LOBELS BREAD (PVT) LTD
versus
JOHN NYAKAMHA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 21 March 2018 and 24 July 2019

Opposed Matter

T Zhuwarara, for the applicant
P. Musendo, for the respondent

NDEWERE J: The applicant is Lobels Bread (Pvt) Ltd. The respondent is John Nyakamha.

The background of the case is that the respondent got an arbitral award from Mr Chavura on 23 December, 2003. However the award did not give any quantum. On 29 April 2005, Mr Chavura's arbitral award was registered as an order of court with the High Court.

On 21 January, 2008, the award was quantified by Mr C.H. Lucas. Mr Lucas was selected by both parties to handle the quantification. He gave the total quantum of damages in lieu of reinstatement as $1 724 555.80 Zimbabwean dollars.

The respondent was not happy with the award. He appealed to the Labour Court. On 11 June, 2008, the Labour Court struck the appeal off the roll because the Labour Court was of the view that it had no jurisdiction to hear an appeal against an award by an Arbitrator appointed in terms of the Arbitration Act [*Chapter 7:15*]. The Labour Court said it had jurisdiction where the arbitrator was appointed in terms of the Labour Act, [*Chapter 28:01*]. It ruled that the High Court was the one with jurisdiction to hear appeals where the arbitrator had been appointed in terms of the Arbitration Act.

The respondent, accordingly, proceeded to the High Court with his matter. On 11 February, 2009, the High Court dismissed the application saying it was brought out of time and in terms of article 34 of the Arbitration Act, [*Chapter 7:15*], there was no provision for the extension of the three months period within which to set aside an arbitral award in terms of the Arbitration Act. The respondent applied to the Supreme Court for condonation and extension of time to file an appeal against the High Court decision. He applied in person. On

22 July, 2010 the Supreme Court dismissed the application for condonation and extension of time, stating that the intended appeal had no prospects of success.

On 12 July, 2011, the applicant once again acting in person, applied to the Labour Court. It is not clear what the application was about, but the Labour Court said the application was not properly before the court and dismissed it. The Labour Court order of 12 July 2011 read as follows:

> "It is ordered that:
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> 1. The application being improperly before this court, it be and is hereby dismissed.
> 2. Mr Chavura's award upon which this application is based, was by consent referred to and quantified by arbitrator Mr Lucas on the 21st of January, 2008 and that award still stands. The adage there must be finality to litigation is apt."

On 7 November, 2016, the respondent, in person, applied to the High Court. It is not clear what he wanted, but on 7 November 2016, the High Court dismissed his application.

On 16 June, 2017 the respondent applied to the Labour Court for quantification of damages. He was represented by a Trade Unionist. Once more the Labour Court said it had no jurisdiction and the application was struck off the roll.

On 28 September, 2017 the respondent, in person, applied for variation of judgment to the Labour Court. The application was dismissed on 11 October, 2017.

Because of the 28 September 2017 application by the respondent, the applicant, on 12 October, 2017 approached this court for a decree of perpetual silence against the applicant. The Founding affidavit was deposed to by one Tellme Madidi. He described himself as the applicant's Human Resources Business Partner. That definition is not explained further. No Board Resolution authorising the business partner to represent the applicant was filed with the applicant's papers. It was relevant to file this authorisation because later on in the papers, it appears the applicant wanted to settle the matter and the applicant's officials were entertaining him for settlement negotiations but the Human Resources Partner did not want to settle. So his authorisation became relevant. Was his refusal to negotiate on the instructions of the applicant? Was he authorised to represent the applicant? He is neither the Managing Director nor the Chief Executive Officer. He is not the chairman of the Board, or the Human Resources Director. The offices mentioned above are usually the offices which represent companies in litigation. The applicant itself is a duly registered company with capacity to sue and be sued. So who was this Business Partner? What was his relationship with the company? Was he clothed with authority

to represent the company? It was for the applicant to clarify the relationship and provide proof of authorisation ln its founding papers. It did not do so.

It is trite law that an application stands or falls on its Founding Affidavit. The Founding Affidavit should provide all relevant information and attachments to the court. The applicant's founding affidavit did not do so in relation to the Business Partner. Instead, it raised a lot of questions for the court which were left unanswered.

Although the respondents did not challenge the authority of the Business Partner, the court's view is that the business partner's authorisation was not proved and to that extent, there was no valid founding affidavit by the applicant.

The court still proceeded to consider the application on the merits since all the issue had been argued before the court.

It is common cause that the respondent instituted various legal proceedings on the same matter against the applicant, at arbitration, the Labour Court, High Court, and the Supreme Court. I have already alluded to the cases initiated by the respondent in the background to this case. In the first two, he was represented. In four of them, the respondent was a self-actor. Except at arbitration, respondent's claims were thrown out of the Labour Court, High Court and Supreme Court on technical procedural issues which were difficult for a lay person to appreciate. In the current case, he finally obtained legal assistance from the law firm which represented him at the hearing.

It is also common cause that the respondent, throughout the proceedings, had a valid arbitral award against the applicant. That award was registered as an order of the High Court in 2005. It was quantified on 21 January 2008. That quantification was also valid. Neither the award or its quantification was set aside by an appeal or review process.

The award is for a huge amount of money Z$1 724 555.80. It was granted in January, 2008. Exactly a year later, before the respondent was paid, Zimbabwe abandoned the Zimbabwe dollar as a medium of exchange and it adopted a multi-currency system. Some of the respondent's applications were caused by this change of currency. He wanted to get paid what was due to him and in his applications, he thought the award could be set aside or varied so that he gets paid in the currency which was obtaining then, the American dollar. He tried settlement negotiations, without success.

The applicant himself never tendered any payment for the whole year, before the currency changed or at any time thereafter. The applicant was not forthcoming on out of court settlement negotiations so none were finalised.

Clearly, an applicant who is going to court to get paid what was lawfully awarded to him cannot be said to be abusing the court process in circumstances where he had no legal representation. He could not be deemed to have understood the technicalities of jurisdiction and *res judicata* which the applicant used to raise. So his numerous applications were justified in the circumstances.

The court also noted that the applicant itself was not helpful in the circumstances. It appeared to have taken advantage of the situation of the currency confusion. In fact, just before filing this court application the applicant, through its Human Resources Partner, categorically stated that it did not want to settle. In the e-mail dated 26 October, 2017, the applicant's lawyers actually said that the applicant maintained the position that the respondent had no valid claim against them! How could the applicant say respondent had no valid claim against them when it knew that the respondent was holding on to an award of more than one million Zimbabwe dollars which was registered by the High Court. The Applicant never appealed against that award and it is still extant. So how could it say respondent had no valid claim?

Fortunately for the respondent, at the time of writing this judgment, the Zimbabwe dollar had just resurrected after ten years of abandonment! Statutory Instrument 142 of 2019 decreed that the Zimbabwe dollar was legal tender once more with effect from 24 June 2019. It is the multi-currency system that has now been abandoned. So the respondent is now at liberty to enforce his award and get paid his dues soonest!

So clearly, the applicant dismally failed to make a case for the decree of perpetual silence against the respondent. Its application must therefore fail.

It is therefore ordered that the application be and is hereby dismissed. The applicant shall pay the respondent's costs on the ordinary scale.

Mawere & Sibanda, applicant's legal practitioners