UZ- UCSF COLLABORATIVE RESEARCH PROGRAMME
verses
ISDORE HUSAIWEVHU
and
WALTER MUTOWO
and
FUNGAI ZINYAMA
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 04 December 2019 and 02 February, 2022

MOTION COURT

H Mutasa for the applicant
L Madhuku for the respondent

Urgent Chamber Application

CHITAPI J: This matter has a long history. I write this judgment in order to set the record straight in the light of the fact that the respondents are now self-actors who may intend to continue to fight their cause as evidenced by their continued writing of letters a determination which was already made as will become apparent later.

The first, second and third respondents are erstwhile employees of the applicant. The parties are embroiled in a labour dispute that resulted in the dispute being referred for determination by arbitration. The history of the dispute was set out in detail in the judgment of MAFUSIRE J in case number HC 3973/14 (Ref HH 260/14)

The points of significant note are that the labour dispute between the applicant and the respondents was subject of arbitration proceedings before the arbitrator, are Mr Mutongoreni who issued an award in favour of the three respondents in 2007. The employment dispute had arisen in 2006. The issue between the parties arose in regard to whether the employment contracts of the

respondents which were said to be of fixed terms of 12 months at a time subject to renewal for the same period at a time had been properly terminated. The applicant appealed against the award to the Labour Court. Since the appeal did not have the effect of suspending the arbitral award, the applicant applied to the Labour Court for a stay of execution of the arbitral award pending appeal. The application for stay of execution was dismissed. The respondents then applied for the quantification of the award. The quantification was done by arbitrator Matsikidze. The arbitrator quantified the dues of the first respondent as US $94 920, second respondent at US $46 818-78 and the third respondent at US $55 118-48.

The applicant was dissatisfied with the quantification aforesaid. It appealed against the award of quantification to the Labour Court. Again, because the appeal did not automatically suspend the judgment appealed against, the applicant filed an application before the same court for an order of stay of execution pending the determination of the appeal. The respondents on 30 March, 2010 filed an application in this court for registration of the award as quantified by arbitrator Matsikidze. In respect of the application for registration of the award, this court registered the arbitral award as quantified on 20 October, 2010. The appeal to the Labour Court against the quantification was dismissed on 28 March, 2014. On 8 May, 2014, the respondents then issued a writ of execution to recover the quantified amount which was expressed as US $788 296-21.

The applicant in turn filed an application for leave to appeal to the Supreme Court against the dismissal of its appeal against quantification which the Labour Court dismissed. At the same time the applicant filed an urgent chamber application for a stay of execution of the quantified award. The award had however, been already registered by the court and the urgent application to the Labour Court could not be determined by that court since the writ was new a process of this court upon its registration.

In respect to the application for leave to appeal, the Labour Court struck the application off the roll for the reason that the application had been filed out of the time period of 30 days given in the Labour Court rules for making the application post the date of the judgment sought to be appealed against. The applicant then filed an application for leave to appeal to the Supreme Court against the judgment of the Labour Court striking off the application for leave to appeal aforesaid. In this respect, it is apposite to record that in judgment No. HH 260/14, MAFUSIRE J on p 9 of

the cyclostyled judgment expressed the view that the Labour Court had miscalculated the *dies induciae* within which the applicant ought to have filed an application for leave to appeal against the quantification award. I also express the same view but cannot make a declaration in regard thereto because the challenge was escalated to the Supreme Court which must make its decision on the point.

The respondents despite the pendency in the Supreme Court of the application for leave to appeal decided to continue with execution on the writ. They were legally entitled to do that because the application for leave to appeal aforesaid did not suspend the operation of the award and the writ of execution. The applicants therefore, approached the court by this application on an urgent basis for an order to suspend the operation of the writ pending the determination by the Supreme Court of their application for leave to appeal to that court. The applicants submitted that if execution were to be proceeded with, the application pending before the Supreme Court would be rendered academic.

Upon going through the application, I noted that MAFUSIRE J had in fact suspended execution of the writ of execution pending the determination of the application by the Labour Court of an application for leave to appeal against its decision upholding the quantification of the award if arbitration Matsikidze. It was the learned judge's view which I embraced because it was a glaring omission, that the arbitrator in awarding damages as part of the quantification process had failed to consider and take into account the obligation of a dismissed employee to mitigate his or her damages and by a further failure to determine a cutoff point beyond which the damages had to cease. The learned judge determined that *prima facie*, the applicants intended appeal were leave to appeal to be granted by the Labour Court was meritorious. The judgment of MAFUSIRE J has remained extant. It can safely be stated that the applicants proposed appeal has been determined by this court to have prospects of success. This court therefore previously suspended the writ of execution pending the determination of the application for leave to appeal against the quantification of damages by order of MAFUSIRE J.

In respect to the appeal for leave to appeal against which execution on the merit was suspended by MAFUSIRE J, the Labour Court did not determine the appeal on the merits and therefore, did not consider MAFUSIRE J judgment on the merits. The Labour Court struck the matter off the roll. This prompted the making of the application for leave to appeal to the Supreme

Court. The views and findings of MAFUSIRE J in relation to the merits of the intended appeal to the Supreme against the quantification award have remained extant and there are no developments or grounds to differ from them. The development that the application was removed from the roll does not affect the findings on the merits of the intended appeal. When the respondents opposed this application, they ought to leave known that the court had already determined that the intended appeal had merit and that in the absence of a change of circumstances or facts, that finding remains made. The change of circumstances of note was that the order of MAFUSIRE J lapsed upon the dismissal by the Labour Court of the application for leave to appeal against the Labour Courts' decision to strike the matter from the roll.

The respondents noted in their opposing affidavits quite correctly that the order of MAFUSIRE J had lapsed. They submitted that the application was not urgent, that the deponent to the founding affidavit had no authority to represent the applicant and that the applicants had committed a material non-disclosure. The non-disclosure was stated to be the applicant's failure to relate to the judgment of MAFUSIRE J and disclose that the order granted therein had lapsed. However, it was clear from the papers that the non-disclosure objection amounted to an objection to form and not substance because the applicant attached the judgment of MAFUSIRE J and chronicled the paper trail following its making. The applicants disclosed that their application for stay was dismissed and they filed an application to the Supreme Court. It followed as a matter of law that the interim order of MAFUSIRE J lapsed.

The point in *limine* on urgency was not persisted in after I directed by consent of the parties that the application be argued for final relief. In respect of authority of the deponent to the founding affidavit to represent the applicant, the point was answered by affidavit of the applicant's director who confirmed that the deponent was authorized to represent the applicant. The respondents also submitted that the applicant had not disclosed that it had an appeal which was dismissed by the Supreme Court. The exact nature of the appeal was not given nor its relationship with the relief sought herein. The relief sought was simply that the writ of execution issued in case No. HC 2411/10 be suspended pending the determination by the Labour Court of application for leave to appeal to the Supreme Court filed under case No. LC/
H/APP/124/19.

I have already related to the findings made by MAFUSIRE J on whether the applicant has a cause worthy to be granted the protection of the court by way of suspending the writ of execution. The application *in casu* is in the nature of a final interdict. The process of execution is controlled by the court as much as the court regulates its processes subject to the rules of court see *Stumbles & Rowe v Mattinson* 1989(1) ZLR 172(H). The requirements for a final interdict are well established. They may be listed as per the authority of *Pauline Makoni* v *Julius Makoni & Anor* HH 820-15 per MWAYERA J and cases cited therein as follows:

(a) a clear right which must be established on the balance of probabilities;
(b) irreparable harm actually committed or reasonably apprehended;
(c) the absence of similar protection by any other remedy.

The applicant's clear right was established. It has the *locus standi* and right to seek a suspension of the writ of execution pending the determination by the Labour Court of its application for leave to appeal to the Supreme Court application. That application was pending determination on the making of this application and was filed under case No. LC/H./APP/124/19. The court is entitled to regulate its process and either suspend execution of its writ or order that execution be continued. There is a risk of irreparable harm present because the attached goods if sold will result in the paralysis of the applicant in its operations. The respondents did not dispute the allegation that the attached goods as listed in the notice of seizure and attachment comprised of goods in use for the applicant's operations. The respondents did not offer security to show that they would be able to restitute the huge amounts on the writ in the event that leave to appeal is granted by the Labour Court and the Supreme Court ultimately resolves the matter in favour of the applicants. If the execution is allowed to continue, then the applicants would not have any similar protection seeing as it is that the respondents did not indicate that they would be able to recompense the applicant.

As a general observation, my view is that where suspension of execution on a writ is sought on the basis there is a pending court process which challenges the judgment on which execution is derived, if the challenge has reasonable prospects of success, then serious consideration should be given to the grant of a suspension in order to safeguard the pending litigation and avoid turning the challenge on the judgment academic as would be the case if execution is granted. The circumstances of each case will in all cases determine the way the court exercises its discretion to

order execution or refuse it. *In casu,* a finding which I agree with was made by MAFUSIRE J that the arbitrator erred in material respects is not taking into account the duty of the employee to mitigate his damages, see *Ambali v Bata Shoe Company* 1999(1) ZLR 417(S). Such misdirection would be material if accepted by the Supreme Court and would substantially alter the size of the payout due to each respondent. In my view the applicant established the case for a final interdict.

The outstanding issue is one of costs. Costs are in the discretion of the court. The applicants were within their rights to seek a suspension of execution pending the determination of the application for leave to appeal. The respondents were entitled to proceed with execution as a matter of law. They cannot be faulted for defending the application. Besides, the issue between the parties still remains one arising from a labour dispute where the courts as a rule of practice are slow to penalize parties with a costs order. The respondents are owed some money by the applicant, the quantity of which is under disputation. Both parties are justified to defend their positions and strictly speaking, there is no outright in the application winner. The process of bringing the dispute to finality is still ongoing. It is justiciable not to make a costs order.

Before I conclude, I must record that the parties were granted time to try and resolve their issue. The process went on and on until the parties were called to indicate whether there was room for settlement. The applicant then indicated that the Labour Court had granted leave to appeal. The applicant also pointed out that it had paid the judgment debt by RTGS transfer into the account of the legal practitioners for the respondents. The parties agreed to again discuss this development in the light of the applicant's assertions. It appeared to me that the matter would be resolved. The respondents' legal practitioners renounced agency and the respondents became self-actors of which they remain so on record. They have persisted that they want a written judgment on the application to be issued. Regrettably the onset of COVID-19 lockdowns delayed the judgment and changed set targets and promises made on possible dates of judgment. Whether this judgment is now academic is not a decision for me to make since I have been requested to determine the application on the papers filed.

In all the circumstances of the case I determine that:

(i) The application succeeds.

(ii) The operation of the writ of execution issued in case No. HC 2411/10 is suspended pending finalisation of the application for leave to appeal in case No. LC/H/APP/124/19.

(iii) The notice of seizure and attachment of applicant's goods issued by the Sheriff on 2 December 2019 is set aside.

(iv) Each party shall bear its own costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

L Madhuku, respondent's legal practitioners