

**IN THE LABOUR COURT OF ZIMBABWE
HELD AT HARARE 6TH DECEMBER 2013
& 31ST JANUARY 2014**

**JUDGMENT NO LC/H/31/14
CASE NO LC/REV/H/99/13**

In the matter between:-

MDC - T

Applicant

And

H MAVHANGIRA & 13 OTHERS

Respondents

Before The Honourable R.F. Manyangadze, Judge

For Applicant

Mr B Peresuh (Legal Practitioner)

For Respondents

Mr P Mawadze (Legal Practitioner)

MANYANGADZE, J:

This is an application for stay of execution of an arbitral award granted on 30th September 2013, in which damages were quantified and amounted to a total of US\$491 760.00.

A brief history of the matter is as follows.

The Applicant terminated Respondents' contracts of employment in August 2010. The Respondents challenged the termination as an unfair dismissal. They won an arbitral award on the 3rd of May 2012, in which Applicant was ordered to reinstate the Respondents or pay them damages for unlawful dismissal.

The Applicant appealed against that award, and the appeal is pending under Case No LC/H/364/12. THE Applicant also filed an application for stay of execution of that award. From the papers in the instant application, it appears the parties were given an opportunity to settle the matter (the main appeal)

out of court, in the course of which the application for stay of execution was postponed **sine die**.

The parties failed to reach a settlement. The Respondents filed an application for quantification of damages which application was granted on the 30th of September 2013.

The Respondents proceeded to file an application in the High Court for registration of the quantification award. The application, which is being opposed by the Applicant, is pending under Case No H.C. 9142/13

In early November 2013, Applicant filed an application for review of the arbitral award of 30th September 2013, on the basis that Applicant was not given proper notice of the arbitration hearing and was denied an opportunity to file its submissions.

The Applicant also filed the instant application, which is an urgent application for stay of execution of the arbitral award in respect of which the review is sought, pending the outcome of such review.

The basis of the application for stay of execution, which Applicant describes in its papers as suspension of the arbitral award, is that Applicant will suffer irreparable harm if Respondents proceed to execute the arbitral award. In the event that Applicant succeeds in its application for review, it is unlikely to recover the monies that would have been paid to the Respondents.

Respondents raised several points *in limine*, urging the Court to dismiss the application on the basis of these points. The points raised can be outlined as follows:

- 1) An affidavit deposed to by Ms G.T. Nyamai, a Legal Practitioner in the employ of Applicant's Legal Practitioners, should not form part of the record.
- 2) The Labour Court has no jurisdiction to hear the application, since there are pending proceedings in the High Court for registration of the arbitral award.
- 3) There is no basis for an application for stay of execution pending review. Such an application can only be made pending appeal against an arbitral award.
- 4) Application is not urgent.
- 5) Applicant used wrong procedure by applying for a review, instead of a rescission of the arbitral award on the basis that it was a default judgment.
- 6) The application is *lis pendens*
- 7) Applicant is coming to Court with dirty hands.

I must deal with each of the points raised *in limine*, and determine whether the application should be rejected on the basis thereof.

Affidavit

Under this point, the basis of Respondents' contention is an affidavit deposed to by Ms Gloria Nyamai. Ms Gloria Nyamai is a Legal Practitioner in the employ of Honey & Blankenberg, Legal Practitioners of record for the Applicant. As such, she is part of the team of Legal Practitioners for the Applicant.

The Applicant seeks to incorporate an Affidavit by Ms Nyamai, in which she refutes Respondents averment that she made an undertaking on behalf of the Applicant, that Mr B Peresuh will file submissions within 14 days from the 18th of July 2013. This undertaking was allegedly made when Ms Nyamai appeared before Honourable D Mudzengi, the Arbitrator who was handling the dispute between the parties. She was standing in for Mr B Peresuh, who was indisposed.

It is significant to note that both parties are agreed that it is improper for a Legal Practitioner to file an affidavit on behalf of a client, unless there are exceptional circumstances warranting such a course of action.

In the case of **Khuzwayo v Assistant Master & Others** 2007 (1) ZLR 34 (H) a Respondent's lawyer was censured by the High Court, for filing an affidavit on matters that were said to be within the personal knowledge of the client and not within his personal knowledge.

In the instant case, I think we are faced with a situation where a matter peculiarly within the Legal Practitioner's knowledge is in issue. It is the pertinent question of whether or not an undertaking to file submissions within 14 days was made. Ms Nyamai is the lawyer who supposedly made such a binding commitment.

No one else can authentically clarify the situation. It seems to me, she is placed in the rather unenviable position of having to clear the air herself. This, in my view, is an exceptional situation where a departure from the norm can be

justified. In the circumstances, it is held that the application to incorporate Ms Nyamai's affidavit has been properly made.

Jurisdiction

Objection to this Court's jurisdiction is premised on the fact that an application of the arbitral award in question has been made in the High Court, where it is still pending. The application for stay of execution, it is argued, must be filed with the High Court, and not the Labour Court.

The Labour Court is a creature of statute. It derives its authority from, and is guided by the Labour Act, [Chapter 28:01] and any regulations made there under.

The applicable provision is found in Rule 34 of the Labour Court Rules, Statutory Instrument 59 of 2006. It reads as follows:

"Where a decision, order or determination has been registered in terms of section 92 B (3) of the Act, the Court or a President sitting in chambers may, upon application, order a stay of execution of the decision, order or determination."

This Statutory provision is quite clear. It does not preclude a litigant from seeking interim relief, such as stay of execution, in the Labour Court, by reason of the order or determination in respect of which such relief is sought having been registered either with the Magistrate Court or High Court in terms of Section 92 B (3) of the Act.

Guided by these provisions, I do not think that an application for stay of execution relating to an order whose registration is pending in the High Court for purposes of enforcement cannot be made in this Court.

Furthermore, section 98 (9) of the Labour Act confers upon Arbitrators the same powers, in labour matters, as those of the Labour Court. If determinations of arbitral tribunals are executed the same way as those of the Labour Court i.e. by means of registration at the Magistrates' or High Court, I do not see how arbitral awards can be excluded from the provisions of Rule 34.

Relief pending review

The point Respondents are making here is that there is no provision for interim relief pending review. The provision is there only pending appeal.

The argument by the Respondents, essentially, is that the application for interim relief is wrong at law. It is defective in that it does not emanate from a pending appeal but a pending review.

With respect, I am unable to uphold Respondents' contention. As pointed out by Applicant, as provided for in section 89 (1) (d) of the Labour Act, the Labour Court exercises the "same powers of review as would be exercisable by the High Court in respect of labour matters."

Apart from determining the review itself, the High Court determines ancillary matters relating to the execution of the determination under review. In my view, there is no basis for limiting the Labour Court to determination of the review itself, if prejudice may conceivably arise from matters ancillary thereto.

It seems Respondents are making a very restrictive application of Section 92 E (3) insisting that the express mention of “appeal” excludes “review”

If the strict and restrictive application of the law urged by the Respondents is also applied to the preceding subsection i.e. 92 E (2), the logical consequence would be that a review will have the effect of suspending the determination or decision in question. The reasoning would be that since non-suspension is mentioned with specific reference to an appeal, it does not apply to a review.

I do not think such contradictions were intended by the legislature. The bottom line is that there is an order or determination which is being challenged, be it by review or appeal. Such challenge does not suspend the determination or order. What is then provided for is a mechanism for interim relief through an application for the suspension of the order or determination. I believe this is an instance where a purposive interpretation of the law can be properly made, to give effect to the intention of the legislature. I do not think it was the intention of the legislature to grant relief in one situation, and deny it in the other, where in both situations, it is sought that the determination in question be temporarily stayed.

In the circumstances, I hold that the application for stay of execution pending review of the arbitral award has been properly made.

Urgency

On this aspect, a brief history of the matter has already been outlined, showing how this application came about.

The decisive date is 30th September 2013, when the arbitral award was handed down. What shows urgency is what the party adversely affected by the award did upon learning of the award. This is where the parties are making vehemently opposed averments.

Respondents contend that there was communication before the 1st of October, to the Applicant from the Arbitrator, that the arbitral award was ready for collection. The Applicant did nothing about it until 8th November 2013 when it filed the urgent chamber application for interim relief.

On the other hand, Applicant avers that it was not aware of the arbitral determination until the 4th of October 2013, when it learnt of it from a press article. It was not until 31st October 2013 that the Applicant received a copy of the determination by way of service upon it of an application for registration of the determination in the High Court for purposes of enforcement. Applicant then lost no time in filing an application for urgent interim relief, in addition to opposing the High Court application.

Applicant further pointed out that the issue dates back to the 17th of in July 2013, when they were given short notice to attend the arbitral hearing of the 18th of July 2013. This hearing, as already indicated, was attended by Ms Nyamai on behalf of Mr Peresuh. What transpired in that hearing is the subject of very contentious assertions by the parties.

Applicant asserts that it wrote a number of letters to the Arbitrator, seeking clarification on how the session of 18th July 2013 was conducted, and how the arbitral award of 30th September 2013 was made, despite an agreement or understanding that the matter was not to be dealt with whilst an application for interim relief filed in respect of the main appeal, was still pending.

Respondents concede there was a flurry of letters from Applicant to the Arbitrator. On behalf of Respondents, it was submitted that Applicant wrote several letters to the Arbitrator querying a lot of issues. Respondents hastened to add that Applicant should have taken action to have award rescinded or set aside, instead of writing the numerous letters.

The Respondents have however, not been able to point to any correspondence from the Arbitrator's Office calling upon the Applicant to collect the arbitral award in question. In the absence of this, the doubt not must be resolved in Applicant's favour, that it was in receipt of a copy of the award on or about 31st October 2013, when it was served with the application for registration of the award. This is what then galvanised the Applicant into lodging the urgent application for interim relief. It cannot therefore be said to have been lackadaisical or dilatory, or created its own urgency.

The application can reasonably be said to have been filed in circumstances of urgency.

Default

It is contended on behalf of the Respondents, that Applicant was in default when the arbitral award was handed down on the 30th of September 2013. The default consists in it having failed or neglected to file its submissions. The Applicant should therefore have sought relief by way of an application for rescission of the default judgment.

There is no explicit provision on rescission of judgments by an Arbitrator. Reliance is often placed on section 98 (9) of the Labour Act, which states, that an Arbitrator exercises the same powers as the Labour Court in labour matters.

The point advanced on behalf of the Respondents is that if a litigant has been given notice, and has defaulted to file submissions when called upon to do so, and a Court goes on to give a decision, the decision is based on default, which is capable of rescission.

I must say this is a correct exposition of procedural law. A default judgment is remedied by rescission of such judgment, on good cause shown by the party prejudiced by it.

What is however peculiar in this matter is that it is not premised on default, but on allegations of bias and procedural irregularity.

The question of whether or not Applicant was in default can be traced back to the hearing of the 18th of July 2013. As already indicated, what transpired in that session is in serious contention. It is on the basis of that the allegations of procedural irregularity have arisen. It is further on the basis of such allegations that the application for review has been made.

The merits or otherwise of these averments, of bias and procedural irregularity, will be the subject of the review hearing.

It cannot be said that this is a clear cut case of an application for rescission of a default judgment, given the issues in contention. I hold therefore, in the circumstances, that the application for review was properly filed. Its merits or otherwise will be determined at the appropriate stage

Lis pendens

As I see it, there is no contention on the legal principles of *lis alibi pendens*. Applicant referred the Court to the book by Herbstern and van Winsen, "The Civil Practice of the Superior Courts in South Africa" 3rd ed (1997) Butter worths; Durban, where, at pages 269 - 270, the learned authors postulate thus:

*"If an action is already pending between parties and the plaintiff therein brings another action against the same defendant **on the same cause of action** and in respect of the **same subject matter**, whether in the same or different court, it is open to such defendant to take the objections of *lis pendens* , that is, another action*

respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action” (at 269 - 270. Emphasis added.)

The parties differ in their application of the principles enunciated, to the facts *in casu*.

I agree with the Applicant that the test of *lis pendens, in casu*, fails on the requirements of the same cause of action and the same relief or subject matter.

The background to this matter has shown the emergence of two arbitral awards. One deals with the issue of unlawful dismissal. The other dealt with quantification of damages for the unlawful dismissal. In the former, Applicant seeks to have the contracts of employment ruled unlawful, with Respondents arguing for a ruling that they be found to be lawful. In the latter, the relief sought relates to quantification of an award that has already been made. It seeks to stop enforcement of that quantification. It has been prompted by the imminence of such enforcement. In this regard, it does not duplicate the earlier application where those elements were not in issue.

Dirty Hands

Respondents contend that Applicant must not have right of audience until it has complied with the arbitral award of 3rd of May 2012. It cannot seek

the protection of the Court when this order, which has not been suspended, has not been complied with.

Applicant has referred the Court to a number of cases, among them that of the **Director General of the Central Intelligence Organisation v Minister of State Security**, HH 37/05, and **Air Zimbabwe v National Workers Union** LC/H/147/10.

The cases underpin the principle that orders by courts must be observed and respected by those affected by such orders, and a party approaching the court has no right of audience if in contempt of court, unless and until they purge the contempt.

The principles referred to are, without doubt, fundamental principles of our procedural law. What needs to be resolved is whether Applicant has fallen foul of these requirements.

It has been argued, on behalf of the Applicant, that , in respect of the initial award, the Respondents opted for damages. The issue of their reinstatement therefore fell off. Consequently, Applicant could not be said to be in contempt of the order to reinstate the Respondents. Significantly, this averment, which accords with what has transpired, was not controverted by the Respondents. Indeed, it is difficult to hold the Applicant in contempt of that portion of a court order that has been rendered inoperable against it, by reason of Respondents' push for the alternative remedy of damages for unlawful dismissal.

The portion relating to damages could not be enforced until the damages were quantified on 30th of the September 2013, after which Applicant was required to comply with the arbitral award.

However, the issue of compliance is what is the subject of the current application. The issue of contempt does not therefore arise. The Respondents have not even raised it in respect of the second arbitral award.

In the circumstances, and for the reasons stated, each of the Respondents' points *in limine* cannot be upheld.

It must be pointed out that the parties argued at length on the points *in limine*, which were quite numerous. They did not indicate that the rest of the matter could be decided on the papers, in the event that the points *in limine* are dismissed. What it means is that they must, once again, be given an opportunity to argue the merits of the application.

Having dealt with the extensive points *in limine* raised in this matter, and having regard to the findings I have made in respect thereof, I am of the view that I should not proceed to hear arguments on the merits. I believe it is more appropriate that such hearing be presided over by another judge.

In the result, it is ordered that:

1. Each of the points *in limine* raised by the Respondents be and is hereby dismissed.

2. The Registrar shall set the application down for hearing on the merits before a different Judge, on an urgent basis.
3. Costs shall be in the cause.

Honey & Blackenberg, Applicant's Legal Practitioners

Manase & Manase, Respondents' Legal Practitioners