

ZIMBABWE OPEN UNIVERSITY
v
(1) GIDEON MAGARAMOMBE (2) DEPUTY SHERIFF HARARE
N.O.

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GWAUNZA JA & MAVANGIRA AJA
HARARE, MAY 13, 2014 & FEBRUARY 23, 2016

F Hashiti, for the appellant

S Chatsama, for the respondent

MALABA DCJ: This is an appeal from the decision of the High Court dated 1 February 2012 by which it dismissed an urgent Chamber Application by the appellant for an order suspending a writ of execution of an arbitral award registered with it.

Before the appeal could be heard, the respondent applied for permission to lead what he referred to as further evidence when in reality it was fresh evidence of facts that came into existence after the decision appealed against had been made. The application was strenuously opposed by Mr *Hashiti* for the appellant on the grounds that it was not an application to lead further evidence within the meaning of r 39(4) of the Rules of the Supreme Court (RGN 380/64) (“the Rules”) because the decision to which the application related occurred after the decision appealed against had been made. The contention was that the evidence of the facts

sought to be led was not in existence at the time the decision appealed against was made. It was argued further by Mr *Hashiti* for the appellant that the evidence sought to be led on appeal was not material to the determination of the questions raised by the appeal.

The background facts are these. The respondent is a former employee of the appellant. On 10 January 2011 he was granted an arbitral award declaring that the termination of his employment with the appellant was unlawful. The appellant was ordered to reinstate the respondent or pay damages *in lieu* of reinstatement. The appellant appealed to the Labour Court against the arbitral award and applied in terms of s 92E(3) of the Labour Act [*Cap. 28:01*] for an interim determination in the form of an order suspending the enforcement of the arbitral award pending the hearing and determination of the appeal.

Before the hearing of the application for interim determination of the questions of suspension of the order of reinstatement of the respondent pending the hearing and determination of the appeal against the arbitral award, the respondent approached the Arbitrator for quantification of damages *in lieu* of reinstatement. The Arbitrator entertained the application on the ground that as there was no order from the Labour Court suspending the arbitral award, his power to quantify the damages was unfettered. On 22 August 2011 the Arbitrator awarded the respondent a sum of \$77 302.00 as damages *in lieu* of reinstatement.

On 22 September 2011 the appellant appealed to the Labour Court against the second arbitral award and also applied for an interim determination in the form of an order suspending the enforcement of the award pending the hearing and determination of the appeal.

On the same day the respondent made an application to the High Court for the registration of the second arbitral award.

It appears that on 7 October 2011 the respondent filed with the Labour Court papers opposing the application by the appellant for the interim determination. The President of the Labour Court does not seem to have seen the papers because on 1 November 2011 he granted an interim determination suspending the execution of the second arbitral award pending the hearing and determination of the appeal against it. The interim order was granted on the ground that the application for the interim determination was not opposed.

It is common cause that when the interim determination that the enforcement of the second arbitral award be suspended and the order to that effect was issued registration of the same by the High Court had not been granted. The application for the registration of the arbitral award was granted on 15 November 2011.

On 2 December 2011 the respondent filed at the Labour Court the application for the rescission of the interim determination made on 1 November 2011. Before the application was heard and determined, the respondent took out of the High Court a writ of execution on 11 January 2012 to enforce the arbitral award.

On 27 January 2012 an urgent chamber application was made by the appellant to the High Court for an order suspending the writ of execution. The application was dismissed on 1 February on the ground that it was not urgent. The appeal against that decision was lodged

with the Supreme Court on 2 February 2012. On 22 February the learned Chief Justice granted an interim order suspending the execution of the writ pending determination of the appeal against the decision of the High Court “dismissing” the urgent chamber application.

On 18 January 2013 the Labour Court rescinded the interim order granted on 1 November 2011. It is the order of rescission of the interim order granted by the Labour Court which prompted the respondent to make the application to lead “further evidence” of the rescission to show that the interim determination relied on by the appellant to challenge the validity of the registration of the award had subsequently been rescinded.

The question for determination is whether the rescission order constitutes further evidence that should have been adduced before the High Court in the urgent chamber application. The answer to the question is NO. The order of rescission of judgment was not in existence at the time the issues of urgency of the chamber application were determined. The contention before the High Court was that the registration of the award had no legal effect as the award had been suspended.

It was common cause that the Labour Court had the jurisdiction to grant the interim determination suspending the arbitral award. It granted the order suspending the enforcement of the award before the High Court purported to register it. The startling proposition put forward on behalf of the respondent was that because the Labour Court was a subordinate court to the High Court it had no power to grant the interim determination which had the effect of interfering with the process of the High Court.

In registering the arbitral award the High Court would have been exercising a *quasi*-administrative function. The Labour Court had the power to grant the interim determination suspending for all purposes the enforcement of the award because it was the court seized with the appeal against the arbitral award. It was in a position to decide whether the appeal had prospects of success or not. At the time the High Court purported to register the award there was in fact no award to register. The award had been suspended by a court with jurisdiction to do so.

The issues before the High Court were decided on the basis of the evidence of an interim determination which was in existence at the time. The evidence of rescission of the order came into existence after determination of the issues had been made. In *Bendezi Sugar Farm (Pvt) Ltd v Mhene Estates (Pvt) Ltd* 1995(1) ZLR 135(S) at p 142 the Supreme Court stated as follows:

“The principles upon which this court allows the adduction further evidence were set out in *Border Syndicate (Pvt) Ltd* 1961 R & N 28(FS). They have been applied many times since, most recently in *Beval Trading (Pvt) Ltd v Voest-Alpine Intertrading GMBH* S-149-94 (not reported). There are four criteria:

1. The evidence must not with reasonable diligence have been obtainable for use at the trial;
2. The evidence must be such as is presumably to be believed or is apparently credible;
3. The evidence must be such as would probably have an important influence on the result of the case, although it need not be decisive;
4. Conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party.”

See also *Warren-Codrington v Forsyth Trust (Pvt)Ltd* 2000(2) ZLR 377(S) at 380G-381B.

It is clear from the first requirement for adduction of further evidence on appeal that the applicant must show that the evidence sought to be adduced was available at the time the issue in respect to which it would have been led was determined. The evidence should not have been obtainable with reasonable diligence. Evidence which is not in existence at the time an issue is determined is not further evidence which was available but not obtainable with reasonable diligence. The other requirements follow from a finding that the evidence sought to be adduced on appeal was available at the time the issue in respect to which it is sought to be led was determined. Once it is found that the evidence sought to be adduced on appeal was not in existence at the time the issue in respect to which it is sought to be led was determined there is no need to consider the other requirements of the test for adduction of further evidence on appeal.

The evidence sought to be adduced by the respondent was not in existence at the time the determination of issues was made by the High Court. Mr *Chatsama* conceded that the evidence of the order of rescission of the order granted by the Labour Court on 18 January 2013 was not in existence on 1 February 2012 when the decision appealed against was made. He thought that the fact that it was not available was a good reason for it to be adduced. The fact that the order suspending the award was granted erroneously by the Labour Court did not make the rescission of the order further evidence that could be adduced on appeal.

The application to lead further evidence is dismissed with costs.

GWAUNZA JA: I agree

MAVANGIRA AJA: I agree

Dube, Manikai & Hwacha, appellant's legal practitioners

Hogwe, Dzimirai & Partners, respondent's legal practitioners