

STANLEY MACHOTE
versus
ZIMBABWE MANPOWER DEVELOPMENT FUND

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 19 November 2015 and 13 January 2016

Opposed Matter

T Zhuwarara, for the applicant
L Uriri, for the respondent

MAKONI J: The application before me is an application for leave to execute pending appeal. The facts of the case have been covered in detail in the pleadings and what appears below is a brief summary of the relevant facts.

The applicant herein applied to this Honourable Court to have an arbitral award registered. This application was opposed by the respondent. The respondent opposed the application for two main reasons; the first was that there was an application for stay of execution of the arbitral award pending before the Labour Court at the time the applicant sought to have the arbitral award registered. The respondent also argued that they had a general appeal in the matter also pending before the Labour Court and this appeal should be heard before the arbitral award is registered. The second reason for the respondent's opposition was that, in their view, the arbitral award was against public policy and should not be enforced.

At the time the application for the registration of the arbitral award was heard the Labour Court had dismissed the application for stay of execution pending appeal. This, amongst other reasons, prompted this Honourable Court to grant the application for the registration of the arbitral award. The respondent has since appealed against the decision to grant the application to register the arbitral award. This appeal is pending before the Supreme Court.

The grounds of appeal are as follows:

- “1. That the learned judge erred at law by registering the Arbitral Award in the face of the appeal against the Arbitral award and an application for leave to appeal against the dismissal of the application for stay of execution of the Arbitral award pending before the Labour Court.
2. The learned judge erred at law by not appreciating that section 98 (24) of the Labour Act is worded using a permissive term and hence registration of an Arbitral Award is not mandatory and where an appeal is pending before the Labour Court and there is an unresolved application for stay of execution of the Arbitral Award pending appeal, the High Court ought to have deferred such registration of such Arbitral award.”

The applicant argues that the respondent has appealed the decision made by this Honourable Court in a bid to delay execution of the arbitral award. In the result the applicant seeks leave to execute pending the appeal. The respondent on the other hand argues that their appeal is *bona fide* and that they have strong prospects of success on appeal. The respondents also maintain that they would suffer irreparable prejudice if the applicant was allowed leave to execute pending the finalisation of the appeal.

The sole issue for the court to decide in this matter is this whether or not leave to appeal should be granted pending the finalization of the appeal.

It is trite law that when considering an application for leave to execute pending appeal the court must consider the following:

- “1. The possibility of irreparable harm or prejudice being sustained by the appellant should leave to execute be granted;
2. The possibility of irreparable harm or prejudice to be suffered by the respondent should leave to execute be denied;
3. Prospects of success of the appeal.
4. Where there is possibility of irreparable harm to both parties, the hardship or convenience as the case may be.”

See *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 ZLR 152 (H); *Dabengwa and Anor v Minister of Home Affairs and Ors* 1982 (1) ZLR 223; *Zimbabwe Distance (Correspondence) Education College (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61.

I will begin by dealing with the respondent’s prospects of success. Upon reading the respondent’s Notice of Appeal I am of the opinion that the appeal lodged by the respondent does not enjoy high prospects of success. Tsanga J gave sufficient reasons for granting the application

to have the arbitral award registered and I fail to see how she erred at law in coming to her decision.

The Respondent's main grounds for contesting the application for registering the arbitral award fell away once the Labour Court dismissed the application for stay of execution. Thereafter the Respondent was grasping at straws to keep their argument alive. For example, the argument that the registration of the award must be suspended pending appeal was simply untenable. Section 92 E (2) of the Labour Act [*Chapter 28:01*] states that an appeal against a decision in terms of section 92E (1) of the Act does not suspend the operation of the decision appealed against; see *Giya v Ribbi Tiger Trading* HH-57-14. In order for an arbitral award to operate it must be registered with either the Magistrates Court or with the High Court; see s 98 (14) of the Labour Relations Act and *Delta Beverages (Pvt) Ltd v Chimuriwo & Ors* HH 600-14 and *Muneka & Ors v Manica Bus Co* HH 30-13. It thus follows that if an appeal does not suspend the operation of an arbitral award then the arbitral award must be capable of registration with the appropriate court despite the fact that an appeal is pending.

The argument that the award was against public policy *inter alia* as it was a nullify in that it did not order damages in the alternative is equally untenable. The respondents also believed that the computation of the award amounted to tax evasion they ought to have objected to the method of computation by using Art 33 (1) (a) of the *Uncitral Model Law* as was correctly pointed out by Tsanga J. The respondent did not do this and they did not offer an explanation as to why they failed to do so. This leads one to believe that this line of argument is not genuine and is merely intended to buy the respondent's time.

Having found that the respondent does not enjoy high prospects of success I now turn to the issue of the balance of convenience and potential prejudice to the parties. It is clear in this case that the applicant stands to be prejudiced severely by not receiving remuneration for work the applicant has already done. It is however not apparent how and why the respondent will be severely prejudiced should execution be granted. This aspect was considered by the Labour Court, which is seized with the main appeal. It made the following observation:

"I have looked at the two grounds of appeal. They raise one factual issue. Secondly and as submitted by the respondent should the respondent be reinstated the applicant will pay for work done. There is therefore no prejudice to either party. The balance of convenience favours the application be dismissed."

The respondent has the option of giving the applicant work so that he earns his salary and benefits. The balance of convenience therefore favours the granting of the application.

I will make the following order:

1. Leave be and is hereby granted to the applicant to execute the judgment granted by the Honourable Court in case number HC 9609/14 pending the determination of the appeal noted by the respondent in case SC 421/15.
2. The Respondent pay costs of suit.

Chambati Mataka & Makonese Attorneys at Law, applicant's legal practitioners
Matsikidze & Mucheche, respondent's legal practitioners