MASIYEPHAMBILI COLLEGE

Versus

SYDNEY MACHOKOTO

And

THE SHERIFF OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
TAKUVAJ
BULAWAYO31 OCTOBER & 27 NOVEMBER 2014

N. Mangena for the applicant
J. James for the 1st respondent

Urgent Chamber Application

TAKUVAJ: This is an urgent chamber application wherein the applicant seeks the following relief:

"Pending the determination of this matter, applicant is granted the following relief:-

1) The 2nd respondent be and is hereby ordered to stay the execution of the order of this honourable court in HC 1402/14 pending the finalization of the application for rescission of judgment to be filed."

The facts which are largely common cause are as follows:

The 1st respondent is a secondary school teacher who was employed by the applicant with effect from 1st January 2008. On 28 January 2013, the applicant unilaterally terminated this contract of employment for "failure to produce quality results." Dissatisfied, 1st respondent took the matter up with the National Employment Council, the Ministry of Labour and eventually the matter was referred to arbitration after conciliation failed. The arbitrator's determination was that the 1st respondent was an employee of the applicant and that the applicant unlawfully dismissed the 1st respondent.

The applicant noted an appeal to the Labour Court against the arbitral award. The appeal was partially successful in that while the judge found that the arbitrator's finding that 1st

respondent was applicant's employee who was unlawfully dismissed, the finding in respect of notice pay could not be sustained. This was on 20 May, 2014. Aggrieved by this order, applicant applied for leave to appeal to the Supreme Court in terms of S 92 F (2) of the Labour Act [Chapter 28:01]. Applicant failed to file its heads of argument within the prescribed period set out in R 19 (3) (a) of the Labour Court Rules. The application for leave to appeal in case number LC/ORD/MT/107/13 was dismissed for want of compliance with the rules on 10 September 2014.

On the 22nd of September 2014 applicant filed an application for rescission of the Labour Court's order of 10 September 2014. Meanwhile, 1st respondent had on 6 October 2014 registered the arbitral award as an order of this court for purposes of execution. Applicant claims that it became aware of this order in case number HC 1402/14 on 22 October 2014 when 2nd respondent attended at the college to attach property.

Applicant then filed this application on the following grounds:

1. that the matter is urgent as it is only just and proper that execution of the award be stayed.
2. that the applicant was never served with an application for the registration of the arbitral award in question.
3. that applicant has a constitutional right to the protection of the law and it is "simply not right that another party can register an arbitral award without notifying the other interested party"
4. that applicant will suffer great prejudice in that since the registration of the arbitral award should have been done on notice to the applicant (which was not given) then it stands to reason that the execution will be in furtherance of an arbitral award "improperly registered".
5. that the execution of the order will render the proceedings pending before the Labour Court academic.

Mr *James* for the 1st respondent argued that the matter is not urgent at all. He further submitted that this a classic case of self created urgency. He relied on *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H); *Chidawu & Ors* v *Shah & Ors* 2011 (2) ZLR 426 (H) and *General Transport* v *ZIMBANK* 1998 (2) ZLR 301 (H) B-C.

In casu, the arbitral award was granted on 20 August 2013 while the Labour Court issued its judgment on 20 May 2014. Applicant filed its application for leave to appeal on 2 July 2014 which application was dismissed on 10 September 2014. Applicant then filed an application for

rescission of the order on 22 September 2014. Surprisingly, applicant did not file an application for stay of execution of this order at that time. It allowed the matter to wait until 30 October 2014. This was after its property had been attached on 22 October 2014. Quite clearly the applicant acted in a dilatory manner. The certificate of urgency does not explain this delay. Rather it states the basis of the urgency on the "imminent removal" of applicant's property and that the award was registered irregularly.

In my view the applicant has not shown that this matter is urgent and this should be the end of the matter. However, assuming I am wrong, the applicant has, on the merits failed to satisfy the requirements of an interdict. These are well known, they are:

1. a *prima facie* right even if it is open to doubt;
2. an infringement of such right by the respondent or a well grounded apprehension of such an infringement;
3. a well grounded apprehension of irreparable harm to the applicant, if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally;
4. the absence of any other satisfactory remedy; and
5. that the balance of convenience favours the granting of an interlocutory interdict.

In casu, the basis of the whole application is that the applicant was not served with the application for registration. However it turned out that this submission is incorrect as the respondent produced an affidavit of service showing that the application was indeed served in the principal's office at applicant's premises. Mr *Mangena* for the applicant conceded that he could not contest the validity of the affidavit of service. However, his view was that since the affidavit does not mention any specific name, it could be that, service was done, but was not passed on to the relevant authorities. Therefore, he urged the court to exercise caution in respect to whether or not service actually took place. Finally, he submitted that there would be no reason why applicant would not oppose the application since it is already challenging the order in the Labour Court.

I do not share this view for the simple reason that service was done by a member of ZFTU who specifically states in the affidavit that he entered the principal's office on the 18th August

2014 and served the application on a female employee who declined to identify herself or to sign or stamp the application as proof of receipt. The applicant has not adequately dealt with these averments. In fact applicant has accepted that this could have happened but the application was not brought to the attention of the relevant authorities. This argument presupposes that applicant's employees were negligent in the manner they handled the application. If that is the case then the applicant cannot escape the consequences. I therefore find that the application was indeed served on the applicant on 18 August 2014.

If applicant was properly served with the application for registration of the arbitral award what would be the basis of filing a court application for rescission of the order issued on 6 October 2014 under case number HC 1402/14? Put differently, there are virtually no prospects of success in the event that such an application is filed. For this reason, applicant has no *prima facie* right that requires protection. Even if it were to be assumed that applicant has such a right can it be said that 1st respondent by enforcing his rights lawfully is infringing on applicant's rights. The answer is certainly in the negative.

Finally, counsel for the applicant referred me to two cases that deal with registration of arbitral awards. These are: *Trust Me Security Organisation* v *Julia Mararike* and *Chikwira and Webster Mandikonza and Anor* v *Cutnal Trading (Pvt) Ltd & Ors*. Counsel could not provide the citation for the latter case. The question of law that arises is whether or not it is necessary to give notice to the other party that an application for registration of an arbitral award has been made either in terms of section 92B (3) or 98 (14) of the Labour Act [Chapter 28:01].

On the facts of the matter before me, any view that I may express on this question will simply be *obiter dictum*. For that reason, I will leave it open. For reasons outlined above, I find that the applicant has failed to establish the requirements for the stay of execution of the order issued under case number HC 1402/12.

As regards costs Mr *James* submitted that applicant has not been acting in good faith throughout. According to documents filed of record, namely the arbitral award and the Labour Court judgment, applicant has been found to be dishonest and lacking *bona fides* in its conduct. *In casu*, the applicant proceeded on the basis that it was not served with the application before establishing from its employees who were in that office on that day whether or not they had

received the application. It is on this basis that the court was urged to award costs on attorney and client scale.

The issue of costs is within the discretion of the court. The discretion must however, be exercised judiciously. *In casu*, the applicant has made a series of blunders that are costly to the 1st respondent. Despite the realization that this application was hopeless and doomed to failure, applicant nevertheless trudged on regardless of the consequences. Such conduct should be discouraged by an order of costs on a higher scale.

Accordingly, it is ordered that:

(1) the application for an interim relief be and is hereby dismissed.
(2) the applicant be and is hereby ordered to pay 1st respondent's costs on attorney and client scale.

Lazarus & Sarif applicant's legal practitioners
James, Moyo-Majwabu & Nyoni 1st respondent's legal practitioners