (the court *a quo*) LC/H/2/19 dated 7 February 2019. The appeal is against the court *a quo*'s ruling on the question of citation of the parties and the arbitrator's failure to award damages as an alternative to reinstatement.

[2] The appeal was initially set-down for hearing on 11 September 2020 whereupon it was removed from the roll by consent of the parties to consider placing it before a full bench comprising a panel of 5 judges in terms of s 3 of the Supreme Court Act [*Chapter 7:13*].

[3] Upon due consideration of the nature and complexity of the appeal, the learned presiding judge determined that there was no need to set up a full bench comprising 5 judges to deliberate over the appeal as it was eminently capable of resolution by a three panel bench as previously constituted. The appeal was then set down for hearing before the same panel of judges on 16 June 2021.

BRIEF SUMMARY OF THE CASE

[4] The 56 appellants were employed by the respondent Freda Rebecca Mine Holdings Limited in various capacities at its mine in Bindura. Owing to virulent economic hardships at the time, the respondent ceased its mining operations sometime in 2008 without terminating the appellants' respective contracts of employment.

[5] Sometime in 2009 the respondent sought to resuscitate its mining operations. In doing so it unilaterally sought to reengage the appellants on inferior contracts different from those obtaining as at the time it ceased operations in 2008. A dispute then arose concerning the appropriate terms of employment upon resumption of mining operations

[6] Following failure to resolve the dispute the respondent arbitrarily wrote to the appellants terminating their original contracts of employment. The termination letters were written on a standard letterhead bearing the name **FREDA REBECCA GOLD MINE**. The letters were signed by one T Chivonivoni who designated himself/herself as the **GENERAL MANAGER- FREDA REBECCA GOLD MINE**.

[7] Dissatisfied by the turn of events, the appellants took the dispute to the designated agent. The designated agent referred the dispute to conciliation. Upon failure of the conciliation

process the conciliator issued a certificate of no settlement and completed a Reference to Arbitration on a standard form in which he designated the parties as, “*Freda Rebecca Mine alleged unfair labour practice of E Mapondera and 60 others*”¹. The reference form is dated 12 May 2010. It is common cause that the proper citation of the respondent as a party to legal proceedings ought to have been **Freda Rebecca Gold Mine Holdings Limited**.

TERMS OF REFERENCE

[8] The arbitrator’s terms of reference were, “To determine whether the dismissal of E. Mapondera and 60 others was lawful or not.”

[9] At the hearing before the arbitrator the respondent took the preliminary objection that apart from Edmond Mapondera the rest of the remaining appellants had no *locus standi* because their names had not been listed as claimants and E Mapondera was not authorised to represent them.

[10] Counsel for the appellants argued that the respondent had always been aware that the case involved 61 employees whose identities had not been placed in issue at conciliation stage. It was only at the arbitration stage that the respondent belatedly sought to make it an issue. During the course of the arbitration proceedings, the arbitrator was then provided with a list of the concerned employees comprising a total of 58 claimants. The list of the claimants who were party to the proceedings was availed to the respondent

[11] The arbitrator dismissed the objection *in limine* on the ground that the appellants had a real and substantial interest in the matter and that right from the initiation of the legal

¹ Page 165 of the record

proceedings the respondent knew the identity of its adversaries. Having dismissed the preliminary objection, the arbitrator proceeded to make an award in favour of E Mapondera and 57 others on 12 January 2011. The award was couched in the following terms:

- “1. That the claimants are hereby reinstated to their positions without loss of salary and benefits with effect from the date of unlawful dismissal.
2. Each party to meet its own costs.”

[12] Dissatisfied with the arbitral award, the respondent appealed to the court *a quo* with partial success. It took the following 4 grounds on appeal:

- “1. The Honourable arbitrator unprocedurally accepted evidence submitted by the claimants subsequent to the arbitration hearing in respect of the purported hearing in respect of the purported identity of the innominate (sic) 60 other claimants who had not been included by name in the original claim.
2. The Honourable arbitrator fundamentally misdirected himself in finding that since the alleged 60 other employees had a substantial interest in the matter they did not need to be identified and to be made parties in arbitration proceedings before him. The fact that the employees have any kind of interest in the matter did not dispense with the entitlement of the appellant to know who the said appellants were at the commencement and during the course of the proceedings. The production of the names of the employees subsequent to the hearing and without an opportunity for the appellant to challenge the accuracy of the names and the positions so stated for the employees violated the appellant’s right to a fair hearing before an independent and impartial tribunal.
3. The Honourable Arbitrator fundamentally misdirected himself in failing to find that the contracts of employment for the said employees, E Mapondera & 60 Others had terminated by operation of law and the appellant could only re-engage the employees in terms of new contracts of employment. The said former employees having refused to sign new contracts of employment, the appellant lawfully confirmed the termination of their contracts of employment by operation of law on the 5th of March 2010.
4. The Honourable arbitrator fundamentally misdirected himself in ordering the reinstatement of E Mapondera & 60 other employees without affording the Appellant an opportunity to pay damages in lieu of reinstatement. The order of reinstatement without the alternative for the payment of damages is not consistent with the ordinary rules of the law of contract and the specific circumstances of the appellant”

THE RELIEF SOUGHT

[13] On the basis of the above grounds of appeal the appellant sought the following relief:

- “(i) That the claimant’s claim be and is hereby dismissed.
- (ii) Alternatively that in the event that the Honourable court finds that the contracts of employment for the Respondents were not lawfully terminated, that the Appellant is hereby directed to pay the Respondents damages in lieu (sic) of reinstatement.
- (iii) The Respondents shall pay the costs of suit.”

[14] Upon consideration of the facts and the law the court *a quo* found that the arbitration proceedings were a nullity at law because the claimants had cited a non-existent person and that the 2nd to 60 employees were not a party to the arbitration proceedings.

[15] It also found that the arbitrator had no discretion to award reinstatement without an alternative of payment of damages for unlawful dismissal. It therefore ordered as follows:

“It is accordingly ordered that-

1. The appeal be and is hereby allowed on grounds 1, 2, 4 and 5.
2. The appeal falls on ground of appeal 3.
3. Overly the appeal succeeds as the proceedings were a nullity due to wrong identity of the employer.
4. Each party to bear its costs.”

[16] Aggrieved by the above order the appellants appealed to this Court challenging the court *a quo*'s order on the following grounds:

“**GROUND S OF APPEAL**

1. The court *a quo* erred at law in finding that the citation of the respondent through its trade name “Freda Rebecca Mine” was such an irregularity whose effect rendered the entire proceedings a nullity.
2. The court erred at law in finding that 2nd to 61st appellants were not properly cited before the Arbitrator and that the extent of the impropriety was such that they were all not party to the arbitration proceedings.
3. The court *a quo* erred at law in finding that the Arbitrator has no power to order an employer to reinstate an unlawfully dismissed employee without giving the same employer the option to pay damages *in lieu* of reinstatement to the employee. “

[17] On the basis of the above grounds of appeal, the appellants prayed for the following relief:

1. That the appeal succeeds with costs
2. That the judgment of the court *a quo* is partially overturned and the order substituted with the following:
 - “(a) The preliminary point raised by the Appellant relating to its miscitation be and is hereby dismissed.
 - (b) The preliminary point raised by the Appellant relating to the proper citation of the 2nd to the 61st Respondents be and is hereby dismissed. The 2nd to 61st Respondents are hereby held to be properly before the court.
 - (c) The appeal be and is hereby dismissed with costs and the arbitration award be and is hereby upheld.”

ISSUES FOR DETERMINATION

[18] The grounds of appeal raise the following three cardinal issues for determination:

1. Whether or not the alleged improper citation of the respondent rendered the entire proceedings a nullity.
2. Whether or not the appellants were properly before the Arbitral Tribunal.
3. Whether or not it was proper for the Arbitral Tribunal to order reinstatement of the appellants without an alternative of payment of damages *in lieu* of reinstatement.

ANALYSIS AND DETERMINATION OF THE ISSUES

[19] It is pertinent to note at this juncture that the judgment appealed against in this case is to a large extent grounded on legal technicalities. A lot of industry has been expended by learned counsel in placing reliance on procedural legal technicalities that are best suited for courts of law rather than arbitral tribunals. It is trite that the object of arbitral tribunals is to do simple justice for the common person without being shackled by legal technicalities and

formalities pertaining to an ordinary court of law. To this end in arbitration the rules of procedure are often relaxed and the arbitrator has a wide discretion provided that justice can be attained without doing violence to the basic tenets of natural justice.

[20] Likewise, s 90A of the Labour Act [*Chapter 28:01*] is meant to unshackle the court *a quo* from the vice grip of rigid legal rules, formality and technicalities. It provides as follows:

“90A Procedure and evidence in the Labour Court

- (1) The Labour Court shall not be bound by the strict rules of evidence, and the court may ascertain any relevant fact by any means which the presiding officer thinks fit and which is not unfair or unjust to either party.
- (2) Evidence may be adduced orally or in writing in any proceedings in the Labour Court, at the discretion of the presiding officer.
- (3) The parties or their representatives to any proceedings in the Labour Court shall be entitled to question or cross-examine each other or any witness.
- (4) It shall be the responsibilities of the presiding officer to ascertain the facts in any proceedings in the Labour Court, and for that purpose he or she may—
 - (a) call any party or his or her representative;
 - (b) question or cross-examine any party or his or her representative or witness; and
 - (c) put any question to a party or his or her representative or witness which is suggested to him or her by any party.”

[21] It is self-evident that s 90A of the Act distinguishes ordinary courts of law from the Labour Court as a special court. The law maker therefore saw it fit to confer the court *a quo* with a wider discretion than that obtaining in the ordinary courts of law in order to do simple industrial justice.

[22] Because of their legal training and the involvement of lawyers, Labour Court judges often stray into the morass of legal jargon and technicalities much to the bewilderment of the unsophisticated litigants. This unwelcome tendency has the undesirable effect of mystifying industrial legal proceedings thereby clouding the dispensation of industrial justice. It therefore

acts as a barrier to accessing industrial justice. This prompted McNALLY JA in *Dalny Mine v Banda*² to remark that:

“As a general rule, it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this I do not mean that such irregularities should be ignored. I mean that such irregularities should be put right.”

[23] In *Edmore Taperesu Mazambani v International Trading Company (Private) Limited and Anor*³ MATHONSI JA had occasion to make similar remarks when he said:

“This is a court of justice which is required to resolve the real issues between the parties. It should not dabble too much into small technicalities.”

[24] It is therefore clear from the authorities that the primary function of the court *a quo* is to do simple justice between the parties without dwelling too much on legal technicalities. It is also self-evident that the general courts of law are beginning to mellow and drift towards the idea of correction of simple procedural errors in order to do real and substantial justice.

[25] When interpreting statutes and codes of conduct, the court *a quo* should endeavour to give a broad liberal interpretation that is not embroiled in flimsy legal technicalities in order to achieve social justice based on equitable labour standards. On that score, I now proceed to determine whether or not the alleged improper citation of the respondent rendered the entire proceedings a nullity.

² 1999 (1_ ZLR 220 (S)

³ SC 88/20

WHETHER OR NOT THE ALLEGED IMPROPER CITATION OF THE RESPONDENT RENDERED THE ENTIRE PROCEEDINGS A NULLITY

[26] Generally speaking, it is undisputable and a matter of trite elementary law that one cannot sue a non-existent person. In the leading case of *Gariya Safaris (Pvt) Ltd v van Wyk*⁴ the High Court had occasion to remark that:

“A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio*.”

[27] That proposition of law was cited with approval by this Court in *Fadzai John v Delta Beverages*⁵ and a host of other cases cited by the respondent from both local and foreign jurisdictions. It is thus settled law and a matter of common sense that one cannot sue a non-existent person.

[28] The main distinguishing feature in this case is that arbitral proceedings are different from trial proceedings in courts of law. Sight should therefore not be lost that trial proceedings in a court of law are commenced by summons drafted by the plaintiff. On the other hand arbitral proceedings are commenced by a reference drafted by the conciliator in terms of the Act. The claimant has no control over the drafting of the reference to arbitration whereas the plaintiff has full control over the drafting of the summons. It would therefore seem unfair and unjust to penalise the claimant for the sins of the conciliator in crafting the reference.

[29] Counsel for the appellants further argued that where there is a person who actually exists who is sued in their colloquial, nickname or some other informal name, an amendment

⁴ 1996 (2) ZLR 246 (H)

⁵ SC 40/17

is permissible to formalise or regularise the citation. For that proposition of law he placed reliance on the South African case of *Four Tower Investments (Pty) Ltd v Andre's Motors*⁶ among others. In that case, shortly before the hearing of the appeal it was discovered that in the summons and particulars of claim the plaintiff had been incorrectly cited and referred to as a company called *Four Tower Investments (Pty) Ltd* whereas it had been at all times a close corporation called *Four Tower Properties CC*. In the lease agreement which was the subject of the dispute between the parties it was also referred to as a company. The letting agent was responsible for the misdescription. Following an application for an amendment to regularize the citation the court held that under the circumstances an amendment was permissible. The headnote reads:

“an application for an amendment would always be allowed unless it was made *mala fide* or would cause prejudice to the other party which could not be compensated for by an award of costs or by some other suitable order such as a postponement. (At 43H).

Held, further that there had been a gradual move from an overly formal approach and in line with this approach courts should be careful not to find prejudice where none really exists. (At 44I-J)

Held further, that the fact on its own that the citation or description of a party happened to be of a non-existent entity should not render the summons a nullity.

Held further, that in the present case the citation of the plaintiff had been nothing more than a misdescription and the application for amendment had to be allowed. (At47F)”

[30] It is needless to say that the *Four Tower* case *supra* is on all fours with the instant case.

The judgment is grounded on sound logic and meets the ends of justice between litigants.

[31] Back home, in *Muzenda v Emirates Airlines & Others*⁷ the Emirates Airlines had been misdescribed as Arab Airlines. In allowing the amendment to regularize the name, MATANDA MOYO J had this to say:

⁶ 2005 (3) SA 39 (N)

⁷ HH 775/15

“I am of the view that the description of a party to a suit does not immutably determine the nature and identity of a party. The law reports are full with instances where the correct description of a party was allowed, in the absence of prejudice to the other party involved. This would be done after an application to amend. The plaintiff herein was not diligent. After being advised of the wrong citation of first defendant, all she had to do was apply for amendment. I would have granted such amendment as I am of the view that there was no prejudice to first defendant. However the court can only do so upon asking. The court cannot *mero motu* grant orders not sought. Without such amendment, the first defendant remains wrongly cited. See *ZFC Ltd v Taylor* 1999 (1) ZLR 308 and Order 20 r 132 and 134 of this court’s rules, *Commercial Union Assurance Company Limited v Waymark NO* 1995 (2) See *ZFC Ltd v Taylor* 1999 (1) ZLR 308 and Order 20 r 132 and 134 of this court’s rules, *Commercial Union Assurance Company Limited v Waymark NO* 1995 (2) SA”

[32] The learned judge beautifully articulates the law in circumstances that are on all fours with the case at hand. In the same vein, in *Masuku v Delt Beverages*⁸ the same court held that:

“... generally, proceedings against a non-existent entity are void *ab initio* and thus a nullity. However, where there is an entity which through some error or omission is not cited accurately, but where the entity is pointed out with sufficient accuracy, the summons would not be defective.”

[33] I could go on and on but the principle of law established by case law is clear. Where an existing entity is inadvertently misdescribed in judicial proceedings it is permissible to apply for correction of the anomaly in good faith provided that there is no irreparable prejudice to the other party.

[34] It is common cause that taking a cue from laid down precedent the appellants successfully applied to the court *a quo* before the same judge for an amendment of the citation of the respondent’s name. He granted the order on 31 May 2018 under order number LC/MD/ORD/78/2018. It reads:

“it is ordered that:

- ‘1. the application to amend the citation of the respondent be and is hereby granted.

⁸ 2012 (2) Z LR 112 (H)

2. each party is to bear its own costs.”

[35] It is amazing that when the matter came up for hearing on the merits the same judge held that the proceedings before the arbitrator were a nullity because the appellants had sued a non-existent person. This was clearly a serious misdirection considering that the honourable judge was bound by his earlier order that had regularised the incorrect citation of the respondent.

WHETHER OR NOT THE APPELLANTS WERE PROPERLY BEFORE THE ARBITRAL TRIBUNAL

[36] It will be remembered that the arbitrator’s terms of reference were, “To determine whether the dismissal of E Mapondera and 60 others was lawful or not.” It is trite that an arbitrator is bound by the given terms of reference. He has no jurisdiction outside the terms of reference. Respondent’s objection sought to amend the terms of reference by limiting the terms of arbitration to E Mapondera to the exclusion of the 60 other employees. This the arbitrator could not do as it would amount to a violation of his terms of reference.

[37] Placing reliance on the High Court cases of *Panganai and 20 Others v Kadir and Sons (Private) Limited*⁹ and *Prosser and 35 Others v Ziscosteel Company Limited*¹⁰, the learned judge *a quo* held that apart from E Mapondera the other 60 employees were not properly before the arbitrator. He reasoned that this was because the arbitrator had not been provided with a list of their names and they had not filed affidavits professing jointer to the arbitral proceedings.

⁹ HH – 26 - 95

¹⁰ HH – 201 - 93

[38] It is rather ironic if not irrational that the respondent sought validation of dismissals that were carried out in the name of a non-existent person styled Freda Rebecca Gold Mine which it disowns. It was therefore a serious misdirection that after holding that the proceedings before the arbitrator were a nullity, the learned judge proceeded to determine the appeal on the merits. This was despite his ruling that there was no respondent before him.

[39] What escaped the learned judge *a quo*'s attention is that the two precedents he relied upon in para 33 above were determined by the High Court in terms of the High Court Rules which are not strictly applicable to arbitration proceedings in terms of the Act. Again the learned judge failed to distinguish arbitral proceedings from trial proceedings in a court of law.

[40] Conscious of his obligation to determine the complaint of the 60 other employees by reference, the arbitrator properly sought and obtained clarification on the identities of these other employees. That clarification was communicated to the respondent thereby giving it an opportunity to be heard on the authenticity of the list of names provided. There was therefore no prejudice to the respondent, real or imagined. In my view the arbitrator did not misdirect himself in any way as that was the correct thing to do to facilitate the proper discharge of his mandate in terms of the reference. Thus, again, the learned judge *a quo* misdirected himself and fell into error by holding that the other 60 appellants were not properly before the arbitrator.

[41] Having come to the conclusion that the 60 other employees were not properly before the arbitrator, it was remiss of the learned judge *a quo* to proceed to deal with the merits of the appeal before him. He again erred in this respect. The proceedings beyond that finding were therefore a legal nullity. They cannot stand in light of the gross misdirection by the learned judge *a quo*.

WHETHER OR NOT IT WAS PROPER FOR THE ARBITRAL TRIBUNAL TO ORDER REINSTATEMENT OF THE APPELLANTS WITHOUT AN ALTERNATIVE OF PAYMENT OF DAMAGES IN LIEU OF REINSTATEMENT

[42] In view of the finding that the proceedings pertaining to the merits of the case were a legal nullity, it shall not be necessary to determine the above issue.

DISPOSAL

[43] For the foregoing findings of fact and law, I hold that both the appellants and the respondents were properly cited and lawfully appeared before the arbitrator. The court *a quo* fell into error and misdirected itself by nullifying the proceedings before the arbitrator without any legal basis. The court *a quo* therefore ought to have dismissed both objections *in limine* and proceeded to hear and determine the appeal on the merits.

[44] In the result it shall be necessary to reverse the court *a quo*'s judgment and order a rehearing of the appeal before a different judge as the judge *a quo*'s views appear to have been clouded by his earlier faulty findings of fact and law.

[45] Costs follow the result in respect of the appeal whereas costs of the objection *in limine* shall be in the cause.

[46] It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs being costs in the cause.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:
 - “(a) The preliminary points raised by the appellant relating to its miscitation be and is hereby dismissed.

- (b) The preliminary point raised by the appellant relating to the proper citation of the 2nd to the 60th respondents be and is hereby dismissed. The 2nd to 60th Respondents are hereby held to be properly before the court.”
3. The court *a quo*'s determination on the merits of the appeal before it be and is hereby quashed and set aside
4. The matter be and is hereby remitted to the court *a quo* for a hearing *de novo* of the appeal before a different judge.”

MAVANGIRA JA I agree

CHITAKUNYE JA I agree

Dube, Manikai & Hwacha, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners