

REPORTABLE (140)

**(1) WISE GARIRA (2) SHEPHARD MASHINGAIDZE (3) BAYAI
BAYAI**

v

**(1) NATIONAL ENGINEERING WORKERS' UNION (2) FIRST
CAPITAL BANK**

SUPREME COURT OF ZIMBABWE

GUVAVA JA, BHUNU JA & KUDYA AJA

HARARE, 27 OCTOBER 2020 & 12 NOVEMBER 2021

S Ushewokunze, for the appellants

R Mabwe, for the 1st respondent

No appearance, for the 2nd respondent

BHUNU JA:

Judgment No. SC 141/21
Civil Appeal No. SC 222/20

1

[1] This is an appeal against the whole judgment of the High Court (the court *a quo*) which ordered the removal of the three appellants from being signatories to the first respondent's bank account with the second respondent. The appeal is opposed by the first respondent. The second respondent has chosen not to appear both before the court *a quo* and this court. It appears that the second respondent has chosen to remain neutral as the outcome of the court proceedings is unlikely to prejudice it one way or the other.

PRELIMINARY POINT

[2] At the commencement of the appeal hearing Mrs *Mabwe* for the first respondent, took a preliminary point seeking the removal of the matter from the roll to facilitate consolidation of this matter with other appeals in case records SC 27/20, SC 32/20 and SC 34/20.

[3] She argued that it would be unjust to determine this appeal before the main matter has been determined. Asked by the court as to the stage the other matters she sought to be consolidated were she said that the records in SC 27/20 and SC 32/20 were complete but was not sure of record SC 34/20. Asked whether she had given notice of the intended consolidation to all the parties she stated that she had only given notice to some of the interested parties. She was therefore seeking removal of the case from the roll to enable her to give the relevant notices to all the remaining interested parties.

[4] Mr *Ushewokunze* objected to the application for the removal of the case from the roll. He submitted that it was not true that there were three related cases pending before this Court because the appeal in case SC 34/20 had been abandoned. It was his submission that the judgments of CHIKOWERO J and MUSITHU J respectively had not been appealed against. He further pointed out that in both outstanding appeals, Judgment No. SC 141/21 and Appeal No. SC 22/20, the second respondent is not even a party and the respondents are not the appellants. Mr *Ushewokunze* pointed out that Mrs *Mabwe*'s client Ben Mambara, had been barred.

[5] Finally he argued that in the circumstances of this case, the Court has a discretion which it should exercise in his favour because it was not convenient to remove the matter from the roll causing further unnecessary delays.

[6] Having considered the submissions by counsel, we noted that Mrs *Mabwe* had not established a compelling case for removal of the case from the roll. She was not even certain of the status of the appeals she intended to have consolidated. Apart from merely submitting that it will be unjust to proceed with this appeal before the main matter has been determined she did not motivate what prejudice or injustice her client

would suffer if the matter was not removed from the roll. In her written submissions she made it clear that it would be proper to proceed with this appeal without consolidation when she says at p 1 of her heads of argument:

“Whilst it would be proper to deal with the current appeal alone, this will be a matter where the court may have to consolidate all matters involving the parties,” (My emphasis)

What this means is that there is nothing wrong if the appeal is determined alone without consolidation.

[7] Upon careful consideration of submissions made by counsel, we took the view that the question of signatories to the bank account needed to be resolved expeditiously without being drawn back by the uncertainties surrounding the state of preparedness of the other cases to be heard on appeal. For that reason, we came to the conclusion that the requested removal of the case from the roll will not serve any useful purpose but only to cause uncertainty and unnecessary delay. Consequently, we dismissed the application and directed that the appeal hearing must proceed. I now turn to consider the appeal on the merits.

Judgment No. SC 141/21

Civil Appeal No. SC 222/20

3

BRIEF BACKGROUND OF THE CASE

[8] The first respondent is a duly registered trade union representing the interests of employees in the Engineering, Iron and Steel sector hereinafter referred to as the Union. The Union opened and maintains a Bank Account Number 6327897 with the second respondent bank. On the other hand, the first and second appellants were employed by the Union as its president and secretary general respectively, whereas the third appellant was its trustee.

[9] At the inception of the bank account, the three appellants were appointed by Union resolution dated 15 February 2019 as signatories to the said bank account in their respective capacities as Union officials. The union then sought to remove the appellants from the panel of signatories to its bank account on the basis that they had ceased to be union officials.

[10] In its founding affidavit deposed to by Ben Mambara, the union averred that the first and second appellants were dismissed from employment following disciplinary proceedings on 22 April 2019 and 14 June 2019 respectively. The third appellant's trusteeship had expired through the effluxion of time. The union provided documentary evidence of the appellants' dismissal from office.

[11] The appellants however resisted their removals from being bank account signatories on the basis that they were still union officials. They also challenged the legitimacy of the union resolution that authorised their removal as signatories to the union bank account. They challenged the legitimacy of Ben Mambara as the incumbent president of the union and deponent to its founding affidavit. In that vein they refused to relinquish their respective mandates as signatories to the Union's bank accounts hence the application for their removal as bank signatories in the court *a quo*.

[12] The case has been the subject of various conflicting judgments in the court *a quo* which are now pending in this court on appeal. On 23 January 2020, MUSHORE J issued a lengthy order in favour of the appellants under case number HC 8111/19. The order basically declared that the three appellants were the legitimate office holders entitled to run the affairs of the first respondent without let or hindrance. On the other hand, the order declared Ben Mambara to be an illegitimate president of the first respondent. In short the judgment restored the *status quo ante* prior to the

appellants' dismissal from office. The judgment is now a subject of appeal and it triggered a series of other appeals under appeal case numbers SC 27/2020, SC 32/2020 and SC 34/2020.

- [13] Following the restoration of the status *quo ante* by MUSHORE J'S order the respondents were aggrieved by the manner in which the appellants were handling the first respondent's funds. Resultantly, the first respondent represented by Ben Mambara approached the court *a quo* under case number HC 6844/19 seeking their removal from office as signatories of its bank account. The first respondent was successful in this respect. The current appeal challenges the judgment on the basis that MUSHORE J'S order had barred Ben Mambara and six others from acting as the Union's officers. The appellants claim to have been declared the legitimate signatories to the bank account by the judgment which is still extant.

Judgment No. SC 141/21
Civil Appeal No. SC 222/20

5

- [14] Notwithstanding the appeal, the first respondent sought leave of the court *a quo* to execute the order removing the appellants from being signatories to its bank account under case number HC 444/20. CHIKOWERO J dismissed the application. Another application for the reactivation of the Union's bank account was dismissed by MUSITU J on 15 September 2020.

DETERMINATION OF THE COURT A QUO.

- [15] The court *a quo* found that Ben Mambara had the requisite authority to represent the union. In coming to that conclusion the learned judge *a quo* reasoned that the union being a legal *persona* could only be represented by a natural person duly authorised thereto by a valid union resolution. Consequently, upon the removal of the first appellant from office as Union President, the Union by resolution dated 15 February

2019 replaced the first appellant with Ben Mambara. The resolution also conferred him with authority to represent the respondent in these proceedings.

[16] The resolution reads in part:

“IT WAS RESOLVED:

2. That the President Ben Mambara shall sign documents and represent the Union and at NEC level.

SIGNED AT BULAWAYO this 15th February 2019.

Signed

.....

(SECRETARY).”

[17] Having found that Ben Mambara was properly appointed as the Union President and Union representative, the learned judge *a quo* proceeded to hold that the appellants were no longer Union officials. That being the case, they could no longer continue to be signatories to the Union’s bank account. On the basis of such finding he proceeded to issue the following order:

“IT IS ORDERD THAT:

1. The first respondent be and is hereby ordered to delete or remove Shepard Mashingaidze, Wise Garira and Bayayi Bayayi from being signatories of applicant’s Account No. 6327897 held with the 1st respondent.
2. The 2nd to 4th Respondents jointly and severally one paying the others to be absolved, pay costs at the legal practitioner and client scale”

[18] Counsel for the first 1ST respondent has not however sought to sustain and enforce the above order. She has in fact implored the court to exercise its review jurisdiction under s 25 of the Supreme Court Act [*Chapter 7:13*] on account of perceived irregularity. Wherefore she prayed for an order in the following terms:

“Having utilised the powers granted to it under s 25 of the Supreme Court Act [7:13], the following is ordered:

- a. Appeals under S - 27- 2020, S – 32 – 2020 S – 34- 2020 and S 222-20 be and are hereby set consolidated.
- b. The judgment of the High Court under HC 8111/2019 granted by MUSHORE J on 23rd January 2020 be and is hereby set aside.
- c. The judgment of the High Court under HC 6844/20 by TAGU J on 20th May 2020 be and is hereby set aside.
- d. The judgment of the High Court under HC 444/20 granted by CHIKOWERO J on 8th July 2020 be and is hereby set aside.
- e. The judgment of the High Court under HC 594/20 by MUSITHU J on 15th September 200 be and is hereby set aside.
- f. HC 8111/19 is remitted back to the High Court for a hearing *de novo* before a different judge.
- g. **Pending the determination of HC 8111/19, 2nd Plaintiff, third plaintiff, 3rd-9th Defendants Plaintiff shall not take any steps that will interfere with the operations of the 1st Defendant.”**
(Emphasis provided)

Judgment No. SC 141/21
Civil Appeal No. SC 222/20

7

2. It is thus prayed.”

[19] It is plain that the above relief sought is premised on the ill-conceived assumption that the court would grant the request for consolidation. Paragraph ‘g’ of the draft order however, seems to have some merits because it seeks to protect the bank account from abuse by persons who are for the time being no longer its officials pending the final determination of the parties’ competing rights.

[20] The Court having dismissed the prayer for consolidation, paras (a) to (f) of the first respondent’s prayer cannot stand as they are premised on the envisaged consolidation which never materialised. For that reason, the Court cannot interfere with appeals which are not before it. I will therefore focus on the instant appeal before this Court. No application for review can be brought in terms of s 25 of the Act. The court acts

mero motu. Thus Mrs *Mabwe* was merely raising the court's attention to exercise its discretion in this regard.

ANALYSIS OF THE FACTS AND THE LAW

[21] It is common cause that all the appellants were appointed as signatories to the bank account by virtue of their status as Union officials in their respective capacities as President, Secretary General and Trustee. That being the case, common sense dictates that their status as signatories to the bank account terminates upon cessation of office. It stands to reason that when the reason for the appointment falls away the appointments also fall away. The fundamental question that the learned judge *a quo* had to answer was whether the appellants were still in office for them to retain their status as signatories to the Union's bank account. He answered that question in the negative. The correctness or otherwise of that judgment is yet to be determined on appeal.

Judgment No. SC 141/21
Civil Appeal No. SC 222/20

8

[22] The difficulty with this case is that the appeal falls to be determined on the basis of conflicting judgments emanating from the same court *a quo*. The position in our law is clear that judicial judgments are correct until they have been pronounced otherwise by a higher court of competent jurisdiction. In the South African case of *Mkize v Swemmer & Ors* 1967 (1) SA 186 the court held that, "Judicial decisions will ordinarily stand until set aside by way of appeal." Back home in the case of *Williams & Anor v Msipha NO & Ors* 2010 (2) ZLR 552 (5) at p 567C, this Court held that, "Only an appeal court has the right to say that a judicial decision is wrong."

[23] Given the position of our law in this respect, the logical conclusion is that all the conflicting judgments referred to in this case are correct until this Court has resolved

the conflicts. Before that no one can authoritatively say that any of the impugned judgments are wrong.

[24] Paragraph g of the first respondent's prayer seeks to downgrade the order granted by the court *a quo* in HC 8111/20 to a temporary interdict pending the determination of the main dispute on appeal. There is need to interrogate that proposal on the merits.

[25] It is common cause that first and second appellants were employed by the Union. They were dismissed from employment following disciplinary proceedings. They have since appealed against their dismissal. That much is not in dispute. In terms of s 92E (2) of the Labour Act [*Chapter 28:01*] an appeal shall not suspend the decision appealed against.

[26] In interpreting the section in *CFI Retail (Pvt) Ltd v Manyika*¹ MALABA DCJ as he
Judgment No. SC 141/21
then was observed that: Civil Appeal No. SC 222/20

9

“Section 92E (2) provides that the noting of an appeal to the Labour Court against a determination or decision does not have the effect of suspending the operation of the determination or decision appealed against. The purpose of the section is to provide for the effect of the noting of an appeal in terms of the Act on the enforcement of the determination or decision. The provision is the reversal of the common law principle that the noting of an appeal against a judgment or decision of a tribunal or lower court suspends the execution of the judgment or decision pending the determination of an appeal”.

[27] The same applies to appeals against the judgments or decisions of the Labour Court. This is because there is no statutory provision for the suspension of its judgments or decisions pending appeal. The common law rule that an appeal suspends the decision appealed against only applies to superior courts of inherent jurisdiction. In *Founders Building Society v Mazula*² the court held that:

¹ SC 8/16 at p 4

² 2000 (1) ZLR 529

“The rule that an appeal suspends the operation of the decision appealed against applies only to superior courts. It does not apply to other tribunals unless the relevant statute so provides.”

[28] In the absence of statutory authorisation the common law rule that an appeal suspends the judgment or decision appealed against does not apply to any appeals in terms of the Labour Act. Had the appellants wanted to remain in office despite their dismissal from employment, they should have successfully applied for an interim order staying execution pending appeal in terms of s 92E (3) of the Act. See *Greenland v Zimbabwe Community Health Intervention Research Project (ZICHIRE)*³. This they did not do. What this means is that whether or not they have appealed against their dismissals in terms of the Labour Act, it does not matter whether or not the dismissals were correct at law. It is therefore an exercise in futility for both appellants at this stage to impugn or cast aspersions on the decision of the inferior tribunal that dismissed them from employment. They stand dismissed from employment until their respective appeals have been reversed on appeal. As regards the third appellant, it is common cause that he was appointed as Trustee by Union resolution and was removed from office by Union resolution on account of the expiration of his term of office. Following his removal from office he is *defacto* out of office.

[29] The net result is that all the three appellants are *de facto* out of office as Union officials. Although they have appealed against their removal from office, in the interim the balance of convenience favours the respondents. It is highly undesirable and a recipe for disaster and irreparable harm that a person dismissed from office whether rightly or wrongly continues to be a signatory to his/her principal's bank account pending appeal.

³ HH 93/13

[30] Having come to the unassailable conclusion that the appellants are currently no longer officials of the first respondent, the court *a quo* cannot be faulted for holding that the appellants are unsuited to be signatories to the first respondent's bank account as things stand. The court *a quo* however fell into error in making a final order before the parties' competing rights have been conclusively determined on appeal.

[31] The mere fact that there were numerous conflicting decisions on the same matter emanating from the same court on various aspects of the matter meant that there was uncertainty on the appellants' prospects of success on appeal. Despite that knowledge they chose not to obey judicial and administrative processes that removed them from office and ultimately from being signatories to the first respondent's bank account. It is always wrong for a person to insist on being a signatory to another's bank account without that person's consent. Even assuming for one moment that the appellants had been wrongfully removed from office, they had no right to insist on continuing to be signatories to the Union's bank account without its consent.

Judgment No. SC 141/21

High Court of Botswana, 22/02/2022

11

[32] Given the unsavoury chaotic state of affairs created by the various conflicting judgments emanating from the court *a quo*, this is in my view an appropriate case where the Court must resort to its inherent jurisdiction to restore order pending appeal. In *Williams and another v Msipha N.O and Ors (supra)* this court held that:

“Once the Supreme Court is seized with a matter, it has inherent jurisdiction to control its process. That jurisdiction includes the power to control the process of the court, including the prevention of execution of a judgment pending the hearing of an application. It thus has the power to restrain the magistrate and the Attorney-General from relying on the magistrate's decision...”

[33] What this means is that the court in this case can achieve justice without recourse to its review jurisdiction as requested by Mrs Mabwe. In my view, it is always preferable for the Court to use its original inherent jurisdiction where it is possible to do justice

without recourse to borrowed jurisdiction under s 25 of the Supreme Court Act. I say borrowed jurisdiction because the section clothes this court with the jurisdiction of the High court where there is a lacuna in its own jurisdiction.

COSTS

[32] The courts always frown upon failure to obey court orders. The appellants' moral turpitude in this case was however ameliorated by the fact that theirs was not a naked disobedience of a court order as they appear to have been ill-advised to act on the basis of a court order that had been overtaken by events. For that reason, punitive costs were not warranted. The fact however stands that TAGU J's order being a later order to that of MUSHORE J's order ought to have been obeyed. This is however not to detract from the fact that there is need to preserve order and the bank account from abuse pending the final determination of the dispute on appeal.

Judgment No. SC 141/21
Civil Appeal No. SC 222/20

12

DISPOSAL

[33] In the result, it is ordered that:

1. The appeal partially succeeds with each party bearing its own costs.
2. The order of the court *a quo* is set aside and substituted with:
 - “(a) Pending the determination of HC 8111/19, 2nd, 3rd plaintiff and 3rd to 9th defendants shall not take any steps that will interfere with the operations of the first respondent pending.
 - (b) The applicants shall bear the costs of the application jointly and severally the one paying and the other to be absolved.”

GUVAVA JA

:

I agree

KUDYA AJA : I agree

Ushewokunze Legal Practitioners, the 1st to 3rd appellants' legal practitioners.

Makuru & Partners, the 1st respondent's legal practitioners.