WICKBURY INVESTMENTS WORKERS COMMITTEE
versus
WICKBURY INVESTMENTS (PVT) LIMITED
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE,8 November & 21 November 2018

Opposed application

P Musendo, for the applicant
No appearance for the 1st respondent

MUZENDA J: The applicant's members have been employed by the first respondent. On the 5th of February 2014 the employees were awarded $59 246-85 by Hon N.A. Mutongoreni, the Arbitrator. On the 24th of September 2015 the award was registered by this court under HC5433/15. The second respondent executed the order but could not collect the whole amount, a balance of $8 302.72 remained outstanding. The applicant reinstructed the Deputy Sheriff for a second chance. The first respondent filed an urgent chamber application on the 4th of August 2017 under HC 7246/17 for an interdict. On the 9th of August 2017 the urgent chamber application was removed from the roll for lack of urgency.

On the same date, 4 August 2017, the first respondent simultaneously filed an application for rescission of the registration of the arbitral award under HC 7245/16. On the 17th of August 2017 the first respondent made yet another urgent chamber identical to the 4th August 2017 one and the applicants opposed it, but erroneously cited the wrong case member, instead of citing HC 7591/17, they cited HC 7246/17. Due to the wrong case number, the 17 August 2017 application for interdict was heard unopposed on the roll of 4th of October 2017. On the 10th of October 2017 the second respondent informed the applicant of this Order of the 4th of October 2017. On the 17th of October 2017 the applicant filed the current application for rescission of judgment.

Applicant's representative in his affidavit contends that the applicant was not in wilful default. The application under HC7591/17 was filed on 17 August 2017 and it filed its papers on the 28th of August 2017 and served on the 29 August 2017. The first respondent noted the

typing error and nonchalantly took advantage of this and snatched a judgment. Otherwise from the onset applicants were desirous of opposing the application.

The applicant adds that the 17th August 2017 application was wrong at law, it was made when HC 7246/17 was extant. Hence the applicant had a good defence of *lis pendens*. On the other hand the first respondent does not dispute the Arbitral Award and up to this date had not done anything to upset the substantive award. The application by first respondent to have the registration of the award by this court is thus doomed. There is no appeal against the award. The judgment has by now been executed on substantially save per the balance of $8 302.72. It further argues that this court does not concern itself with the merits of the Labour Court awards but the registration of an award for enforcement purposes, the first respondent badly intends on buying time. All the three applications at the instance of the first respondent are unmerited, it argues.

The applicant also prayed that in the granting of the application for rescission, the first respondent should pay costs on a punitive scale. After having snatched a judgment it persists in opposing its rescission.

The application is opposed by the first respondent. The first respondent raised a point *in limine* arguing that the present application is not properly before the court as there is no applicant who has the requisite *locus standi* to appear before the court and be heard in terms of the law. The applicant is not a legal persona. On the other hand it contends justifying its application for rescission of the registration of the award by arguing that this court has inherent powers to correct its own judgment. It also argued that it is at the risk of being sued by its employees and will end up paying the employees twice. It also justified its application for an interdict on the grounds that it had already made two instalment payments to the applicant's legal representative in terms of a deed of settlement reached between the two parties, yet its property was still being attached. The first respondent suggested, in line with its point *in limine*, that each employee ought to have been cited individually so as to enable first respondent to specifically perform its contractual obligations in terms of the contract of employment. It denies any contractual nexus between itself and the applicant. The applicant lacks prospects of success on the matter. It adds that the registration of the arbitral award was in error and that registration must be rescinded. It also went on to point out that there is no proof of how the applicant reached the balance of $8 302-72 and which employees remain unpaid. On the issue of the outstanding application, it argues that it had been withdrawn.

The cited cases by the applicant do not relate to each other, the first respondent contends. It disputes that there was no typing error by the applicant. The application by the applicant is frivolous. It denies snatching a judgment. It admits that this court is not concerned with the merits of Labour Court Awards but has the jurisdiction to control any wrong in a judgment. It applies that the application be dismissed with costs on a higher scale.

The following aspects are not in dispute. There is an arbitral award in favour of the employees which was competently registered by this court. After registration the order was executed upon and after execution a balance remained outstanding. The application of the first respondent under case number HC7591/17 was heard unopposed due to a wrongly cited case reference number but the applicants had filed opposing papers on 28 August 2017. What is in dispute is whether that default judgment granted on 4 October 2017 should be rescinded or not.

Having heard both parties in this application it is now trite law that in terms of r 63 (1) a party against whom in default judgment has been granted is permitted to apply for the setting aside of such judgment and in terms of r 63 (2) the court is satisfied that there is good and sufficient course to do so it may set aside the judgment concerned.

The first respondent raised a point *in limine*. I agree with the applicant's counsel that the point *in limine* should have been properly dealt with by the Arbitrator and dispersed with. In any case if the application for rescission is granted parties will be free to argue on the subject again and an appropriate order will be given.

I will dismiss the point *in limine*.

The factors/or grounds to be relied upon by the court in an application for rescission of judgment are now crisply common course. The court has to look at the reasonableness of the applicant's explanation for the default, the *bona fides* of the application to rescind the judgment, the *bona fides* of the defence of the merits and finally the prospects of success of the defence.

(See *Collen Kwaramba* v *Winshop Enterprises (Pvt) Ltd & Ors* HH 788-15) and the plethora of authorities therein cited. In this application the central issue is the wrongly cited case number shown on the applicant's opposing papers. I am satisfied by the applicant's explanation on the events leading to the granting of the default judgment and conclude that the applicant was not in wilful default. The applicant has met the requirements of r 63 and the default judgment of the 4th of October 2017 is rescinded.

The judgments attached by the applicant show that the applicant wrongly cited the case number and hence the opposing papers were not considered by the court on 4 October 2017 or

were not even before the court. The first respondent's legal practitioners even after having been served with the same papers on 29 August 2017 did not inform the applicant about this and joyously proceeded to apply for default judgment on 4 October 2017. It did not even bring it to the attention of the court that the application was opposed by the applicant but a wrong case number had been cited. After it was brought to the first respondent's attention that the applicant was seeking rescission premised upon that the first respondent persisted in its opposing the application. This must be discouraged at all costs and given the conduct of the first respondent in this application, costs on a punitive scale are justified, accordingly it is ordered as follows:

(a) The default judgment granted in matter number HC 7591/17 in 1st respondent's favour on the 4th of October 2017, be and is hereby set aside.
(b) Applicant is ordered to file its opposing papers within 10 days from the date of this order.
(c) 1st respondent to pay costs of this application on an attorney-client scale.

Kamusasa & Musendo, Plaintiff's Legal Practitioners