

EDWARD MADYAVANHU
versus
CAIRNS FOODS LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 25 March 2021 & 17 June 2021

Opposed Application

Applicant, in person
A K Maguchu, for the respondent

DUBE J:

1. The applicant is a former employee of the respondent. His contract of employment was terminated in 2001 after which he obtained judgment by consent against the respondent at the Labour Court for unlawful dismissal. He was awarded damages in the sum of Z\$26 076 252 on 27 May 2009 after quantification. The applicant seeks to register the judgment with this court in terms of s 92B (3) of the Labour Act, [*Chapter 21: 08*].
2. The respondent challenges the registration of the judgment on two grounds. The first, is that the judgment sought to be enforced constitutes a nullity because the Labour Court was not empowered by law to hear the matter when it granted the judgment. It submitted that the Labour Court being a creature of statute, can only hear appeals in terms of the enabling Act and that the Labour Relations Act did not have a provision empowering the Labour Relations Tribunal to hear an appeal against a unilateral termination of a contract of employment by an employer. It contended that even its successor, the Labour Act, [*Chapter 28:01*] does not empower the Labour Court to hear such an appeal and that the glaring lack of jurisdiction renders the judgment which is sought to be enforced a nullity. It urged the court to decline to register the judgment and dismiss the application on this basis alone.
3. On the merits, it submitted that the judgment sought to be registered, is expressed in the Zimbabwean dollar of prior to 2010 and is incapable of enforcement. According to the

respondent, registration of the judgment achieves nothing other than for academic purposes and should be denied. It contended that registration of a judgment expressed in a moribund currency amounts to nothing but a *brutum fulmen* act.

3. The general approach is that a judgment will generally stand until set aside by way of appeal or review. In *Mkize v Swemmor and Ors* 1967 (1) SA 186 the court stated at 197 C-D , as follows,

“Judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are exceptions , one of them being that , where a decision is given without jurisdiction , it may be disregarded without the necessity of a formal order setting it side.” see also *Manning v Manning* 1986 (2) ZLR 1.

4. This case speaks of exceptions to the general rule one of which is lack of jurisdiction. Where a judgement or order is given without jurisdiction, it may be disregarded without the need for a formal order to set it aside. In *Dube v Maphephe Syndicate and Ors HB 5/2009*, the court remarked as follows;

“There is merit in the applicant’s contention. When a magistrates court does what is not within its jurisdiction, the result of what it purports to do is void and it is a nullity in law with no force or effect. No benefit can be derived from it. It has been repeatedly stated that it is like trying to build something on nothing and expect it to stand; it will collapse. See for instance *Mcfoy v United Africa Co Ltd* (1961) ER 1165”

5. The applicant referred me, for the proposition that an order issued without jurisdiction must be obeyed until it is set aside on appeal, to the case of *Strachan v The Gleaner Company Ltd & Anor* (Jamaican) [2005] UK PC 33, [2005], WLR 3204 , where the court held as follows,

“An order issued by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside An appeal is the proper method of getting rid of it. ... Whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong he makes an error whether of law or fact which can be corrected by the court of appeal but he does not exceed his jurisdiction by making the error, nor does a judge of co-ordinate jurisdiction have power to correct it”

6. This case is from a foreign jurisdiction and is of persuasive authority. The court in this case accepted that an order issued without jurisdiction is vulnerable and went on to say that an appeal is the method of getting rid of it. The position of our law is that such a judgment would be a nullity and there is no need to actually set it aside.

7. It appears to me that judgment and orders that require to be registered to enable enforcement are in a class of their own. The purpose of s 92 B (3) of the Labour Act is to facilitate

registration of an order or judgment. Consequently, when the High Court sits as a court registering an order or judgment of the Labour Court, it does not assume review or appeal powers. In *Nyarota v ANZ (Pvt)Ltd* HH 591/15, the court remarked as follows;

“in dealing with an application for registration of an arbitral award this court is not called upon to review the decision of the arbitrator or to go into the merits” See also *Brian Muneka and Ors v Manica Bus Company* HH 30/13.

8. These sentiments apply with equal force to registration of Labour Court judgments. The power of this court under s 92 B (3) of the Labour Act does not extend to setting the judgment or order sought to be registered aside for whatever reason. The Court has no mandate to delve into the merits of the matter. It merely performs administrative functions without an entitlement to look into the correctness or otherwise of the judgment or order it seeks to register. Its role remains that of simply recognising that the judgment exists for the purposes of enforcement. Were the court to deal with challenges to the jurisdiction of the Labour Court it would amount to it sitting as an appeal court.

9. A person aggrieved by a judgment of the Labour Court on the basis that the court lacked jurisdiction must realise that if he does not challenge it, it will be registered with a view to enforce it in terms of s 92 B (3) of the Labour Act [*Chapter 28:01*]. In a case where a judgment is granted without jurisdiction, the aggrieved party has an option to appeal the judgment or apply to set it aside on the basis that it is a nullity. This is especially so where the other party insists on enforcing the judgment. In this sense, the judgment is vulnerable as it is liable to being set aside.

10. Where an issue regarding the jurisdiction of the Labour Court to deal with a matter arises during proceedings for registration of a judgment, this fact does not clothe this court with appeal or review jurisdiction. The jurisdiction of the Labour Court cannot be challenged at the registration stage and in this court. I am persuaded that because the respondent has not appealed the judgment of the Labour Court, it remains extant until set aside by the Supreme Court.

11. The court has also considered that the judgment of the Labour Court was granted by consent. The judgment has not been set aside nor has an application been made to set aside the judgment. The judgment still stands. See *Masulani v Masulani* HH 68/2003. For the reason that this court does not sit as either a review or appeal court and is not empowered to delve into the merits of the challenge and make any pronouncement on challenges regarding the propriety of Labour Court judgements, it will not be drawn into doing so. The parties must go and fight it out

elsewhere. The correct manner to vacate a judgment of the Labour Court is either to seek its rescission, review or to appeal it. Having failed to set aside or appeal the judgment, the judgment must be obeyed until it is set aside. I agree with the applicant that the issue of the jurisdiction of the Labour Court is not for this court. The respondent's argument is misplaced.

12. The judgment sought to be registered sounds in Zimbabwean dollars and was granted in 2009. In supplementary heads of argument filed in the course of argument of the case, the applicant submitted that when the judgment was granted in 2009 the Zimbabwean dollar did exist and was valid legal tender. He argued that it was not moribund and is not so now. He submitted further that when the judgment of *MANYANGADZE J* was handed down in July 2020, the Zimbabwean dollar still existed and that it still does exist today. He requested the court consider this case on its own facts and register the order as it is. He urged the court to dismiss the point that the judgment is *brutum fulmen*.

13. It is common cause that the Zimbabwean dollar that was in use during the period prior to 2010 is now redundant. The year 2009 saw the introduction of the USD with the adoption of a basket of foreign currencies. There have been numerous changes to currencies since then and the Zimbabwean dollar of that day has been badly eroded. The Zimbabwean dollar currency currently in use was introduced in 2019 and is not the same Zimbabwean dollar that was in place in 2010 nor is the value the same.

14. A judgment that is in a currency that is not in use is not capable of enforcement. It is not possible that a writ of execution or any form of compliance may be compelled in respect of the judgment. The award in the currency in which it was expressed, is not capable of enforcement and is not registrable. In *Makoni v The Cold Chain (Pvt) Ltd* HH 197 /2015, the court held that a judgment that is expressed in a currency that is not in use is not capable of enforcement.

15. Another case in point is *Rushezha & Ors v Dera* CCZ 24 /17 where the court held that
“courts are not expected to, and invariably do not, render judgements that cannot be put into effect –which are in other words a *brutum fulmen*”.

For the reason that the judgment is expressed in a moribund currency, it constitutes a *brutum fulmen*. No useful purpose will be served by registering an award in a currency which is no longer in use and valueless. Courts do not grant orders for enforcement of judgments that are *brutum fulmen*.

16. At the hearing of the matter there were suggestions that the Zimbabwean dollars be converted to United States dollars. This, in the spirit of settlement. This course failed. It is not the function of this court sitting as a court registering a judgment of the Labour Court to convert a currency in a judgment to a usable currency or carry out any form of quantification.

17. The court has considered the fact that the debt is still due and payable. In *Madhatter Mining Company v Tapfuma* SC 51/2014 GWAUNZA JA (as she then was) remarked as follows:

“The principles of equity and social justice as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (e.g. damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there has been a change to the realisable currency. Equity would demand that a formula be found to give effect to the employee’s entitlement to payment of, and the employer’s obligation to pay, the debt in question.”

18. This case states the principle that a debt is not wiped out simply because there have been changes to a realisable currency in which it is expressed. Following on the case of *Fleximail (Pvt) Ltd v Samanyau & Ors* SC 21/14, the court emphasized the need for equity and social justice considerations for just resolution of labour disputes in cases where damages awarded are no longer payable the currency in which they are expressed. In the Supreme Court judgment of *Fleximail (Pvt) Ltd v Samanyau & Ors* the court held that it is not the function of the High Court when registering a judgment of the Labour Court, to revisit an award simply because an award is no longer realisable in a currency in which it was expressed, see *Samanyau & Ors v Fleximail (Pvt) Ltd* HH 108/11.

19. Following the Supreme Court *Samanyau* case, the Labour Court in *Samanyau & Ors v Fleximail (Pvt) Ltd* LC/H/776/14 considered the provisions of 2A(1)(f) of the Labour Act and held that the Labour Court has an entitlement, in the exercise of its equitable jurisdiction to order payment of damages into an operational and realizable currency. In *Nzuma and 2 Ors v Hunyani Paper and Packaging*, SC 137/11, the court remitted a matter to the Labour Court for it to exercise its equitable jurisdiction and determine conversion of an award into foreign currency. A reconsideration of the award is permissible at law.

20. This is an order of the Labour Court and only that court has an entitlement in line with 2A (1) (f) of the Labour Act and the applicable factors of equity and social justice to revisit the

question of quantification and conversion of currencies in circumstances such as these. For the reason that the judgment is, when expressed in the moribund currency, incapable of enforcement, clearly the applicant has the option to get the judgment converted into a usable and enforceable currency at the Labour Court.

21. The court is aware that the Labour Court did turn down an application by the applicant for “*valuation of salaries, benefits and severance pay*”, owed to him after the judgment was granted. Whilst the respondent seems to have hit a brick wall at the Labour Court, he may need to refocus and reconsider his options. I have decided in the exercise of my discretion, not to dismiss this application but to strike it off the roll to enable the applicant to reconsider his case and possibly seek legal advice on the way forward. The court is wary of non- suing the applicant. The respondent was not opposed to this course.

In the result, it is ordered as follows,

1. The application be and is hereby struck off the roll.
2. The applicant to pursue his legal rights against the respondent in terms of the law.
3. No order as to costs.

Dube Manikai & Hwacha, respondent’s legal practitioners