NATIONAL FOODS LIMITED
versus
GODFREY NGWARU
and
LINOS CHINGONGA
and
CLOUD ZINGUNDE
and
DEPUTY SHERIFF HARARE N.O

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 17 May 2011 & 1 June 2011

Mr *Maguchu*, for applicant
Mr *Sakala*, for respondent

MTSHIYA J: On 17 May 2011 I dismissed an urgent application wherein the applicant sought the following relief:-

"FINAL ORDER SOUGHT

It is ordered that:-

1. The Arbitration award by Arbitrator Chimhuka issued no 28 April 2011 be and is hereby registered as an order of this Honourable Court.

2. The Writ of execution issued by the Registrar on 23 April 2011 under case No. HC 1926/11 be and is hereby set aside.

3. Messrs Sakala and Company be and are hereby ordered to pay the costs of this application *de bonis prepriis* on a higher scale alternatively first, second and third respondents are hereby ordered to pay costs of this application on a legal practitioner and client scale.

INTERIM RELIEF SOUGHT

Pending the determination of this application, the applicant is hereby granted the following relief;-

1. An interdict be and is hereby issued stopping the removal of any of applicant property in pursuant to the Writ of Execution issued on 23 April 2011 under case No. HC 1926/11. In the event that any of the applicant's property has been

removed, the fourth respondent is hereby instructed to release such property into applicant's custody.

2. Applicant is hereby granted authority to serve this order on the first, second, third and fourth respondents."

I have since received a request for my reasons for the decision I made. I give here below the reasons for my decision.

On 3 February 2011 the respondents were granted the following award:-

"WHEREUPON after perusing the claimant's written submissions filed of record and in light of the respondent's default in filing written submissions.

IT IS ORDERED THAT:

1. The respondent to pay to each claimant the amount shown below, this being the difference of what is legally due for each claimant and what has already been paid (retrenchment packages):- GODFREY NGWARU = $ 2 667-00
   LINOS CHIGONDA =$15 029-23
   CLOUD ZINGUNDE =$15 408-00
2. This award to be effected within 14 days from the date of delivery.
3. Cost of this arbitration to be borne by claimants."

On 25 March 2011 the Arbitral Award was registered as an order of this court in the following terms:-

"IT IS ORDERED THAT:

1. The Arbitration Award dated the 3rd February, 2011 be and is hereby registered as an order of this Court for purposes of execution"

The above order is still in force and can only be set aside by this court.

On the basis of the above order the respondents issued a writ of execution followed by a Notice of Removal on 27 April 2011. The removal notice indicated that the applicant's goods would be attached on 3 May 2011. The applicants' goods were indeed attached as averred in the founding affidavit.

On 28 April 2011, a month after the arbitral award had been registered as an order of this court, the applicant obtained an award from the same arbitrator setting aside the already registered arbitral award. The new arbitral award granted on 28 April 2011 read as follows:-

> "1. The arbitrator has jurisdiction to hear and determine on that application for rescission of a default judgment.
>
> 2. The default judgment is hereby set aside to allow another arbitrator to look into the merits of the case – it is undesirable that labour disputes be resolved on the basis of technicalities
>
> 3. The matter is referred to the designated agent of the National Employment Council of the industry for purpose of securing a settlement failure of which he/she can refer the matter to an independent arbitrator.
>
> 4. In the event that the matter is referred to an independent arbitrator the cost of arbitration is to be borne by the applicant.
>
> 5. Cost of this arbitration to be borne by the parties equally.
>
> 6. Conciliation and reference to arbitration to be done within 14 days from the date this order".

Legally the above award has no effect on what is already an order of this court.

The papers do not indicate when the application to set aside the registered arbitral award was made. It is on the basis of the second arbitral award that this application purports to have been filed. The relevant part of the certificate of urgency reads as follows:

> "2. Following a labour dispute the three (3) respondents obtained an Arbitration Award for the payment of $33 104-223.
>
> 3. Despite the fact that the aforesaid Arbitration Award has been set aside, the three respondents are insisting on the payment, through execution, of the aforestated amount.
>
> 4. The Deputy Sheriff has attached applicant's basic tools of trade. I have considered:-
>
> (a) The basic nature of the goods in relation to applicant's business;
> (b) The fact that respondents are men of straw;
> (c) The award upon which payment is based has been set aside and
> (d) The respondents are unreasonably and without basis insisting on payment.

5. In view of these factors, I conclude that the matter is urgent. Execution has to be stopped lest irreparable harm will be suffered.

6. It is for these reasons, that this matter, in my considered view, is extremely urgent".

In support of urgency, the founding affidavit also states, in part:

"Meanwhile, applicant successfully applied for the rescission of the default Arbitration award, Annexure "A". Following a contested hearing, the same Arbitrator issued an Award setting aside the default award. I annex a copy of the latest award and mark it Annexure "E".

The existence of Annexure "E" has been brought to the attention of the respondents' lawyers. Despite their awareness of the existence of Annexure "E" above, the respondents' lawyers are insisting that the Deputy Sheriff should proceed with execution. The lame excuse given is that until the Arbitration Award Annexure "E" has been registered, they will not recognize it. With respect, such conduct on respondents' lawyers is regrettable and in my view unprofessional. The conduct only serves to increase the workload of this Honourable Court and the costs attendant to this matter.

Owing to the aforesaid conduct of the respondents' lawyers, the Deputy Sheriff is at applicant's premises intending to remove applicant's property. It will be noted from the Notice of Seizure and Attachment, Annexure "B" that the property that is sought to be removed are applicant's business trucks responsible for deliveries countrywide. The removal of the trucks will not only literally put a halt applicant's business, it affects consumers at large since applicant is the country's largest producer and supplier of basic commodities including flour, cooking oil and salt. This in my view is totally not called for considering that the execution is unnecessary.

In the circumstances, I request this Honourable Court to stay execution of the award in the interim. The final order that I seek is the registration of the latest award Annexure "E" and the setting aside of the Writ of Execution. I seek the registration on the basis of s 98(14) of the Labour Act which provides as follows:-

> 'Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him to the court of any magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court'

The applicant has no other remedy to stay the execution of the writ of execution. If the stay of execution is not granted, irreparable economic harm will be visited on the applicant and the public at large as set out in para eight (8) above".

In the opposing affidavit, supported by both second and third respondents, the first respondents states as follows:

"1. This matter cannot be heard on an urgent basis because the reasons that have been given are not valid but are just meant to buy time.

2. The applicant was served with an arbitral ward by the Arbitrator M. Chimhuka and was also served with a Chamber Application of registration of the arbitral award under Case number HC 1962/11 on 22nd February 2011. Applicant never bothered to oppose the application only to wait until the Deputy Sheriff wanted to remove the attached goods.

3. The award upon which payment is based on has not been set aside or appealed against at the Labour Court by the applicant".

Mr *Maguchu*, for the applicant, submitted that prior to the registration of the award the applicant had no legal basis, as provided for in Article 36 of the Arbitration Act [*Cap 7:15]* ("the Act") to interfere with the registration of the award. He said it is only on the basis of the provisions of Article 36 of the Act that the award could be set aside.

The said Article 36 of the Act provides as follows:

"(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only-

(a) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that-
   (i) A party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
   (ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
   (iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that –
  (i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or
  (ii) The recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) For the avoidance of doubt and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if-
  (a) the making of the award was induced or effected by fraud or corruption; or
  (b) a breach of the rules of natural justice occurred in connection with the making of the award".

The chronology of event in this matter throws me to the side of the respondents. The applicant does not deny that it was duly served with a chamber application for the registration of the award of 3 February 2011. The award, whose registration the applicant says it could not interfere with, is the same award whose execution it now seeks to frustrate. The founding affidavit is silent on why the registration of the award was not opposed and we are not told as to when the rescission application was filed. We are also not given the detailed reasons for the rescission except that the award was granted in default.

However, what emerges clearly from the events surrounding this matter, is that the threat the applicant now seeks to avert has always been in existence since 3 February 2011. The day of reckoning cannot be said to have been triggered by the writ of execution issued on 23 April 20011 for the attachment of the applicant's goods. The applicant was served with an application for the registration of the award on 22 February 2011. The applicant knew very well that registration of the award was meant to facilitate execution. I find no legal or logical basis for the applicant to hide behind the provisions of s 36 of the Act. The reasons, if any, for resisting the execution of the registered order must have existed prior to its registration.

In *General Transport & Engineering Private limited & Ors v Zimbank Corporation Private Limited* 1988(2) ZLR 301(H) GILLESPIE J said:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it".

I associate myself with the above remarks because, given what transpired, I am unable to find good cause for giving the applicant preferential treatment. A litigant seeking assistance through the urgent window of this court must demonstrate having taken immediate action (i.e. timeous action) when the danger to be averted first arose. As already explained, that is not the case *in casu*. In my view, the need to take action arose long before 10 May 2011. It was also a long time before the award was registered by this court on 25 March 2011. Apart from the aspect of default, I believe that the main reasons for applying to set aside the award were in existence on 22 February 2011 and cannot therefore be conveniently ignored through a restrictive interpretation of Article 36 of the Act.

In view of the foregoing, my view is that this application does not qualify to be heard on an urgent basis. That view disables me from considering the merits of the case. The applicant can proceed on the basis of an ordinary application.

1. The application is dismissed with costs for lack of urgency.

*Dube Manikai & Hwacha*, applicant's legal practitioners
*Sakala & Company*, respondents' legal practitioners