BEITBRIDGE BULAWAYO RAILWAY (PVT) LTD

Versus

ZIMBABWE AMALGAMATED RAILWAY WORKERS UNION

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 1, 6 & 15 SEPTEMBER 2011

Ms H. M. Moyo with S. Hwacha for applicant
F. Museta with V. Majoko for respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order for the stay of execution of writ of execution issued to a provisional order under case number HC 1534/09. The provisional order has not yet been confirmed. The terms of the provisional order under HC 1534/09, *supra,* are the following:

"Terms of the Final Order sought

It is ordered that:

1. Pending final resolution of the review application instituted by the applicant [respondent *in casu*] under case number HC 1524/09 the respondent [applicant *in casu*] be and is hereby interdicted and restrained from carrying into effect any of the provisions of the arbitral award by which respondent was granted leave to retrench employees.
2. Respondent to pay the costs of this application.

Interim Relief granted

1. Respondent be and is hereby interdicted and restrained from making any payment of terminal benefits consequent to the arbitral award of Mrs Gladys Mpemba handed down on the 23rd September 2009.
2. Without derogating from the generality of the preceding paragraph respondent is interdicted from effecting wages, stoppage and barring those identified for retrenchment from continuing to render service to the respondent pending final

determination of the review application instituted by the applicant under case number HC 1524/09."

The salient facts of this matter are the following. The respondent filed a court application under HC 1524/09. This is the main substantive case to all these and many other peripheral cases which now seem to clutter the real issues between the parties. Under HC 1524/09 the respondent seeks to set aside an award by arbitrator Mrs Gladys Mpemba*, supra*. The respondent's members were retrenched in October 2009 and they were all paid their retrenchment packages all duly approved by the Ministry of Labour. From 2009 to date, the respondent has not succeeded in setting aside arbitrator Mpemba's award. Instead of setting down the main case under HC 1524/09, the respondent has filed a litany of applications. The writ of execution in this matter arises from one such tangential application and not from the substantive determination that the respondent's members are owed any money or that they were unlawfully retrenched. Applicant contends that this alone is a compelling reason for staying execution. Case under HC 1524/09 was set down when respondent sought judgment off a technicality and not on the merits. Respondent obtained such order by default. Under case number HC 1962/10 the applicant sought and obtained an order rescinding the above order by consent. In this matter what is clear is that after filing the main case under HC 1524/09 *supra,* in October 2009, the respondent thereafter filed an *ex parte* chamber application under case number HC 1534/09 seeking a provisional order that the applicant be interdicted from "making any payment of terminal benefits consequent to the arbitral award pending final determination of HC 1524/09." The provisional order was granted *ex parte*. It is important to note that by the time the provisional order and the urgent chamber applicant in HC 1534/09 were served on the applicant the retrenchment packages or terminal benefits which the application was trying to stop had already been paid out to all the retrenched members of the respondent. The retrenchment pay-outs were made on 1 October 2009 whilst the *ex parte* application to stop payment of the same retrenchment package, HC 1534/09, was filed a whole week later on 7 October 2009 and served on 8 October 2009. In fact it is apparent that by the time the main application in HC 1524/09 was filed and served, the retrenchment packages had already been paid out to the individual employees. Proverbially speaking, the order under HC 1534/09 was issued well after the horse had bolted. There was a *brutum fulmen*. The respondent had a duty to disclose these facts honestly and fully when he made the said application.

Further, by receiving the retrenchment packages, the respondent's members seem to have compromised and waived any claims for salary pending review. For as long as the

respondent's members have retained their packaged they cannot at the same time claim or be paid arrear salaries.

In February 2011, instead of setting down the main case under HC 1524/09, or setting down the return date of the *ex parte* under HC 1534/09, the respondent filed a chamber application under HC 318/11 for the issue of writ in the sum of US$330 883,92 as arrear salary for the period since the provisional order which had been lying idle since 2009. This chamber application simply ignored the contents of the opposing affidavit in case number HC 1534/09 which show, and this has not been disputed, that the respondent's members were paid their retrenchment packages. The applicant opposed the latter chamber application on 1 March 2011. The chamber application was not set down. On 2 June 2011, and without formally withdrawing the earlier opposed chamber application under case number HC 381/11, and without communicating to the applicant, the respondent issued yet another application under case number HC 1478/11 for the same relief as was sought in the pending chamber application under case number HC 381/11. It is on the basis of the court application under case number HC 1478/11 that the writ has been issued to attach applicant's property. This court application pursuant to which the writ has been issued, case number HC 1478/11 was not served on the applicant's legal practitioners of record nor their Bulawayo correspondent Messrs Job Sibanda Legal practitioners who are appointed in all these earlier stated matters as the formal address for service for the applicant.

The service was effected directly on the applicant. What can be gleaned from the papers in case number HC 1478/11 is that the affidavits used to support the claim therein are exactly the same affidavits that were filed in the earlier case under case number HC 381/11 which is still pending and in respect of which there has not been withdrawn or payment or tender of costs. These affidavits were simply transported from HC 381/11 to HC 1478/11, the cause of action is the same.

The respondent raised a point *in limine* that the application is not urgent. The default judgment was entered on 3 June 2011. The respondent's legal practitioners informed, by letter, the applicant's legal practitioners on 29 July 2011. Thereafter there was dialogue between the parties. These deliberations yielded some limited success in that the applicant's property which had been attached by the Deputy Sheriff was released to the applicant pursuant to a letter addressed to the Deputy Sheriff by respondent's legal practitioners. This letter dated 5 September 2011 reads *inter alia,*

> "Agreement has been reached between the parties that the property you removed, following attachment, be released to the judgment debtor, pending final determination of the urgent application filed by the judgment debtor."

I have given this detailed history to evince the type of litigant that the respondent is. In brief, the respondent will not shy away from using any legal technicality that comes its way. The conduct of respondent's case is characterized by non-disclosure of material facts and unfair taking advantages of technicalities. The applicant is reasonable when it fears the respondent dangling the writ. The writ may be used without notice to the applicant to the irreparable detriment of the applicant's operations. This makes the matter urgent. In any event, the respondent has conceded that the writ be stayed until the return date in this application. I do not see why this should not be extended to the finalization of the main matter under HC 1524/09. The potential loss to the applicant in the event of its success is likely to be irreparable as the retrenched workers may not afford to pay back the total figure of $330 883,92. The writ of execution is based on an unconfirmed provisional order and for over two years the respondent has avoided setting it down for determination on the merits. With all this in mind I find that the application is urgent and a case has been made for the interim relief sought in the provisional order.

Accordingly, the provisional order is granted in terms of the amended draft order.

Dube, Manikai & Hwacha c/o Job Sibanda & Associates, applicant's legal practitioners
Messrs Majoko & Majoko, respondent's legal practitioners