GUARD-ALERT (PVT) LTD

versus

MORGAN MUKWEKWEZEKE

and

MS TAHWA N.O.

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 25 July, 2012

**Opposed Application**

*T.S. Manjengwah*, for the applicant

1st respondent in person

No appearance for 2nd respondent

MUTEMA J: Job’s patience is certainly among the virtues which a judicial officer must possess in the discharge of his/her functions especially when dealing with a lay person self-actor to whom knowledge of both adjectival and substantive law is an intellectual exercise not subscribed to by the common man.

THE BARE BONES OF THE MATTER

The applicant (Guard-Alert) is a member of the National Commercial Employers Association of Zimbabwe (the Association) while the first respondent (Mukwekwezeke) is a member of the Commercial Workers Union of Zimbabwe (the Union).

On 12 August, 2009, the honourable arbitrator Hutire made an arbitral award ordering the Association’s members to pay the Union’s members a minimum wage of US$150-00 per month for the period 1 April, 2009 to 31 July, 2009. Dissatisfied with that arbitral award, the Association appealed to the Labour Court. In its judgment LC/H/420/10 handed down on 3 December, 2010 the Labour Court dismissed the appeal with costs.

On 17 December, 2010 the Association and Union’s respective office bearers held a meeting whereat “it was agreed that wages for grade 1(a) shall be USD200-00 per month effective 1 January, 2011 until 30 June, 2011 and that CWUZ (the Union) and NCEAZ (the Association) agreed to waive and abandon their rights arising from the award made by Arbitrator Hutire and Labour Court judgment of Judge President MUSARIRI handed down on 3 December, 2010”.

The papers filed of record do not ventilate whether or not Mukwekwezeke was aware of the waiver agreement of 17 December, 2010 between the Association and the Union, for on 21 March, 2011 he issued out a summons in Magistrates’ Court under case number 3068/11. In the case he was suing Guard-Alert for payment of $660-00 representing what he termed “underpayments back pay as said by the Labour Court with case No. LC/H/420/10 calculations are as follows: 1 April 2009 to August 2009 paid $84-00 instead of $150-00 Balance $66-00 x 5 months = $330-00. 1 September 2009 to 28 February 2010 paid $94-00 per months (*sic*) instead of $160-00 Balance $66-00 x 5 months = $330-00, $66-00 x 10 months x daily rates that is $660-00….”. He was a self-actor.

Guard-Alert entered a special plea in bar to the effect that the Magistrates’ Court had no jurisdiction to entertain the matter whose issues arise from an employer employee relationship. On the merits, Guard-Alert pleaded that Mukwekwezeke could not seek to enforce a judgment to which he was not a party and that the parties to that judgment had agreed on 17 December, 2010 that the rights arising from the arbitral award and judgment Mukwekwezeke made reference to be waived. On 13 April, 2011 Mukwekwezeke withdrew his claim.

But he had remained undaunted because on 11 April, 2011 Mukwekwezeke had lodged a chamber application under case No. 4511/11 in the Magistrates’ Court seeking to register the Labour Court judgment in terms of s 98(14) of the Labour Act, [*Cap 28:01*]. He contended that he was a direct beneficiary of the Labour Court judgment and that he never agreed to waive or forgo his back pay with Guard-Alert and was not party to any “negotiations” and “agreements” purportedly made to waive employees’ rights to the back pay. He wanted Guard-Alert to pay him $660-00 in terms of the Labour Court judgment alluded to *supra* calculated from April, 2009 to December, 2010 with interest at the rate of 25% p.a. from 20 December, 2010 to-date of full payment.

In opposing that application for registration of the judgment Guard-Alert argued that Mukwekwereke’s claim by way of action in case no. 3068/11 was still extant for the purported withdrawal was ineffectual for the simple reason that he did not tender costs. Over and above that, Guard-Alert and himself were not parties to both the arbitral award and the Labour Court judgment so he had no *locus standi* to seek the registration of the judgment and its enforcement against Guard-Alert. Further, Guard-Alert argued that the judgment Mukwekwezeke attached to his application was incapable of registration as it was not quantifiable and also that the actual parties had waived and abandoned their rights arising from both the arbitral award and the judgment. Mukwekwezeke’s application was dismissed, the court ruling that the matter was improperly before it as the applicant had not shown a cause of action as there was no *nexus* between parties to that application and parties to the judgment sought to be registered and enforced. This was on 11 May, 2011.

Still obdurate and undaunted, on 12 May, 2011 Mukwekwezeke lodged yet another chamber application for registration of the same Labour Court judgment in terms of s 98(14) of the Labour Act in the Magistrates’ Court under case No. 6633/11. In his founding affidavit, he wrote *inter alia* that:

“2… I am a security Guard 24294 Morgan Mukwekwezeke. I hereby in-

form you that, I am employer of Guard-Alert (Pvt) Ltd. I have 10 years with the same employer. My complain is that when the judgment came from the Labour Court done by Miss Hutire L on April 2009 it was given in favour of the workers. The judgment given by the workers committee (Guard-Alert (Pvt) Ltd)

3. Then as time goes on there was a dispute of right to the employee since the employers of the whole sector had defied the order by not complying to it positively saying they were not able to pay any increase backdated from April 2009.

4. Therefore as this dispute took more time to ripe I saw, it worth forwarding it ahead as my individual since doing it collectively was baring us no fruits.

5. As to my last resort, I approached the magistrate Court in order to advance this dispute of right. That’s why I am still persisting to insist the court order be paid my wages as accumulated to the figures amounting to US$660-00, as per given time. Draft order is attached behind….”.

Naturally Guard-Alert opposed that application before the second

respondent pointing out that Mukwekwezeke required legal counsel as he kept raising the same issues when the matter had already been dealt with and was *res judicata*

The second respondent’s terse ruling was this:-

“From the papers filed in his application the applicant has shown himself to be party to labour arbitration by way of his membership to the appeal’s (*sic*) respondent’s committee. However the court is of the view that there are material disputes of fact on whether he was part of the employees that waivered (*sic*) their back pay. And as such the court should decide the matter after hearing evidence”.

This ruling was made on 23 May, 2011. This ruling prompted the current application for review in terms of r 256 of the High Court Rules 1971 as read with ss 26 and 28 of the High Court Act, [*Cap 7:06*].

It is pertinent to point out that despite being aware that Guard Alert had launched this application for review, Mukwekwezeke had by 21 June, 2011 lodged yet another application in the Magistrates’ Court for registration of the same Labour Court judgment alluded to *supra* which Magistrate Manyika postponed *sine die*  pending the outcome of this review application.

GUARD-ALERT’S GROUNDS FOR REVIEW

1. The decision by the magistrate (to refer the matter to trial) was so unreasonable that no person properly applying his/her mind would have reached it in that the order which Mukwekwezeke sought to register was not attached to the application and so did not form part of the record.
2. The application was based on the same facts and sought the same relief that Mukwekwezeke had sought in case number 4511/11 which the court had dismissed hence the matter was clearly *res judicata*.
3. The benefits of the judgment referred to (i.e. the Labour Court judgment as well as the arbitral award) were waived by the parties to that judgment and no claim could arise therefrom.

RESOLUTION OF THE DISPUTE

Section 28 of the High Court Act empowers this court to set aside or correct proceedings or decision on review where any of the grounds provided for in s 27(1) of the that Act are established viz:

- absence of jurisdiction on the part of the court *a quo*.

- interest in the cause, bias, malice or corruption on the part of the person

presiding over the court;

- gross irregularity in the proceedings or decision.

The first ground for review is that the magistrate’s decision was so unreasonable that no person properly applying his/her mind to the matter would have reached it. In other words, the decision complained of must be so outrageous in its defiance of logic that no reasonable person properly applying his/her mind to the matter would have arrived at the same decision. The grievance here is that labour awards sought to be registered in terms of s 98(14) of the Labour Act must be attached to the application for registration. Failure to so attach that award means that there is nothing to be registered before the court. In the instant case the arbitral award was not attached to the application. The Labour Court judgment that was attached was an appeal judgment, not quantified or sounding in money and therefore incapable of registration for enforcement purposes. Since the arbitral award was not available and the Labour Court judgment that was attached was not quantified, this did not imbue the second respondent with power to refer the matter to trial as if the court were one of first instance. In terms of s 89(1) as read with subs (6) the court *a quo* has no jurisdiction to hear the matter as a court of first instance. Over and above that, the second respondent’s decision was so unreasonable in failing to appreciate that her mandate was limited merely to attend to the registration of an award which is capable of enforcement that this conduct amounted to gross irregularity in the decision arrived at.

Regarding the second ground for review, it goes without quarrel that in case number 4511/11 Mukwekwezeke had filed the same application based on the same facts, seeking the same relief and between the same parties and that application had been dismissed on merits. This means that the matter had become *res judicata*. In the event, the second respondent should not have entertained the latter application. Her entertaining it and referring it to trial was palpably grossly unreasonable which warrants the setting aside of the decision: *African Tribune Newspapers* (*Pvt*) *Ltd and Ors* v  *Media and Information Commission and Anor* 2004(2) ZLR 7(H), *Pondoro* (*Pvt*) *Ltd and Anor* v *Nemakonde* *and Anor* HH 18-08. The irregularity amounts to a clear case of miscarriage of justice in that the second respondent strayed from the task before her and arrogated to herself the jurisdiction to delve into the merits of the matter by referring it to trial thereby exceeding her mandate as well as prejudicing Guard-Alert’s rights and interests by exposing it to a second suit when the matter was *res judicata*. In *Ndlovu* v *Regional Magistrate Eastern Division and Anor* 1989(1) ZLR 264 (HC) at 267 C-D the court quoted with approval what was held in *Rascer* v *Minister of Justice* 1930 TPD 810 that:

“a wrong decision of a Magistrate in circumstances which would seriously prejudice the rights of a (litigant) would justify the court at any time during the course of the proceedings in interfering by way of review”.

The third ground for review *supra* also exhibits gross unreasonableness amounting to gross irregularity in the decision by the second respondent. She referred the matter to trial on the purported basis that Mukwekwezeke had “shown himself to be party to labour arbitration by way of his membership to the appeal’s (*sic*) respondent’s committee. However the court is of the view that there are material disputes of fact on whether he was part of the employees that waivered (*sic*) their back pay …”.

The ruling not only prompted Guard-Alert to file this review application but also Mukwekwezeke to file documents titled Pre-Trial Conference Issues and Notice of Set down For Pre-Trial Conference on 3 June, 2011.

Apart from the fact that the Magistrate’s Court does not have the jurisdiction at first instance to hear the labour dispute in view of the provisions of s 89(1) as read with subs (6) of the Labour Act as already stated above, the issue purportedly referred to trial as a material dispute of fact had already been disposed of on 11 May, 2011 in case number 4511/11 when the same suit was dismissed. Over and above the *res judicata* issue, there is also evidence of the minutes of 17 December, 2010 in which the Association and Union agreed to waive and abandon their rights arising from the arbitral award as well as the Labour Court judgment to which the two entities and not Mukwekwezeke, were the parties. Apart from the fact that Mukwekwezeke did not have the *locus standi* to institute the application for the registration of any award – he not being a party to any of the previous award(s) – the Union of which he was a member was his representative/agent and to that end, whatever decision the Union made did bind Mukwekwezeke. He thus could not be heard to argue that he was not part of the employees who waived their rights to the back pay.

At the end of the day, each of the three grounds for review *in casu* has a common thread running through it, viz unreasonableness which is so extreme that little further evidence, if none at all is needed for proof of gross irregularity making the decision complained of so outrageous in its defiance of logic that no reasonable person properly applying his/her mind to the matter would have arrived at the same decision.

In closing, there is an issue I am constrained to advert to. Earlier on in this judgment I adumbrated Mukwekwezeke’s conduct of continuously filing applications and documents in the Magistrates Court which plainly amounts to abuse of court process. That he is a lay person cannot amount to an excuse. Even in this court, Mukwekwezeke repeated his haranguing. The documents filed of record show the following:-

1. After this review application was filed on 13 June, 2011, on 29 July, 2011 he wrote a letter to Guard-Alert’s legal practitioners asking them to speed up the review “so that the matter can be finalised at the Magistrate Court where they are waiting for the outcome of the review”.
2. Before penning the above letter Mukwekwezeke had on 23 June, 2011 filed what he termed “Notice of Responding For Review” and an affidavit headed “RESPOND TO THE APPLICANT (*SIC*) FOR REVIEW”.
3. On 25 July, 2011 he had again filed his notice of opposition to the review application as well as a document titled “1st Respondent’s Answering Affrtidavit (*sic*) For Review”.
4. On 4 August, 2011 he again filed a “Notice of Opposition For Review” as well as “Notice For Respond (*sic*) For Review” in affidavit form attaching documents he had used in cases 6633/11 and 4511/11 in the Magistrates’ Court.
5. On 13 December, 2011 he again filed two documents titled “1st Respondent’s Notice of Opposition” and “Notice of Opposition of M. Mukwekwezeke” with the latter being in affidavit form.
6. On 14 June, 2012, exactly seven days after being served with the notice of set down of this review application, he again filed a “Notice of Opposition” and “Opposition (*sic*) Affidavit of M. Mukwekwezeke” wherein not even himself can comprehend what the head or tail of his story is.

I was constrained to advert to all he forgoing episodes related to

Mukwekwezeke’s conduct for the simple reason pertaining to the scale of costs. I accept that generally a litigant should not be penalised with costs especially when that litigant is a lay person. However, exist certain instances where a litigant- lay person or not or self-actor or not – deserves to be mulcted with costs on an attorney client scale. In *Neil* v *Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 at 607 TINDALL JA (as he then was) said,

“The true explanation of awards of Attorney and Client costs not authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which gave rise to the action or conduct of the losing party, the Court in a particular case considers it just, by means of such an Order to ensure more effectively than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation”.

In the instant case, Mukwekwezeke, the losing party, by his conduct both in the Magistrates’ Court and in this Court as shown above, clearly abused court process. He was clearly frivolous and vexatious. There are therefore ample grounds to mulct him with costs on the scale of attorney and client.

In the result, I make the following order:-

1. The application for review succeeds and the second respondent’s decision in case number MC 6633/11 be and is hereby set aside and is substituted with “The application is dismissed with costs”.
2. The first respondent herein is ordered to pay the applicant’s costs on the scale of legal practitioner and client.

*Wintertons*, applicant’s legal practitioners