

JOSHUA KACHASU
and
SUNNINGDALE 2 MEDICAL CENTRE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 11 March & 27 November 2024

Opposed Court Applicant

M K Masasike, for the applicant
S Shonai, for the respondent

TAKUVA J:

This is a court application for summary judgment in terms of Rule 30(1)(2) of the High Court Rule 2021.

BACKGROUND FACTS

Applicant was employed by the respondent. The latter terminated the contract of employment. Applicant was aggrieved and he filed a claim against respondent with the National Employment Council for the Medical Industry. The matter was determined by a DESIGNATED AGENT of the NEC for the Medical Industry who ordered that respondent pays a total sum of US\$10366.62 or equivalent being back pay and damages in lieu of reinstatement. The respondent failed to pay the amount so ordered resulting in applicant issuing summons in this Court against respondent claiming US\$10366.62 or its equivalent. Respondent entered an appearance to defend. Applicant believed that the appearance to defend has been filed solely to delay the inevitable as there is no genuine or sincere defence that can be raised by the respondent.

APPLICANT'S CASE

Applicant applied for summary judgment seeking the following order;

“1. The application for summary judgment be and is hereby granted,

2. The respondent be and is hereby ordered to pay applicants a total sum of US\$10366.62,
3. The respondent to pay costs of suit on an attorney client scale.”

The applicant seeks to enforce the determination hence the filing of this application. It is applicant’s contention that the deponent to the opposing affidavit has no authority in that there is no resolution authorizing the same to act on behalf of the respondent.

Further, it was submitted that there are no pending cases before this Court or the Labour Court for the simple reason that the summons for Provisional Sentence matter has been withdrawn while the application for condonation was dismissed by the Labour Court. Applicant argued that a determination issued by the Designated Agent is final and definitive. If aggrieved by it, one can only seek its setting aside either by appeal or review by the appropriate court.

In *casu*, the determination remains extant and has not been complied with. The provisions of the Labour Act do not provide ways of enforcing a determination. It can not be registered like an arbitral award or a labour court order. The only way of enforcing the order is through action procedure and treat the determination as a liquid document. Applicant relied on *Chiwenga v Chiwenga SC 2/14*.

C.F.U. v Mhuro and Ors 2000(2) ZLR 405(S). *Zimbabwe Rural District Council Workers Union v Nyanga Rural District Council & Ors* HH 11822 where the Court stated that “the determination by the Designated Agents can form the basis of proceedings for judgments from this Court in much the same way as liquid documents are.”

Finally, it was argued that *in casu*, the determination being unchallenged qualifies as a liquid document. The determination issued created a new cause of action for purposes of its enforcement. It was submitted that the appearance to defend has been essentially filed to delay the execution process and frustrate the applicant from enjoying his money.

RESPONDENTS’S CASE

The application was opposed by the respondent who raised *Lis Pendenis* as a point *in limine*. The argument is that this matter is pending before the courts under case numbers HCH 281/22 and LC/H/781/22. In the former, a summons was issued by Musoni Masasire Law Chambers in 2022 but on 15 March 2023, Masasire Law Chambers filed a notice of withdrawal before Musoni Masasire Law Chambers renounced agency. Masasire Law Chambers simply

assumed agency. According to the respondent, applicant's conduct violated Rules 9(1) and 9(5) of the High Court Rules 2021. As a result, so the argument goes, the matter in HC 6281/22 was not withdrawn and it is still pending in this Court. Case No. LC/H/781/22 is still pending since judgment was reserved in 2022.

On the merits, respondent submitted that the determination is unenforceable in that it refers to one Joshua Kachasu Geza and not to the applicant. Further, it was contented that the award refers to a figure of US\$7771.22 not US 10366.62. Also, respondent is contesting the NEC determination in the Labour Court under case No. LC/H/781/22 (an application for Condonation for late filing of Review of the NEC determination).

Since summary judgment is an extra-ordinary and drastic remedy which negates the benefits of the *audi alterain partem* principles, it should be exercised cautiously to enable respondent to plead his defence to the applicant's claim.

Respondent submitted that NEC determinations are not convertible to begin with, they are just determinations which do not require any conversion. According to the respondent, there is no law that empowers courts to convert such determinations. Also, there are no enforcement mechanisms of the NEC determinations in the Labour Act.

Respondents insisted that it has a valid and bona fide defence to the applicant's claim. Respondents prayed for the dismissal of the application for summary judgment.

ANALYSIS

In, *Bastin v Madima* NO 2020(1) 542(S) at 548D – E it was held that while summary judgment is an extra ordinary remedy given that it deprives a litigant, desirous of defending an action, the opportunity to do so without regards to the *audi alteram partem* rule, it has always been granted by the courts to an applicant possessing an unanswerable case. It is trite that such applicant should not be delayed by resort to a trial, whose outcome is a foregone conclusion. It is also trite that in order to defeat an application for summary judgment, a respondent must set out a *bona fide* defence with sufficient clarity and completeness to enable the court to decide whether the opposing affidavit disclose facts which if proved at the trial, would entitle the respondent to succeed.” See also *Kingston Ltd v L D Ineson (Pvt) Ltd* 2006(1) ZLR 45(S) at 458F – 459A.

In the present matter, the respondent has reached that threshold in that he has raised in its opposing affidavit the defence of *lis pendenis* with sufficient clarity an completeness. The

opposing affidavit discloses facts which if proved at a trial, would enable the respondent to succeed. It also challenges the appropriateness of the procedure adopted by the applicant to enforce a determination by a Designated Agent.

In my view, these are genuine and sincere defences to the applicant's claim. The nature and grounds of the defence and the material facts relied upon by the respondent have been fully disclosed. It is only just and fair that the legal points raised be fully ventilated during a trial.

In the circumstances, I take the view that summary judgment is an inappropriate remedy. Accordingly, it is ordered that;

1. The application for summary judgment be and is hereby dismissed with costs.
2. The action shall proceed as if no application for summary judgment had been made.

Masasire Law Chambers, applicant's legal practitioners
Shonai Law Chambers, respondent's legal practitioners

TAKUVA J:.....