IMPERIAL REFRIGERATION (PVT) LTD
versus
WILLARD MABVUWA
and
THE SHERIFF, HIGH COURT, HARARE N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 4 and 10 November, 2016

**Urgent Chamber Application**

*M.C Mukome,* for the applicant
*H. Mutasa,* for the 1st respondent
No appearance for the 2nd respondent

MANGOTA J: The applicant and the first respondent had an employer-employee relationship. They had a labour dispute. They took it to the arbitrator.

The arbitrator awarded $17639 to the first respondent. The award was broken down as follows:

(a) back - pay $7593
(b) cash in lieu of leave $ 902
(c) damages for loss of employment $9144

The applicant appealed to the Labour Court against the arbitrator's decision. Its appeal was filed under case number LC/H/483/15.

Before the appeal was heard, the fist respondent successfully applied for registration of the arbitral award. Its application was filed on 8 June, 2015. He filed it under case number HC 4329/15. He also filed his notice of response and grounds of opposition to the appeal. He did so on 18 June, 2015.

Following the successful registration of the arbitral award, the first respondent instructed the second respondent to attach from the applicant's business premises property which is mentioned in the notice of seizure and attachment. The notice, Annexure F, was

attached to the urgent chamber application. The annexure gave 2 November 2016 as the date of removal of the goods.

The attachment of the property gave birth to the present application. The applicant moved the court to stay execution of the judgment which was under case number HC 4329/15. It stated that the first respondent misled the Labour Court into dismissing its appeal. It said it had since applied for rescission of the default judgment which dismissed its appeal. The rescission application was, according to it, pending determination at the Labour Court.

The applicant averred that the dismissal of its appeal came as a surprise to it. It stated that the dismissal was based on the allegation that it did not file its heads with the Labour Court. It said its legal practitioners made a follow up of the demise of its appeal. These, it averred, discovered that:

"(i) the first respondent cited a wrong case number when he filed his notice of response to its appeal. He cited case number LC/H/541/11 instead of the correct case number LC/H/483/15.

(ii) the notice, it said, was received by its legal practitioners' secretary who, because of the wrongly cited case number, placed it in a file which did not relate to the appeal. She placed the notice of response in a file which related to the first respondent's disciplinary hearing- a matter which the applicant's legal practitioners had dealt with earlier on.

(iii) the secretary, it alleged, did not draw her employer's attention to the existence of the first respondent's notice of response. She, it said, was no longer within the employment of the applicant's legal practitioners.

The applicant attached to its application Annexures H and I. The first annexure, it said, was the first respondent's notice of response which he served upon the applicant's legal practitioners. The second annexure, it averred, was the same notice which he filed with the registrar of the Labour Court.

The applicant claimed that the citation of the wrong case number enabled the first respondent to snatch at the judgment which he got when its appeal was dismissed. It stated that the first respondent's legal practitioners realised the anomaly wherein they had cited a wrong case number. These, it submitted, clandestinely rectified the case number on Annexure I which they filed with the Labour Court registrar. It stated that they crossed out case number

LC/H/541/11 and substituted it with case number LC/H/83/15. It contended that the first respondent should have sought its consent or should have made a formal application for an amendment of the wrongly cited case number. It insisted that, at the very least, the first respondent should have advised it of the correction of the case number. It stated that the Labour Court's dismissal of its appeal was a nullity. It said it had very good prospects of success with its appeal. It submitted that it would suffer irreparable harm if it was made to pay the first respondent what was not due to him. It moved the court to grant the interim relief to it.

The first respondent raised two *in limine* matters. He also raised a third preliminary issue during submissions. His two preliminary matters were that:

(a) the application was inherently defective for want of compliance with r 241 (1) of the rules of this court; - and

(b) the application was not urgent.

He, as a third preliminary matter, objected to the filing of the applicant's answering affidavit. He said there was no rule which allowed the applicant to file an answering affidavit in an urgent chamber application. He stated, on the merits, that the applicant's grounds of appeal had no merit. They were, according to him, frivolous and vexatious. He insisted that the Labour Court had already dismissed the appeal. He said it was unreasonable for the applicant to suggest that it was unaware of the opposition to its appeal. He stated that the applicant did not deny that a notice of response was served upon it. He said his grounds of opposition which were attached to the notice of response bore the correct case number. He insisted that the applicant's legal practitioners were grossly negligent when they filed away the notice of response which had been served upon them. He averred that the endorsement of the correct case number on his notice of response was effected before the same had been issued and served. He stated that the applicant's appeal was correctly dismissed for want of compliance with the rules of the Labour Court. He said it was absurd for the applicant to assert that it had prospects of success in a matter which had already been dismissed. He moved the court to dismiss the application with costs on a higher scale.

It was common cause that the applicant's property was attached on 28 October, 2016. It was also common cause that it filed this urgent chamber application on 1 November, 2016. The application was, in other words, filed three days after the attachment. It could not be said

that the applicant did not treat the matter which confronted it with the urgency which it deserved. It acted with extreme haste to protect its interests.

The first respondent's assertion was that the application was not urgent. He said what was before the court fell into what was normally referred to as self-created urgency. He referred the court to the letter which he addressed to the applicant on 18 May, 2015. He attached the letter to his opposing affidavit. He called it Annexure L. The letter read:

> "Dear Sirs
>
> RE: WILLARD MABVUWA V IMPERAIL REFRIGERATION
>
> We refer to the above matter and to your letter of 12 May 2015.
>
> You may have received a copy of the Arbitral Award on 7 May 2015 as you say, but certainly, you have been aware of its existence since as far back as 27 March 2015 when we notified you of that award. In view of the long winding route that our client has had to follow in pursuit of relief, we have been instructed by him to procure that this matter is closed without any further unnecessary delays. Therefore, we bring to your attention that as soon as the Award is registered, the necessary steps for its execution will be taken unless payment is received in the interim…." [emphasis added]

It was on the basis of the contents of the cited letter that the first respondent insisted that the present application was not urgent. He said what the applicant did *in casu* was self-created urgency. He submitted that the need for the applicant to act arose as at the date of the letter and not when the applicant's goods were attached.

The applicant's response, with which the court agreed, was that the letter was an expression of the first respondent's intention to execute upon the award. It submitted that the first respondent could not use the contents of the letter as a basis of stating that the application fell into what the rules of this court and case authorities referred to as self-created urgency. It stated, and correctly so, that if the letter had been written after the award had been registered, its contents would have carried more weight than it did in the form in which it appeared on 18 May, 2015.

The applicant could not, in the court's view, have acted upon the contents of the letter. It was clear in its mind that no execution would be allowed to occur on the basis of the letter. It was also clear that, if an application for the registration of the award was filed and it opposed the same, registration of the arbitral award might, or might not, have occurred. It would have indeed been naïve in the extreme for the applicant to have sought to act on the

letter which the first respondent addressed to it on 18 May, 2015. The first respondent's submission on the issue of what he termed self-created urgency was, therefore, without merit.

The first respondent's second preliminary matter related to the applicant's alleged non-compliance with r 241 (1) of the High Court Rules, 1971. He submitted that non-compliance with the rule rendered the application fatally defective.

The applicant, in response, referred the court to r 244 of the rules of this court. He stated that the rule laid out the parameters of how urgent chamber applications were prepared and filed.

The broad title under which rules 241 and 244 as well as other rules in the section fall makes reference to chamber applications. Rule 241 refers to the form of chamber applications. Rule 244 refers to such applications as the present one. It, in short, refers to urgent applications.

Rules 241 and 244 do not, in the court's view, assume the respective relationship of genus and species. One is not governed by the other for its existence and/or operation.

Rule 244 insists upon the fact that an urgent chamber application should be accompanied by a legal practitioner's certificate. The certificate, it says, must show two things. These are that:

(i) the matter is urgent- and

(ii) the reasons for the urgency should be stated in the certificate.

The moment that the above mentioned two matters appear in the legal practitioner's certificate, the court would not treat the application placed before it as anything else other than an urgent chamber application. That would be so notwithstanding the fact that the applicant has, or has not, complied with r 241 (1) of the High Court Rules, 1971.

The application which was before the court fell under r 244 of the rules of this court. It, to all intents and purposes, complied with that rule. Whilst it did not set out in summary the basis of the application as is stated in Form 29 B, the application could not, in any way, be regarded as anything other than an urgent chamber one.

It was on the basis of the argument which the first respondent advanced that those who drafted the High Court Rules 1971 saw it wise to insert into the rules of this court r 4C. The rule was specifically designed to offer a leeway to the court to arrest a situation where a party whose case was next to nothing would get away from a very serious case on the basis of

technicalities. Consequently, where in the opinion of the court, an injustice would result from a decision which is premised on technicalities, r 4C allows the court to make a departure from its rules. The departure would be in the interest of attaining justice as between the parties.

The current is one such application where the court, as would unfold in the subsequent portions of this judgment, decided to, and did actually, invoke r 4C of the High Court Rules, 1971. The court was, on the mentioned basis, satisfied that the application was not fatally defective as the first respondent claimed.

The first respondent's last *in limine* matter was that the applicant was precluded from filing an answering affidavit. He submitted, on that point, that no rule allowed the filing of an answering affidavit in an urgent chamber application. He strenuously opposed the filing of the answering affidavit by the applicant.

The applicant's response was that there was no rule which stated that the applicant could not file an answering affidavit in an urgent chamber application. It submitted that the court had a discretion to accept, or not to accept, its answering affidavit.

The applicant and the first respondent appeared to have been correct on the point in issue. Neither party could point to any rule which supported its side of the case. There is, it was observed, a defect in the rules of court.

Rule 234 which could have cured the defect was inapplicable to the present application. The rule deals with court, as opposed to chamber, applications. The two sets of applications are separate and distinct from each other.

It was on the basis of the above observed matters, therefore, that the court did not have any difficulty in sustaining the first respondents' objection. The objection did not, however, materially adversely affect the application.

The substance of the application raised more questions than it provided answers to them. The court's attention was drawn to Annexures H and I which the applicant attached to its founding affidavit. The annexures were one and the same document. They constituted the first respondent's notice of response to the applicant's notice and grounds of appeal against the arbitral award.

The appeal was filed under case number LC/H/483/15 It was served on the first respondent. He filed his notice of response under case number LC/H/541/11. He attached to

his notice of response his grounds of opposition. These were correctly filed under case number LC/H/483/15.

The first respondent could not, and did not, explain what caused him to file his notice of response under case number LC/H/541/11. He also could not, and did not, offer any explanation as to why he filed his grounds of opposition under the correctly cited case number LC/H/483/15.

Having served upon the applicant's legal practitioners his notice of response [LC/H/541/11] to which his grounds of opposition [LC/H/483/15] were attached, the first respondent altered the case number which appeared on the notice of response which he filed with the registrar of the Labour Court. He crossed out case number LC/H/541/11. He, in hand written ink, corrected it to read LC/H/83/15. The hand written number appeared to have been an effort on his part to write the correct case number on the notice of response which he filed with the registrar of the Labour Court.

The first respondent did not give any reason for having conducted himself in the manner which he did. He did not tell the Labour Court nor the applicant of what he had done. He, in the process, misled the Labour Court and the applicant.

The applicant's legal practitioners' secretary who received the notice of response to which the grounds of opposition were attached did not, in all probability, think that what she had received related to the applicant's appeal. The wrong case number which appeared on the notice of response must have misled her in a material way. She, not unnaturally, did not see the need to draw the attention of her employers to the anomaly. These, on their part, labored under the genuine but mistaken belief that the appeal which they filed on behalf of the applicant was not opposed. They must, therefore, have been thoroughly surprised when they learnt that their client's appeal had been dismissed on the basis that they had not filed their Heads.

The Labour Court registrar should have been more circumspective than he did in regard to the process which the first respondent filed. He should have observed that the correction of the case number in handwritten ink called for some explanation from the first respondent's legal practitioners. He should, in short, have insisted on the point that the first respondent's legal practitioners notify the applicant's legal practitioners of the correction

which they had effected on the notice of response. He, for some unexplained reason, did not perform his duty diligently in the mentioned regard.

The fact that the first respondent's notice of response which bore a case number which did not correspondent with that of the applicant's notice and grounds of appeal found its way into the correct record at the Labour Court remained inexplicable. That was more so than otherwise particularly when regard was had to the fact that both LC/H/541/11 and LC/H/83/15 were not corresponding to the file's correct appeal court case number – i.e LC/H/483/15. Short of collusion between the Labour Court registrar and the first respondent's legal practitioners the occurrence defied common sense and logic.

The observed occurrence misled both the Labour Court and the applicant. The first respondent, no doubt, snatched at a judgment to which he was not entitled. He, or his legal practitioners, made every effort to ensure that the applicant's appeal would not see its day in court.

The conduct of the first respondent's legal practitioners did, in the court's view, exhibit a disturbing degree of dishonesty. They did not have the courtesy to advise the applicant's legal practitioners of what they had done on behalf of their client. They must have been clear in their mind that the applicant's legal practitioners would most probably act upon the wrong case number which they had cited. They appeared to have made every effort to achieve their desired and - in - view in the mentioned regard. Their assertion which was to the effect that the applicant's legal practitioners acted grossly negligently by not perusing the grounds of opposition which they attached to the notice of response was thoroughly misplaced. They should, in every aspect of this matter, have been candid with the Labour Court as well as with the applicant. They were not. They could not, therefore, be allowed to blow both hot and cold as they did *in casu.*

The court has considered all the circumstances of this case. It was satisfied that the applicant proved its case on a balance of probabilities. The application is, accordingly, granted as prayed.

*M.C. Mukome*, applicant's legal practitioners
*Gill, Godlonton & Gerrans*, 1st respondent's legal practitioners