

DISTRIBUTABLE (25)

SYNOHYDRO ZIMBABWE (PRIVATE) LIMITED

v

**(1) TOWNSEND ENTERPRISES PRIVATE LIMITED (2) DAVID
WHATMAN N.O (3) THE SHERIFF OF ZIMBABWE N.O**

**SUPREME COURT OF ZIMBABWE
HARARE, 18 & 28 February, 2019**

K. Kachambwa with C Shava, for the applicant

C. McGowan, for the first respondent

Second & third respondents in default

IN CHAMBERS

MAKARAU JA: This is an urgent chamber application for stay of execution in terms of r 73 of the Supreme Court Rules 2018 as read with Rule 244 of the High Court Rules, 1971.

On 19 December 2018, the High Court handed down a judgment registering an arbitral award against the applicants. The judgment also dismissed an application by the applicant to set aside the arbitral award. The applicant became aware of the judgment on 29 January 2019 after the first respondent had caused the third respondent to attach its equipment and assets to satisfy the debt. On 31 January, the applicant's legal practitioners

advised the first respondent's practitioners that they intended to appeal against the judgment and were accordingly filing an application for condonation and extension of time within which to note the appeal. In the same letter, the applicant inquired whether the first respondent was inclined to stay execution in light of the applicant's intention to appeal the judgment. Whilst the first respondent's practitioners responded to the letter, they did not advise on whether or not they were inclined to stay execution as requested. To avoid the attached property being removed, the applicants issued a security bond in terms of the High Court Rules.

The application for condonation was filed on 5 February 2019 and was duly served on the respondents. The applicant once again made inquiry of the first respondent as to whether or not it was inclined to stay execution. It gave the first respondent up to 8 February to respond. Instead of responding to the inquiry, the first respondent, on 11 February, caused further attachment of the applicant's property. On 13 February, 2019, the applicant filed this application.

In the application, the applicant contends that the matter is urgent, that it has prospects of success in the application for condonation and that the balance of convenience favours the granting and not the denial of the interim protection that it seeks. On this basis, the applicant seeks an order staying execution pending the determination of its application for condonation and extension of time within which to note an appeal.

At the hearing of this application, it was common cause that the application for condonation and extension of time within which to note the appeal is now ready for hearing and is simply awaiting set down.

The application was opposed on four main grounds. Firstly, it was contended that the matter is not urgent. Secondly, it was argued that the application was improperly before me. The first respondent contended, thirdly, that the applicant's prospects of success in the application for condonation and extension of time to note the appeal are not bright and lastly, it was argued that the balance of convenience favours the denial of the application.

It is convenient that I deal with this application on the basis of the four grounds of opposition that have been advanced by Mr *McGowan* for the first respondent, but not in the order in which he presented them as the second ground goes towards jurisdiction and should be dealt with first.

Whether or not the application is properly before this court

It was contended on behalf of the first respondent that the applicant ought to have applied for the judgment against it to be rescinded in the court *a quo* as a default judgment. The basis of this contention is a statement by the applicant in its founding affidavit in the application for condonation contending that the effect of the striking out of the opposing affidavit in the application for registration of the award was that the application was granted unopposed. To this extent, the contention proceeds, it was a default judgment yet the order of the court *a quo* did not reflect this state of affairs and gives the impression that the order was granted on the merits.

It is common cause that the court *a quo* upheld the point in *limine* raised by the first respondent that the deponent to the applicant's affidavit was incompetent to swear positively to the contents of the applicant's affidavits. Having done so, it dismissed the application by the applicant and granted the application by the first respondent. It is therefore not in dispute that

the court *a quo* did not render a judgment in default of appearance or of filing relevant papers in the two matters but dismissed the one and granted the other after hearing arguments from the parties on the basis of papers filed of record. The court considered that the applicant was properly before it and accepted argument from it on the point *in limine*. It follows therefore, that the judgment that it rendered thereafter on that point cannot by any imagination be described as a default judgment as envisioned by the High Court Rules. The applicant was clearly before the court and did not default in the filing of any papers. It was simply not persuasive in its argument before the court *a quo* on the point *in limine*. The ensuing judgment was made in its presence, on the basis of its papers but against it.

It appears to me that having struck off the applicant's papers, the court *a quo* ought to have either dealt with the matter on the merits, or refer it to the unopposed roll for a "proper" default judgment to be entered against the applicant. It did neither.

As matters stand, the only way that the applicant could have had the correctness of the judgment against it tested was by way of an appeal. It could not conceivably have done so by way of an application for rescission of the judgment as argued for and on behalf of the first respondent.

Notwithstanding that the applicant itself may have incorrectly referred to the judgment of the court *a quo* as a default judgment, I find that it was not a default judgment capable of correction by way of rescission. I further find that applicant, once having made an application to this Court for condonation of late filing of its appeal and an extension of time within which to note the appeal, is properly before this Court in this application. The jurisdiction of this Court in this matter is not inherent but is ancillary to the application for

condonation that this Court is seized with. It is the settled position at law that once this court is seized with a matter, it is then imbued with inherent jurisdiction to control and protect its processes and this includes jurisdiction to stay the judgment appealed against. (See *Net One Cellular (Private) Limited v 56 Net One Employees & Anor* SC 40/05).

Urgency

Clearly the matter before me is urgent. What has created the urgency is the first respondent's unwillingness to advise the applicant in time its intention to proceed with execution notwithstanding the filing of the application for condonation and extension of time within which to note an appeal. Had that intention been communicated to the applicant when it was solicited on 29 January 2019, this application may have been filed earlier than it eventually was.

I am constrained by the facts of this matter to note in passing that it is eminently ethical practice for legal practitioners to be upfront with colleagues and advise them of client's instructions, especially when an indulgence sought is not being granted. To the contrary, it is sharp practice, one that this Court frowns upon, for legal practitioners not to respond to a direct inquiry on an indulgence sought, and then surreptitiously proceed with the course of action which is the subject of the inquiry.

As correctly contended on behalf of the first respondent, the need to act in this matter arose on 29 January 2019 and the applicant would have been at fault had it failed to take action then in the absence of any explanation. The applicant has however taken the court into its confidence and has explained all the steps that it took during this period, including the issuance of a security bond and the sending of the two unrequited written inquiries to the first

respondent on whether or not it was inclined to suspend execution pending the determination of the application for condonation.

It is on the basis of the above that I view this matter as being urgent.

Prospects of success

It was contended on behalf of the first respondent that the applicant's prospects of success on appeal are not bright.

In considering this factor I am aware that another court is yet to consider the same prospects of success on appeal when it determines the application for condonation of late filing of the appeal and extension of time within which to file the appeal. I am however comforted by the fact that my findings herein are not binding on that other court.

The applicant contends that the court *a quo* erred in several respects.

It argued in the main, that the court *a quo* erred in holding that a director of a company who had read the arbitral award, the record of proceedings and had access to the records and other institutional memory of the company could not depose to an affidavit in an application to set aside the award and to the opposing affidavit in an application to register the award. Its main contention was that corporations, being persons in perpetuity and lacking corpus, can only be represented in legal proceedings by authorised officers and a director, so authorised is competent to depose to an affidavit on behalf of the corporation. In circumstances where a corporation is so represented, it cannot be said that it has no voice before the court and only the other party will be heard.

Per contra, the first respondent argued that the director who represented the applicant in the proceedings *a quo* did not participate in the negotiation of the arbitral agreement, was not a witness to the arbitration proceedings, did not attend the meetings where the dispute was discussed and did not set out the basis of his knowledge of the facts that he deposed to in the two affidavits. On account of this failing, it is argued that the court *a quo* correctly held that the applicant's affidavits in both matters be struck off.

There is clearly an argument in the two competing contentions advanced by the parties that may detain the Supreme Court. There is no ready answer to each of them and the court will have to rely on one or more underlying legal principles in company law and in the interpretation of the rules of procedure to resolve the argument.

The contention by the applicant that a corporation can be represented by any of its authorised directors who has access to company records and other reservoirs of institutional memory has some prospects of success on appeal.

Having found that there is an argument relating to one of the grounds of appeal is sufficient basis for a finding that there are prospects of success in the application for condonation. On this basis alone, I would grant the relief sought in the application. For completeness of the record though, I will briefly consider the other grounds upon which the judgment of the court *a quo* has been attacked.

It has further been argued on behalf of the applicant that the court *a quo* erred in registering an award that does not sound in money. The award was not attached to the

application and I am none the wiser as to its contents. In opposition to this averment by the applicant I expected a vehement denial by the first respondent of the allegation. It was not there. Instead, the argument advanced was that the applicant was aware of the amount of the award, presumably from some other sources that are not the judgment nor the award itself. Assuming that the complete information is placed before the court determining the application for condonation of late filing of the appeal and extension of time within which to note the appeal, this may be another arguable position to be referred to the Supreme Court for determination.

It was yet and further argued that the court *a quo* erred in rendering a judgment without reasons.

After summarising the arguments of the first respondent, the court *a quo* in a rather terse judgment held that it was “*accordingly persuaded that the opposing papers, such as they are in case no HC 1186/18 ought to be struck out*”

The court *a quo* made a similar statement regarding the founding affidavit in the application for setting aside the arbitral award.

Applicant contended that the above did not constitute “reasons” for the decisions that the court finally made. *Per contra*, the first respondent argued that the statements coming as they do immediately after the court *a quo* had summarised the arguments of the first respondent, the statements must be read as an endorsement of those arguments which then constitute the reasons for the decisions made. Again, there is content in both arguments that may detain the Supreme Court. The court may find that the court *a quo* misdirected itself by

not clearly articulating its reasons for judgment and may consequently find that the *ratio decidendi* of the court *a quo* cannot be and should not be discerned from the opposing arguments as argued for and on behalf of the first respondent. In my view, this argument enjoys some prospects of success on appeal.

Finally, it is argued on behalf of the applicant that the court *a quo* made two contrary findings regarding costs. In the body of the judgment the court made a finding that it ordered that the applicant bears the costs of the two applications on the higher scale. It proceeds to give reasons for the decision and in doing so, ultimately orders that the applicant bears costs only in the one matter on the ordinary scale while in the other, each party is to bear its own costs.

Mr *McGowan* for the first respondent has sought to downplay the apparent contradiction regarding costs by submitting that the contradiction can be corrected under r 449 of the High Court Rules 1971. It is not necessary that I comment on whether this course of action is feasible or not. What is clear to me is that the Supreme Court also enjoys jurisdiction on appeal to decide on whether or not the contradictory pronouncements by the court *a quo* on the issue of costs was an irregularity meriting its attention and possible rectification.

On the whole, I am satisfied that the application for condonation for the late noting of appeal and extension of time within which to note the appeal has some prospects of success on one or more of the grounds raised by the applicant.

Balance of convenience

An application for stay of execution pending the determination of some other process by the court is a hybrid application. It combines the factors that a court takes into

account when considering an application for an interim interdict generally and the factors that a court considers when granting an indulgence in an exercise to control and protect its own proceedings. (see *Makaruse v Hide and Skins Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) and *TM Supermarkets (Private) Limited v Avondale Holdings (Private)Limited and Another* SC 37/17. In both instances, the court must always bear in mind the balance of convenience or more importantly, where the interests of justice lie.

Comparing itself to the biblical David against an international corporation that it likened to Goliath, the first respondent has painted a vivid picture of a small local company that is being brought to its knees by the delays in receiving payment from an arbitral award that it has been awarded and has since had registered. Against the proceeds of projects that are worth at least US1,2 billion, the amount due to the first respondent in the sum of US1,5 million, appears trifling and will or should not cause a financial dent to the applicant.

If this was the only factor that I had to consider, I would have been persuaded by the submission made by the first respondent regarding the crippling effect that delay has had on its operations, to be on its side and deny the application. Taking into account all the factors cumulatively as I must, I find myself on the applicant's side. The applicant has exhibited utmost good faith in the manner in which it has proceeded after learning of the judgment against it, it has taken out a security bond and has tried to engage the first respondent regarding the stay of execution of the judgment *a quo* in vain. Further the period of the interim order sought is fairly short as the order will hold only up to the determination of the application for condonation. Yet further, there are clear challenges with the judgment *a quo* that may need commenting on and possible rectification by this court before the judgment can be executed upon.

Disposition and costs

It is my finding that it is in the interests of justice that pending the determination of the application for condonation for late noting of appeal and extension of time within which to note the appeal, execution be stayed. The applicant has succeeded in this application. It is entitled to its costs. No argument was advanced by either side as to why the ordinary incidence of costs following the cause, should not apply.

Accordingly, I make the following order:

1. The application is granted with costs.
2. Execution of the judgment in case no HC825/13 is hereby stayed pending determination of the application for condonation and extension of time within which to note an appeal filed under case no SC41/19.

Manokore Attorneys, applicant's legal practitioners.

Machekano Law Practice, 1st respondent's legal practitioners.