

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/63/14

HELD AT HARARE 22ND NOVEMBER 2013

CASE NO LC/H/302B/13

& 14TH FEBRUARY 2014

In the matter between:-

MBADA DIAMONDS (PVT) LTD

Applicant

And

NHAMO CHATEVUKA

Respondent

Before The Honourable Manyangadze, Judge

For Applicant

Mr A Marara (Legal Practitioner)

For Respondent

Mr S Machingauta (Legal Practitioner)

MANYANGADZE, J:

This is an application for stay of execution pending appeal against an arbitral award dated 16 March 2013, which ordered reinstatement of the respondent or payment of damages.

The respondent, a Technician in the appellant company's Engineering Department, was found in possession of a stone in the inside pocket of his work suit. He was charged with theft and wilful disobedience to a lawful order, in terms of the applicable Code of Conduct.

Following disciplinary proceedings, he was convicted of the misconduct charges and dismissed from employment on 19 September 2012.

He lodged a complaint with a labour officer in terms of s 101 (6) of the Labour Act [Chapter 28:01] (The Act), alleging procedural irregularities in the conduct of the disciplinary proceedings that led to his dismissal. In particular, he complained that the delay in concluding the proceedings constituted an unfair labour practice, hence the referral to a labour officer.

The matter was referred to compulsory arbitration, resulting in the arbitral award of 16 March 2013, against which applicant noted an appeal on 6 May 2013. This was followed by the filing of the present application on 7 May 2013, wherein is sought stay of execution of the arbitral award pending determination of the appeal.

The basic requirements for an application for stay of execution have been well captured by the applicant. They are:

- a) good prospects of success on appeal
- b) the possibility of irreparable harm if the application is not granted.
- c) the balance of convenience.

The principles have been enunciated in a number of cases, notably

South Cape Corporation (Pvt) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 and Zimbabwe Open University v Gideon Magaramombe and Anor SC 20/12

The parties are not in contention on the applicable legal principles and requirements. The issue that needs to be satisfactorily resolved is whether, in the instant application, the requirements have been met. The pertinent question is whether the applicant has convincingly made out a case for the granting of the interim relief that it seeks.

On the prospects of success, it is important to note that the arbitral award being challenged, rests mainly on a procedural technical aspect. This is clearly seen in the arbitrator's findings, a relevant portion of which reads:

It is my considered view that it constitutes an unfair labour practice, if one of the procedural elements of the code was not followed that is of issuing a dismissal letter or endorsing on the hearing form in terms of Statutory Instrument 165 of 1992 part D (3) (d)

It appears the arbitrator treated this as a fundamental or fatal irregularity.

A look at the minutes of the hearing shows that the panel involved deliberated on the issue and returned its verdict on the same day the hearing was conducted. This was in respect of both the initial hearing and the appeal hearing of 28 September 2012 and 19 September 2012, respectively. The verdict was handed down in the presence of the respondent. It can rightly be viewed as an *ex tempore* judgment, in which both the verdict of guilty and penalty of dismissal were pronounced.

The dismissal letter would, in the circumstances, merely reduce to writing what was pronounced in the presence and hearing of the respondent. One may therefore, quite reasonably, argue that there was no delay in the conclusion of the disciplinary proceedings.

The other aspects dealt with in the arbitral award, really go to the question of penalty. These include the value of the stone, the fact that respondent was a first offender, and the need for correction and education of offenders.

Again, a look at the minutes of the disciplinary proceedings reflect that the employer had a serious view of the infraction of its regulations by the respondent. The employer was concerned about possession of the stone, against security rules, in a highly sensitive mining zone. It was not so much the value of the stone as the breach of strict security rules.

It is of course up to the court that will be seized with the appeal to look fully into the merits of the issues highlighted, and make an appropriate determination. For purposes of this application, the applicant has in my view established, *prima facie*, that he has good prospects of success on appeal.

The next issue is the possibility or potential of irreparable harm should the respondent execute the arbitral award. As pointed out by the applicant, the damages being claimed amount to \$36000.00. If the appeal succeeds, respondent will be an unemployed man, from whom the \$36000.00 will become due and payable. It is most unlikely he will be in a position to restore the *status quo ante*. Respondent's counsel suggested he can be sued for recovery of the debt. That is a path fraught with immense difficulties, as any assets are likely to be disposed of in anticipation of such debt recovery. Most probably, respondent will not co-operate in any debt recovery process instituted against him.

In the *Zimbabwe Open University v Magaramombe* case, *supra* the court attached considerable weight to the ability of the respondent to make good any loss suffered as a result of execution. CHIDYAUSIKU CJ had this to say, on p 9 of the cyclostyled judgment:

On the papers before me it has been established that in the event of the University being successful on appeal Magaramombe will not be able to

restore the status quo ante. On this basis I am satisfied that the University will suffer harm if interim relief is not granted.

The other aspect, that of the balance of convenience seems to be inextricably tied up with that of irreparable harm. Should the appeal fail, applicant may reinstate respondent, or pay him damages. Applicant would be in a position to meet the requirements of the appeal outcome if it is not in its favour. As already indicated, the same cannot be said about the respondent.

In the circumstances, applicant has made out a convincing case for the interim relief being sought.

It is accordingly ordered that:

1. The application for stay of execution pending appeal be and is hereby granted.
2. Costs shall be in the cause.

Mutamangira & Associates, applicant's legal practitioners

Tavenhave & Machingauta, respondent's legal practitioners