

ZIMBABWE OPEN UNIVERSITY
versus
GIDEON MAGARAMOMBE
and
THE DEPUTY SHERIFF HARARE N.O.

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 1 FEBRUARY 2012

T Mpofu, for the applicant
Ms T Mberi, for the first respondent
No appearance for second respondent

KUDYA J: This is an application for stay of execution. The first respondent was an executive dean in the Faculty of Commerce and Law of the applicant. At the end of his fixed term contract as dean, a dispute arose on his status. The parties failed to agree on whether he automatically assumed his former post or whether his contract of employment was terminated. Conciliation failed and the matter was referred to arbitration.

On 10 January 2011 the applicant was ordered to reinstate the first respondent as a senior lecturer and in the alternative to negotiate his exit package in lieu of reinstatement. It was further directed that they approach the arbitrator if they failed to agree on the exit package. On 2 February 2011, the applicant noted an appeal to the Labour Court against the arbitral award and applied for interim relief seeking the suspension of the award pending the appeal. While these were pending in the Labour Court, the first respondent requested for the quantification of the exit package in lieu of reinstatement. On 22 August 2011 the arbitrator quantified the amount in the sum of US\$77 302.00. On 26 September 2011 the applicant filed a combined application for review and an appeal with the Labour Court against the quantification.

On 27 September 2011, the first respondent, on notice to the applicant, applied in the High Court for the registration of the arbitral award. He served the applicant with the application for registration of the arbitral award on that date. The applicant did not oppose the

registration. Instead, aware of the application in the High Court, it filed an urgent chamber application in the Labour Court on 5 October 2011 seeking interim relief for the suspension of the arbitral award of 22 August 2011. The interim relief was granted by the Labour Court on 31 October 2011.

In the meantime the award was registered by the High Court on 15 November 2011. On 26 January 2012, the second respondent served a notice of attachment to remove the applicant's property for execution without any notice period. The applicant launched the present application on 27 January 2012. I set it down for hearing on 1 February 2012.

The first respondent raised four preliminary points contesting the urgency of the matter. I deal with each in turn.

The first preliminary issue raised is on the authority of the deponent to the applicant's affidavit to depose to such an affidavit on behalf of the applicant. Ms *Mberi*, for the first respondent, submitted that where a natural person acts for an artificial person, he or she must establish the authority so to act. She relied on the sentiments expressed by ADAM J in *Direct Response Marketing (Pvt) Ltd v Shepherd* 1993 (2) ZLR 218 (H) at 221D-G, part of a quotation in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) ZLR 347 (C) at 351-352. Mr *Mpofu*, for the applicant, relied on the same quotation to argue that the first respondent had not established that that the applicant is not properly before the court. The portion he relied on at 221 G- 222B reads:

"The best evidence that the proceedings have been properly authorised would be to provide by an affidavit made by an official by the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant (cf *Parsons v Barkly East Municipality* 1952 (3) SA 595 (E); *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C))."

I am satisfied that to insist on a resolution from the applicant that it resolved that the deponent file the founding affidavit on its behalf would be carrying formality too far. The applicant is the Director Legal Services of the applicant. Ms *Mberi* conceded that she has in previous litigation between the parties filed founding affidavits on behalf of the applicant.

There has been protracted litigation between the parties. I am satisfied that the application is that of the applicant and not of the deponent to its founding affidavit.

The first preliminary point must fail.

The second preliminary issue was that the application was irregular in that on the face of it reads:

“Take notice that the applicant, Zimbabwe Open University hereby makes an application for interim relief pending the hearing of its appeal currently pending before this Honourable Court.” (Underlining is mine for emphasis).

It proceeds to list seven bases for the application that demonstrate that it was an anomaly to aver in the preamble that the appeal was pending in this court. In addition the founding affidavit clearly demonstrates that the first sentence in the preamble was in error. Mr *Mpofu* conceded the point but applied for condonation in terms of rule 4C of the Rules of Court. Ms *Mberi* conceded that the court could condone the error. I accordingly condoned the error and dismissed the second preliminary issue.

The last two preliminary points have unduly exercised my mind. The third was that the applicant was coming to court with dirty hands. The dirty hands policy was set out with clarity in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity and Ors* 2004(1) ZLR 538(S). The rationale for the rule being that a court of law cannot connive or condone open defiance of the law and that citizens are obliged to obey the law and argue afterwards.

The third preliminary point was based on the fact that when the Deputy Sheriff went to execute on the registered High Court order, the applicant stopped him by waving the interim relief granted by the Labour Court suspending the operation of the arbitral ward pending appeal. The applicant proceeded to remove the items from the reach of the Deputy Sheriff before he could attach the property. The contention by Ms *Mberi* was that the applicant deliberately frustrated the Deputy Sheriff from effecting a High Court order and thus acted in defiance of the High Court order.

As pointed out by GOWORA J in *Dhlodhlo v Deputy Sheriff Marondera & Ors* HH 76/2011, it was improper to expect the Deputy Sheriff to choose sides by interpreting the law. It was up to the applicant to bring an application such as the present to stop execution rather

defy the implementation of judgment that it did not oppose. If the averment was correct, it is clear that the applicant had dirty hands. Mr *Mpofu*, however, argued that whether or not the Deputy Sheriff was stopped from attachment was a question of fact proved by evidence of his return of service. In the absence of the return of service or an affidavit from the second respondent I am not prepared to non-suit the applicant. I therefore dismiss the third preliminary point.

The last preliminary point was that the matter was not urgent. The meaning of urgency has been spelt out in numerous cases. Some of the pertinent cases are *Dexprint Investments (Pvt) Ltd v Property and Investments Company (Pvt) Ltd* HH 120/02 at p 2 of the cyclostyled judgment quoted in full in *Madzivanzira & Ors v Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H) at 318A-F; *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H). Ms *Mberi* submitted that the applicant sat on its laurels and only acted when the day of reckoning was at hand. She contended that the applicant should have acted on 27 September 2011 when it was served with the notice of registration of the award. Mr *Mpofu* made contradictory submissions on the failure to oppose registration. The first was that the noting of an appeal in the Labour Court against the arbitral award automatically suspended award. The second was that it was hopeless to oppose without first obtaining interim relief from the Labour Court stopping the implementation of the arbitral award. If the applicant believed that it was on firm footing on the first ground, then the more reason for it to oppose registration on that point. But as events that transpired after it obtained interim relief shows, the applicant believed that implementation could only be stayed by obtaining interim relief from the Labour Court. The applicant's erstwhile legal practitioner wrote as much to the applicant on 4 November 2011 and applicant waved the interim relief at the second respondent on 26 January 2012.

Mr *Mpofu* did not dispute Ms *Mberi's* submission that the applicant was aware of the judgment of *Dhlodhlo, supra*, handed down in motion court on 8 March 2011 that the Labour Court judgment could not stop a High Court order because the later is a court of superior jurisdiction. Accordingly, I agree with Ms *Mberi* that at the very least, with this foreknowledge, the applicant knowing that the first respondent was seeking registration of the arbitral award should have diligently searched for the outcome of the application especially after it received the interim relief it sought in order to forestall it. It was aware that the purpose of seeking registration was to execute. Armed with the interim order, the applicant

was duty bound to either oppose the registration, which was only granted on 15 November 2011 or to file an application such as the present one soon thereafter.

I find that it waited until the day of reckoning precipitated by the attachment of 26 January 2011 to stay the execution. It did not act with diligence. It sat on its laurels and did not act when the time to act presented itself.

Accordingly, the urgent application is dismissed with costs for want of urgency.

Dube, Manikai and Hwacha, applicant's legal practitioners
Hogwe, Dzimirai & Partners, first respondent's legal practitioners