

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/51/2014

**HARARE, 13 SEPTEMBER
2013 & 14 FEBRUARY 2014**

CASE LC/H/148/2013

In the matter between:-

MINERALS MARKETING CORPORATION OF ZIMBABWE APPELLANT

Versus

GEORGE TINODIREYI MVUDUDU	1ST RESPONDENT
And	
JORRUM MUNYARADZ CHINAMASA	2ND RESPONDENT
And	
TINASHE KASERE	3RD RESPONDENT
And	
TWOBOY MOYO	4TH RESPONDENT
And	
NHLANHLA MPOFU	5TH RESPONDENT
And	
WINNIFIELDAH KUDZANAI RUGARE	6TH RESPONDENT

Before The Honourable D L Hove : Judge

For the Appellant S Zvinovakobvu (Legal Practitioner)

For the Respondent H Mutasa (Legal Practitioner)

HOVE J:

On 23 September 2013 this court issued an order dismissing with costs the application for stay of execution. A request has been made for reasons for the order and I outline the reasons in the following judgment.

This is an application in terms of s 92 E (3) of the Labour Act which provides materially as follows:

“Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.”

The facts are as outlined in the respondents heads. Briefly, the respondents were retrenched by the applicant. It was a term of the retrenchment agreements that annual performance bonuses would be paid to each of the respondents after the finalization of the audited accounts.

Long after the respondents had left the applicant's employ, pursuant to the retrenchment agreements, the applicant decided to unilaterally alter the terms of the retrenchment agreements by failing to pay bonus for 2009. The basis of this new position was that no profits had been realized for that year.

It is trite that the issues to be considered in an application of this nature include:

- (i) The applicant's prospects of success on appeal;
- (ii) Absence of an alternative remedy;
- (iii) Well-grounded apprehension of irreparable harm;
- (iv) Balance of convenience; and
- (v) The demands of justice.

See *Chibanda v King* 1983 (1) ZLR 116; and *Employees of ABC Auctioneers v ABC Auctioneers* LC/H/263/04.

From the undisputed facts, the applicant entered into an agreement to pay a bonus. It did not qualify its decision to pay the bonus. It could have said that it would pay the bonus if it made a profit for that year. It did not. It simply undertook and agreed to pay a bonus. It later found out that it had not made a profit for the year 2009. That however is not a good enough reason to renege on an undertaking which it had entered into. The employer may have made a bad decision but that in itself is not sufficient to allow it to renege on a legally binding agreement. In the case of ***Blessing Mashizha***

v First Banking Corporation HH-186-99 the Court stated at page 8 as follows:

*"The position is now settled that a person who signs a contractual document thereby signifies his assent to the contents of the document and if these turn out not to be to his liking, he was no one to blame but himself - R H Christie, The Law of Contract in South Africa 3rd edition page 194 - 5. This is often, referred to as the caveat subscriber rule. In **George v Fairmead (Pty)Ltd 1958 (2) SA 465 A**, FAGAN CJ remarked:*

'When a man is asked to put his signature to a document, he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature'".

In this case, the applicant willingly entered into a retrenchment agreement and signed that agreement. The Applicant cannot therefore assert that the terms thereof are not binding on it.

The applicant's prospects of success are in my opinion bleak.

The interests of justice and the balance of convenience cannot be served by staying execution in a case that the court is of the opinion that the applicant's prospects of success are bleak. In fact the balance of convenience weighs heavily in favour of the respondents.

In the event that the applicant is successful in its appeal, they can always recover their money from the respondents. They will therefore have a remedy by proceeding to recover from the respondents. No irreparable harm will be suffered as the applicant can recover from the respondents.

The common law position as enunciated in the case of **Cape Corp v Engineering Management Services 1977 (3) SA 534 (A)** that:

"It is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal. The purpose of the rule is to prevent irreparable damage from being done to the intending appellant."

has been modified by statute. The Labour Act [Cap 28:01] ("the Act") has specifically altered this position. It provides in section 92 E (2) that the noting of an appeal does not suspend the decision appealed against.

In labour matters the legislature has however given the court a wide discretion to decide in the interests of justice whether or not to stay execution pending appeal.

This position is by operation of law. See section 92 E (3) of the Act.

The applicant had to show that the respondents were not going to be able to pay it back in the event that the applicant is successful. The affidavit by *Nomsa Moyo* on behalf of the applicant does not in any way establish the basis of its bold statement that the respondents would fail to pay back. Nothing has been placed before the court to persuade it that this is so. No basis for the apprehension for irreparable harm has been shown.

The case of **Santam Insurance Company Limited v Paget (2) 1981 ZLR 132** established that:

"The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused him or, to express the preposition in a different form of the potentiality of his suffering irreparable harm or prejudice. That task is by no means easy where,

as in the present case, the judgment it is sought to suspend sounds in money, for the giving of effect to it, unlike with orders for ejection or the transfer of property, does not render difficult any restitution that may have to be made."

The applicant has, in my opinion, failed to discharge this heavy onus. It failed to place before the court any reasons why it is felt that there would be irreparable harm when restitution can easily cure the harm the applicant may have suffered by the execution of the judgment.

The cases of

- (i) ***Cohen v Cohen* 1979 (3) SA 420**, and
- (ii) ***Mtune v Mutiti* 2002 (2) ZLR 490**

Re-emphasized the position that it is the court which is granted the power to do what is just and convenient by granting execution or refusing to grant execution depending on the circumstances of each case and on the basis of real and substantial justice.

The circumstances of this case, where I have found that the applicant's prospects of success on appeal are bleak, are such that it is in the interest of justice that the application be dismissed with costs.

Mutamangira & Associates, appellant's legal practitioner