ZIMBABWE RED CROSS SOCIETY

versus

EMMA KUNDISHORA

and

SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE

NDEWERE J

HARARE, 11 November 2014 & 14 January 2015

**Urgent Chamber Application**

Adv. *T. Mpofu*, for the applicant

Adv. *T. Zhuwarara*, for the first respondent

NDEWERE J: On 8 September, 2014, the first respondent obtained an arbitral award in its favour. Four days later on 12 September, 2014 the first respondent applied for the registration of the award. The applicant was served with the application for registration of the award as a High Court Order but for a total of 17 days, the applicant did nothing about that application for registration. It only acted on the 17th day, on 29 September, 2014 by filing an opposition which was already out of time.

In the meantime, 18 days after the award was handed down, on 26 September, 2014 the applicant had filed a Notice of Appeal and an application for interim relief of stay of execution in the Labour Court.

On 2 October, 2014, the first respondent’s legal practitioners alerted the applicant about its opposition filed out of time and told them about the automatic bar and that their opposition was not properly before the court. The first respondent’s lawyers actually invited the applicant to “engage” their client with a view to resolving the issue. The applicant did not respond to this overture in anyway.

Consequently, a default order registering the award was granted. The applicant has sought to argue that this default order was granted in error because the opposing papers ought to have been formally struck out of the record. However, no evidence was adduced to show that this opposing document which was filed out of time was before the judge when she granted a default judgment. I therefore do not have any legal basis to conclude that the default judgment registering the award was granted in error.

The default order registering the award was granted on 2 October, 2014 and applicant’s moveables were attached on 7 October, 2014. On 8 October, 2014, the applicant applied for stay of execution of the registered arbitral award.

The applicant has argued that the need to act arose on 7 October, 2014, when the applicant saw the attachment papers and it has asked the court to exercise its discretion in its favour and stay execution of the registered arbitral award.

In my view, the need to act arose on 2 October, 2014 when the applicant was alerted about its opposition filed out of time, and that the papers were therefore not properly before the court. This is because after such a warning, the applicant must have forseen that a default judgment could be granted at any time. However, the applicant neither “engaged” the first respondent as invited or approached the court on an urgent basis. It did nothing for five days and only acted on 8 October, 2014, after its motor vehicles had been attached.

The applicant’s inaction was unfortunate. A diligent party should have foreseen that once there was an automatic bar, then default judgment in the form of registration of the award would follow and once the award got registered, the first respondent would execute it. So the applicant should have approached the court on 2 or 3 October, 2014 when it was advised of the automatic bar and not wait to be prodded by the attachment of the motor vehicles five days later.

The case of *Chief Gampu Sithole and Gampu Tours (Pvt) Ltd* v *K.C. Ndlovu & the Deputy Sheriff of Bulawayo N.O* HB 63/13 referred to by the respondent’s counsel is relevant to this case. In that case, the first respondent had obtained a default judgment granting him leave to execute pending appeal.

Pursuant to the leave to execute pending appeal, the first respondent instructed the Deputy Sheriff to attach the applicant’s motor vehicle. After the attachment, the applicant filed an urgent chamber application for stay of execution pending finalisation of its rescission application and its appeal to the Supreme Court. The application was opposed. On p 4 of the cyclostyled judgment, the court said:-

“A diligent *parter familias* would, under the circumstances, have known that once leave to execute pending appeal has been granted, execution of that judgment was imminent at any time and would have immediately filed the urgent chamber application for stay of execution instead of wallowing in wonderland, only to be prodded into action by attachment of property….Neither the certificate of urgency nor the founding affidavit can be said to contain any explanation, let alone a reasonable one…” .

Likewise, in the present case, a diligent party would have sprung into action the moment it realised it was barred and not wait to be prodded into action by an attachment. On p 5 of the cyclostyled judgment in Chief Gampu Sithole (*supra*), the court said:-

“The chronology of the case leading to the day of reckoning, including when the need to act arose as well as justification for the delay if there is any must be clearly explained so as to persuade the court to properly exercise its discretion in extending the desired protection/preferential treatment”.

I associate myself with the views expressed above that the chronology of the case is relevant. In the present application, the applicant was never diligent in the handling of its case. It did nothing for 15 days after the arbitral award was granted against it and it did nothing for 17 days after the application to register that award in the High Court was made. It also did nothing when the first respondent advised it that it had filed its purported opposition late and was thus automatically barred. No reasonable explanation has been given for the delay. The only explanation is that the deponent to applicant’s affidavit was “out of town”, yet the applicant is an organisation with other officers who could have acted on its behalf in the absence of the deponent. Even the applicant’s Heads of Argument were filed late, without any explanation.

As correctly pointed out in *Ndebele* v *Ncube* 1992(1) ZLR 288 at 290, the law will help the diligent and not the sluggard. Because of the lack of diligence on the applicant’s part, the court is not persuaded to exercise its discretion in its favour.

In *Kuvarega* v *Registrar General* 1998(1) ZLR 188 at 193, the court said:

“Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay”.

As stated above, in the present case no reasonable explanation has been given for the failure to act timeously throughout this case.

I am therefore of the view that the application is not urgent. It arises from self-created urgency caused by a failure to act timeously throughout the chronology of the case. The application does not therefore warrant any preferential treatment against other applications.

Having ruled that the application is not urgent, I will not proceed to deal with the other issues raised in the application on the merits.

The applicant shall pay the first respondent its costs.

*Coghlan, Welsh & Guest*, applicant’s legal practitioners

*Chambati, Mataka & Makonese*, respondent’s legal practitioners