

CFI RETAIL (PRIVATE) LIMITED
v
ERIC MASESE MANYIKA

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GOWORA JA
HARARE, JULY 6, 2015

A K Muguchu, for the appellant

No appearance for respondent

MALABA DCJ: After hearing counsel for the appellant, the appeal was allowed with costs and the order of the court *a quo* set aside. The matter was remitted to the court *a quo* for it to be determined on the merits. It was indicated that reasons for the decision would follow in due course. These are they.

The respondent was employed by the appellant as an empty bottles clerk until August 2009 when he was retired after having attained the retirement age of 60 years in January 2009. Mr Manyika had originally been an employee of the then Farmers Co-op. He had joined the Farmers Co-op Pension Fund in 1982. Under that Pension Fund's regulations the date of retirement was said to be January 2014. In 1995 there were changes in the company and a merger which saw the creation of the CFI Pension Fund. The pension regulations were changed with the passage of time. Under the CFI Pension Fund regulations the age of retirement was lowered to 60 years and all the employees were informed of the change through their

subsidiaries. The information was also communicated to the employees through their payslips. The same information was also placed on the notice boards which were accessible to all employees.

The respondent was still of the belief that his retirement age was 65 years which would have been reached on 30 January 2014. According to the new pension regulations, the respondent should have been retired from work in January 2009. He was however retired in August 2009. The appellant admitted that there was an oversight on their part as there had been changes in the human resources department. Mr Manyika unsuccessfully pleaded with the appellant to remain at work until January 2014. Mr Manyika was aggrieved by the decision of the appellant and approached a labour officer complaining of unfair labour practice. The dispute was referred to compulsory arbitration.

After hearing both parties the arbitrator issued the following award:

“Having carefully considered both oral and written submissions and evidence from both parties, I hereby declare that:

1. Respondent committed an unfair labour practice by prematurely retiring Eric Manyika on 31 August 2009 having given him short notice.
2. In light of this finding and as a remedy to the unfair labour practice, I hereby order respondent to comply with one of the two options given below:
Either: (a) reinstate claimant without loss of pay and benefits from 1 September 2009 and keep him to the pay roll until his normal retirement age on 13 January 2014;
Or
(b) if reinstatement is no longer an option for whatever reason, pay claimant the following:
 - (i) Full pay and benefits from 1 September 2009 to 31 July 2011.
 - (ii) Cash-in-lieu of leave from 1 September 2009 to 31 July 2011.
 - (iii) 12 months pay as damages for loss of employment before normal retirement age.
 - (iv) 3 months notice pay.
 - (v) Any other terminal benefits which claimant may be legally entitled.”

The appellant was aggrieved by the decision of the arbitrator and approached the Labour Court. The appellant lodged an application for interim determination in terms of s 92E(3) of the Labour Act [*Cap. 28:01*] (“the Act”). It however withdrew the application. On the day of the hearing, the respondent raised a point *in limine* alleging that the appellant had approached the court with dirty hands since it had not complied with the arbitrator’s decision. The Labour Court held that the appellant ought to have complied with the arbitrator’s award before approaching the court. It upheld the point *in limine* and dismissed the appeal from the arbitral award. The appellant noted an appeal to this Court on the following grounds:

1. The court *a quo* erred at law in finding that appellant’s failure to comply with an arbitration award it was appealing against constituted dirty hands and even then to the extent that the appellant should be denied audience.
2. The court *a quo* erred at law and erred grossly on the facts in finding that appellant was contemptuously failing to comply with the award. In so finding, the court disregarded the fact that the amount payable by the appellant to the respondent was not quantified.
3. The court *a quo* erred at law in finding that the appellant had dirty hands when the appellant’s non-compliance was one in the context of a pending application for interim relief.
4. Assuming without conceding that the appellant’s hands were dirty such as to be denied audience, the court *a quo* erred at law in dismissing the appellant’s appeal for the reason alone. Instead the court *a quo* should have denied the appellant audience but postponed the matter till such time when the appellant had complied with the arbitration award.

Section 92E of the Act provides as follows:

“Section 92E: 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.
- (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.”

Section 92E(2) only provides that the noting of an appeal to the Labour Court against a determination or decision does not have the effect of suspending the operation of the determination or decision appealed against. The purpose of the section is to provide for the effect of the noting of an appeal in terms of the Act on the enforcement of the determination or decision. The provision is the reversal of the common law principle that the noting of an appeal against a judgment or decision of a tribunal or lower court suspends the execution of the judgment or decision pending the determination of the appeal. Section 92E(2) does not impose an obligation on a party appealing against the determination or decision to act in terms of the determination or decision appealed against pending determination of the appeal. In other words there is no provision requiring the appellant to first comply with the determination or decision appealed against in order to preserve the right of appeal.

There are remedies available to a party in whose favour the determination or decision appealed against has been made for its enforcement in the absence of an interim determination made by the Labour Court suspending the determination or decision appealed against pending determination of the appeal. The effect of the section is that it leaves the party in whose favour the determination or decision was given with a right to enforce the

determination or decision appealed against by having it registered with the High Court or any Magistrates Court in terms of s 98(14) of the Act.

Section 92E(3) of the Act has no effect at all on the right to appeal. It leaves the appellant with a right to apply for an interim determination suspending the execution of the determination or decision appealed against. The right holder may exercise the right or choose not to do so. He or she is not obliged to apply to the Labour Court for an interim determination. The fact that a party has opted in the exercise of discretion not to exercise a right given by law does not mean that he or she is guilty of approaching the court with dirty hands. Both parties are equally protected by the law as they have remedies available to them. When the Labour Court refuses to hear an appeal on the basis that the appellant has not complied with the determination or decision appealed against, it is creating a remedy not provided for by the law.

The court *a quo* misapplied the principle of dirty hands to the facts of the case. The principle of dirty hands governs a situation where a party is under a direct obligation imposed by law to act in a specific manner which obligation the party deliberately refuses to perform. It is a time honoured principle based on the need for litigants who approach a court of law seeking relief to do so with the required degree of truthfulness, and honesty. It does not apply in cases where the appellant fails to act in terms of a determination or decision appealed against under s 92E of the Act because he or she would not be under an obligation to first comply with the determination or decision appealed against in order to be heard.

The right to be heard by a court in proceedings that have been properly instituted is a fundamental right that should not be lightly denied to a party. In this case the appellant was not guilty of contempt of court as suggested by the Labour Court because it was exercising the right to appeal to the court given by law. The court was obliged to hear the appellant in the appeal which was properly before it.

In the case of *Zimbabwe Mining Development Corporation & Anor v African Consolidated Resources PLOC* SC 1/10, CHIDYAUSIKU CJ stated the following:

“The right of appeal is fundamental and critical to our justice system. Where the law confers the right of appeal on a litigant it should not be rendered nugatory or abrogated without due process. Due process requires that a case proceeds to finality, namely the giving of a judgment. Once a judgment is given, the losing party who has a right to appeal is entitled, if he so wishes to note an appeal.”

See also *Claudius Marimo and Anor v The Minister of Justice, Legal and Parliamentary Affairs* S-25-06.

A party wishing to apply to the Labour Court for interim determination pending determination of the appeal against an arbitral award would have to consider the question whether the award appealed against is enforceable. The party contemplating to have the award registered with the High Court or Magistrates Court pending determination of the appeal by the Labour Court would have to consider the same question. In this case the award was not sounding in money. It simply directed payment of damages. The parties were given the option of approaching the arbitrator in the event that they failed to agree on the quantum of damages. It goes without saying that the award could not be executed because the person in whose favour it was made could not even register it. That explains why the respondent did not take steps to

enforce the award pending determination of the appeal notwithstanding the effect of s 92E(2) of the Act. It also explains why the appellant was entitled in the circumstances not to apply for an interim determination.

If an arbitral award is patently *ultra vires* the jurisdiction of the arbitrator or is for some reason not executable what would happen if the Labour Court refuses to hear and determine the appeal on the ground that the appellant must first comply with the award appealed against? It is clear that the right to be heard in the determination of the appeal noted in terms of the Act remains extant even where an interim determination in the matter of the determination or decision appealed against is made. At law there cannot be a determination of an appeal without a hearing.

If the right to be heard on appeal were to be denied to the appellant on the ground that it had not applied for and obtained an interim determination suspending execution of the arbitral award, it would mean that the granting of an interim determination is obligatory when s 92E(3) of the Act is a discretionary provision. A party may apply for an interim determination only when it realizes that there are chances of the determination or decision appealed against being executed pending determination of the appeal.

Section 92E(3) of the Act is not limited to applications for suspension of determinations pending the outcome of the appeal. It is further not limited to interim determination sought by a litigant against whom the determination or decision appealed against

was made. A litigant in whose favour a determination was made, who is faced with an appeal against the determination or decision, may seek an interim determination.

If the court *a quo*'s decision refusing to hear the appellant on the basis that it had not complied with the order was based on a sound principle of law, it would mean that the order would never be enforced and there would never be an appeal. What is worse is that the court *a quo* dismissed the appeal instead of removing it from the roll.

ZIYAMBI JA: I agree

GOWORA JA: I agree

Dube, Manikai & Hwacha, appellant's legal practitioners