

NATIONAL FOODS LIMITED  
versus  
GODFREY NGWARU  
and  
LINOS CHINGONGA  
and  
CLOUD ZUNGUNDE

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 8 March 2016 & 23 March 2016

### **Opposed application**

*A K Maguchu*, for the appellant  
*M Hungwe*, for the respondents

MUREMBA J: On 3 February 2011, the respondents obtained an arbitral award in the sum of US\$33 104.23 against the applicant. On 25 March 2011 they came and registered the arbitral award as an order of this court under case number HC1962/11 for purposes of enforcement. On the same date of 25 March 2011 the respondents had a writ of execution issued by the Registrar of this court.

On 28 April 2011 the same arbitrator who issued the arbitral award in default rescinded it upon application for rescission by the applicant and upon hearing the parties. In rescinding the arbitral award he said, among other things,

“The default judgement is hereby set aside to allow another arbitrator to look into the merits of the case. It is undesirable that labour disputes be resolved on the basis of technicalities. .... Conciliation and reference to arbitration to be done within 14 days from the date of this order.”

Meanwhile the respondents had instructed the Sheriff to attach the applicant's property in execution. Consequently the Deputy Sheriff had attached the applicant's property and served the applicant with a notice of removal of the attached property on 27 April 2011. The property was going to be removed on 3 May 2011. This prompted the applicant to make an urgent chamber application at this court for stay of execution under case No. HC 4410/11. In the interim relief the applicant wanted the respondents who included the Deputy Sheriff

stopped from removing the attached property pending the return date. In the final order the respondents wanted the order of the arbitrator of 25 April 2011 rescinding the arbitral award of 3 February 2011 registered as an order of this court. It also wanted the writ of execution issued by the Registrar on 25 March 2011 under case number HC 1962/11 to be set aside.

Unfortunately for the applicant, the application was dismissed by Mtshiya J on 17 May 2011 for lack of urgency. The applicant was ordered to proceed by way of an ordinary court application. On 19 May 2011 the applicant appealed to the Supreme Court against the judgment of Mtshiya J. Whilst the appeal was pending, the Supreme Court on 20 June 2011, granted an interdict interdicting the Deputy Sheriff from removing the attached applicant's property in pursuit of the writ of execution issued by the registrar of this court on 25 March 2011. However, for 3 ½ years the applicant did not prosecute its appeal in the Supreme Court and on 30 January 2016 the Supreme Court Registrar dismissed the appeal for want of prosecution. The Supreme Court Registrar wrote to the parties notifying them of the lapse of the appeal.

As a result of the dismissal of the applicant's appeal, the respondents on 19 February 2015, had another writ of execution issued by the Registrar of this court and instructed the Sheriff to attach and remove the property of the applicant. Again the applicant rushed here with an urgent chamber application for stay of execution arguing among other things that there was no arbitral award entitling the respondents to claim any money against it as the arbitral award of 3 February 2011 had been rescinded by the arbitrator. The applicant further averred that in terms of the Arbitration Act one can resist the enforcement of an arbitral award that has been set aside. However, this application was struck off the roll for lack of urgency by Makoni J. As usual the applicant appealed against the decision of Makoni J to the Supreme Court.

When the present application was made, the appeal was still pending at the Supreme Court. When the urgent application for stay of execution was struck off the roll for lack of urgency by Makoni J, the respondents proceeded with execution. In order to save its property which had been attached, the applicant paid cash to the respondents' counsel, Mr *Hungwe*, on 22 April 2015.

After all this had happened, the applicant made the present application seeking the following reliefs.

- a) the registration of the order of 28 April 2011 by the arbitrator rescinding the arbitral award of 3 February 2011.

- b) the setting aside of the High Court order in case number HC1962/11 registering the arbitral award of 3 February 2011.
- c) the restitution of the \$33 104.23 that it paid to the respondents; together with interest and costs on a higher scale.

In opposing the application the respondents raised a point in *limine* that the same matter is pending in the Supreme Court as an appeal against Makoni J's judgment. However, at the hearing when Mr *Maguchu* submitted that the appeal had lapsed in the Supreme Court, Mr *Hungwe* submitted that in that event the respondents were abandoning the point in *limine*. We then went straight into the merits of the case. In resolving the matter I will deal with the reliefs being sought one by one.

**(a) Registration of the arbitration award of 28 April 2011**

The applicant averred that on 28 April 2011 the arbitrator, Mr Chimhuka rescinded the arbitral award that he had granted to the respondents in default on 3 February 2011. It averred that, that order rescinding the arbitral award should have been registered with this court. The applicant stated that on that basis it seeks to register the order which rescinded the arbitration award in terms of s 98 (14) of the Labour Act [*Chapter 28:01*]

In opposing the granting of this relief, Mr *Hungwe* argued that the rescission of the arbitral award that the arbitrator made was incompetent. Mr *Hungwe* argued that an arbitrator has no powers to rescind an arbitral award which would have been registered as a judgment of this court. He said that as such the order which rescinded the arbitral award that the applicant seeks to register in this court is a nullity. Mr *Hungwe* made reference to the case of *Sibangalizwe Dhlodhlo v Deputy Sheriff for Marondera & Others* HH76/11 wherein Gowora J (as she then was) at page 8 said,

“In terms of s92B (4) of the Act, once a judgment or order has been registered with the High Court it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court. The same provision is found in s 98 (15) of the same Act. Effectively therefore, once this court issued an order registering the award in favour of the applicant, upon the registration the award became to all intents and purposes a judgment of the High Court. The contention by the applicant is that as a result of the registration the Labour Court ceases to have jurisdiction over the judgment and it cannot control, vary, set aside or rescind the judgment. I think this is a correct exposition of the law. The effect of the registration with this court is that only the High Court, barring an appeal to the Supreme Court, can interfere with the judgment or its execution. This is because, the High Court, being a court of superior jurisdiction has the inherent power to regulate its own proceedings.....”

Mr *Hungwe* went on to quote what Gowora J (as she then was) said at p 8 of the same case,

“Once the order is registered only the High Court can entertain an application for rescission or variation.”

Mr *Hungwe* further cited the case of *Joseph Tapera & 17 Others v Field Spark Investments (Pvt) Ltd* HH 102/13 wherein the respondent was opposing the registration of the arbitral award which had been granted in default on the grounds that it had since made an application to the arbitrator for the rescission of the default judgement. Mathonsi J at p 2 said,

“It is myopic for the respondent to think that an application for rescission of judgement submitted to the arbitrator who clearly is *functus officio* and cannot reverse his own decision can prevent the registration of an arbitral award which is extant. The respondent should have sought the suspension of the award.”

Mr *Hungwe* argued that if an application for rescission of judgment which was submitted to the arbitrator prior to registration could not stop this court from registering the arbitral award, there is no reason why this court should recognise and register an order which wrongly rescinded an arbitral award which had already been registered as a judgment of this court.

I would like to agree with the arguments made by Mr *Maguchu* that this court only deals with registration of arbitral awards solely for purposes of enforcement. In doing so, it does not worry itself about the validity or otherwise of the awards. All issues to do with the merits of the case are dealt with by the Labour Court. The pertinent question that this court should therefore answer is, can an arbitrator rescind an arbitral award that he would have granted? Does he have such powers? Section 98 (9) of the Labour Act states that,

“In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court”.

Section 92C of the same Act gives the Labour Court powers to rescind or vary any determination or order it made. The section reads,

**“92C Rescission or alteration by Labour Court of its own decisions**

(1) Subject to this section, the Labour Court may, on application, rescind or vary any determination or order—

(a) **which it made in the absence of the party against whom it was made;** or  
(b) which the Labour Court is satisfied is void or was obtained by fraud or a mistake common to the parties;

or

(c) in order to correct any patent error.” (My emphasis)

It follows therefore that if the Labour Court can vary or rescind its orders and judgments then the arbitrator can do the same since in hearing and determining disputes he has the same powers as the Labour Court. I am therefore not in agreement with what was said by the learned judge in the case of *Joseph Tapera* case *supra* that once an arbitrator grants a default judgment he becomes *funtcus officio* and cannot rescind his decision.

The next issue that I ought to determine is whether or not the Labour Court or the arbitrator can rescind its order or judgement after it has been registered as a judgement of this court. Mr *Hungwe*'s argument was that an arbitrator cannot rescind the arbitral award once it has been registered as a judgment of this court. He said that under such circumstances the applicant's recourse is to apply for review or appeal against the registered arbitral award. He further argued that in the present matter since the arbitrator rescinded an arbitral award which had already been registered as a judgment of this court the effect of his action was to rescind or set aside a High Court judgment which is legally wrong or incompetent.

Mr *Maguchu* submitted that at law an arbitrator cannot set aside an order of this court, but he can rescind an arbitral award he granted in default of the other party. He further submitted that the effect of it is that the rescission that the arbitrator grants entitles the beneficiary to come to this court and apply for the setting aside of the judgement of this court which registered the arbitral award on the basis of the rescission. I entirely agree with Mr *Maguchu*'s argument. My reason for so agreeing is that s 92C of the Labour Act which empowers the Labour Court to rescind or vary its judgements or orders does not state that rescission or variation of orders or decisions can only be done before the registration of the order as the order or judgment of this court.

In fact s 92B (5) of the Labour Act states that,

“If any order which has been registered in terms of subsection (4) has been rescinded or altered by the Labour Court in terms of section *ninety-two C*, the clerk or registrar of the court concerned shall make the appropriate adjustment in his register.”

Subsection 4 which is referred to in s 95B (5) above deals with registration of labour court orders in the Magistrate Court or High Court depending on the court with jurisdiction to register the order. Section 95B (5) therefore makes it clear that the Labour Court can rescind or vary its decisions or orders even after they have been registered as judgments of this court or the magistrates court.

It must be noted that Labour Court decisions and orders are also registered with the magistrates court or this court for purposes of enforcement in terms of s 92B (4) of the Labour Act. The decisions or the arbitral awards that are made or granted by arbitrators are

the ones that are registered with this court for purposes of enforcement in terms of s 98 (14) of the Labour Act. It follows therefore that since the arbitrator has the same powers as the Labour Court in terms of s 98 (9) as read with s 92C to rescind or vary his judgements or orders, then the power to rescind or vary can also be exercised even after the arbitral award has been registered as an order of this court. I do not believe that such rescission by the arbitrator amounts to rescinding the judgment of this court which would have registered the arbitral award as Mr *Hungwe* suggested. The rescission only tampers with the arbitral award, but it does not tamper with the judgment of this court registering the award. The judgment of this court remains extant. It is my considered view that when rescission of the arbitral award has been granted by the arbitrator and it is to the knowledge of the respondent(s), as was in the present matter, the respondent(s) should not proceed with execution of the judgment of this court. The judgment of this court registering the arbitral award should just die a natural death by not being acted upon or being executed. The other alternative would be to make an application to this court, as what the applicant did in the present matter, seeking the setting aside of the judgement which registered the arbitral award or the Labour Court order. This alternative can be resorted to in cases such as the present, wherein the respondent insists on execution despite knowing that the Labour Court order or the arbitral award was rescinded or varied.

I am strengthened in my conclusion that an arbitral award which has been registered as a judgment of this court can still be rescinded by the arbitrator or by the Labour Court by what Gowora J said in the *Dhodhlo* case *supra* at p 8. She said,

“The absurd situation is therefore created where this court has registered an order which becomes its own but if either party wishes it rescinded this court cannot consider the merits of the application as it has no jurisdiction to determine labour issues. In the event, the parties have to utilise the structures set up under the Act to regularise or deal with the dispute. Once that is finalised they approach the High Court to set aside its judgement which came by way of registration.”

In view of the foregoing I make a finding that the arbitrator was not wrong in rescinding the arbitral award that he granted in default. What he did was well within his powers in terms of s 98 (9) as read with s 92C of the Labour Act. However, after the legal practitioners had argued this point I queried with Mr *Maguchu* if this court is entitled to register an order that rescinded the arbitral award as an order or judgment of this court seeing that arbitral awards which are registered with this court should sound in money as the

purpose for registration is enforcement only<sup>1</sup>. Mr *Maguchu* made a concession that a rescission of judgement is not an arbitral award and as such it is not registrable. He then indicated that he was abandoning that relief.

**(b)Setting aside of the High Court Order in case number HC 1962/11 registering the arbitral award of 3 February 2011**

In seeking this relief the applicant's argument was that the arbitral award of 3 February 2011 was set aside or was rescinded by the same arbitrator who granted it. The applicant averred that as a result the High Court order registering that arbitral award no longer has a leg to stand on. In arguing this point the applicant's counsel made reference to the case of *Stumbles & Rowe v Mattinson; Mattinson v Stephens & Others* 1989 (1) ZLR 172 stating that where good and sufficient cause have been shown this court can set aside its own judgment or order.

In opposing this relief the respondents stated that the arbitral award which was granted in their favour on 3 February 2011 was registered as an order of this court on 25 March 2011 in default. They argued that the applicant ought to have made an application to set aside that judgment of 25 March 2011 within one month of that date. They argued that the applicant cannot be seeking to set it aside now after almost 4 years. Mr *Hungwe* argued that in terms of r 63 of the High Court Rules, 1971, an application to rescind a default judgment should be made within one month of the applicant having had knowledge of the judgment, for the judgment to be set aside.

It appears to me that Mr *Hungwe* missed the point which was being made by the applicant. The point that Mr *Hungwe* missed was that the applicant was not making an application for the setting aside of the registration of the arbitral award on the basis that it had been granted in default. The applicant's basis for making the application to set aside the judgment is that the arbitral award which gave rise to the registration was rescinded by the arbitrator and as such the registered judgment of 25 March 2011, no longer has a leg to stand on now. Rule 63 is not applicable in the present matter. The applicant never said that it was making this application in terms of r 63, but in terms of common law.

Since I have already made a finding in (a) above that the arbitrator is empowered in terms of s 98 (9) as read with s 92C of the Labour Act to rescind a default judgment he

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<sup>1</sup> *Thandiwe Mandiringa v National Social Security Authority* HH 98/05.

granted in default, it therefore follows that as we speak, there is no arbitral award in favour of the respondents. The one that was once granted was later rescinded. It goes without saying that the judgment of this court which registered the rescinded arbitral award no longer has a leg to stand on and as such it should be set aside. Even if I am wrong in my conclusion that the arbitrator has jurisdiction or power to rescind his judgment he granted in default, still there is no arbitral award in favour of the respondents which is in existence at the moment. The one that was granted in default in favour of the respondents on 3 February 2011 was rescinded. Even if it was wrongly rescinded, the fact is that it was rescinded. The rescission cannot be ignored or wished away. If the respondents were aggrieved by the wrong decision of the arbitrator to rescind, the correct course of action they should have taken was to appeal against it to the Labour Court. The fact that they did not make an appeal means that the rescission order of the arbitrator remains extant. So there is no arbitral award that the judgment of this court is standing on. You cannot put something on nothing and expect it to stay there, it will collapse<sup>2</sup>. The judgment of this court which registered the arbitral award which was later rescinded should therefore be set aside.

**(c) The restitution of the US\$33 104.23**

It is common cause that the respondents proceeded with execution after the arbitrator had rescinded the arbitral award. Although the judgment of this court registering the award remained extant because it had not been set aside, it is clear that it no longer had a leg to stand at the time execution was carried out. It is on this basis that the applicant argued that by being paid US\$33 104.23, the respondents were unjustly enriched for there is no arbitral award in their favour.

In opposing this relief, the respondents argued that payment of the money was necessitated by an arbitral award which remains extant for the arbitrator has no powers to rescind a registered award as he did. Mr *Hungwe* argued that there is therefore no basis or ground for the respondents to reimburse the applicant.

Unjust enrichment is a general equitable principle that, no person should be allowed to profit at another's expense without making restitution for the benefit that has been unfairly received and retained. In *Industrial Equity v Walker*<sup>3</sup> the requisites for liability for this action were spelt out as (a) the defendant must be enriched; (b) the plaintiff must have been

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<sup>2</sup> *Macfoy v United Africa Co Ltd* [1961] 3 All ER at 1172 I.

<sup>3</sup> 1996 (1) ZLR 269 (H)



impoverished by the enrichment of the defendant; (c) the enrichment must be unjustified; (d) the enrichment must not come within the scope of one of the classical enrichment actions; and (e) there must be no positive rule of law which refused an action to the impoverished person.

In *casu*, I have already made a finding that an arbitrator has jurisdiction to rescind or vary his decisions or orders granted in default and that as such rescission in the present matter was properly granted. With this finding it therefore follows that the respondents should reimburse the applicant the US\$33 104.23 that it paid to them as they were unjustly enriched. The enrichment is unjustified. Once the arbitral award was rescinded the respondents had no right to execute on the judgment of this court which had registered the arbitral award. Even if it is argued that the arbitrator has no powers to rescind his judgment which he granted in default, the point remains that in the present matter he did rescind. Consequently, there is no arbitral award which entitled the respondents to execute. So whichever way the matter is looked at, the respondents should reimburse the applicant its money. Unjust enrichment is an appropriate remedy because the respondents improperly benefited when they were not entitled to benefit.

### Costs

The applicant applied for costs on a higher scale and to be paid *de bonis propriis* by the respondent's legal counsel. The applicant argued that the respondent's legal counsel's conduct was deplorable in the following manner. He proceeded to issue a writ of execution based on a High Court judgment which he knew was founded on an arbitral award which had been rescinded. Not only did he do that once, but twice. He went on to have the Sheriff attach the applicant's property on two occasions. On the second occasion when the applicant offered to pay cash in order to save its property that had been attached, Mr *Hungwe* received the money. His conduct was clearly malicious and reckless. He ought to have advised his clients appropriately instead of hiding behind a technicality in proceeding with execution.

The respondents counter-claimed for costs on a higher scale and *de bonis propriis*. This was based on the argument that the applicants' application is vexatious and lacks *bona fides*.

It appears to me that Mr *Hungwe* genuinely believed that the arbitrator lacks jurisdiction to rescind his decision or order granted in default. He cited case authorities which supported his argument that once an arbitrator grants a decision he becomes *functus officio*

and cannot rescind that decision. Mr *Hungwe* therefore genuinely believed that the rescission that was granted by the arbitrator was a nullity. On that basis I will simply grant the application against the respondents with costs on the ordinary scale.

In the result, it is ordered that:

1. The High Court order in case number HC1962/11 registering the arbitral award of 23 February 2011 issued in favour of the respondents be and is hereby set aside.
2. The respondents, jointly and severally, the one paying the others to be absolved, be and are hereby ordered to pay back to the applicant the sum of US\$33 104.23, together with interest at the prescribed rate, within 7 days of this order.
3. The respondents, jointly and severally, be and are hereby ordered to pay costs of suit on the ordinary scale to the applicant.

*Dube, Manikai & Hwacha*, applicant's legal practitioners  
*Hungwe & Partners*, respondents' legal practitioners