

REPORTABLE (37)

CFI HOLDINGS t/a FARM & CITY
v
ANDREW MACHAYA

SUPREME COURT OF ZIMBABWE
GUVAVA JA, CHATUKUTA JA, & MWAYERA JA
HARARE: 28 JANUARY 2022 & 8 MAY 2023

S. M Hashiti & M. Ndlovu, for the appellant

K. Gama, for the respondent

CHATUKUTA JA: This is an appeal against the whole judgment of the High Court (court *a quo*) in which the court granted an application for the registration of the judgment of the Labour Court amounting to US \$177 408.00 in favour of the respondent. Judgment No. SC 37/23 Civil Appeal No. SC 189/21 1

FACTUAL BACKGROUND

The labour dispute between the appellant and the respondent has been raging on for the past twenty-three years, dating back to 2000. The respondent was employed by the appellant as a Personnel Manager. Sometime in 2003, the appellant suspended the respondent on allegations of misconduct. The respondent challenged the suspension resulting in a judgment by this Court in 2012 in which the suspension was declared a nullity.

Following the nullification of the suspension, the appellant opted to retire the respondent in 2012. The appellant paid the respondent his salaries and benefits for the period from January 2009 up to 2012 in United States dollars. The payment for that period did not raise any dispute between the parties as the country had dollarized. A dispute, however, arose as to the payment of salaries and benefits for the period extending from 1 April 2003 to 31 December 2008 which were denominated in Zimbabwean dollars. The respondent filed an application in the Labour Court for the quantification of the outstanding salaries and benefits for the period 1 April 2003 to 31 December 2008 in United States Dollars. The total amount he sought was US\$1 001 381, 14. The Labour Court held that the respondent was not entitled to payment of benefits. It awarded him an amount of US \$177 408.00 being arrear salaries and cash in lieu of leave with interest on the total sum payable at the prescribed rate.

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PROCEEDINGS BEFORE COURT A QUO

The respondent filed an application in the court *a quo* for the registration of the Labour Court judgment in terms of s 92B (3) of the Labour Act [*Chapter 28:01*]. The respondent submitted in the court *a quo* that the Labour Court judgment was sounding in money and could therefore be registered.

The appellant opposed the application. It argued that the judgment of the Labour Court was unenforceable as it was denominated in United States dollars which currency had ceased to be lawful currency. It submitted that the Labour Court erred in ordering payment in United States dollars for a debt that was incurred prior to 22 February 2019. It was further argued that the judgment was therefore *contra bonos mores* and not registrable. It was also argued that

an application for leave to appeal was pending in the Labour Court under case number LC/H APP/293/2020 and the court *a quo* should defer determining the application pending determination of the appeal.

In response, the respondent argued that the appellant was not being denied the right to pay in local currency using the Reserve Bank of Zimbabwe auction rate. He denied there being a pending application for leave to appeal. He also argued that the existence of an application for leave to appeal was not a valid reason for refusing to register a judgment.

DETERMINATION BY THE COURT A QUO

The court *a quo* found that the respondent had managed to satisfy the requirements for registration of the judgment of the Labour Court. It further found that the issue of currency of the judgment is a question of law which could only be entertained by the Supreme Court on appeal in terms of s 92F of the Labour Court Act. It held that registration of the judgment was not contrary to public policy.

The court *a quo* further held that the appellant could not seek to rely on an intended appeal as a ground for opposing the registration of the judgment and that in any event the noting of an appeal does not suspend the decision appealed and consequently the registration as well.

The court *a quo* proceeded to grant the application for the registration of the Labour Court judgment. Aggrieved by the court *a quo*'s decision, the appellant noted the present appeal on the following grounds:

GROUNDS OF APPEAL

1. “The court *a quo* erred and misdirected itself in relying on an authority neither argued nor brought to the attention of the parties.
2. The court *a quo* further erred and misdirected itself in failing to exercise judicial function to determine an application before it contra the specific provision of section 92B (3) of the Labour Act.
3. The court *a quo* further erred in failing to distinguish between and conflating the determination of the executability of a judgment with an appeal addressing the correctness of a judgment.
4. The court further erred and misdirected itself in registering and ordering the enforcement of judgment whose enforcement is proscribed and contra statutory authority per s 22 of Finance Act and section 2 of S.I 142/19, s 4 (1)(d) of SI 33/19 Judgment No. (SC 92B(3)) Civil Appeal No. SC 189/21 and s 94 of the Labour Act.”

SUBMISSIONS BY THE APPELLANT

Mr Hashiti, for the appellant, submitted that to order execution on an unlawful currency is contrary to the law. He argued that the order issued by the court *a quo* was not sounding in money as it was denominated in United States dollars which at the time was not legal tender. He further argued that the court *a quo* could therefore not register a judgment which ordered payment of arrear salaries in illegal tender.

Counsel for the appellant argued that the court *a quo* failed to exercise its judicial function when it held that the matter raised a point of law which could only be determined by the Supreme Court. He submitted that the court *a quo* ought to have determined whether or not the amount in issue was legal tender rather than avoid the issue.

SUBMISSIONS BY THE RESPONDENT

Mr *Gama*, for the respondent, submitted that the court *a quo* was not required to go into the merits of the case as doing so would be usurping the powers of the Labour Court. He submitted that the court *a quo* did not misdirect itself in failing to deal with the issues raised by the appellant. He further submitted that the court *a quo* cannot amend the Labour Court's judgment.

Counsel submitted that the judgment was sounding in money thereby satisfying the requirements for registration. He argued that the issue that the judgment was not sounding in money was never raised in the court *a quo* and could not therefore be raised for the first time before this Court. He further submitted that if the Labour Court's judgment was unlawful as alleged, the appellant ought to appeal against that decision.

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ISSUES FOR DETERMINATION

Two issues fall for determination, firstly whether the Labour Court judgment was registrable and secondly, whether the court *a quo* ought to have entertained the question of law raised by the appellant that the judgment was denominated in an illegal currency.

THE LAW AND ANALYSIS

The requirements to be satisfied in an application for the registration of an award were listed in *Biltrans (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Ors* 2016 (2) ZLR 306. MALABA DCJ (as he then was), citing with approval the remarks by CHIWESHE JP (as he then was) in *Olympio & Ors v Shomet Industrial Development* HH-191-12, remarked at 311 B–G as follows,

“In registering an arbitral award, the High Court and the Magistrates Court are not carrying out a mere clerical function. **While the registering Court may not go into the merits of the award, since its duty is to provide an enforcement mechanism and not to usurp the powers of the Labour Court, it must be satisfied before registering an award that all the necessary formalities have been complied with.** In *Olympio & Ors v Shomet Industrial Development* HH-191-12, CHIWESHE JP at 1 and 2 of the cyclostyled judgment, outlining the requirements for registering an arbitral award, stated:

‘The purpose of registration is merely to facilitate the enforcement of such an order through the mechanism availed to the High Court or the magistrate court, namely the office of the Deputy Sheriff or the messenger of court, respectively... In an application such as the present one, this Court is not required to look at the merits of the award - all that is required of this Court is that it must satisfy itself that the award was granted by a competent arbitrator, that the award sounds in money, that the award is still extant and has not been set aside on review or appeal and that the litigants are the parties, the subject of the arbitral award. There must also be furnished, a certificate given under the hand of arbitrator...’

The requirements that must be satisfied before the High Court or the Magistrates Court grants an application for registration of an award are:

- a) **The award must have been granted by a competent arbitrator.**
- b) **The award must sound in money.**
- c) **The award is still extant and has not been set aside on review or appeal.**
- d) **The litigants are the parties to the award.**
- e) **The award must be certified as an award of the arbitrator.”** (emphasis added).

As correctly noted by the court *a quo*, whilst both cases related to the registration of arbitral awards, they apply with equal force to the registration of Labour Court judgments.

In casu, the appellant did not dispute that requirements a), c), d), and e) were satisfied. It, however, argued that the judgment was not sounding in money as it was not denominated in legal tender. It further argued that the judgment was not, as a result, executable and hence could not be registered.

As correctly submitted by the respondent, the question whether the judgment was sounding in money was not raised in the court *a quo*. The court *a quo* cannot therefore be faulted for failing to determine an issue that was not raised before it. Had it done so, the court would have gone on a frolic of its own. (See *Nzara v Kashumba* SC 18/18)

In any event, the mere fact that the appellant is of the view that the judgment is denominated in illegal tender does not mean that the judgment is not sounding in money. In *Shaun Evans & Another v Yakub Surtee & 3 others* SC4/2012 two categories of judgments were identified. It was held that:

“Orders of court are, generally speaking, divided into two categories: orders to pay a sum of money, namely, orders *ad pecuniam solvendam*; and orders to do, or abstain from doing, a particular act, or to deliver a thing, namely, orders *ad factum praestandum*.”

The court, in that case, addressed the meaning of a judgment sounding in money which it described as *ad pecuniam solvendum*. A judgment sounding in money therefore simply means a judgment that requires the judgment debtor to pay an identified sum of money.

Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa 5th ed Volume 2 at p 1022 also state that *ad pecuniam solvendam* is when the court has ordered the judgment debtor to pay a sum of money. In terms of the Labour Court judgment the appellant is

required to pay to the respondent a sum of US \$ 177 408.00. The amount payable having been specified, the judgment is sounding in money.

The court *a quo* therefore correctly relied on *Vasco Olympio, supra*, and *Biltrans (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Ors, supra*, when it held that all the five requirements were met and the Labour Court judgment was registrable.

WHETHER OR NOT THE COURT A QUO OUGHT TO HAVE ENTERTAINED THE QUESTION OF LAW RAISED BY APPELLANT.

The appellant submitted that it filed an application in the Labour Court for leave to appeal against the Labour Court judgment on the basis that the judgment is denominated in a currency that was not legal tender at the time the judgment was rendered. The issue whether the Labour Court could render the judgment as it did is one that the court *a quo* shied away from determining and in our view correctly so. The court *a quo* stated that:

“The issue of the currency is one that is a question of law. It can only be entertained by the Supreme Court in terms of s92F of the Labour Court Act. It is telling that the respondent in its draft founding affidavit for an intended application for leave to appeal raised the same issue relating to S.I 33/19 as read with the Finance Act (No.2 of 2019). The same was raised in the draft notice of appeal. The respondent clearly realised that this Court cannot purport to review the order of the Labour Court or treat it as an appeal. It is ironic that the respondent persisted with this issue at the hearing when clearly it had no merit.”

The request by the appellants for the court *a quo* to determine the issue of the currency was in essence a request for the court to determine the lawfulness or correctness of the decision of the Labour Court. The court *a quo* did not have the power to determine the propriety

of the judgment of the Labour Court. To do so would amount to delving into the merits of the matter before the Labour Court. The court *a quo* could only do so in the exercise of its review or appeal powers.

The limitation of the court *a quo*'s powers was addressed in the remarks cited above from *Vasco Olympio, supra*, and *Biltrans (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Ors, supra*, where it was clearly pronounced that the court *a quo* would not have the power to delve into the merits of the case in an application for the registration of an award and in this case a Labour Court judgment. All that the court *a quo* was required to do was to determine whether the requirements for registration of the judgment had been met.

It appears the appellant was mindful of the limitation of the court *a quo*'s powers. It argued in this Court that the court *a quo* ought to have deferred determining the application pending determination of an application for leave to appeal against the Labour Court judgment filed before the Labour Court. It appears from the respondent's heads of argument that the application was filed on 23 October 2020 and was regarded as abandoned by the Registrar of the Labour Court on 1 December 2020. Having failed to file an application for the reinstatement of the application for leave to appeal within the time stipulated in the Labour Court Rules, 2017, the appellant filed an application for condonation for the late filing of the application for reinstatement on 27 May 2021. The appellant did not disclose to this Court the status of the application for condonation. The court *a quo* could not be expected to defer the determination of the application for registration of the judgment in circumstances where there was no such application for leave pending in the Labour Court. The court *a quo* did not misdirect itself in

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holding that even if there was an application for leave before the Labour Court, such application was not a barrier to the registration of the judgment. It is trite that even an appeal from the Labour Court does not suspend the judgment appealed against. The only circumstances where the High Court would be constrained to determine an application for registration is where an application for suspension of a judgment of the Labour Court is pending determination, In *Biltrans (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Ors, supra*, at 311 H- 312 A it was stated that:

“An application for registration of an arbitral award presupposes that there is no application made to or pending before the Labour Court for an interim order suspending the execution of the decision appealed against. A party cannot submit for registration an arbitral award he or she knows or ought to know is subject to an interim determination suspending its execution pending appeal. The High Court or Magistrates’ Court would be required to take into account the fact that there is at the time of entertaining the application for registration no application pending before the Labour Court for an interim determination suspending the execution of the decision appealed against.”

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An application for an interim determination suspending the execution of the decision of the Labour court is made in terms of s 92C (3). It is common cause that there is no appeal against the judgment of the Labour Court before this Court which would be the basis for the application for an interim determination suspending the execution of the decision of the Labour court.

The court *a quo* was correct in holding that an appeal on a question of law lies to the Supreme Court from any decision of the Labour Court. (See s 92 F of the Labour Court Act [Chapter 28:01]. In the absence of an appeal against the Labour Court judgment, this Court is constrained to determine the question relating to the correctness of the judgment of the Labour Court where the matter is not properly before it.

DISPOSITION

The appeal lacks merit and ought to be dismissed.

COSTS

The respondent prayed for costs on the legal practitioner and client scale. Counsel for the respondent submitted that the appeal was frivolous and vexatious, and intended at frustrating the respondent. The prayer was resisted by the appellant.

It has taken twenty-three years for the matter to be finalized. The decision of the court *a quo* is beyond reproach. The remarks by MATHONSI J (as he then was) in *Wangayi v Mudukuti* HB 155/ 017 are apt. In finding that costs on a higher scale were warranted, he remarked that:

“There must be finality to litigation and courts of law should not be abused in that manner by litigants with wounded pride and a lot of money to waste fighting personal battles in the courts. Nothing is being served here other than an itching ego seeking a massage in the wrong place.”

The appellant has hounded the respondent for the past twenty- three years. The appellant’s pride has been wounded by the numerous successes of the respondent who is now in his late 60s. It has therefore sought to frustrate the respondent from benefitting from the judgments in his favour. What is evident is that the judgment of the Labour Court was handed down on 25 September 2020. The appellant failed to prosecute its application for leave to appeal in the Labour Court. The application having been considered abandoned on 1 December 2020,

the appellant only sought the reinstatement of the application on 27 May 2021. As at the date of hearing of this appeal on 28 January 2022, the appellant failed to controvert the averments by the respondent on the history of the application for leave to appeal. It failed to confide in the court as to the status of the application for leave or the application for condonation for failure to apply timeously for reinstatement of the application for leave. The appellant seems to have failed to pursue the remedy available to it that would enable it to challenge the decision of the Labour Court. It appears that the appellant is dangling the respondent on a string so that he does not realise the benefit of the orders issued in his favour. Under the circumstances, the respondent is entitled to an order for costs on the legal practitioner and client scale.

It is accordingly ordered as follows:

The appeal be and is hereby dismissed with costs on the legal practitioner and client scale,
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GUVAVA JA: I agree

MWAYERA JA: I agree

Nyawo Ruzive Legal Practitioners, appellant's heads of argument

Gama and Partners, respondent's Legal Practitioners