

MINISTER OF FOREIGN AFFAIRS
AND INTERNATIONAL TRADE
versus
DESTINY VENTURES Ltd BOTSWANA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 26 July & 10 August 2022

Application for Condonation

Mr L T Muradzikwa, for the applicant
Advocate Zhuwarara, for the respondent

MHURI J: On 7 July 2021 under case No. HC 741/21 in the matter between DESTINY VENTURES (PROPRIETARY) LTD (BOTSWANA) and UNITED NATIONS CHILDRENS FUND, this Court issued a default order against the respondent UNICEF.

It is this order that applicant *in casu*, intends to have rescinded. Applicant was late in filing the application for rescission hence this application for condonation of late filing and extension of time within which to apply for rescission.

The case of *KODZWA v SECRETARY FOR HEALTH and ANOR* 1999(1) ZLR 313 @ 315 C – D stated the requirements to be considered in applications such as this one. These are:-

- a) the degree of non-compliance
- b) the explanation for the delay
- c) the prospects of success
- d) the importance of the case
- e) respondent's interest in the finality of the case
- f) the convenience of the court
- g) the avoidance of unnecessary delay in the administration of justice

The first three in my view are the most critical. The length of the delay is common cause. The order was issued on 7 July 2021 and this application was filed on 16 November 2021, this is four months. This is a long delay in my view.

The explanation given by the applicant is that, applicant was not aware of the proceedings under HC 741/21, until 20 July 2021 whereupon he instructed his legal practitioners of record to apply for joinder to the proceedings. When he instructed the

legal practitioners to make the application, the order had already been issued. He became aware of the Order after 19 October 2021 through UNICEF which had received it on 31 August 2021. On 20 October 2021 he instructed the legal practitioners to apply for rescission.

Applicant's explanation is not smooth flowing. There are some gaps for which there is no explanation. He averred that:-

- i. he became aware of the proceedings on 20 July 2021 (by this date the order had been issued on 7 July 2021 and not 16 July 2021)
- ii. he instructed his legal practitioners to apply for joinder on 20 July 2021 (the letter Annexure 2 he refers to was received at the Attorney General's office on 27 October 2021 as for the date stamp)
- iii. while he was waiting for the process of joinder to be put in place, he received communication that the matter had already been heard (he does not state when or file the communication)
- iv. he became aware of the order after 19 October 2021 and on 20 October 2021 he instructed his legal practitioners to apply for rescission (the delay between 20 October 2021 and 16 November 2021 is not explained)

As regards prospects of success in the main matter, applicant submitted that it has bright prospects in that the High Court had no jurisdiction to set aside the award by the Permanent Court of Arbitration. The terms of the contract between the parties bound the Parties in so far as clause 22 thereto was concerned vis that the parties were bound by the arbitration as the final resolution of whatever dispute between them.

UNICEF is a member of the United Nations and enjoys the privileges and immunities provided in the 1948 Convention. In view of these privileges and immunities enjoyed by UNICEF, the Court had no jurisdiction to entertain the matter. It therefore ought to have declined jurisdiction.

It is common cause that UNICEF is a member of the United Nations. It is not disputed that it enjoys the privileges and immunities provided the 1948 Convention on Privileges and Immunities of the United Nations.

It is also not in dispute that under clause 22 of their contract, the Parties agreed that they will be bound by any arbitration award rendered as the final adjudication of any controversy-claim or dispute. The issue of waiver by UNICEF is disputed on the basis of clause 22 and that the

arbitration proceedings were not done in Zimbabwe but in the Republic of South Africa. On that basis, I find that applicant has good prospects of success.

The issues raised by the applicant vis that of immunity, jurisdiction, waiver in respect of foreign organs of the United Nations are of great importance and applicant should therefore be afforded the opportunity to argue them in Court. It will be in the interests of both Parties to bring finality to this litigation.

While the delay was not satisfactorily explained, I am of the view that despite that, the application should be granted on the basis of the good prospects of success, the importance of the case and the need to bring finality to this litigation.

Consequently, it is ordered that:

1. the application for condonation of late filing of the application for rescission of the default order issued under HC 741/21 and extension of time within which to file the application be and is hereby granted
2. applicant files his application for rescission within 10 days of the granting of this order
3. each party to bear its own costs

Civil Division of the Attorney General's Office, applicant's legal practitioners
Scanlen and Holderness, respondent's legal practitioners