

DISTRIBUTABLE (39)

RAINBOW TOURISM GROUP

v

(1) FARAI KABASA

(2) SHERIFF HARARE N.O.

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 13 & JULY 24, 2014

A Maguchu, for the applicant

I Mataka, for the first respondent

No appearance for the second respondent

Before: **CHIDYAUSIKU, CJ**, In Chambers

This is a Chamber application in which the applicant seeks the relief set out in the draft order. The draft order reads as follows:

“IT IS ORDERED THAT

1. The urgent Chamber application for leave to appeal to the Supreme Court be and is hereby granted.
2. The second respondent be and is hereby interdicted from selling in execution the applicant’s movable goods in pursuit of the writ of execution issued by the High Court in Case No. HC 8712/13.
3. There shall be no order as to costs if the respondent does not oppose this application. In the event that it does, the respondent be and is hereby ordered to pay costs of the application.”

The facts of the matter are briefly as follows.

The first respondent (hereinafter referred to as “Kabasa”) was an employee of the applicant. The applicant discharged Kabasa. Kabasa disputed the lawfulness of the discharge. The matter was referred to arbitration for determination. On 11 September 2012 the applicant was ordered by the arbitrator to reinstate Kabasa or pay him damages. On 25 September 2012 the applicant appealed to the Labour Court. On 8 May 2013 the applicant applied to the Labour Court for an order staying the enforcement of the award pending a hearing of the appeal. The application was set down for hearing on 21 November 2013. The hearing of the application was postponed at the request of Kabasa. Kabasa took the opportunity created by the postponement to register the arbitration award with the High Court and cause the attachment of the applicant’s goods. Faced with the danger of losing its goods through execution, the applicant made an urgent application for an interdict to stay execution pending the determination of the applicant’s appeal to the Labour Court. At the hearing Kabasa contended that he had since registered the award with the High Court. He argued that the award was now an order of the High Court which, it was submitted, could not be stayed by the Labour Court. This submission found favour with the Labour Court and the application for interim relief was dismissed. The Labour Court concluded that it had no jurisdiction to entertain the application for interim relief as the award had become a High Court order through registration. The applicant sought leave from the Honourable Judge of the Labour Court to appeal against that determination. The application for leave to appeal was refused. The applicant now seeks leave of a Judge of the Supreme Court for leave to appeal to the Supreme Court and also for the interim relief set out in the draft order.

The issue of the respective jurisdiction of the Labour Court and the High Court in regard to awards by arbitrators pending the hearing of appeals by the Labour Court is an issue that has been considered on a number of occasions in the High Court. It has emerged that there are two schools of thought regarding this issue. The one school of thought is that the Labour Court has jurisdiction to adjudicate on the issue of interim relief pending the determination of an appeal by the Labour Court despite the registration of an award with the High Court, while the other holds it does not have such jurisdiction. The learned judge of the Labour Court was alive to the divergence of views of the High Court. In this regard, this is what she had to say at pp 4-5 of her cyclostyled judgment:

“The facts of the case raise the fundamental problem facing labour matters where there is an element of parallel jurisdiction between the High Court and the Labour Court.

The applicant relied heavily on the case of *Benson Samudzimu v Dairiboard Holdings* HC/H/204/10 to demonstrate the fact that, even though the arbitral award has become a High Court order by virtue of its registration, the fact that the main case is a labour matter ... means that the Labour Court’s jurisdiction has not been ousted in favour of the High Court.

It even went on to argue that if the court were to refuse relief on the basis of jurisdiction, in this case it means that it would also follow that the court could also not legitimately entertain the appeal in such circumstances as it would be argued that the order was now a High Court order.

The applicant, therefore, maintained that, since the High Court on registering the award did not deal with the merits of the award, the Labour Court still remained at large to deal with the interim relief application and the attendant appeal in the main.

Whilst the respondent did not cite authority on the ouster of the Labour Court’s jurisdiction based on the registration argument, it is pertinent to observe that, to date, there are two High Court decisions with conflicting views as to whether the Labour Court can effectively grant an order for stay in a case where the applicant has also applied for registration of the award at the High Court. See *Sibangilizwe Dhlodhlo v Deputy Sheriff Marondera and Watershed College* HC/H/76/11 and *Kingdom Bank Workers Committee v Kingdom Bank Holdings* HC/H/302/11.

What is apparent from both cases and from what counsel for both parties agreed upon is the fact that it is settled law that the Labour Court has no powers to stay an order made by the High Court. However, what remains murky/unclear is whether by the same token, it can be said that, since the arbitral award has now been ‘transformed’

into a High Court order, therefore anything else attendant to it, like appeals against it, cannot be entertained by the Labour Court on a jurisdictional basis.

Whilst the *Samudzimu* case *supra* makes it clear that jurisdiction in relation to the other components of the award like the appeal component remains solely a labour issue to be determined by the Labour Court it remains questionable whether the same can be said in relation to interim relief.”

It would appear to me that this is an issue which is awaiting final determination by the Supreme Court in due course. Given the uncertainty of the law pending the determination by the Supreme Court, I am satisfied that the learned Judge of the Labour Court misdirected herself in refusing the applicant leave to appeal to the Supreme Court. Where the law is uncertain and a decision is pending in the Supreme Court, a Judge of the lower court cannot hold that such an appeal has no prospects of success on appeal. The leave to appeal has to be granted on the basis that the Supreme Court is yet to speak and until that happens it cannot be said that the applicant’s case has no prospects of success.

Accordingly, I grant the applicant leave to appeal to the Supreme Court.

As I have already stated, the issue of whether or not the Labour Court has jurisdiction to grant interim relief in respect of arbitral awards registered with the High Court but pending before the Labour Court is an issue to be determined by the Supreme Court.

However, the applicant also seeks the relief of a stay of execution pending the determination of the Supreme Court. I am satisfied that in the event of the Supreme Court deciding in favour of the applicant’s contention, then the applicant will have a real right and its entitlement to interim relief inevitable. As of now, all the applicant has is a *prima facie* right. On the papers as they stand, I am also satisfied that if the Supreme Court decides in favour of the applicant and payment of US\$40 000 has been made by the applicant to Kabasa,

the prospects of Kabasa being able to pay back the money are next to non-existent. Consequently, the applicant would suffer irreparable loss. On the basis of the above, I am satisfied that the applicant is entitled to interim relief pending the determination of this matter by the Supreme Court.

In the result, the application is hereby granted and an order in terms of the draft order granted.

Dube, Manakai & Hwacha, applicant's legal practitioners

Chambati & Mataka, first respondent's legal practitioners