GEOFFREY NYAROTA
versus
ASSOCIATED NEWSPAPERS OF ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 25 March 2015 & 1 July 2015

Opposed application

Ms *F Mahere*, for the applicant
T Mpofu, for the respondent

MUREMBA J: The applicant is a former employee of the respondent. During the course of the applicant's employment the parties had a fall out resulting in the dismissal of the applicant.

The matter went for arbitration resulting in the applicant obtaining an arbitral award in his favour on 2 August 2011. On 24 February 2012 the arbitrator quantified the arbitral award.

The present application is for the registration of the arbitral award in terms of s 98 (14) of the Labour Act [*Chapter 28:01*] as an order of this court for the purposes of enforcing the award.

In opposing the application the respondent raised two points *in limine*.

The first point *in limine* is that the application was brought as a chamber application through an entry in the chamber book yet in terms of s 98 (14) of the Labour Act and Article 35 of the Model Law such an application should be made as a court application.

Section 98 (14) of the Labour Act reads,

> "Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subsection (13) to the court of any magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court."

Article 35 of the Model Law reads,

> "An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36."

Mr *Mpofu* argued that s 98 (14) of the Labour Act and Article 35 of the Model Law make reference to an application being made to the High Court as opposed to a judge of the High Court. He went to lengths distinguishing between the High Court as a court and a judge of the High Court. He argued that an application to the High Court is a court application whereas an application to a judge is a chamber application. In support of his argument he cited r 4D and r 226 (1) of the High Court Rules, 1971.

Rule 4D states,

> "Where in any law reference is made to proceedings in the High Court by way of petition, notice of motion or application, such proceedings shall be taken by way of application in terms of Order 32"

Order 32 Rule 226 (1) states,

> "(1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—
> (*a*) as a court application, that is to say, in writing to the court on notice to all interested parties ; or
> (*b*) as a chamber application, that is to say, in writing to a judge."

Mr *Mpofu* argued that applicant's failure to comply with a statutory provision which says such an application is a court application renders the application null and void and as such it should be dismissed with costs.

Mr *Mpofu* further argued that even if it was to be assumed for a moment that the application can be brought as chamber application still the application before the court does not comply with the rule governing the making of such an application. He said that it does not comply with r 241 (1) which states that a chamber application shall be accompanied by Form 29 B which requires the grounds of the application to be set out. He said that the grounds of the application were not set out. At the same time he said that the chamber application in the present case is the kind which needs to be served on the other party in terms of r 242. He said as such it should have been accompanied by Form 29 but that was not done. I found his submissions confusing on this aspect because he seemed to suggest that the applicant should have used both form 29 and 29B which is impossible.

In response Ms *Mahere* argued that there is no merit in the point *in limine*. She argued that s 98 (14) of the Labour Act does not set out the procedure to be followed in an

application to register an arbitral award. She argued that that provision simply states that the High Court may be approached, but it is up to the applicant to elect the form of procedure to follow. She argued that the distinction that Mr *Mpofu* sought to make between the High Court and a Judge is without merit too. she argued that it is not always the case that 'High Court' means the court and 'Judge' means a judge. She said the definitions are not always as clear cut as Mr *Mpofu* wanted to portray. She went on to submit that the definition of the word Judge in the High Court Act is different from the definition in the High Court Rules, 1971. She further argued that the relief that the applicant is seeking is of a procedural nature. Nothing on the merits is to be determined by this court. She argued that as such it was proper for the applicant to proceed by way of a chamber application. She made reference to R 226 (2) (c) which states that if the relief being sought is of a procedural nature an application can be made as a chamber application.

She argued that r 241 was complied with because the accompanying form sets out the basis of the application. It says,

> "Take notice that in terms of s 98 (14) of the Labour Act [*Chapter 28:01*], an application for registration will be made for enforcement of an Arbitration Award due to the applicant in an unfair labour dismissal and dispute of right."

Ms *Mahere* also argued that in terms of r 229 (c) the adoption of a wrong form of application is not a basis to dismiss an application unless there is prejudice to the other party. She said in the present case there is no prejudice to the respondent because the respondent was served with the application. The chamber application was done on notice to the respondent. She further submitted that if the application is defective she applies for condonation.

What I have before me is an application for the registration of an arbitral award arising from a labour dispute. Therefore its registration is governed by s 98(14) of the Labour Act. Article 35 of the Model Law is not applicable in the present matter because it is a provision which deals with registration of arbitral awards in general. It is not specific to labour matters. There being a specific provision which deals with the registration of arbitral awards in relation to labour matters, that specific provision should be employed.

Looking at the wording of s 98(14) of the Labour Act it is clear that it does not say that if a person intends to register an arbitral award they have to make an application. It says a party may submit for registration the copy of the award to the court of any magistrate or to

the High Court if the arbitral award exceeds the jurisdiction of the Magistrates court (My emphasis).

Submitting and making an application are not exactly synonymous words. To submit is to present. Presenting can be done in various forms which include simply handing over to another person or it can be done by way of an application.

The way I understand the word "court" in s 98 (14) is that it is being referred to as an institution and not in the way Mr *Mpofu* argues. As an institution the High Court comprises the courts, judges and even the registrar thereof. With this definition of "court" and the definition of "submit" in mind, I believe that a party seeking registration of an arbitral award in terms of s 98 (14) of the Labour Act can simply hand over the award to the registrar of this court for registration or they can make either a chamber application to a judge or a court application. So as what Ms *Mahere* was arguing, s 98(14) of the Labour Act does not stipulate the procedure that a party seeking to register an arbitral award ought to adopt. It is entirely up to the party seeking registration to elect the procedure to adopt. The applicant therefore did not err in bringing this application as a chamber application and not as a court application.

However, even if I am wrong in my interpretation of s 98 (14) of the Labour Act, as correctly argued by Ms *Mahere*, r 229(c) which deals with the adoption of incorrect form of application states that the adoption of an incorrect form of application shall not in itself be a ground for dismissing the application unless the judge or court considers that an interested party has been prejudiced by the wrong form of application and that such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order for costs (my emphasis).

So the fact that in the present matter the applicant made a chamber application instead of a court application is not *per se* fatal. The respondent occasioned no prejudice since the application was made on notice to it. The notice enabled the respondent to file a notice of opposition and an opposing affidavit. The chamber application was placed before Judge Kudya in his chambers. On 5 April 2012 he had it referred to the opposed roll on the basis that it was opposed. The referral to the opposed roll also cured the defect of the application having been made as a chamber application. However, it must be noted that the referral to the opposed roll does not change the chamber application to a court application. It still remains a chamber application. This is a chamber application that was done or made on notice to the

respondent. At the same time the grounds upon which the application is based are spelt out on the accompanying form.

There being no prejudice suffered by the respondent I will dismiss the point *in limine*.

The second point *in limine* that Mr *Mpofu* raised is that the respondent had since lodged an appeal against the first arbitral award and intended to lodge another appeal against the quantification of the arbitral award. Mr *Mpofu* submitted that there are two conflicting positions of law with regards to the effect of lodging an appeal. He submitted that there are conflicting judgments from this court on that issue. Ms *Mahere* did not dispute that. It is common cause that there are some judgments by this court which say that the noting of an appeal does not have the effect of suspending the operation of the decision appealed against. In *Samudzimu* v *Dairiboard Holdings Limited* 2010(2) ZLR 357 (H) at 360 D the court said:

> "In the present case, the respondent has lodged an appeal with the Labour Court. The appeal is still pending. Should the respondent wish to have the arbitrator's determination suspended or dealt with in any other interim way, it is to that court that it must direct its application. Accordingly, for as long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same".

On the other hand there are some cases, for instance the case of *Sibangalizwe Dhlodhlo* v *Deputy Sheriff for Marondera and Ors* HH 76/11, which say the noting of an appeal suspends the operation of the decision appealed against. In that case it was held:

> "In terms of subsection 2 the Legislature has finally put to rest the confusion in the law as to whether or not an appeal under the Act would suspend the operation of the decision or determination appealed against. The arbitral award was however granted in terms of s 98 (9) of the Act. An appeal against the decision of the arbitrator on a question of law lies to the Labour Court in accordance with the provisions of s 98(10) of the Act. Where s 92 E provides that the noting of an appeal does not suspend the decision or determination, there is no such provision in relation to an appeal against an award by an arbitrator".

Mr *Mpofu* argued that on the basis of conflicting judgments this court should not deal with the matter as this will cause it to align itself with one side thereby causing further confusion in the law. Mr *Mpofu* suggested that the court must proceed in terms of s 4(5) of the High Court Act [*Chapter 7:06*] which says:

> "If a matter being heard by the High Court involves a difficult question of law or if at any stage during the hearing of a matter by one or more judges such a question arises, the presiding judge may direct that the hearing of that matter or the hearing in respect of that question shall proceed before such greater number of judges than two as may be determined by the Chief Justice or the Judge President, and thereupon the decision of the majority of such judges shall be the decision of the High Court".

Ms *Mpofu* submitted that this is the approach that was adopted in *CBZ Ltd* v *M M Builders & Suppliers (Pvt) Ltd & Anor* 1996 (2) ZLR 420 (H). In that case four matters raising the same legal point on the Roman law in *duplum* rule were heard by three High Court Judges. In making the decision for three judges to hear the matter two judges who were faced with the matters considered:

(1) the potential complexity of the issue
(2) that two judges were already engaged in the matters and a third judge was desirable for divergence of opinion between two judges
(3) the importance and topicality of the principle under consideration both legally and in the banking and business community where the issue had been under debate for some time.

In the present case Advocate *Mahere* opposed the point *in limine* correctly arguing that there is nothing complex about the issue at hand. She correctly argued that the mere fact that there is a divergence of decisions by this court does not mean that the matter is complex. There is a provision which spells out the effects of an appeal on a decision appealed against. Section 92E (2) of the Labour Act reads:

"**Appeals to the Labour Court generally**

(1) An appeal in terms of this Act may address the merits of the determination or decision appealed against
(2) an appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against." (My emphasis)

This provision simply says that the noting of an appeal does not suspend or set aside the operation of the decision appealed against. Section 92E (3) of the same Act reads,

"Pending the determination of an appeal, the Labour Court may make such interim determination in the matter as the justice of the matter requires."

This means that a party wishing the decision appealed against to be suspended pending determination of the appeal may approach the Labour Court and make an application for an interim stay or suspension of the arbitral award. If a party does not approach the Labour Court for such a temporary relief there is nothing to stop the registration of the arbitral award. In the absence of a court order for stay of execution pending appeal this court will proceed to register the award for enforcement unless there are grounds for not doing so as provided for in Article 36 of the Model Law. See *Greenland* v *Intervention Research*

Project (ZICHRE) HH 93/13, *Mukwenga* v *Grain Marketing Board* HH 193/12, *Tapera & Ors* v *Field Spark Investments (Pvt) Ltd* HH 102/13.

In my view since there are already divergent views on the issue of whether or not the noting of an appeal suspends the decision appealed against the proper route to go is by way of an appeal to the Supreme Court so that the Supreme Court as a higher court can determine the issue and settle the position of the law once and for all. It is my considered view that with the divergent decisions of this court at the moment, it will be improper for a team of judges to sit in order to determine this issue in terms of s 4(5) of the High Court Act. That will, in my opinion, be tantamount to this court reviewing its own decisions which is not proper.

I am therefore not inclined to proceed in terms of s 4(5) of the High Court Act. Instead I will make a determination on the issue. If any party is aggrieved by my decision they can appeal to the Supreme Court.

I therefore dismiss the respondent's second point *in limine.*

When I heard arguments on the point *in limine* Advocate *Mpofu* submitted that he had not come prepared for the hearing on the merits of the matter. Even his heads of argument did not include heads of arguments on the merits. He submitted that after making a determination on the points *in limine* the court could invite the parties back for arguments on the merits.

Ms *Mahere* was not amused by Mr *Mpofu*'s approach to the matter. Clearly Advocate *Mpofu*'s approach had the effect of delaying the finalisation of the matter. However, we had no choice since Mr *Mpofu* had not filed heads of arguments on the merits.

Now that I have dismissed Mr *Mpofu*'s points *in limine* the matter should proceed to be determined on the merits. Looking at the opposing affidavit of the respondent I do not see any point in calling the parties to argue on the merits. In the opposing affidavit the respondent raised the effect of an appeal on the decision appealed against as a point *in limine* which point I have already dismissed. On the merits the respondent argued that the arbitral award ought not to have been awarded. It goes on to attack the decision of the arbitrator in granting the arbitral award and says on that basis the arbitral award should not be registered.

In dealing with an application for registration of an arbitral award this court is not being called upon to review the decision of the arbitrator or to go into the merits of the appeal which is pending in the Labour Court. See *Brian Muneka and Ors* v *Manica Bus Company* HH 30/13. For this reason I do not see the point in recalling the parties to argue on the merits. The points *in limine* dispose of the matter.

In the result, the application for registration of the arbitral award is granted with costs.

Scanlen & Holderness, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners