CMED PRIVATE LIMITED
versus
KENNETH MAPHOSA
and
SHERIFF OF ZIMBABWE N.O
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 2 December 2014, 5 December 2014 and 18 February 2015

Urgent Chamber Application

M Kamdefwere, for the applicant
W Chinamhora, for the 1st respondent

CHIGUMBA J: "The power of the lawyer is in the uncertainty of the law." [1] The law is subject to interpretation, especially where it is not clear. Ordinary members of the public are usually not trained in the art of interpreting the law. They rely on the legal practitioners of their choice who practice this skill on a regular basis. On 1 December 2014, an application for stay of execution was placed before me via the urgent chamber book. A preliminary perusal of the interim relief being sought revealed that the applicant was petitioning the court to order the sheriff of Zimbabwe to withdraw the notice of seizure and attachment and the notice of removal in case number HC 7533/13 which had been served on the applicant on 28 November 2014. Removal was due to take place on 3 December 2014.

[1] Jeremy Bentham:

The applicant was also seeking an order that execution of the writ in that case be stayed. The terms of the final order sought were similar to those of the interim relief sought, the only distinction being the addition of the words "permanently stayed", to the terms of the final order. A reading of the applicant's founding affidavit revealed that the writ of execution which the applicant was seeking to stay had been issued pursuant to the registration of an order of the Labour Court for purposes of execution by this court.

The question that immediately came to my mind was whether, by virtue of having registered an order of the Labour Court for purposes of execution, this court had supplanted, or usurped, all and any other powers that the Labour Court had, to deal with this matter? In my mind, the answer was an unequivocal NO. Legal practitioners, have, with regrettable intransigence, ignored the relevant law, at their own and their client's peril, or actively exploited this seemingly grey area, for a very long time. While it is correct that the High Court has inherent power to regulate its own process, there is nothing in the High Court Act [*Chapter 7: 06*] or the High Court Rules 1971, which justifies usurping the powers of the Labour Court, in those instances where the Labour Act [*Chapter 28:01*] provides a suitable viable, and satisfactory remedy. It is my view that the mere registration of Labour Court orders by this court, for purposes of execution, does not automatically remove labour matters from the realm of the Labour Act[*Chapter 28:01*], and thrust them under the auspices of this court's inherent jurisdiction. The time has come for the Legislature to take away the power of lawyers to exploit this apparent uncertainty in the law. In my view the solution is simple. Give the Labour Court its own enforcement mechanism.

Mr *Oliver Chirongoma* deposed to the founding affidavit on behalf of the applicant. He averred that the first respondent was a former employee of the applicant, who after protracted litigation in the Labour Court registered his Labour Court judgment as an order of this court for purposes of execution. On registration of the order of the Labour Court order, this court issued a writ of execution in February 2014, for recovery of US$46 800-00 in damages, as well as costs of suit on a higher scale, and interest at the prescribed rate. Further sums were due in respect of back pay due to the first respondent from as far back as August 2005 to December 2008, January 2009 to July 2009, fuel allowances, cafeteria, telephone housing and school fees allowances. All

in all, the applicant owed the first respondent US$38 814-50 for back pay, US$46 800-00 in damages, and US$45 646-04 for interest, a total of USD$131 261-43 as at the first of October 2014.

In the founding affidavit, the applicant averred that the first respondent has a tax liability of US$65 204-34, to the third respondent, the Zimbabwe Revenue Authority (ZIMRA), in terms of the Income Tax Act [*Chapter 23:06*] and the Finance Act [*Chapter 23: 04*]. It was averred further, that the first respondent had been advised of its obligation to the third respondent by the applicant, in a letter to him dated 22 October 2014. The applicant waxed lyrical about how it was obliged to deduct relevant taxes from earnings and remit them to the third respondent, failing which the third respondent would be entitled to pursue the applicant for payment of the taxes by way of criminal prosecution. Paragraph 9 of the applicant's founding affidavit contains the curious averment that the applicant has no other relief save the order prayed for, and will suffer irreparable loss and harm should execution proceed.

A certificate of urgency signed by *Tarisai Mutangi* of Messrs Donsa-Nkomo & Mutangi legal practitioners, accompanied the founding affidavit. In that certificate, the matter was certified as urgent for the reason that the second respondent, the sheriff, had attached and intended to remove in execution, five motor vehicles and a set of leather sofas belonging to the applicant, and that removal of this property was due to take place on 3 December 2014. Mr *Mutangi* alluded to the fact that the sum of US$32 000-00 which was intended to be recovered by the first respondent was a sum which was due and owing to the third respondent for taxes, and that such sum was not recoverable from the applicant, by the first respondent. The first respondent was accused of using a 'coercive' method of recovering money which was not due to him, that of attaching the applicant's property and threatening to have it sold in execution.

Finally, I was asked to stay execution of the writ pending determination of whether or not the first respondent is entitled to proceed with execution. If the applicant had applied its mind to the pertinent question of which court would then have to adjudicate on this dispute of what the first respondent was entitled to recover or not recover, it would have been guided accordingly in terms of which court to approach for relief. As it is, the applicant adopted the pedantic approach

that, just because the writ of execution was issued by this court, the only remedy available to it lay with this court.

The question that arose for determination before me was whether the applicant had any other suitable and satisfactory alternative remedy available to it, in which case it could not be heard by this court on an urgent basis. My preliminary view was that the applicant had other suitable and satisfactory remedies in terms of the Labour Act, and that consequently, the requirements of urgency had not been met. I proceeded to endorse the face of the application with the words "not urgent". On 3 December 2014, a letter addressed to my assistant was served in chambers by counsel for the applicants. In the letter, the legal practitioners proceeded to advise my assistant that they were not happy with the endorsement of lack of urgency, because they had not been heard in oral argument. They attached a set of heads of arguments, and in their letter instructed my assistant to place the matter for hearing before another judge or before me, whichever appeared expedient. The legal practitioners, in their wisdom, advised my assistant that "the application is therefore urgent on the basis that nothing short of an order of this honorable court will stop the sheriff's scheduled removal of the attached goods".

Aside from the ethical considerations of addressing my assistant directly on questions of law, or of having a matter that had been heard and determined by one judge placed before another judge for re-hearing, and the attendant procedural irregularities that are implied by such a course of action, the implied lack of knowledge of the Labour Act and its attendant remedies persuaded me to revisit my preliminary view, and to set the application down for oral arguments on the question of whether the requirements of urgency had been met. I was fortified in this view by Order 32 r 244 of the High Court Rules 1971 which gives judges the discretion to invite interested parties to make representations on the question of urgency. Further I was guided by the persuasive authority, of the dicta in the case of *Church of the province of Central Africa* v *Diocesan Trustees, Diocese of Harare* [2] where this court said the following:

[2] 2010 (1) ZLR 346 @ 347 G-H to 348A-B

> "…while normally a court does not have jurisdiction to interfere with its own judgments because, in relation thereto, it is functus officio, it does have such jurisdiction over orders made in interlocutory and procedural matters…The endorsement that the matter is not urgent was made on a consideration of the papers without hearing any oral argument by the parties. It was the *prima facie* view of the matter as regards the issue of urgency. This court cannot be functus officio in such circumstances. Had the parties been heard orally and a determination made thereafter, such determination would be consequent upon full ventilation by the parties on the pertinent issue. In my view, the court would then become *functus officio*".

The first respondent filed an opposing affidavit, on 3 December 2014. He attached a copy of the deed of settlement entered into by the parties, dated 2 July 2014. In terms of that deed, the parties agreed that a sum of US$163 346-73 would be paid to the first respondent by the applicant, in four tranches, from 2 July 2014 up to 1 October 2014. After hearing both applicant and first respondent, on 5 December 2014, it was ordered that the requirements of urgency had not been met, that the applicant had other satisfactory remedies in terms of the Labour Act, and that the matter be struck off the urgent chamber book with costs on an ordinary scale. On the same date, the applicant's legal practitioners addressed a letter to me in which they requested that I supply them with written reasons for finding that the matter was not urgent, as they intended to appeal against that finding.

In order to save time, I instructed my assistant to telephone the applicant's legal practitioners and advise them to comply with the provisions of s 43 of the High Court Act. I have now been served with a chamber application for leave to appeal, by the applicants. In considering this application, I came to the considered view that it was necessary to elucidate the reasons why I held the view that the requirements of urgency had not been met in the application for stay of execution. The same reasons would be of assistance in the determination of whether leave to appeal should be given to the applicants. I will deal with the requirements of urgency first, then address the question of whether leave to appeal should be granted.

The test for urgency is settled. It is so settled as to be cast in stone. One wonders why legal practitioners continue to grapple with the requirements of urgency, and why they continue to ill advice their clients, resulting in a waste of the court's time and a corresponding waste of resources.

It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules".

See [3].

It has also been held that:

> *"*For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…"

See [4] And[5], [6]

In my view, which I previously expressed in the case of *Finwood Investments Private Limited & Anor* v *Tetrad Investment Bank Limited & Anor* [7], in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met:

A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.

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[3] Kuvarega V Registrar General and Anor 1998 (1) ZLR 189

[4] Mathias Madzivanzira & @ Ors v Dexprint Investments Private Limited & Anor HH145-2002"

[5] Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare 2010 (1) ZLR 364(H

[6] Williams v Kroutz Investments Pvt Ltd & Ors HB 25-06, Lucas Mafu & Ors V Solusi University HB 53-07

[7] An unreported HH-2014 case. See also Denenga v Ecobank HH 177-14

(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.

(c) There is *prima facie* evidence that the applicant treated the matter as urgent.

(d) The applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) There is no satisfactory alternative remedy.

The need to act arose for the first time when the writ of execution was issued and the applicant's goods were attached in execution. The parties in their wisdom then decided to enter into a deed of settlement on 8 July 2014. The applicant agreed to pay the first respondent the sum of US$163 346-73 in total. It is not clear how that sum is calculated, from the face of the deed of settlement. The terms of the deed of settlement do not mention the applicant's tax obligations to ZIMRA. It is clear that the order of the Labour Court that was registered with this court for purposes of execution is silent on the parties' tax obligations to the third respondent. Despite all this, the applicant expressly agreed to pay the full sum of US$163 346-73 to the first respondent by 1 October 2014. When it failed to do so, the first respondent caused more property to be attached pursuant to its writ of execution. To find that the need to act then arose in December 2014, just because execution was imminent is in my view not the sort of urgency that is contemplated by the law.

The writ of execution attached as Annexure 'A' to the urgent chamber application shows clearly that there was no mention of taxes in the calculation of the first respondent's dues by the Labour Court. The question that arises is, what is the appropriate remedy available to an applicant in these circumstances. The parties agreed to pay each other in tranches way back in July 2014 when the need to act first arose. The applicant waited until 22 October 2014, well after the fourth and last tranche of payment that had been agreed was due, and wrote a letter to the first respondent advising it of its tax liability. No satisfactory or reasonable explanation was proffered by the applicant as to:

(a) The reason why the deed of settlement between the parties signed in July 2014 did not address the issue of the parties' liability to the third respondent.

(b) The applicant waited three months from July to October to raise the issue of tax obligations with the first respondent.

The applicant did not treat the question of its tax obligations to the third respondent as warranting urgent address. It did not apply its mind to this question when the deed of settlement was signed in July. To have the audacity to approach the court via the urgent chamber book and demand that other litigants wait while it is heard, does not cure the failure to act when the need to act arose. The first respondent caused the applicant's goods to be attached on 28 November 2014. The attachment and imminent removal of the applicant's goods did not create urgency. There was deliberate failure to act when the need to act arose in July 2014 by failing to address the issue of tax obligations in the agreement between the parties. Raising that issue now, at the eleventh hour, when removal in execution is imminent, for the second time, does not place the applicant within the ambit of the requirements of urgency.

One of the requirements of urgency is that there be no satisfactory alternative remedy. It was submitted on behalf of the applicants that no remedies lie in the Labour Court because the award was registered as an order of this court, and reliance was placed on the case of *University of Zimbabwe* v *Jirira & Ors*[8] as authority for this proposition. That case provides an interesting discussion of the issues on both sides of the divide. The first thing to note is that in this case, I did not decline jurisdiction to hear the applicants. I made a finding that the requirements of urgency had not been met, more specifically that the applicant failed to act when the real to act arose, and that the applicant had failed to establish the requirement that there be no suitable alternative remedy available to an applicant who comes on a certificate of urgency. It was my view that the Labour Act provided a suitable and satisfactory remedy in the circumstances of this case.

The second distinguishing factor is that, in *Jirira's* case, the applicant had filed an appeal to the Labour Court against the arbitral award, which appeal was pending before the Labour Court, whereas in this case no evidence was placed before me of whether the applicant had approached the Labour Court at all for determination of the question of applicant's tax

[8] SC 6-2013

liability to ZIMRA, more particularly whether, in light of the deed of settlement of July 2014, the applicant's tax liability ought to be deducted from the amount that the applicant expressly agreed to pay to the first respondent.

It is my considered view that the appeal to the Supreme Court has no merit and is not likely to succeed. I am fortified in this view by the litany of distinguishing factors between the circumstances of this case which is under consideration and those that were before the trial Judge in *Jirira's case.* The most obvious difference, as previously stated, is that no evidence was placed before this court, that an appeal had been filed with the Labour Court, so some of the legal issues that arose in *Jirira's Case,* will not be applicable here. The question that arose before the Judge of Appeal in chambers on appeal against the finding of the trial judge in Jirira's case was that it was submitted on behalf of the applicants that the learned judge erred in declining jurisdiction and refusing to consider the merits of the application for a stay of execution since the arbitral award became an order of the High Court upon registration in that court and was suspended pending the appeals which were before the Labour Court. It was submitted that in the circumstances only the High Court could entertain an application for stay of execution of the award. The case of *Net One Cellular (Pvt) Ltd* v *Net One Employees & Anor* 2005 (1) ZLR 275 (S), was relied on.

The argument proffered by the respondents before the Judge of Appeal was that an appeal against an arbitrator's award is an appeal in terms of the Labour Act, and is not suspended pending appeal. They referred the Judge of Appeal to *Zimphosphate* v *Matora & Ors* SC 44/2005. The decision in the *Net One Cellular* case (*supra),* they argued, was given prior to the introduction of s 92E of the Act and in *Zimbabwe Open University* v *Gideon Magaramombe* & *Deputy Sheriff Harare N.O SC 20/12* it was decided that it was within the Labour Court's powers to suspend the execution of an arbitral award. Accordingly, it was argued on behalf of the respondents that the applicant ought to have proceeded, in terms of s 92E(3) of the Act, to apply to the Labour Court for a stay of execution pending appeal which it failed to do.

It was submitted, that there appears to be a divergence of legal authority on the question as to whether or not, on a proper consideration of s 92E and s 98(10) of the Labour Act, it can

be concluded that appeals on points of law from an arbitrator's decision in terms of s 98(10) would operate to suspend the execution of the judgment appealed against. The following cases were cited in support of this submission: *Nyasha* v *Dodhill SC 28/09, Net One Cellular* (*supra), Tel One (Pvt) Ltd* v *Communication & Allied Services Workers' Union of Zimbabwe* 2007 (2) ZLR 262 (H). As previously stated, it is this court's considered view that it cannot be bound by the Supreme Court decision because the circumstances of this case are substantially and materially different from those brought before the Supreme Court, on appeal in *Jirira's* case. In this case, I made a finding that the requirements of urgency had not been met because the applicant has other suitable alternative remedies before the Labour Court. I had in mind specifically the provisions of section 92C of the Labour Act which provide that the Labour Court may, on application, rescind or vary any determination or order.

The applicant could make a case for the Labour Court to re-visit its award and vary it, in terms of s 92 C (1) (b) , on the basis that it was obtained by a mistake common to both parties . Neither party saw fit to petition the Labour Court to explicitly determine the extent of the tax obligation and to make a finding as to whether the amount of tax due could legally be deducted from the award in favor of the first respondent. On application to it in terms of s 92 C(1) (b), the Labour Court would have power, in terms of s 92 C (3) (b), to suspend the operation of its order pending the application for variation, and on such terms as to security for the due performance of its order or variation thereof, as it saw fit. It is important to note that the provisions of s 92 C must be invoked on notice to all parties, and that the Labour Court cannot exercise any of the powers conferred on it by s 92 C (1) in respect of any determination or order which is the subject of a pending appeal or review.

In *Jirira's Case*[9] , this is what the Judge of Appeal, sitting alone in chambers, had to say:

> "I granted the application at the end of the hearing because I was of the view that, the award having become an order of the High Court upon registration by that court, the court *a quo* misdirected itself in holding that it did not possess the jurisdiction to grant the order sought. **It may be that a bench of three Judges of the Supreme Court may come to a different conclusion but the very fact of a divergence of positions on this issue of law** is what causes me to conclude that the applicant has established a *prima facie* right entitling it to the order sought…". (my emphasis)

[9] @p4

Clearly, there was a grey area in the circumstances of *Jirira's* case. In my view, there is no similar grey area in the circumstances of the case before me. It was suggested that a bench of three judges of the Supreme Court settle the issue conclusively. This case does not fall within the ambit of the legal principles on which *Jirira's Case* turned. Having said that, I hesitate to decline to give the applicants an opportunity to test the legal principles on which this case was decided by way of an appeal to the Supreme Court. Although I hold the view that the applicant's appeal has no prospects of success in the circumstances of this case, I am persuaded to grant the applicants leave to appeal, by the prospect of presenting an opportunity for the divergence of positions on these issues of the law to be ventilated. For these reasons, and in the interests of justice, the application for leave to appeal is granted, with costs to remain in the cause.

Messrs Muringi & Kamdefwere, applicant's legal practitioners
Messrs Mufuka & Associates, 1st respondent's legal practitioners