REPORTABLE (10)

Judgment No. SC 20/12
Civil Application No. 25/12

ZIMBABWE OPEN UNIVERSITY v

(1) GIDEON MAGARAMOMBE (2) DEPUTY SHERIFF HARARE N.O.

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 22 & APRIL 16, 2012

T Mpofu, for the applicant

T Mberi, for the first respondent

No appearance for the second respondent

Before CHIDYAUSIKU, CJ, In Chambers

This is a Chamber application in which the applicant, the Zimbabwe Open University (hereinafter referred to as "the University"), seeks the following relief –

(a) An order that the appeal SC 25-12 be heard on an urgent basis; and

(b) A stay of the sale in execution of the University's property, attached in pursuance of an arbitration award it has appealed against.

The first respondent is Gideon Magaramombe (hereinafter referred to as "Magaramombe"). The second respondent is the Deputy Sheriff of Harare.

Magaramombe was formerly employed by the University as a lecturer. The University terminated Magaramombe's contract of employment. Magaramombe now disputes the termination of employment and contends it was unlawful. The disputed termination was referred to an arbitrator for determination. The dispute was determined in favour of Magaramombe and the arbitrator ordered that Magaramombe be reinstated or that alternatively he be paid damages in lieu of reinstatement.

The University appealed to the Labour Court against the arbitrator's decision in terms of s 98(10) of the Labour Act [*Chapter 28:01*] (hereinafter referred to as "the Act"). The University also applied to the Labour Court for an order suspending the arbitral award pending the hearing of the appeal. That application was made in terms of s 92E(3) as read with s 89(1)(a) of the Act.

Magaramombe elected to be paid damages in lieu of reinstatement and requested the arbitrator to quantify the damages due to him. During the quantification proceedings the University unsuccessfully applied for the stay of proceedings, on the grounds that it had applied to the Labour Court for the suspension of the arbitral award pending the appeal. The application for the stay of proceedings was turned down by the arbitrator, on the ground that an appeal against an arbitral award and an application for interim relief do not have the effect of suspending an arbitral award. The arbitrator thereafter awarded Magaramombe the sum of $77 302 as damages.

On 26 September 2011 the University appealed against the award of damages and also applied for a review of the award. On 27 September 2011 Magaramombe applied to the High Court for registration of the arbitral award. The University did not oppose the application for registration, as it was of the view that there was no need to oppose the application for registration since it had already applied for the suspension of the award to the Labour Court. The University assumed that the execution of the award was dependent on the outcome of the application to the Labour Court. The Labour Court granted the University a stay of execution of the arbitral award pending the hearing of the appeal on 3 November 2011. The High Court registered the arbitral award on or about 14 November 2011.

After the registration of the arbitral award with the High Court, Magaramombe sought to execute the award despite the suspension of the award by the Labour Court. The University launched an urgent application to stay the execution to the High Court. The basis of the University's urgent application was that the arbitral award that was executed had been suspended by the Labour Court pending the hearing of an appeal against that award by Labour Court. The High Court dismissed the Chamber application. The University noted an appeal against the dismissal. The University now applies in Chambers for the appeal to be set down on an urgent basis and for an order staying execution pending the determination of that appeal.

In dismissing the urgent application the learned Judge had this to say at pp 4-5 of the cyclostyled judgment (HH-61-12):

"The last preliminary point was that the matter was not urgent. … Ms Mberi submitted that the applicant sat on its laurels and only acted when the day of reckoning was at hand. She contended that the applicant should have acted on 27 November 2011 when it was served with the notice of registration of the award.

Mr Mpofu made contradictory submissions on the failure to oppose registration. The first was that the noting of (the) appeal in the Labour Court against the arbitral award automatically suspended the award. The second was that it was hopeless to oppose without first obtaining interim relief from the Labour Court stopping the implementation of the arbitral award.

If the applicant believed that it was on (a) firm footing on the first ground, then all the more reason for it to oppose registration on that point. But as events that transpired after it obtained interim relief shows (*sic*), the applicant believed that implementation could only be stayed by obtaining relief from the Labour Court.

Mr Mpofu did not dispute Ms Mberi's submission that the applicant was aware of the judgment of *Dhlodhlo supra*, that the Labour Court judgment could not stop a High Court order because the latter is a court of superior jurisdiction. … I agree with Ms Mberi that at the very least, with this foreknowledge, the applicant, knowing that the first respondent was seeking registration of the arbitral award, should have diligently searched for the outcome of the application especially after it received the interim relief it sought in order to forestall it. It was aware that the purpose of seeking registration was to execute. Armed with the interim order, the applicant was duty bound to either oppose the registration, which was granted on 15 November 2011 or to file an application such as the present one soon thereafter.

I find that it waited until the day of reckoning precipitated by the attachment of 26 January 2011 (2012?) to stay the execution. It did not act with diligence. It sat on its laurels and did not act when the time to act presented itself."

My understanding of the above excerpts of the judgment is that the court *a quo* made the following two determinations –

(a) the matter was not urgent; and

(b) the execution of the arbitral award could not be stayed because the award had become a High Court judgment whose execution cannot be suspended by the Labour Court.

In this Chamber application Mr *Mpofu,* for the University, essentially argued that execution of the award of the arbitrator was suspended by the Labour Court, which preceded the registration of the award in the High Court. Consequently, Magaramombe could not execute the award despite its registration with the High Court as the execution of the award had been suspended by the Labour Court by the time it was registered. In other words, the award that was registered was a suspended award which could not be executed.

Ms *Mberi*, for Magaramombe, on the other hand, initially raised two preliminary points. She submitted that the Supreme Court had no jurisdiction to hear the Chamber application because there was no valid appeal before the Supreme Court. She argued that the court *a quo* simply ruled that the matter was not urgent and such ruling was interlocutory. She contended that the University had not obtained the leave of the court *a quo* to appeal. Leave to appeal not having been sought and granted, there can be no valid appeal before the Supreme Court. It was also Ms *Mberi's* submission that, on the authority of *Dhlodhlo v The Deputy Sheriff for Marondera and Three Ors* HH-76-11, even if the order issued by the Labour Court had stayed execution of the award, such an order was of no force and effect because the award had since been registered with the High Court and thus became a High Court order which cannot be suspended by an order of an inferior court, namely the Labour Court.

The learned Judge in the court *a quo* was probably correct in concluding that the University had authored the urgency of the matter before him by delaying the launching of the urgent application until the last minute. I also accept

the submission of Ms *Mberi* that a determination of whether or not a matter is urgent is interlocutory. An appeal against such a determination would certainly require the leave of the court *a quo*. If such leave were granted, the superior court can only interfere with such a ruling on the basis of a misdirection or gross unreasonableness.

In casu, as I have already stated, the learned Judge went beyond ruling on the urgency or otherwise of the matter. The court *a quo* determined that the execution of the arbitral award could not be stayed on the basis of a suspension order issued by the Labour Court. The learned Judge reasoned that the Labour Court was inferior to the High Court. Consequently, the Labour Court could not suspend a judgment of the High Court. He concluded that once a judgment is registered in the High Court it becomes a judgment of the High Court and cannot be interfered with by the Labour Court.

This determination by the court *a quo* is not interlocutory. It is a definitive and final determination and therefore appealable by the University without the need for leave of the court *a quo*. On this basis I am satisfied that the Supreme Court is properly seized with the matter and that the relief sought in this Chamber application relates to a matter with which the Supreme Court is properly seized.

In this Chamber application, as I have already stated, the University seeks the relief that the appeal be set down on an urgent basis and that the execution of the arbitral award be stayed pending the hearing of the appeal. Two issues fall for determination in this Chamber application – (1) whether or not this matter should be set down on an urgent basis; and (2) whether or not the University is entitled to the

interim relief of a stay of execution of the arbitral award pending the determination of the appeal.

I will deal with the second issue first, namely the entitlement of the University to the interim relief of a stay of execution.

The factors to be taken into account in considering the grant of interim relief are now well settled. These are –

(1) Whether or not the party seeking the relief has a *prima facie* right, *in casu*, whether the University has a *prima facie* right to stay the execution of the sale of the attached property pending the determination of the appeal;

(2) Whether or not the applicant, in this case the University, will suffer irreparable harm if execution of the arbitral award is not stayed and the appeal succeeds; and

(3) The balance of convenience.

Dealing first with the issue of whether or not the University has a *prima facie* right to the stay of execution pending the determination of the appeal. In effect the University is appealing against the court *a quo's* determination that the Labour Court's order suspending execution of the arbitral award is *ultra vires* because the Labour Court cannot interfere with the process of a superior court. Whether or not the court *a quo* was correct in this conclusion is a matter that the appeal court will have to determine. In the event of the Supreme Court determining that issue in

favour of the University, the University will have a clear right or entitlement to a stay of execution of the arbitral award pending the hearing of the appeal by the Labour Court. On this basis alone, the University has established a *prima facie* case.

In my view, the University has not only established a *prima facie* case but has very good prospects of success on appeal for the following reasons.

The University appealed against the arbitral award in terms of s 98(10) of the Act. Section 98(10) of the Act provides as follows:

> "**98 Effect of reference to compulsory arbitration under Parts XI and XII**
>
> (10) An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

Section 98 confers on the University the right of appeal against the determination of the arbitrator on a question of law.

Having noted an appeal against the arbitral award, the University also applied to the Labour Court in terms of s 92E(3) as read with s 89(1)(a) of the Act for the stay of execution of the arbitral award. Section 93E(3) as read with s 89(1)(a) of the Act provides as follows:

> "**92E Appeals to the Labour Court generally**
>
> (3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires."

And:

> "**89 Functions, powers and jurisdiction of Labour Court**

(1) The Labour Court shall exercise the following functions –

(a) hearing and determining applications and appeals in terms of this Act or any other enactment. …"

Quite clearly, the Act conferred on the University the right to apply for the suspension pending appeal of the arbitral award in terms of the above section.

On 3 November 2011 the Labour Court granted the University a stay of execution of the arbitral award. The Labour Court in doing so was *intra vires* the above cited provisions of the Act. On 14 November 2011 the High Court, upon application by Magaramombe, registered the arbitral award. Upon the registration of the arbitral award, the award became a judgment of the High Court. See s 92B (3) and (4) of the Act.

I entertain serious doubts as to whether the mere registration of the arbitral award with the High Court has the effect of erasing or rendering null and void the prior order of the Labour Court suspending execution of the arbitral award. That, however, is an issue that will be determined by the appeal court.

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 irreparable harm if interim relief is not granted.

Lastly, the balance of convenience is slightly in favour of the University, Magaramombe is presently employed and will not be seriously disadvantaged by the delay of the sale in execution of the University's property.

An order leaving the property under attachment but staying execution would meet the justice of this case. Accordingly I order that the property belonging to the University remain under attachment pending the determination of the appeal. The balance of convenience also favours that the University remain in possession of the attached property pending the determination of the appeal.

Finally, the grant of interim relief removes the urgency of set down. There is no indication that the papers in this matter are ready for the hearing of the appeal. Accordingly I will not grant that relief, except to direct that the matter be set down as soon as the record is ready.

Costs will be costs in the cause. Accordingly, the application to the extent stated above is granted.

Dube, Manikai & Hwacha, applicant's legal practitioners

Hogwe, Dzimirai & Partners, first respondent's legal practitioners