

BILTRANS SERVICES (PVT) LIMITED
v
**(1) THE MINISTER OF PUBLIC SERVICE, LABOUR AND
SOCIAL WELFARE**
(2) DICK TOGARASI MUTADZIKI
(3) DAVID CHISHIRI
(4) KUDAKWASHE KAVARE
(5) DONALDSON MAFUNDIRWA
(6) KERDIMO CHIPADZE
(7) THE SHERIFF OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC,
GOWORA JCC, HLATSHWAYO JCC, PATEL JCC,
GUVAVA JCC & UCHENA JCC
HARARE, MAY 18, 2016

T Mpofu, for the applicant

M Chimombe, for the first respondent

R Dembure, for the second to sixth respondents

No appearance for the seventh respondent

MALABA DCJ: At the end of hearing argument for both parties the court dismissed the application with no order as to costs. It was indicated at the time that reasons for the decision would follow in due course. These are they.

The applicant approached the Court in terms of s 85(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 (“the Constitution”), which provides that any person who alleges that any of the fundamental rights enshrined in Chapter IV has been infringed, may approach a court seeking an appropriate relief which a court has discretion to grant. The applicant sought an order declaring invalid ss 92E (2) and 98(14) of the Labour Act [*Cap. 28:01*],

(“the Act”) on the basis that the provisions infringe the fundamental right to equal protection of the law enshrined in s 56(1) of the Constitution. The applicant also took as an additional point that s 98(14) of the Act infringes the right to fair labour practices enshrined in s 65(1) of the Constitution.

The second to the sixth respondents were employees of the applicant until they were dismissed for misconduct. They were aggrieved by the dismissal and raised a complaint of unfair labour practice with a labour officer, claiming overtime and several other allowances that they alleged the applicant owed them. When conciliation failed to yield a settlement, the dispute was referred to compulsory arbitration. The Arbitrator found in favour of the second to the sixth respondents.

The applicant filed an appeal with the Labour Court, but failed to file heads of argument, leading to the second to the sixth respondents successfully applying to the Labour Court for dismissal of the appeal for want of prosecution. The second to sixth respondents then applied to the Arbitrator for quantification of the award. They were awarded USD\$99 882-60. They then applied to the High Court to have the arbitral award registered as an order of the High Court. The High Court granted the application for registration.

The applicant noted an appeal to the Labour Court against the quantification. In the meantime the second to sixth respondents armed with a writ of execution proceeded to attach the applicant’s property. The applicant immediately filed an application for stay of execution of the writ with the High Court. The application was dismissed. This application was then made.

Mr *Mpofu* who appeared for the applicant argued strenuously that s 92E(2) of the Act is inconsistent with Section 56(1) of the Constitution, which provides that all persons are equal before the law and have the right to equal protection and benefit of the law. It was his argument that s 92E(2) of the Act, by providing that an appeal to the Labour Court against a determination or decision did not suspend the determination appealed against, deprived the party appealing of the right to equal protection of the law. Mr *Mpofu* said it was particularly so since the winning party could then register and execute the award, before the appeal was heard by the Labour Court, thus rendering the appeal academic. Worse still, if an arbitrator ordered reinstatement, an employer would be forced to work with an employee it had already dismissed, pending the appeal.

More importantly, Mr *Mpofu* argued that s 92 E(2) does not pass the test of rationality, when it is considered that decisions of superior courts, like the High Court, are suspended by the noting of an appeal, yet arbitrators' decisions were not subject to the same limitation. According to Mr *Mpofu* the irrationality became more apparent when one took into account the fact that arbitrators, unlike Labour Court or High Court Judges, are not required at law to possess any legal qualification, yet they seemed to have *carte blanche* to adjudicate legal matters and make decisions involving large sums of money and substantial labour entitlements.

In the applicant's view, s 92E(2) of the Act, by providing that an arbitral award is not suspended by the noting of an appeal, prejudiced the party appealing. It infringes the right to equal protection of law enshrined in s 56(1) of the Constitution.

Mr *Mpofu* further submitted that s 98(14) of the Act which provides that an arbitral award may be registered with the High Court or Magistrates Court for enforcement purposes is

unconstitutional. It was his submission that s 98(14), by not providing that upon registration of an award a judge of the High Court may examine the award on the merits, deprives a party against whom the award is made of the protection of the law as enshrined in s 56(1) of the Constitution, since it reduces a High Court judge to play the role of a clerk who, as a matter of course, must routinely rubber stamp the arbitral awards. In the same vein, it robbed the High Court of judicial authority vested in it by s 162 of the Constitution. In the applicant's view, s 198(14) not only violates ss 56(1) and 162 of the Constitution, it also amounts to an unfair labour standard contrary to s 65(1) of the Constitution.

Mr *Chimombe* for the first respondent indicated that he would stand guided by the decision of the Court. Mr *Dembure* for the second to the sixth respondents argued that there was nothing unconstitutional about s 92E(2) of the Act. It was his submission that s 92E(2) should be read in conjunction with s 92E(3), which provides that the Labour Court may make an interim determination pending the determination of the appeal. Failure by a party to exploit the remedy of interim relief does not render s 92E(2) of the Act unconstitutional.

With regards to s 98(14) of the Act, Mr *Dembure* argued that the provision does not take away the High Court's authority to decline in appropriate circumstances to register the award. It could not be argued that a High Court Judge is reduced to discharging a clerical function when considering an application for registration of a determination appealed against in terms of s 98(10) of the Act. In any event, he argued, the fact that a party can oppose registration of an award means that both parties are equally protected by the law and there can thus be no question of a violation of s 56(1) of the Constitution.

The first question for determination is whether s 92 E(2) of the Act infringes or limits the right to equal protection of the law enshrined in s 56(1) of the Constitution. Secondly, whether s 98(14) of the Labour Court is also contrary to the right to equal protection of the law and perpetuates an unfair labour standard.

It is the view of the Court that neither section of the Act whose constitutional validity of which is challenged is contrary to the provisions of the Constitution referred to by the applicant.

Section 92(E) of the Act provides:

“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.”

It is clear from submissions made on its behalf that the applicant has fallen into the mistake of reading the provisions of s 92E(2) in isolation from the rest of the section. Such a piecemeal approach to the law offends against the settled rule of interpretation to the effect that legislative provisions must be read in their context, and construed with proper regard to the subject matter the instrument deals with and the object it seeks to achieve. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. A court must not in expounding a statute be guided by a single sentence or

member of a sentence. It must look to the provisions of the whole law, and to its object and policy. See *Hibbs v Winn* 542 US88 (2004) at 101.

The provisions of s 92E are all lined up and deal with the same issue, which is an appeal to the Labour Court and its effects and remedies. In essence, the provisions of the section all colour each other. It would be an error in legislative interpretation to treat s 92E(2) as though it existed in isolation, unaffected by the provisions surrounding it. While Section 92E(2) provides that an appeal against a determination shall not suspend the determination appealed against, equally important is s 92E (3) which empowers the Labour Court, pending the determination of the appeal, to make such interim measures as the justice of the case requires.

The net effect is clear. The Legislature clearly sought to protect the interests of both parties. Section 92E (2) protects the winning party by ensuring that the losing party does not initiate frivolous appeals merely to delay complying with the award, which a losing party may be tempted to do if an appeal suspended the award. Conversely, s 92E(3), provides a safety net for the losing party, by permitting such party, once it has noted an appeal to the Labour Court, to make an application for an interim measure pending the appeal. Such interim measures would take the form of an application for stay of execution or any other appropriate relief to ensure that the judgment appealed against is not executed before the Labour Court has determined the appeal. In *Standard Chartered Bank of Zimbabwe Ltd v Muganhu* 2005(1) ZLR 43(S) it is stated that:

“The object of an interim determination made under s 97(4) of the Act is to give a party in whose favour the determination appealed against was made an interim right which he would otherwise not have because of the noting of the appeal. It may also be to grant the party against whom the judgment was made temporary relief from the burden of the obligation imposed by the determination which he would otherwise not have because of the appeal.” (emphasis added)

(Section 97(4)) was repealed by s 34 of Act 7 of 2005 but the provision on interim measures pending appeal was retained under s 92E(3) of the Act.

The argument that s 92E (2) violates the right to equal protection of the law cannot stand, when the Act clearly provides remedies that protect the interests of both parties. Section 92E(2) has the effect of protecting the rights of the party in whose favour the determination or decision was given whilst the party against whom the determination or decision was given exercises his or her right of appeal. As a way of providing protection of the rights of the appellant in the event of a successful appeal, s 92E(3) gives such a party an opportunity to secure from the Labour Court an interim determination suspending the execution of the decision appealed against. The Labour Court is in a position to strike a balance between the competing interests of the parties. Both parties have equal opportunity to present their case to the court. Provision for an interim determination made by the Labour Court if the justice of the case requires is an important protective remedy for securing a determination by an independent party.

The applicant had the right to appeal to the Labour Court and at the same time apply for stay of execution pending finalisation of the appeal. The facts show that the applicant chose not to exercise the right to apply for an interim determination. It merely noted an appeal to the Labour Court. It sought to act to protect its rights when its property was attached in execution. The applicant is before the Court not because there is no remedy provided by the law for the protection of its rights or that the remedy is an inadequate protection. It is here because for reasons known to itself it failed to take advantage of the remedy designed for the protection of its rights.

When a party fails to utilise a remedy provided by the law for the protection of its rights it cannot seek refuge from the underlying constitutional provision. It must first show why the remedy provided for the protection of its rights by a statute is not an effective remedy. Failure to invoke a remedy designed for the protection of a right does not give rise to a question of violation of the fundamental right to equal protection of the law.

The submission that “unskilled arbitrators”, as Mr *Mpofu* described them, have *carte blanche* to issue awards which are not suspended by an appeal, is self-serving and cannot be sustained. The Act has enough safeguards to ensure that erroneous decisions are not carried to execution. Not only can the Labour Court, upon application in terms of s 92E (3), suspend a determination by the Arbitrator, his or her decision would be appealable to the Labour Court itself in terms of s 98(10) of the Act. The matter may go up to the Supreme Court on appeal from the decision of the Labour Court in terms of s 92F(1) of the Act.

The Court turns to consider the contention that s 98(14) of the Act is unconstitutional. Section 98(14) provides for the administrative process of registration of an arbitral award which would have been granted by the Arbitrator. It provides as follows:

“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.”

In registering an arbitral award the High Court and the Magistrates Court are not carrying out a mere clerical function. While the registering Court may not go into the merits of the award, since its duty is to provide an enforcement mechanism and not to usurp the powers of

the Labour Court, it must be satisfied before registering an award that all the necessary formalities have been complied with. In *Vasco Olympio & 4 Ors v Shomet Industrial Development* HH-191-12, CHIWESHE JP at p1 of the cyclostyled judgment, outlining the requirements for registering an arbitral award, stated:

“The purpose of registration is merely to facilitate the enforcement of such an order through the mechanism availed to the High Court or the magistrate court, namely the office of the Deputy Sheriff or the messenger of court, respectively... In an application such as the present one, this court is not required to look at the merits of the award. All that is required of this court is that it must satisfy itself that the award was granted by a competent arbitrator, that the award sounds in money, that the award is still extant and has not been set aside on review or appeal and that the litigants are the parties, the subject of the arbitral award. There must also be furnished, a certificate given under the hand of arbitrator.”

The requirements that must be satisfied before the High Court or the Magistrates Court grants an application for registration of an award are:

- a) The award must have been granted by a competent arbitrator.
- b) The award must sound in money.
- c) The award is still extant and has not been set aside on review or appeal.
- d) The litigants are the parties to the award.
- e) The award must be certified as an award of the arbitrator.

The process of registration of an arbitral award is closely connected to the remedy provided for under s 92E(3) of the Act. It is the decision relating to the arbitral award which would be the subject of appeal to the Labour Court. An application for registration of an arbitral award presupposes that there is no application made to or pending before the Labour Court for an interim order suspending the execution of the decision appealed against. A party cannot submit for registration an arbitral award he or she knows or ought to know is subject to an interim determination suspending its execution pending appeal. The High Court or Magistrates' Court

would be required to take into account the fact that there is at the time of entertaining the application for registration no application pending before the Labour Court for an interim determination suspending the execution of the decision appealed against.

The High Court and the Magistrates Court would be exercising a judicial function in carrying out the inquiry before registering the award. The inquiry the Court has to undertake and the factors it has to consider are meant to define the content and scope of the right to equal protection of the law. They guarantee the right to equal protection of the law through judicial process.

As counsel for the second to the sixth respondents correctly submitted, registration is not a foregone conclusion and a party against whom the award is made can successfully oppose the registration of an arbitral award if it does not comply with the requirements for registration.

The right to oppose the application means that the parties are equal before the law. The situation would be different if the losing party was prohibited by the law from opposing registration of the arbitral award. Failure by a party in its opposition does not render the process unconstitutional.

The application is devoid of merit and was therefore dismissed.

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

UCHENA JCC: I agree

Messrs Coghlan Welsh and Guest, applicant's legal practitioners

Civil Division of the Attorney General's Office, 1st respondent's legal practitioners

Messrs Mabulala and Dembure, 2nd to 6th respondent's legal practitioners