STANLEY MACHOTE
versus
ZIMBABWE MANPOWER DEVELOPMENT FUND

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 15 October 2015

Opposed matter

T J Mafangonya, for applicant
TG Mboko, for respondent

TSANGA J: On 21 July 2015, I registered an arbitral award in favour of the applicant which was in the following terms:

> "It is ordered that
>
> 1. The arbitration award attached hereto and granted in favour of the applicant on the 29th of October 2014 be and is hereby registered as an order of this Honourable court.
> 2. The respondent be and is hereby ordered to pay the applicant $11 448.88 plus interest of 5% per annum from the date of the arbitral award up to the date of full payment.
> 3. Respondent shall pay costs of this application at a higher scale if it opposes the application but if it does not oppose the application each party to bear its own costs."

The respondent has appealed against the registration of the award and has asked for my written reasons for registration. A summary of the case is in order. The applicant obtained an arbitral award in his favour for unfair dismissal. He was dismissed for tarnishing the image of ZIMDEF by failing to pay his personal debts and drawing public attention by being pursued by the messenger of court at his workplace. His conduct was deemed by the employer to be inconsistent with the conditions of his employment. He disputed being guilty of misconduct on the basis that these were private debts and the charges stretched too far and were unfair. The messenger of court had threatened to attach the employer's property and had disrupted

business. The arbitrator's finding was that the failure to repay debts did not justify disciplinary proceedings. The arbitrators view was that allowing the charges to stand would set a bad precedent for labour relations.

The arbitrator who did the calculations of what was due to the applicant, who was different from the original arbitrator, ordered that he be paid $11 448.88 plus interest at 5% per annum from the date of the arbitral ward to the date of full payment. The applicant sought registration of the award in order to compel the respondent to comply with the award.

The respondent had opposed the registration in the initial instance, on the grounds that there was a pending application for interim relief in the Labour Court and that the Labour Court should be given an opportunity to make a ruling on the application for interim relief pending before it. It was argued that registration would render Labour Court application nugatory. It was also argued by the respondents that a litigant who has taken advantage of the procedure to seek interim relief would suffer the very harm from he had sought protection. In addition the respondent also highlighted in its application that it had a general appeal pending on the matter in the Labour Court besides its interim application.

At the hearing of this opposed application on 21 July 2015, the applicant drew attention to the fact that the pending application for stay of execution pending appeal, upon which the respondent had resisted registration on the basis that it would be rendered nugatory, had since been heard and dismissed on 17 April 2015 under LC/H/349/14. As such, it was the applicant's argument that there was no basis upon which to refuse to grant registration. The applicant further argued that the respondent's standpoint that to register the award would be against public policy also lacked merit.

The respondent, on the other hand, acknowledged dismissal of the application for interim relief but emphasised that it had filed an application for leave to appeal the dismissal of its application for interim relief. As a result of this pending application for leave to appeal, it was argued that I should not register the award. Furthermore, it was the respondent's argument that the main appeal on the award had yet to be heard. In addition, it was maintained that to register the award would be against public policy on the basis that the manner in which the calculation of the award had been done would result in tax avoidance. At the same time the respondent was adamant that the process that had been initiated in the Labour Court in terms of the challenge to the arbitral award, should certainly not be ignored.

The applicant, however, resisted the respondent's argument that registering the award would be against public policy on the basis that as this was a labour matter, Art 34 and 36 of the *Uncitral Model Law* set out in the Schedule to the Arbitration Act [*Chapter 7:15*] was not applicable. This was said to be because the Arbitration Act and its provisions apply to matters referred to compulsory arbitration in terms of s 98 (2) of the Labour Act. Reliance for this viewpoint was placed on the case of *Samudzimu* v *Dairibord* 2010(1) ZLR 357 (H).

More significantly the respondent put forward the argument that gone are the days when this court could argue that it cannot not interfere with a labour matter as it has now been constitutionally as a court of original jurisdiction. It was emphasised that this court therefore had jurisdiction to determine a labour matter. Authority for this standpoint was placed on the case of *Confederation of Zimbabwe Industries* v *Rita Marque* HH 125/15 whereby Mathonsi J held that s 171 (1) (a) of the Constitution of Zimbabwe had reinstated the jurisdiction of the High court in labour matters which had been ousted by s 89 (6) of the Labour Act [*Chapter 28:01*].

Section 89 (6) essentially provides that no court other than the labour court shall have jurisdiction to hear and determine labour matters which include applications and appeals. Section 171 (1) (a) of the Constitution which is argued to have altered this position provides that "the High Court has *original jurisdiction* over all civil and criminal matters throughout Zimbabwe".

Jurisdiction of a court essentially refers to the authority that a court has to hear and determine a dispute that is brought before it. This is in distinction to the court's *"inherent power*" to do something as dealt with by s 176 of our Constitution. In terms of this section, the Constitutional Court, the Supreme Court and the High Court all have *inherent powers* "to protect and regulate their own process and to develop the common law or customary taking into account the interests of justice and the provisions of this Constitution". Such *inherent powers* can thus be inherent procedural powers or inherent substantive powers and are exercised on the premise that the court in question already has jurisdiction in the first place. Thus regulation of process as exhorted by s 176 would be largely an exercise of inherent procedural powers while development of common law and customary law as per s 176 would be largely an exercise of inherent substantive powers. Respondent's argument was founded on the *jurisdictional authority* of the High Court in terms of s 171 (a) to hear and determine a civil matter, in this instance a labour dispute.

It was against the backdrop of the jurisdictional argument that I formulated the decision to grant the order of registration. I took into consideration the argument advanced by the respondent this court is now fully empowered to hear such labour matters as a court of original jurisdiction. As stated, when a court has original jurisdiction this refers to its standing and right to hear a case as the first court of first instance. Constitutionally, the High Court has indeed been conferred with unfettered power to exercise original jurisdiction in all civil and criminal matters as argued by the respondent. Such original jurisdiction is exercisable even in matters regulated by statute. However, whilst s 171(1) (a) does confer upon the High Court original jurisdiction over all civil and criminal matters throughout Zimbabwe, this overall authority also has to take into account other applicable constitutional provisions as well as legislation force that in reality places some breaks or limits on its exercise of original jurisdiction in specific instances.

Thus, s 172 (2) of the Constitution gives the Labour Court "jurisdiction over labour matters as conferred by an Act of Parliament". The applicable Act of Parliament in labour matters is the Labour Act [*Chapter 28:01*]. As stated, its s 89 (6) clearly confers on the Labour Court jurisdiction in the first instance jurisdiction to hear and determine any applications, appeals or other matters stipulated in that Act. The Labour Act is thus a delegated piece of legislation in labour matters in terms of which it is empowered to determine all labour matters as a court of first instance and as also as a court of appeal.

It can be said that at least in labour matters there is express legislative exclusion by an Act of Parliament of the High Court's original jurisdiction that is envisaged by s 171. In the face of what is tantamount to legislative exclusion of the High Court's original jurisdiction in labour matters, there would have to be a powerful "need" for upsetting the implied exclusion of the High Court's original jurisdiction in labour matters. It is not the intention of in granting the High Court original jurisdiction to create unwarranted conflict with legislation in force. Ordinarily, existing legislative mechanisms that are in place would logically need to be followed unless there exist strong reasons for intervention or unless a reading of any specific provision suggests otherwise in terms of the jurisdiction question. (See for instance *Mapini* v *Omni Africa (Pvt) Ltd* HH 494/13 and also the discussion in *Derdale Investments (Pvt) Ltd* v *Econet Wireless Private Ltd & Ors* HH656/14). Generally it would also be amiss to lose sight of a major reason behind the creation of the Labour Court, which was that it would be a specialist court on labour issues. More significantly, *in casu,* the Labour Court had already

been approached as a court of original jurisdiction in terms of the appeal and interim relief sought, in keeping with legislative intention.

The approach to the High Court was registration related because when it comes to registration of labour awards, the Labour Court clearly lacks jurisdiction as the legislature gives this power to Magistrates' courts and the High Court depending on the value of the award. Registration of awards in terms of s 98 (14) is therefore an area of labour law where the statute endows the Magistrate Court and the High Court with registration jurisdiction. (*See Trust Me Security Org* v *Mararike & Ors* HH 325-14*)* Also Art 34 and 36 of the *Uncitral Model Law* empower the **High Court** as the forum to set it aside an award on specified grounds.

For the court to intervene on the basis of public policy however, the infringement of public policy would have to be palpably outrageous. The approach is to construe public policy restrictively. (See *Zimbabwe Posts (Pvt) Ltd* v *Communications & Allied Services Workers Union* HH 60-14; *Makonye* v *Ramodimoosi & Ors* HH 52 /14; *Wei Properties (Pvt) Ltd* v *S & T Export & Import (Pvt) Ltd HH 336/13*). The Respondent's reasons in this case were that an alternative claim for damages in lieu of reinstatement had not been made. The principle is indeed where reinstatement has been ordered that damages be stated as an alternative to reinstatement. This argument was put forward against the backdrop of an outstanding appeal in which the basis of the appeal is that the dismissal of the applicant was warranted. As such the appeal should be heard since dismissal of applicant is the real gist of its grievance. The appeal court will needless to say, address the way forward on damages such as by ordering remittal for this issue to be addressed by the arbitrator if deemed necessary. Appeals should not be heard through the back door.

Another grievance said to justify non registration was that the computation of tax should have been done on the whole figure instead of piece meal as the piece method employed amounted to tax evasion. In my view this was an issue which if the respondent felt strongly about, should have raised with the arbitrator within 30 days of receipt of the award. I say this because Art 33 (1) (a) of the *Uncitral Model Law* permits a party, on notice to the other party, to request the arbitral tribunal to correct any error in computation among other errors. The respondent's argument lacked merit and was simply one of convenience and avoidance. In any event this court lacked the necessarily details to engage effectively with this assertion. I was therefore of the view that overall this was not a case of compelling need that justified intervention.

Furthermore, in allowing registration, I took into account that with interim relief having been denied, Applicant also stood on firmer ground than the respondent. In terms of s 92 E (2) of the Labour Act, the general legal position is that an appeal does not suspend the decision appealed against. Also in terms of s 92 E (3), pending such determination, the Labour Court may make such interim determination as the justice of the case demands. (See *Giya* v *Ribi Tiger Trading* HH 57-14). In this case the labour court had already decided at the time I heard the application for registration that interim relief did not meet the justice of the case. The Respondents heads of argument had been very clear that the application for interim relief which was pending at the time it filed its case was central to its opposing registration. What was therefore instructive in registering the award was the fact that the application for stay of execution had been dismissed. It remained extant since it had not been stayed or suspended. (See *Greenland* v *Zimbabwe Community Health Intervention Research Project* HH 93/13)

Accordingly, the above were my reasons for registering applicant's arbitral award.

Messrs Chambati Mataka & Makonese, applicant's legal practitioners
Matsikidze & Mucheche Commercial Law Chambers, respondent's legal practitioners