

LYDIA CHINYAUKIRA

versus

PREMIER TOBACCO AUCTION FLOORS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

MUSITHU J

HARARE: 11 November 2020 & 5 July 2021

Opposed application – Registration of an Award of the Labour Court

Mr *J.R. Tsivama*, for the applicant

Mr *K. Mabhaudi*, for the respondent

MUSITHU J:

BACKGROUND

The applicant is a former employee of the respondent. The employment relationship between the two parties was severed in March 2018. The applicant claimed arrear salaries and certain entitlements from the respondent. The claim was unhonoured leading to the referral of the dispute to a Labour Officer who found in favour of the applicant. The applicant approached the Labour Court for the confirmation of the Labour Officer’s ruling. On 6 December 2019, the Labour Court made the following award:

- “1. The application for confirmation of the draft ruling be and is hereby granted.
2. The draft ruling of SABILIKA MAXWELL N.O. dated 19 March 2019 be and is hereby confirmed.
3. 1st respondent be and is hereby ordered to pay to the 2nd respondent a total of US\$36 108-00 in respect of salary arrears and benefits less US\$1080-03 outstanding loan with effect from 30 days from the date of this order.
4. 1st respondent to pay costs in the sum of \$40-00 to the Ministry of Public Service Labour and Social Welfare with effect from 30 days from the date of this Order....”

The Labour Court award was not complied with. The non-compliance with the award prompted the applicant to approach this court for its registration as an order of court in terms of section 93(5b) of the Labour Act¹. The relief sought is couched as follows:

“IT IS ORDERED THAT

1. The award by the Labour Court issued under Case No. LC/H/LRA/151/19 dated 6th December 2019 be and is hereby registered as an order of this court.
2. The respondent shall pay the applicant the sum of US\$35 019.00.
3. Interest shall accrue on the said sum of US\$35 019.00 from the date of this order to date of full payment.
4. The respondent shall pay the applicant’s costs of suit”

¹ [Chapter 28:01]

The respondent tendered payment of the sum of RTGS35 027.00. The applicant allegedly turned it down. The respondent also sought to appeal the Labour Court determination to the Supreme Court. It applied for condonation of late noting of an appeal and leave to appeal to the Supreme Court. The application was withdrawn at the Labour Court on 4 August 2021. Accordingly, applicant averred that nothing stood in the way of the registration of the award.

The application was opposed. The respondent submitted that a sum of RTGS35 027.00 was deposited into the applicant's account. It contended that it was bound by the law to pay the amount in local currency. In terms of the law, all United States dollar financial obligations that arose before 22 February 2019, were to be paid in local currency at the rate of one as to one. The obligation to pay arose when the applicant resigned from the respondent's employ in March 2018. It therefore fell within the ambit of that law. The respondent further averred that following the payment of the said amount, there was no need for the respondent to pursue its appeal to the Supreme Court. That explained its withdrawal of the application for condonation of late noting of an appeal and leave to appeal to the Supreme Court.

The respondent further averred that the applicant did not payback the amount that was deposited into her account. Her conduct was therefore inconsistent with that of a party rejecting payment. The respondent argued that it had complied with the Labour Court award as confirmed by the payment. There was no reason to have the award registered. The respondent also opposed the claim for interest on the grounds that the Labour Court award did not make provision for that. The court was urged to dismiss the application with costs on the legal practitioner and client scale.

In reply, the applicant refuted the respondent's contention that the court could not grant the award in the currency in which it was rendered. That was the gravamen of the applicant's intended appeal to the Supreme Court. That route was abandoned. The applicant's contention was that this court could not vary or interfere with another court's award. The court could not interrogate the merits of the award by the Labour Officer. That was the prerogative of the Labour Court, which confirmed the award. The award had to be registered as it stood. For that reason, the alleged payment that was made in local currency was not consistent with the Labour Officer's ruling. It also did not comply with the award issued by the Labour Court which confirmed the Labour Officer's ruling.

As regards the claim for interest, the applicant averred that such a claim was competent in terms of section 5(1) of the Prescribed Rate of Interest Act.² The applicant was seeking the registration of the Labour Court award. In terms of that law, interest was due from the date this court granted the order sought.

The Issues

Two issues arise for determination. These are:

1. Whether the Labour Court award sounding in the United States dollar is registrable as an order of the High Court; and
2. Whether respondent fully discharged its obligation by the payment in local currency.

The Submissions

Mr *Tsivama* for the applicant, submitted that there was nothing impinging upon the registrability of the Labour Court award in its present form. The question of whether or not the Labour Court was correct in confirming the Labour Officer's ruling which required that payment be made in the United States dollars was a matter for the Labour Court to deal with. If the respondent was not pleased with the finding of the court on that point, then it ought to have appealed. It decided not to pursue its appeal. The matter could not be raised at this stage. As regards the payment allegedly made in local currency, Mr *Tsivama* submitted that the applicant's position was communicated to the respondent. That payment did not comply with the Labour Court award. It was accordingly turned down.

On the issue of the legality of a United States dollar denominated award, Mr *Tsivama* submitted that section 2 (1)(d) of the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act), which incorporated section 4(1)(d) of the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter referred to as "S.I. 33/19" or the instrument), did not apply to the present case. Section 22(1)(d) as read together with S.I. 33/19 only applied to obligations that arose before the effective date. The instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act. In any case, the obligation to pay arose following the Labour Officer's ruling of 19 March 2019, which was confirmed by the Labour Court in December 2019. According to applicant's counsel, the Labour Court threw out a similar argument by the respondent.

² [Chapter 8:10]

In her heads of argument, the applicant referred to several decisions of the courts whose central theme is that a court seized with an application of this nature does not interrogate the merits of an award. The court was obliged to register that award.³ Registration was for purposes of enforcement since the labour structures did not have that enforcement mechanism.

For the respondent Mr *Mabaudi* submitted that the respondent had discharged its obligation by making payment in terms of the applicable law. All financial obligations that required payment to be made after the effective were to be discharged in local currency, unless such obligations fell within the ambit of the exceptions permitted under the relevant law. Counsel further submitted that the Labour Court could only fix the date of judgment, but not the date liability. S.I. 33/19 came into operation on 22 February 2019. All liabilities that arose before the effective date of S.I. 33/19, and were denominated in the United States dollar were dischargeable in local currency at the rate of one as to one with the United States dollar. In *casu*, the respondent's obligation to pay the applicant arose on 23 March 2018, when she left employment. This was the date when the cause of action arose. The Labour Court delivered judgment on 6 December 2019 when S.I. 33/19 was already in place. This court could not therefore rubberstamp an order that violated the law.

Mr *Mabaudi* further submitted that the question of how the respondent's liability was to be discharged was answered by section 4(1)(d) of S.I. 33/19, as entrenched through section 22(1)(d) of the Finance Act. He further submitted that section 93(5b) of the Labour Act only provided a mechanism for enforcing a Labour Court award. It did not create an exception to the Finance Act. The enforcement of the award had to be done cognisant of the implications of section 22(1)(d) of the Finance Act. The provisions of the Finance Act that encapsulated S.I. 33/19 were critical to the resolution of the present dispute.

In its heads of argument, the respondent argued that the rejection by the Labour Court of its argument about the currency in which its liability was to be discharged was irrelevant. The Labour Court judges were only required to confirm the Labour Officer's ruling. The respondent further contended that the issue of the applicable currency was put to rest by the Supreme Court in *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Another*⁴. That judgment was handed down on 20 January 2020, after the Labour Court

³*Nyakamha v Lobels Bread (Pvt) Ltd & Another* 2016(2) ZLR 567 (H) at 569; *Matthews v Craster International* HH 707/15; *Ndlovu v Higher Learning Centre* HB 86/10

⁴ SC 3/20

award had been rendered. The respondent's decision to pay the applicant in local currency was therefore informed by the Supreme Court judgment. That judgment also rendered the intended appeal to the Supreme Court nugatory.

The court was also referred to the case of *Shava v Bergus Investments (Private) Limited*⁵, where the court held that a party could not revalue a judgment debt for purposes of execution. This is what the applicant was seeking to do in *casu*. She was seeking to revalue her claim when it had already been paid in full. She was seeking to convince the court that the principles espoused in the *Zambezi Gas* judgment were not applicable to labour matters. She was asking the court to find that payment should be made at the interbank rate once it was established that judgment was delivered after the effective date. Such an interpretation would create an absurdity. It would have a disastrous consequences. It would be an affront to public policy.

The Analysis

Whether the Labour Court award sounding in the United States dollar is registrable as an order of the High Court

From the submissions by counsel, it seems the central issue is whether this court can register the Labour Court award which is in a currency that ceased to be legal tender by operation of law. The amount owed is not in dispute. It is the currency in which it was rendered that took centre stage. Mr *Mabaudi* argued that the respondent discharged its obligations by paying the amount in local currency. There was therefore nothing to be registered. Mr *Tsivama* on the other hand argued that the award must be registered as it is. The court was not required to interrogate the correctness of the award. It was merely being asked to register that award. The role of the court in applications of this nature was explained by MATHONSI J (as he then was), in *Ndlovu v Higher Learning Centre*⁶. At page 2 of the cyclostyled judgment, the learned judge said:

“Respondent cannot seek to challenge an arbitral award in opposing papers filed in an application for registration. In an application of this nature this court does not inquire into the merits or otherwise of an arbitral award. That is the province of the Labour Court upon an application or appeal being made to that court.

Registration of an arbitral award is only done for purposes of enforcement because the labour structures have no enforcement mechanism. Upon registration the award has the effect of a civil judgment of the appropriate Court. As long as the award stands unchallenged the

⁵ 2011 (2) ZLR 482 (HC)

⁶ HB 86/10

appropriate court has no mandate to inquire into the propriety or otherwise of that award and is obliged to register it.” (Underlining for emphasis)

The case of *Ndlovu v Higher Learning Centre* case was cited with approval by MAFUSIRE J in *Nyaguse & Others v ZIMRA*⁷. The argument about the legality of the currency in which the Labour Court award was rendered was raised before this court for the first time. It was not raised before the Labour Court. If at all it was raised, then it was not dealt with by that court. The judgment of the Labour Court does not allude to that issue at all. The respondent made an application for condonation for Late Noting of an Appeal and Leave to Appeal to the Supreme Court. That application was withdrawn on 4 August 2020. The essence of that appeal was not explained.

I am persuaded by Mr *Tsivama*'s submission that this court cannot interrogate the propriety of the Labour Court award. This court is simply being asked to register the award as an order of court for enforcement purposes, nothing more nothing less. The argument pertaining to the validity of the award, to the extent that it directs the respondent to discharge its obligations in a currency that it perceives to be in contravention of section 4(1)(d) of S.I. 33/19, as read with section 22(1)(d) of the Finance Act is being raised belatedly. This is the argument that ought to have been raised at the confirmation proceedings before the Labour Court, if not earlier.

Section 93(5b) of the Labour Act permits the Labour Court to confirm a ruling with or without amendments. It was within that court's powers to confirm the Labour Officer's ruling with or without amendments. The denomination in which the amounts claimed were to be paid, would in my view, be one such matter that court could deal with. S.I. 33/19 came into operation on 22 February 2019. From a reading of the Labour Court judgment, it appears that the Labour Officer's ruling was issued on 19 March 2019. The confirmation proceedings were held before the Labour Court on 7 November 2019. The Labour Court award was handed down on 6 December 2019. The respondent was aware of the existence of that law at that stage. It did not question the propriety of confirming a ruling that directed payment in a currency that violated the law. It seeks to raise the issue for the first time at this stage. That in this court's view, the respondent cannot do.

The respondent's counsel contended that the Labour Court's rejection of the argument on the lawfulness of directing payment in the United States dollar was insignificant. In its heads

⁷ HH 453/15. See page 10 of the judgment.

of argument, the respondent averred that the task of the Labour Court judges was simply to confirm the Labour Officer's ruling. In this court's view, that submission is devoid of merit. As already noted, section 93(5b) permits the Labour Court to make modifications to a Labour Officer's ruling. If the currency issue had been raised at that stage, the Labour Court would have been invited to determine the propriety of confirming a ruling that potentially violated the law. As I have already indicated, the Labour Court judgment does not show that the currency issue was raised by the respondent. On page 2 of the Labour Court judgment, the learned judge noted:

“Mr Mandava stated that he abided by the documents filed of record. He also made an application to have the Draft Order amended in paragraph 2 thereof with the insertion of the words “USD” before the figures. He prayed for an order in terms of the Draft Order.”⁸

Mr Mandava was appearing on behalf of the Labour Officer who had since left employment. The judgment does not show that the application was opposed by Mr *Mabaudi* who was appearing on behalf of the respondent herein. After noting the application for the amendment, the court proceeded to deal with the submissions by Mr *Mabaudi*. After analysing counsels submissions, the learned judge of the Labour Court concluded as follows:

“Precedent has always stated that an appellate court can only interfere with the decision of a lower court or tribunal where there is evidence of a misdirection. There should be in existence an erroneous evaluation of facts or it is satisfied, that the tribunal has given no weight or sufficient weight to those considerations which ought to have weighed with it or that the tribunal had been influenced by other considerations which ought not to have weighed with the tribunal or weighed so much with it. (See *LEVY v MODUS PUBLICATIONS* 1998(1) ZLR 229(S).”⁹

This court finds that the propriety of awarding relief sought by the applicant in the United States dollar ought to have been raised before the Labour Court, as one of the reasons to oppose the confirmation proceedings. The applicant could also have sought a referral of the matter back to the Labour Officer to address that issue, assuming the Labour Court was somehow constrained to deal with it. That was not done. This court is being asked to endorse a payment in local currency. In essence, the court is being asked to substitute the United States dollar with the local currency. Were this court to do that, it would in essence be varying the Labour Court award. But then this court is not exercising its review or appellate powers at this stage.

⁸ See page 6 of the record of proceedings.

⁹ Page 7 of the record

Related to the currency issue is the question of the enforceability of a court order that sounds in the United States dollar. Section 23 (1) of the Finance Act provides that:

“23 Zimbabwe dollar to be the sole currency for legal tender purposes from second effective date

(1) For the avoidance of doubt, but subject to subsection (4), it is declared that with effect from the second effective date, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.”

The second effective date is defined in the Finance Act as 24 June 2019, being the date on which Statutory Instrument 142 of 2019 (which reintroduced the Zimbabwe dollar as the sole legal tender for all transactions in Zimbabwe) took effect. Further statutory instruments have been gazetted to allow the use of the United States dollar as a medium of exchange in certain transactions. That still does not make the United States dollar legal tender in Zimbabwe. It follows that in cases where judgment is granted in the United States dollar, such amount would have to be paid in local currency at the prevailing interbank rate. The court finds nothing irregular with the Labour Court award. In any event, the question of its enforceability does not arise for determination by this court at this stage.

Whether respondent fully discharged its obligations by making payment in local currency.

Mr *Tsivama* submitted that the alleged payment in local currency was rejected because it did not comply with the Labour Court award. That explained the applicant’s approach to this court for the relief she seeks. Mr *Mabaudi* on the other hand submitted that the payment was in accordance with section 4(1)(d) of S.I. 33/19, as read with section 22(1)(d) of the Finance Act. At any rate, the payment allegedly rejected by the applicant was not paid back. The respondent had thus discharged its payment obligation.

This court is persuaded by Mr *Tsivama*’s argument. The payment made by the respondent was not consistent with the terms of the Labour Court award. That award has not been challenged and it remains extant. The payment was therefore made arbitrarily. As already stated in this judgment, the question of the propriety of the Labour Court award does not arise for determination by this court. It is subject to determination by another forum, which has the prerogative to consider the merits of the matter.

As for the interest claim, this court observes that while it was raised in the opposing affidavit and the answering affidavit, it was not pursued in the heads of argument and oral submissions. At any rate, it would have been imprudent for this court to grant the claim for interest seeing as it was not a component of the Labour Court award to be registered.

COSTS

Costs follow the event. I do not find any reason to depart from this general rule. The respondent's counsel urged the court to dismiss the application with costs on the punitive scale because it was meritless. He did not however address the court on how the issue of costs should be dealt with in the event of the court finding in favour of the applicant. In view of my findings, I see no reason to deny applicant costs as the successful party.

DISPOSITION

Accordingly, it is ordered that:

1. The award by the Labour Court issued under Case No. LC/H/LRA/151/19 dated 6 December 2019, be and is hereby registered as an order of this court.
2. The respondent shall pay the applicant's costs of suit.

Sawyer & Mkushi, legal practitioners for the applicant
Hove and Associates, legal practitioners for the respondent