DISTRIBUTABLE (28)

LOWVELD RHINO TRUST

v

SENELE DHLOMO-BHALA

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GWAUNZA JA and MAVANGIRA AJA
HARARE, JUNE 15, 2015 & MARCH 02, 2020

A Mugandiwa, for the appellant

L Madhuku, with him *T Marume*, for the respondent

MALABA DCJ: This is an appeal against the judgment of the High Court (the court *a quo*) which registered an arbitral award in favour of the respondent.

The facts of this case are not in dispute. The respondent was employed by the appellant as a Community Specialist. The appellant sent the respondent a letter of mutual termination of employment on 21 March 2012. The respondent disputed that the termination was mutual. On 05 April 2012 she approached a labour officer, complaining of unfair dismissal. On 09 May 2012 the respondent received a letter purportedly withdrawing the letter of termination of employment. When she reported at her place of work on 09 May 2012 the respondent was informed by the appellant that she could return on condition she dropped her complaint pending before the labour officer.

On 18 May 2012 the labour officer attempted to have the dispute resolved by conciliation. No settlement was reached and the dispute was referred to compulsory arbitration. On 03 September 2012

the arbitrator made an award to the effect that the appellant had terminated the employment contract unlawfully. The appellant appealed against the award to the Labour Court on 2 October 2012. The award was quantified on 5 October 2012. The respondent then made a chamber application for the registration of the award before the court *a quo* on 10 October 2012. The appellant opposed the application on the grounds that the chamber application was not the correct procedure to follow and that the award sought to be registered had been stayed pending the appeal which had been noted before the Labour Court. The appellant also opposed the application on the basis that there was a pending application for interim determination before the Labour Court which was filed on 25 October 2012.

The court *a quo* found that the chamber application procedure was the correct procedure in the circumstances. The court *a quo* also found that the arbitral award had not been suspended despite the noting of the appeal to the Labour Court. The court *a quo* found no impediment to the registration of the award and duly registered the award as its judgment for purposes of enforcement. The appellant was aggrieved by such finding and launched the appeal.

One of the grounds of appeal was that the court *a quo* erred in registering the award which, in the view of the appellant, was suspended by the noting of the appeal to the Labour Court. The court *a quo* reasoned that the noting of the appeal did not suspend the operation of the award. The court *a quo* was undoubtedly correct in making this finding.

The appellant relied on *Sagittarian (Pvt) (Ltd)* v *Workers' Committee* 2006 (1) ZLR 115 (S) and *Net One Cellular (Pvt) Ltd v 56 Net One Employees and Anor* 2005 (1) ZLR 275 (S). The appellant argued that the Labour Amendment Act No. 7 of 2005 ("the Amendment Act") does not affect the position enunciated in the cases relied on. It is not in dispute that these cases were determined before the promulgation of the Amendment Act. The argument cannot be correct.

All appeals to the Labour Court, except where otherwise provided for, are guided generally by the provisions of s 92E of the Labour Act [*Chapter 28:01*] ("the Act"). The section provides as follows:

"**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."

The Act provides for a number of appeals. Before the Amendment Act came into force, the appeals regime under the Act was regulated as follows:

"**97 Appeals to Labour Court**

(1) Any person who is aggrieved by –

(a) any determination or direction of the Minister in terms of section *twenty-five, forty, fifty-one, seventy-nine* or *eighty-two,* or in terms of any regulations made pursuant to section *seventeen*;

(b) a determination made under an employment code in terms of section *one hundred and one;* or

(c) the conduct of the investigation of a dispute or unfair labour practice by a labour officer; or

(d) the conduct of any proceedings in terms of an employment code;

may, within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Labour Court.

(2) An appeal in terms of subsection (1) may –

(a) address the merits of the determination or decision appealed against;

(b) seek a review of the determination or decision on any ground on which the High Court may review it;

(c) address the merits of the determination appealed against and seek its review on a ground referred to in paragraph (b).

(3) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.

(4) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires."

This was a composite provision detailing some of the appeals that were provided for under the Act. The wording of the section is pertinent at this juncture. The section allowed any person aggrieved by any decision or conduct or determination detailed under the section to appeal to the Labour Court. The right to appeal was contained in that section. One derived the right to appeal from section 97 of the Act.

There was an important qualification attendant to appeals under section 97 of the Act. An appeal in terms of section 97 did not have the effect of suspending the decision or determination appealed against. The Act also allowed the Labour Court, pending the appeal, to make an interim determination in accordance with the justice of the matter. It is important to note that subss (3) and (4) of s 97 applied only to appeals provided for under s 97(1) of the Act. See the *Sagittarian (Pvt) Ltd* case *supra*.

There are appeals which were outside the purview of s 97 of the Act, to which the above statutory qualifications did not apply. Appeals under ss 47, 54, 61 and 98(10) of the Act, for example, did not fall under the purview of s 97 of the Act. They were not mentioned in the exhaustive list of appeals under s 97(1). What this meant is that the effect of an appeal in terms of ss 47, 54, 61 and 98(10) was governed by the common law.

The Labour Court is a creature of statute. It is not a superior court of inherent jurisdiction. It is a specialist court created in terms of a statute and can only exercise powers as granted by the Act.

In the *Net One Cellular (Pvt) Ltd* case *supra*, the court held that an appeal against an arbitral award made after compulsory arbitration in terms of the Act suspended the decision being appealed against. At p 282A CHIDYAUSIKU CJ said:

> "The arbitrator made a determination. The employer appealed against that determination in terms of s 98(10) of the Act. The effect of the noting of that appeal was to suspend execution of the arbitrator's determination pending a decision of the Labour Court."

In *Vengesai and Ors* v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at pp 596E-599E, GILLESPIE J said:

"In each case that has adopted, as a general statement of law, the proposition that at common law all judgments are suspended, the undoubted authority of CORBETT JA (as he then was) has been relied upon:

> '... it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment.' ...

In my opinion, the *dictum* of CORBETT JA, cited above and approved in the various judgments referred to, does not, and was not intended to, apply to a judgment of any court, tribunal or authority other than a superior Court of inherent jurisdiction. I say this for the following reasons.

The Roman law pertaining to appeals was expressed in the maxim:

'*nihil innovari appellatione interposita.*'

This law is expressed by *Voet* in the terms:

'The effect of an appeal is that the decision is suspended, that all things must be left in their original condition and that no new step can be taken in terms of the heading of this title.' ...

I would suggest that this does not mean that a person aggrieved by a decision, judicial or administrative, which is not covered by any enactment providing for its suspension pending appeal, and who wishes to appeal and whose prospects of success are sufficient, is left without a remedy. He may approach this court, as a matter of urgency if required, in order to move the appropriate stay or interdict."

This reasoning was adopted in *Longman Zimbabwe (Pvt) Ltd* v *Midzi and Ors* 2008 (1) (ZLR) 198 (S) where the court held that an appeal against a determination of the Rent Board does not suspend the decision being appealed against. At pp 204D-205D GARWE JA stated the law as follows:

"In the circumstances, therefore, I agree that the issue that falls for determination in this appeal is the effect the noting of an appeal has on the order of the Rent Board.

The common law position was aptly captured by CORBETT JA (as he then was) in *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A when the learned JUDGE OF APPEAL remarked:

> 'Whatever the true position may have been in the Dutch courts, and more particularly the Court of Holland ... it is today the accepted common law rule of practice in our courts

> that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment ... .'

The application of this common law rule of practice has in the past not been uniform and a divergence of opinion has arisen amongst Judges in this jurisdiction, resulting in uncertainty.

In *Vengesai and Ors* v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) GILLESPIE J, after considering a number of earlier decisions on the matter, remarked at p 598E-F:

> 'In stating the common law, CORBETT JA (as he then was) referred to the automatic stay of execution upon the noting of (an) appeal, as a rule of practice. That is not a firm rule of law, but a long established practice regarded as generally binding subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation ... .'

The learned Judge continued p 599A-D:

> "... the grant or withholding of a stay of execution is, at common law, a matter of discretion reserved to a court in which such a discretion is imposed. It follows that, in absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conferred by statute. It cannot order the suspension of its own judgment pending an appeal. It has no discretion to enforce its own judgment notwithstanding an appeal. The only basis upon which its judgment or order can be supposed to be stayed is where its enabling statute provides for the situation.
>
> ... the grant, whether automatic or not, of a stay of execution of judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal or any temporary stay. It follows that the question of enforcement pending appeal of judgments from an inferior court or authority cannot possibly be regulated according to a rule of practice, derived from common law, and applicable in superior courts of inherent jurisdiction."

What this effectively means is that an appeal from an inferior tribunal without inherent jurisdiction does not suspend the decision being appealed against. An arbitrator is not a superior tribunal with inherent jurisdiction. There is no difference between an arbitrator appointed in terms of the Act and the Rent Board. As such, an appeal against the determination of an arbitrator does not suspend the decision being appealed against. This means that s 97(3) of the Act was a codification and not an alteration of the common law.

The difference between appeals under s 97(1) and those provided for elsewhere under the Act was that interim determinations under s 97(4) could only be made for appeals under s 97(1). All the appeals under the other sections would not suspend the decision being appealed against. There was no provision for interim determinations under the Act. These had to be dealt with under the common law.

Section 97 of the Act was repealed by Amendment Act No. 7 of 2005. Whereas s 97 was a specific provision dealing with specific appeals to the exclusion of others, s 92E introduced by the amendment is a general provision.

Section 92E is a general provision regulating appeals under the Act. The determination that s 92E is a general provision regulating appeals under the Act does not stem from the heading of s 92E. Section 92E(1) relates to an "appeal in terms of this Act". The words "in terms of this Act" mean that the appeal is provided for elsewhere in the Act.

Appeals under s 47 of the Act are governed in part by s 48 of the same Act. Section 47 is a specific provision. The general provision under s 92E applies to all the other appeals which do not have provisions such as ss 47 and 48. The fact that the other appeals are not governed by a specific provision shows that s 92E is a law of general application which applies to all appeals, unless specifically ousted. All the other appeals under the Act which do not have standalone provisions fall under the purview of s 92E of the Act. A comparison can be made with the old s 97(2) which made reference to "appeals under subsection (1)", which was a reference to the appeals detailed under s 97(1).

Section 89(1) of the Act provides as follows:

"89 Function, powers and jurisdiction of Labour Court

(1) The Labour Court shall exercise the following functions -

(a) hearing and determining applications and appeals in terms of this Act or any other enactment."

The Labour Court is empowered to deal with appeals in terms of the Act and those from other enactments in terms of s 89(1). Section 92E of the Act streamlines the appeals that s 89(1) governs. These appeals are not provided for under s 92E but are governed by that section, because s 92E does not contain a right to appeal.

While the old s 97 of the Act gave a right to appeal to an aggrieved party, the new s 92E does not afford the same right. Section 92E is an unbundled section which governs appeals provided for elsewhere under the Act. The wording of s 92E, unlike that of s 97, does not in any way confer upon anyone the right of appeal. All it does is to regulate appeals provided for elsewhere under the Act. These include appeals under ss 25(6), 40(5), 47, 51(3), 54(4), 61(5), 81(5), 92D and 98(10) of the Act. The argument by *Mr Mugandiwa* that s 92E does not cover appeals under s 98(10) of the Act is flawed. It is premised on the misunderstanding of s 92E as enshrining a right of appeal.

An appeal under s 98(10) is an appeal in terms of the Act. The provisions of s 92E apply also to appeals brought in terms of s 98(10).

The reliance by the appellant on the *Sagittarian (Pvt) Ltd* case *supra* is misplaced. The wording of the old s 97 of the Act and the wording of s 92E of the Act are different. The court in the *Sagittarian* case *supra* at p 119F-120B said:

> "There is little doubt that the purpose of s 97 was to set out the context in which certain specific appeals to the Labour Court were to be prosecuted. I am satisfied the Legislature did not intend subsection (4) to be given an interpretation that embraced situations falling outside of this context. Appeals filed with the Labour Court in terms of s 98 of the Act, as was the one *in casu*, clearly fell outside the context set out in s 97. It follows that the Labour Court did not have the authority to hear an application for interim relief in terms of s 97(4), pending its determination of an appeal filed in section 98. ...
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> This argument, in my view, flows from the presumption that the only interim determinations envisaged under subsection (4) of s 97 were those to do with enforcement of the order appealed against. That clearly cannot be the case. Appeals filed in terms of s 97 did not have the effect of suspending the determination appealed against. Considering, as I have found, that subsection (4) was restricted to appeals specified in s 97(1), it can be assumed that the Legislature must have envisaged other types of interim relief 'as the justice of the case requires',

for it to have framed subsection (4) of s 97 in the way it did."

It is apparent from the above exposition of the law that the old s 97 of the Act gave a right of appeal. It listed four instances where the right existed. The non-suspension of the order appealed against applied only to the appeals listed under s 97(1) of the Act, as it was then couched. An appeal against an arbitral award was not one of the appeals governed by the old s 97 of the Act. For that reason, subss (3) and (4) of s 97 did not apply to appeals against arbitral awards, which fell outside the ambit of the old s 97 of the Act.

The same reasoning was utilised in the *Net One Cellular (Pvt) Ltd* case *supra*, wherein the learned CHIEF JUSTICE found that the suspension pending appeal stipulated under s 97(3) of the Act was limited to appeals in terms of s 97.

As already noted, s 92E of the Act is not a direct replacement for the old s 97. It introduces a new concept altogether. Whereas s 97 accorded a person a right of appeal, s 92E does not confer on anyone the same right. Section 92E has unbundled the appeals provisions and the right of appeal is now derived from the various sections of the Act. Section 98(10) is one such section. It falls under the ambit of s 92E. Thus, an appeal in terms of s 98(10) is no different from the appeals under the other sections already listed above. The operation of an arbitral award is not suspended by the mere noting of an appeal by virtue of s 92E(2) of the Act.

At this point, it is pertinent to address the authorities which have fuelled the confusion.

In *Dhlodhlo* v *The Deputy Sheriff for Marondera and 3 Ors* HH 76/11 GOWORA J (as she then was) at p 10 of the cyclostyled judgment said:

> "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 92E 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."

This does not reflect the true position of the law. An appeal in terms of s 98(10) of the Act is no different from any other appeal in terms of the Act. The only difference with regards to the specific appeal under s 98(10) is that it has to raise a question of law, which is not a requirement in respect of some of the other appeals provided for under the Act.

The correct position was set out by PATEL J (as he then was) in *Baudi* v *Kenmark Builders (Pvt) Ltd* HH 4/12 at p 2 of the cyclostyled judgment. The learned Judge said:

> "It is not in dispute that an appeal to the Labour Court against the decision of an arbitrator under section 98(10) of the Labour Act [*Chapter 28:01*] does not suspend the decision appealed against. This is expressly provided by section 92E(2) of the Act in relation to every appeal to the Labour Court in terms of the Act. Nevertheless, section 92E(3) empowers the Labour Court to make any interim determination it may deem fit, *viz.* for the stay or suspension of an award, pending the determination of an appeal. It is common cause, in view of the dismissal of the respondent's application in June 2011, that the quantified award has not been suspended and is therefore presently registrable." (the underlining is for emphasis)

This position was also adopted by MAFUSIRE J in *Nyaguse and Ors* v *ZIMRA* HH 453/15.

What can stop the execution of an award appealed against is not the noting of the appeal itself in the Labour Court but the invocation of s 92E(3) of the Act. After a party has appealed against an arbitral award, he or she or it must make an application in terms of s 92E(3) to safeguard his or her or its interests.

The next question is whether or not the court *a quo* has discretion whether or not to register an award as an order of court. Section 98(14) of the Act gives the magistrates court or the High Court, as the case may be, the power to register an arbitral award, thereby conferring on it the same status as any of its orders for purposes of execution.

The noting of an appeal to the Labour Court does not affect the registration of an arbitral award. An arbitral award remains an arbitral award despite registration by the High Court or the magistrates

court in terms of s 98(14) of the Act. The application for an interim determination pending appeal also does not affect the registration of an arbitral award pending appeal. The reason is that in terms of s 92E(2) of the Act an appeal in terms of the Act does not have the effect of suspending execution of the arbitral award.

The situation is different, however, where an order suspending the execution of an arbitral award has been made by the Labour Court as an interim determination in terms of s 92E(3) of the Act. The Labour Court has the power to suspend execution of an arbitral award by an order granted in terms of s 92E(3) of the Act notwithstanding its registration.

It is important to point out that s 92E(3) of the Act does not give the Labour Court the power to suspend registration of the arbitral award. It gives the Labour Court the power to order suspension of the execution of the arbitral award. Registration is distinct from execution. It is only done for the purposes of enforcement of the arbitral award because the Labour Court structures have no enforcement mechanism. See: *Elvis Ndlovu* v *Higher Learning Centre* HB 86/2010; *Mvududu* v *Agricultural and Rural Development Authority* 2011 (2) ZLR 449 (H).

Although, strictly speaking, the High Court would be within its powers to register an arbitral award in the face of an order by the Labour Court suspending execution of the award, doing so in the circumstances would be improper. Registration of an arbitral award should not be done when it is known that execution will not take place or will be stayed.

In *Zimbabwe Open University* v *Magaramombe* SC 20/12 the CHIEF JUSTICE had this to say at p 9 of the cyclostyled judgment:

> "On 3 November 2011 the Labour Court granted the University a stay of execution of the arbitral award. The Labour Court in doing so was *intra vires* the above cited provisions of the Act. On 14 November 2011 the High Court, upon application by Magaramombe, registered the arbitral award. Upon the registration of the arbitral award, the award became a judgment of the High Court. See s 92B (3) and (4) of the Act.

> I entertain serious doubts as to whether the mere registration of the arbitral award with the High Court has the effect of erasing or rendering null and void the prior order of the Labour Court suspending execution of the arbitral award. That, however, is an issue that will be determined by the appeal court."

There are two different scenarios that may arise. The first is where the High Court goes ahead with the registration of an arbitral award for purposes of enforcement in the face of an extant order granted by the Labour Court in terms of s 92E(3) of the Act suspending the execution of the arbitral award pending determination of the appeal. The second is where there has been an application to the Labour Court for interim determination and no order has been granted by the Labour Court.

The next question relates to the form used by the respondent, the chamber application procedure for registration of arbitral awards. The court *a quo* found that the chamber application procedure was the correct procedure to adopt. The court *a quo* was correct. It relied on r 226(2)(c) of the High Court Rules. It also relied on *Friend* v *Wallman* [1946] KB 493 at p 498, wherein SOMERVILLE LJ said:

> "The word 'court' can clearly in ordinary language bear different meanings according to the context. Considering the matter apart from authority, it is obvious, for example, that the words 'an application to the "court"' may, in certain contexts, clearly mean an application in chambers. In other contexts, it might as clearly mean an application to the judge at the trial or otherwise (than) in open court."

The learned Judge continued at p 499:

> "We are, however, clear, both on authority and in principle, that there is no rigid rule which compels us to construe the word 'court' as excluding jurisdiction exercised in chambers. Regard must be had to the context and to the ordinary practice which the legislature must be assumed to know. In the first place interlocutory applications are normally made in chambers … ."

The words "High Court" in s 98(14) of the Act do not necessarily mean an open court. In the context of the High Court, they may in appropriate circumstances mean a Judge sitting in chambers. Both court applications and chamber applications in the High Court are presided over and determined by one Judge.

The court *a quo* rightly rejected the contention that an application for registration of an arbitral award had to be by a "court application" and not a "chamber application".

The Magistrates Court Act and the Rules of the civil magistrates' court do not provide for chamber applications.

DISPOSITION

The appeal is dismissed with costs.

GWAUNZA JA: I agree

MAVANGIRA AJA: I agree

Wintertons, appellant's legal practitioners

Matsikidze & Mucheche, respondent's legal practitioners