ZIMBABWE EDUCATIONAL, SCIENTIFIC, SOCIAL AND CULTURAL WORKERS UNION

v

WELFARE EDUCATIONAL INSTITUTIONS EMPLOYERS ASSOCIATION

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GOWORA JA
HARARE, JUNE 5, 2012 & FEBRUARY 26, 2013

T Mpofu, for the appellant
F Nyakabau, for the respondent

MALABA DCJ: At the end of hearing argument for both parties the court allowed the appeal with costs. It was indicated at the time that reasons for the decision would follow in due course. These are they.

On 29 September 2010, the Labour Court allowed an appeal by the respondent from a voluntary arbitration award on the ground that the arbitrators had seriously misdirected themselves.

The appellant and the respondent are, in the welfare and educational industry. They are members of the National Employment Council for Welfare and Educational Institutions. The appellant is the registered Trade Union representing the interests of workers whilst the respondent represents the interests of the employer institutions. The parties were unable to reach an agreement in a collective bargaining over minimum wages and allowances payable to employees in the undertaking for the period 1 May to 31 August 2009. They

agreed to submit the dispute to arbitration. An arbitration agreement signed by the parties included clause 8 which provides that:

> "8. The award issued by the Arbitrator(s) shall be final and binding on the parties and shall form an intergral part of the Collective Bargaining Agreement for the Welfare and Educational Institutions – except Independent Hospitals and International and Local Humanitarian NGOs".

According to the arbitration agreement the arbitrators were to be chosen by the parties. The two arbitrators were appointed. They inquired into the matter of dispute between the parties and on 19 June 2009 handed down their award. The respondent was dissatisfied with the award. It noted an appeal on 30 June 2009. On 10 July an application for review of the award was made to the same court. The respondent applied for an interim order suspending the implementation of the arbitral award pending the outcome of the appeal. The application was granted.

The appellant raised a point *in limine* to the effect that voluntary arbitration proceedings are not appealable. The learned President of the Labour Court held that the court a quo had jurisdiction to hear the application for review and the appeal. Taking the view that the matter could not be decided on technicalities, she allowed the appeal. It is against that decision that the appellant has appealed to this Court.

The particulars of the grounds of appeal were stated as follows:

"1. That the judgment appealed is grossly irregular to the extent that whilst the parties were heard *in limine* and the court retired to consider the points *in limine,* the judgment grants substantive relief on the issues and sets no basis for such relief.

2. The court *a quo* further erred in assuming jurisdiction in respect of a matter which was a subject of voluntary arbitration proceedings and so erred in exercising a power which it does not have under the Labour Act.

3. The court *a quo* further erred in entertaining a matter in respect of which the agreement referring it to arbitration indicated that the award by the arbitrators would be final and binding and would not be appealable. It so erred in dealing with such a matter notwithstanding absence of proof that the arbitrators had departed from the strict standard of honour in making their award."

There is no doubt that the procedure adopted by the respondent in the court *a quo* was irregular. Neither the Labour Act [Cap. 20:28] or the Arbitration Act [Cap. 7:15] has any provision granting a litigant in voluntary arbitration proceedings a right of appeal against an arbitral award granted in those proceedings. Both statutes do not provide for the remedy of an application for review of such an arbitral award to the Labour Court. The respondent sought to rely on ss 89 (1) and 89(1)(d1) of the Labour Act [*Cap. 20:28*].

Section 89(1) of the Labour Court provides:

"89 Functions, 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; and
(b) hearing and determining matters referred to it by the Minister in terms of this Act; and
(c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
(*d*) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application;
(*d*1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;
(*e*) doing such other things as may be assigned to it in terms of this Act or any other enactment."

There was confusion on whether the court dealt with an appeal or review. Mrs *Nyakabau* for the respondent believed it was an appeal. The confusion arose from the fact that the judgment of the court *a quo* at one point refers to the same person as the appellant

and the applicant. In the end the judgment says that "the appeal therefore succeeds". One is left wondering whether the court is dealing with an appeal or an application for review.

The question for determination is therefore whether s 89 provides for the hearing of an appeal from a voluntary arbitration award. The words "in terms of this Act or any other enactment" limit the powers of the exercise of the functions of hearing and determining to grounds raised in an application and appeal made or noted in the exercise of a right given under the Act or any other enactment. There should be a provision in the Act or any other enactment giving the party the right to make the application or note the appeal to the Labour Court before it can exercise the power to hear and determine the matter as an application or appeal.

The Labour Court has the power to hear and determine an appeal from a compulsory arbitration award because the appeal would have been noted in accordance with the right of appeal given by s 98(10) of the Act. The Labour Court would be exercising the power of hearing and determining an appeal validly placed before it in the exercise of a right of appeal given by the Act. A right to appeal is a statutory right which must be created by the statute by which a court is established or by any other enactment.

In *NRZ v Zimbabwe Railway Artisans' Union & Ors* 2005(1) ZLR 341 (S) ZIYAMBI JA at 346F-347D said:

> "There is, I think, judging from the cases which have come before us, a misconception generally held by the Labour Court, namely, that it is, in terms of s 89 of the Act, endowed with jurisdiction to entertain all applications brought before it.....Thus before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of the Act or any other enactment. This necessarily means that the Act or the other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring; see *PTC v Chizema* S-108-04...thus the application and the remedies

> obtainable thereby must be authorised in the Act...nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court *a quo*..."

The observation made in respect of applications having to have been made in terms of rights given by the Act or any other enactment applies to appeals. An application or appeal to a court or tribunal is a remedy which exists because there is a statutory right to use it to seek relief. For the court to exercise the right to review a decision of the Arbitrator as provided by S 89(1) (d)(1) there has to be a valid application for review in terms of the Act or any other enactment as provided by s 89(1).

Consistent with the meaning of s 98(1)(a) of the Act, s 98(10) provides that an appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed to hear and determine a dispute referred to him or her for compulsory arbitration. The fact that s 98(10) of the Act gives a limited right to appeal on a question of law underscores the fact that a right of appeal is a statutory creation and its ambit will depend on the terms of the statute creating it.

If the words "in terms of this Act..." as used in s 89(1)(a) of the Act did not mean an appeal noted in the exercise of a right of appeal under the provisions of the Act s 98(10) would have no bearing on the question of the validity of the exercise of the power to hear and determine an appeal from a decision of an arbitrator in compulsory arbitration proceedings. The provisions of s 98(10) become relevant in the determination of the question of the validity of the hearing and determination of the appeal because in terms of the provision there is no right of appeal against a decision of an arbitrator in compulsory arbitration proceedings on a question of fact.

Voluntary arbitration proceedings cannot thus be subjected to either an appeal or review under the Labour Act. Voluntary Arbitration proceedings are governed by the Arbitration Act. In *McKelvey v Abrahams* & *Anor* 1989 (2) ZLR 251 (SC) GUBBAY CJ at 264C-D said:

> "The object of arbitration, as expressed in para 13 of the Schedule to the Act, is to arrive at an award that is final and binding on the parties. Thus an award is not subject to appeal. It may be set aside on any of the four grounds. First, that it does not fall under para 13 as not being "made in terms of the Submission". Second, if the arbitrator has misconducted the proceedings, as envisaged in s12 (2) of the Act. Third, where it has been improperly procured (vide the same subsection). Fourth, where the arbitrator's mistake is so gross and manifest that it could not have made without some degree of misconduct."

see *McKenzie NO v Basha* 1951 (3) SA 783 (N) at 786A-B.

The parties agreed that the award would be final. The award would not be final if any of the parties had a right to appeal. In *Ropa v Reosmart Investments* (Pvt) *Ltd & Anor* 2006 (2) ZLR 283 (S) GWAUNZA JA at 286B-C said:

> "In addition to this, I found to be persuasive the submission made for the respondent, that the effect of the arbitral award is to bring to finality the dispute between the parties. The respondent relied for this submission on the following passage set out in *Butler and Finsen* "Arbitration in South Africa; Law & Practice" at p 271:
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> > "The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end; the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award, unless the arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become *res judicata* and neither party may reopen those issues in a fresh arbitration or court action".
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> This position applies with equal force in Zimbabwe."

See also *Monticello (Pvt) Ltd v Edgerton* 1981 ZLR 292 (GD).

It is trite that where parties make submissions to arbitration on the terms that they choose their own arbitrator(s), formulate their own terms of reference to bind the arbitrator and agree that the award will be final and binding on them, the court of law will

proceed on the basis that the parties have chosen their own procedure and that there should not be any interference with the results. See *Zesa* v *Maposa* 1999(2) ZLR 452(SC). Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The standard is high.

What public policy entails has been subject to judicial comment. In *ZESA v Maposa* it was held that:

> "An award would be contrary to public policy if –
>
> (a) It was induced by fraud or corruption;
>
> (b) A breach of natural justice occurred. The substantive effect of an award may also make it contrary to public policy, if, for example, it endorsed the break up of a marriage or some criminal act.
>
> It was held, further, that the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequences apply where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned."

The Arbitration Act is clear that the only court that has jurisdiction in those limited circumstances is the High Court, not the Labour Court, and expressly grants jurisdiction to the High Court. Article 34 of the Model Law provides recourse against voluntary arbitration awards. It provides as follows:

"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the *High Court* only if—

(a) The party making the application furnishes proof that—

(i) A party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of *Zimbabwe*; or

(ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(b) The *High Court* finds, that—

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of *Zimbabwe*; or

(ii) The award is in conflict with the public policy of *Zimbabwe*.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The *High Court*, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(5) *For the avoidance of doubt, and without limiting the generality of paragraph* (*2*) (*b*) (*ii*) *of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if—*

(a) The making of the award was induced or effected by fraud or corruption; or

(b) Breach of the rules of natural justice occurred in connection with the making of the award."

It is clear that the court *a quo* did not have jurisdiction to entertain the appeal and application for review of the award made in voluntary arbitration proceedings.

For these reasons the appeal was allowed and the following order given:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following order.
3. "Both the appeal and application for review are dismissed with costs."

ZIYAMBI JA: I agree

GOWORA JA: I agree

Messers Gonese & Majome, appellant's legal practitioners

Messers Gill Godlonton & Gerrans, respondent's legal practitioners