UNILEVER ZIMBABWE (PRIVATE) LIMITED
versus
REGIMENT MURIRA
and
EDGAR KUTSAWA
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 June, 2016, 1 July, 2016 and 14 September, 2016

**Urgent Chamber Application**

*T.A. Chiurayi*, for the applicant
*T.J. Madotsa*, for the 1st and 2nd respondents
No appearance for 3rd respondent

CHITAPI J: The applicant field this chamber application seeking a stay of execution of the order of MTSHIYA J dated 2 February 2016 in case No. HC 5240/15. MTSHIYA J granted an order in favour of the first and second respondents herein registering an arbitral award which had been granted in their favour against the applicant by the arbitrator G. Fereshi dated 31 July, 2014. The order granted by MTSHIYA J in HC 5240/15 reads as follows:

IT IS ORDERED THAT

1. The arbitral award dated 31st July, 2014 by the Arbitrator Ms G. Fereshi in favour of the applicants be and is hereby registered as an order of this court.
2. The applicants shall delay execution of this order until 19 February, 2016
3. The respondent shall pay costs of suit.

On 23 May, 2016, the first and second respondents acting on the strength of MTSHIYA J's order caused the issue by the registrar of this court of a writ of execution against the movable property of the applicant to enforce the arbitral award wherein the sum of US$39 847.12 was to be realized. On 24 June 2016, the third respondent acting on the strength of the writ of execution attached certain movable goods from the applicants' business premises at 2 Sterling Road, Workington Harare. The goods were to be removed for sale on 29 June, 2016.

The applicant filed this application on 25 June, 2016, being the date following the attachment of its goods.

The background to this case is one that leaves me uncomfortable in setting it out yet I have no choice but to simply do so in the interests of justice. There has been a delay in the disposition of ancillary matters and applications made to the courts following the arbitral award being handed down. It is the delays in the disposition of those matters which have culminated in this application. My discomfort arises from the fact I may appear as if I am judging the conduct of another judicial officer seized with the ancillary matter. I have no jurisdiction to do this.

It is necessary to set out the background to the dispute. The background will however touch on proceedings pending in other courts. The involvement of this court arises from the fact that it is the court for execution of Labour Court orders for purposes of execution. The unfortunate end result is that this court ends up scrutinizing and appearing to review proceedings relating to matters pending in the labour court yet under the Labour Act, [*Chapter 28:01*], the Labour Court enjoys similar or parallel review powers as does this court in labour matters. I do not however wish to be detracted by debating this scenario as it has been mirrored in several decisions of this court. I will simply add my voice to the many voices which have spoken before me that the ideal situation is for the Labour Court to control its processes and execute its orders. The courts have pronounced that once an order of an arbitrator or the Labour Court has been registered in this court for purposes of enforcement, it becomes an order of this court. See *Trust Me Security & Mararike* HH 325/14 and contrast with *CMED Private Limited* v *Kenneth Maphosa and 2 Ors* HH151/15. Whether I agree or not with this legal position is another matter. I did not receive argument on this issue and my position is therefore reserved.

1. The first and 2nd respondents as indicated registered their arbitral award for enforcement. The arbitration was in two parts delivered on 31 July, 2014 and on 15 March, 2015. The award of 31 July, 2014 ruled that the applicant herein had committed an unfair labour practice. It ordered the applicant to reinstate the first and second respondents or pay damages in lieu of reinstatement. The award of 15 March, 2015 was a follow up on the main award ordering reinstatement. The arbitrator quantified damages in lieu of reinstatement.
2. The applicant noted an appeal against the arbitral award of 31 July, 2014. The appeal was noted in the Labour Court on 16 September, 2014 under case No.

LC/H/809/14. A copy of the notice of grounds of appeal is attached to the applicants' papers in this application.

3. After the arbitrator had quantified damages in lieu of reinstatement, the applicant noted an appeal to the Labour Court against the award of quantification on 10 June, 2015 under case No. LC/H/515/15. A copy of the notice of appeal is attached to the applicants' papers in this application.
4. On 19 August, 2015, the applicant filed a chamber application for stay of execution and suspension of the arbitral award in the Labour Court. The stay of execution and suspension of the arbitral award is predicated on the fact there are appeals pending determination before the Labour Court. The chamber application according to the applicant awaits a set down and determination with the parties having filed all the papers. The first and second respondents however aver that the matter was supposed to have been set down for hearing on 23 October, 2015 which date was also the last day for the filing of the respondents heads of argument. The matter I assume was then not heard. The respondents aver that the applicant has not yet set down the chamber application for hearing. The respondents further aver that the chamber application was "misplaced as the award had already been submitted to the High Court for registration." I would observe though that whilst the award may have been 'submitted" to this court for registration, it had not been registered because MTSHIYA J only registered it on 2 February, 2016.
5. On 29 October, 2015, the main appeal case No. LC/809/14 was argued before the Labour Court and the presiding judge reserved judgment. The parties as agreed by them have been making follow ups on the judgment which was reserved and it is common cause that by letter dated 25 January, 2016 the Registrar of the Labour Court advised the parties that the presiding judge had indicated that the judgment was being typed. There were further follow ups by the parties the last of which was a letter from the first and second respondent's legal practitioners dated 13 May, 2016.
6. On 12 May, 2016 the second appeal against the quantification award was postponed sine die with the presiding judge reasoning that it would not make logical sense to hear the quantification appeal in the absence of or before the determination of the main appeal. Obviously the presiding judge was correct

because quantification would only stand to be argued if the arbitral award declaring wrongful conduct by the applicant was upheld.

7. The parties agree that even though MTSHIYA J registered the award on 2 February, 2016, he suspended the operation of his order until 19 February, 2016 hoping that the decision in the main appeal would have been delivered since it was said to be with typing or was being typed as at 25 January, 2016.
8. When the parties appeared before me on 28 June, 2016, I postponed the matter to 1 July, 2016 following the production by consent of the parties of the letter dated 25 January, 2016 from the Labour Court Registrar indicating that the appeal judgment was being typed. I directed the Registrar of this court to make a follow up with the Registrar of the Labour Court on the progress with the awaited for judgment and to submit a report on such progress. I further ordered that in the absence of a report from the Registrar of the Labour Court, the said Registrar was to appear before me at the resumed hearing on 1 July, 2016 to provide me with such information as I considered necessary to assist me in determining this application. In ordering that the Labour Court Registrar should appear before me in chambers as aforesaid, I was acting under the powers given to a judge who is seized with an urgent application as *in casu* by r 246 (1) (a) of the High Court Rules. The rule reads as follows:

> "246 Consideration of application s
> (1) A judge to whom papers are submitted in terms of rule 244 or 245 may-
> (a) Require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide on oath or otherwise as the judge may consider necessary such further information as the judge may require:
> (b) …….
> (2) ……..
> (3) …….

I also granted an interim order against the third respondent to hold over the removal of he attached goods until the final determination of this application.

On 1 July 2016, I was advised that the Labour Court judge who had reserved judgment was not in office. The Labour Court Registrar did not therefore have any useful information on the progress with the handing down of judgment without comment from the judge concerned. Both counsel then agreed that I should determine the application on the papers filed of record. I in turn further ordered the Registrar to again take up the matter of the

reserved judgment with the Labour Court Registrar so that I could be furnished with a report on progress with the handing down of judgment. I directed the Registrar to appraise me of the update by 5 July, 2016. On 5 July, 2016, the Registrar submitted a report from the Registrar of the Labour Court whose operative contents read:

> "We refer to the above matter. Kindly note that judgment in this matter is still reserved."

I am grateful to both Registrar of this court and the Labour Court for their efforts.

The purport of the follow ups on the judgment which I made should not be misconstrued as anything other than an endeavour to establish the fact that judgment is still pending in the main appeal in respect of the award which the first and second respondents insist on seeking to execute on. I have indicated earlier on that I am uncomfortable commenting on the delay in the disposition of the appeal. What I can safely state is that the delay in handing down judgment by the Labour Court has culminated in this application. What I am not able or qualified to comment on are the reasons for the delay. What is relevant to my judgment however as I have pointed out is that the first and second respondents accept that they are a party to an appeal by the applicant which was argued with judgment being reserved. They however insist on their pound of flesh or the execution of the judgment despite the judgment on appeal not being ready yet.

The first and second respondents in their opposing affidavit have raised a point *in limine* that the present application is incompetent because it is *lis pendens.* They aver that the applicant already has a pending application LC/H/515/15 filed in the Labour Court seeking a suspension or stay of the arbitral award pending appeal. They aver further that the Labour Curt is the court which has competent jurisdiction under s 92 E (8) of the Labour Act to order a suspension or stay of execution pending appeal. Section 92 E (8) does not exist in the Labour Act. Perhaps the (8) should have read (3). Section 92 E (3) reads 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".

I agree that the Labour Court has powers outlined in s 92 E (3) as aforesaid. I do not believe however that s 92 E (3) ousts the jurisdiction of this court either expressly or by implication. In fact the section does not say that only the Labour Court can make an interim determination. This court in terms of s 171 (1) (a) of the Constitution has original jurisdiction over all civil and criminal matters throughout Zimbabwe. The Labour Court in terms of s 172 (2) of the Constitution has jurisdiction over labour matters as may conferred by an Act of

Parliament. The Labour Act and in particular s 92 E (3) has not ousted the jurisdiction of the High Court.

The jurisdictional issue is not however the crux of the first and second respondents' argument but that the present application raises issues which are *lis pendens* before the Labour Court in case No. LC/H/515/15. I respectfully disagree. The present application seeks to suspend the operation of the order of MTSHIYA J or its execution. This is not the issue before the Labour Court in case No. LC/H/515/15. *Lis pendens* as a defence can be raised where as stated by Van Winsen *The Civil Practice of the Superior Courts in South Africa*, 3rd ed p 269:

> "If an action is already pending between the parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendant to take the objection of *lis pendens*, that is another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision on the first action".

See also *Mhungu* v *Mhindi* 1986 (2) ZLR 171 (S); *Nkululelo Mabhena* v *PG Industries (Zimbabwe) Ltd & Ors* HB 156/15; *Ntshinga* v *Andreas Supermarket (Pty) Ltd* 1997 (1) SA 184; *Nestle (South Africa) (Pty) Ltd* v *Mars Inc* 2001 (4) SA 542 (SCA); *George & Ors* v *Minister of Environmental Affairs & Tourism* 2005 (6) SA 297.

To ventilate the matter further, the order of this court granted by MTSHIYA J in case No. 5240/15 is not under scrutiny nor does it form part of the application in LC/H/515/15. Case No. LC/H/515/15 does not involve the stay of execution of an attachment already made following the order of this court. The present case involves the Sheriff of this court as a party and he does not feature in case No. LC/H/515/15. I have also indicated that the ruling authorities suggest that once registered, an arbitral award becomes an order of this court. It would be anomalous to argue that the Labour Court is seized with the matter of suspending an order of the High Court. Lastly the relief sought herein is to stay execution pending the determination of appeals filed in LC/H/809/14; LC/H/APP/1012/15 and also LC/H/515/15 the last matter of which the first and second respondents base their defence of *lis pendens* upon. The defence in any event is not an absolute bar to the determination of a matter properly before a court. The court seized with the matter in which *lis pendenis* is raised as a defence has a discretion to stay the matter before it pending determination of an earlier filed matter. Equally the court can decide to deal with the matter irrespective that another

undecided matter is pending in another court. In this application however, I do not find merit in the point *in limine* for reasons I have given and I therefore dismiss the point *in limine*.

The next point raised by the first and second respondents though in a feeble manner and not developed or persisted in with conviction pertains to the urgency of the matter. They aver that the matter is not urgent because the urgency is self-created. They aver that the applicant took no steps to set down the application for stay of execution and suspension of arbitral award in the Labour Court since the filing of the last pleading on 23 October, 2015. The applicant avers that the matter awaits set down. I am not sure as to what it is that the first and second respondents allege should be done by the applicant and I cannot surmise on what blame to apportion to the applicant. The parties are agreed that the application is pending a hearing and I will go by that.

The first and second respondents aver that the applicant should have taken steps to apply for a stay of execution immediately after registration of the award with this court since the next step was obviously going to be execution. They argue that the applicant waited for the day of reckoning to arrive by only acting after a writ had been issued and an attachment made. They further aver that the "law favours the diligent". There is some merit in this criticism of the applicant. However, the objective facts do not present the applicant as having been sluggard in the conduct of its cases. There was anticipation by all the parties that the Labour Court would have delivered its judgment by 19 February, 2016. Following its failure to do so, both parties continued to follow up on the judgment through correspondence to that court. From the papers filed of record, the parties were copying each other the correspondence they made to the Labour Court. The last such correspondence was a letter dated 13 May, 2016 from the first and second respondents' legal practitioners. The writ of execution was only issued on 23 May, 2016. What is clear is that the first and second respondent did not issue a writ of execution immediately after registering the award. The parties appear to have proceeded on the understanding that any further action would depend on the outcome of the Labour Court appeal judgment which they both eagerly awaited on. The issuance of the writ of execution must have been moved by frustration on the part of the first and second respondent that the judgment on appeal had continued to delay. Since both parties were following up on the judgment on appeal, I am unable to hold that the applicant just sat back and waited for the day of reckoning as now sought to be argued by the first and second respondents. The point *in limine* on urgency lacks merit and is dismissed.

I am satisfied that the *dicta* of MATHONSI J in *Tel one (Pvt) Ltd* v *Bhiza & Anor* HH 592 quoted by the applicant in its heads of argument apply with equal force in this application. The learned judge said on p 2 of the cyclostyled judgment;

> "I do not agree that the applicant has only acted now. The applicant did note an appeal and then made an approach to the Labour Court for interim relief. That application is yet to be determined. I think Mr Bangidza missed the point in that the urgency has arisen because despite the pending application for a stay of execution, the applicant is proceedings with execution as if nothing has happened. There is therefore no merit in the point *in limine*, which is dismissed."

*A fortiori*, in this matter, the Labour Court reserved judgement on appeal. An application for stay of execution and suspension of arbitral award is pending determination or set down. It was filed before this court registered the award. The first and second respondents proceeded with the process of registration of the award in this court in the face of a pending application for stay of execution and suspension of arbitral award in the Labour Court. Two parallel processes were running at the same time in different courts. In my view this is undesirable and untidy. The rules must be synchronized. It just does not make sense to me that where an application for suspension of award and stay of execution pending appeal has been filed before a competent court and awaits determination by the same court which will hear the appeal, the respondent who is opposing that application and the appeal nonetheless and in the full knowledge of the pending application, proceeds to apply for registration of that same award. If after registration the registered order becomes an order of this court, what becomes of the pending application for stay of execution and suspension of award in the Labour Court? There is no doubt in my mind that the Labour Law legislation needs to be revisited.

The Labour Court should be given teeth to enforce its orders and not merely suspend them. A lot of confusion and uncertainty has been created in this area of the law and the sooner the problems are attended on the better for the case management system and timely relief for the litigants who invariably bed hop between this court, the Labour Court and the magistrates court.

In terms of r 246 (2) of the High Court Rules, the applicant at this stage simply has to establish a *prima facie* case. This court has inherent power to regulate its processes and orders. This includes the process of execution. The applicant seeks relief in the form of an interim interdict, that is, staying execution pending the determination of pending court proceedings which have been instituted in the Labour Court. The requirements for a

temporary interdict were set out by ZIYAMBI JA in *ZESA Pension Fund* v *Clifford Mushambadzi* SC 57/2002, a case dealing with a stay of execution application brought as an urgent application as in this case though the facts are different. The learned Judge set out the requirements as follows on p 3 of the cyclostyled judgment.

> "With regard to a temporary interdict, the following must be established:
>
> 1. A right which, though *prima facie* established is open to doubt.
> 2. A well-grounded apprehension of irreparable injury
> 3. Absence of any other remedy
> 4. The balance of convenience favours the applicant.
>
> See *Erikson Motors (Welkom) Ltd* v *Protea Motors & Anor* 1973 (3) SA 685 (A) at 691; *Flame Lily Investments Company (Private) Limited* v *Zimbabwe Salvage (Private) Limited & Anor* 1980 ZLR 378; *Durma (Pvt) Ltd* v *Siziba* 1996 (2) ZLR 636 (S) at 641."

I am satisfied in this application that the applicant has established a *prima facie* case (*fumus boni juris*) entitling it to the grant of the provisional order. The arbitral award sought to be executed upon is subject of appeals before the Labour Court and the main appeal was argued and a determination is awaited. I am not in a position to prejudice or express an opinion on the likely decision which the Labour Court will grant on appeal.

There is a well-grounded apprehension that the applicant will suffer irreparable financial prejudice if the attached goods are sold. The goods will not be easy to replace judging by their nature as listed on the notice of attachment. The first and second respondents have not indicated anywhere in their papers that should the applicant succeed on appeal, they will be able to restitute the applicant. They have not offered any security for restitution. I am further satisfied that the balance of convenience favours the granting of a stay of execution. The stay is sought on a sound basis at law in that the applicant has already put into motion the appeal process being a legal process recognized at law and whose effect may be to overturn the arbitral award on whose strength execution has been initiated.

I further note that in an application for stay of execution, a court has a discretion whether or not to grant the stay of execution. The test to be applied is the real and substantial justice test. In short, a court will grant a stay of execution where injustice would otherwise result. The judgment of MAFUSIRE J in *Golden Reef Mining (Private) Limited & Anor* v *Mnjiya Consulting Engineering (Pty) Limited* H631/15 specifically at pages 10 and 11 of the cyclostyled judgment and cases therein cited present an invaluable extrapolation of the test of be applied. I stand persuaded and in agreement with MAFUSIRE J and incorporate what he said therein by reference. I am satisfied that *prima facie*, the applicant meets that test.

In passing, when I reserved judgment, the parties agreed to continue to engage on the issues of statutory benefits. This was after I raised the issue of why statutory benefits which were ordered to be paid under the award should have remained outstanding. The parties as evidenced by correspondence between them and some copied to the Registrar for inclusion into the court record shows that the parties have been engaging on the issues. One hopes that their engagements will bear fruitful results. The engagements are however not part of nor do they fall within the purview of my judgment.

My order is that "the provisional order shall issue as prayed for by the applicant in its draft provisional order attached to its application".

*Coghlan, Welsh & Guest*, applicant's legal practitioners
*Madotsa & Partners*, 1st & 2nd respondents' legal practitioners