IN THE LABOUR COURT OF ZIMBABWE **JUDGMENT NO LC/H/43/14**

HELD AT HARARE 1ST NOVEMBER 2013 **CASE NO LC/H/540/13**

& 31ST JANUARY 2014

In the matter between:-

CITY OF HARARE **Applicant**

And

PETROS G CHAMISA **Respondent**

Before The Honourable R.F. Manyangadze, Judge

For Applicant **Mrs R.P. Chimhenga (Principal Legal Officer)**

For Respondent **Mr J Bamu (Zimbabwe Lawyers for Human Rights)**

MANYANGADZE, J:

This is an application for stay of execution. It emanates from an arbitral award dated the 3rd of June 2013, in which it was ruled that a collective job action in which Respondent participated was lawful, and as a consequence of which Applicant was ordered to reinstate Respondent without loss of salary or benefits.

Respondent was employed by the Applicant as a Heavy Vehicle Driver. Sometime in May 2012, Respondent took part in a collective job action, as a consequence of which he was charged with misconduct in terms of the applicable Municipal Code of Conduct and was dismissed from employment.

Applying section 104 (4) of the Labour Act [Chapter 28:01] the Arbitrator ruled that the collective job action was not unlawful, and ordered Respondent's reinstatement.

The Applicant filed an appeal against the arbitral award on the 17th of July 2013, which appeal is still pending. The noting of the appeal was followed by filing of this application on the 30th of July 2013.

The two basic elements in an application of this nature are prospects of success and prejudice.

Applicant avers that it has strong prospects of success on appeal. The Arbitrator erred in finding that the collective job action was lawful in terms of section 104 (4) of the Act. Applicant's argument is that the occupational hazard in question did not pose an immediate danger or threat to the health or safety of the persons concerned. The Respondent, for about 6 months, was moving in and out of the Crusher Station without protective clothing. Furthermore, Respondent was not permanently stationed at the Crusher Station, where there was the threat of an occupational hazard.

It seems to me Applicant is treading on rather thin ground here. It can be argued that since the site is a designated "hard hat" area requiring protective clothing, exposure thereto would be potentially harmful.

The two elements referred to however, must be looked at together. In some cases, the requirement of prospects of success can be so decisive that the application for stay of execution can be granted or refused on that basis alone. In other cases, the aspect of potential prejudice, should the contested award be executed, can become a decisive factor.

On this other aspect, ie potential prejudice, it is the Respondent who is treading on thin ground. Counsel for the Respondent recognised this difficulty, and made an unusual proposal. The proposal was some kind of middle of the road, compromise approach. In terms of this, Respondent would be paid his salary and benefits from the date of the order on this application, to the date of the determination of the appeal, whilst any payments prior to this date would remain suspended. This is a cumbersome arrangement, which simply goes to show that the Respondent had no meaningful submissions to make on the likelihood of prejudice to the Applicant resulting from execution of the award. Respondent is in essence saying that he would be unable to restore the *status quo ante.*

Given the respective difficulties seen in each party's case in this application, the best course of action would be to allow Respondent to execute only after the appeal is disposed of in his favour. The Applicant would then be required to pay him any outstanding salaries and benefits, something it should be able to do. Respondent, who would be out of employment, would be unable to reimburse Applicant should the appeal decision go against him after he has executed.

In adopting this approach, I am persuaded by the case cited by the Applicant, of **Ndlovu v Zimbabwe Grain Bag** HC 1039/02, where it was stated *inter alia* that

> *"it is the practice of these courts to allow litigation to run to its full turn before allowing a party to execute on a judgment, which is still the subject of further litigation between the parties."*

This of course must be understood to be a general approach, all pertinent factors having been taken into account. In the instant case, I do not think that there should be a departure from the general practice.

In the circumstances, it is ordered that;

1. The application for stay of execution pending appeal be and is hereby granted.
2. Costs shall be in the cause.

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MANYANGADZE J