

KUKURA KURERWA BUS COMPANY
versus
SIMBA MUKWENA
and
TRUST SINANI
and
RAYMOND CHIGWAZE
and
MESSENGER OF COURT MUTARE

HIGH OF ZIMBABWE
MATHONSI J
HARARE, 9 September 2014

Urgent Chamber Application

T. Deme, for the applicant
J. Tendere for the 1st, 2nd & 3rd respondents
4th respondent In person

MATHONSI J: The first, second and third respondents are former employees of the applicant who were represented by their union namely the Transport & General Workers Union in a labour dispute with their employer, the applicant. The dispute went to arbitration where labour arbitrator Lester Murenje made an arbitral award on 23 May 2014 directing the applicant to pay the 3 respondents, along with 10 other employees, certain sums of money in funeral allowance reimbursements by 31 May 2014.

The applicant did not comply with the arbitral award but instead noted an appeal to the Labour Court on points of law challenging the award granted by the arbitrator. That appeal is yet to be determined. The respondents then approached the Magistrates Court in Mutare and managed to register the award for enforcement purposes in terms of s 98 (14) of the Labour Act [*Cap 28:01*] and issued a writ of execution against property.

Acting on their instruction and in pursuance of that writ, the messenger of Court for Mutare promptly attached, and removed the applicant's Volvo omnibus registration number AAS 3641 on 15 August 2014. In response to the attachment, the applicant has filed this urgent application seeking the following relief:-

“TERMS OF THE INTERIM RELIEF GRANTED

1. The 3rd respondent be and is hereby ordered to release and return the following property it removed from 9B Riverside Drive Mutare:
 - (i) Volvo Bus registration No AAS 3641

TERMS OF THE FINAL ORDER SOUGHT

1. That the 1st, 2nd and 3rd respondents be and are hereby barred and restrained from executing against applicant's property at 9B Riverside Drive, Mutare until applicant (*sic*) appeal in case number LC/MC/66/14 is finalised.
2. The 1st, 2nd, 3rd and 4th respondents pays (*sic*) costs for this application on the attorney-client scale”.

Never mind that the draft order has its challenges including the fact that it is not in Form 29C provided in the High Court Rules, but what the applicant is saying is that, because he has noted an appeal against the arbitral award, execution of the award should be stayed until the appeal has been determined by the Labour Court. Significantly, the applicant has not sought a suspension in the Labour Court, of the arbitral award pending the appeal.

What has to be determined therefore is whether the applicant is entitled to a reprieve pending an appeal noted in the Labour Court. Section 92E(2) of the Labour Act is explicit in its application. It states:

“An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against”.

It was upon a realisation that an appeal to the Labour Court on its own would not suspend the arbitral award appealed against that the law giver included s 92E(3) of the Act which provides:

“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 import of that provision is to allow a party to approach the Labour Court, pending appeal to seek a suspension of the arbitral award where the justice of the case requires.

These provisions of the Labour Act contained in Part XI of the Act were inserted initially by s 29 of Act 17 of 2002 while s 92E was introduced by s 32 of Act 7 of 2005. The authority relied upon by the applicant namely *Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd* 1996(1) ZLR 45(S) that an appeal to the then Labour Relations Tribunal suspended the execution of the judgment was decided on the basis of the common law before s 92E(2) was promulgated. It does not help the applicant.

I have to restate the point I made in *Chaire & Ors v Mt Darwin Bazaar* HH 121/13 at p 2 that:-

“Registration, or is it recognition or enforcement of an arbitral award can only be refused where an application for a stay of execution or suspension of the award is made in terms of s 92E(3) of the Act or upon the person against whom it is invoked satisfying the court of the existence of grounds of refusal set out in Article 36 of the model law in the Arbitration Act [*Cap 7:15*]. See *Tapera & Ors v Field-spart Investments (Pvt) Ltd* HH 103/13 at p 2”.

See also *Greenland v Zichire* HH 93/13 at p 3.

A litigant who has challenged an arbitral award by way of an appeal or review to the Labour Court must then approach that court, not the High Court, in terms of s 92E(3) for interim relief. He cannot, when execution is levied, rush to this court on a certificate of urgency seeking the release of goods placed under attachment on the basis of the appeal. This is because the legislature has seen it fit to provide that such appeal does not suspend the award in s 92E(2) of the Act.

Mr *Deme* for the applicant, having burnt his fingers on the effect of an appeal on an arbitral award, submitted, in trying to save the application, that the award was not properly registered by the Magistrates Court in that the applicant was not served with the application for registration. It is trite that an application stands and falls on the founding affidavit and that evidence cannot be led from the bar.

In the founding affidavit, the closest the applicant comes to alluding to that is where the applicant says the award was clandestinely registered. The submissions made by Mr *Deme* that the award was not registered are not only at variance with the evidence, that is the founding affidavit, they amount to evidence being led from the bar which the applicant is not entitled to do.

In that regard I reject Mr *Deme*'s submissions as being improperly made. Clearly therefore the applicant has taken a wrong turn. It should have approached the Labour Court in terms of s 92E(3) of the Act for interim relief in the form of a suspension or stay of the arbitral award. Having failed to do so, but instead taken what is purely a labour dispute, to this court, the applicant must leave with the consequences.

The application being without merit, it is accordingly dismissed with costs.

Chibune & Associates, applicant's legal practitioners