

THE HERITAGE SCHOOL
versus
MONICA SEKA
and
NEVIES CHIBONDO
and
ANYWAY KAZINGACHIRE
and
CHIRATIDZO NDOWA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 11 January and 12 January 2012

Urgent Chamber Application

Mr *O Matizanadzo*, for the applicant
Mr *K Gama*, for the 1st, 2nd, 3rd and 4th respondents
No appearance for the 5th respondent

HUNGWE J: This matter was placed before me through the Chamber Book as an urgent application seeking the following interim relief:

“INTERIM RELIEF GRANTED

1. That the fifth respondent be and is hereby ordered to temporarily stay the removal of the attached goods and stay execution of the judgment and writ issued under case number HC 10266/11 pending the hearing of the application for stay of execution.
2. In the event of the fifth respondent having removed the attached property, he is hereby directed to temporarily return possession of the property to the applicant pending the outcome of the application for stay of execution.

SERVICE OF THE PROVISIONAL ORDER

That service of the provisional order be effected on the respondents by an employee of the applicant’s legal practitioners.”

Background to the Application

The applicant is a private educational institution. It used to employ the first to fourth respondents. That relationship terminated. In the process of termination the matter was referred to arbitration.

On 10 October 2011 the arbitrator made an award of damages in lieu of reinstatement in favour of the four respondents.

On 7 November 2011 the applicant lodged a Notice of Appeal in the Labour Court against the award issued against it in favour of the respondents stating that it only became aware of this award on 28 October 2011.

On or about 18 October 2011 the respondents' legal practitioners filed a Chamber Application for the registration of the arbitral award in terms of s 98(14) of the Labour Act, [Cap 28:01], under case number HC 10266/11. This application was served on the applicant.

On or about 8 November 2011, the applicant filed a Notice of Opposition. In its Opposing Affidavit the applicant relies on two main grounds. Firstly, it states that the application for registration is not in compliance with the law and contrary to the rules regarding enforceability of labour judgments which are under appeal.

Secondly, the applicant states that enforcement of the award is contrary to public policy on the basis that an application for interim relief in which the applicant seeks to be excused from complying with the award pending the outcome of the appeal had been lodged.

On 30 November 2011 the application for registration was granted by this honourable court.

On 19 December 2011 a writ of execution was issued. The applicant states that it only became aware of the judgment on 5 January 2012 when the Deputy Sheriff served it with a Notice of Removal.

The Basis of the Present Application

The applicant premises this application mainly on two grounds. First, it submits that as the arbitral award is presently under appeal in the Labour Court, the respondents could not lawfully seek the registration of such an award since the matter is *lis pendens*. Second,

the order registering the award as an order of this court was granted in error in light of the undisputed fact that the applicant filed opposing papers raising issues regarding the legality of registering an award subject of appeal. Consequently, the applicant argued, had the court been aware of the opposing papers it would have, at the very least sought to grant audience to the applicant before granting the order.

The Issues

The issue before me is whether, in light of the fact that there are allegations of an error by this court, justice will be served by the grant of an order of stay of the writ subsequently issued. However the parties raised interesting arguments for and against the grant of the interim order sought.

The applicant on one hand argued that in light of the fact that the judgment resulting in the arbitral award is under appeal, the registration of the award ought to have been put on hold pending the final determination of that appeal. The applicant relied on the judgment of this court (per GOWORA J) in *Sibangalizwe Dhlodhlo v The Deputy Sheriff, Marondera & Ors* HH 76/2011. In that matter this court held that whereas s 92E provides that the noting of an appeal against an award does not suspend the decision or determination, there is no such provision in relation to an appeal against an award by an arbitrator. In *PTC v Mahachi* 1997 (2) ZLR 71 (H) this court reasoned thus:

“... (in) proceedings conducted in the public law domain under the provisions of the Act ... the common law presumption against the operation of judgments which have been appealed against applies unless the Act provides to the contrary. In this case the Act is silent on the issue.”

Relying on one of the cardinal rules of statutory interpretation, the court came to the conclusion that in such circumstances, there is a presumption that Parliament does not intend to change the common law, unless it expresses its intention with irresistible clearness, or, it follows by necessary implication from the language of the statute in question, that it intended to effect such alteration in the common law. (See *Phiri & Ors v Industrial Steal & Pipe (Pvt) Ltd* S-242-95).

It seems to me that the same principles are applicable to the appeal by the applicant. I did not hear the respondents to say that they were not aware of the appeal to the Labour Court by the applicant.

Their argument, as I understood it, is that the applicant was aware all along that the arbitral award existed and was extant. It did not prosecute the application for a provisional order wherein it sought temporary relief suspending its effect pending the determination of the appeal since the appeal in its own right did not have the effect of suspending the award. Attractive as this argument may sound; it is, in my view, flawed. The fact of the matter is that by operation of law once an appeal was noted the award was automatically suspended. This position brings me to the second ground of the applicant's argument.

If the operation of the arbitral award was suspended by the lodgement on the Notice of Appeal was it competent for this court to register the arbitral award? In any event could an error of fact regarding the existence of opposing papers at the time of the grant of the order registering the award be discounted beyond doubt? The respondents argued that because in Chamber Book applications the court is not obliged to request representations from the other side therefore the order obtained in this manner without the other side being heard cannot be impugned on that ground. The submission could not have been seriously made since the effect of the order sought clearly affected the rights of the other parties who were not heard. In any event, in all likelihood, even in the absence of proof as to what constituted the record, I can infer that the court then was unaware of the existence of the Notice of Opposition. To hold otherwise is to impute such ineptitude on the part of the honourable judge as would soil her reputation without good cause. The assumption by the applicant that the papers were not placed before her is the most probable explanation for this debacle. Or else this court must again as a matter of conjecture explain why her Ladyship did not see it fit to give reasons why she disregarded the forceful arguments advanced by the applicant in its Notice of Opposition.

In conclusion therefore I am persuaded to hold that in all the circumstances of this case, the applicant has made a good case for the grant of an interim order as follows;

INTERIM RELIEF GRANTED

- 1 That the fifth respondent be and is hereby ordered to temporarily stay the removal

of the attached goods and stay execution of the judgment and writ issued under case number HC 10266/11 pending the hearing of the application for rescission of judgment given under case number HC 10266/11.

- 2 In the event of the fifth respondent having removed the attached property, he is hereby directed to temporarily return possession of the property to the applicant pending the outcome of the application for rescission aforesaid.
- 3 There will be no order as to costs.

Matizanadzo & Warhurst, applicant's legal practitioners
Madzivanzira, Gama & Associates, respondents' legal practitioners