

SHUNGU ENGINEERING (PVT) LTD
versus
SIMBARASHE SANGONDIMAMBO & ORS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 February 2012 & 29 February 2012

Urgent application

O. Machuvairi, for applicant
Z. Kajokoto, for respondents

MATHONSI J: This is an urgent application in which the applicant seeks a provisional order in the following terms:-

“(A) TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the execution of the Arbitral Award in case number HC 6251/11 by the respondents be and is hereby permanently stayed.
2. That there shall be no order as to costs of this application.

(B) INTERIM RELIEF GRANTED

Pending confirmation or discharge of the provisional order the applicant is granted the following relief:

- (a) That the execution of the Arbitral Award registered in case number HC 6251/11 be and is hereby stayed.
- (b) In the event of this application being heard after execution has been carried out, that the applicant be restored to possession of its movable property.”

On 24 May 2011 labour arbitrator L.M. Gabilo handed down an arbitral award in an arbitration involving the parties in terms of which he directed the applicant to pay the respondents a total sum of US\$ 24 103-00 as unpaid salaries and cash in lieu of notice. It does not appear from the papers as if the applicant did anything about the award until recently.

The arbitral award was registered with this Court following an application made by the respondents in terms of s 98(14) of the Labour Act [*Cap 28:01*] in case number HC 6251/11 but not before that application was served upon the applicant on 4 July 2011. According to the Deputy Sheriff's return of service the application was served on an employee of the applicant Mrs Mudyawabikwa who is a responsible person.

The applicant did not see the wisdom of opposing the application and now claims that the employee did not bring it to the attention of management. I find it incredible that Mrs Mudyawabikwa could have appropriated the application for herself especially as no affidavit has been elicited from her explaining how this came about. In fact I reject the argument that the applicant only got to know of the arbitral award at the time of attachment.

Looking at L.M. Gabilo's award, the arbitration costs were to be borne by the parties at the ratio of 15% by the respondents and 85% by the applicant. It is highly unlikely that the arbitrator would have failed to send the award to the applicant when the bulk of his fees were to come from the applicant. I therefore proceed from the premise that, aware of both the award and its registration as an order of this Court, the applicant did nothing about the matter until removal of its property on 12 January 2012. This is particularly so given that the applicant did not act even when served with the notice of seizure and attachment on 6 September 2011 and with the notice of removal on 5 January 2012.

Following registration of the award a writ of execution was issued and the applicant's property attached and removed for sale in execution on 13 January 2012. It is that removal which jolted the applicant into action as, prior to that, it had blissfully allowed the matter to remain unattended.

The applicant promptly filed an urgent application in this Court in case no. HC 289/12 seeking an order for a stay of execution pending the hearing of a review application which it only filed in the Labour Court on 13 January 2012 when its property was removed.

The urgent application in HC 289/12 was placed before my brother MUTEMA J who refused it on 13 January 2012 on the basis that he lacked jurisdiction as s 89(6) of the Labour Act ousted the jurisdiction of this Court, the determination of such application falling within the exclusive purview of the Labour Court as well as the

fact that no urgency was demonstrated by the applicant it having waited until the eleventh hour to bring the application.

It would appear that after failing to get relief from this Court, the applicant tried its luck at the Labour Court but it met with no joy there either as Senior President G. Mhuri of that Court threw out the application on 15 February 2012 “for want of jurisdiction”.

The applicant then returned to this Court, again on an urgent basis, seeking a stay of execution pending the determination of its review application in the Labour Court. Significantly, the applicant filed almost the same application rejected by MUTEMA J and did not attach the review application in question. More importantly, the applicant did not disclose the fact that it had been to this Court before and had had the same application dismissed. Neither did it disclose that its property had been advertised by the Deputy Sheriff and part of it sold by public auction on 4 February 2012. If I had not directed service of the application upon the respondents, I would have determined the matter without knowledge of the existence of a similar application dismissed by this Court or indeed the sale of the property sought to be protected.

The utmost good faith must be shown by litigants making applications of this nature. They should place all material facts before the Court to enable the Court to make an informed decision. See *N & R Agencies (Pvt) Ltd & Anor v Ndlovu & Anor* HB 198/11 and *Graspeak Investments v Delta Corporation (Pvt) Ltd* 2001 (2) ZLR 551(H) at 554 D where NDOU J stated, as he quoted with approval, HERBESTEIN and VAN WINSEN, The Civil Practice of the Supreme Courts of South Africa:

“The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the Court, so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully or *mala fide* or negligently which might have influenced the decision of the Court whether to make the order or not the Court has a discretion to set the order aside with costs on the grounds of non-disclosure”.

At p 555C the learned judge went on to say:-

“The Courts should, in my view, discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides* or dishonesty. Depending on circumstances of the case, the Court may make

adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants”.

I find myself in total agreement with the sentiments expressed by the learned judge. Here is a litigant that had approached this court a few weeks earlier and had its case dismissed. Its property has already been sold in execution, it was sold on 4 February 2012. The same litigant returns to this Court on virtually the same facts but does not disclose the history of the matter. In my view this is a very material non-disclosure and it borders on dishonesty. The courts must always cast a dim view on litigants who pull the wool over its eyes.

This is not the only problem confronting the applicant in this matter. The other issue relates to urgency. I have already stated that MUTEMA J rejected the same application for lack of urgency on 13 January 2012. For the applicant to approach the Court on the same facts more than a month later is not only disingenuous in the extreme but a lamentable abuse of court process. Realising this difficulty, Mr *Machuvairi* for the applicant tried to suggest that this matter came before me as a referral from the Labour Court. That is not the case, as it is a stand alone application.

The applicant was aware that the arbitral award was being registered for purposes of execution in July 2011. It did not contest the registration neither did it seek a stay of the execution. It waited until the day of reckoning to approach the Court. This is not the kind of urgency envisaged by the rules. As stated by CHATIKOBO J, a pronouncement which I am in total agreement with, in *Kuvarega v Registrar General & Anor* 1998(1) ZLR 188 at 193 E-G.

“What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberative or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules”.

The interim relief which the applicant seeks betrays its real intention. The applicant prays that in the event that execution has been carried out the court must restore possession of the property to it. How can one do that? The property has already been sold and third parties have acquired rights over such property. Applicant desires to reverse the execution and not to stay it.

This is a case calling for costs to be visited upon the applicant on a higher scale in light of its lack of *bona fides* and what appears to be an abuse of court process. It should have

been apparent to the applicant, especially with the benefit of legal counsel, that the application has no prospects of success.

In the result the application is dismissed with costs on the legal practitioner and client scale.

Manyurureni & Company, applicant's legal practitioners
Kajokoto & Company, 1st respondent's legal practitioners