KINGDOM BANK WORKERS COMMITTEE
versus
KINGDOM BANK FINANCIAL HOLDINGS

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 6 September 2011 and 10 January 2012

M. Nkomo, for the applicant
H. Zhou, for the respondent

PATEL J: The issues herein arise from the implementation of a 2010 collective bargaining agreement in the banking sector. The dispute between the parties relates to the increments payable to the applicant's members. The dispute was referred to an arbitrator who made an award on 25 June 2010 in favour of the applicant, holding the respondent guilty of an unfair labour practice and ordering it to pay the sum of US$491,645.

The applicant now seeks the registration of the award. It also seeks an order for the payment of the sum awarded, and an order for the attachment and execution of the respondent's property in the event of non-payment.

On 5 July 2010, the respondent filed an appeal-cum-review of the award before the Labour Court, on the grounds of bias and gross irrationality. The Labour Court dismissed both the appeal and review on 14 March 2011. Its decision was then appealed to the Supreme Court on 7 June 2011 in Case No. SC 118/2011.

The respondent contends that the registration of the award is premature, as it will render its appeal academic and cause irreparable prejudice to the respondent if the award were to be enforced. The applicant counters that the noting of the appeal does not suspend the award and that it is entitled to register and enforce the award, unless and until the respondent takes appropriate steps to stay its execution.

The Submissions

At the hearing of this matter, counsel were directed to address three specific issues: the grounds upon which this Court may exercise its discretion to decline registration of an award in terms of section 98 of the Labour Act [*Chapter 28:01*]; whether the remedies sought by the applicant beyond registration are competent under section 98; and whether the noting of the appeal to the Supreme Court has the effect of suspending the award.

Adv. *Zhou* submits that any violation of acceptable notions of elementary justice is contrary to public policy and an award that violates such notions is unenforceable. See *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S); *Pamire & Others* v *Dumbutshena N.O. & Another* 2001 (1) ZLR 123 (H). The award *in casu* was outrageous and grossly irrational for several reasons. Firstly, the arbitrator made the award before determining the legality of the collective bargaining agreement of 17 February 2010 upon which it was premised. Secondly, the increments claimed by the applicant had already been paid to its members before that date, and the arbitrator arrived at the sum awarded without any proper quantification having been done. Lastly, the effect of the award is to irreparably stress the financial position of the respondent without regard to its financial resources and ability to pay, thereby defeating the mutually beneficial structure of the employer-employee relationship. See *Tel-One (Pvt) Ltd* v *Communication & Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 at 266. Mr. *Nkomo* accepts that registration of the award may be declined if it is found to be untenable on the ground of public policy, *viz.* gross irrationality. However, there is nothing irrational in the arbitrator's decision. The sum awarded represented the arithmetical computation of the amounts owed to the applicant's members. Moreover, the figures were drawn from the applicant's statement of claim and those figures were not challenged by the respondent. The latter then accepted that an oral hearing was not necessary and the arbitrator proceeded to determine the matter on the papers.

Both counsel accepted, quite correctly in my view, that any relief beyond registration is not competent under subsections (14) and (15) of section 98 of the Labour Act. Mr. *Nkomo* accordingly withdrew the relief sought by the applicant in paragraphs 2 and 3 of the draft order.

As regards the suspension of decisions appealed against, Mr. *Nkomo* maintains that the effect of section 92E of the Labour Act is all-inclusive. Any appeal in terms of the Act, including one to the Supreme Court under section 92F, does not suspend the decision that is appealed against. Adv. *Zhou* submits that the effect of an appeal to the Supreme Court is to suspend not only the decision of the Labour Court but also the arbitral award upheld by that court. He relies in this respect on the decisions in *Net One Cellular (Pvt) Ltd* v *Net One Employees & Another* 2005 (1) ZLR 275 (S) at 282B, and in *Dhlodhlo* v *Deputy Sheriff for Marondera & Others* HH 76-2011 at pp. 10-11.

Relevant Appeal Provisions

The relevant provisions of the Labour Act governing appeals are contained in sections 92E and 92F. They provide as follows:

> "92E Appeals to the Labour Court generally
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> (1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.
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> (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."

> "92F Appeals against decisions of Labour Court
>
> (1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.
>
> (2) Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the President who made the decision leave to appeal that decision.
>
> (3) If the President refuses leave to appeal in terms of subsection (2), the party may seek leave from the judge of the Supreme Court to appeal."

Suspension of Arbitral Awards

As regards the *Net One Cellular* case, *supra*, the most important point to note is that the appeal provisions of the Labour Act at the time that this case was determined were radically different from those currently in force. At that time, appeals to the Labour Court were governed by section 97 of the Labour Act. Section 97(1) listed the specific determinations and conduct appealable to the Labour Court. Section 97(2) provided that any such appeal could address the merits of the decision appealed against and/or seek a review of that decision. Section 97(3) then declared that an appeal would not have the effect of suspending the decision in question. The salient distinctive feature of section 97 is that it was confined to the appeals specifically enumerated in subsection (1). Appeals against arbitral awards were not covered and were therefore subject to the general common law rule suspending any decision appealed against.

Section 97 was repealed in its entirety by Act No. 7 of 2005 and replaced by the present section 92E which is significantly broader in its scope of coverage. Having regard to these amendments, it is reasonably clear that the decision of the Supreme Court in the *Net One Cellular* case, *supra*, insofar as it pertains to the suspension of arbitral awards on appeal, has been superseded by legislative intervention. In any event, that decision is distinguishable on its facts which involved an award that had already been registered by this Court.

The decision of this Court in *Dhlodhlo's* case, *supra*, is more recent and impacts directly on the prevailing appeal provisions of the Labour Act. Gowora J (as she was then) noted the existence of section 92E(3) but held that there was no equivalent provision in relation to the decision of an arbitrator. Consequently, she concluded that an arbitral award, being in the domain of public law, continues to be regulated by the common law principle that an appeal against a judgment operates to suspend it. With great respect, I am constrained to disagree with that conclusion.

Section 98 regulates references to compulsory arbitration under Parts XI and XII of the Labour Act. Section 98(10) provides that:

> "An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

Section 92E(1) is very broadly framed to encompass appeals in terms of this Act. The ambit of appeals which do not suspend the decisions appealed against is now considerably wider than the category of appeals delineated under the repealed section 97. It is abundantly clear that Parliament intended to modify the common law position generally. It is equally clear that an appeal against an arbitrator's decision under section 98(10) is an appeal in terms of the Act. I fully agree with Mr. *Nkomo* that the provisions of section 92E are unambiguous and unequivocal in their scope and effect. Subject to what follows later in this judgment, they apply to every appeal in terms of the Act, including an appeal under section 98(10), and they operate to pre-empt and preclude the suspension of the decision appealed against. The common law presumption against the operation and enforceability of judgments appealed against has been explicitly ousted by section 92E in the case of arbitral awards rendered under section 98.

Contrary to Adv. *Zhou's* contentions in this regard, I do not think that the appeals envisaged in sections 92E(1) and 98(10) are materially different. Section 92E(1) simply makes it clear that an appeal to the Labour Court may address the merits of the decision appealed against, in addition to any question of law, while an appeal under section 98(10) is confined to questions of law. However, that does not render any such appeal one that is not in terms of the Act. Moreover, although section 98 is a special provision dealing specifically with compulsory arbitration, that does not necessarily suffice to invoke the maxim *generalia specialibus non derogant* so as to exclude the operation of section 92E, particularly as the latter is a later provision, endowed with the benefit of the maxim *lex posterior priori derogat*.

The golden rule of statutory interpretation dictates that the words of a statute must be given their ordinary grammatical meaning unless to do so

would lead to an absurdity. I see no absurdity whatsoever in construing section 92E to embrace appeals against arbitral awards under section 98(10). Moreover, , to use the words of Lord Halsbury LC in *Bank of England* v *Vaghani* [1891] AC 107 at 120, cited in *PTC* v *Mahachi* 1997 (2) ZLR 71 (H) at 75, it is very clear to me that the presumption against any alteration of the common law has been excluded by the irresistible clarity of the provisions under consideration. In the premises, I am amply satisfied that an appeal against an award under section 98(10) is an appeal in terms of the Act within the meaning of section 92E and, as such, it does not have the effect of suspending the award in question.

Suspension of Labour Court Decisions

Section 92F of the Labour Act provides for appeals to the Supreme Court from decisions of the Labour Court, albeit only on questions of law. Mr. *Nkomo* submits that section 92E is categorical in its application to any and every appeal in terms of the Act, including one from the Labour Court to the Supreme Court. Consequently, the appeal against the Labour Court's decision *in casu* does not suspend that decision or preclude the registration of the arbitral award upheld by it. Adv. *Zhou* persists with his reliance on the *Net One Cellular* case, *supra*, to challenge the enforceability of the award. However, as I have already explained, that decision is distinguishable on its facts and, in any event, it has been superseded by the legislative amendments to the appeal provisions of the Act. Moreover, I find it extremely difficult to grasp and digest Adv. *Zhou's* contention that an appeal to the Supreme Court is made in terms of the Rules of that Court and not in terms of the Labour Act.

The heading of section 92F reads "Appeals against decisions of Labour Court" and differs from the heading of section 92E which reads "Appeals to the Labour Court generally". Does the wording of these headings impinge on the ambit of section 92E in order to answer the question whether an appeal under section 92F is an appeal in terms of the Act within the contemplation of section 92E?

It is necessary in this context to have regard to the relevant provisions of the Interpretation Act [*Chapter 1:01*]. Section 7 of the Act is particularly germane to the question at hand. It states that:

> "In an enactment—
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> (*a*) headings and marginal notes and other marginal references therein to other enactments; and
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> (*b*) notes, tables, indexes and explanatory references inserted therein as part of any compilation or revision in terms of the Statute Law Compilation and Revision Act [*Chapter 1:03*];
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> shall form no part of the enactment and shall be deemed to have been inserted for convenience of reference only."

Section 2(1) of the Interpretation Act spells out its general scope of application, while section 2(2) provides as follows:

> "Nothing in this Act shall exclude the application to any enactment of any rule of construction applicable thereto and not inconsistent with this Act."

The traditional common law rule of statutory interpretation is that a heading does not form part of the operative provision. See *R* v *Hare* [1934] 1 KB 354, at 355. However, the context of the provision under scrutiny may dictate otherwise. The modern tendency is to accept that, while headings cannot control the plain words of a statute, they may be regarded as preambles in order to explain ambiguous provisions or words in the statute. See *Maxwell on Interpretation of Statutes* (11th ed.) at pp. 48-49.

The approach adopted by Bennion: *Statutory Interpretation* (1984) at p. 590, goes significantly further. The learned author accepts that the plain literal meaning of the words in a statute cannot be overridden purely by reason of a heading. However, he takes the view that, in accordance with the informed interpretation rule, modern judges consider it not only their right but their duty to take account of headings. He accordingly opines that:

> "A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached."

I must confess that I find this robust approach very attractive, particularly if one accepts that the entire statute is passed by Parliament, including headings inserted for reference purposes. Be that as it may, it is difficult to reconcile it fully with the provisions of section 7 of the Interpretation Act. In contrast, the flexible approach as to the significance of headings propounded in *Maxwell*, *supra*, is not in any way inconsistent with that section. I therefore take the view that it may be legitimately adopted and applied in conformity with section 2(2) of the Interpretation Act.

Turning to section 92E of the Labour Act, the language of subsections (1) and (2) evidently encompasses every appeal made in terms of the Act, including one from the Labour Court to the Supreme Court. However, subsection (3) of section 92E appears to be limited to the interlocutory powers of the Labour Court in relation to appeals pending before it. This would indicate that the appeals referred to in subsections (1) and (2) of that section are also appeals before the Labour Court, as distinct from appeals before the Supreme Court. It seems to me that this apparent ambiguity can only be resolved by having regard to the context of sections 92E and 92F.

In my view, there are two features that have a direct bearing on the contextual setting of these two provisions. The first is that the latter immediately follows the former. The second is that they were both introduced and inserted at the same time by section 32 of Act No. 7 of 2005. Given these factors of their juxtaposition and the contemporaneity of their enactment, it seems virtually impossible to disregard their headings. Taking those headings into account, it becomes clear that section 92E is confined to appeals made to the Labour Court generally, while section 92F deals specifically with appeals against decisions of the Labour Court to the Supreme Court. It follows that the two provisions must be interpreted and applied separately and independently from one another. I am fortified in differentiating them in this manner by dint of the fundamental hierarchical distinction between the two courts. The Supreme Court is a constitutionally established court of general appellate jurisdiction, while the Labour Court is creature of statute with

limited jurisdiction in the sphere of labour relations only. In the premises, I am inclined to hold that an appeal under section 92F is not an appeal "in terms of this Act" for the purposes of section 92E. Consequently, an appeal from a decision of the Labour Court to the Supreme Court would, in accordance with the general common law rule, operate to suspend that decision, subject to the right of the successful party to apply for execution pending appeal.

Disposition

In light of the foregoing construction of the relationship between sections 92E and 92F, the answer to the question posed at the outset must be answered in the affirmative. Thus, the appeal to the Supreme Court by the respondent against the decision of the Labour Court, upholding the arbitrator's award *in casu*, operates to suspend that decision as well as the award. It follows that the present application for the registration of the award under section 98(14) and (15) of the Labour Act is premature and cannot be granted at this stage. The applicant must await the outcome of the respondent's appeal to the Supreme Court.

In the circumstances, I do not deem it necessary to consider the remaining question as to whether or not the award is so grossly irrational or so violative of elementary notions of justice as to be unenforceable on the ground that it is contrary to public policy. This is an aspect that will presumably be fully canvassed and determined in the pending appeal.

As regards costs, it seems to me that this is a proper case for not applying the general rule of costs following the cause. The principal issue raised herein is one of appreciable public importance with respect to which the law was not clearly settled. In the result, the application is dismissed, with each party bearing its own costs.

Donsa-Nkomo & Mutangi Legal Practice, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners