

BLESSING KHUMALO

Versus

JCR HOLDINS EQUIPMENT (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 16 & 26 JANUARY 2023

Provisional sentence

M.E. P. Moyo for the plaintiff

I. Mafirakureva for the defendant

MAKONESE J: This is a claim for provisional sentence instituted in terms of Rule 14 (1) of the High Court Rules, 2021. The claim is for payment of the sum of US16 000 together with interest at the prescribed rate from the date of summons to the date of payment.

The claim is based on arbitration award granted by a designated agent in terms of section 63 (3a) of the Labour Act (Chapter 28; 01). The award was granted by F. Chitsenga on 22 August 2022. In terms of the document an amount of US10 000 is payable to the plaintiff in respect of damages for alleged sexual harassment and constructive dismissal.

Plaintiff's claim is opposed by the defendant who argues that the High Court has no jurisdiction to entertain the application. Defendant further avers that the arbitration award is not an acknowledgment of debt as envisaged by the provisions of Rule 14 (1) of the High Court Rules.

Factual background

The plaintiff was employed by the defendant. Sometime in 2021 she resigned from her employment citing alleged sexual harassment by defendant's managing director, a Mr Hollins. Mr Hollins has since died. Plaintiff complained that Mr Hollins' behavior bordered on gross pervasive sexual misconduct. The matter was referred to a Designated Agent for the National Employment Council of the Mining Industry in terms of section 63 (3a) of the Labour Act (chapter 28:01). The designated agent was mandated in terms of the Labour Act to either redress or attempt to redress the dispute. A final decision was made by the designated agent after hearing evidence on the dispute from the parties. The designated agent made an order in the following terms.

- “1. Blessing Khumalo was employed by the respondent.
2. There was constructive dismissal based on sexual harassment.
3. The respondent is liable for damages.
4. Respondent to pay US\$10 000 to the claimant within 21 days of the issuance of this determination.”

Plaintiff attempted to register this award with this court under case number HC 1759/22. The matter was placed before KABASA J who indicated that there was no provision in our rules for the registration of such awards in our law. The matter was removed from the roll. It must be noted that that matter was not disposed on the merits. The matter was simply removed from the roll.

This application has been motivated by applicant’s desire to bring this matter under the procedure of provisional sentence as provided under Rule 14 (1) of the High Court Rules.

Submissions by the applicant

The plaintiff submits that the arbitration award by the designated agent is a liquid document. In support of this contention, the plaintiff placed reliance upon the case of *Zimbabwe Rural District Councils Workers Union v Nyanga District Council & 2 Others and 11 Others* HH-118-22. I have perused the judgment delivered by MAFUSIRE & CHILIMBE JJ. In this judgment the learned judges dismissed an application for the registration of awards by designated agents. The judges held that there was no provision in the law for the registration of such awards. CHILIMBE J held as follows:

“... But registration awards by a court is something quite different. There is no statutory authority for it. That seems to have the determination by a designated agent at the level of a liquid document or some such instrument of debt. In my view, there is an obvious need for the legislature to step in and correct the anomaly ...”

The decision in the above cited case was subsequently set aside by the Supreme Court. In any event, the issue for determination in this matter is somewhat different. The authority cited by the plaintiff has not been helpful.

Mr M.E.P. Moyo, appearing for the plaintiff referred in oral submissions to the case of *Isoquant Investments (Pvt) Ltd t/a ZIMOCO vs Memory Darikwa* CCZ -6-20. In this matter MALABA CJ stated as follows at pages 29-30:

“Section 63 (3a) allows a designated agent, upon authorization by the Registrar of Labour to either redress or attempt to redress any dispute which is referred to the designated agent or has come to his or her attention ... what is key in understanding what a designated can or cannot do is to understand the meaning of the phrase “redress any dispute”, used in s63 (3a) of the Act ... When used as a verb, the word redress, according to the Oxford English Dictionary means to remedy or set right an undesirable or unfair situation.

A designated agent authorized by the Registrar of Labour redresses a dispute referred to him or her. He or she offers a remedy or sets right an unfair situation. A final decision was made by a designated agent after hearing evidence on the dispute from the parties. It was a decision made by an impartial arbiter after hearing evidence from both parties. It despised of the issues for determination.”

Regrettably, the above case does not assist the plaintiff. The decision by the Constitutional Court sets out the status of a decision awarded by the designated agent. It is a final decision resolving the dispute between the parties.

Submissions by the respondent

The defendant submits that the plaintiff approached the wrong court. The defendant opines that a determination of a designated agent remains a draft ruling until confirmed by the Labour Court in terms of the procedure laid out in the Labour Act. For this reason the defendant argues that this court has no jurisdiction to deal with the matter. This submission misses the point. The plaintiff seeks a provisional sentence order and not registration of the award. *Mr Mafirakureva*, appearing for the defendant referred to a number of cases of this court which define what an acknowledgment of debt is. Defendant’s submission is that the plaintiff’s claims do not qualify to be brought under Rule 14 (1) of the High Court Rules.

Defendant contends that the relief sought is incomplete as the plaintiff is not the holder of an acknowledgment of debt.

The law regarding provisional sentence

Rule 14 (1) of the High Court Rules provides as follows:

“Where the plaintiff is the holder of a valid acknowledgment of debt, commonly called a liquid document, the plaintiff may cause summons to be issued claiming provisional sentence on the said document.”

In terms of Rule 14 (1) of the High Court Rules it is clear that the avenue of provisional sentence is only available to a party that is in possession of an acknowledgment

of debt, which is commonly known as a liquid document. What this means is that an acknowledgment of debt is a liquid document but not all liquid documents are acknowledgments of debt.

In *Petroguru (Pvt) Ltd v Imexpotrad (Pvt) Ltd* HH-206-16 it was held that;

“To succeed in a claim for provisional sentence, a petitioner must allege and show that:

1. The petitioner is a creditor which is in possession of a duly signed and witnessed liquid document.
2. There is *prima facie* presumption of indebtedness in favour of the petitioner.
3. The petitioner is entitled to be summarily paid without having to wait for resolution of the dispute in the main matter.
4. The petitioner is entitled to quick and robust remedy.
5. The defendant has failed to discharge the onus on it, to rebut the presumption of indebtedness which is raised by the production of a valid liquid document.
6. The defendant has very poor prospects of success in the main matter, the defence proffered is weak, and not likely to be accepted by the court.”

See also: *Sibanda v Mushapaidze* HH-56-10; *Briggs v Billiati & Anor* HH-749-15; and *Maseko v Ndlovu* HB 20-16.

In this matter, the plaintiff has placed before the court a ruling made by a designated agent. The award is not an acknowledgment of debt as envisaged by Rule 14 (1) of the High Court Rules. In terms of the rule, provisional sentence may only be sought by a plaintiff who is the holder of an acknowledgment of debt. The wording of the specific rule is clear and unambiguous and permits of no other interpretation. As already indicated it is not every liquid document that qualifies for provisional sentence. It must be a valid acknowledgment of debt which must satisfy the requirements that have been established through the jurisprudence of this court. The determination by the designated agent does not show how the damages were quantified. It would seem the figure for damages was just plucked from the air. I have serious doubts that the award would qualify as a liquid document.

Disposition

I am satisfied that the application for provisional sentence on the basis of an award by a designated agent is ill-conceived and incompetent.

For these reasons, the provisional sentence summons is hereby dismissed with costs.

Mathonsi-Ncube Law Chambers, plaintiff's legal practitioners
Messrs Moyo & Nyoni, defendant's legal practitioners