DISTRIBUTABLE (7)

BEITBRIDGE BULAWAYO RAILWAY COMPANY
vs
ZIMBABWE AMALGAMATED RAILWAY UNION AND ARBITRATOR GLADYS MPEMBA

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & OMERJEE AJA
BULAWAYO, NOVEMBER 26, 2012 & MARCH 26, 2013

S Hwacha, with P Madzivire, for the appellant
V Majoko, for the first respondent
No appearance for the second respondent

OMERJEE AJA: At the conclusion of submissions for both parties the court allowed the appeal with costs. It was indicated at the time that reasons for the decision would follow in due course. These are they.

The appellant is a company registered in terms of the laws of Zimbabwe and operating a railway transportation business. The first respondent is a registered trade union for the railway industry. The second respondent is an independent arbitrator registered in terms of the laws of Zimbabwe. In June 2009, owing to viability challenges the appellant engaged its employees and the first respondent with a view to reducing its workforce through a process of retrenchment. The parties failed to secure an agreement.

As a result the appellant decided to proceed in terms of the Labour Act [*Cap 28:01*] in order to achieve a retrenchment of some of its labour force. A notice together with a list of employees to be retrenched accompanied by the reasons for seeking retrenchment was prepared by the appellant.

As of the 3 July 2009, a total of 35 employees in their individual capacities negotiated and mutually agreed on an exit package with the appellant with the knowledge and consent of the respondent. Separately, a group of employees numbering 35 were represented by the respondent in regard to their proposed retrenchment. A dispute arose between the appellant and the respondent as to whether it had followed the correct procedure in seeking to effect retrenchment.

In September 2009, by agreement of the parties the second respondent was appointed to conciliate over the dispute. The following were her terms of reference:

> "The agreed terms of reference are:
>
> 1. This arbitration is a voluntary submission to arbitration by the two parties.
> 2. Mrs. Mpemba be and is hereby appointed to arbitrate on the matter referred to in terms of reference hereunder.
> 3. The decision or award shall be made as soon as possible at the conclusion of the hearing and in any event within fourteen days.
> 4. The award shall be binding upon the parties and that no appeal can be made against the award.
> 5. The two parties shall submit their cases in writing and will be able to support their cases at the hearing if required to do so by the arbitrator.
> 6. The BBR Works Council to meet the arbitration fees."

The question for determination before the arbitrator was whether or not the employer had followed the correct procedure in proposing to retrench the workers. On 23 September 2009 the arbitrator ruled that the appellant had followed the correct procedure in seeking to effect the retrenchment. She made the following award:

"**IT IS ORDERED THAT**:

1. The employer (**Beitbridge Bulawayo Railways (Pvt) Ltd**) followed the correct procedures in wanting to retrench and even coming up with the Terms and Conditions of such retrenchment.
2. The employer be and is hereby authorized to retrench the remaining thirty five (35) employees on the same Terms and Conditions stated herein, with effect from 23rd September 2009.
3. The Works Council no longer has jurisdiction to deal with this matter as notice given on 18th June is still valid but because of the 30 days time limit, the parties cannot convene.
4. The award is binding on both parties and no appeal shall be made against it as agreed between parties themselves.
5. The costs of this Arbitration shall be borne by the Beitbridge Bulawayo Railways (Pvt) Limited Works Council."

Aggrieved by the arbitrators' finding the respondent filed an application in the High Court in October 2009 for an order to set aside the arbitral award. This application was opposed by the appellant. The court *a quo* found that the arbitrator had erred and granted the following order:

"1.In conclusion I am satisfied that the determination made by the arbitrator in this case should not be allowed to stand and it is set aside.

2. The 1st respondent is to pay the costs."

It is against this order that the appellant has now appealed to this court.

The grounds of appeal as set out in the notice of appeal are repetitive. They can be addressed comprehensively by dealing with two issues. Firstly whether or not there was a proper application before the court *a quo.* Secondly, whether or not the court *a quo* misdirected itself in setting aside the arbitral award?

Whether or not there was a proper application before the court *a quo*

It was contended on behalf of the appellant that the award issued by the second respondent was not reviewable by the High Court since it resulted from a voluntary arbitration. Such an award, it was contended, could only be set aside in terms of Article 34 of the Model law prescribed in the 2nd Schedule of the Arbitration Act [Cap 7:15]. Article 34 provides as follows:

> "(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."

The appellant submitted that the respondent filed an ordinary application for review on grounds of review as set out in s 27 of the High Court Act [*Cap. 7:06*]. The application did not state whether it was in terms of s 27 of the High Act or in terms of Article 34 of the Model law. A perusal of the grounds for review contained in the founding affidavit indicates that the first respondent was relying on the ground of review as contained in Article 34 (2) (a) (iii) of the Model Law which provides that:

> "(2) An arbitral award may be set aside by the *High Court* only if—
> (*a*) the party making the application furnishes proof that—
> (i) ……

> (ii) ……
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submissions to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside."

It is trite that the High Court cannot set aside an arbitral award on the grounds set out in s 27 of the High Court Act. In *Catering Employers Association of Zimbabwe v Zimbabwe Hotel and Catering Workers Union & Anor 2001 (2) ZLR 388 (S) SANDURA JA at p 392E said:*

> "The suggestion by the learned Judge is that in addition to the grounds set out in Article 34(2) of the Model Law, an arbitral award may be set aside by the High Court on review on the grounds set out in section 27 of the High Court Act (Chapter 7:06). I respectfully disagree. In my view, Article 34(2) of the Model Law sets out the sole ground on which an arbitration award may be set aside by the High Court. That is what Article 34(2) says and that is what this court said *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452(S) at 458F."

The court *a quo* in its judgment, clearly relied on the provisions of Article 34 of the Model law, and stated that the provisions of the Arbitration Act applied to the application before it. There can be no question that the application before the court *a quo* was made and determined in terms of Article 34 of the Model law. It is my view that the correct procedure was used to challenge the arbitral award. The judgment of the court *a quo* shows that the court relied on Article 34(2) (a) (iii) in reaching its decision. The High Court therefore had jurisdiction in terms of Article 34 to entertain the application. There was thus a proper application before the court *a quo*.

Whether or not the court *a quo* misdirected itself in setting aside the arbitral award?

The legal standard for setting aside a voluntary arbitral award is high. Even in cases of misconduct of the proceedings by an arbitrator, a court will be reluctant to interfere save in limited instances.

In *NetOne Cellular (Pvt) Ltd v Communications and Allied Services Workers Union of Zimbabwe and Anor* SC-89-05 CHIDYAUSIKU CJ at p 5 of the cyclostyled judgment stated as follows:

> "A proper reading of Article 34 of the Arbitration Act, in my view, reveals that it prescribes the power of the High Court in relation to the setting aside of arbitration awards. **A litigant who wishes to set aside an arbitral award by way of an application to the High Court has to satisfy the stringent requirements of Article 34 of the Arbitration Act."** (Emphasis added)

In setting aside the arbitral award the court *a quo* relied on the provisions of the said Article and came to the conclusion that the second respondent had gone beyond her terms of reference. The appellant contends that the second respondent did not exceed her mandate. The second respondent was required to answer the question referred for arbitration and to provide a remedy. She did so by finding the process of retrenchment lawful.

The arbitrator answered the question referred to her for consideration by the parties in the affirmative namely whether or not the employer had followed the

correct procedure in wanting to retrench. Mr *Majoko* for the first respondent accepted that the arbitrator had answered the question in the affirmative. In effect Mr *Majoko* accepted that the employer had followed the correct procedure. I find that there is no issue in this respect. The further remarks of the second respondent, properly construed, are merely by way of elucidation or guidance to the parties on ancillary matters concerning the main issue.

This court finds that the court *a quo* misdirected itself in finding that the arbitrator had gone beyond the scope of her terms of reference on the issue referred to her for determination. Such finding is not justified by the circumstances of the case.

In the result and for the aforementioned reasons the court allowed the appeal and granted the following order:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   "The application is dismissed with costs."

MALABA DCJ: I agree

GOWORA JA: I agree

Messers Dube, Manikai and Hwacha, appellant's Legal Practitioners

Messers Majoko and Majoko, first respondent's Legal practitioners