ZIMBABWE POSTS (PVT) LTD
versus
COMMUNICATION AND ALLIED SERVICES
WORKERS UNION OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 14 NOVEMBER, 2013 & 19 FEBRUARY 2014

T. Mpofu for the applicant
S. Njerere for the respondent

Opposed Application

MUTEMA J**:** The applicant is the employer of members of the respondent union. In early 2009 the parties engaged each other in negotiating wage and salary adjustments. Respondent was advocating for a minimum wage of US$490,00 per month on behalf of each of its members. The applicant argued that it could not afford to pay any adjustment above that which was already being paid. These negotiations yielded an agreement that wages would be pegged at US$100,00 while other benefits including transport and housing would be $50,00 for each employee for April, 2009 only. Subsequent negotiations yielded no positive results and a deadlock was declared at NEC level. The parties then agreed to submit the dispute for arbitration.

The Commercial Arbitration Centre chose Mr Mordecai Mahlangu to be the arbitrator. Following submissions by the parties he handed down his award on 23 February, 2012. That award is reasoned and couched in these words:

> "The determination of this matter requires something of the wisdom of Solomon in that there are two competing and patently legitimate interests to be reconciled. While it is clear to me that the US$490 which has been sought by the claimant on behalf of its lowest paid members is not easily afforded, it is equally clear to me that I cannot with a clear conscience simply leave matters as they are in respect of the period between May and December 2009 …
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> For the period between 1 May and 31 August 2009, the salary of the lowest earning employee of the respondent company should receive an adjustment of US$25 in respect of each month and for the period between 1 September 2009 and 31 December 2009 a further US$25 should be effected. The effect of this on the lowest earning employee of

the respondent is that in total the back pay payable to him or her will be US$300. In doing this I realize that further financial strain will be added to respondent company but believe that this is necessary in fairness to the claimant."

The applicant was dissatisfied with the outcome of the arbitration hence this application seeking the setting aside of the arbitral award. The application is being made in terms of Article 34 (2) (b) (ii) of the Model Law whose relevant provision provides:

"(2) 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."

The gravamen for challenging the content of the award is predicated upon the premise that recognition of the award either in its present form or its substantive effect would be contrary to the public policy of Zimbabwe. The award, so the argument went, plunges the apple cart over the cliff; it has the effect of killing the goose that lays the golden egg. The learned arbitrator found that the applicant was operating at a loss and would continue to do so even in the foreseeable future. He agreed that applicant had no ability to pay as it was in a precarious financial position and any adjustment will simply contribute to the already existing deficit and funding gap. But inspite of all these findings, he went ahead and made an award which was certain to drive the applicant into insolvency. The overall effect of the award is therefore contrary to public policy of Zimbabwe.

The respondent argued to the contrary submitting that it is for the applicant to show that some fundamental principle of law or morality or justice was violated. The learned arbitrator's reasoning cannot be faulted. The respondent had claimed a minimum salary of $490,00 but the award was much less with the arbitrator reasoning: "It seems to me that a fair and sensible compromise is to grant claimant an adjustment in recognition of the plight of its members, but for this to be in such an amount that it does not break the back of respondent company and drive it to complete insolvency." This reasoning does not constitute a palpable inequity. That inability to pay or comply with the award makes the award contrary to public policy is both erroneous and

mischievous. If applicant is unable to pay its debts it must go into liquidation or judicial management.

When then is an award in conflict with the public policy of Zimbabwe? Article 34 (5) (a) and (b) of the Model Law spells out instances when an award is in conflict with the public policy of Zimbabwe, *viz* 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 foregoing provision, however, clearly states that the two instances are not exhaustive hence should not be taken as "limiting the generality of paragraph (2) (b) (ii) of this article." What this boils down to therefore is that the determination of other instances as falling under the category of being contrary to the public policy of Zimbabwe is a question of value judgment, for the words public policy are a wide and vague concept.

Below are some of the instances where an award has been or could be held to be in conflict with the public policy of a country:

- where the substantive effect of the award, after a consideration of the merits of the dispute endorsed immorality or crime: *ZESA* v *Maposa* 1999 (2) ZLR 452 (SC) at 465;
- where there has been a violation of fundamental principles of the forum state's legal order, hurting intolerably the feeling of justice: *Leopold Lazarus Ltd (UK)* v *Chrome Resources SA* reported in (1979) 4 Yearbook of Commercial Arbitration 311 at 312 quoted with approval in the *ZESA* v *Maposa* case *supra* at 465;

The list, I must say is also not exhaustive. As GUBBAY CJ stated in *ZESA* v *Maposa supra* at 466 the difficulty is not with the formulation of an appropriate and acceptable test but with the application of that test in an endeavour to determine whether the arbitral award should be set aside or enforcement of it denied, on the ground of a conflict with the public policy of Zimbabwe. The court went on to hold that the approach to be adopted is to construe the public

policy defence restrictively in order to preserve and recognize the basic objective of finality in all arbitrations. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, 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 accepted 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, then it would be contrary to public policy to uphold it.

In *Telone (Pvt) Ltd* v *Communications and Allied Services Workers Union of Zimbabwe* HH-74-2007 the award was held to be contrary to the public policy of Zimbabwe on the basis that its effect would be to drive corporations into insolvency thereby destroying the economic fabric of the nation. The respondent contended that that case is distinguishable from the current one on the ground that in the former facts before the court showed that the wage bill would result in 130% of *Telone's* income being committed to salaries and wages, which is not the scenario in the latter.

While that may be so I remain unpersuaded by the respondent's contention. The facts which were common ground were that applicant was in the red in 2009 by US$2 000 000,00. Its shareholder, the government was not prepared to bail it out as it also had no money and could not even afford to pay its own employees (Civil Servants) a minimum wage of more than US$150,00 per month. Applicant's staff costs contributed 52% of overall expenditure and consumed 67% of total revenue. This precarious financial position of the applicant was not expected to improve in the foreseeable future. The learned arbitrator found the foregoing as a fact. Applicant is a quasi public entity. It would be too simplistic and too onerous on the part of its shareholder to argue that the shareholder (which on its part was also broke) should bail it out, a fortiori to argue, as respondent did, that if applicant is unable to pay its debts then it should go for liquidation. Such a result is untenable and too ghastly to contemplate as it would result in dire consequences for the very employees who are seeking wage increment as well as for their families.

On the common cause facts I am thoroughly persuaded that even applying the public policy defence restrictively the substantive effect of the arbitral award upon the applicant – never mind that the awarded increments are not substantial – would be to drive it into insolvency with the inevitable consequence of liquidation with massive loss of jobs for all its employees and mass suffering for their dependants. All these affected people will be rendered destitute with little or no prospects of getting alternative employment in a tight job market, starvation and school dropouts for their children. Certainly this will constitute a palpable inequity and the conception of justice in Zimbabwe would be intolerably hurt by this substantive effect of the award. That the award will be viewed as being in conflict with the public policy of Zimbabwe would be beyond caevil.

In the event, the arbitral award made by the learned arbitrator Mr Mordecai P. Mahlangu on 23 February, 2010 be and is hereby set aside with costs.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners