CITY OF HARARE
versus
STANLEY TAVANANA GOMO
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 16 March 2016 & 30 November 2016

Opposed application

C. Kwaramba, for the applicant
M. P. Mahlangu, for the respondent

MAFUSIRE J: The applicant applied to set aside a certain writ of execution on the basis that it had been wrongly issued against a judgment not sounding in money, and for amounts that were hotly disputed.

The respondent opposed the application on the basis that the judgment giving birth to the writ was executable since the amount owing was not in dispute and was easily ascertainable. The respondent also counter-applied for an order of payment of a certain sum of money, allegedly the balance or portion of the total amount in the writ, which the respondent alleged was owed to him by the applicant but was still outstanding.

The applicant opposed the counter-application on the basis that the mere fact that the respondent had now seen it fit to apply for an order of payment of the disputed amount was in itself an admission or realisation by him that he had turned the civil procedure upside down by first having issued a writ of execution and only now seeking the court's endorsement of the disputed amount.

Naturally, the details will clarify what was going on.

The abridged and relevant details of the dispute before me were these. Originally, the applicant was employed by the applicant as Chief Security Officer. Subsequently, his contract of employment was terminated. The parties agreed on a severance package that set out what emoluments the applicant would pay the respondent. Two written agreements were executed. The one relevant to these proceedings was signed in May 2008. The applicant did not

implement the terms of the agreement, either in full or timeously or both. A dispute arose as to whether the respondent would remain in the applicant's employ pending the full implementation of the agreements. The dispute was referred to arbitration in terms of the arbitration clause in the agreement. On 12 November 2010 the arbitrator, a former Chief Justice of this country, found in favour of the respondent. This aspect requires more focus. It was the crux of the matter before me.

In the severance package, the respondent would be due several payments and benefits. These included payment in lieu of notice; service pay; medical aid; a relocation allowance; payments in lieu of outstanding leave days, and the like. Payments in kind included a vehicle; newspaper allowances; school fees for children; funeral benefits; fuel; parking; and two immovable stands, one industrial and the other residential. Under a clause headed "IMPLEMENTATION", the parties agreed that each of them would expeditiously take all the necessary steps to fully implement the agreement and that none of them would do anything to prejudice the other.

A sub-clause under the "implementation" clause was just about the whole case before the arbitrator, and, to an extent, before me. It said:

> "The parties hereby agree that until the implementation of this agreement Gomo remains an employee of the City in his capacity as the Chief Security Officer and is entitled to his salary and benefits."

In the agreement, the term "implementation" was expressly defined to mean three things, namely:

i/ the payment of the monetary part of the severance package;

ii/ the execution of the agreement of sale for the two stands in question; and

iii/ the provision of documentation to facilitate the change of ownership of the motor vehicle in question from the applicant to the respondent.

By 31 May 2008 the applicant had paid the monetary part of the severance package. It had also transferred the motor vehicle and had signed the agreements of sale in respect of the two stands.

However, it ran into serious problems regarding the immovable properties. In respect of the industrial stand for example, the respondent ended up being evicted from occupation by a third party who claimed prior rights over it. It seems the applicant had botched the cancellation and repossession procedures in relation to the property and the third party. Ultimately, the applicant acknowledged that it could not pass title in the properties. It ended up substituting them. But the issue of the costs of suit incurred by the respondent in defending eviction led to further problems. However, these were eventually ironed out in the course of the hearing of the present matter, thereby making it unnecessary for me to dwell on that aspect any longer.

However, notwithstanding that "implementation" in respect of the two stands had been, in the agreement, defined to mean "execution of the agreements of sale", before the arbitrator, it seemed common cause between the parties that the mere signing of the agreements did not constitute execution within the meaning of the severance package. The arbitrator explained that the expression in fact, meant the perfection of each individual sale by the passing to the respondent of ownership in the stands.

The issue before the arbitrator was whether what the applicant had done in towards the implementation of the severance package as aforesaid had been sufficient to terminate the respondent's employment as Chief Security Officer and his entitlement to his salary and benefits, notwithstanding that none of the agreements of sale in respect of the two properties had yet been executed, i.e. in the sense of passing ownership.

The arbitrator ruled that the respondent's employment could only be terminated upon the fulfilment by the applicant of all the three obligations. The applicant, having by that time only fulfilled two, the arbitrator ruled that the respondent's employment could only be terminated upon the fulfilment of the one remaining one, namely the passing of ownership in the two stands.

The relevant portion of the arbitrator's award read as follows:

> "It is hereby declared that the respondent [applicant herein] has not fully implemented the Memorandum of Agreement for Severance Package entered into with the claimant [respondent herein], and that in consequence, the claimant remains an employee of the respondent in his capacity as chief security officer, and is entitled to salary and benefits …. from 1 August 2008 to the date when the residential and industrial stands are registered in his name."

The respondent applied to this court for the registration of the arbitral award. But by that time, the applicant had now registered the industrial stand in the respondent's name, and the registration process was underway in respect of the residential stand. In its papers before me, the applicant says it opposed the respondent's registration application, not because of any disagreement with the award itself, but only to demonstrate the respondent's *mala fides*.

Notwithstanding the applicant's opposition, this court registered the arbitral award on 16 January 2014. The operative part of the court order read:

> "The award of the Honourable A.R. Gubbay SC is hereby recognised for enforcement as an order of this Court."

It was common cause before me that the transfer of the remaining stand in favour of the respondent was finally completed on 20 March 2014. The respondent's impeached writ of execution was issued on 12 September 2014. The amount in that writ was $113 147-24. Since the judgment against which the writ was to be issued did not sound in money, the respondent had had to file an affidavit explaining the amount to be inserted in the writ. The amount was in two portions. $70 870-24 was said to be the amount that had accumulated to the respondent by way of salaries and benefits up to May 2014, the month in which the remaining property was transferred. The respondent attached to the affidavit an unsigned schedule showing how this amount was made up, a schedule which he said had been prepared by the applicant's own officials.

The balance of the amount on the writ, $42 277, was said to be the further salaries and benefits due to him after 20 March 2014. He said he was due this amount because the applicant had still not yet fully implemented the severance package by reason of the monetary portion of the severance package having accumulated further, meaning that he had remained in applicant's employ as Chief Security Officer. The respondent also attached to his affidavit for the writ, his own schedule showing how he had arrived at this further amount. The amount was allegedly the total of salaries and benefits up to August 2014, the month preceding the date when the writ was issued.

The Registrar of this Court ["***the Registrar***"] must have been convinced. He issued the writ on 12 September 2014. The applicant's property, mostly vehicles, was attached. That triggered the present application.

The respondent's counter-claim was neither for $113 147-24 in the writ, nor $42 277, the balance after deducting the $70 870-24. It was for $80 732-10. The applicant had since paid the $70 870-24. But the respondent had since revised upwards the amount allegedly due by way of salaries and benefits from April 2014 to August 2014, and had also added what he felt due to him for the month of September 2014. This application was launched in October 2014.

So, the ultimate and predominant issue before me in the main application, as I see and craft it myself, was whether or not the respondent's writ of execution had been improperly issued.

In the counter-application, the predominant issue, again as I see it, was the procedural propriety of the respondent seeking an order for the payment of a sum of money a portion of which, $42 277, had already been included in the writ already issued, and the balance, $38 455.10, quantified on the basis that until it had paid the monetary portion of the severance package as had allegedly accumulated beyond 20 March 2014 when the last stand had been transferred, the respondent was still employed by the applicant as Chief Security Officer, notwithstanding that the arbitrator had ruled that the salaries and benefits would both terminate upon the date of transfer of the properties.

But before dealing with the two main issues above, the respondent, in his heads of argument, and at the hearing, raised two preliminary points the decisions on which I held over for handing down together with this judgment.

It was said the applicant's papers were fatally defective for the non-joinder of the Registrar. This was said to be a point of law which could be raised at any time. It was argued that it was immaterial that the point had not been raised in the affidavits.

The respondent's further argument was that the impeached writ had been issued by the Registrar. Therefore, it was his writ. It was his process. Reference was made to r 322 of the Rules of this Court ["***the Rules***"]. That rule says a writ for the execution of any judgment for the payment of money, delivery up of goods, or premises or for ejectment, is signed by the Registrar.

So, the first preliminary point raised by the respondent, in my own words, was that in its papers the applicant had purported to impeach the conduct of the Registrar, for not only issuing a writ against a judgment that did not sound in money, but also in accepting the

respondent's unilateral calculation of the amounts to be paid to him without having afforded the applicant an opportunity to comment or respond. As such, the respondent's argument continued, the substantive party to the application should have been the Registrar, not himself, because he was a mere beneficiary of the writ. Not having joined the Registrar to the application, the matter could not be decided on.

The second preliminary issue raised by the respondent was that since the applicant was alleging that the Registrar had issued the writ unprocedurally, then it could only be set aside on review, after the applicant had brought a proper application, complying strictly with the provisions of Order 33 of the Rules.

In the premises, the respondent prayed that the main application be dismissed on the preliminary points.

I now deal with all the issues as follows, starting with the two preliminary points.

[a] **Non-joinder of Registrar**

The respondent argued that the applicant's non-joinder of the Registrar could not be saved by r 87 allegedly because that rule does not cover a situation where the substantive party to the proceedings is not cited.

Rule 87[1] says that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party. It further says the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

In my view, and with all due respect, it was absurd to suggest that the writ of execution in question was a process *of* or *for* the Registrar and that the respondent was a mere beneficiary. Rather, it was a process *by* the Registrar. It was a warrant or authorisation to the Sheriff to execute against the applicant on behalf of the respondent. The respondent might have been the beneficiary. But the Registrar had no interest in it at all. All he would have been required to do would be to satisfy himself that the writ was regular on the face of it, and that its object complied with the judgment behind it. The contents of the writ, particularly the amount thereof, were the respondent's. Thus, in substance the writ was the respondent's, even though the form might have been the Registrar's. But substance overrides form.

Rule 87[1] puts paid to the respondent's argument. An order of court upholding or setting aside the writ has no effect on the Registrar beyond, perhaps, being asked, possibly at some future date, but most probably never, to sign yet another writ, maybe in the same matter, but most likely in a different one, or for a different amount. The rights and interests affected by the upholding or setting aside of the writ would be those of the applicant and the respondent, not the Registrar.

The situation herein was unlike that in *Rose v Arnold & Ors*[1] or *Hundah v Murauro*[2], two of a number of cases cited by the respondent, in which the party with the substantive interest in the cause or matter to be decided had completely been excluded from the suits. *In casu*, the nonjoinder of the Registrar, though undesirable, could not preclude the determination of the cause or matter as between the applicant and the respondent.

Therefore, this first preliminary point is dismissed. But before I leave it, I consider that there was no reason to cite the second respondent, the Sheriff. Like the Registrar, he had no more interest in the cause or matter beyond getting paid his costs of execution.

[b] **Applicant ought to have brought a review application**

Beyond saying that if the applicant's complaint was that the writ had been issued unprocedurally, then a proper review application ought to have been made, the respondent gave no further details of his argument on this aspect, or explain why the present application could not be held as one such. By making reference to Order 33, perhaps the respondent was saying or implying that one or other or all of the requirements of Order 33 had not been complied with. But his argument remained undeveloped. The court cannot speculate. Some aspects of Order 33 would require evidence of non-compliance. For example, whether an application is out of time or not is a question of fact.

Therefore, the respondent's argument on this aspect having been grounded on nothing, will also count for nothing. It cannot hold. It is hereby dismissed.

[c] **Whether the writ was improperly issued, and therefore liable to be set aside**?

The writ of execution in question was improperly issued and therefore liable to be set aside for a number of reasons.

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[1] 1995 [2] ZLR 17 [H]
[2] 1993 [2] ZLR 401 [S]

Rule 322 aforesaid clearly provides that the process for the execution of any judgment for payment of money, for the delivery up of goods or premises, or for ejectment, is by way of a writ of execution. The writ *in casu* purported to be for the payment of a sum of money that the respondent had allegedly recovered by a judgment of this court dated 16 January 2014. The order of this court dated 16 January 2014 was, of course, the one registering the arbitral award. It was not a judgment for the payment of any money. It was not a judgment for the delivery up of goods. It was not a judgment for any of the things mentioned in r 322. The court merely "***recognised***", albeit for enforcement, the arbitrator's award.

I find it intriguing that the respondent and his legal practitioners felt confident they could execute such an order which was in such raw a form. I also found it surprising that the Register could have issued a writ of execution in such circumstances. In *Matthews v Craster International [Private] Limited*[3] I refused an application for the registration of an arbitral award in favour of an ex-employee that, in part, awarded him "*cash-in-lieu of the leave he had acquired and not taken as at 4 September 2009 in line with the Respondent's leave policies*". In the course of my judgment I said:

> "As I understand them, the *ratio decidendi* of *Mandiringa & Ors*[4]and *Herbert Sauramba & Ors*[5]*, supra*, was that the purpose of registering an arbitral award in terms of s 98(14) of the Labour Act, is so that it can be enforced; that, as such, for one to sue out a writ of execution to enforce an arbitral award, it must necessarily sound in money, and that an award that does not specify the sum due is incomplete and incapable of registration as an order of this court."

At pp. 6 to 7 of my cyclostyled judgment I said:

> "… If an award is one that must sound in money and it is not, then, in my view, it is incapable of registration. It is incomplete. In this case, if the parties went for arbitration to determine the nature and quantum of the terminal package due to the applicant, then it is rather surprising that they came out of that arbitration with only two-thirds of the award having been quantified. An order that an employer must pay his ex-employee cash-in-lieu of the leave due to him and not taken for the period in question is not complete. Mr *Chagonda* argued that it was complete, because the leave days and their sum total were both capable of easy ascertainment. But that kind of approach is precisely what was rejected in the cases referred to above. In particular, in *Mandiringa & Ors*, MAKARAU J said[6]:

[3] HH 707-15
[4] *Mandiringa & Ors v National Social Security & Ors* 2005 [2] ZLR 329 [H]
[5] *Sauramba & Ors v Mitchells Bakery Mutare* HH 134-10
[6] At p 334B - C

> 'The awards did not compute the loss that each employer had to make good even if he chose to reinstate the respective applicant. It is conceded that while such computations are relatively easy by comparing what a similarly placed employee received in emoluments over the same period, **the issue remains that the quantum thereof is not part of the award made and was not determined as part of the arbitration proceedings in the presence of both parties**. It was not agreed upon in any one of the matters.'(my emphasis)

I agree with the learned judge's approach."

In casu, I still do agree with the learned judge's approach. A similar argument was proffered by Mr *Mahlangu*, for the respondent, that the amounts that the respondent had inserted in the writ had not only been easy to ascertain, but also that they had largely been computed by the applicant's own officials. But such an argument was dismissed in *Mandiringa*:

> "Such computations, no matter how accurate, are not part of the awards made by the arbitrators and have not been before any determining authority for quantification. They remain the claims that the applicants are making against their respective employers. A writ of execution cannot therefore issue in respect of such claims before they are made part of the arbitral award."

But even if Mr *Mahlangu's* argument was tenable, which it was not, the particular schedules relied upon by the respondent in the present matter had special problems of their own. The one schedule that the respondent claimed had been prepared by the applicant's own officials was not even signed. Yet there was provision for signatures by the applicant's Town Clerk and the Human Capital Director. Further, it was not clear for what particular purpose that schedule had been prepared. It certainly looked like a draft. It is immaterial that the respondent ended up paying the amount reflected on it, i.e. $70 870-24. The point is, it certainly had not been prepared for the purpose of the writ of execution, and the amount on it had not been sanctioned by the arbitrator in any arbitration process.

The second and third schedules that the respondent had prepared himself had further problems. Firstly, in the light of the arbitrator's award saying the respondent's entitlement to salaries and benefits as Chief Security Officer would terminate on the date when the two immovable properties would have been registered in the respondent's name, the question was: could the respondent nonetheless, recover salaries and benefits beyond that cut-off

point? Could he argue that the monetary portion of the severance package was still unpaid and that therefore, he was entitled to continue claiming to be an employee? This, of course, was hotly disputed by the applicant. So the issue had to be resolved first, not through unilateral computations of amounts, and the issuing of a self-serving writ of execution, but by further arbitration.

Secondly, the mere fact that the responded ended up revising upwards a portion of the amount that he had originally inserted in the writ, not just because he had had to take into account the month of September 2014, but also because it seemed he had miscalculated the original figures, showed that this was an arbitral award that was crying out for quantification.

Thirdly, the mere fact that the respondent, in the present proceedings, was now seeking an order for the payment of an amount, a portion of which had already been included in the writ that had already been issued, showed that, as the applicant argued, the respondent had put the cart before the horse. He did not have a judgment sounding in money against which he could have simply sued out a writ of execution.

Lastly, the Registrar issued the writ on the respondent's figures without hearing what the applicant had to say on them. That was an elementary misdirection and a breach of the *audi alteram partem* rule of natural justice.

For these reasons the writ of execution in question should be set aside.

[d] **Whether the respondent could properly seek an order for the payment of the amount in the counter-claim**

By now it should be obvious that the object of the respondent's counter-claim was improper, both substantively and procedurally. Mr *Mahlangu* tried to justify the counter-claim on the basis of expediency. He argued that it had been launched out of an abundance of caution in order to curtail any further litigation, seeing that the parties had been locked up in litigation for a very long time. He narrated how the respondent had suffered because of the applicant's intransigence, incompetence and negligence.

Mr *Mahlangu* also argued that once the arbitral award had been registered, it became an order of this court which the court could deal with as it deemed fit.

Mr *Kwaramba*, for the applicant, among others things, stuck to the argument that the arbitrator, having unequivocally pronounced that the respondent's employment as Chief

Security Officer, and his concomitant entitlement to salaries and benefits, would terminate once the immovable properties had finally been registered in his name, there was no question of the respondent continuing to claim being employed, and therefore, due a salary and benefits, beyond 20 March 2014 when the last of the properties had finally been registered in his name.

Mr *Kwaramba* persisted with that argument notwithstanding that the written agreement on the severance package had unequivocally stated that implementation meant three things, namely, payment of the monetary portion; execution of the agreements of the sale of the stands [i.e. transfer] and transfer of the motor vehicle. This was also notwithstanding the emphasis by the arbitrator that the absence of the conjunctives "**and/or**" after each such obligation, meant that until each one of them had been fulfilled the applicant would remain employed.

Sitting in 2010, the arbitrator could not have dealt with the monetary portion of the severance package beyond 31 July 2008 because at that time, it was not an issue before him. By 31 July 2008, the applicant had complied with the other two obligations, i.e. the monetary portion and the motor vehicle. It had partly complied with the third, i.e. one stand had been transferred and the transfer was pending in respect of the other. Therefore, the focus of the arbitrator, in fixing the cut-off date, was the property portion of the severance. That is why the clock would start to tick against the applicant from 1 August 2008 and continue to do so until such time as the remaining property was transferred.

After the arbitration, and given the problems the applicant subsequently encountered in trying to register transfer, thereby resulting in inordinate delays, the respondent went back to the pre-arbitration era, retrieved the severance package, and claimed such further salaries and benefits as he deemed had accrued to him beyond 31 July 2008. And when, the last of the properties was finally registered on 20 March 20014, the respondent again deemed that he was due further salaries and benefits up until the date when he would be finally be paid his emoluments that were accruing monthly. The situation was not helped by the fact that the applicant was in arrears with the salaries and benefits for all persons in its employ. This meant that for the respondent, riding on the severance package, and the way the implementation clause had been interpreted, would remain employed, a situation which

would then give rise to further claims of salaries and benefits, thereby generating further arrears, *ad infinitum*.

But before me the point was not, or could not have been, whether or not the respondent could legitimately continue to claim to be employed, and therefore due a salary and benefits *ad infinitum*, or until the severance package agreement had somehow, come to an end. That was an issue for arbitration. The original arbitration had not concluded the matter. It had only dealt with issues current at the time. Even then, the award had not been quantified. Even if it had been registered, it was not executable in its current form. But even if the Registrar had somehow been convinced to issue a writ against a judgment not sounding in money, but nonetheless claiming money, it was not correct for the respondent, under the guise of a counter-claim, to seek to sanitize such procedural filth. Expediency or abundant caution did not come into it.

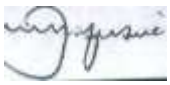
In the circumstances it is hereby ordered as follows

1 The writ of execution issued out of this court on 12 September 2014, in the case under the reference number HC 5536/13, is hereby set aside;

2 The respondent's counter-application is hereby dismissed;

3 The costs of the application and of the counter-application shall be borne by the respondent.

30 November 2016



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