TRUST ME SECURITY ORGANISATION
versus
LUCIA MARARIKE
and
JESSY CHIKWIRA
and
MESSENGER OF COURT N.O.
and
THE CLERK OF COURT CIVIL MAGISTRATES COURT N.O.
and
PROVINCIAL MAGISTRATE N.O.

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 17 and 24 June 2014

Urgent chamber application

C.K. Mutevhe, for the applicant
T. Moyo, for the respondent

MANGOTA J: The present application which the applicant filed with the court on 9 June, 2014 was referred to me for my attention. When I went through the application, I noted that the event which the applicant wanted arrested had already taken place. I accordingly endorsed on the face of the application the words "the application has been overtaken by events and hearing it would not save any purpose". The endorsement which I made on the morning of 11 June, 2014 was as a result of what the applicant had stated in its founding affidavit. It said:

> "The 3rd respondent has since attached applicant's property and removal has been set for the 10th of June, 2014" (emphasis added)

Following this seemingly simple disposal of the matter which had been placed before me, the applicant filed a supplementary affidavit advising the court that the first and second respondents' representatives agreed that the removal of the attached goods be suspended pending the determination of the applicant's urgent chamber application or a mutual resolution of the issues which existed between the parties. Paragraphs 2 and 3 of the applicant's supplementary affidavit are pertinent to the court's reconsidered opinion to hear the application. The paragraphs read:

> "2. Considering execution was scheduled for the 10th of May, 2014 the application filed on the 9th of June, 2014 only appeared before the judge on the 11th after the date

> scheduled for the removal hence the Honourable Justice MANGOTA noted that the application had been superseded by events consequently applicant responded in a letter dated 11 June 2014 attached as Annexure A and herein furnishes further information to paragraph 14 of the founding affidavit;
> 3. Though attachment was scheduled for the 10th of June 2014, the applicant's legal practitioners and the 1st and 2nd respondents' representatives Zimbabwe Security Guards Union have agreed that the said removal be suspended until the 13th of June, 2014 pending either a determination on the urgent chamber application or a mutual resolution of issues between the parties".

The supplementary affidavit which the applicant filed with the court and served on the respondents persuaded the court to entertain the application which was set down for hearing at 10 am of Friday, 13 June, 2014. On the mentioned date and time, the parties duly appeared and counsel for the first and second respondents requested that he be given time within which he would receive instructions, study the application and do justice to the respondents' case. The matter was, by consent of all the parties who were then present, postponed for hearing at 9:00 am of Wednesday 18 June, 2014. The postponement was subject to the fact that the parties would allow the *status quo* to remain until the hearing and the determination of the application.

The first and second respondents filed their opposing papers on Tuesday 17 June, 2014. The third, fourth and fifth respondents who were cited in their respective official capacities as the messenger of court, the Clerk of Magistrates' Civil Court and the Provincial Magistrate did not appear in person or through legal representation. The court remains of the view that all the three will abide by the decision which will have been reached.

The papers which are filed of record show that the applicant and the first two respondents were embroiled in two labour disputes both of which ended up with Honourable Arbitrators R.E Nhiwatiwa and P. Shawatu for arbitration. Arbitrator Shawatu's award was issued on 30 January, 2013 and Arbitrator Nhiwatiwa's award was issued on 17 April, 2013. Both arbitral awards were issued in favour of the first and second respondents who, in the first case, raised the complaint of under - payment of wages, non-payment of overtime, leave pay and gratuity. In the second case, the two respondents raised the complaint of non-payment of wages and terminal benefits.

Armed with the two arbitral awards, the first and second respondents approached the fourth and fifth respondents with a view to having the arbitral award of 17 April, 2013 registered and enforced against the applicant. The applicant was not aware of the four respondents' move until on 5 June, 2014 when the third respondent called at the premises of the applicant on whom he served notice of attachment of the applicant's property and setting

10 June as the date of removal of the same. The gravamen of the applicant's complaint was, or is, that the arbitral award of 17 April, 2013 was not registered with the Magistrate's Court and service upon it of the warrant of execution as well as the notice of attachment and removal of its property came to it as a surprise as no process was served upon it for the registration of the arbitral award (emphasis added). It stated that the removal and sale of its property based on an unregistered arbitral award would visit it with untold hardship as its operations would be5r crippled.

The first and second respondents filed their opposing papers to the application. They raised one preliminary matter after which they proceeded to address the court on the substantive aspects of the application. The matter which the respondents raised *in limine* was that the deponent to the applicant's founding affidavit did not have the applicant's authority to depose to the same. That matter was, however, disposed of when, on 18 June 2014, the applicant filed with the court the resolution which authorised the deponent to represent the applicant in legal proceedings which challenge the arbitral awards involving the applicant and the two respondents.

On the substance of the application, the respondents stated that the manner in which the parties were cited was rather tardy and somewhat vexatious. They contended that the relief which the applicant was or is seeking had very little or no bearing on the third, fourth and fifth respondents. The applicant's position on the matter was that the conduct of the fourth and fifth respondents created the unpalatable situation in which the parties were currently labouring under. It submitted that the directive which the fifth respondent displayed at the Magistrates' Court stated that any party with an arbitral award who intends to register it with the Magistrate's Court as provided for in terms of the Labour Act [*Cap 28:01*] should submit such award and a draft warrant of execution which when issued instructs the Messenger of Court to execute (emphasis added). The fourth respondent, the applicant claimed, issued the warrant of execution in respect of the arbitral award which had been made in favour of the first and second respondents on 17 April, 2013. It is this issued warrant of execution which the third respondent based his action upon when he proceeded to attach the applicant's property, the applicant said. It, accordingly, prayed the court to declare that the directive which the fifth respondent issued was or is unconstitutional. The directive, it said, violated its constitutional right to administrative justice as contained in s 68 of the constitution. It stated further that the directive violated the rules of natural justice which are embodied in the *audi alteram partem* rule.

Looked at from the abovementioned perspective, the applicant cannot be faulted when it cited the third, fourth and fifth respondents as it did. The fourth and fifth respondents are the major cause of its concern. The third respondent, in the court's view, acted pursuant to the directive of the fifth respondent which directive the fourth respondent translated into what may be regarded as an order of the Magistrate's Court through which order the arbitral award of 17 April, 2013 was apparently registered for purposes of having it enforced.

The first and second respondents spent a great deal of their time lecturing the court on the obvious. They centred most of their submissions on wanting to convince the court of this simple fact which is that the Labour Court and arbitrators who are appointed in terms of the Arbitration Act [*Cap 7:15*] have inherent and exclusive jurisdiction in all labour matters. They submitted that the directive which the fifth respondent issued and displayed at the Magistrate's Court was or is in sinc with s 92 B (3) of the Labour Act, [*Cap 28:01*]. They argued and stated that, in terms of the wording of the mentioned section, registration of an arbitral award was an event which was completed by the submission of the award to a court which has jurisdiction over the registration of the award. They, in this regard, referred the court to three case authorities which they said supported the view which they held and hold of the matter. The cases in question were those of:

(a) *Tapera and 17 others* v *Field Spark Investments* HH103/13

(b) *Brian Muneka & 5 others* v *Manica Bus Company*, HH30/13 – and

(c) *Vasco Olympio & 4 others* v *Shomet Industrial Development*, HH191/12

All the abovementioned three cases involved registration of arbitral awards for purposes of having them enforced. A reading of the cases in question shows that the arbitral award winning parties did not just submit their arbitral awards to the court(s) which had jurisdiction to register the awards. The parties went by way of application and serving their respective applications on the respondents when they sought to have the awards which had been made in their favour registered for purposes of enforcing them. That, in the court's considered view, is the correct position of the law on the matter. The registration of a Labour Court order or an arbitral award is not an event but a process.

The legislature, it hardly requires any emphasis, conferred on the Labour Court and arbitrators who are appointed in terms of the Arbitration Act inherent and exclusive jurisdiction to hear all labour disputes as well as to make orders, decisions and determinations on the same. The legislature, however, deprived the Labour Court, arbitrators and such like tribunals which are set up to hear and determine labour matters the power to enforce their judgments, orders, determinations or decisions. It reposed such powers of enforcement in the

magistrates' court or the High Court depending on the monetary value of the order or award which is intended to be registered for purposes of enforcement. The questions which must be asked and answered in respect of this part of the case are:

(i) why should the order or the award be registered – and

(ii) what process must be involved in the registration of the order or award.

It goes without saying that the Labour Court or the arbitrator's award is, by the process of registration, turned into an order of the court in which the order or award is being, or has been, registered. The registration exercise converts the Labour Court order, award, decision or determination into a civil judgment of the court in which such order, award decision or determination has been registered. The question which begs the answer at this stage of the proceedings is that which centres on how the substantively made order of the Labour Court or the arbitral award converted into a civil judgment of the court in which the order or award is being, or has been, registered. There are two known processes through which a court is clothed with the power to make an order. The processes in question may be by way of action or application (emphasis added). Litigants who want to register orders or awards which the Labour Court or arbitrators grant to them do, invariably, employ the application mode of having their orders or awards registered with the magistrates' court or the High Court. The application procedure which they adopt places a duty upon them to notify the other party of their intention to register and enforce the order which had been awarded in their favour by the court *a quo*. The aggrieved party has every right to acquiesce to, or to oppose, the registration of the Labour Court order or the arbitral award. However, as soon as the order or award has been registered with the relevant court, the order or award assumes the meaning and content of a civil judgment of the court in which the award or order has been registered. Once it has taken that substantive content the civil judgment becomes executable.

It is a cardinal rule of our procedure and practice that parties who bring matters to court or to the arbitrator must be allowed to participate at every stage of the proceedings which are before that court or arbitrator. They must be heard when the matter is set down for hearing, when judgment is pronounced for or against them and when, as *in casu*, the award winning party moves the relevant court in the form of an application to have the award which was issued in its favour registered for purposes of having it enforced. The word order which appears in s 92 B(3) of the Labour Act does contemplate the fact that the registration of the order or award turns it into an order of the court in which the order or award is registered.

The directive which the fifth respondent issued and displayed at his court does, with respect, set a dangerous precedent which cannot be allowed to stand. The directive gives the distinct impression that courts allow parties who approach them in search of justice to ambush each other as persons who are playing a game of cards are, more often than not, inclined to do. It runs contrary to some long established principles of natural justice and rules of courts of all levels and it, in the process, places the due administration of justice into very serious dispute. The fifth respondent issued it in the hope, it is the court's view, that it would assist in the immediate disposal of such cases as the present one which is labour related. The directive, however, remains unclear as regards the designation of the court official who is clothed with the authority to issue or register the arbitral award. It, if anything, raises more questions than it has answers to them. Questions which immediately come to the fore on a reading of the directive are such as do centre on:

(a) which official between the magistrate and the clerk of court has the power to register the award;
(b) what papers accompany the arbitral award when it is submitted for registration
(c) to which court official are the award and a draft warrant of execution submitted
(d) how does the person who submitted the papers get to know that his or her or its or their order or award has been registered with the court
(e) does he or she or it or they keep on checking upon the progress or otherwise of the registration process and, more importantly,
(f) how are the views of the party who is adversely affected by the effects of the directive get to be known as well as registered with the court.

The last mentioned of the six questions which have been posed in the foregoing paragraphs constitutes the substance of the present application. The applicant submitted, and correctly so, that it was not heard when the event which related to the apparent registration of the award was effected in terms of the fifth respondent's directive. It argued that the writ of execution which resulted from the directive was improperly issued and it cannot, therefore, be used to attach and remove its property, let alone have such sold under the hammer. It is the court's considered view that the applicant was within its rights when it argued as it did and questioned the manner in which the writ of execution had come into existence.

The respondents, on their part, could not assert with any degree of certainty that the arbitral award which was made in their favour on 17 April, 2013 was registered with the magistrates' court.

They did not even say that they submitted the arbitral award and a draft warrant of execution to the magistrates' court in terms of the fifth respondent's directive. They did not produce any paper which showed that registration of the award took place. They, however, remained of the view that registration took place. Their contention in this mentioned regard runs contrary to the case authorities which they cited where it was observed that registration is not an event but a process which is instituted by way of application and on notice to the other party.

The court cannot, under the circumstances of this case, state that the writ of execution was properly issued. It cannot say so when it does not know if the arbitral award was registered and, if it was, the court official through whom it was registered. The probabilities of this case are that, when the fifth respondent issued the directive which lies at the centre of these proceedings his intention was to shed off from himself all responsibility which relates to the registration of Labour Court's or arbitrators' orders, awards decisions and/or determinations onto the clerk of court. However, the magistrates' court (civil) rules do not clothes that official with the power to register such awards, orders, decisions and/or determinations. Registration of these are the preserve of a magistrate or a judge of the High Court who is enjoined to entertain the application on notice to the other party.

The applicant's property was attached on 5 June, 2014 and it was due for removal on 10 June, 2014. The applicant filed its application with the court on 9 June, 2014. The applicant, on the mentioned basis, appears to have treated its case with some urgency. Its case is, however, among many cases which the court would, all things being equal, refuse to entertain. The applicant was aware as far back as 30 January, and 17 April, 2013 that the first and second respondents would most likely want to move the courts to enforce what had been awarded to them. It did nothing from the mentioned period todate and it only approached the court when its interests were under threat. This is not the kind of urgency which is contemplated in the rules of this court. On that basis, therefore, the application would have failed.

In the circumstances of this case, however, the application is allowed to succeed on the basis that the first and second respondents, acting with and through, the unconstitutional directive of the fourth and fifth respondents did not register the award which they properly obtained and wanted to enforce. They cannot enforce an unregistered award. The applicant did well to refer the matter which relates to the apparent registration of the award through the fifth respondent's directive to court for review. The court remains unceased with that review.

It is, however, its considered opinion that the applicant's prospects of success on review are pretty high.

The court has considered all the circumstances of this case. The applicant, in the court's view, proved its case on a balance of probabilities to the satisfaction of the court. The court, accordingly, orders as follows:

(a) that the application be and is hereby sustained.

(b) that each party bears its own costs.

Muvingi & Mugadza, appellant's legal practitioners
Tamuka Moyo Attorneys, respondent's legal practitioners