

UNIVERSITY OF ZIMBABWE
versus
VENGAI MUGABE
and
JELOUS ZHAKATA
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 11, 13 & 26 February 2025 & 3 March 2025

Urgent Chamber Application-Stay of Execution Pending Return Date

Adv T Zhuwarara with T Chagudumba, for the applicant
Mr T E Gumbo, for the 1st respondent

MUSITHU J: The applicant approached this court seeking temporary relief for stay of execution of an order granted by this court per CHINAMORA J pending the confirmation or discharge of the provisional order that it seeks before me. On the return date, the applicant also seeks by way of substantive relief, that the execution of the CHINAMORA J order be suspended pending the determination of an application for leave for direct access that was made to the Constitutional Court.

BACKGROUND

The background to the applicant's case is as follows. In July 2018, the applicant and the first respondent had an employment dispute which was referred to the second respondent for adjudication. The second respondent failed to resolve the dispute through conciliation and proceeded to render a determination on 29 December 2020. The second respondent applied for confirmation of his draft ruling with the Labour Court, and it was duly confirmed by MURASI J of the Labour Court. The Labour Court judgment was registered as an order of this court for enforcement purposes on 1 February 2023 by CHINAMORA J. The order directed the applicant to pay the first respondent the sum of US\$323,036.69, as damages in lieu of reinstatement. It

also gave the applicant greenlight to pay the damages in local currency at the prevailing interbank rate as at the date of payment.

The order further directed the applicant to deliver to the first respondent a Toyota Land Cruiser vehicle, two laptops and a desktop as well as 11 520 litres of fuel or the equivalent in monetary value at the date of delivery. Armed with that order, the first respondent instructed the third respondent to attach the applicant's goods to satisfy the terms of the order.

Before execution took place, the applicant sought and was granted leave to appeal against the Labour Court judgment at the Supreme Court. The Supreme Court dismissed the applicant's appeal and advised that reasons for judgment would follow. The applicant was aggrieved by the way its appeal was handled by the Supreme Court. On 21 January 2025, the applicant's legal practitioners wrote to the Registrar of the Supreme Court requesting reasons for the decision to enable them to progress the matter further.

The applicant's legal practitioners also wrote to the first respondent's legal practitioners seeking their indulgence to stay execution pending the determination of the applicant's application for direct access to the Constitutional Court to challenge the decision of the Supreme Court. The first respondent's legal practitioners refused to accede to the request, and they instructed the third respondent to proceed with execution. The third respondent proceeded to the applicant's premises and placed seven of the applicant's vehicles under judicial attachment, with removal set to take place on 10 February 2025. On 7 February 2025, the applicant filed the Constitutional Court application for direct access to that court in terms of s 167(5) of the Constitution.

The applicant avers that it has good prospects of success in having the Supreme Court judgment set aside. The approach to this court for stay of execution was predicated on the fear of irreparable harm befalling the applicant if the first respondent was allowed to proceed with the enforcement of the judgment. The buses and the motor vehicles that were attached were critical to the functions of the applicant. The buses were used to ferry students and staff members, while the motor vehicles were used for the day to day running of the applicant. Allowing removal to proceed would disrupt the operations of the university.

The applicant further averred that the amount involved was considerably substantial and would cause the collapse of the applicant in circumstances where the first respondent was not due any payment at all. The damages involved were employment related and therefore subject to taxation. The first respondent could not execute the full amount before tax was paid.

The obligation to deduct and remit the tax was on the applicant. It was further averred that the first respondent was not employed and had no means to repay that huge amount in the event that the Constitutional Court matter was successful.

The application was opposed by the first respondent. He raised as a preliminary point, the fact that the matter was not urgent at all. This was because the applicant sought to approach the Constitutional Court on what was clearly a non-constitutional matter. The applicant had previously been granted a stay of execution pending the determination of its appeal to the Supreme Court. That stay had been extinguished following the dismissal of its appeal by the Supreme Court. The applicant could not therefore simply approach this court on an urgent basis in order to challenge the factual findings of the Supreme Court.

As regards the merits, it was averred that the applicant had no prospects of success at all in the purported application to the Constitutional Court. This was because the Supreme Court had not made any pronouncement on any constitutional issue to clothe the Constitutional Court with jurisdiction to hear the application. It was also averred that the applicant was clearly seeking to appeal against the Supreme Court findings on the merits of the matter, because no constitutional issue had been adverted to by the Supreme Court.

SUBMISSIONS AND ANALYSIS

The matter was postponed twice at the request of the parties to facilitate a possible out of court settlement. At the resumption of the hearing, counsel agreed to file heads of argument and leave the court to determine the matter on the papers. In its heads of argument, the applicant submitted that the matter was urgent because the first respondent's writ of execution presently in operation demanded immediate compliance, which would lead to the execution of the applicant's property to satisfy the judgment debt well before the Constitutional Court determined whether the applicant should be granted leave or not. It was also submitted that imminent harm was further compounded by the fact that, absent a stay of execution, the applicant's application for direct access to the Constitutional court would be rendered *brutum fulmen* and not worth pursuing any further.

As regards the merits, it was submitted that what the applicant sought was an interdict *pendente lite*, a temporary order aimed at preserving the status *quo* pending the final determination of adjunct proceedings. Such an interdict served to restore the existing situation until the parties' substantive rights were adjudicated upon in another matter. It was further submitted that the granting of such relief did not involve the final determination of the parties

rights. Rather, it ensured that the pending litigation was not rendered nugatory before a decision is reached on the merits.

In his heads of argument, the first respondent submitted that in an application of this nature, the court had to be satisfied that an injustice would result if a stay was not granted. Citing *MAFUSIRE J in Reef Mining (Pvt) Ltd & Ano v The Sheriff* HH 163/15, the first respondent submitted that stay of execution ought to be granted if it would mean justice would turn on its head if the stay sought was not granted. In *Rushwaya v Bvungo* HMA 19/17, the learned judge also held that in a stay of execution, the requirement was simply real and substantial justice. On that basis, it was submitted for the first respondent that real and substantial justice required that the process of execution be allowed to proceed herein primarily because the applicant was afforded ample indulgence to exhaust its appeal rights at the Supreme Court. That indulgence was extended on the basis that the applicant enjoyed a right to appeal to the Supreme Court.

Having considered the parties' submissions on the question of urgency, the court was left without doubt that the matter was urgent, and it had been properly filed under that tag. The third respondent had already effected a judicial attachment of the applicant's vehicles, and removal was set to take place on 10 February 2025. Prior to that date, the applicant had, on 7 February 2025, filed an application for direct access to the Constitutional court. It was clear to the court that the applicant's apprehension of harm was not illusory. It was real. The matter was therefore urgent.

The application before me is one for an interim order. The order sought at this stage seeks to stay execution pending the return date. The requirements for such an application to succeed at this stage were set out in *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors.*¹ MALABA JA (as he then was) said:

"It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary relief must show:

- "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and

¹ 2004 (1) ZLR 511 (S) at 517 C-E

(d) that the applicant has no other satisfactory remedy.”² (Underlining for emphasis)

At this stage, all that an applicant must demonstrate is that there exists a *prima facie* right, which may even be the subject of doubt. Rule 60 (9) of the High Court rules, 2021, is instructive. It states as follows:

“Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case, he or she shall grant a provisional order either in terms of the draft filed or as varied.”

The judge before whom an urgent application is placed only needs to satisfy himself that the papers before him establish a *prima facie* case. The rules permit the judge to formulate that view even without having heard the parties. What an applicant must therefore demonstrate at this stage is different from what the applicant must establish on the return date when it seeks confirmation of the provisional order, if it has been granted. While at this stage the applicant must establish a *prima facie* right which may be open to doubt, this is not the case on the return date where the applicant must prove its case on a balance of probabilities. It is on the return date that this court must interrogate the merits or demerits of the pending constitutional application. At this stage, the court must therefore be careful not to stray and interrogate the very issues that the court on the return date is seized with.

It was submitted on behalf of the first respondent that the applicant was accorded the protection of a stay of execution pending the determination of its appeal to the Supreme Court. This was because the applicant had the right to appeal the decision of the Labour Court to the Supreme Court. The court was urged not to extend the same indulgence in the present matter because no constitutional issues arose for determination in the Supreme Court. As I have already observed, the merits or demerits of the application for direct access must be interrogated on the return date. I say so because this is exactly what the applicant seeks in paragraph 1 of the terms of the final order sought. On the return date, the court must therefore determine this issue in the context of paragraph 1 of the terms of the final order sought. Denying the applicant the stay of execution that it seeks pending the return date, would be tantamount to prejudging the decision of the court on the return date.

It is for the foregoing reasons that the court is satisfied that there is merit in the applicant’s quest for the suspension of execution pending the confirmation or discharge of the provisional order. Resultantly, the following order is hereby granted.

² See also *Nhende v Zigora & Another* SC 102/22

TERMS OF FINAL ORDER SOUGHT:

A. That you show cause why a final order should not be made in the following terms:-

1. That the execution of the writ of execution issued by this Court under case No. HCH 29/23 be and is hereby stayed pending the finalization of an application for leave for direct access and ancillary proceedings in the Constitutional Court.
2. There shall be no order as to costs of suit.

INTERIM RELIEF SOUGHT

B. Pending confirmation or discharge of this Provisional Order, the applicant is granted the following interim relief:

1. The 3rd respondent, or his lawful deputy, be and is hereby ordered not to remove applicant's property from University of Zimbabwe, 630 Churchill Avenue, Mt Pleasant Harare pending confirmation of this order.
2. The 3rd respondent, or his lawful deputy, be and is hereby ordered not to sell applicant's property pending confirmation of this order.

SERVICE OF PROVISIONAL ORDER

Applicants' legal practitioners are hereby authorized to serve the provisional order on the respondents.

Atherstone & Cook, applicant's legal practitioners
Chinawa Law Chambers, first respondent's legal practitioners