PATHIAS MATAMBO
versus
METALLON GOLD ZIMBABWE PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 18 & 27 January 2016

Opposed application

F Piki, for the applicant
F Rudolf, for the respondent

MTSHIYA J: On 17 March 2010, in *DHL International (Pvt) Ltd* v *Madzikanda* HH 51/10, where the effect of an appeal in the Labour Court on an arbitral award was raised, Makarau JP, as she then was, said:

> "Finally' Mr *Kadzere* has further submitted that in view of the provisions of section 92E of the Act, the respondent stands dismissed from employment as the noting of an appeal to the Labour Court does not suspend the decision appealed against. Again, *Mr Kadzere* is correct. Sections 92E of the Act provides:
>
> (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.
> (3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.
>
> In my view, the amendment to the law in 2005 to provide that appeals to the Labour Court would not suspend the decision appealed against clearly meant to vary common law position that was prevailing prior to the amendment. That for the purposes of the Act the employee is regarded as dismissed pending the determination of the appeal appears to me to be beyond dispute".

The reverse would also apply if the ruling was in favour of the employee.

In similar circumstances, in *Graylord Baundi* v *Kenmark Builders (Pvt) Ltd* HH4/2012, Patel J, as he then was, also observed as follows:-

> "Parliament has obviously applied its mind to the delays inherent in the appeal process and considered the policy implications of the general common law rule which automatically suspends a decision appealed against. It has consciously and deliberately decided that arbitral awards in the realm of labour relations should be enforced, despite any pending appeal and notwithstanding any inconvenience that such enforcement may entail. In this context, it would be very difficult to hold that what is specifically provided for an allowed by statute should be

regarded as contrary to public policy any such approach would simply operate to frustrate and defeat the clear intention of Parliament".

I have quoted from the above judgments because in this application for the registration of an arbitral award, the respondent has, in its opposing papers, argued, in part, as follows:-

"2. AD PARAGRAPH 3

I deny that applicant is entitled to the relief sought. The respondent appealed against the award to the Labour Court. The respondent also applied to the Labour Court for an order staying execution of the award. Both the appeal and the application are pending before the Labour Court. Applicant must wait until the matters have been determined before he applies to register the award".

Indeed, both the application for stay of execution and the appeal have not yet been determined by the Labour Court.

On 12 September 2015, following a labour dispute, the applicant obtained the following arbitral award:

"Wherefore after an analysis of the parties' submission it is accordingly ruled as follows: That:

1. The Claimant's entitled to receipt of his employment benefits as claimed.

2. The respondent is hereby ordered to pay the claimant as follows:

(i)	Salary arrears for 17 months	USD 97,971.00
(ii)	School fees allowance	USD 58,212.21
(iii)	Travel allowance	USD 66,666.66
(iv)	Pension enhancement	USD 36,883.04
(v)	Reallocation allowance	USD 11,526.00
(vi)	DSTV Subscriptions	USD 1,105.00
(vii)	Pension not remitted	USD 82,987.00
	Total Payable	USD355,351.11

3. That the amount payable in 2 above is subject to tax deduction serve for 2(ii) the School fees allowance which tax component is met by the respondent, and should be paid to the claimant within 30 days of receipt of this award.

4. Parties to meet their own arbitration costs as advised".

It is the above award that the applicant seeks to register as an order of this court in terms of s 98 (14) of the Labour Act [*Chapter 28:01*] (the Act) which provides as follows:

"(14) 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".

As already pointed out, the application is opposed on the basis that there is an appeal and an application for stay of execution still pending in the Labour Court.

This court has, in a number of judgments, indicated that as long as an award is legal and extant, it is registrable.

In *Benson Samudzimu* v *Dairibord Holdings Ltd* Chiweshe JP 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 pending appeal 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 Court Act, there is no basis upon which this court may decline registration of the same". (My own underlining)

Furthermore in 2013, in the case of *Greenland* v *Zimbabwe Community Health Intervention Research Project (ZICHIRE)* HH 93/13, Mathonsi J endorsed the above position in our law by saying:

> "A party which finds itself faced with an arbitral award it is challenging should take advantage of the provisions of s 92 E (3) of the Labour Act [*Cap 28:01*] which empowers the Labour Court to make an interim determination for the stay or suspension of an arbitral award. Where the award has not been stayed or suspended in terms of s 92 E (3) and remains extant, this court will, as a matter of principle, register the award for enforcement unless there are grounds for not doing so as provided for in Article 36 of the model law contained in the Arbitration Act [*Cap 7:15*].

I have, in my own judgements, namely in *Brian Muneka & Others* v *Manica Bus Company* HH30/13 and *Fungai Muronzeri* v *Petrol Trade (Pvt) Ltd* HH95/14, also advanced the view that as long as the award is legal and extant, registration, which I regard as an administrative exercise, should never be refused. Nothing *in casu* has been advanced to persuade me to change that view.

In its submissions the respondent makes of partial concession when it says:

> "10.1 It therefore follows that although an appeal against an Arbitral award does not suspend the award, it does suspend the execution of the same and as the current application forms the basis of execution, it is pre-maturely before this Court and therefore a nullity".

As can be seen from the above submission the respondent accepts that its appeal in the Labour Court does not suspend the registration of the award. It, however, goes into error

by saying execution is suspended. That would, indeed, have been the case if the Labour Court had granted the respondent the interim relief (stay) it applied for. The appeal, suspension or stay, can only be relied upon when duly granted by the Labour Court- and not when proceedings are still pending.

The award *in casu* has not been complied with; stayed; suspended or set aside. It remains extant and therefore registrable. There is, therefore, in my view no legal basis for refusing the registration of the award.

I therefore order as follows:-

1. The arbitral award granted by Arbitrator E.F. Chitsa on 12 September 2015, in favour of the applicant, be and is hereby registered as an order of this court; and
2. The respondent shall pay costs of this application on a legal practitioner and client scale.

IEG Musimbe and Partners, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners