CMED (PVT) LTD
versus
SAMSON BANDE & 30 Ors

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 20 February 2017 & 29 March 2017

Urgent Chamber Application

K Kachambwa, for the applicant
1st respondent in person and for the other respondents

CHATUKUTA J: The respondents are former employees of the applicant. They were retrenched in 2012. They were paid their pensions in terms of s 11 of the Public Service (Pension) Regulations, Statutory Instrument 21A of 2001 (the Regulations). They challenged the payment alleging that the pension was supposed to have been payable in terms of s 10 of the Regulations. They alleged unfair labour practice and the dispute was referred for arbitration. An arbitral award was issued in favour of the respondents on 20 July 2015. The applicant appealed to the Labour Court on 28 August 2015 against the award in case number LC/H/795/15. The Labour Court dismissed it on 10 June 2016 (Judgment No. LC/H/371/16). The applicants applied to the Labour Court on 23 July 2016 in case number LC/745/16 for leave to appeal to the Supreme Court against the dismissal. The application is still to be heard.

On 2 August 2016 the respondents applied in case number HC 7853/16 for the registration of the arbitral award. The matter was set down for hearing on 25 November 2016. It was postponed at the instance of the applicant to 1 December 2016 to be heard at 9 am to enable the attendance of an advocate who had been instructed by the applicants to argue the matter on its behalf. The applicant defaulted on that date leading to this court granting a default judgment in favour of the respondents.

On 12 December 2016, the applicant filed an application for rescission of the judgment in HC 7853/16. In its application for rescission of judgment in HC 12567/16, the applicant explained that the legal practitioner who wrote to the advocate confirming the postponement to 1 December 2016, erroneously gave the time of set down as 11 am instead of 9 am.

On 6 December 2016, the respondents obtained a Writ for the execution of the judgment in HC 7853/16. A notice of removal was served on the applicants on 12 December 2016. On 13 December 2016 the applicant filed an urgent chamber application in case number HC 12609/16 seeking an order for the stay of execution of the judgment in HC 7853/16. The application was dismissed on 3 February 2017 for improper citation of the respondents. The present application was filed on 8 February 2017 seeking an order for the stay of execution of the judgment in case number HC 7853/16.

At the commencement of the hearing of this application, the respondents raised a preliminary issue that the application was not urgent. It was contended that the urgency was self-induced in that the applicant was not taking the proceedings seriously. The award was issued in 2015 and the applicant had not sought the stay of execution of the award under the Labour Act. It was further contended that the applicant has not to date prosecuted its application for leave to appeal and that it has not paid any security for costs. The applicant was not likely to suffer any irreparable harm if the matter was not heard urgently. It was contended that the respondents had been awarded in the arbitral award the difference between the pension paid out by the applicant in terms of *s* 11 of the Regulations and what they were entitled to in terms of *s* 10. The applicant believed that it would succeed on appeal. If it did, it would be able to recover the difference from the Public Service Pension Fund.

The applicant submitted that it expressed its eagerness to challenge the award by appealing in case number in LC/H795/16 against the award. Upon being served with the Notice of Attachment on 12 December 2016, it immediately filed an application for stay of execution of the judgment in HC 7583/16 on 13 December 2016. When that application was dismissed on 3 February 2017, it launched the present application. It was further contended that the applicant alleged that it would suffer irreparable harm if the matter was not heard on an urgent basis because the respondents were men of straw and if it won its appeal after the property had been disposed of in execution, it would not be able to recover anything from the respondents.

The law on urgency is trite. A matter is not urgent when the situation complained of has been in existence for a significant time. Conversely, a matter is urgent if when the cause of action arises, there is a need to act immediately in order to redress or arrest the harm suffered or threatened. (See *Kuvarega* v *The Registrar General* 1998 (1) ZLR 188, *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H), *Document Support Centre (Pvt) Ltd* 2006 (2) ZLR 240, *Gwarada* v *Johnson & Ors* 2009 (2) 159 (H).)

The applicant was jolted into action by the service of the Notice of Attachment on 12 December 2016. However, as rightly noted by the respondents, the applicant were supposed to have acted earlier when the arbitral award was issued. A consequence of the issuance of the award was execution by the respondents. The applicant was represented throughout the entire dispute by a legal practitioner of choice. The legal practitioners should have been aware that in terms of *s* 92E (2) of the Labour Act, an appeal to the Labour Act does not suspend the determination or decision appealed against. The applicants had an opportunity in terms of *s* 92E (3) to have execution of the award stayed. In its better wisdom, the legislature empowered the Labour Court to make such interim determination as the justice of the case requires. The applicant did not use this window to their best advantage. The appeal was only dismissed on 10 June 2016 the award having been issued on 20 July 2015. The applicant therefore had an entire year within which to apply for the stay of execution of the award pending determination of the appeal in the Labour Court. The applicant did not consider it prudent to do so.

The applicant appears to have filed an application for stay of execution. It was however not indicated when the application was filed.

Although the applicant submitted that the noting of the appeal was a show of its desire to have the award set aside, a reading of the judgment by MUCHAWA J in LC/H/795/15 reflects that the applicants have exhibited a lackadaisical approach in having the dispute resolved. The appeal was dismissed on the basis that the applicant was barred and the appeal lacked merit. The circumstances leading to the bar were that after filing the appeal on 28 August 2015, the respondents were the last to file their notice of response to the appeal on 23 September 2015. The applicant was supposed to have filed its heads of argument fourteen days of 23 September 2015. It only filed what it termed “Appellant’s Preliminary Heads of Argument” on 7 January 2016. It

was stated in the "Preliminary Heads of Argument" that detailed heads would be filed at a subsequent date. The applicant did not seek condonation for late filing of the "Preliminary Heads of Argument" or the full heads. Such conduct is not consistent with a party seeking to effectively prosecute its appeal.

On 28 June 2016 a letter was addressed by the Secretary of Public Service Commission to Civil Division with schedule of the payments due to the respondents and with a request that the schedule be referred to the applicant for processing the payments. The applicant received the letter on 9 July 2016. On 30 June 2016 the Civil Division referred the schedule to the applicant's erstwhile legal practitioners Muringi, Kamdefuwere Legal Practitioners. The applicant did not act.

The applicant has therefore been aware of the need to act for a very long time. It sat on its laurels and cannot now ask to jump the queue.

Having considered the fact that the applicant did sit on its laurels, I now turn to the question of the validity of the certificate of urgency. The importance of a certificate of urgency in the determination of urgency of an application was underscored in *Chidawu & Ors* v *Sha & Ors* 2013 (1) ZLR 260 at 264 D-265C and that is to assist the court seized with the urgent chamber application to decide if the application is so urgent that it warrants being ahead of other matters. (See also *Gwaranda* v *Johnson & Ors* 2009 (2) ZLR 159 (H) 168F-170B & *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank (Pvt) Ltd* 1998 (2) ZLR 301 (H)). In *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank (Pvt) Ltd*, Gillespie observed at 302E-303D that:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner is involved if a legal practitioner is prepared to give his assurance that such treatment is required.
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> It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency."

One such factor is the date when the applicant became aware of the conduct complained of. In considering urgency, the court takes into account whether or not the applicant acted when the need to act had arisen. This by necessity requires that the court considers the lapse of time between the conduct complained of and the filing of an urgent application. If the lapse is considerable, an explanation must be proffered for having failed to act timeously. In the present case, the entire certificate of urgency is devoid of any relevant dates. The most important date is when the Arbitral award was issued.

One striking feature of the certificate of urgency in the present application is that it is almost identical to the certificate of urgency in case number HC 12609/16. Except for the different names of the legal practitioners certifying urgency and para 11 to both certificates, the certificates are identical to the last dot. The only difference in para 11 is that in the certificate in the present application the reference to the date when the property was scheduled to be removed was deleted. Sherpard Zvavanoda certificated the present application as urgent. Tafara Chiturumani certified the application in case number HC 12609/16 urgent. Both lawyers are from the same law firm. This cannot have been a mere coincidence.

In the present application there are developments that occurred between the application in case number HC 12609/16 and the present application which Sherpard Zvavanoda should have referred to in his certificate. Firstly, case number HC 12609/16 was heard and dismissed on 3 February 2017. The determination of that application was relevant as it explained the delay between 13 December 2016 and 3 February 2017.

The certificate does not address the delay between 1 December 2016 when the order in HC 7583/16 was granted and 13 December 2016 when the urgent chamber application in case number HC 12609/16 was filed. Had someone attended on 1 December 2016 at 10am they would have known that the application for registration of the arbitral award had been granted and the consequence of such registration would have been execution. Such information would have assisted the certifying legal practitioner to form a genuine and independent opinion whether or not this application is urgent.

The respondents refuted the applicant’s claim that the applicant would suffer irreparable harm and was remediless. The contention by the respondents that if the applicant succeeded on

appeal it would be able to recover its loss from the Public Service Pension Fund is valid. The Public Service Pension Fund is the second respondent in the appeal and the applicant has prayed for an order that the Fund pays the respondents the difference between the pension already paid out and what the respondents are entitled to if payment had been made under *s* 11 of the Regulations.

The applicant alleged in para 10 of the Founding Affidavit that the application for leave to appeal had been set down for hearing on 20 February 2017. This, the applicant submitted, was testimony that the applicant was vigorously pursuing the application for leave. As rightly noted by the respondents and conceded by the applicant's counsel, what was before the Labour Court on 20 February 2017 is the application for stay of execution. The respondents submitted that the applicant has not paid the security for costs required for setting down the matter. Mr *Kachambwa* did not have information as to what is happening to the application for leave to appeal despite the instructing attorney, Mr Mawema being present during the hearing of this application. Despite giving the applicant an opportunity to place before me proof that the necessary fees had been paid for the setting down of the application, the applicant has not done so up to date.

Mr *Kachambwa* submitted that the sins of the legal practitioner should not be visited on the applicant. This was, in my view, a concession that the legal practitioners had been inept to the expense of the applicant. Generally, our courts are reluctant to visit a litigant with the sins of his legal practitioners. However, there is a limit beyond which the courts will not go. (See *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 & *Viking Woodwork P/L* v *Blue Bells Enterprises P/L* 1998(2) ZLR 249 at 252H-253C. However, had it been a one off sin, I would have indulged the applicant. It is clear that the ineptitude has been perpetuated for too long a time. It is clear that the applicant has allowed it as exhibited by their acquiescence. The applicant made its choice of a legal representative and it must stand by its choice. The respondent cannot be prejudiced by the ineptitude of the legal practitioner.

There was no prayer for costs by the respondents. Accordingly no order is made as to costs.

In the result it is ordered that:

1. The application is not urgent.
2. The application is removed from the urgent chamber applications roll.

T. K. Hove & Partners, legal practitioners for the applicant