

NMB BANK LIMITED  
versus  
SHEPHERD GOTO

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 21 February 2017 & 22 March 2017

### **Opposed Matter**

*O Kondongwe*, for the applicant  
*T Marume*, for the respondent

DUBE J: The applicant makes an application for a refund of \$63 115-55 which the applicant avers it paid under protest in pursuant to an order of court granted in favour of the respondent.

The brief background to this application is as follows. The respondent was employed as a Senior Security Manager by NMB Bank, the applicant. He was dismissed from employment following a disciplinary hearing. The respondent appealed to an arbitrator who ordered re-instatement of the respondent and alternatively payment of damages in lieu of reinstatement. The arbitrator ordered the applicant to pay \$59 546-24 as damages in lieu of reinstatement after quantification. The applicant appealed to the Labour Court. Subsequent to this award, the respondent filed an application for registration of the award which was duly registered by the High Court on 5 February 2013. The respondent issued a writ of execution resulting in the applicant applying for stay of execution pending the determination of the appeal which was duly granted on 14 March 2013.

The respondent filed an application for rescission of the order granting stay of execution. The applicant approached the respondent with the suggestion that the application for rescission of judgment and the appeal be consolidated. The idea was shot down by the respondent. The application for rescission of the interim relief proceeded and was granted resulting in the

decision of the Labour Court being rescinded. The respondent instructed the messenger of court to execute on the writ and the applicant paid \$63 110-58 in full settlement of the sum claimed. The applicant avers that the respondent snatched at an execution whilst the matter was still pending and that it paid the money under protest.

Subsequent to this, the appeal against the arbitral award was heard in the Labour Court and the dismissal of the respondent was confirmed. The applicant submitted that the respondent was enriched at the expense of the applicant as the respondent literally snatched at execution whilst the matter was still pending. The respondent insisted on payment despite that there was an appeal still pending in the Labour Court. The applicant seeks a refund of the \$63 110-55 it paid out and by which it claims the respondent was enriched. The applicant submitted that the application for leave to appeal filed is of no relevance as it is merely an intention to appeal. It argued that there is no appeal in the Supreme Court which suspends the decision of the Labour Court.

The respondent opposes the relief sought. The respondent acknowledges that the award was set aside and that his dismissal was confirmed. He submitted that he was entitled to execute the award which was in his favour at that stage. The respondent intends to appeal against the judgment of the Labour Court confirming his dismissal. He has filed an application for leave to appeal against the judgement in the Labour Court. The application is still pending. He contends that the present application is premature and that the applicant should wait for his intended appeal to be finalized. The judgment of the Labour Court is not final until confirmed by the Supreme Court. He argued that that his appeal has merit and that the balance of convenience favors that the *status quo* be maintained.

The issue before the court is whether the filing of an application for leave to appeal against the decision of the Labour Court has the effect of suspending the operation of the judgment sought to be appealed against. Generally, an appeal in a civil matter has the effect of suspending the order appealed against. See *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (HC). Labour appeals are governed by the Labour Act, [Chapter 28: 01], hereinafter referred to as the Act. Section 92F deals with appeals against decisions of the Labour Court. Section 92F (2) requires a party wishing to appeal from a decision of the Labour Court on a question of law, to seek leave from the judge who made the decision, in his absence, any other.

The Act does not deal with the effect that an application for leave to appeal has on the appeal sought to be filed. The filing of an application for leave to appeal a decision of the Labour Court in the Supreme Court is not synonymous with filing an appeal. A notice of appeal still has to be filed. The application for leave to appeal on its own has no effect of suspending the decision sought to be appealed against. In *Ngazimbi v Marowa Diamonds* SC 27/13 this court dealt with a party who intended to make an application for leave to appeal and remarked as follows;

“The right to appeal given by s 92F (1) is a limited right. The exercise of it is made conditional upon leave being granted.....

A wish to exercise the right to appeal remains in the mind of the person intending to appeal. When communicated by way of application for leave to appeal, the party is seeking the right to lodge the appeal. The law interposes the President of the Labour Court between the wish to appeal and the action to lodge the appeal. The authority when granted is prospective rather than retrospective. In other words it could not be known whether an appeal is open to him until the special leave is given by the President of the Labour Court or upon refusal by him or her, by a judge of the Supreme Court..... Until that authority is granted, there cannot be said to be an appeal pending before the Supreme Court even though a purported notice of appeal has been filed.”

This case dealt with a litigant who filed a notice of appeal when he had not made an application for leave to appeal. The court made it clear that until leave to appeal is granted, there cannot be said to be an appeal pending before the Supreme Court. The distinction between this matter and the *Ngazimbi* matter is that in the latter case leave to appeal had not been filed with the Labour Court with the notice of appeal being filed first. In this case, leave to appeal has been filed although it is still to be determined. In the *Ngazimbi* case the court correctly held that, authority must be sought from the Labour Court for leave to exercise the right of appeal and that until that right is granted there cannot be an appeal pending in the Supreme Court. The discussion reveals three main things in relation to this case. Firstly, that the right of appeal in the Labour Court is a limited right. Secondly, that the application for leave to appeal does not mark the noting of an appeal and lastly that when leave to appeal is granted, the appeal is not pending in the Supreme Court until the notice of appeal has been filed.

A litigant who intends to lodge an appeal against a decision of a Labour Court with the Supreme Court is required to do two things. He must first apply for leave to appeal against the decision in terms of section 92 F (2) of the Act. The purpose of requiring litigants to apply for leave to appeal is so that the appeals may be streamlined. Only appeals on a point of law are permissible. A party applying for leave to appeal applies for permission to appeal. Such a litigant

has not at that stage, lodged an appeal with the respective court. If he is successful in that application, only then can he file a notice of appeal. It is at that moment that the appeal court is seized with his appeal. For as long as an application for leave to appeal has not been determined, no-one can be certain whether the appeal is open to the applicant.

The applicant has been able to show that it made payment to the respondent in satisfaction of an order of court. An appeal was pending at that stage. Section 92E (2) of the Act provides that an appeal to the Labour Court does not have the effect of suspending the determination or decision appealed against. Having lost its bid to stay execution of the award, the respondent was entitled to proceed and execute on the award. The applicant's appeal against the decision of the arbitrator did not have the effect of suspending the decision appealed against. The applicant paid the money after rescission of the interim order granting stay of execution. The respondent's approach at that stage, of proceeding with execution of the award after the order granting stay of execution had been rescinded is above board.

The order relied on having been reversed, the respondent filed an application for leave to appeal against the decision of the Labour Court. An application for leave to appeal against a decision of the Labour Court has no effect of suspending the decision sought to be appealed against. The respondent has by filing the application for leave to appeal, expressed an intention to appeal. The application is still pending. It is only after it has been determined that a valid notice of appeal can be filed. No appeal is pending in the Supreme Court until the application for leave to appeal is granted and a notice of appeal filed. For as long as there is no appeal pending in the Supreme Court, there can be no appeal to talk about. Nothing bars this court from dealing with this application. The judgment of the Labour Court is still extant. Nothing stands in the way of the Labour court decision.

Allowing the respondent to continue holding onto the monies in the face of the Labour Court judgment which has not been appealed against would amount to the applicant being impoverished and the respondent being unjustly enriched. The applicant has made a case for restitution of monies it paid to the respondent.

Accordingly, it is ordered as follows:

- a) The respondent be and is hereby ordered to pay the applicant the sum of US\$63 110-55 (Sixty Three Thousand One Hundred and Ten United States of America dollars and Fifty

five cents) being a refund of money paid under protest to the respondent pursuant to a writ of execution issued by the Honorable Court and executed by the respondent.

- b) The respondent be and is hereby ordered to pay interest on the judgment debt at the prescribed rate of interest from 8 August 2013.
- c) The respondent be and is hereby ordered to pay Collection Commission chargeable on the judgment debt calculated in terms of the applicable Law Society General Tariff for Fees.

*Dube Manikai and Hwacha*, applicant's legal practitioners  
*Matsikidze and Mucheche*, respondent's legal practitioners