

BRIDGE SPAR
and
ARUNDEL SPAR
versus
ISAAC TEMBO
and
JOSPHENE USHEWOKUNZE
and
MARY MAPOSA
and
SYDNEY ZUNZANYIKA
and
ELPHAS SAYI
and
HERBERT CHAZIYA
and
CHAMUNORWA MADZONGERA
and
NIELD T TOMBO

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 18 February 2016 & 27 September 2017

Civil Appeal

G. Madoka, for the appellants
S. Banda, for the respondents

NDEWERE J: On 15 December, 2014 the respondents, who were the applicants in the court *a quo*, filed an application to register an arbitral award in terms of s 98 (14) of the Labour Act, [*Chapter 28:01*].

The face of the application was written “chamber application for Registration of an Arbitral Award”. The face of the application cited the Commercial Workers Union of Zimbabwe as the applicant’s representatives. Thereafter, one of the applicants, Isaac Tembo, deposed to the founding affidavit and the 7 others filed supporting affidavits, associating themselves with the contents of the founding affidavit by Isaac Tembo. Attached to the

founding affidavit was the 12 November, 2014 Arbitral award itself for a total of US\$9 288-00, being the aggregate of the notice pay to the applicants.

On 6 January, 2015 the respondents filed an opposing affidavit. They submitted that the application for registration of the award was improperly before the court because the Commercial Workers Union, not being legal practitioners, had no right of audience. They also said the applicants had adopted a wrong procedure by approaching the court by way of a chamber application instead of a court application. They further said the applicants had omitted to attach the original award and the arbitration agreement. The last reason for opposing the application for registration given by the applicant was that there was an appeal pending before the Labour Court and this appeal had the effect of suspending the operation of the award.

The application was determined on the basis of the papers filed of record. After going through the submissions made in the documents filed the magistrate granted the court application for registration of the award on 7 January, 2015.

The appellants noted an appeal against this decision on 9 January, 2015. Their grounds of appeal were as follows:

- ‘1. That the learned magistrate grossly erred in entertaining an application that had been prepared, signed and filed by a Trade Union and an unregistered person in breach of the provisions of s 9 of the Legal Practitioner Act [*Chapter 27:07*].
2. That the Honourable Court erred in accepting and hearing the chamber application for the registration of the arbitral award which had been made in breach of the provisions of s 98 (14) of the Labour Act [*Chapter 28:01*] which obliged the respondents to make a court application instead of a chamber application.
3. The Honourable Court grossly misdirected itself in law in granting an application that did not comply with the mandatory provisions of the Arbitration Act [*Chapter 7:15* in particular Article 33 of the Model Law Schedule to s 2 of the Arbitration Act.
4. The Honourable Court fell into error and misdirected itself in granting the registration of an arbitral award whose operation had been suspended by the noting of an appeal to the Labour Court under case no. LC/H/549/14.

The appellants prayer was for the setting aside of the court *a quo*'s decision and its substitution with an order dismissing the respondents' application.

As regards ground one of appeal, s 92 of the Labour Act, [*Chapter 28:01*], provides as follows:

“A party to a matter before the Labour Court may appear in person or be represented and appear by –

- (a) A Legal Practitioner Act [*Chapter 27:07*]; or
- (b) An official or employee of a registered trade union or employers’ organisation of which the party is a member.”

This matter started off before an arbitrator where parties could be represented by a Trade Union. Thereafter, the matter went on appeal to the Labour Court and in terms of the above section, the Trade Union was allowed to represent the parties. The matter was then referred to the Magistrates’ Court for registration only. It could not have been the intention of the legislature to allow a Union to represent its member at the Labour Court and then forbid the Union to prepare registration papers in order to have the award registered. I say “prepare registration papers” because in essence, that is all the Union did. The actual appearance before the court was by the parties themselves through their individual affidavits which they signed. The Union did not depose to the affidavits on their behalf.

In the case of *Ndabezinhle Mkwanzani and Thokozile Mkwanzani v Angelus Mkwanzani and Assistant Master of the High Court* HB 125/06 referred to by the appellants, NDOU J, at p 5 of the cyclostyled judgment had this to say;

“Generally, it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.....This is a general proposition, but it is not a hard and fast rule universally applicable, if however, the court is satisfied in a particular case that the legislature did not intend to render the act invalid, it would not be justified in holding that it is.....”

The present case is a good example where the legislature could not have intended the registration of the arbitral award to become void and of no effect simply because a Trade Union which lawfully represented the respondents before the arbitrator and the Labour Court, did the registration paperwork and submitted the papers for registration of the award in the Magistrates Court. In our view, such involvement of the Trade Union was not fatal to the registration of the award. Accordingly, we find that the first ground of appeal has no merit.

The second ground of appeal was to the effect that the application was made in breach of the provisions of s 98 (14) of the Labour Act which obliged the respondents to make a court application instead of a chamber application.

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.”

It is common cause that the application for registration was determined by the Magistrate’s Court and not by a magistrate in chambers. It was filed on notice to the appellants’, served on them and indeed, they opposed and filed Heads of Argument before a determination was made. So the above section was fully complied with. The mere fact of erroneously labelling it “chamber application” on its face does not negate the actual procedure which was adopted by the respondents. This ground therefore has no merit.

Ground of appeal three alleged that the application did not comply with the mandatory provisions of Article 35 of the Model Law Schedule to s 2 of the Arbitration Act.

The appellant, in its Heads of Argument appears to have abandoned grounds 2, 3 and 4. Their Heads of Argument focus on the issue of representation by the Union only. In para 16 of their Heads of Argument, they actually refer to a point *in limine* instead of points *in limine*. It would have been prudent for the appellants to concede their error on the other three grounds of appeal if they finally decided to argue the appeal on the basis of just the first ground of appeal.

We however, note that ground of appeal 3 also has no merit because the respondents attached the arbitral proceedings and the arbitral award to their application, in compliance with the mandatory provisions referred to above.

Ground of appeal 4 had no merit because of the provisions of s 92 E (2) of the Labour Act, [*Chapter 28:01*] which provide as follows:

“92 E (2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.”

This means the appeal to the Labour Court did not suspend the arbitral award; hence the application to register the award was properly granted.

Accordingly, the appeal is dismissed with costs.

CHITAKUNYE J: I concur

Wintertons, appellant's legal practitioners