

LANCASHIRE STEEL (PRIVATE) LIMITED
versus
TONDERAI ZISENGWE AND 430 OTHERS
and
THE DEPUTY SHERIFF N.O. KWEKWE

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 1 March 2011

URGENT CHAMBER APPLICATION

J Nyarota, for the applicant
C Kwaramba, for the respondents

BERE J: Pursuant to the registration of an arbitral award handed down in favour of the respondents on 17 November 2009, the respondents have proceeded to execute on that order.

The execution currently in full swing has led to the attachment of the applicant equipment some of which constitute the mainstay of its very existence. The applicant's very existence and the welfare of all its employees including the respondents have been thrown on the spotlight. It is under a serious threat.

Alarmed by the unfolding drama the applicant sought clarification as to what amount was exactly due to the respondents against what it had allegedly paid. According to the applicant its accounting section revealed, though belatedly that it had paid the respondents in excess of the amount on the arbitrary award. The applicant then immediately filed an application in this court in HC 2159/11 seeking to have the anomaly corrected. Almost simultaneously with this application was lodged the instant urgent chamber application seeking stay of execution pending the determination of the application in HC 2159/11.

The timing of these applications coming on the 11th hour as it were has not gone well with the respondents who feel quite strongly that they are meant to achieve nothing other than worsening their already miserable situation. They regard the whole exercise as calculated to frustrate them in getting their long outstanding dues. The respondents' concerns are fully understandable because they have gone for a long time without being reasonably paid what is legitimately due to them.

Counsel for the respondents eloquently presented the respondent's predicament in this case. The court was fully put in picture of the situation on the ground.

To the extent that the applicant even as we sit in this hearing has accepted that it still owes the respondents arrear salaries other than the disputed arbitrary award, it appears the applicant has been sincere. What this means is that even if the respondents were to proceed with execution in its current form, the applicant will still remain liable to the respondents.

I have carefully followed the submissions by both counsel in this hearing. Counsel for the respondents seemed to suggest that once an arbitrary award has been registered the quantification of that award cannot be challenged subsequently without seeking first to upset the registration process of the award itself. I am unable to agree. It occurs to me that the figure carried on the writ of execution can be challenged at any given time if it is felt that that figure is not consistent with what is legitimately due to the judgment creditor. I imagine a simple situation where the judgment debtor has effected part payment long before execution commences. If on a subsequent occasion the judgment creditor were to attempt execution without taking into account the part payment, surely the judgment debtor must be given a platform to have that anomalously corrected. This appears to be what has prompted this application by the applicant. More importantly, the applicant has argued that it has paid the respondents far more in excess of the amounts it believes they are entitled to in terms of its own computation of what is due to the respondents. Annexures C and D have been presented to justify the position taken by the applicant. I did not hear the respondents arguing that ever since the arbitrary award was made, the applicant has not paid them anything. There is in my view need to give both parties an opportunity to reconcile the payments made by the applicant against what is due to the respondents and the court application HC 2159/11 presents a perfect opportunity for both parties to achieve this. Either of the two will happen in that process. It is either the applicant will succeed or fail in that regard. If the applicant loses that case, execution will follow and that does not seem to present much of a challenge. But in the event of the applicant succeeding in that application when execution has already been completed, the results will be too ghastly to contemplate.

The aspect of public policy has not escaped my attention. It is easy to destroy the potential of the applicant by the stroke of a pen.

It is equally true that public policy demands that respondents be timeously paid what is due to them as employees of the applicant. Courts do operate within a given political, social

and economic environment. As a judicial officer I am fully aware that our unemployment rate in this country represents one of the highest in the world and it has not been easy to attract investment in this country because of many reasons. However, this is not the perfect platform to debate why as a country we have been unable to attract the much needed investment. But I emphasise we must be slow to move towards the extinction of existing enterprises. The coming into the picture of Essar as a potential investor in the applicant company must not be lightly taken. It must be given a chance, more so given the likelihood of a concrete agreement being reached this current month. It occurs to me that that development might provide a long term benefit to the plight of the respondents and their dependants.

THE ISSUE OF COSTS

It is evident that the applicant has acted in an extremely lackadaisical manner in handling this matter. The timing of the filing of the urgent application is quite curious.

Given the delay in the formal registration of the arbitrary award in order to pave way for execution, the applicant had all the time it needed to clarify issues long before execution had commenced. The parties are in the current mess because of the casual approach adopted by the applicant and for this reason I am satisfied this is a perfect case where a successful part must be burdened with punitive costs some of which it has voluntarily offered to pay.

However, an attempt will be made to avoid the unnecessary incurring of further costs by way of storage charges.

Accordingly I order as follows:

1. Pending the finalization of the application by the applicant as set out in HC 2159/11 the second respondent is ordered to restore to the applicant all the property removed and stay any further execution against the applicant's property.
2. The restored property shall remain under attachment pending the determination of case HC 2159/11.
3. The applicant, shall bear the costs of this application on attorney-client scale and shall further pay the costs of restoration of the property as well as the costs for the execution carried out by the second respondent.