

**DISTRIBUTABLE (6)**

**ZIMROCK INTERNATIONAL (PRIVATE) LIMITED**

v

**TRISH KABUBI**

**SUPREME COURT OF ZIMBABWE**

**ZIYAMBI JA, GARWE JA, GUVAVA JA**

**HARARE, SEPTEMBER 12, 2013 & FEBRUARY 2, 2017**

*T Magwaliba*, for the appellant

*S Bhebhe*, for the respondent

**GUVAVA JA:** This is an appeal against the judgment of the Labour Court delivered on 17 March 2010.

The facts which gave rise to this matter are these.

The appellant is a company established in accordance with the laws of Zimbabwe. The respondent was employed by the appellant as the managing director's personal assistant. On 27 February 2009 the respondent was suspended from duty. She was charged with "any act inconsistent with the fulfilment of the express or implied terms or conditions of her contract" in terms of the Labour (National Employment Code of Conduct) SI 15/2006. It was alleged that she had incited fellow employees to embark on a strike without following the proper procedures. She was also alleged to have written letters to Board members of the appellant in which she made unfounded allegations against the Managing Director. After a disciplinary hearing, she was found guilty of misconduct and

was dismissed from employment. She approached the Ministry of Labour for conciliation and a certificate of no settlement was issued by the labour officer when the parties failed to agree. The matter was referred to arbitration and heard on the 24 June 2009. The arbitrator, after considering written submissions, held that the respondent's dismissal was unfair and ordered her reinstatement and, if no longer possible, appellant pay damages *in lieu* of reinstatement. On 16 April 2010, the appellant appealed to the Labour Court against the Arbitral award. The respondent raised a point *in limine*. She submitted that the appellant had approached the Court with dirty hands because it had not complied with the award it was appealing against. The Labour court upheld the point *in limine* and struck the matter off the roll. Aggrieved by this decision, the appellant approached this court on the following grounds:

1. That the Court *a quo* misdirected itself on a question of law by making a finding that section 92E (2) applies to appeals noted in terms of section 98 (10) of the Labour Act [*Chapter 28:01*]
2. That the court *a quo* misdirected itself, on a question of law, by finding that the appellant was approaching the court with dirty hands and could not therefore be heard until it had purged the alleged contempt of court.

At the hearing of this appeal counsel for the appellant stated that the only issue before the court was whether or not the court *a quo* erred in upholding the point *in limine*.

In my view while the appeal may be disposed of by dealing with this point alone the 1<sup>st</sup> ground of appeal requires some comment.

It was the appellant's contention that s 92E (2) does not apply to appeals to the Labour Court against Arbitral awards. It submitted that those appeals are made in terms of s

98 (10) and in such appeals only questions of law may be raised. In essence, the appellants sought to distinguish an appeal in terms of s 98 (10) of the Act from all other appeals provided for in terms of s 92E. The question that arises from this submission is whether or not s 92 E of the Labour Act [*Chapter 28:01*] gives a right of appeal.

It states:

- “(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”

In my view, a careful reading of the section does not confer a right of appeal but instead, merely regulates appeals made in terms of the Labour Act. The rights with regard to appeals in the Act stem from sections such as s 92D, s 47, s 40 as well as s 98 (10) of the Act among others. These are the appeals that do not suspend the operation of the decision appealed against in terms of s 92E (2). Section 92E merely envisages that there is a right somewhere in the Act and seeks to regulate that right. It does not confer any right of appeal.

The appellant sought to rely on the case of *Net One Cellular (Pvt) Ltd vs Net One Employees and Anor* 2005 (1) ZLR 275 in which the Chief Justice held at pg 282 that the noting of an appeal suspended the execution of the decision of the Arbitrator pending the determination of the appeal by the Labour Court. However, this decision is not applicable to the current matter. The decision was made prior to the repeal of Section 97 of the Act which set out the circumstances in which the noting of an appeal did not suspend the decision appealed against. Thus the learned Chief Justice in that case noted that the only

circumstances in terms of the Act where the noting of an appeal does not suspend a determination in a labour dispute are in terms of s 97 of the labour Act. That section did not provide for an appeal against an arbitral award. He was relying on the repealed s 97 which stated as follows:

“(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.”

The distinct feature of the repealed s 97 was that it was confined to appeals envisaged in its subpara (1). It is clear that an appeal against an arbitral award was not covered by that section. Section 92E cured the apparent *lacuna* in s 97 and provided for appeals in terms of the Act which covers appeals against arbitral awards. In this regard, the

case of *Sagitarian (Private) Limited t/a ABC Auctions vs Workers Committee of the Sagitarian (Private) Ltd* 2006 (1) ZLR 115 (S) which the appellant sought to rely on is distinguishable and cannot be applied to the circumstances of this case.

In this case, s 92E (2) is applicable. The High Court however has added to the confusion by giving different interpretations to this provision. There are some cases which have held that the noting of an appeal suspends the operation of an arbitral award. Such cases include *Dhlodhlo vs Deputy Sheriff of Marondera & Ors* 2011 (1) ZLR 416(H), *Mvududu vs Agricultural and Development Authority (ARDA)* 2011 (2) ZLR 440 (H), among others. Others have held that the noting of an appeal does not have the effect of suspending the operation of an arbitral award. Such cases include the cases of *Baudi vs Kenmark Builders (Pvt) Ltd* HH-4-12 and *DHL International Ltd vs Madzikanda* 2010 (1) ZLR 201(H) and *Bhala vs Lowveld Rhino Trust* HH-263-13 as well as *Nyaguse and Ors vs Zimbabwe Revenue Authority* HH-453-15.

I respectfully disagree with the decision in the *Dhlodhlo* case cited above because it seems to suggest that there is no provision in the Act regarding the suspension of an arbitral award pending appeal yet s 92E (2) clearly relates to appeals in terms of the Act. An appeal against an arbitral award is in terms of the Act. I also disagree with the line of reasoning in the *Mvududu* case because it relied on the *Sagitarian* decision that I have already indicated was decided before the repeal of s 97. These decisions seem to have been predicated upon the misconception that s 92E provides a right of appeal.

I wish to associate myself with the remarks by PATEL J (as he then was), in the case of *Gaylord Baudi vs Kenmark Builders (supra)* in which he interpreted the provision at pp 3-4 as follows:

“As I have already stated, section 92E (2) of the Labour Act expressly provides that an appeal against an award in terms of section 98(10) shall not operate to suspend the award. Section 92E (3) enables the Labour Court to suspend or stay an award upon application by the aggrieved party. Where no such application is made or where it is dismissed, subsections (14) and (15) of section 98 entitle the successful party to apply for the registration and enforcement of the award. Parliament has obviously applied its mind to the delays inherent in the appeal process and considered the policy implications of the general common law rule which automatically suspends a decision that is appealed against. It has consciously and deliberately decided that arbitral awards in the realm of labour relations should be enforced, despite any pending appeal and notwithstanding any inconvenience that such enforcement might entail. In this context, it would be very difficult to hold that what is specifically provided for and allowed by statute should be regarded as being contrary to public policy. Any such approach would simply operate to frustrate and defeat the clear intention of Parliament.”

The same conclusion was reached in the case of *Kingdom Bank Workers' Committee vs Kingdom Bank Financial Holdings 2012 (1) ZLR 93(H) at 99 E-F* in which the Court concluded that an appeal against an arbitral award under s 98(10) is an appeal in terms of the Act within the meaning of s 92E and, therefore, does not have the effect of suspending the award appealed against. These decisions are consistent with my findings that s 92E in itself does not provide a right of appeal but regulates appeals in terms of the Act and therefore s 98 (10) is also regulated by s 92E. The mere noting of an appeal cannot be said to suspend the operation of the award appealed against. I am fortified in my view by the recent Supreme Court decision in the matter between *CFI Retail (Pvt) Ltd vs Manyika SC 8/16*, in which MALABA DCJ made the following remarks:

“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 an 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 the 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”

It is clear from the above *dictum* that the common law position does not apply where the statute provides that the noting of an appeal does not suspend the execution of the decision of the arbitrator. In this respect I am inclined to agree with the court *a quo* that the mere noting of an appeal does not suspend the operation of the arbitrator's decision in terms of s 92E(2).

I turn now to address the issue of dirty hands that was raised by the respondent. Her legal practitioners relied on the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd vs Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 in which the court said at 548 B-C:

“This court is a court of law, and as such, cannot connive at all or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination of the court, in the absence of an explanation as to why this course was not followed, the inference of disdain of the law becomes inescapable”

This decision, in my view, cannot be applied to the instant case. It seems to me that the respondent as well as the court *a quo* misconceived the import of the dirty hands doctrine in relation to arbitral awards. For an arbitral award to be legally binding, it has to be registered in terms of the Act. Section 98 (14) of the Labour Act 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 *CFI Retail (Private) Limited (supra)* MALABA DCJ stated:

“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 premises, the court *a quo* erred in upholding the point *in limine*.

In the result, the appeal must be allowed and I make the following order:

1. The appeal is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“The point *in limine* is hereby dismissed”

3. The matter be and is hereby remitted to the court *a quo* for a determination of the matter on the merits.

**ZIYAMBI JA:** I agree

**GARWE JA:** I agree

*Wintertons*, appellant’s legal practitioners

*Kantor & Immerman*, respondent’s legal practitioners