

TIAN ZE TOBACCO COMPANY (PRIVATE)LIMITED
versus
VUSUMUZI MUNTUYEDWA

HIGH COURT OF ZIMBABWE
MATHONSIJ
HARARE, 14 and 22 July 2015

Opposed Application

Ms N Mahenga, for the applicant
ZW Makwanya, for the respondent

MATHONSIJ: This is an application for the registration of an arbitral award issued by J Mambara, an arbitrator, on 21 October 2014 in terms of which the respondent was directed to pay the applicant a sum of \$43 800-26 plus interest at the rate of 5 per cent per annum from 30 September 2012 and costs of suit on a legal practitioner and client scale. The arbitration was conducted in terms of an arbitration clause in the agreement of the parties. The amount in question is the purchase price of farming inputs sold and delivered to the respondent, a farmer.

The reasons for opposing the application as appears from the opposing affidavit of the respondent are tenuous to say the least. They are that the deponent of the founding affidavit, Loveness Ngwaga, despite stating in the affidavit that she is authorised to depose to the affidavit as the applicant's legal officer, does not have such authority because she has not attached a company resolution to that effect. While admitting that he owes the applicant the money, the respondent asserts that the "award is unregistrable for want of proper identity" in that the arbitration was done in terms of the Arbitration Act [*Chapter 7:15*] but the arbitrator went on to issue a certificate in terms of s 98 (13) of the Labour Act [*Chapter 28:01*]. For those 2 reasons the respondent urged of me the dismissal of the application with costs.

The respondent has not shown that it is not the applicant that is litigating but an unauthorised person. All he wants is a dismissal of the application because a resolution of the board of directors of the applicant has not been produced.

It is now fashionable for respondents who have nothing to say in opposition to question the authority of the deponent of a founding affidavit in order to appear to have a defence. I stand by what I stated in *African Banking Corporation of Zimbabwe Ltd t/a Banc ABC v PWC Motors (Pvt) Ltd and Others* HH 123/13 that the production of a company resolution as proof that the deponent has authority is not necessary in every case as each case must be considered on its merits.; *Mall (Cape) (Pty) Ltd v Merino Ko-opraise Bpk* 1957 (2) SA 345 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an authorised person.

Indeed, where the deponent of an affidavit has said that she has the authority of the company to represent it, there is no reason for the court to disbelieve her unless it is shown evidence to the contrary and where no such contrary evidence is produced, the omission of a company resolution cannot be fatal to the application. That is as it should be because an affidavit is evidence acceptable in court as it is a statement sworn before a commissioner of oaths. Where it states that the deponent has authority, it can only be disbelieved where there exists evidence to the contrary. It is not enough for one to just challenge the existence of authority without more as the respondent has done.

I conclude therefore that there is no merit in the respondent's first line of defence relating to lack of authority.

The second line of opposition relates to the unfortunate and patently erroneous certificate issued by the arbitrator, clearly outside the arbitration process, in terms of s 98 (13) of the Labour Act [*Chapter 28:01*]. Mr Mambara must be so used to arbitrating labour disputes that he quickly generates that certificate like an automaton, a machine without feeling. There was no need for him to issue a certificate in the first place because the arbitration was not in terms of the Labour Act but in terms of the Arbitration Act.

The question however is whether the unsolicited certificate which the applicant unwittingly attached to the application, nullified the award. Of course the respondent gladly latched onto it, it having been Christmas come early for a litigant which had no other defence to the application. I think not. The certificate was as unnecessary in the scheme of things as it was a nullity. It cannot even rub off its null effect onto an arbitral award properly issued as suggested by Mr *Makwanya* for the respondent.

In terms of art 36 of the Model law contained in the Arbitration Act [*Chapter 7:15*]

the recognition or enforcement of an arbitral award may only be refused at the request of the party against whom it is invoked if that party can show proof that:

1. A party to an arbitral award was under some incapacity or the agreement was invalid under the law to which the parties subjected it to or under the law of the country.
2. The party was not given proper notice of the appointment of an arbitrator or the proceedings or was otherwise unable to present his case.
3. The award deals with a dispute not contemplated or not falling within the terms of reference to arbitration.
4. The composition of the arbitral tribunal was not in accordance with the agreement or the law of the country.
5. The award has not yet become binding on the parties or has been set aside or suspended by a court of law.
6. The court finds that the subject matter of the dispute is not capable of settlement by arbitration under Zimbabwean law or recognition or enforcement will be contrary to the public policy of Zimbabwe.

See *Tapera and Others v Fieldspark Investments (Pvt) Ltd* HH 102/13; *Zesa v Maposa* 1999 (2) ZLR 455 (S) 466E; *Delta Operations v Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) 85 C-D.

The respondent has not set out any of the above grounds for refusal to recognise or enforce an arbitral award. It would be stretching logic to elasticity limit to hold that the inclusion of an invalid and extremely unnecessary certificate purportedly issued in terms of an irrelevant statute, amounts to saying that the award itself deals with a dispute, not contemplated or not falling within the terms of reference of the arbitration as the respondent would want to insinuate. That certificate remained outside the award and exceedingly useless.

In the result, it is ordered that:

1. The arbitral award dated 21 October 2014 by the Honourable J Mambara be and is hereby registered as an order of this court.
2. The respondent shall bear the costs of this application.

Muvirimi Law Chambers, applicant's legal practitioners
Zimbodza & Mugwagwa, respondent's legal practitioners