

DISTRIBUTABLE (3)

UNIVERSITY OF ZIMBABWE
v
(1) KWANELE MURIEL JIRIRA (2) LOUIS MASUKO (3)
THE DEPUTY SHERIFF,
HARARE N.O.

**SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 20, & JANUARY 10, 2013**

T Mpofo with *T Ndoro*, for the applicant

E Kadzere with *M Mandevere*, for the respondents

Before, **ZIYAMBI JA**, in chambers in terms of r 5 of the Supreme Court Rules.

The applicant sought an order interdicting the respondents from levying execution on its property pending an appeal against an order of the High Court refusing it a stay of execution. The matter was brought before me as an urgent application.

The respondents, who are former employees of the applicant, were dismissed by the latter for misconduct. The arbitrator to whom the dispute was referred found that the respondents had been unlawfully dismissed and ordered their reinstatement. Following a failure by the applicant to reinstate them, the respondents sought quantification

of the award by the arbitrator who granted them sums totalling approximately US\$308 000. The respondents caused the order to be registered in the High Court and commenced the process of execution. The applicant's property was attached and scheduled for removal and sale. Both the arbitral award and the quantification thereof were, at that time, the subject of appeals before the Labour Court.

The High Court found, firstly, that it had no jurisdiction to grant the order sought since the matter was on appeal before the Labour Court to which the applicant should have made an application to suspend execution of the order. Secondly, that the applicants ought to have exhausted their domestic remedies before approaching it.

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. In the circumstances only the High Court could entertain an application for stay of execution of the award. See *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S).

The respondents however argued that an appeal against an arbitrator's award is an appeal in terms of the Labour Act [Cap 28:01] ("the Act") and is not suspended pending appeal. They referred me 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, 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 the High Court was correct in holding that it lacked jurisdiction to grant the order on the basis that the matter was now before the Labour Court in terms of s 92E. They submitted that the application before me was not urgent, that the applicant had been lax in safeguarding its rights, and that this application constituted an abuse of process.

As Mr *Mpofu* submitted, 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 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. See for example *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)*. Divergent positions, he submitted, create uncertainty.

He submitted that once the order was registered as an order of the High Court, execution was suspended and leave of the High Court was required to execute the judgment pending the determination of the appeals. Accordingly, the execution against the applicant's property was unlawful, having been undertaken without leave of the High Court. Although by the time of the hearing of this application, the appeals before the Labour Court had been dismissed, the applicant had applied for leave to appeal to the Supreme Court in terms of s 92F of the Act.

Further, it was submitted that the sheer magnitude of the arbitrator's award the execution of which could cause the shutdown of the University was *prima facie* evidence of unreasonableness and it was within the power of this Court to act in terms of s 25 of the Supreme Court Act [Cap7:13] and review the award of the arbitrator. A warrant of execution had already been issued and the entire library of the University as well as all its vehicles have been attached and are awaiting removal for sale by the Deputy Sheriff. The respondents, it was submitted, would not be prejudiced by the grant of the order sought and the balance of convenience favoured the applicant.

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. The balance of convenience favours the applicant and a refusal to grant the order would have rendered the appeal academic.

As to the invitation to act in terms of s 25 of the Supreme Court Act, as well as the submission that the arbitrator's award is *prima facie* unreasonable it was my view that this was a matter best dealt with by the Court itself, and not by a single judge.

It was therefore ordered as follows:

“Pending the determination of the appeal filed under case reference SC 360/12, the following interim relief is granted:-

1. The first, second and third respondents shall not do, allow to be done or cause to be done anything the effect of which is to commence or continue with the levying of execution of the judgment obtained under case No HC 2288/12, the stay of execution of which was refused under case No HC 12199/12 and which refusal is now the subject of appeal before this Court”.
2. Costs of this application shall be in the cause”.

Ziumbe & Partners, applicant’s legal practitioner

Kadzere, Hungwe & Mandevere, respondents’ legal practitioners