MUSASA PROJECT
versus
EDNAH BHALA
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 February and 2 March 2016

Urgent Chamber Application

T Magwaliba, for the applicant
B.M Bhala, for the respondents

MANGOTA J: The applicant is a not for profit common law universitas. Its activities centre on the protection and promotion of women's rights in the country. The first respondent is its former employee.

The parties were embroiled in a labour dispute which Mrs. C.T Kadenga, an arbitrator, was pleased to hear and determine. She, on the directions of the Labour Court to which the case was referred by one of the parties, awarded the first respondent the sum of $19 170-60.

On 11 June, 2015 the applicant appealed to the Labour Court against the arbitral award of $19 170-60 which Mrs. Kadenga had quantified on 15 May, 2015. The appeal was filed under case number LC/H/524/15. The first respondent filed her notice of opposition to the appeal on 2 July, 2015. The applicant filed its Heads of Argument on 22 July, 2015. The appeal is pending in the Labour Court.

In an effort to avoid execution of the arbitral award the applicant applied to the Labour Court for stay of execution. It, in short, applied for an order staying the operation of the arbitral award pending finalisation of its appeal. Its second application was filed under case number LC/H/APP 971/15. The application was served on the first respondent on 12 August, 2015. The

latter filed her opposing papers to the same on 1 September, 2015. The application is pending before the Labour Court.

On 14 January 2016, the applicant filed its third application with the Labour Court. It applied for condonation for late filing of its Heads of Argument. These related to the second application. The first respondent opposed that application which is also pending before the Labour Court.

On 11 November, 2015 the first respondent applied for the registration of the arbitral award. It was registered under case number HC 8173/15.

Following the registration of the award, the second respondent, acting on the instructions of the first respondent, proceeded to the applicant's offices where he attached all the property which is mentioned in Annexures 1.1 and 1.2. The annexures are respectively the notice of seizure and attachment.

The conduct of the respondents as described in the foregoing paragraphs triggered the present urgent chamber application. The applicant stated that the attachment of its office equipment would paralise its operations in an irreparable manner. It said it had no budget for capital expenditure. It stated that it would, because of that, not be able to replace the equipment which was attached if such is sold away into execution. It moved the court to interdict the respondents from removing its property and/or selling such in terms of the judgment which falls under case number HC 8173/15.

The first respondent opposed the application. The second respondent who was cited in his official capacity did not. The court assumes that he will abide by this judgment either way it is decided.

The first respondent submitted that the application was not urgent. She said the applicant was aware of the order against it from as far back as 26 November, 2015. She stated that the applicant should have acted as at that date and not now. The urgency, she said, was self-created. She stated that the application was *lis pendens*. She submitted further that, as the applicant had not obtained stay of execution from the Labour Court, nothing stopped execution of the applicant's property.

Two principles guide the court in determining of applications of the present nature. These are:

(a) whether or not the application is urgent – and, if it is

(b) whether or not the applicant treated the application with the urgency which it deserves.

The applicant's goods were attached on 18 February, 2016. It filed the present application on the following day. There is no doubt that the applicant treated its case with a great degree of urgency.

Accompanying the application was the affidavit of one Mercy Gwaunza of Gwaunza and Mapota legal practitioners. Her firm rendered legal services to the applicant in the case of the first respondent and the applicant. The services, she said, related to the first respondent's claims against the applicant following the latter's termination of the first respondent's employment with it on 31 October, 2009. Ms. Gwaunza explained the applicant's inaction from the time that it should have acted in the following words:

> "5. … the 1st Respondent's legal practitioners Mundia and Mudhara Legal Practitioners caused to be filed the court application in case number HC 8173/15.
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> 6. I spoke to the Respondent's legal practitioner prior to her filing the application for registration and she indicated that in her opinion there were too many proceedings going on at the same time, and as such she would not oppose our application for stay if we did not oppose the one for registration… The telephone discussion between myself and Ms Sai regrettably was not confirmed by a letter in writing. I took it that a word of a legal practitioner would be dependable. Her only concern was that we should push for the appeal to be heard as soon as possible.
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> 7. I was therefore completely taken aback on 26 November 2015 when I received an email from the first respondent's legal practitioners enclosing with it a copy of the judgment issued by the Honourable court. The legal practitioners had not advised me of their intention to proceed and set down the matter."

The first respondent agreed that the parties talked to each other prior to the registration of the arbitral award. She said the negotiations were conducted on a without prejudice basis. She said the object of the negotiations were to curtail proceedings. She submitted that the negotiations were not conclusive and they did not yield any outcome.

It is clear from the foregoing that the applicant laboured under a genuine but mistaken belief that:

(a) the negotiations which the parties conducted ended in an agreement between them that execution would not take place;

(b) the negotiations were conducted openly and clearly and not on a without prejudice basis as the first respondent would have the court believe - and

(c) following the understanding which the parties had had reached, the applicant did not see any need to oppose the application for registration of the arbitral award.

The first respondent, in the court's view, was being economic with the truth. She took advantage of the position which the parties had reached and did, as it were, snatch at the judgment. She registered the arbitral award when she knew that three matters were pending before the labour court. She had, in fact, filed opposing papers to two, of the three, cases which were, and are still, pending before that court. Her conduct in the mentioned regard was dishonest of the highest degree. It deserves censure as it cannot be condoned at all.

Litigation is a process. It has rules which govern its operations, the parties' rights as well as obligations towards each other and, above all, the court. The rules of court do not allow parties to ambush each other as the first respondent in *casu* appears to have done. The rules operate from a clear and transparent perspective so that the dignity and decorum of the court and its process are, at all times, maintained in the interests of fairness and justice.

The proposition that the applicant which appealed to the labour court against the arbitral award and applied to the same court for stay of execution decided not to oppose the first respondent's application for registration of the award does not resonate with reality. The position of the first respondent is, on the mentioned basis, not the truth of this entire case.

The court is satisfied that the applicant proved its case on a balance of probabilities. Its application, therefore, succeeds and the interim order is granted as prayed.

*Gwaunza & Mapota*applicant's legal practitioners
Mundia & Mudhara, first respondent's legal practitioners