

**IN THE LABOUR COURT OF ZIMBABWE
HARARE, 21 NOVEMBER 2013, 14 JANUARY
2014 & 31 JANUARY 2014**

**JUDGMENT NO LC/H/32/14
CASE NO LC/H/432/2013**

N NJILISI & 60 OTHERS

APPELLANT

Versus

**TAMBUDZAI ENTERPRISES (PVT) LIMITED
t/a HILTON KWIKSPAR**

RESPONDENT

Before the Honourable F C Maxwell : Judge

For the Appellant Ms R R Mutindindi (Legal Practitioner)

For the Respondent S Zingano (Legal Practitioner)

MAXWELL J:

This is an appeal against an arbitral decision declining jurisdiction to deal with the matter. In 2004 the Appellants were dismissed from employment. In 2006 their reinstatement was ordered by the Midlands Local Joint Committee. The decision to reinstate was affirmed by the Negotiating Committee after the Respondent appealed. Thereafter the Respondent noted an appeal against that decision in this Court. The appeal was noted on 14 June 2013. The Respondent did not comply with the order of reinstatement. The matter was referred for compulsory arbitration for quantification of damages.

On 20 May 2013 Honourable R E Nhiwatiwa made the following award:

"This matter was brought improperly before this tribunal as it is already before the Labour Court. I hereby order that the parties approach the Labour Court for interim ruling on the Labour Court appeal."

The basis of the award was that the Arbitrator was of the view that the appeal to this court suspended the Local Joint Committee judgment.

The appellants were aggrieved and noted an appeal on the following grounds:

1. The Arbitrator grossly erred and seriously misdirected himself on a question of law in making a finding that the matter was improperly before the tribunal as it was already before the Labour Court when the provisions of s 92E (2) of the Labour Act [Cap 28:01] are very clear that the mere noting of an appeal does not suspend the determination or decision appealed against and as such there was nothing which could stop the quantification proceedings.
2. The Arbitrator erred at law in the interpretation of the provision of s 89 (c) (i) that back pay is not obligatory when it is settled law that the reinstatement order comes with no loss of salary and benefits and it invariably connotes a mandatory payment of back pay.
3. The Arbitrator erred and misdirected himself on a question of law by making a finding that employees failed to prove the Zimbabwean dollar amount when the onus of showing how much a worker earned or should have earned during the relevant period generally has (sic) with the employer.
4. The Arbitrator grossly erred on a question of fact and such misdirection amounting to a question of law in failing to realise as he should have done that damages are designed to put the innocent party in the position he would have been had the contract being (sic) duly performed and hence it is perfectly legal to quantify damages in United States dollars as opposed to the moribund and valueless Zimbabwean dollar.

The appellants prayed for the setting aside of the Arbitration Award and that the Registrar of this court be directed to set the matter down for quantification of damages by this court.

In response the Respondent raised a point in *limine* seeking the dismissal of the appeal for non-compliance with the Rules of this court. The point in *limine* was the subject of a preliminary hearing and I condoned the non-compliance.

The Respondent also submitted that s 92 E (2) of the Labour Act [Cap 28:01] does not nullify the Common Law rule that an appeal suspends operation of a judgment as that section is not applicable to arbitral awards. The Respondent further submitted that grounds of appeal 2 - 4 are improperly before this court as the Arbitrator did not decide the issues. The Respondent further states that in any event the Arbitrator would have been justified in law and fact if he had dismissed the Appellants' claim for back pay, and for payment in United States Dollars since the Appellants are not entitled to these payments in terms of the law.

In conclusion the Respondent submitted that the prayer sought is incompetent as the court is only empowered to set aside the Arbitrator's decision if it deems fit and refer the matter to the Arbitrator for determination of quantification. The Respondent prayed for the dismissal of the appeal with costs.

The first issue to determine is whether or not the noting of an appeal against an arbitral award in terms of s 98 (10) suspends the operation of the decision appealed against. This issue has generated a lot of debate in our courts resulting in divergent views. Both parties have cited cases that support their views. The Arbitrator relied on the case of *Sibangilizwe*

Dhlodhlo v the Deputy Sheriff for Marondera & 3 Ors HH-67-2011. The Respondent has relied on the *Dhlodhlo* case as well as cases that were decided prior to the amendment of the Labour Act in 2005. The Respondent has also made reference to the case of *The Heritage School v Seka & Ors* HH-191-12 which was dealt with in January 2012.

A perusal of judgments from the High Court reveals a trend where the court is moving away from the position in the *Dhlodhlo* case. The Appellants have amply demonstrated this in their heads of argument. They made reference to the case of *Sanele Dhlomo Bhala v Lowveld Rhino Trust* HH-263-13 in which JUSTICE MAFUSIRE commented to say:

"... it seems plain that the decisions in *Dhlodhlo* and *Mvududu* were with all due respect incorrect on the question of the effect of an appeal to the Labour Court from the decision of the Arbitrator vis-à-vis the provisions of S 92 E of the Act. I think it was incorrect to say that whereas S 92E of the Labour Act provides that the noting of an appeal does not suspend the decision or determination appealed against, there is no such provision in relation to an appeal against an award by an Arbitrator. There is such a provision. Section 92 E is an omnibus provision regarding all appeals made in terms of the Labour Act."

The same position is reflected in various other cases decided in the High Court. See *Gaylord Bandi v Kenmark Builders (Pvt) Ltd* HH-4-2012; *Trish Kabubi v Zimrock International (Pvt) Ltd* HH-4-2012; *Masvingo City Council Workers Committee & Anor v Masvingo City Council* HH-390-12 and *Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings* HH-302-2011.

I am satisfied that the Arbitrator erred in declining to deal with the matter on the basis that the award had been suspended by the noting of an appeal. The Respondent had not taken advantage of s 92 E (3) of the Labour Act [Cap 28:01]

which empowers this court to make an interim determination for the stay or suspension of an arbitral award pending the determination of the appeal. The first ground of appeal therefore succeeds.

The rest of the grounds of appeal concern matters that the Arbitrator included under the heading: "Facts of matter which arbitration relates".

However these issues were not dealt with in his analysis and award. I therefore find it not necessary to deal with them.

For the above reasons the decision of the Arbitrator is set aside. Accordingly it is ordered that the matter be and is hereby remitted to a different Arbitrator for quantification of damages.

Matsikidze & Mucheche, appellant's legal practitioners
V Nyemba & Associates, respondent's legal practitioners