WORLD EDUCATION
versus
PHANUEL KAPFUDZARUWA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 and 15 October 2014

Opposed Application

R. Makamure for Applicant
Z.W. Makwanya for Respondent

TSANGA J: This is an opposed application in which the Applicant, namely World Education, seeks a rescission of judgement in the matter HC 377/14 in which the Respondent was granted an order to register an arbitration award it had successfully obtained against the Applicant. Applicant seeks rescission on the basis that the order was granted erroneously since it had in fact filed its notice of opposition to the application on the strength of a pending appeal in the Labour Court and more significantly on the basis of its additional application for stay of execution pending appeal in the same court. In essence the rescission therefore sought is in terms of r 449 of the High Court Rules which gives the judge or a court the authority to set aside a decision made in error.

Section 92E (3) of the Labour Act [*Cap 28:01*] makes it clear that an application for stay of execution can be made in the Labour Court pending an appeal. This was done by the Applicants. However, what has complicated the picture is that the Labour Court has since dismissed the application for stay of execution following the lodging of this application. Respondent has argued *in limine* that this being the case the application for rescission in this case is superfluous and serves no purpose as it can now freely go ahead with implementing the registered award unfettered.

Registration of an arbitral award generally does not deal with the merits of the matter. (See *Elvis Ndlovu* v *Higher Learning Centre* HB 86/10) As stated by MTSHIYA J in *Muneka & Ors* v *Manica Bus Company* HH 30-13 the registration of an award in the High Court is generally for purposes of enforcement only since the Labour court does not have its own enforcement machinery. Furthermore as he articulated therein, if an award has not been suspended or set aside on review or appeal there is no basis upon which the High court may decline registration. However, as elucidated by CHIGUMBA J in *Giya* v *Ribi Tiger Trading* HH 57-14 apart from seeking a stay of execution pending appeal, it is also open to a party to challenge registration of an award on the grounds that the registration is contrary to public policy. Such an argument would generally rely on the grounds stated in Art 36 (3) of the Schedule to the Arbitration Act [*Cap 7:15*] though the grounds therein are not exclusive. Applicant in fact persists with its quest for rescission on the basis that registration of the award would be improper as it violates public policy in terms of Art 36 (b) (ii) of the Arbitration Act.

That the High Court in hearing a matter which opposes registration of an award on the basis of the provisions of Art 36 in general of the Arbitration Act, does not mean it can exercise appeal powers or reach any conclusion on the faultiness or otherwise of any arbitrator's decision in such an application, is also well covered in case law. See *Zesa* v *Maposa* 1999(2) ZLR 452 (S) 466E-G; *Wei Properties (Pvt) Limited* v *S &T Export and Import (Pvt) Limited* HH 336-13. As stated in the above cases, what has to be shown to successfully refuse registration using Art 36 (b) (ii) for instance, which is the one which deals with refusal of registration on the grounds of public policy, is that the decision is so far reaching and outrageous in its defiance of logic or accepted moral standards that a fair minded person would consider that the conception of justice would be hurt by the award.

In *casu*, the matter of stay of execution has already been dealt with by the Labour Court in Judgment No. LC/H/334/14 and therefore in my view there would be no merit in the Applicant seeking rescission on the basis of a reason which has since been overtaken by events and which predominantly influenced its argument why it was necessary to be heard. Whether it has valid grounds for continuing to seek rescission on the basis of public policy is really the issue. Notably in dismissing the application for stay of execution, Judge MURASI made the following observations which in my view shed light on this issue:

> "The figure awarded by the Arbitration is $100 296.00. This is a large sum of money to be paid in damages. It becomes alarming if not justified by evidence.

> Considerations should also be had to the other side. Respondent stated that his salary was $2000.00 per month and he had been prejudiced due to Applicant's decision to relieve him of his duties. This court is of the view that the prejudice to be suffered by either party is evenly balanced. Applicant may need to fork out a lot of money in the circumstances, but Respondent is entitled to live and fend for his family. Applicant has not informed the court that Respondent has found alternative employment. If this was so, then it would be understandable that the prejudice suffered by the Respondent would be cushioned by the alternative employment. The court finds that on balance Applicant has not been able to surmount this hurdle."

The Judge also canvassed the prospects of success on appeal noting the weakness in Applicant's argument that what it had was a consultancy arrangement with the Respondent noting that Applicant would not have had to bundle the Respondent out of its premises if it indeed had a one month agreement with him. In addition the Judge stated that the prospects are limited by the fact that the documents suggest that Respondent was engaged for a year.

In light of the view by the that the arbitrators' decision is unassailable, the Applicant's argument that it still seeks rescission on the basis that it wants to oppose registration on the strength of the award being against public policy appears to rest on shaky ground. Applicant failed to make a convincing case before the Labour Court in this regard. It would not be proper in my view for this court to proceed in considering the application for rescission under Order r 449 of the High Court Rules, 1971, as if there have been no developments in this matter as exemplified by the decision of the Labour Court in refusing stay of execution and which addressed exactly that which is sought to be argued if the registration is rescinded. The courts cannot just act like mere robots in applying the law but must do so in a way that meets the justice of the case in light of both the law and the circumstances of a given case.

Given the reasons in *toto* for the dismissal of stay of execution by the Labour Court, including its pessimistic view of the success of the appeal, what accords with real and substantial justice at this juncture is that the registration of the award be not rescinded. Furthermore, it will serve no purpose to rescind registration given the development of the matter because there is also authority that suggests that once an arbitration order is registered with the High Court, it is an order of this court and that as such this court has power to grant a stay if so approached. See *University of Zimbabwe* v *Jirira & others* SC 360/12. As ZIYAMBI JA stated in that case, in an application brought before her where the applicant sought an order interdicting the respondents from levying execution on its property pending an appeal against an order of the High Court refusing it a stay of execution:

> "I granted the application at the end of the hearing because I was of the view that, the award having become an order of the High Court upon registration by that court, the court a quo misdirected itself in holding that it did not possess jurisdiction to grant the order sought….."

Given the controversy in this area of the law, she did raise the issue of the possibility of a full bench of the Supreme Court reaching a different conclusion. However since s171 (1) (a) of the Constitution of Zimbabwe Amendment (No.20) Act 2013, grants the High Court original jurisdiction over all civil and criminal matters throughout Zimbabwe, it could therefore be argued on this basis that it would have jurisdiction in matter concerning stay of execution, more so as it is in fact the one court that can register such an order.

Notably at the time that ZIYAMBI JA heard the above application the appeals before the Labour Court had been dismissed and the applicant had applied for leave to appeal to the Supreme Court in terms of s 92F of the Labour Act [*Cap 28:01*]. The rational for seeking stay in that case was that the magnitude of the award would have led to the shut of the University and hence execution was prima facie unreasonable. The entire library of the University and its vehicles had been attached.

In a similar vein Applicant argues that it has sought leave to appeal to the Supreme Court against the dismissal of stay of execution by the Labour Court. Its application was yet to be heard at the time that this application for rescission came before me.

In the final analysis this application for rescission has been overtaken by events in the form of the dismissal of stay of execution and the reasons therein which *prima facie* touch on its public policy argument. The application is without merit in terms of seeking to reverse registration of the award. Furthermore as stated, the Applicant even at this point is not entirely without a remedy were the Respondents to seek execution in the face of registration of the award with the High Court.

The application is accordingly dismissed with costs.

Kantor & Immerman, applicant's legal practitioners
M.E. Motsi and Associates, respondent's legal practitioners.