

SAMSON MARTIN MEKI
versus
AIR ZIMBABWE (PRIVATE) LIMITED
and
AIR ZIMBABWE HOLDINGS (PRIVATE) LIMITED
and
COMMERCIAL BANK OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 12 July 2017 & 24 January 2018

Opposed Application

P Kawonde, for the applicant
Mrs G Dzitiro, for the 1st and 2nd respondents
No appearance for the 3rd respondent

HUNGWE J: The applicant seeks the grant of an order in the following terms:

- “1. That on service of this order upon the second respondent, the said second respondent cause to be paid out of its account with the third respondent such a sum as will satisfy the judgment issued out of this Honourable Court in cases number HC 6220/13 and HC 10786/14.
2. That should the second respondent fail to pay the applicant as required in terms of paragraph 1, then the third respondent is restrained from paying to the second respondent any proceeds in an account No. 06109-01120051570077, Kwame Nkrumah Branch in Harare. Instead, the third respondent is directed to pay to the applicant such sums as will satisfy the court judgment due to the applicant.
3. That the first and second respondents shall pay the costs of this application.”

The applicant obtained an arbitral award in his favour against first respondent. It was subsequently, registered as an order of this court under HC 6220/13 on 21 October 2013. Upon

service of the court order, the first respondent neglected or failed to pay the amount stated in the order. Applicant then obtained a writ of execution against the first respondent. The Sheriff of this court attempting to attach monies held in a bank account with the third respondent. It turned out that the account did not belong to first respondent but to the second respondent. Applicant then made application to this court seeking to join second respondent as a judgment debtor in the writ of execution proceedings under HC 10786/14. In the absence of opposition, applicant obtained an order against the second respondent in default. As all the processes unfolded, applicant remained on the payroll of the first respondent. This was in spite of the fact that the subject matter of the writ was his retrenchment package. In 2016 his employment with second respondent was terminated in terms of a law that did not entitle him to a lucrative severance package. That law entitled him to a leaner exit package than that offered under the retrenchment scheme. His salary was ceased. He then mounted these proceedings in order to execute the order of court entitling him to receive a retrenchment package aforesaid.

The first and second respondents oppose the grant of the order sought on various grounds which I will advert to in due course.

In his founding affidavit, the applicant's averments revolved around how he had acquired proprietary rights, title and interest in the arbitral award made in his favour by an independent arbitrator. He narrates how the respondents had constantly evaded payment by resort to one excuse or the other. He avers that by reason of his entrenched constitutional right, he was entitled to the enjoyment of his right to property, which right the respondents have breached by failing to pay. There is no doubt that terminal benefits of an employee are an accrued benefit. As such, the applicant would naturally have a right to, either by virtue of the arbitral award or by virtue of his right to terminal benefits in terms of his contract of employment. In short, the applicant has a contingent right that has accrued to him.

However, as matters stand, it would appear that the true nature and extent of those rights are under dispute as between himself and the respondents. I mention this as fact because the first respondent has challenged the judgment that led to the issuance of the writ of execution i.e. HC 6220/13. First respondent has filed an application for rescission of the judgement. Second respondent has also filed an application for rescission of the order of this court joining it as a judgment debtor in a matter to which it was not party to i.e. Case No. HC 10786/14.

In order to deal exhaustively with the basis of the application, I proceed to consider the issues raised in the sequence in which they appear in the applicant's heads of argument.

1. Whether the respondents are in contempt of court and therefore should not be heard

Applicant contends that because the two respondents have not complied with the order of this court compelling them to pay the amount awarded to him by the arbitrator, the respondents should be held to be in contempt of court and therefore cannot be heard unless they first purge their contempt. The respondents deny that they are in contempt of court. First and second respondents contend that they have approached this court for rescission of the two judgments under HC 2005/17 and HC 2050/17. Both respondents have raised several defences to the claim by the applicant.

First respondent's contention is that there was a novation of the 2010 agreement to retrench which was accepted by the applicant when he agreed to continue in employment after the Notice to Retrench had been given. He had continued drawing a salary on a monthly basis until his employment was terminated on notice in 2015. His terminal benefit in terms of that notice to terminate employment was only a sum of about US\$9 131.08 as opposed to the US\$88 878.67 awarded by the arbitrator which was beyond its capacity to pay at once. In any event, the first respondent maintained, its assets were protected by section 24 of the Finance Act No. 8 of 2015 which categorized it as a State entity. Finally, the first respondent took the point, in that application for rescission, that applicant had failed to give the required notice before proceeding against it in terms of the State Liabilities Act [*Chapter 8:14*].

Second respondent in HC 2050/17 seeks rescission of the order under HC 10786/14 on the basis that it was not a party to the proceedings in HC 6220/13 in which the applicant obtained registration of the arbitral award against first respondent. For it to be joined at execution stage was highly irregular. In any event, so the argument went, the Supreme Court had, in *Air Zimbabwe (Pvt) Ltd and Air Zimbabwe Holdings (Pvt) Ltd v Nhuta* 2014 (2) ZLR 333 long held that second respondent was not a successor company to Air Zimbabwe Corporation, the basis upon which the order in HC 10786/14 was granted. Consequently, second respondent could not be liable for the debt accruing to the applicant. The respondent urged this court to hold that since they have approached this court seeking the indulgence of rescission, they cannot be held in contempt of court. Respondents argue that there is a real

likelihood that the applications for rescission will meet with success in that all that they are required to show is good and sufficient cause. *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corporation* 1997 (2) ZLR 47. To my mind, the arguments raised in the rescission applications are arguable.

In light of the above, I am satisfied that the respondents are not in contempt and therefore dismiss this point *in limine*.

2. Does the mis-citation of an Act of Parliament render it invalid?

The second point *in limine* raised in the application was that the Finance Act No. 8 of 2015 erroneously cited the State Liabilities Act as [Chapter 22:13] instead of [Chapter 8:14]. As such, the Finance Act is invalid. Before the repeal of the Statute Law Compilation and Revision Act, [Chapter 1:03] this would have been well taken. The answer to that is that the section of the Statute Law Compilation and Revision Act [Chapter 1:03] relied upon by the applicant was long repealed and therefore no longer applicable. As matters stand, a mis-citation or an erroneous citation of an Act of Parliament does not render it invalid. The point *in limine* is therefore dismissed.

3. Is the State Liabilities Act [Chapter 8:14] unconstitutional?

The third point *in limine* was that section 5 (2) of the State Liabilities Act [Chapter 8:14] is unconstitutional as it deprives applicant of the right to property. The argument requires me to make a finding of constitutional invalidity of an Act of Parliament and immediately act on it. This is clearly not the position at law. Whilst this court is vested with the power make such a finding, that is not the end of the matter. It is only after the Constitutional Court has confirmed such a finding that an Act of Parliament can only then be regarded as unconstitutional. In any event, the procedure adopted by the applicant prevents me from making such a determination as the point was raised in *in limine*. No full argument was presented on the issue and therefore this court is unable to decide it on the merits. There has been no prior declaration of constitutional invalidity by the superior court of the Act.

Consequently, the applicant's points *in limine* fail.

There are other grounds to dismiss this application on the merits.

Applicant brought the application for a garnishee order under Order 32 rule 226(1) (a) of the High Court Rules, 1971. (see page 1 of the papers). That rule provides:

Order 32 r 226 (1) (a) of the High Court Rules, 1971

226. Nature of applications

(1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—

(a) as a court application, that is to say, in writing to the court on notice to all interested parties ; or

(b) as a chamber application, that is to say, in writing to a judge.

(2) An application shall not be made as a chamber application unless—

(a) the matter is urgent and cannot wait to be resolved through a court application; or

(b) these rules or any other enactment so provide; or

(c) the relief sought is procedural or for a provisional order where no interim relief is sought only; or

[Paragraph amended by s.i. 101 of 1994]

(d) the relief sought is for a default judgment or a final order where—

(i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought, and is in default; or

(ii) there is no other interested party to the application; or

(iii) every interested party is a party to the application; or

(e) there are special circumstances which are set out in the application justifying the application.

Clearly, this is not the rule under which to bring an application of this nature. The appropriate rule is to be found under Order 42 titled **Attachment Of Debts**.

Order 42 Rule 377 provides:

ORDER 42

ATTACHMENT OF DEBTS

377. Court Application for attachment of debt due to judgment debtor

A judgment creditor who has obtained a judgment or order for the recovery or payment of money, which judgment or order is unsatisfied, may make a court application for an order that **any money at present due or becoming due in the future to the judgment debtor** by a third party within the jurisdiction (hereinafter called “the garnishee”) shall be attached. (my emphasis).

[Rule amended by s.i. 43 of 1992]

377A. Preliminary notice of application where State is garnishee

(1) No sooner than fourteen days before applying for a garnishee order against the State for the attachment of salary or wages owed by the State to a judgement debtor, the applicant shall cause written notice of the application, together with the supporting documents that will be filed with the application, including a copy of the judgment or order which created the judgment debt concerned and the judgment creditor’s affidavit setting forth the amounts still due to him in terms of the judgment or order, to be served on—

(a) the Director of the Salary Service Bureau and the head of the Ministry, department or force in which the judgment debtor is employed, where the judgment debtor is employed by the State otherwise than in the Zimbabwe National Army or in Parliament; or

(b) the Chief Paymaster of the Zimbabwe National Army and the Commander of the Army, where the judgment debtor is employed in the Zimbabwe National Army; or

(c) the Director of the Salary Service Bureau and the Secretary to Parliament, where the judgment debtor is a member of the staff of Parliament or is a Senator or a member of the House of Assembly.

(2) A notice in terms of subrule (1) shall set forth the date on which the application for the garnishee order is to be made and sufficient information to identify the judgment debtor, including—

- (a) his full names; and
- (b) his employee code number or force number; and
- (c) the Ministry, department, force or institution in which he is employed, as appropriate.

(3) As soon as possible after receiving a notice in terms of subrule (1), the Director of the Salary Service Bureau or the Chief Paymaster of the Zimbabwe National Army, as the case may be, shall send the applicant for the garnishee order and the judgment debtor a notice setting forth—

- (a) the amount of any money that is or will be payable to the judgment debtor by way of salary or wages; and
- (b) the amount and nature of any deductions required to be made from such salary or wages by the Director or Chief Paymaster; and
- (c) the earliest date from which any payment may be made in terms of a garnishee order.

[Rule inserted by s.i. 144 of 1985]

I have cited the full provision for ease of comparison. Where the garnishee is the State as an employer, the requirements are set out in the above rule. Applicant ought to have made an application for attachment under r 377. Despite his referring the application as having been brought under Order 32, I approach the matter on the basis that applicant has brought it in terms of r 377 as it is clear that was his intention. By comparison, it will be seen from the provisions in r 377A that such an application is by notice directed at the officer holding *money at present due or becoming due in the future to the judgment debtor*.

The question whether money held by a bank on behalf of a judgment debtor was “money at present due or becoming due in the future to the judgment debtor” was considered in *Muvengwa v Matarutse & Another* 1968 (4) SA 752 (R). The headnote of that case reads:

“A judgment creditor applied for the attachment of a debt alleged to be due or accruing to the first respondent, the judgment debtor, in terms of Order 47 of the High Court Practice and Procedure Act (R). He alleged that the garnishee, a bank, was indebted to the judgment debtor in an amount standing to his credit in his savings account with the bank. Under the conditions under which the judgment debtor had deposited the money, withdrawals above £100 were subject to notice and the judgment debtor had to apply personally, bringing his book. The applicant requested the Court to authorise the Sheriff to fulfil the stipulations which the judgment debtor was required to fulfil before money became payable to him.

Held, that the money had to be due or accruing at the time when the attaching order was served: the Court was not entitled to change the method of payment, alter the contractual obligations of the parties or render an amount due which was in fact not due or accruing due on the relevant date. Application accordingly dismissed.”

It is clear that in order to meet the requirements in r 377, the applicant needed to have shown, first, that the money held by the garnishee on behalf of the judgment debtor, is a specific amount of money standing to the credit of the respondents sufficient to meet the sum in the order. Second, applicant would have to show that this money is due and owing in the sense intended in r 377. In terms of r 377 an applicant must prove that an amount is “**money at present due or becoming due in the future**” by the garnishee to the judgment debtor. I must therefore determine whether the money standing to the credit of the respondents in third

respondent's account qualifies as such. There is admittedly no evidence led by the applicant on the amounts standing to the credit of the respondents held in their accounts with the third respondent bank; the terms and conditions thereof or whether the sheriff will be in the same or more favourable position than the judgment debtors should this court grant the order sought. In other words, the terms of the contract regulating the withdrawals of the money in that account are not known. A court must avoid granting an order that is *brutum fulmen*. There therefore need to show that the money held by third respondent is standing to the credit of the judgment debtor otherwise how does the sheriff execute if there is merely an overdraft facility upon which the respondents are drawing down? Without evidence of the specific amount standing to the credit of the respondents as judgment debtors, there is no knowing the efficacy of the order granted. Unless applicant shows, on the papers, that there is a specific amount standing to the respondents' credit or that a specific amount will become due to the respondents by the garnishee in future, it cannot be said that he is entitled to the order sought. The point I make here is that the order sought, without the detail I have referred to above, is too vague and therefore unenforceable.

It is therefore in my view not “**money at present due or becoming due in the future**” as contemplated in the rules. Similarly, in *Mugabe Mutezo & Partners v Barclays Bank of Zimbabwe Limited & Another* 1989 (3) ZLR 162 this court held that where a garnishee order is granted under Order 42 of the Rules of the High Court, it takes the form of an order for attachment and payment, that is, for execution. Once, he obtains a garnishee order, there is no need for the judgment creditor thereafter to institute fresh proceedings at common law in order to secure payment. The garnishee order itself is directed at the garnishee and requires him to pay over the sum stated in the order. Non-compliance with the order would constitute a contempt of court. It follows, in my view that this the court cannot do unless it is equipped with sufficient information as would enable it to issue an efficacious order. In the absence of the vital information that I have referred to, an application of this nature cannot succeed.

Rule 378 (1) of the Rules of the High Court requires a judgment creditor who wishes to obtain a garnishee order to show, to the court's satisfaction, that the garnishee is indebted to the judgment debtor. The applicant has not shown that the garnishee is indebted to the judgment debtor. In the event the court cannot grant a garnishee order in the absence of the fulfilment of this requirement.

The respondents raised other grounds upon which they resisted the order sought. In light of the above I do not find it necessary to make any findings on the grounds so advanced on respondents' behalf. Suffice it to say that I find that the applicant had not met the criteria set out in r 377 of the High Court Rules, 1971.

Consequently, the application is dismissed with costs.

Kawonde Legal Services, applicant's legal practitioners
Mutumbwa Mugabe & Partners, 1st & 2nd respondents' legal practitioners