MANDLA KHANYE KHUMALO
and
SHAME MUTUNGURA
and
LIVER MDLONGWA
versus
INGWEBU BREWERIES

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 1 JUNE 2017 AND 8 JUNE 2017

Opposed Application

1st and 2nd applicants in person
J J Moyo for the respondent

MATHONSI J: In terms of appearance the applicants are old, but for almost 13 years they have pursued the respondent, their former employer who unlawfully dismissed them in 2004. They have been relentless in their pursuit for justice and they say since then they have never been employed. Perhaps they are no longer employable and of course the current depressed economic situation may not have helped their cause. But then the sooner they sought and obtained alternative employment or other means of livelihood the better. They cannot expect to continue milking the same poor old cow. Everything has an end.

The three applicants have, by joint effort, made an application using all the wrong means and filed all the wrong papers seeking in essence an order awarding them interest on certain amounts of money awarded to them by an arbitrator in a labour dispute pitting them against their former employer in respect of unlawful dismissal. Except that the two arbitral awards, the first made by M Imbayago on 27 September 2010 and the second by S Willie both arbitrators did not award them interest on the amounts due to them. After having been paid the full amounts due, the applicants have not had enough. They have now come to this court asking the court to order that they be paid interest on what they have already been paid in terms of the arbitral awards.

In his founding affidavit, the first applicant stated that he was employed by the respondent in 1989. He was unfairly dismissed on 31 December 2004 leading to a labour dispute which was referred to an arbitrator Mason Imbayago. The latter issued an arbitral award in his and the other two applicants' favour on 27 September 2006, that they be reinstated without loss of benefits from the date of dismissal, that if reinstatement was no longer tenable the parties negotiate damages in lieu of reinstatement within 21 days and that if negotiations failed they return to him for quantification of those damages. When reinstatement was not made and the parties did not agree on damages in lieu thereof they indeed returned to Imbayago. On 27 September 2010 he issued another arbitral award again skirting around the issue. He ruled that the applicants should be paid their back pay without any loss of pay and benefits from February 2009 to 3 September 2010 and that they should also be paid 12 months salaries as damages in lieu of reinstatement. Imbayago did not quantify what was due to the applicants. More importantly he did not award interest on both the back-pay and the damages in lieu of reinstatement.

The applicants did not contest that award but were happy to pocket it as it was. Unable to make use of an award which did not sound in money, the applicants sought to return to the arbitrator for quantification but by then Imbayago had "hung his boots" as they say in the sporting world. Instead they appeared before another arbitrator S. Willie who, on 9 March 2015 quantified the award directing that the first applicant be paid $13 350-16, the second applicant $20 739-25 and the third applicant $8 186-45. Significantly Willie did not award interest on those sums and again the applicants did not contest the exclusion of interest by way of appeal or otherwise. They were happy to register the award for enforcement as it was. They did not even invoke Article 34 (2) of the Model Law in the Arbitration Act.

In HC 1290/15, the applicants made an application for registration of the award by this court. Although the order granted by KAMOCHA J on 25 June 2015 is couched as a provisional order, it is the order which registered the arbitral award. What has caught my attention in that court order is clause 5 which reads:

> "That the above amounts should be paid in full to each applicant, not later than the end of May 2015, taking into account the period the award was amended. Failure of which the amount shall accrue interest at the prescribed rate until final payment is done."

What is the meaning of that clause? The parties did not address me on that at all. The first applicant who claimed to speak on behalf of all the applicants submitted that the order of KAMOCHA J did not award interest but only "hinted" on interest. He busied himself with making submissions on the unfairness of paying what was due to them in instalments submitting that this court should, for that reason, award interest in retrospect on the sums already paid to them.

I have said that the order of KAMOCHA J is couched as a provisional order. I say this because its preamble reads:

> "IT IS ORDERED THAT:
> Respondent show cause why the following order should not be made:-
> ---."

Worded as a show cause order, it does not however have a return date. It also does not indicate when and how the respondent should show cause. Whatever the case, it is that registration order which the applicants sought to enforce. They were then paid the sums due to them in instalments. After being paid they made this application seeking an order that they be paid interest at the rate of 5% per annum on the sums awarded to them by the arbitrator "from 27 September 2010 to the end of 2015, the date of final payment."

If the order of KAMOCHA J is a final order, and I find it unnecessary to make such a pronouncement given that it was not placed in issue and the parties did not address me on it, then interest was provided for at the registration of the arbitral award. The portion of the order that I have referred to above can only mean that if the respondent did not pay the sums due to the applicants by "the end of May 2015" then interest was to accrue on any outstanding amount at the prescribed rate from 31 May 2015 up to date of final payment.

It is trite that the rules of interpretation applicable to statutes apply to the interpretation of agreements and indeed any other legal literature like a court order in our case. The basic rule of interpretation is that words must be given their grammatical and ordinary meaning unless that would lead to an absurdity, or some repugnance or inconsistency with the rest of the document. In that case the grammatical or ordinary sense of the words may be modified so as to avoid the absurdity or inconsistency but no further. See *Chegutu Municipality* v *Manyora* 1996 (1) ZLR

262 (S) 264 D –E; *Madoda* v *Tanganda Tea Company Ltd* 1999 (1) ZLR 374 (S); *S* v *Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253(S).

In this case an order of this court states that in the event that the respondent did not pay the applicants by end of May 2015 the amounts outstanding would accrue interest at the prescribed rate. The prescribed rate of interest currently stands at 5% per annum. Therefore interest has been provided by court order. What the applicants are asking for has been provided already but they want interest to be awarded from 27 September 2010 when this court has already ruled on that aspect. It is not within the jurisdiction of this court to tinker with a judgment of another judge enjoying the same jurisdiction. I do not have jurisdiction to examine or review the order made in HC 1290/15 as it was made by a fellow judge of this court enjoying the same jurisdiction as myself. See *Ncube* v *Nyathi and Others* HB 224-16.

To that extent, if the applicants would like interest, perhaps they should consider enforcing that order if at all it is enforceable given what I have already said about it. The issue of interest may, in that regard be said to be *res judicata*. The requisites of *res judicata* were succinctly set out in *Flowerdale Investments (Pvt) Ltd and Another* v *Bernard Construction (Pvt) Ltd and Others* 2009 (1) ZLR 110(S) 116E;

"The essential elements are—

(a) the two actions must be between the same parties;
(b) the two actions must concern the same subject matter.; and
(c) the two actions must be founded upon the same cause of action."

It occurs to me that those requirements are met in this case in relation to the order of KAMOCHA J.

Lest I be accused of deciding an issue that is not before me, I have already qualified my comments in respect of that order by saying that I have no jurisdiction over it. The question of whether upon registration of an arbitral award this court can add interest on the award which has no provision for it, cannot be determined by this court for want of jurisdiction. However, it is the parties who placed that order before me and I am entitled to make the point that it rules on the same issue that the applicants pray for. It is for that reason that I have related with the principle of *res judicata*.

Although the founding affidavit of the applicants made no reference to a declaratory order, in their answering affidavit they suddenly make reference to such an order. They attempted to argue that this court should issue a declaratory order that they are entitled to interest. Unfortunately that cannot be. It is trite that an application stands and indeed falls on the founding affidavit. See *Mobil Oil Zimbabwe* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70. The applicants cannot import the aspect of a declaratory order in the answering affidavit when it was not the basis of the application as contained in the founding affidavit.

In any event, I agree with Mr *Moyo* for the respondent that the application does not make out a case for a declaratory order. The grant of a declaratory order is provided for in s14 of the High Court Act [Chapter 7:06] in terms of which this court may, at the instance of any interested party, inquire into and determine any existing, future or contingent right or obligation. In interpreting that provision GUBBAY CJ stated in *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 ZLR 337 (S) 343 G- 344 A-E:

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch and Diamond Co (Pvt) Ltd and Others* v *Disa Hotels and Another* 1972 (4) SA 409 (C) 415 *infine; Milani and Another* v *South African Medical and Dental Council and Another* 1990 (1) SA 899 (T) at 902 G-H. The interest must relate to an existing, future or contigent right. The court must not decide abstract, academic or hypothetical questions unrelated to such an interest. ---. This, then, is the first stage in the determination by the court. At the second stage of the inquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s14."

In my view the applicants do not have a right to interest because their rights against the respondent were determined by an arbitrator who excluded interest on what was due to them. They did not contest that decision which determined what was due to them. Even if one were to say that the order of KAMOCHA J bestowed the right to interest upon them, that would be cold comfort to the applicants. All it means is that their rights in that regard have already been determined. They cannot be a subject of further inquiry. This is therefore not a case for the exercise of the court's discretion under s14.

What all this means is that the applicants must suffer grief. I have said that perhaps it is time that they now seriously consider redirecting their energies on other income generating

endeavours which are not expecting to ike out a living out of a company that parted ways with them more than 13 years ago. That may indeed be worth their while.

In the result, the application is hereby dismissed with costs.

Calderwood, Bryce, Hendrie and Partners, respondent's legal practitioners