

RURAL ELECTRIFICATION AGENCY

VERSUS

CHARLES MASHEZHA

AND

DEPUTY SHERIFF (BULAWAYO)

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 5 MARCH AND 28 MARCH 2013

Mr P Madzivire for the applicant
Miss N Z Ncube for the 1st respondent

Urgent Application

MAKONESE J: On the 5th March 2013, I heard and determined an Urgent Application by the Applicant in chambers and dismissed the application on the grounds that the matter was not urgent. I have been requested to provide my written reasons for judgment and these are my reasons.

On the 1st March 2013 the Applicant lodged an Urgent Chamber Application seeking an order in the following terms:-

"INTERIM RELIEF

The Applicant is granted the following relief:-

1. *Pending the return day the order granted by this Honourable Court dated 18th February 2013 be and s hereby suspended.*
2. *2nd Respondent is ordered to stay execution of Applicant's property in the interim pending the return date.*
3. *In the event that 2nd Respondent has removed Applicant's property, it is ordered that, 2nd Respondent restores Applicant possession of its property forthwith.*
4. *There be no order as to costs."*

The brief circumstances of this matter are that the first Respondent was employed as a stores Clerk by the Applicant on a fixed term contract for a period of six months. The contract was extended for twelve months and after this extension Applicant refused to extend the contract of employment. A dispute arose between the parties and the matter was referred to an Arbitrator who ruled in favour of the first Respondent. The Arbitrator made an Award on 25th October 2012 in terms of which the Applicant was ordered to pay the sum of \$32 209.34 being damages *in lieu* of reinstatement inclusive of back-pay and payment for leave days. Applicant, however, filed an appeal with the Labour Court within the stipulated 21 days under case number LC/MT/140/12. Applicant proceeded to file an application staying the registration of the award and an order was granted by the Labour Court on the 1st day of February 2012 in the following terms:-

"INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicant is granted the following relief:-

1. *The Arbitral Award granted by the Honourable I. Bonda dated 21st December 2012 being the supplementary Arbitration Award and the main Award of the 25th October 2012 be and are hereby suspended pending the finalisation of the Appeal filed by the Applicant on the 14th November 2012.*
2. *There will be no order as to costs."*

In spite of the above order which has not been set aside, the first Respondent filed an Application for registration of the Award with this court under case number HC 6/13. It is instructive to observe here that the Applicant confirmed that they were served with a copy of this Chamber Application for the registration of an Arbitral Award on the 3rd January 2013. The Applicants deliberately and consciously took a decision not to oppose the granting of an order for the registration of the Arbitral Award. The attitude of the Applicant on this aspect is covered in paragraph 5.3 of the Founding Affidavit of Silbah Chido Zimwara where he states:-

"5.3 I am also advised by my legal practitioners of record that opposing the registration of the Arbitration Award with this Honourable Court is procedurally impossible as the court does not deal with the merits of arbitration awards emanating from the Labour Court and its subsidiary legislation thus opposition does not stop the registration on the merits of the Award."

I find it difficult to appreciate the basis of the above submission. If the Applicant was aware that the first Respondent sought to register the Award notwithstanding the order granted by the Labour Court suspending execution pending appeal why then did they not oppose the registration of the Award and bring to the attention of the court this vital information.

What the facts clearly show is that from the 3rd of January 2013 onwards, the Applicant was aware that first Respondent was proceeding with the matter and seeking to enforce the award. As things turned out the order was registered by the Honourable KAMOCHA J, on the 12th February 2013. On these facts it is my view that the Applicant decided to take a position not to oppose registration of the award concisions of the consequences. The Applicant must have been aware that once the Award was registered with this court the first respondent would be free to execute the order. On the 1st February 2012 the first Respondent obtained a Writ of Execution against property. The Deputy Sheriff, cited herein as the second Respondent was instructed to remove Applicant's attached property, on the 26th February 2013. This is what jolted the Applicant into action. The Applicant filed the Urgent Chamber Application on the 1st of March 2013 for the purposes of staying execution. In seeking an order for stay of execution, the Applicant states in the Founding Affidavit in paragraph 6.7 as follows:

"6.7 Thus 1st Respondent's order registering the award under case No. HC 06/13 granted on the 14th of February 2013 had been superceded by the Labour Court order suspending registration of the award which order was granted on 1st February 2013..."

One wonders why the granting of the order by this Court on the 14th February 2013 could have been said to have been superceded by the order of the Labour Court of the 1st February 2013. In any event the Honourable Judge who granted the order on the 14th February 2013 would not have been aware of the order of the Labour Court unless Applicant who was in possession of such order had brought it to the attention of the court. The Applicant had the opportunity to bring the order to the attention of the court because he was given the opportunity to do so. He was served with a copy of the Application for registration of the Arbitral Award on the 3rd of January 2013 and decided to ignore it on the basis that this court did not deal with the merits of the matter. I have no doubt that this is but a lame excuse. The

Applicant knew the consequences of not opposing the registration of the Arbitral Award. Applicant was aware that once the Award was registered it would become an order of the court capable of enforcement. Applicant's failure to act led to the issuance of a Writ of Execution. They only had themselves to blame. In my view once I came to the conclusion that the Applicant's failure to act timeously was deliberate, then the issue of urgency did not arise. The urgency if at all was self created by the Applicants who had all the time to take appropriate action, and failed to do so.

I must make it clear that the matter before me does not require that I go into the merits and de-merits of the Appeal against the Arbitral Award. Further, I may not go into the merits of the matter before the Labour Court and the appeal in that matter. That is for that court to decide. What I am primarily concerned with is whether the Applicant managed to establish that this matter before me deserved to be heard as an urgent matter. I am satisfied that from January 2013 when the Applicant became aware that the first Respondent intended to register the Arbitral Award they should have taken positive steps to protect their interests. They failed to do so to their detriment. The Applicants were represented and they had the benefit of legal counsel which they did not utilize to their benefit. They deliberately chose to ignore the registration of the Arbitral Award. See *Kuvarega v Registrar-General and Another* 1998(1) ZLR 188 (H). In this matter CHATIKOBO J laid down the principle that Urgency which stems from a deliberate or careless abstension from action until the deadline draws near is not the type of urgency contemplated by the rules. *In casu* I am satisfied that the Applicant deliberately refrained from taking action well aware of the consequences that would ensue.

In the circumstances, I dismissed the application with costs.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Zimbabwe Energy Worker's Union, 1st respondent's legal practitioners