SENELE DHLOMO-BHALA
versus
LOWVELD RHINO TRUST

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 3 July 2013 & 26 August 2013

Opposed application

T. Marume, for applicant
T. Magwaliba, for respondent

MAFUSIRE J: This is an application for the registration of an arbitral award. It is opposed. The facts are fairly common cause. The applicant was a former employee of the respondent. The respondent had terminated her contract of employment. She had considered the termination unlawful and had referred her case to a labour officer for conciliation in terms of s 93 of the Labour Act, [*Cap 28: 02]* [**the Labour Act** or **the Act**].

Conciliation not having resolved it the matter had been referred for compulsory arbitration. The arbitrator had made an award in favour of the applicant. In terms of that award the respondent was to pay a sum of money in lieu of outstanding salaries and other employment benefits.

It was this award that the applicant sought to have registered with this court for enforcement purposes. But the respondent had appealed the arbitral award to the Labour Court in terms of s 98(10) of the Act. It had also, in terms of s 92E of the Act, applied to that court on an urgent basis for a stay of the operation of the arbitral award pending the determination of its appeal. At the time of the hearing of the application *in casu* both the appeal and the urgent application for stay had been pending.

This application is in terms of subsection (14) of s 98 of the Act. Sub-s (14) has to be read together with subsection (13). The two read as follows:

> "(13) At the conclusion of the arbitration the arbitrator shall submit sufficient certified copies of his arbitral award to each of the parties affected by it.
>
> (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."

The application has been made through the chamber book but on notice to the respondent. The respondent has opposed it to the hilt. Three sets of affidavits and three sets of heads of argument have been filed. I heard it in an open court as an opposed application.

Respondent's major grounds of opposition were essentially taken *in limine*. On the first ground it objected to the form of the application. 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.

Article 35 of the Arbitration Act reads:

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the ***High Court***, shall be enforced subject to the provisions of this article and of article 36."

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[1]:

[1]At p 498

> "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)

Order 1 of the High Court of Zimbabwe Rules [**the Rules**] defines "court" in r 3 as meaning the High Court. "Court application" is defined as an application to the court in terms of r 226. Rule 226 is the one governing court applications. Its essential features are that the application has to be in writing to court and on notice to all interested parties. "Judge" is defined as a judge of the court sitting otherwise than in an open court.

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.

I note in passing that in terms of s 98(2) of the Labour Act the Arbitration Act applies to disputes referred to compulsory arbitration, but subject to that section.

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."

Section 81 of the old Constitution was duplicated in the preamble to the High Court Act, [Cap *7:02]*. It was provided therein that there would be a High Court which would be a superior court of record with jurisdiction and powers as might be conferred upon it by the Constitution or an Act of Parliament. It would consist of the Chief Justice, the Judge President of the High Court and such other judges of the High Court as might be appointed from time to time.

Section 81 of the old Constitution is now Section 170 in the new 2013 Constitution. It provides that the High Court is a superior court of record and consists of the Chief Justice, Deputy Chief Justice, the Judge President of the High Court and such other judges of the High Court as may be appointed from time to time.

Thus, like the two Acts above of the Constitution is not concerned with the form of proceedings in the High Court. The two Acts merely specify the *forum* to which registration 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.

The Rules themselves, in my view, do make it clear that their reference to "court" is a reference to the more technical meaning of that term, not the ordinary common law meaning as defined in the Constitution. I say so because r 3, the definition section, is prefaced with the words "**In these rules -**". In other words, in terms of the Rules whatever the term "High Court" might mean elsewhere or however it might be defined there, for their purposes "High Court" means a "court" which is different from a "judge".

I have already stated that the Labour Act and the Arbitration Act direct the forum to which applications for the registration of arbitral awards should be made and that the rules of court wouldthen govern the procedure. Court applications and chamber applications are governed by Order 32 of the Rules. The one essential difference between a court application and a chamber application is that a court application is determined in an open court and a chamber application in the judge's chambers. Both are made in writing and supported by affidavits. Both are determined by a judge sitting alone. In both the resultant order is an order 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. But so is the case with some chamber applications.

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[2]:

> "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."

In terms of the proviso to r 241 a chamber application can be served on all interested parties with appropriate modifications to the form. As noted already the applicant served her application on the respondent who filed opposing papers. This resulted in the matter turning into a full-fledged opposed application. I see nothing that the applicant has offended. I therefore overrule the respondent's first objection.

The next objection taken by the respondent was that by reason of its appeal to the Labour Court the arbitral award had been suspended and that therefore there was nothing yet to register. This objection was based on the common law rule that an appeal suspends the judgment appealed against.

I was quite surprised that not only could the respondent still found an objection on that basis, especially in the face of the unequivocal provisions of s 92E of the Labour Act and the judgment of PATEL J in *Gaylord Baudi v Kenmark Builders (Private) Limited* HH 4-12, but also that it could persist with it.

Section 92E reads as follows:

> "**92E Appeals to the Labour Court *generally***
> (1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.
> (2) An appeal in terms of subsection (1) ***shall not have the effect of suspending the determination or decisions appealed against*** (emphasis added).
> (3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires"

Section 98(10) provides for an appeal to the Labour Court from a decision of the arbitrator. It reads:

> "(10) An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

Thus an 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 "**…**

[2]At p 2 of the cyclostyled judgment

shall not have the effect of suspending the determination or decision appealed against" within the meaning of subs (2) of s 92E.

In *Gaylord Baudi's* case above PATEL J, as he then was, held as follows:[3]

> "It is not in dispute that an appeal to the Labour Court against the decisions of an arbitrator under section 98(10) of the Labour Act [Chapter 28:01] does not suspend the decision appealed against. This is expressly provided by section 92E (2) of the Act in relation to every appeal to the Labour Court in terms of the Act. Nevertheless, section 92E (3) empowers the Labour Court to make any interim determination it may deem fit, viz. for the stay or suspension of an award, pending the determination of an appeal. ……
>
> "As I have already stated, section 92E (2) of the Labour Act expressly provides that an appeal against an award in terms of section 98(10) shall not operate to suspend the award. Section 92E (3) enables the Labour Court to suspend or stay an award upon application by the aggrieved party. Where no such application is made or where it is dismissed, subsection (14) and (15) of section 98 entitle the successful party to apply for the registration and enforcement of the award. Parliament has obviously applied its mind to the delays inherent in the appeal process and considered the policy implications of the general common law rule which automatically suspends a decision that is appealed against. It has consciously and deliberately decided that arbitral awards in the realm of labour relations should be enforced, despite any pending appeal and notwithstanding any inconvenience that such enforcement might entail…."

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.

[3] At p 2 & 4 of the cyclostyled judgment

As counsel's argument seemed fastened on the word "***generally***" which is only found in the heading to s 92E and not in the substantive provisions of that section, I drew his attention to s 7 of the Interpretation Act which provides that *inter alia* headings and marginal notes form no part of the enactment and are deemed to have been inserted for convenience of reference only. Mr *Magwaliba* responded by referring to the Supreme Court case of *Blue Ranges Estate (Pvt) Ltd* v *Muduviri* 2009 (1) ZLR 368 (S) as authority for the proposition that headings can in fact be taken into account when considering the substantive provisions of an enactment.

However, I have found nothing in *Muduviri's* case that is quite relevant to the present matter, and certainly nothing in relation to the treatment to be accorded headings, notes and marginal references in the interpretation of statutes. In that case the Supreme Court, after examining the relevant provisions of the rules of that court, held that a judge of that court, sitting alone in chambers, had no jurisdiction to remove or strike out an appeal which is pending before that court because such an appeal is made to the court for determination by that court when duly constituted. The court noted that the Supreme Court is duly constituted by three judges sitting together in open court.

The issue dealt with by the Supreme Court in the *Muduviri* case is not the same as the one confronting me in the present application. 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 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 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.

At p 5 of the cyclostyled judgment in the *DHL International* case, MAKARAU JP had this to say:

> "In my view, the amendment to the law in 2005 to provide that appeals to the Labour Court would not suspend the decision appealed against was clearly meant to vary the common law position that was prevailing prior to the amendment. That for the purposes of the Act the employee is regarded as dismissed pending the determination of the appeal appears to me to be beyond dispute."

In *Benson Samudzimu* CHIWESHE JP stated as follows[4]:

> "In the present case the respondent has lodged an appeal with the Labour Court. The appeal is still pending. Should the respondent wish to have the arbitrator's determination suspended pending appeal or dealt with in any other interim way, it is to that court that it must direct its application. Accordingly, for as long as the arbitral award has not been suspended or set aside on review or on appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same."

I respectfully associate myself with the remarks in those two cases.

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

[4]At p 3 of the cyclostyled judgment

(c) the conduct of an investigation of a dispute or unfair labour practice by a 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.**"

(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."

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 *Dhlodhlo v Deputy Sheriff of Marondera and Others* HH-76-11, a judgment of GOWORA J; and *Mvududu* v *Agricultural and Development Authority (ARDA)* HH- 286-11, a judgment of BHUNU J. 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. In the *Dhlodhlo* case GOWORA J firstly quoted s 92E of the Act. The learned judge then stated[5]:

> "In terms of subsection (2) the Legislature has finally put to rest the confusion in the law as to whether or not an appeal under the Act would suspend the operation of the decision or determination appealed against. The arbitral award was however granted in terms of s 98(9) of the Act. An appeal against the decision of the arbitrator on a question of law lies to the Labour Court in accordance with the provisions of s 98(10) of the Act. Where s 92E provides that the noting of an appeal does not suspend the

[5]At p 10 of the cyclostyled judgment

> decision or determination, there is no such provision in relation to an appeal against an award by an arbitrator" (underlined for emphasis)

Similarly, in the *Mvududu* case BHUNU J referred to s 92E of the Act and noted that subs (2) thereof specifically provided that an appeal in terms of ss (1) shall not have the effect of suspending the determination or decision appealed against. The learned judge then said[6]:

> "The Supreme Court has already ruled in the case of *Sagittarian (Pvt) Ltd v Workers Committee, Sagittarian (Pvt) Ltd* 2006 (1) ZLR 115 that the provisions of s 97(4) do not apply to an appeal made in terms of s 98 of the Act. In other words, where an appeal is made in terms of s 98 of the Labour Act there is no express provision in the Act to the effect that an appeal shall not have the effect of suspending the determination or decision appealed against. There being no such provision one has to turn to the common law for an answer" (underlined for emphasis)

I note that in the *Gaylord Baudi's* case PATEL J did not refer to the cases of *Dhlodhlo* and *Mvududu* the decisions of which were directly in contrast to his. Be that as it may, it seems plain that the decisions in *Dhlodhlo* 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 determine the matter under the provisions of the common law provisions when such a position had expressly been altered by statute.

In the premises the respondent's second ground of objection to the registration of the arbitral award is also overruled.

The respondent's next ground of objection was that in an application for the registration of an arbitral award in terms of s 98 of the Act it is not just a copy of the award

[6] At p 4 of the cyclostyled judgment

that must be submitted for registration but one which is certified. That this is so is plain in terms of subs (14) as read with subs (13) of the Act. Mr *Magwaliba* dismissed the document appearing on p 27 of the record as irrelevant, incoherent and not an authentication of the arbitral award.Hereafter I shall refer to that document as the **impeached document**.

The impeached document was itself a copy. It was attached to the back of a copy of the arbitral award. It was signed by the arbitrator, one C Mesikano. Below I reproduce it in full:

"LABOUR ACT CHAPTER 28:01

Case: …. 0925/12 CERTIFICATION OF DOCUMENTS

Ref: Cmes 219 (Certificate In Terms of Section 98(14) of the Labour Act)

In terms of the Arbitration Act of 1996, I, Christopher Mesikano, being the Arbitrator, do hereby certify that this is a true copy of the Arbitration Award which contains the calculations of the parties involved amounting to forty nine thousand three hundred and seventy two dollars (US$49 372-00 only)

~~BEFORE~~ AFTER ZIMRA TAXATION DEDUCTIONS.

Between: SENELE DHLOMO & LOWVELD RHINO TRUST –
(Parties to the dispute)

Being: QUANTUM OF ARBITRAL AWARD –

Concerning: QUANTUM OF AWARD DATED 2ND SEPT 206

Hon. C. MESIKANO
ARBITRATOR

Date……. 2012 Place Harare"

In attacking it Mr *Magwaliba* pointed out that whilst the impeached document purported in its heading to have been a certificate in terms of the Labour Act its contents in fact referred to the Arbitration Act of 1996. He also drew attention to the incorrect date, "2nd Sept 206"; the fact that the document was itself a copy and that this was just stuck at the back of the copy of the award. He said that there was no telling that the document in fact related to the arbitral award in question.

I find respondent's objection on this ground as opportunistic and mere nit picking. The impeached document may have lacked care and precision in its preparation but I am

satisfied that it substantially complies with the requirements for certification. It sufficiently identified the arbitral award in question by, among other things, some case reference number, the names of the parties, the name of the arbitrator and the quantum involved. Furthermore, in the voluminous papers placed before me by both parties, there were annexed the copies of the documents in the proceedings pending in the Labour Court. Those documents included several copies of the arbitral award. Thus by his own documents the respondents did confirm that the award sought to be registered was indeed the same award which was now the subject matter of the dispute. It was common cause that it was the award in question.

I am prepared to condone the lack of precision in the certification of the arbitral award. I think that where a party has so substantially complied with the requirements of the law as the applicant has done in this case and where there is no discernible prejudice to the other party it "would make justice turn on its head" to deny relief in such circumstances[7]. I dismiss the respondent's ground of objection on this point.

Respondent's next ground of objection was that the documents tendered by the applicant for the registration of the arbitral award were inadequate. It was argued that in terms of article 35 a party seeking the registration with this court of an arbitral award for enforcement purposes is required to submit not only the duly authenticated original of the award or a duly certified copy thereof, but also the original arbitration agreement. Sub article (2) of article 35 reads:

> "The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not in the English language …."

I also note that s 5 of the Arbitration Act provides that what shall be construed as the arbitration agreement in an enactment that provides for a matter to be determined by arbitration is the requirement itself. It reads as follows:

> "**5 Application of Act to arbitration under other enactments**
> (1) Subject to subsection (2), where an enactment requires any matter to be determined by an arbitrator or by arbitration in accordance with any law relating to arbitration, such requirement shall be deemed to be an arbitration agreement for the purposes of this Act.

[7]See the remarks in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S), at p 466 which were quoted by MAKARAU J in *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) at p 127.

(2) Where an enactment provides for the determination of any matter by arbitration, the provisions of that enactment, to the extent that they are inconsistent with this Act, shall prevail."

The respondent cited the case of *Webster Mandikonza and Another v Cutnal Trading (Private) Limited and 2 Others* HH 189/04, a judgment of UCHENA J, as authority for the proposition that it is a requirement in an application for the registration of an arbitral award for enforcement that the arbitration agreement be submitted. At p 3 – 4 of the cyclostyled judgment the learned judge stated as follows:

"3. The requirements under article 35 are that the application shall be in writing and be accompanied by the following documents: -
(a) a duly authenticated original award or certified copy thereof;
(b) the original arbitration agreement or a certified copy thereof; and
(c) if the award or agreement is not in English a duly certified translation thereof into the English Language.
"It seems to me whoever has to recognize and order the enforcement of the award must be someone qualified to understand the application, the arbitral award, and [the] arbitration agreement."

In casu the respondent submitted that the applicant ought to have attached the reference to arbitration form in lieu of the arbitration agreement or, alternatively, her statement of claim before the arbitrator together with the respondent's statement of defence.

The *Webster Mandikonza* case was not dealing with an arbitral award which had been the outcome of arbitration proceedings in terms of the Labour Act. It dealt with an arbitration agreement proper which the parties themselves had allegedly penned. Furthermore, the main issue for consideration was whether an application for the registration of an arbitral award for the purposes of enforcement in terms of the Arbitration Act was one to be made to the registrar of this court or to the court for the consideration of a judge. The court held that it was one to be made to court for the consideration of a judge who, unlike the registrar, would be qualified to apply his judicial mind to recognize and understand the application, the arbitral award and the arbitration agreement. The court was not dealing with an arbitral process under an employment situation which is governed by the Labour Act. Therefore, that ruling in that case would not be relevant to the present matter.

I have already noted that the Labour Act in s 98(2) enjoins the provisions of the Arbitration Act to apply to compulsory arbitrations and that s 5 of the Arbitration Act says that the requirement in an enactment to submit to arbitration shall be deemed to be the arbitration agreement. However, in terms of s 98 of the Labour Act and s 5 of the Arbitration

Act, the application of the Arbitration Act to arbitrations is made subservient to the Labour Act. The Labour Act does not require the submission of the arbitration agreement in an application for the registration of an arbitral award with this court for enforcement purposes. In my view, compulsory arbitrations under s 98 of the Labour Act are by operation of the law. The fact that in terms of subs (3) of s 98 the parties may be afforded an opportunity to make representations, or that in terms subs (4) they may be consulted in the determination of the arbitrator's terms of reference, does not, in my view, detract from the fact that where conciliation has failed to resolve the employment dispute, it is a statutory requirement that the dispute be referred for compulsory arbitration. It is the Labour Court or the labour officer that refers the dispute for compulsory arbitration, appoint the arbitrator and fix the terms of reference for the arbitrator. It is not a matter governed exclusively by the private agreement of the parties as in most commercial arbitrations.

In the case of *Benson Samudzimu v Dairibord* referred to above, CHIWESHE JP, dealing with the position of the Labour Act versus the Arbitration Act regarding applications for the registration of arbitral awards with this court for the purposes of enforcement, held that the Labour Act takes precedence over any other law. At p 2 of the cyclostyled judgment he stated:

> "I agree with the applicant that the correct interpretation would be that, with regards the law, the Labour Act takes precedence over the Arbitration Act and any other enactment. The intention of the legislature was to have all labour matters initiated and resolved to finality in terms of the Labour Act. Equally, the legislature must have intended that such matters be dealt with by the Labour Court to the exclusion of any other court. Sections 34 and 36 of the Arbitration Act are not applicable in cases where the award sought to be challenged relates to a labour dispute. The mechanisms of challenging such awards are provided for in the Labour Act and may be accessed through the medium of the Labour Court."

I am satisfied the failure by the applicant in the present matter to annex the reference to arbitration form or the statement of claim and of defence as the substitutes for the arbitration agreement does not form a legitimate ground for opposing the application for the registration of the arbitral award for the purposes of enforcement in terms of s 98(14) of the Labour Act. The respondent's objection on this ground is also overruled.

The last ground of objection by the respondent to the registration of the arbitral award for enforcement would in some respect necessarily require an assessment of the merits of its appeal and the merits of the application for a suspension of the operation of the arbitration

awards both of which are pending before the Labour Court. In its Heads of Argument the respondent makes the point that:

> "The question of whether or not the appeal currently pending before the Labour Court has merits is not something which this Honourable Court can determine."

However, the respondent went on to submit that the applicant is a person of straw such that if the award is registered and execution follows the respondent would suffer an irreparable harm in the event that its appeal succeeds.

This court has steadfastly refrained from getting involved in matters that properly lie for determination by the Labour Court; see for example the cases of *Elvis Ndlovu* and *Benson Samudzimu* referred to above. The issue raised by the respondent under this head of objection properly lies for determination by the Labour Court. Therefore the objection lacks merit. It is dismissed.

In the final result the respondent's objections to the application by the applicant for the registration of the arbitral award made in favour of the applicant in September 2012 are all overruled. The application is granted with costs. I make the following orders:

1. The arbitral award dated 5 September 2012 by the arbitrator C. Mesikano be and is hereby registered as an order of this court;
2. The respondent is hereby ordered to pay the applicant the sum of US$ 49 372-00 (forty nine thousand three hundred and seventy two dollars) within five days of the date of service of this order;
3. The respondent shall pay the applicant's costs of suit.

Matsikidze & Mucheche, legal practitioners for applicant
Wintertons, legal practitioners for respondent