

NELSON DZIRUTWE  
versus  
DAIRIBOARD ZIMBABWE LIMITED  
and  
ADDITIONAL SHERIFF MUTARE

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 25 and 26 November 2014 and 4 February 2015

### **Urgent Chamber Application**

*T. Zhuwarara*, for the applicant  
*A.K. Maguchu*, for the respondent

BHUNU J: This is an urgent chamber application in which the applicant seeks a provisional order staying execution of a default judgment issued against him under case number HC 8062/10. The applicant and the first respondent have a long standing dispute that was determined through arbitration but has now spilled to the High Court, the Labour Court and the Supreme Court.

The applicant was employed by the respondent as a Human Resources Officer responsible for Chipinge and Mutare. He approached the labour officer complaining of under payment and constructive dismissal. The Labour Officer in turn referred the matter for determination by compulsory arbitration in terms of s 93 (5) (a) of the Labour Act [*Cap. 28:01*]. The issues referred for determination were framed as follows:

1. Whether employee was underpaid and was not paid productivity incentive for the quarter two of 2010 and the remedy thereof.
2. Whether there is an element of constructive dismissal when the employee tendered his resignation.

The matter went before the independent arbitrator Mr. Mutongoreni who issued the following arbitral award on 18 November 2010

“Wherefore after hearing this case, I make the following order:

1. That the employee was underpaid and he must be paid a total of \$38 295 as underpayment during the period 1999 to 31 August 2010.
2. That the employee was not paid productivity incentive for quarter two and three and hence must be paid the same totalling \$3 273.04
3. There was constructive dismissal when the employee tendered his resignation letter and he must be reinstated on his job without loss of salary and benefits and if reinstatement is no longer tenable he be paid damages amounting to \$41 040.
4. That in total he be paid \$82 608.04.
5. That the employee be allowed to purchase the vehicle he was using in terms of the company policy.
6. That he be allowed to stay in the company house and in an event (*sic*) that the employer found reinstatement no longer tenable he only vacate (*sic*) after at least half of his benefits are paid.”

There being no compliance with the above order the applicant sought to enforce the arbitral award by registering it in the High Court for enforcement in terms of the Act. The first respondent’s Corporate services Director one M.N. Ndawona responded through an undated letter offering the respondent reinstatement. The letter reads:

“Dear Mr. Dzirutwe,

Re:- DAIRIBORD ZIMBABWE LIMITED & YOURSELF

We are informed by our lawyers that you have filed an application with the High Court alleging Dairibord Zimbabwe Limited’s non-compliance with the arbitral award.

There was clearly a failure in our communication channels. We instructed our lawyers back in 2010 that since the termination was never instigated by us and since the Arbitrator gave reinstatement as an alternative you will be reinstated to your old position. We are not too certain how this was not done.

Kindly note that we have opted for reinstatement as afforded by the Arbitrator. You must report to the office of the Human Resources Manager Harare within five days of

this letter. You should liaise with the Chipinge dairy for your fuel requirements for this trip. Please ensure that you bring the car allocated to you for inspection. In view of the accident it was involved in and for a general assessment.

We welcome you back and look forward to a good working relationship of course subject to the legal challenges.

Signed.

M.N. NDAWONA

CORPORATE SERVICES DIRECTOR.”

Despite having written to the applicant advising him that it had complied with the Arbitral award by reinstating the applicant, the respondent nevertheless appealed against the award to the Labour Court and ultimately to the Supreme Court. While the matter was still pending on appeal it applied in the Magistrates Court for an order to evict the applicant and reclaim the motor vehicle in dispute. In its application the respondent did not disclose that the dispute was the subject of litigation on appeal and that the applicant had already obtained a lawful binding arbitral award authorising him to stay in the house and retain the motor vehicle as specified in the arbitral award.

The respondent's claim however failed in the Magistrates Court and it launched the same claim in the High Court under case number HC 8602/10. In the High Court the respondent again did not disclose that the applicant had received an arbitral award reinstating him without loss of salary and benefits. More importantly it did not disclose that it had in terms of the above letter agreed to reinstate him. Despite the above non disclosures the respondent managed to obtain default judgment against the applicant in case number HC 8062/10.

In my view, in light of the above concerns, the ends of justice can only be met by maintaining the *status quo ante* until such time the applicant's application for rescission of judgment has been determined by the court. Doing otherwise will cause irretrievable prejudice should the applicant succeed in the High Court and ultimately on appeal. The balance of convenience therefore favours the applicant.

The matter is undoubtedly urgent as the applicant and his family are in danger of being thrown into the streets in circumstances where he has an arguable case both in this court and on appeal. Although the provisional order sought is similar to the final order it is plain that the two are not identical. Unlike the final order the interim order seeks to restore

possession in the event that it might have been temporarily lost before judgment in this matter. There is therefore no merit in the preliminary points raised by the respondent.

For the foregoing reasons the application can only succeed. It is accordingly ordered that a provisional order be and is hereby granted in terms of the draft order filed of record.

*Chambati, Mataka & Makonese Attorneys At Law*, applicant's legal practitioners  
*Dube, Manikai & Hwacha*, respondent's legal practitioners