GRACE MAHACHI
versus
SMALLHOLDER MICRO-IRRIGATION
DEVELOPMENT SUPPORT PROGRAMME
(C/O MINISTRY OF FINANCE)

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 4 November 2010

A Muchadehama, for the applicant
J Mumbengegwi, for the Ministry of Finance
A Dururu, for the Small Holder Micro-Irrigation Development Support Programme

MUTEMA J: On 8 September, 2010 I erroneously granted an order, following a chamber application, registering an arbitral award in favour of the applicant against the Ministry of Finance as if the correct respondent was Smallholder Micro-Irrigation Development Support Programme ("the Programme"). The Programme is donor-funded by the European Development Fund.

Subsequent to the registration of the arbitral award, it was brought to my attention via my sister judge – Gowora J – who had dealt with an urgent chamber application by the Programme to stay the sale in execution of the Programme's motor vehicles which had been attached pursuant to the enforcement of the arbitral award, that the award had been registered against a wrong respondent. A closer scrutiny of the papers confirmed the error.

In order to rectify the error and the consequent injustice, I drew the parties' attention to the anomally. They filed their respective submissions on the issue and on 4 November, 2010 I issued the following order:

> "The order made on 8 September, 2010 registering an arbitral award in favour of the applicant against the Small Holder Micro-Irrigation Development Support Programme as the respondent was issued in error. The proper respondent should have been the Ministry of Finance. That order is accordingly rescinded".

The applicant has now noted an appeal against the above quoted order to the Supreme Court. The reasons for my order have been requested. These are they:

Order 49r 449(1)(a) allows a judge, either *mero moto* or on application by any party affected, to correct, rescind or vary any judgment or order erroneously granted in the absence of any party affected thereby while subr (1)(b) allows the same to be done if the order was

granted as a result of a mistake common to the parties. Either of the subrules applied in the present matter, hence I invoked that Rule.

What can be gleaned from the papers is that the contract of employment was entered into on 3 November, 2008 between the applicant as employee and the National Authorising Officer for the Programme, viz the Ministry of Finance as the employer. It is common cause that the Programme is a separate legal person from the Ministry of Finance.

The letter of applicant's suspension from work dated 20 October, 2009 emanated from the Ministry of Finance. It was authored by a deputy National Authorising Officer of that Ministry. So was the letter containing the misconduct charge dated 30 October, 2009.

Following an abortive disciplinary hearing at the Ministry of Finance, the applicant took her case to the Ministry of Labour – against, not the Programme but the Ministry of Finance. A labour officer referred the matter to arbitration after conciliation failed. It is common cause that before the arbitrator, the parties were the applicant as claimant and the Ministry of Finance as respondent. The award reads:

> "That respondent pay to the applicant salary arrears and benefits amounting to E51 933,90 within 7 days from date of the interim determination".

It goes without quarrel, in view of the foregoing, that the Programme had nothing to do with applicant's misconduct charge, it therefore was not her employer hence it did not feature before the labour officer or the arbitrator. It was never represented before the two tribunals. The award was clearly not against it, it being a separate legal entity. When the applicant resumed duty following her reinstatement pursuant to the arbitral award, the Programme Manager, Nhlema, on 26 May, 2010 wrote to the Ministry of Finance asking for instructions on how to proceed. He also on the same date wrote to the applicant saying *inter alia* "I now await formal instructions from the employer on how to proceed". This buttresses the view that the Ministry of Finance was applicant's employer. Even the letter written by the applicant's legal practitioners on 11 November, 2009 complaining about the applicant's suspension from duty and disciplinary enquiry was addressed not to the Programme but to the Ministry of Finance.

Also common cause is the fact that the Programme was cited for the very first time only in the application for the registration of the arbitral award in this Court. This escaped my eye for had I detected it I would not have granted the application for the registration of the award. What applicant did in this respect connotes an element of misleading the court if it was

done to circumvent the difficulty of executing against the Ministry of Finance's assets or property. It is a wonder that the applicant seemed not to be in the know as regards who her employer was.

Order 39 r328 clearly states that any process which names a wrong person as a party is invalid. *In casu* a wrong respondent was named in the process of registering the arbitral award as well as in the writ of execution. Such a process is accordingly invalid.

The foregoing are the reasons for the order/judgment that I gave.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners.
Civil Division of the Attorney-General's Office, Ministry of Finance's legal practitioners
Dururu & Associates, Programme's legal practitioners