

FIRST MUTUAL LIFE ASSURANCE
versus
JACKSON MUZIVI
and
THE MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 December 2019 & 2 January 2020

Urgent chamber application

T Zhuwarara, for Applicant
1st Respondent in person

TSANGA J: On the 12th of December 2019 pending the return date, I granted a provisional order to the applicant suspending attachment and sale in execution of the applicant's property in terms of the writ of execution dated 6 December 2019. The writ was pursuant to a sentence of fine of Z\$900 000.00 granted against the applicant by the magistrate's court in case No.R484/19 for delayed payment of employment benefits. As part of the provisional order, the Sheriff was also ordered to temporality release all applicant's property attached in terms of that writ. The final order to be sought is that that attachment and sale in execution be stayed pending the hearing of CA 715/19.

The first respondent, Jackson Muzivi was employed by the applicant until 2002. Part of his employment benefits which remain in the then defunct Zimbabwean dollar were valued at Z\$864 million in 2011. They were not paid as his employer approached the Supreme Court on a point of law regarding the jurisdiction of the Labour court to convert the amount owed. The Supreme Court matter was heard in June 2019 under SC 583/18 and the decision is awaited.

In the meantime, Jackson Muzivi approached the magistrate's court in terms of s13 (2) of the Labour Act on the basis that there had been a delay of at least 21 years in paying him his benefits. The provision penalises as an unfair labour practice the failure to pay wages and benefits timeously upon termination of employment.

On the 4th of November 2019 the applicant was found guilty of contravening the section and accordingly fined Z\$900 000.00 payable in three instalments. Applicant lodged an appeal on 8th of November 2019. Among the grounds of appeal is that the magistrate erred at law in failing to make a finding that for an offence in terms of s 13 (2) to avail there should be specified terminal benefits which also ought to be in realisable currency. The court is also said to have misdirected itself in concluding that the pending decision before the Supreme Court had no bearing on the criminal proceedings before it. A delay in payment could only occur after the determination had been made of whether the complainant was due any money and the quantum thereof. It is further argued that the court had erred in finding a delay in circumstances with the Labour Court judgment of 2011 was a *brutum fulmen* as it could not be paid out in that form.

On the 6th of December the writ of execution was issued against the applicant to force the sentence imposed on the applicant. On the 9th of December its property was attached. Together with the writ was served a court order registering the judgment in R 484/19. Prior to this applicant says he was unaware of the fact that the first respondent had sought a writ.

Applicant essentially argued that it had a prima facie right to be protected which is a right to appeal. Also it was argued that the amount to be paid was significant and that the respondent had not shown that he would be able to pay it back in the likely event of the appeal being successful. It was argued that there were prospects of success as the finding that the applicant had delayed in making payment was not correct as the delay was caused by the first respondent registering an a order in a moribund currency. Moreover the dispute was before the Supreme Court under SC 583/18 and awaiting judgment. Stay of execution was also prayed for on the basis that the execution was unlawful as no warrant directing the second respondent to execute was ever issued by the magistrate as envisaged under s 348 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The registration of the judgment was also said to be irregular as the order registered was not made by a Labour Court as envisaged by s 92(B)(3) of the Labour Act which regulates the registration of orders. The amount registered was also said to be well beyond the jurisdiction of the magistrate court.

The harm to the applicant was said to be immense as it would be unlikely to recover the amount from the first respondent. Moreover, the balance of convenience was said to favour stay of execution more so as the property attached was directly used by the applicant in its day to day business. The first respondent was said to be protected by the interest provision in the unlikely event that the applicant loses his appeal.

The first respondent objected to the request for stay for execution. He argued that the applicant was approaching the court with dirty hands having not paid the money ordered. He also argued that the applicant should have approached the Labour Court. On the merits, the first respondent argued that the warrant was not mandatory and that a court can direct the Messenger of court to execute its order. He also argued that there was no reason for delay in payment as the amount owed was in essence known.

I granted the provisional order for the following reasons. In deciding whether a provisional order should be granted, four requirements must be satisfied, namely the applicant must have a prima facie right; there must be a real apprehension of harm; the balance of convenience must favour the applicant and lastly there must be no other satisfactory remedy. These are the primary considerations as the order is a temporary one pending the hearing of the matter for a final order.

The applicant in my view laid out a prima facie right as articulated in the reasons for appealing the judgment. I was not necessarily in agreement with the applicant in the interpretation of s 348 of the Criminal procedure and Evidence which deals with the issuance of warrant of execution where there has been an imposition of a fine. It reads as follows:

348 Recovery of fine

- (1) When an offender is sentenced to pay a fine, the court passing the sentence may in its discretion issue a warrant addressed to the Sheriff or messenger of the court authorizing him to levy the amount by attachment and sale of any movable property belonging to the offender, although the sentence directs that in default of payment of the fine the offender shall be imprisoned or shall be permitted to render community service.

This provision was relied upon by the applicant to argue that the magistrate who dealt with the matter had not issued a warrant when he could have done so and that therefore the warrant that had been obtained outside these parameters was irregular. It is common that as this was a company, imprisonment or community service were not appropriate forms of punishment. The applicant was therefore sentenced to a fine by the magistrate. The applicant's point was that he had not exercised his discretion to issue a warrant and that any warrant obtained outside these parameters was improper. The word used in the provision is "may" which means it is in his discretion. It is doubtful whether the obtaining of a warrant outside this provision can be said to be irregular.

However, I granted the order because the applicant in my view had a very valid point that the imposition of the fine itself appears highly irregular as the actual amount that is to be

paid to the first respondent remains in a moribund currency and its conversion by the Labour court is yet to be determined in the pending Supreme Court decision. In this regard the applicant in my view made out a very strong case that the imposition of the fine for delayed payment was irregular. I did not agree that the applicant was approaching this court with dirty hands under the circumstances where there is in reality no ascertainable amount of what the employer was or is supposed to pay in real currency. The argument that the applicant should have approached the Labour Court also did not hold water because the approach to its court has been instigated by a decision in the magistrate court with regards to the subject matter of the fine in a criminal matter.

On the apprehension of harm and the balance of convenience, as the applicant pointed out, the amount it was ordered to pay under circumstances which seem improper was very substantial. In the likely event of winning its appeal there was indeed no guarantee of getting it back. Moreover, in terms of apprehension of harm the property attached was said to be that which is key to its daily activities. There was therefore real apprehension of harm and the balance of convenience in my view favoured the applicant in the absence of proof that he would be able to pay the money back were the appeal to be in the applicant's favour.

It was for the above reasons that I granted the provisional order which the first respondent of course has every right to challenge on its confirmation. What is important is that a case for the granting of the provisional order sought had been made.

Atherstone and Cook: Applicant's Legal Practitioners