REPORTABLE (47)

HWANGE COLLIERY COMPANY LIMITED

v

(1) TENDAI MAKUTE (2) DEPUTY SHERIFF, HWANGE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GOWORA JA & HLATSHWAYO JA
BULAWAYO, NOVEMBER 17, 2014

V Majoko, for the appellant
J Sibanda, for the first respondent
No appearance for the second respondent

GOWORA JA: After perusing papers filed of record and hearing counsel in this matter we allowed the appeal with costs. We indicated therein that our reasons would follow in due course. These are they.

The respondent was formerly employed by the appellant. Sometime in September 2012, the appellant obtained approval from the Ministry of Labour to send a number of employees on retrenchment. The respondent was one of those affected by the exercise. On 23 August 2012, the parties agreed a retrenchment package to be paid to the employees. The appellant, for reasons not germane to these proceedings, did not pay out.

On 19 March 2014, the respondent, under Case No HC 627/14, filed a chamber application to have the retrenchment package thus agreed registered by the High

Court in Bulawayo. On 3 April 2014, the High Court issued an order against the appellant as follows:-

1. The Registrar of the High Court is directed to register the Retrenchment Award made in favour of the applicant as an order of this court.
2. The respondent shall pay to the applicant the sum of US$34 318. 52 due to him in terms of such award.
3. The respondent shall pay the costs of this application.

The respondent then caused a writ of execution to be issued by the High Court. The Deputy Sheriff executed the writ and attached properties belonging to appellant in satisfaction of the debt. Upon service of the writ, the appellant attempted negotiation with the respondent to stay execution of the writ to no avail. On 9 May 2014, seven days after being served with the writ, the appellant filed an urgent application to have the writ of execution stayed. The application was dismissed by the High Court on the grounds that it was not urgent. This appeal lies against that dismissal.

In sum, the appellant attacks the judgment on the grounds that the Court erred in the following respects:

a) in holding that the appellant was aware of the registration of an award when in fact there was no such award;

b) in failing to appreciate that the writ was premised on an order obtained ex-parte without notice to the appellant;

c) in failing to appreciate that the appellant only became aware of the order on 2 May 2014 upon service of the writ and that, consequently, the appellant had acted speedily in filing the application for stay of execution;

d) in holding as it did, that the application was prompted by firstly, the imminent removal of its goods, and secondly, the appellant's inability to pay its obligations in terms of the award when there was no award;

e) in holding as it did, that the fact that the appellant might have owed the respondent was the only decisive factor and that the procedure by which the payment was sought was inconsequential.

The court *a quo* concluded that the application for a stay of execution of the writ was not urgent on two bases. The first was the appellant was aware, not only of the existence of "the award" but also of its registration and yet took no action in relation thereto. The second basis was that the appellant had as far back as September 2012 been aware of its financial obligations *viz a vis* the retrenchment packages and had made no effort whatsoever to pay the retrenchees. The court therefore reasoned that due to the above circumstances, the only motive for the application was the appellant's inability to pay and its desire to postpone the imminent removal of its property in execution of the writ.

I intend to dispose first of the question of the registration of the award. The order in relation to the said award was issued by the High Court on 3 April 2014. The order was premised on a chamber application filed on 19 March 2014. It is common cause that the application itself was never served on the appellant. The contention is made that the learned judge who granted the application had raised a query on the failure to serve the application on the appellant. It is further common cause that in answer to the query the respondent's legal practitioner informed the judge that the application was procedural and therefore there was no need to serve the application. As is evident from the record, this was inaccurate. The order granted dealt with substantive issues including an order for the payment of a specified sum of money to the respondent. Thus the application could not in any circumstance be termed procedural.

Although an application for the rescission of the order in question has been filed and is still pending the court *a quo* made certain findings relating to the order in

disposing of the application for a stay which make it necessary to comment briefly on the order.

The first relates to the conclusion that the appellant was aware of the retrenchment award. There was in fact no award. What was in place was an agreed retrenchment package which was subsequently approved by the Retrenchment Board in the Ministry of Public Service Labour and Social Planning. It was this package that was placed before the High Court for registration as an award. It is this registration that the appellant contends was irregular. Indeed from the record it is not clear upon what premise the High Court was requested to register the said award and, and in addition, how it was empowered to do so. In basing the perceived lack of urgency on the said award the High Court misdirected itself.

I turn next to the finding by the court *a quo* that there was no urgency in the application due to the awareness by the appellant as far back as September 2012 of its financial obligations and, that as a result, there was no urgency. The retrenchment package in question does not reflect the name of the respondent. It was an agreement between the representatives of the appellant as employer and the representatives of non-managerial employees of the appellant. The agreement sets out the modalities of calculating the packages. It does not set out specific amounts for payment as retrenchment dues. Nor does it spell out any individual packages for payment by the appellant. The monetary value for payment to the respondent appears to have been compiled by ZIMRA. No explanation for its origin is evident on the application. It therefore begs the question how the appellant could have been aware of a specific obligation to the respondent personally or any of its employees under these circumstances.

Lastly the issue that falls for resolution is whether or not the appellant delayed in instituting the application to have the writ stayed. The order in terms of which the award "was registered" was granted on 3 April 2014 but in view of the lack of notice the appellant only became aware of it on 2 May 2014 when the Deputy Sheriff served it with a writ. On 9 May 2014, the chamber application to stay execution was filed and served on the respondent. The matter was set down for hearing on 15 May 2014 but could not proceed on that date because the parties' legal practitioners advised the judge that they were exploring an out of court settlement which, unfortunately, came to naught. The matter was heard on 6 June 2014 on which date the learned judge dismissed the application. He reasoned that the matter could not be urgent merely because the applicant said it was urgent. He indicated that the application had been filed solely to delay and frustrate the writ of execution sought to be enforced by the Deputy Sheriff.

I am convinced that the learned judge erred and misdirected himself. All the facts point to the order having been obtained in an irregular manner. There was no award made in favour of the respondent which was capable of being registered. The High Court is a superior court with inherent jurisdiction but does not have the power to register a retrenchment award in the circumstances under which this order was made. The order itself was obtained without notice to the appellant. The Rules of the High Court 1971 provide in rule 226 for the nature of an application and the circumstances when such application is permissible. Rule 226 reads:

> **"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

(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."

The chamber application filed by the respondent for the registration of the retrenchment award was not permitted under the rules. The matter was not filed under a certificate of urgency and could not therefore be said to be urgent. The relief sought was not a default judgment. The appellant had not previously had notice that the respondent would be seeking the order in question. Nor could the appellant be said to have been in default after due notice to itself. The appellant was an interested party. There were no special circumstances cited justifying the application.

It cannot be overemphasised that in proceeding as he did the respondent was in clear breach of the rules. The failure to bring a court application instead of a chamber application could have been forgiven had the respondent given notice of the application to the appellant by ensuring that it was served upon the latter. The respondent's legal practitioner in

clear breach of the rules than proceeded to have the matter referred to a judge in chambers without service of the same on the appellant.

The learned judge before whom the application was placed was alive to the need for service of the chamber application upon the appellant. In my view the learned judge ought not to have so easily accepted the explanation from the respondent's legal practitioner that the matter was of a procedural nature and that consequently service of the application was not required. The rules provide that a chamber application shall be served upon all interested parties. The rules then set out the circumstances under which service may be dispensed with. Rule 242 is pertinent and reads in relevant part:

> **242. Service of chamber applications**
>
> (1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following-
>
> (a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;
>
> (b) that the order sought is -
>
> (i) a request for directions; or
>
> (ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or [Paragraph substituted by S.I. 25 of 1993]
>
> (b) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;
>
> (d) that the matter is so urgent and the risk of irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;
>
> (e) that there is any other reason, acceptable to the judge, why such notice should not be given.

(3) Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (*a*) to (*e*) of subrule (1) -

(a) he shall set out the grounds for his belief fully in his affidavit; and

(b) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (*a*), (*b*), (*c*), (*d*) or (*e*) of subrule (1).

In *casu,* the nature of the relief sought and obtained was not "uncontentious." The order granted by the court affected the rights of the appellant as it made provision for the payment of a sum of money. The appellant would reasonably be expected to object to it. It was not an order for directions nor was its purpose to enforce a provision of the rules. Finally there was no allegation that service of the application upon the appellant would result in perverse conduct on the part of the appellant. In sum therefore, there was no explanation on the papers for the decision not to serve the application upon the appellant. This again constituted a serious and grievous breach of the rules of the High Court.

In addition to being a breach of the rules the failure to serve the application was also a fundamental breach of the *audi alteram partem* rule, which requires that every person must be afforded an opportunity to be heard in his own cause.

This Court, like the High Court, has powers of review which are exercisable when it comes to the notice of the court or a judge that an irregularity has occurred during proceedings before a lower court or tribunal or in the making of a decision by such lower court or tribunal. The court's powers of review are spelt out in s 25 of the Supreme Court Act [*Chapter 7:13*], which reads:-

"25 Review powers

(1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.

(2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.

(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination.

The application for the registration of the retrenchment award was fraught with irregularities. It was filed as a chamber application when the respondent should more properly have filed a court application. It was not served upon the appellant who was the party with a clear interest in grant of the order. Lastly, the nature of the award itself is such that it was not capable of registration. It is not evident from the High Court what nature of jurisdiction it was exercising in registering the award. The registration of the award was not only irregular, the manner in which the registration was sought was also irregular.

It is trite that this court is not a court of first instance, and therefore its review powers can only be exercised within the context of s 25 above. As the powers in question were exercised in the determination of an appeal it is only appropriate that the remedy be provided in terms of s 22 of the Act. Section 22 reads:

"22 Powers of Supreme Court in appeals in civil cases

(1) Subject to any other enactment, on the hearing of a civil appeal the Supreme Court -

(*a*) shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;

(b) may, if it thinks it necessary or expedient in the interests of justice -

(i) n/a;

(ii) n/a;

(iv) n/a;

(v) n/a;

(vi) n/a;

(vii) n/a;

(viii) n/a;

(ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case;

In terms of s 22 (1) (ix), this Court is empowered to take a course which is aimed at achieving a just speedy and inexpensive settlement of the case. It was evident to both parties to the dispute and the court that the irregularities were such that to subject the appellant to further litigation to have the registration of the retrenchment package set aside would be unjust. In the exercise of the powers of the Supreme Court in terms of s 25 and s 22, it is only just and proper that the order for registration be set aside. The writ is also set aside as having been premised on an irregular order.

What was before the High Court was an application for the grant of a provisional order. The applicant thereto merely had to establish a *prima facie* case. However, it is evident that in considering the chamber application, the High Court went

beyond an examination of the dispute on a *prima facie* basis. It went to the root of the dispute and made findings of fact and conclusions of law. In the event, it would have served no purpose to issue a provisional order under these circumstances. The merits of the entire application having been considered, it was only proper that in allowing the appeal an order setting aside the writ be granted. It was for these reasons that we allowed the appeal with costs and granted an order in favour of the appellant.

The appellant filed its application a mere seven days after becoming award of the default judgment. In my view there were more than ample grounds for the grant of an order staying execution of the writ on an urgent basis.

In the premises the following order will issue:

"IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and is substituted with the following:
    (i) The registration of the retrenchment award with the High Court under case No HC 627/14 is hereby set aside as being irregular.
    (ii) The warrant of execution against the appellant's property issued under case No HC 627/14 is hereby set aside as it is based on an order granted in an irregular manner.

CHIDYAUSIKU CJ: I agree

HLATSHWAYO JA: I agree

Majoko & Majoko Legal Practitioners, appellant's legal practitioners

Messrs Job Sibanda & Associates, respondent's legal practitioners