MOVEMENT FOR DEMOCRATIC CHANGE

Versus

FRACISCO NYONI

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 18 & 24 MARCH & 1 DECEMBER 2011

J Tshuma, for applicant
K Ngwenya for 1st respondent

Judgment

NDOU J: This is an application for stay of execution of an arbitral award registered by this court in terms of section 98 (14) of the Labour Act [Chapter 28:01]. This application for stay of execution has since been overtaken by events as this court granted rescission of the judgment sought to be executed. The only issue left is costs of this application. What is beyond dispute in this case is that the application under case number HC 2029/10 was properly served on the applicant on 25 January 2011. The applicant chose not to oppose the application. In brief, the applicant did not oppose the registration of the arbitral award granted in favour of the 1st respondent. *Mr Tshuma* for the applicant attacked the propriety of the application for registration of the arbitral award. He attacked the procedure followed by the 1st respondent in the application. He attacked the non-disclosure of material facts by the 1st respondent in his founding affidavit. He argued that the figure awarded was inflated. The problem the applicant has in this approach is that it was served with the application. It was afforded an opportunity and a forum to raise all these objections. It chose not to utilize the said opportunity and forum. It only sprung into action when the 1st respondent attempted to satisfy his judgment against its property. Why did applicant wait until its property was attached? There is no reasonable explanation for such inaction. This inaction is important in the determination of the issue of costs. It is trite law that the award of costs is a matter wholly within the discretion of the court. But this is a judicial discretion and must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at – *Fripp* v *Gibbon & Co* 1913 AD 354; *Levben Products (Pvt) Ltd* v *Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR). As alluded to above, there has been inept handling of this litigation by the applicant. The applicant did not oppose

the application at the appropriate stage until the day of reckoning *i.e* execution. This has resulted in this application. The applicant should bear the costs of this application which would not have been necessary had the opposition been made timeously – *Benmac Mfg Co (Pvt) Ltd* v *Angelique Entprs (Pvt) Ltd* 1988 (2) ZLR 52 (H) and *Mac & Sons Coach-builders (Pvt) Ltd* v *Mapfumo & Anor* 1984 (1) ZLR 16 (H).

Accordingly, it is ordered that the applicant will bear costs of this application on the ordinary scale.

Webb, *Low & Barry*, applicant's legal practitioners
Hwalima, *Moyo & Associates*, 1st respondent's legal practitioners