REPORTABLE (28)

THE ZIMBABWE BATA SHOE COMPANY LIMITED
vs
(1) THE CHAIRMAN, NEC FOR THE LEATHER INDUSTRY
(2) ZIMBABWE LEATHER AND ALLIED WORKERS UNION

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GUVAVA JA & MAVANGIRA AJA
HARARE, FEBRUARY 16, 2015

R Goba, for the appellant

M Nkomo, for the first respondent

T Mpofu, for the second respondent

GWAUNZA JA: At the close of argument in this matter, it was the unanimous view of the court that the appeal lacked merit and we dismissed the application with costs. We indicated that the full reasons for the judgment would follow, and these are they.

This is an appeal against the whole judgment of the Labour Court dismissing an application for review of a decision of the National Employment Council for the Leather Industry ("NEC"). The NEC declined to hear the appellant's application for an exemption from the terms of an arbitral award in favour of the second respondent, on the basis that it lacked jurisdiction.

The facts of this matter are largely common cause. The employers in the tanners and shoe manufacturing industry - of which the appellant was a member - had a wage dispute with employees in the industry who are affiliated to the second respondent. The dispute related to the wages for the period 1 July to 31 December 2010. The conditions of employment for the employees were governed by the *Collective Bargaining Agreement: Leather and Shoe, Sports Equipment, Animal Skin Processing and Taxidemy, Leather Goods, Travel and Canvas Goods Manufacturing Industries, SI 246/1993 ("CBA").* Collective bargaining negotiations were held under the chairmanship of the first respondent, NEC, and ended in a deadlock. The result was that NEC, following an agreement jointly signed by and on behalf of the employers' and employees' representative associations, referred the matter for voluntary arbitration. A panel of two arbitrators, one appointed by the employers' association and the other by the second respondent, duly heard the matter and made an award in terms of which they ordered the employers to effect a 9.1 per cent wage increase across the board in respect of their employees for the relevant period. Pursuant to this award NEC issued a wage increase notice for the said period, which was to be observed by all employers.

On 11 November 2010 the appellant purported to file a written application with the NEC, in terms of s 2 of the CBA, seeking exemption from implementing the stipulated wage increase. The basis of the application was given as the lack of financial capacity to comply with the award. Proof of such incapacity was furnished together with the application.

The matter was considered by a sub-committee of the NEC which, upon failing to reach agreement, referred it to full council. The council met on 1 March 2011 and, without going into the merits of the dispute, issued a decision to the effect that they had no

jurisdiction to consider an application requiring them to interfere with an arbitral award. The appellant then approached the court *a quo* with an application for review of NEC's refusal to entertain the matter on the merits. The court dismissed the application, having reasoned as follows;

> "The bottom line in this case is that the NEC simply said that it had no jurisdiction. The applicant agreed that indeed that is a question of law. With due respect this is where the case ends. There is nothing grossly irregular about an authority saying that in the circumstances of a particular case it has no jurisdiction at law. Any party that is not in agreement with such a view should simply appeal on a point of law as provided for in the law---."

The appeal raises the following issues:-

(i) Whether or not the parties agreed to be bound by the arbitral award?

(ii) Whether or not the court *a quo* erred at law when it held that the decision of NEC declining to hear the matter on the basis that it had no jurisdiction, raised a point of law and was therefore appealable and not reviewable.

(iii) Whether NEC and the Labour Court had jurisdiction to hear this matter.

The parties through their authorised representatives agreed, in writing, to submit the dispute in question to voluntary arbitration. They further agreed to be bound by the award resulting from such arbitration. Specifically, the agreement concerned included a declaration on its last page, which read in part as follows after the citation of the two parties;

> "…….. Do hereby declare that the Parties shall be bound with the award from the Arbitration Panel" (*sic*)

It cannot therefore be disputed that the parties freely and voluntarily subjected themselves to voluntary arbitration. It was not a term of the arbitration agreement between them that the award would form an integral part of the relevant *CBA, S.I 246/93*, nor that the

unsuccessful party would seek exemption in terms of *s 2 of the CBA*. It is pertinent in this respect to note (and *Mr Goba* for the appellant properly concedes the point), that the arbitral award was not statutorily incorporated into or made a part of the CBA, i.e. SI 246/93. There thus was no basis for relying on the terms of the CBA to seek an exemption from a provision of the voluntary arbitral award. The two were separate and distinct in terms of character and effect. The assumption can therefore safely be made, that it was in the contemplation of both parties that the arbitral award would not only be final in its effect, but that it would also bind all employers and employees in the Tanners and Shoe Manufacturing Industry.

The effect of an award of this nature is authoritatively stated in the case of *Zimbabwe Educational Scientific Social and Cultural Workers Union v Welfare Educational Institutions Employers Association* SC 11/2013;

> "It is trite that where parties make submissions to arbitration on the terms that they choose their own arbitrator(s), formulate their own terms of reference to bind the arbitrator and agree that the award will be final and binding on them, the court of law will proceed on the basis that the parties have chosen their own procedure and that there should not be any interference with the results. See *Zesa v Maposa* 1999(2) ZLR 452(SC). Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The standard is high."

Indeed, so high is the standard that the only court vested with jurisdiction, and limited at that, to interfere with a voluntary arbitration award, is the High Court. It derives this authority from the Arbitration Act [*Chapter 7.15*], in particular, Article 34 of the Model law which provides as follows in its introductory part-

> "ARTICLE 34
> *Application for setting aside as exclusive recourse against arbitral award*
> (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.
> (2) An arbitral award may be set aside by the High Court only if—
> (a) the party making the application furnishes proof that—……." (my emphasis)

My reading of the provision cited above suggests that recourse to the High Court is to be made only in cases where one party seeks to have the arbitral award or part thereof set aside, and on the specific grounds set out therein. It follows from this that unless one seeks to have the award or any part thereof set aside, the award will for all intents and purposes be assumed to have final effect. *In casu* the appellant did not seek to have the award or any part thereof set aside, it sought exemption from the provision that obliged it to effect the pay rise in question. This is clearly not the type of 'exclusive relief' envisaged in Article 34 of the Model Law, cited above. The appellant in any case did not file its application before the High Court.

Against this background, I find that the decision by NEC to the effect that it had no jurisdiction to interfere with the arbitral award, cannot be faulted. It also becomes evident that the court *a quo* was handicapped in the same way as the NEC, and could not have properly heard the matter, either as an appeal or an application for review. While it may well be true, as stated by the court *a quo*, that in some circumstances a point of law justifies an appeal rather than review, this clearly was not such a circumstance. The application in the court *a quo* was therefore doomed to failure, but not on the basis on which the court dismissed the application.

Consequently, while the correctness of the dismissal by the court *a quo* of the application is beyond dispute, that decision was nevertheless based on the wrong premise. The option of an appeal against NEC's decision was not one that was open to the appellant. A misdirection on the part of the court *a quo* is therefore manifest.

It appears to me that the parties – and the court *a quo* for that matter – misguidedly expended valuable time on an irrelevant issue of whether the decision made by the NEC was reviewable or appealable. This appears to have diverted attention from the real dispute, which simply was whether a voluntary arbitral award was appealable or could otherwise be interfered with, by any court, given the circumstances of the case.

In the result, the appeal was found to lack merit, hence the order of this court to dismiss it with costs.

GUVAVA JA I agree

MAVANGIRA AJA I agree

Danziger & Partners, appellant's legal practitioners

*Donsa, Nkomo & Mutangi, f*irst respondent's legal practitioners

*Matsikidze & Mucheche, s*econd respondent's legal practitioners