

CHENAI NYAGUSE  
and  
SUSAN PHIRI  
and  
LOVEMORE NGWARATI  
and  
BETHAN MABAMBE  
and  
EDMORE DHLAKAMA  
and  
STANFORD SITHOLE  
and  
COSMAS USHUMBA  
and  
L. GOMO  
and  
VINCENT MAZURU  
and  
TSITSI MANGOSHO  
and  
JOSEPHINE DUBE  
and  
EDMORE DHLAKAMA  
and  
BRIGHTON MATINGU  
and  
ZIMRA TRADE UNION  
versus  
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 7 April 2015 & 15 May 2015

**Opposed application**

*Adv. R. Chingwena*, for the applicants  
*Adv. T. Magwaliba*, for the respondent

MAFUSIRE J: Applicants one to twelve were employees of the respondent. The thirteenth was a trade union. The twelve were members and office bearers of the trade union.

The applicants had two arbitration awards in their favour. In the first, the arbitrator had stopped the respondent from proceeding with disciplinary proceedings against the twelve

applicants on the basis that the charges were illegal and calculated to victimize them. The arbitrator further ruled that the respondent was committing an unfair labour practice.

The second arbitration award quantified the first. The twelve applicants had been suspended without pay and benefits. The second arbitration award quantified the amounts due by the respondent to the twelve in the sum of US\$414 362-52.

The application before me was for the registration of those two awards as an order of this court for enforcement purposes in terms of s 98(14) of the Labour Act [*Cap 28:01*]. It reads:

“(14) Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subs (13) to the court of any magistrate which would have jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court.”

In the papers filed by its legal practitioners of record, the respondent strenuously opposed the application on a number of grounds. The first was a *point in limine*. It was alleged that other than the first, Chenai Nyaguse, none of the other applicants was properly before the court. This objection was predicated on the fact that the founding affidavit which explained the nature and purpose of the application, as well as the background to it, had been deposed to by the first applicant. The rest of the applicants, except for the thirteenth, had then simply filed standard word affidavits explaining who they were and incorporating the contents of the first applicant's affidavit. The standard paragraph in those affidavits read as follows:

“2. I have read and understood the founding affidavit by **CHENAI NYAGUSE** and wish to incorporate the entire contents thereof as specifically deposed to by myself.”

To that, the respondent's deponent stated in the opposing affidavit as follows:

**In limine**

1. There are no Founding Affidavits by the 2<sup>nd</sup> to 13<sup>th</sup> Applicant in this Application. This is so because there are no Affidavits by the 2<sup>nd</sup> to 13<sup>th</sup> Applicant authorizing Chenai Nyaguse to depose to the Founding Affidavit on their behalf as she alleges in paragraph 1.1 of her Founding Affidavit. The Supporting Affidavit (sic) by 2<sup>nd</sup> to 13<sup>th</sup> Applicant (sic) does not authorize Chenai Nyaguse to depose to the Founding Affidavit on behalf of them. This means that there is only one applicant in this matter who is before the court. For this reason the Application is defective and must be dismissed.

On the merits, the respondent opposed the application on the basis that it had appealed against the arbitral awards; that as a result of that appeal the awards had automatically been suspended pending the determination of the appeal, and that therefore it was improper to seek registration for enforcement purposes when the operation of the awards had automatically been suspended.

The respondent developed its argument on the merits by saying that whilst in terms of s 92E of the Labour Act an appeal does not suspend the determination or decision appealed against, its appeal was not in terms of s 92E, but in terms of s 98(10).

Section 98(10) of the Labour Act is, of course, the one that provides for an appeal to the Labour Court on a question of law from any decision of an arbitrator. The respondent relied strongly on the cases of *Sagittarian (Private) Limited t/a ABC Auctions v The Workers Committee of Sagittarian (Private) Limited*<sup>1</sup>; *Netone Cellular (Private) Limited v Netone Employees and Anor*<sup>2</sup> and *Sibangalizwe Dhlodhlo v The Deputy Sheriff of Marondera & Ors*<sup>3</sup>. These cases held that an appeal against the decision by, or determination of, the arbitrator automatically suspends that decision or determination in accordance with the common law rule of practice.

It was argued that the respondent's appeal before the Labour Court had very strong prospects of success on the merits. The opposing papers went into some detail to prove the point.

Another ground of opposition, but which was only raised in the respondent's heads of argument, was that the application was a procedural nullity in that it had been made through the chamber book as opposed to an open court. This was said to be a contravention of s 98(14) of the Labour Act. The argument was that the reference to "...*High Court*" in that section was a reference to a judge sitting in open court and not in chambers. For support, reference was made to the case of *Nicolle v Minister of Lands & Anor*<sup>4</sup>, particularly the passage at pp 281F – H to 282 A. There GARWE JP (as he then was) adverted to the provisions of r 18 of the Rules of this court that provide that no civil process may be sued out against the President or any Judge of this court without leave being granted upon a court application being made for the purpose, and said that to seek such leave through a chamber application would be contrary to the provisions of that rule. Nonetheless the learned JP went

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<sup>1</sup> 2006 (1) ZLR 115 (S)

<sup>2</sup> 2005 (1) ZLR 275 (S)

<sup>3</sup> HH 76-11

<sup>4</sup> 2003 (1) ZLR 280 (H)

on to exercise his discretion in terms of r 4C and condoned the failure to follow the correct procedure.

The respondent also cited r 226(2) extensively. The rule deals with situations when proceedings may be brought by way of a chamber application.

Finally, the respondent referred to the English cases of *Re Bathe*<sup>5</sup> and *Friend v Wallman*<sup>6</sup>. The following passage in the latter case was quoted for support<sup>7</sup>:

“In recent years the expression ‘the Court or Judge’ has been frequently used as (**sic**) in this expression the Court means a Judge or Judges in open court and ‘a judge’ means a Judge sitting in Chambers.”

Except for the point *in limine*, I had previously dealt with, and dismissed virtually all the arguments raised by the respondent in this case. That was in the case of *Senele Dhlomo Bhala v Lowveld Rhino Trust*<sup>8</sup>.

At the hearing of this case the respondent was represented by the same Counsel, Mr *Magwaliba*, who had appeared for the respondent in the *Bhala* case. (Coincidentally, the firm of legal practitioners representing the applicants herein was also the same firm that had represented the applicant in *the Bhala* case.) All the opposing papers for the respondent in this case, as in the *Bhala* case, had been prepared and filed by Counsel’s instructing practitioners. Mr *Magwaliba* conceded that there was nothing new in the respondent’s arguments that had not been dealt with in the *Bhala* case. He submitted he had nothing useful to say. He only objected to certain patent errors in the applicants’ draft order.

Mr *Magwaliba*’s approach was most reasonable and professional. The court felt indebted to him because he did not waste time.

The respondent’s opposition was manifestly spurious, both on the *point in limine* and the substantive grounds. As I granted the order sought, I aired my strong displeasure on the conduct of its legal practitioner of record. Among other things, he only cited those cases that seemingly were in support of his position. He completely ignored all the others that were against him. The *Bhala* case was just one of several. No attempt was made to distinguish such cases. The passage in *Friend v Wallman* was quoted out of context.

The respondent’s point *in limine* had no merit. Except for the trade union in respect of which no founding papers were filed, all the other applicants were properly before the court.

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<sup>5</sup> (1892) 1 Ch 463

<sup>6</sup> [1946] KB 493

<sup>7</sup> At p 499

<sup>8</sup> HH 263-13

By virtue of the standard word paragraph appearing in all their supporting affidavits, they incorporated the averments in the first applicants' affidavit as their own. So they were before the court in their own right.

On the merits, all Mr *Chingwena*, for the applicants, ever had to do was simply to stand up, hand up a copy of my judgment in the *Bhala* case, and sit down. That was understandable. The argument that an appeal against the decision of the arbitrator automatically suspends that decision because such an appeal is one made in terms of s 98(10) of the Labour Act as opposed to s 92E is a stale one. Here is how I had dealt with it in the *Bhala* case<sup>9</sup>:

“[A]n appeal to the Labour Court from a decision of an arbitrator is an appeal “... **in terms of this Act...**” within the meaning of ss (1) of s 92E of the Act. Such an appeal “...**shall not have the effect of suspending the determination or decision appealed against**” within the meaning of subs (2) of s 92E.

‘.....’

In the light of such clear provisions of the Act and such a clear pronouncement by this court, in this matter what possibly could have been the respondent's argument on the point?

Respondent's argument on the point has been to read one thing in the heading to s 92E of the Act, particularly the word “generally”, and another in the substantive provisions of that section.

Mr *Magwaliba*, for the respondent, first noted that the heading to s 92E of the Act is “**Appeals to the Labour Court generally**” and then argued strenuously that the section was concerned with general appeals to the Labour Court and that therefore there also ought to be special appeals to that court. He submitted that an appeal from the decision of an arbitrator to the Labour Court as provided for in s 98(10) of the Act is not such a general appeal as is contemplated by s 92E of the Act, but that it is one of the special appeals. On that basis, he contended that such an appeal is not one covered by ss (2) of s 92E of the Act and that it has the effect of suspending the decision appealed against in terms of the common law rule.

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I reject the respondent's fanciful attempt at splitting hairs and the word play on “generally”. The legislature in s 92E of the Labour Act could not have put the position any plainer. If it was intended to categorise an appeal from the decision of the arbitrator as special and therefore as one different from the general appeals referred to in s 92E whose effect would be not to suspend the decisions appealed against, then it would have been the simplest of things for the legislature to have said so. In my view, the provisions of sections 92E and 98 are so plain as to require no such tortuous constructions as urged by the respondent. Appeals from the decisions of an arbitrator are made in terms of s 98(10) of the Labour Act. Such appeals are appeals “... **in terms of this Act...**” within the meaning of s 92E. Such appeals do not

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<sup>9</sup> At pp 6 – 7 of the cyclostyled judgment

have the effect of suspending the determinations or decisions appealed against. I respectfully associate myself with the judgment of PATEL J in the *Gaylord Baudi's* case above”.

*In casu*, one of the respondent’s arguments was that this court is bound by the decisions of the Supreme Court such as *Net One Cellular (Pvt) Ltd v Net One Employees & Anor*<sup>10</sup>. But in the *Bhala* case I pointed out that, among other things, such decisions were not applicable because they were concerned with the provisions of the Labour Act before an amendment to it in 2007. I also dealt with the other cases that the respondent cited in support of its position, particularly the judgments by BHUNU J, in *Mvududu v Agricultural and Development Authority (ARDA)*<sup>11</sup>, and GOWORA J (as she then was), in *Dhlodhlo v Deputy Sheriff of Marondera and Others*<sup>12</sup>. I said<sup>13</sup>:

“In the Respondent’s Heads of Argument, drafted by counsel’s instructing legal practitioners, it was contended that judgments of this court to the effect that the decision of an arbitrator is not suspended by an appeal to the Labour Court as provided for by s 92E were wrongly decided as they purportedly went against the decision of the Supreme Court in the case of *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275.

Decisions of this court which held that decisions of an arbitrator are not suspended by appeals to the Labour Court include the aforesaid cases of *Gaylord Baudi* and *Elvis Ndlovu*. Other cases include *DHL International Ltd v Clive Madzikanda* HH51-10, a judgment of MAKARAU JP, as she then was; and *Benson Samudzimu v Dairibord Holdings Ltd* HH 204/10, a judgment of CHIWESHE JP.

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The Supreme Court case of *Net One Cellular (Pvt) Ltd* above was a 2005 decision. It considered equivalent provisions of the Labour Act in relation to appeals from decisions of the arbitrator to the Labour Court before the amendment to the Labour Act in 2007 by Act 17 of 2007. Before it was repealed s 97 in the old Act read as follows:

**‘97 Appeals to Labour Court**

- (1) Any person who is aggrieved by –
- (a) any determination or direction of the Minister in terms of section *twenty five, forty, forty-one, seventy-nine* or *eighty-two*, or in terms of any regulations made pursuant to section *seventeen*;
  - (b) a determination made under an employment code in terms of section *one hundred and one*; or
  - (c) the conduct of an investigation of a dispute or unfair labour practice by a

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<sup>10</sup> 2005 (1) ZLR 275

<sup>11</sup> HH 286-11

<sup>12</sup> HH 76-11

<sup>13</sup> At pp 7 - 10

labour officer; or

- (d) the conduct of any proceedings in terms of an employment code; may, within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Labour Court.
- (2) An appeal in terms of subsection (1) may –
- (a) address the merits of the determination or decision appealed against;
  - (b) seek a review of the determination or decision on any ground on which the High Court may review it;
  - (c) address the merits of the determination appealed against and seek its review on a ground referred to in paragraph (b).
- (3) **An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.**<sup>7</sup>
- (4) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.<sup>7</sup>

One of the appeals in that case was from the decision of the arbitrator to the Labour Court. The Supreme Court noted that such an appeal was not one made in terms of ss (1) of s 97 of the Act. It held that an appeal from the decision of the arbitrator was not provided for in terms of that subsection.

The amendment to the Act in 2007 manifestly changed the position. The new wording in the new s 92E now covers all appeals in terms of the Act. That is a material difference.

At the hearing Mr *Magwaliba* neither pressed the argument based on the *Net One Cellular* judgment nor relied on the cases of *Dhlohdhlo v Deputy Sheriff of Marondera and Others* HH-76-11, a judgment of GOWORA J; and *Dhlohdhlo v Deputy Sheriff of Marondera and Others* HH-76-11, a judgment of BHUNU J (sic)<sup>8</sup>. These latter two cases held that an appeal to the Labour Court against the decision of an arbitrator suspends the decision appealed against. The cases reverted to the old position under the common law.

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[I]t seems plain that the decisions in *Dhlohdhlo* and *Mvududu* were, with all due respect, incorrect on the question of the effect of an appeal to the Labour Court from the decision of the arbitrator *vis-a-vis* the provisions of s 92E of the Act. I think it was incorrect to say that whereas s 92E of the Labour Act provides that the noting of an appeal does not suspend the decision or determination appealed against, there is no such provision in relation to an appeal against an award by an arbitrator. There is such a provision.

Section 92E is an omnibus provision regarding all appeals made in terms of the Labour Act. It must necessarily cover appeals from the determinations or decisions of the arbitrator to the Labour Court. There is nothing in the Act to suggest that the legislature evinced a contrary intention. The case of *Sagittarian (Pvt) Ltd v Workers Committee, Sagittarian (Pvt) Ltd* (*supra*) relied upon by BHUNU J in the *Mvududu* case was concerned with the provisions of the Act before the amendment referred to above. Consequently, it was manifestly incorrect to

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<sup>8</sup>The reference to *Dhlohdhlo* was an error. It was meant to refer to *Mvududu v Agricultural and Development Authority (ARDA)* HH 286-11

determine the matter under the provisions of the common law when such a position had expressly been altered by statute.”

I also dealt, in the *Bhala* case, with the argument that the reference to “...**High Court**” in s 98(14) of the Labour Court was a reference to a judge in open court as opposed to a judge sitting in chambers. Specifically I showed how the reference to that passage in *Friend v Wallman* was selective and therefore misleading. I said<sup>14</sup>:

“It was contended that ‘*High Court*’ in subs (14) of s 98 of the Labour Act means the open court and not a judge sitting in chambers. Respondent also made the point that article 35 of the Model Law on International Trade Law adopted by the United Nations in 1985 and which our legislature has domesticated as a schedule to the Arbitration Act, [*Cap 7: 15*] [hereafter referred to as the **Arbitration Act**] also refers to the High Court and not a judge in chambers.

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Relying on the English cases of *Re Bathe* (1892) 1 Ch 463 and *Friend v Wallman* [1946] KB 493 the respondent argued that a reference to ‘court’ was a reference to a judge sitting in an open court. In its Heads of Argument the respondent quoted a section of the judgment in *Friend’s* case (which was delivered by SOMERVELL LJ) at p 499 as follows:

‘In recent years, the expression ‘the court or a judge’ has been frequently used, and in this expression, the ‘court’ means a judge or judges in open court, and ‘a judge’ means a judge sitting in chambers.’

However, not only did the respondent quote the section of the judgment inaccurately and out of context, but also the quotation was so selective as to be misleading. This is so because that portion of the judgment went further as follows:

‘We are, however, clear, both on authority and in principle, ***that there is no rigid rule which compels us to construe the word ‘court’ as excluding jurisdiction exercised in chambers.*** Regard must be had to the context and to the ordinary practice which the legislature must be assumed to know. In the first place interlocutory applications are normally made in chambers...’ (emphasis added).

Furthermore, earlier on in the judgment the court had stated as follows<sup>15</sup>:

‘The word ‘court’ can clearly in ordinary language bear a different meaning according to the context. ***Considering the matter apart from authority, it is obvious, for example, that the words ‘an application to the “court” may, in certain contexts, clearly mean an application in chambers.*** In other contexts it might as clearly mean an application to the judge at the trial or otherwise than in open court.’ (emphasis added)

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<sup>14</sup> At pp 2 - 5

<sup>15</sup>At p 498

On the premise that s 98(14) of the Labour Act and article 35 of the Arbitration Act refer to the High Court, the respondent submitted that there was no room for importing a reference to a judge sitting in chambers in an application for the registration of an arbitral award. It submitted that *in casu* the registration application having been made to a judge in chambers it meant that the applicant had adopted the wrong procedure. The respondent therefore called for the dismissal of the application on that basis.

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However, notwithstanding that the relevant provisions of both the Labour Act and the Arbitration Act refer to the ‘**High Court**’ I am not persuaded that such a reference excludes a judge in chambers. There is no justification for limiting the import of ‘High Court’ in the two provisions above to an open court. The legislature did not make such limitation. Neither the Labour Act nor the Arbitration Act defines ‘High Court’. However, the Interpretation Act, *Cap 1: 01*, does so in Section 3. Therein ‘High Court’ is defined as:

‘... the High Court of Zimbabwe referred to in subs (1) of s 81 of the Constitution.’

.....

Thus, like the two Acts above the Constitution is not concerned with the form of proceedings in the High Court. The two Acts merely specify the forum to which applications for the registration of arbitral awards should be referred. There is nothing to suggest that when the legislature referred to the High Court in s 98(14) of the Labour Act it was referring to anything other than the ordinary High Court as defined in the Constitution. There is nothing to suggest that the legislature meant to ascribe to that term the more technical meaning of ‘court’ as spelt out in the Rules.”

Court applications and chamber applications are governed by Order 32 of the Rules. The one essential difference between them is that a court application is determined in an open court and a chamber application in the judge’s chambers. But both are made in writing and supported by affidavits. Both are determined by a judge sitting alone. In both the resultant order is that of the High Court. An order from an open court and an order obtained in chambers have the same force and effect. In a court application notice to all interested parties has to be given. It is also the case with some chamber applications. Rule 229C puts the issue beyond contest. It provides that the fact that an applicant has instituted proceedings by way of a court application instead of a chamber application, *or vice versa*, shall not in itself be a ground for dismissing the application unless there is evidence that some interested party has or may suffer such prejudice as may not be cured by appropriate directions with an appropriate order of costs. There was no prejudice cited in this case.

In the *Bhala* case I also dealt with the point that in applications for the registration of arbitral awards for enforcement purposes this court is not concerned with the merits of the dispute. That concern lies with the Labour Court. I said<sup>16</sup>:

“In terms of r 226(2) certain matters cannot be brought by way of chamber applications unless they fall within one or more of the exceptions specified therein. One of those exceptions is that the relief sought is procedural. An application to register an arbitral award as an order of this court for the purposes of enforcement is clearly an application seeking a procedural relief. The court is not being asked to determine the merits of the arbitration anew. MATHONSI J stated as follows in *Elvis Ndlovu v Higher Learning Centre* HB 86/10<sup>17</sup>:

“The respondent cannot seek to challenge an arbitral award in opposing papers filed in an application for registration of the award. In an application of this nature, this court does not inquire into the merits or otherwise of an arbitral award. This is the province of the Labour Court upon an application or appeal being made to that court.”

Thus, it was futile for the respondent in its papers to try and argue before me the merits of its appeal to the Labour Court.

Soon after Counsel’s submissions I granted the order sought by the applicants in terms of their draft, with appropriate amendments. The operative part of the order read as follows:

“WHEREUPON after reading documents filed of record and hearing Counsel,

**IT IS ORDERD THAT**

1. The arbitral awards dated 4 June 2013 and 28 February 2014 by George Nasho Wilson and P. Mutsinze respectively be and are hereby registered as orders of this court.
2. In terms of those awards the respondent shall pay the applicants the sum of four hundred and fourteen thousand three hundred and sixty two dollars and fifty two (US\$414 362-52).
3. The costs of this application shall be borne by the respondent.
4. This order shall not apply to the thirteenth applicant which is not properly before the court.

15 May 2015



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<sup>16</sup> At pp 4 - 5

<sup>17</sup>At p 2 of the cyclostyled judgment

*Matsikidze & Mucheche*, legal practitioners for the applicants  
*Sinyoro & Partners*, legal practitioners for respondent