HENRIQUE JORGE
versus
MUSEKIWA KAMBARAMI
and
MESSENGER OF COURT MUREHWA N.O.

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 10 March 2016 & 6 April 2016

Urgent Chamber Application

Ms *R Venge*, for the applicant
B Machengete, for the respondent

MTSHIYA J: In an urgent application, on 10 March 2016 and upon hearing both parties' legal practitioners, I granted the following Provisional Order:

"**TERMS OF FINAL ORDER SOUGHT**

That you show to this Honourable Court why a final order should not be made in the following terms:

1. The removal of the applicant's attached property judgment under Case No. CG34/15 be and is hereby stayed to allow second respondent to follow provision of bond of security.
2. The first and second respondent to bar costs of suit on a legal practitioner and client scale in the case of opposition.

INTERIM RELIEF GRANTED

That pending determination of this matter the applicant is granted the following relief:

1. This order acts as interim relief preventing the 1st and 2nd respondent from proceeding with removal in execution of the writ issued in Case Number CG34/15.
2. The second respondent be and is hereby ordered to restore applicant possession of the property which was attached and removed pursuant to the writ issued in Case Number CG34/15 in terms of bond of security pending procedures for sale in execution being complied with."

On 24 March, 2016 the Registrar advised that the respondent, for the purpose of appeal, wanted my reasons for granting the order. These are they:

On 26 February 2016, the applicant filed this urgent application seeking the relief that I granted.

The first respondent was at one time employed by the applicant as a security guard at the applicants' mine in Mutawatawa. A dispute arose over payment of wages resulting in the "registration" of an arbitral award in favour of the first respondent. The applicant was ordered to pay an amount of US$3604.00.

On 9 February 2016 the second respondent, on first respondent's instructions, attached the applicant's property, namely a tractor (New Holland 5640 Ford) and a trailer.

On 8 February 2016, prior to the attachment, the applicant had, through an *exparte* application, unsuccessfully applied for stay of execution in the magistrate's court. Apart from indicating his intention to appeal against the dismissal of his *exparte* application, the applicant also proceeded to challenge the award in the Labour Court (per LC/H/app 182/16). He wanted the award to be set aside and in doing so he lodged a bond of security with the Magistrate Court relating to the attached property.

The bond of security, the applicant, alleges, is still in force. There is, however, no clear evidence of the existence of the bond of security. There is no clear evidence that the bond was ever accepted.

The papers, however, as I shall show, reveal some irregularities in the process leading to the attachment of the applicant's property.

In examining the papers before me, I quickly observed that there were some fatal procedural irregularities that required immediate attention by the court. I observed that:

1) There was no evidence of an order of the Magistrate's Court registering the award; and
2) There was no explanation for the abandonment of the following certificate of settlement from a Labour Office, which certificate in terms of the operational part read as follows:-

"Concerning

Alleged non-payment of wages and leave days accrued, underpayment of wages
……..

(Issues in dispute)

Was resolved by agreement of the parties on the 4/03/2015 and further that the
(Date)

Terms of the agreement are as follows:-

The employer to pay a total of $760 over two months commencing the end of April 2015. The
……

first payment shall be $380. The last payment to be made on the 30th May 2015. This is a full
……

and final settlement of all the issues in dispute. The money to be paid through the Labour
……
Offices."
……

The first respondent submitted that there was no appeal in the High Court and therefore execution should be allowed to proceed.

The supporting papers to the founding affidavit, among other averments, state:

"6. The applicant and first respondent attended a conciliation hearing and entered into a certificate of settlement in terms of form LR1 of the Labour Act [*Chapter 28:01*]. It is trite that after parties have voluntarily entered into a settlement no other Labour proceedings must ensue ….

7. The procedure adopted by the first respondent in instructing the second respondent to attach in execution property of applicant is improper against an arbitral award. The accepted procedure is for the first respondent to have sought to register the arbitral award as an order of the Magistrate court and empowered by that order prepare a warrant of execution and instruct the second respondent. The first respondent has not registered the award with this court and as such it remains enforceable only within the ambit of the Labour Courts."

At the hearing, the first respondent chose to ignore the above averments and instead devoted attention to the fact that the intended appeal in the High Court against the Magistrate's refusal to grant a stay of execution was not yet in place. However, my view is that, given the existence of the certificate of settlement, endorsed by both parties on 4 March 2015, there was need to explain how the dispute later ended up before an arbitrator. The said award should have been registered in terms of the law. There was no evidence of the award having been registered with the magistrates court.

Furthermore, the award makes no reference to the certificate of settlement. Such reference would have helped to explain the circumstances under which the certificate of settlement was discarded in favour of the arbitration process.

Without clear answers to the above issues, I believe the whole process is not legally sustainable and hence the need for urgent intervention by way of the interim relief sought.

The above are my reasons for the provisional order that I granted on 10 March 2016.

Mambosasa Legal Practitioners, applicant's legal practitioners
Rubaya and Chatamba, 1st respondent's legal practitioners