

DOVES FUNERAL SERVICES (PRIVATE) LIMITED  
versus  
ALEXIO MAVHEMWA  
and  
THE SHERIFF (N.O)

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 23 October 2017 and 31 October 2017

### **Urgent Chamber Application**

*G. Gomwe*, for the applicant  
*E Mukwewa*, for the 1<sup>st</sup> respondent

MUREMBA J: The first respondent is a former employee of the applicant. On 12 February 2016 he obtained an arbitral award against his former employer, the applicant. On 4 July 2017 the first respondent had the arbitral award registered as an order of this court under case number HC 1753/16. On 16 October 2017 he had a writ of execution issued by the registrar of this court and this resulted in the Sheriff attaching the applicant's movable property on 18 October 2017. The property was due for removal on 23 October 2017. This prompted the applicant to file the present application for stay of execution on 19 October 2017. Apparently, the applicant had already filed an appeal in the Labour Court against the arbitral award under case number LC/H/112/16 and the appeal is still pending. So the present application is for stay of execution pending the determination of the appeal in the Labour Court.

In opposing the application, the first respondent raised the following 3 points *in limine*.

#### *Jurisdiction*

The first respondent averred that all labour matters are dealt with by the Labour Court and the present matter is no exception. He stated that this court, in terms of s 98 (14) of the Labour Act [*Chapter 28:01*], is only empowered to register the arbitral award, but not to deal with the merits of the arbitral award. He further averred that this court can only order stay of

execution in cases where the order of the registration of the arbitral award is challenged on appeal in the Supreme Court. He averred that the applicant has not challenged the court order registering the arbitral award and as such this court has no jurisdiction to order stay of execution in the matter.

In response Mr *Gomwe* submitted that this court has jurisdiction to stay execution because by virtue of the registration of the arbitral award in this court, the arbitral award became an order of this court in terms of s 92 B (3) and (4) of Labour Act. He said that as such this court has jurisdiction to stay execution of its own order. I am in agreement with this submission. In *University of Zimbabwe v Kwanele Muriel Jirira and 2 Ors* SC 6/13 ZIYAMBI JA dealt with a similar issue which had been taken on appeal after this court had declined jurisdiction in a similar application for stay of execution. ZIYAMBI JA said:

“...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.”

In view of this I dismiss the point *in limine*

#### *Res Judicata*

The first respondent averred that a similar application for stay of execution was dealt with by the Labour Court under case number LC/H/APP/566/17 and was dismissed. The first respondent averred that since that court order has not been overturned, it remains extant and as such the matter is *res judicata*.

In response the Mr *Gomwe* submitted that the matter is not *res judicata*. He went on to narrate what happened in the Labour Court. He explained that after the applicant had filed its appeal on 1 March 2016, it was set down for hearing on 22 June 2016, but because both parties misdiarised the dates, neither party appeared on the date of the hearing. Resultantly, the appeal was dismissed. Consequently, an application for stay of execution of the arbitral award that had been filed on 8 March 2016 pending the appeal was also dismissed. On the same day the appeal was dismissed i.e. on 22 June 2016, the applicant made an application to rescind the order dismissing the appeal. The application for rescission was granted on 26 July 2017 hence the appeal was reinstated. On 31 July 2017 the applicant then filed an application for stay of execution of the arbitral award pending the determination of the reinstated appeal. However, this application for stay was dismissed on 4 October 2017. It was Mr *Gomwe*'s submission that

when Judge CHIVIZHE dismissed the application she had not been made aware that the appeal had been reinstated and as such she said,

“The appeal in LC/H/112/16 having been dismissed on 22<sup>nd</sup> June 2016 the application stands dismissed as overtaken by events.”

Mr *Gomwe* submitted that if the Judge had been aware that the appeal had been reinstated she would not have given such an order.

It was Mr *Gomwe*'s argument that the application for stay that was made in the Labour Court and the one that has been made presently before this court are different in the sense that the one before the Labour Court was meant to stay execution of the arbitral award whilst the one in this court is meant to stay execution of the order that was registered in this court. He said that as such the matter is not *res judicata*.

In terms of s 92 E (3) of the Labour Act,

“Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.”

In terms of this provision, the Labour Court can stay execution of the arbitral award or suspend it pending appeal upon application by the appellant. See *Zimbabwe Open University v Gideon Magaramombe & Anor* SC 20/12 and *Giya v Ribi Tiger Trading* HH 57/14. I believe that once an order for stay or suspension of the arbitral award is granted by the Labour Court, the claimant in the matter (the respondent in the appeal) is barred from approaching this court (the High Court) for registration of the arbitral award in terms of s 98 (14) of the Labour Act until the appeal is determined since the arbitral award would have been suspended. It is my considered view that if registration of the arbitral award is done in this court in spite of the existence of the Labour Court order suspending or staying the arbitral award, that registration would be erroneous and can be rescinded in terms of r 449 (1) of the High Court Rules, 1971 for having been erroneously made.

On the other hand, if an appeal against the arbitral award is lodged in the Labour Court but there is no Labour Court order staying or suspending the arbitral award, the claimant is perfectly entitled to approach this court to register the arbitral award for purposes of enforcement as the noting of an appeal alone does not suspend the arbitral award appealed against. See s 92 E (2) of the Labour Act. Once registration of the arbitral award has been done in this court and the respondent wants execution stayed pending finalisation or determination of the appeal in the Labour Court, he should file his application for stay of execution in this

court and not in the Labour Court since what he will now be seeking is stay of execution of the order registered in this court. An application for stay of execution in the Labour Court in terms of s 92 E (3) will no longer be of any use to him since registration of the arbitral award would already have been made in this court. The Labour Court cannot subsequently issue an order which suspends or stays the enforcement of an order of this court. Once registered, the arbitral award becomes an order of this court for purposes of enforcement. See s 98 (15) of the Labour Act.

*In casu* it is pertinent to note that by the time the appeal was reinstated in the Labour Court on 26 July 2017 and by the time the application to suspend the arbitral award pending appeal was filed in the Labour Court on 31 July 2017, the arbitral award had already been registered as an order of this court on 4 July 2017. It is common cause that the application to suspend or stay the arbitral award that was made in the Labour Court was later dismissed on 4 October 2017. It is on the basis of that Labour Court order that the first respondent avers that the application for stay was determined in the Labour Court and is thus *res judicata*.

The requisites of *res judicata* are as follows

1. The previous matter was between the same parties or their privies.
2. The subject matter must have been the same.
3. The matter is founded on the same cause of action.
4. The earlier court must have given a final and definitive judgment on the matter. See *Kawondera v Mandebvu* SC 12/06 and *Banda & Others v Zisco* 1999 (1) ZLR 340.

In view of these requirements I would not say the matter is *res judicata*, for the subject matter in the Labour Court was different from the subject matter in the present application. In the Labour Court it was an application to stay execution of the arbitral award whereas in the present matter the application is to stay execution of the registered order of this court. This means that even if the Labour Court had granted the application to stay the arbitral award on 4 October 2017 that order would have been a *brutum fulmen* as it could not stop or stay execution of an arbitral award already registered with this court prior to it being granted. Put differently, an order of the Labour Court for stay of execution which is issued after registration of the arbitral award has already been made in this court cannot stay execution of the registered order. Therefore the fact that the Labour Court dismissed the application for stay of execution of the arbitral award on 4 October 2017 is of no consequence. As I have already stated, even if it had

been granted that would not have stopped the first respondent from proceeding with execution of his registered order. To stay execution the applicant would still need to make an application in this court as it has done. This clearly demonstrates that the application for stay of execution that the applicant made in the Labour Court is different from the current application for stay being made in this court.

In view of the foregoing I dismiss the point *in limine*.

*The matter is not urgent*

The first respondent averred that the matter is not urgent because the arbitral award was registered in this court on 4 July 2017 after full argument by both parties and the applicant did not appeal against the registration of the award. He averred that there is no urgency in the matter because this court has no jurisdiction to grant stay of execution in a matter where registration of the award has not been appealed against to the Supreme Court. The first respondent further averred that from the time the chamber application for stay of execution which was filed in the Labour Court was dismissed on 4 October 2017, it took the applicant 2 weeks to file the present application on 19 October 2017. The first respondent averred that this delay shows that there is no urgency in the matter.

The first respondent further averred that the claim that is being made by the applicant in its founding affidavit that the property that was attached by the Sheriff belongs to third parties does not make the matter urgent. He averred that the third parties have a remedy at law and it is not for the applicant to be making the claim on their behalf.

In response Mr *Gomwe* submitted that the chamber application for stay of execution of the arbitral award in the Labour Court having been dismissed on 4 October 2017, the applicant only became aware of the dismissal on 18 October 2017 upon attachment of the property. The writ of execution had been issued on 16 October 2016. He submitted that on 19 October 2017, the applicant filed the present application so there was no delay in the handling of the matter. Mr *Gomwe* submitted that the applicant was abandoning the argument about the attached property belonging to a third party.

In dealing with the issue of jurisdiction I dismissed the first respondent's argument that for this court to have jurisdiction there ought to have been an appeal against the registration of the award in this court. I made a finding that once registration of the award has been made in

this court, this court has jurisdiction to deal with an application for stay of execution. So the argument that the matter is not urgent because registration of the award has not been appealed against is dismissed.

After the arbitral award had been registered as an order of this court on 4 July 2017, the first respondent took no action to execute the order until 16 October 2017 when it had a writ of execution issued by the registrar of this court. Meanwhile the applicant had been busy pursuing an application for stay of execution of the arbitral award in the Labour Court erroneously believing that it would stop execution in the matter. This application was only dismissed on 4 October 2017. The applicant stated that it only became aware of this dismissal on 18 October 2017 when the Sheriff came to attach the property. On 19 October 2017 the applicant filed the present application. Looking at this history I would not say that there was a delay in filing the present application. The way the applicant handled the matter shows that it never sat on its laurels. It treated the matter with the urgency it deserved.

I am further persuaded in my finding that the matter is urgent by a further averment made by the applicant that the first respondent is unemployed and that as such if execution is allowed to proceed at this juncture only for the arbitral award to be overturned on appeal, it will suffer irreparable financial and operational harm as the first respondent will not be able to compensate or restitute it for the motor vehicles it would have lost. The applicant averred that the motor vehicles that have been attached are used in its operations. The first respondent did not dispute this issue of irreparable harm that is likely to befall the applicant.

In view of the foregoing I make a finding that the matter is urgent.

### *Merits*

The applicant averred that since the appeal is still pending in the Labour Court real and substantial justice demands that execution be stayed pending its determination so that the appeal will not be rendered academic. It averred that if it succeeds on appeal, it might not be able to recover its money if the first respondent who is currently unemployed is allowed to execute now. It will thus suffer irreparable harm. The applicant averred that the balance of convenience favours the granting of the relief of stay of execution.

In opposition the first respondent averred that this court has no jurisdiction to grant stay of execution pending appeal because the order registering the arbitral award was not appealed

against in the Supreme Court. He further said that this is a matter which is within the jurisdiction of the Labour Court only. The first respondent reiterated the issue of *res judicata* he raised as a point *in limine*.

The grounds raised by the first respondent for opposing the application are without merit. As I have already stated above, this court has jurisdiction to stay execution of the arbitral award which it has registered as its own order for purposes of enforcement. It does not matter that the registration order has not been appealed against. I have already dismissed the issue of *res judicata supra*. The first respondent has not disputed that in the event of the applicant being successful on appeal, he will not be able to pay back the applicant in order to restore the status *quo ante*. I am thus satisfied that the applicant will suffer irreparable harm if the interim relief is not granted. The balance of convenience thus favours the granting of stay of execution at this juncture. The first respondent will suffer some inconvenience now, but if the applicant does not succeed on appeal, he will proceed with execution of the order. The disadvantage and inconvenience will not be permanent for him.

As far as the final relief and the interim relief being sought are concerned, there is no difference at all. In both instances the applicant is seeking a final order of stay of execution pending the determination of the appeal in the Labour Court. This is not proper. The reliefs are couched as follows:

“TERMS OF FINAL ORDER

1. The execution of the order granted in Case No. HC 1753/16 be and is hereby ordered to be stayed pending determination of appeal at the Labour Court filed under Case No. LC/H/112/16.
2. Costs of suit shall be costs in the cause in the pending appeal at the Labour Court under Case No. LC/H/112/16.

INTERIM RELIEF GRANTED

Pending the determination of the appeal at the Labour Court under Case No. LC/H/112/16, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be and are hereby ordered to stay the execution and attachment of Applicant’s movable property to satisfy the order in Case Number HC 1753/16.”

During the hearing I pointed out to Mr *Gomwe* that the interim relief that he was seeking was incompetent for it is no different from the final relief but he failed to see the light at all. I was hoping that he would amend the terms of the interim relief but alas he failed. Be that as it may his failure to make the amendment is not fatal to the application. I will grant the interim

relief being sought and make the necessary corrections. Since the applicant's property has already been attached, I will order that it will remain under attachment pending the determination of the matter. The property will however remain in the possession of the applicant pending the determination of the matter.

I thus order that pending the determination of this matter, the first and second respondents be and are hereby interdicted from removing the applicant's property which was attached pursuant to the order granted in case no. HC 1753/16.

*Mutamangira & Associates*, applicant's legal practitioners  
*Mukwewa & Ngwerume*, 1<sup>st</sup> respondent's legal practitioners