HH 118/22
HC 4627/21

ZIMBABWE RURAL DISTRICT COUNCILS WORKERS' UNION
versus
NYANGA RURAL DISTRICT COUNCIL
and
DANGAREMBIZI M N.O.
and
ELEVEN OTHER CASES

HIGH COURT OF ZIMBABWE
MAFUSIRE J & CHILIMBE J
HARARE, 25 February 2022

Chamber application

MAFUSIRE J

[a] Introduction

[1] In November 2021 there was a deluge of chamber applications to this court for the registration of determinations or awards issued by designated agents employed by the National Employment Council for Rural District Councils [RDC]. In all of them, the applicant was the Zimbabwe Rural District Council Workers' Union, a trade union. The first and second respondents would respectively be the particular rural district council concerned and the respective designated agent who would have issued the determination. Except for the names of the RDCs; the names of the designated agents, and the amounts of the awards, the applications were identical in all other respects.

[2] Some of those applications were disposed of in one way or the other by the different judges to whom they had been allocated. In due course administrative measures were incepted to have the rest of them dealt with by a single judge. Such an approach is sound administrative practice. Among other things, it curtails or minimises the potential for embarrassment, the uncertainty and the inconsistency that may arise when different judges from the same court issue conflicting or contradictory decisions on similar matters.

[3] Upon perusing the applications I noticed something odd. My brother CHILIMBE J and I set out to investigate. In chronological order of case numbers, the applications to which this judgment relates are:

	Case No [HC]	**RDC**	**Designated Agent**	**Award [RTGS$]**
i/	7208/20	Mutasa	Ruziwa W	3 679-80
ii/	4627/21	Nyanga	Dangarembizi M	850 393-44
iii/	4770/21	Mazowe	Munyaradzi Dangarembizi	743 855-20
iv/	5242/21	Mazowe	Munyaradzi Dangarembizi	Food hampers
v/	5244/21	Mazowe	Munyaradzi Dangarembizi	101 490-31
vi/	5485/21	Chirumhanzi	Munyaradzi Dangarembizi	681 781-42
vii/	5487/21	Gutu	Munyaradzi Dangarembizi	104 987-58
viii/	5521/21	Bulilima	Munyaradzi Dangarembizi	343 791-50
ix/	6174/21	Mazowe	Munyaradzi Dangarembizi	28 107 158-80
x/	6178/21	Kusile	Munyaradzi Dangarembizi	360 433-11
xi/	6594/21	Nyaminyami	Munyaradzi Dangarembizi	534 582-75
xii/	6789/21	Pfura	Washington Ruziwa	658 540-58

[b] Nature of the applications

[4] The applicant wants the various awards by the designated agents registered by this court. Upon such registration the awards should become orders of this court for enforcement purposes. Curiously, there is no provision anywhere in our statute books governing such a procedure. The applicant and its legal practitioners confess as much. It is stated that the applications are made in terms of s 14 of the High Court Act [*Chapter 7:06*], as read with s 63(3a) of the Labour Act [*Chapter 28:01*]. But these provisions do not say that the High Court can, upon application, register awards by designated agents of employment councils for enforcement purposes. The applicant's standard form affidavit in support of the applications has these averments:

> "10. I am advised that the route taken by the 2nd respondent [i.e. the designated agent] meant that his determination became final and binding on all the parties including the 1st respondent [i.e. the RDC].
>
> 11. However, it is common cause that the 2nd respondent does not have the mechanism and competence for the execution of his decision.
>
> 12. Therefore, the Applicant hereby makes an Application to this Honourable Court for an order to register this determination as an order of this Court for the purpose of enforcement.
>
> 13. This court has jurisdiction to grant the relief sought as a court of inherent jurisdiction on all civil matters in this jurisdiction. This is, more so, due to the fact [*that*] there is no specific enactment dealing with the registration of such determinations by any other court."

[5] At the heart of these applications is the nature and extent of the expression 'inherent jurisdiction' and whether it applies to situations such as the present where no legislative provision exists to govern such an approach. But before I delve into our findings, it is necessary to comment, albeit briefly, on a side aspect concerning the conduct of the applicant's legal practitioners.

[c] Conduct of applicant's legal practitioners

[6] The applications were all made via the chamber book. The rationale, as stated in the founding affidavits, was that the relief sought was merely procedural. I took no issue with that. Nobody else did. But given that the situation was manifestly a novel one, and having formed a *prima facie* impression that the applications were unprocedural, I decided to invite the applicant's legal practitioners for a hearing in chambers. I wanted to share my concerns and hear them out. So, I set the matters down for hearing on 13 December 2021 at 10:00 hours and notified them through the Registrar well in advance. This approach is permissible in terms of r 60(8)(a) of the High Court Rules, 2021.

[7] The legal practitioners did not turn up. Exactly a month later, they wrote to the Registrar attaching some heads of argument which they said they had prepared in response to a query raised by myself. That was presumptuous. I had raised no query. I had merely pointed out that the relief sought seemed incompetent. I had given no further particulars. These would be the

business of the proposed hearing. No excuse was given or any apology tendered or any explanation extended on the failure to attend the hearing. Evidently, the heads of argument were intended to anticipate or second-guess my concerns. But they missed the point. They went no further than merely attempting to interpret the Constitutional Court case of *Isoquant Investments (Pvt) Ltd t/a as ZIMOCO v Darikwa CCZ* 6/20 [hereafter referred to as "***the ZIMOCO judgment***"]. But that case did not deal with the issue arising from these applications. The issue arising from these applications is this: despite its inherent jurisdiction, can this court register awards from other adjudicatory or quasi-adjudicatory authorities such as designated agents from employment councils in the absence of legislative authority? Does the exercise of power by a court of inherent jurisdiction extend to every situation where there may be a lacuna in the law? Is inherent jurisdiction limitless? These issues are the substance of this judgment and that of my brother CHILIMBE J below.

[d] The concept of inherent jurisdiction of a court

[8] The concept of inherent jurisdiction of a court is a complex one. Virtually all the legal systems of the world have at one time or the other grappled with it, but with varying degrees of success. Its precise boundaries are incapable of demarcation. There is considerable literature around the concept. Plainly, no judgment of any court can ever be the last word on it. It is a common law concept. Some academics discern theoretical differences between the inherent jurisdiction of a court and its inherent power. They say that the terms are sometimes conflated. Others believe they mean the same thing and are interchangeable: see, for instance, an article by a New Zealand academic, Ferrere M R *The Inherent Jurisdiction and its Limits*, Otago Law Review [2013] Vol 13, Number 1. My brother CHILIMBE J deals with these aspects in somewhat greater detail. But widespread opinion seems to regard the concepts as converging, the distinction being just a matter of semantics: see Ferrere, *ibid*, p 111.

[9] Section 176 of our Constitution provides that the Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own processes and to develop the common law, or the customary law, taking into account the interests of justice and the provisions of the Constitution. But the Constitution does not define 'inherent power'.

Therefore, it can only be understood in accordance with the common law definition. The functional definition of inherent jurisdiction which the various jurisdictions around the globe have employed is said to have been coined by I H Jacob, *The Court's Inherent Jurisdiction* (1970) 23 CLP 23, quoted by Ferreira, *ibid*, at p 108. It is:

> "… [the] residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[10] From case law in the different legal systems of the world and the relevant literature on the point, my summary of the principles emerging from the concept 'inherent jurisdiction', or 'inherent power', is this:

- **Inherent jurisdiction is the residual power drawn upon by a superior court of inherent jurisdiction, in the interests of justice, to provide a solution or a remedy in circumstances where there is none available or readily discernible from statute or the common law**. For example, in 1976 England, the birth place of the common law [as opposed to the civil law of Roman origin], came up with what became known as Anthony Piller orders, after the case of *Anthon Piller KG v Manufacturing Process Ltd* [1976] Ch 55 (CA). This is an order granted *ex parte* for the preservation of evidence in civil litigation where a party is authorised to enter his or her opponent's premises to search and remove property in circumstances where the opponent is likely to destroy such evidence. This procedure was neither prescribed by statute nor formed part of the common law.

- **A court's power to exercise inherent jurisdiction is not unlimited. The power is exercised in the most exceptional circumstances**. Sometimes it is best for a court, after identifying the lacuna in the law, to leave it to Parliament to promulgate relevant laws to fill the gap. Thus in the English case of *Al Rawi v The Security Service* [2011] UKSC 34; [2012] 1 AC 531, the United Kingdom Supreme Court refrained from exercising its inherent jurisdiction to resort to what is called a "closed material procedure". In terms of this procedure a court would, in the public interest, permit limited discovery by one party to a civil suit of certain privileged evidence by making discovery only to the court and to what are termed "special advocates. "Special advocates" are counsel cleared by the government to examine such evidence on behalf of the opposing party who himself or herself is not permitted access to it. Whilst such a procedure was permitted by statute in certain criminal proceedings for the purposes of preventing the disclosure of sensitive information that could undermine national security, it was not provided for in civil proceedings. Accepting that a court's jurisdiction is not unlimited, and believing that such a procedure would violate certain fundamental common law rights of a litigant, the House of Lords left it to Parliament

to craft the relevant law. Parliament obliged, albeit two years later, see: Ferrere, *ibid*, at p 117.

- **Inherent jurisdiction is primarily a procedural concept which the courts should not invoke to make changes in substantive law. Changes to substantive law is the duty of the Legislature**: see W H Charles, *Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?* (2010) 33 Dalhousie LJ 63, 64[1].

- **A judge does not have an unfettered power to do what he or she thinks to be fair as between the parties. A court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matters at issue**: W H Charles, *ibid*. Ferrere, at p 121, refers to a Canadian case of *Gillespie v Manitoba (Attorney-General)* (2000) 185 DLR (4th) 214 in which the court, refusing to extend the exercise of inherent jurisdiction in certain situations, said in the course of its judgment:

  > "… the inherent jurisdiction is not a kind of 'ubiquitous judicial prerogative.' Indeed, it is not a prerogative at all. The Divine Right of Kings is dead; it has not passed to judges. In a democracy such as ours, judges have a distinct function which enables them to command others, but the power to do so must be exercised within the Constitution and the law."

- **The ultimate aim of the exercise of inherent jurisdiction is to ensure that justice is done. On the one hand its exercise cannot contravene legislative intent. But on the other, only explicit legislative intention will suffice to ousting it**: *Derdale Investments (Pvt) Ltd v Econet Wireless (Pvt) Ltd & Ors* 2014 (2) ZLR 662 (H).

[11] The above list is by no means exhaustive. Very broadly, and put differently, inherent jurisdiction is the ability of a court to craft solutions to particular problems out of necessity in certain situations. Such a power stems from a realisation that the Legislature cannot codify all the solutions to human problems in advance of their occurrence. It is not within human powers to foresee the manifold sets of facts which may arise: see *Seaford Court Estates Ltd v Asher* [1949] 2 All ER 155 (CA) at 164. But even if it were, no Act of parliament is drafted with divine prescience and perfect clarity as to cover all situations or to completely eliminate ambiguity. Therefore, the right of a court to draw on its inherent jurisdiction and the power thrust upon it by the Constitution to, among other things, develop the common law, enable it to provide solutions in certain situations where not do so would lead to an injustice. But this is done within certain limits. Among other things, where there is a possible solution or remedy available, the court will not always resort to the exercise of inherent jurisdiction. Inherent

[1] Referred to by Marcelo Rodriguez Ferrere, *The Inherent Jurisdiction and its Limits*, Otago Law Review [2013] Vol 13, Number 1 at p 120

jurisdiction is not an excuse for a court to assume despotic power and clothes itself with legislative capability to craft new laws. It is in the light of these principles that the present applications are considered.

[e] The applicant's case

[12] In terms of the Labour Act dispute resolution in employment situations at the shop floor outside a particular company or organisation is entrusted to labour officers appointed in terms of s 121, and designated agents appointed in terms of s 63. Labour officers have jurisdiction over all disputes referred to them. Employment or designated agents only have power in respect of disputes arising from their particular industries or undertakings. The contrast between the powers of labour officers and those of designated agents in the adjudication process is extensively discussed in the *ZIMOCO* judgment. Very broadly, the crisp difference between their powers is that, in the context of the present applications, labour officers, at the end of the dispute settlement process, can only issue "draft rulings" which are subject to confirmation by the Labour Court. On the other hand, designated agents do not issue draft rulings which have to be confirmed by the Labour Court. Their rulings are final. If ever they have to be referred to the Labour Court, it will be only by way of an appeal or review.

[13] The applicant's case, as I have understood it, and in my own formulation, is that on the authority of the *ZIMOCO* judgment, and in the exercise of its inherent jurisdiction, this court is empowered and obliged to register determinations of designated agents because they are final, requiring no further processes to clothe them with validity. They are already valid. But designated agents lack authority to enforce their determinations. They cannot go to the Labour Court to have them registered because that court, as a creature of statute, cannot entertain them when no such power is conferred by the founding Act.

[14] The applicant's argument is persuasive. But I think it is contrived. The focus of the *ZIMOCO* judgment was completely on a different issue altogether. What the applicant wants done is not for the court to invoke its inherent jurisdiction to adjudicate on a matter. The applicant's matters have been adjudicated upon already. What the applicant wants done is for

this court to adopt and incorporate as its own, by the process of registration, a ruling which it has not itself given and in circumstances in which neither the common law nor statute provides for such a process. It is not my understanding of the common law that the adoption and incorporation of rulings by adjudicating or quasi-adjudicating authorities outside the purview or authority of this court has ever been a common law function of a court of inherent jurisdiction anywhere in the world. Registration of awards is merely procedural.

[15] In our context, the power to register rulings by other judicial or quasi-judicial bodies is expressly provided for and regulated by statute. CHILIMBE J elaborates more on this. If it were not, where would one draw the line? Granted, designated agents are creatures of statute who are clothed with extensive statutory powers. The only problem is that such statutory provisions do not go so far as to explain what one does with their rulings. If designated agents are creatures of statute, I think their own progeny (in the form of awards) ought properly be governed by statute as well

[16] I do not understand the applicant's reference to s 14 of the High Court Act and s 63(3a) of the Labour Act. Section 14 of the High Court Act enjoins this court, at its discretion, to determine future or contingent rights of any interested person even if that person cannot claim any relief consequent upon such determination. On the other hand, s 63(3a) of the Labour Act empowers a qualified designated agent to redress, or attempt to redress, any dispute which is referred to them or which has come to their attention if it is a dispute arising in the undertaking or industry in which their employment council is registered. The designated agents are then empowered to exercise certain powers as are reposed in the labour officers, and to follow certain steps as labours officers are required to follow. As to how far the designated agents go in the exercise of such powers is what was extensively spelt out in the *ZIMOCO* judgment. But as to what steps are to be followed after they have redressed a dispute was not dealt with in that judgment or, as far as I know, any other. So the reference by the applicants to the provisions of these two Acts is unhelpful.

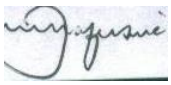
[f] <u>Conclusion and disposition</u>

[17] As shown above, a court's power to exercise inherent jurisdiction is not unlimited. I do not believe that the authority given by the Constitution in s 176 for superior courts to develop

the common law extends to the power to invent new laws. It is a power to extend principles of the common law to novel situations as may arise from time to time. It is not a power to legislate. I believe this is an appropriate situation, as the UK Supreme Court did in the *Al Rawi* case above, to defer to Parliament to legislate. It can easily make simple amendments to the Labour Act by providing for the enforcement of rulings by designated agents. It seems to me to have been an oversight in the first place.

[18] I consider that that the applicant is not without a remedy. The determinations by the designated agents can form the basis of proceedings for judgments from this court in much the same was as liquid documents are. In closing, whilst I consider the matter as novel and borderline, on a proper analysis of the concept of inherent jurisdiction, this is a case where it would be inappropriate for the court to extend its power to cover these applications. In the premises, the applications are dismissed.

25 February 2022



CHILIMBE J

[19] I have read the judgment of my brother MAFUSIRE J. I concur. The sole issue in these applications is the registrability with this court for enforcement purposes of determinations by designated agents from employment councils. There is no specific statutory provision dealing with this aspect. The scope and purpose of activities of an employment council are defined in section 62(1) (a) of the Labour Act. Among other matters, an employment council is designed to support collective bargaining engagements between employers and employees. An employment council is also mandated to prevent or resolve any disputes as may occur within the undertaking. In short, an employment council is a forum for employers and employees to harmonise conflicting interests in the labour space, such harmony being essential for the effective functioning of specific undertakings, and in this case, rural district councils. They are an arm of local government.

[20] The employment council deploys, in discharging its functions, the designated agent. He or she is an officer appointed by the employment council. He or she is invested with authority to redress, or attempt to redress, disputes as may occur within the undertaking. In the present proceedings, the applicant was aggrieved by the conduct of the rural district councils in question. The grievance arose from the non-remittance of union dues by those councils. The applicant sought an order to compel these councils to remit union dues from those of their employees who were not members of the applicant. The applicant was successful in this regard, before the designated agents.

[21] The determinations handed down by the designated agents outline the factual backgrounds as well as the basis of the awards. Essentially, the applicant had negotiated a series of collective bargaining agreements (CBAs), on behalf of all employees of those rural district councils. Those CBAs awarded increases in the employees` salaries and benefits. In terms of the constitution of the National Employment Council, the applicant became entitled to a contribution equivalent to 25% of the value of the collective bargaining package. These contributions were due from those employees of the rural district councils that were not members of the applicant. The responsibility to deduct and remit the dues fell on the rural district councils. Thus, the applicant secured, in default of contestation by each of the respective rural district councils, the various awards set out in Para 3 of the judgment by my brother.

[22] Armed with those default awards, the applicant has now approached this court seeking to register them for purposes of enforcement. The applicant acknowledges that there is no specific statute providing for the registration of a designated agent`s determination. The result is that the applicant is armed with a batch of awards validly issued by quasi-judicial tribunals vested with statutory authority to issue such awards. However, the applicant is unable to progress these awards to execution. Effectively, the applicant seems to be suggesting that unless this court registers the awards then it will be burdened with orders which are in effect a *brutum fulmen*. Implicit in their approach is the argument that it could not have been the intention of the legislature to issue designated agents with authority to dispose of matters, but deny the resultant orders legal effect.

[23] In *Isoquant Investments (Private) Limited t/a ZIMOCO v Memory Darikwa* CCZ 6/20, MALABA CJ stated as follows at pages 29-30:

> "Section 63(3a) allows a designated agent, upon authorisation by the Registrar of Labour, to either redress or attempt to redress any dispute which is referred to the designated agent or has come to his or her attention. …….What is key in understanding what a designated agent can or cannot do is to understand the meaning of the phrase "redress any dispute", used in s 63(3a) of the Act…….. When used as a verb, the word "redress", according to the Oxford English Dictionary means to remedy or set right an undesirable or unfair situation. A designated agent authorised by the Registrar of Labour redresses a dispute referred to him or her. He or she offers a remedy or sets right an unfair situation. A final decision was made by a designated agent after hearing evidence on the dispute from the parties. It was a decision made by an impartial arbiter after hearing evidence from both parties. It disposed of the issue for determination."

[24] Once a designated agent disposes of a dispute through redress, the next question is how does the beneficiary or claimant awarded entitlement under that designated agent`s redress execute such an award? Naturally, this being a labour matter, one would assume that the Labour Act has mechanisms or a framework for the execution of determinations by the designated agents whom it not only created but invested with authority. Sections 92B and 95(5a) the Labour Act provide for the registration of determination issued (92B), or confirmed (93(5b)) by the Labour Court with either the magistrates` court or he High Court for enforcement purposes. The destination court for registration of these determinations depends on the jurisdictional size or value of the judgment in question. It is clear that the registration of orders in terms of this provision relates only to orders made by the Labour Court.

[25] Parts XI and XII of the Labour Act also create various other mechanisms for dispute resolution. These are additional to the main adjudicative functions of the Labour Court. They are also additional to the dispute resolution mechanism provided for under section 63(3a) relating to designated agents, as already noted. Thus Parts XI and XII of the Act create room for labour officers to refer labour disputes for resolution by compulsory arbitration. The awards obtained under that procedure can again be registered with the magistrates` court or the High Court for purposes of execution in terms of section 98 (13) of the Labour Act.

[26] The Arbitration Act [*Chapter 7:15*], in Article 35, provides for the registration of arbitral awards with this court. Among others, these are awards resulting from disputes resolved by arbitration after referral in terms of the Labour Act. No provision is made for the registration of awards or determinations by the designated agents. Sections 2A and s 3 of the Labour Act, read together with the Act`s short title, encapsulate the purpose of the Act as follows: to advance social justice and democracy in the workplace by giving effect to the fundamental rights of employees; providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment; the promotion of the participation by employees in decisions affecting their interests in the work place, and securing the just, effective and expeditious resolution of disputes and unfair labour practices. It is also expressly provided that the Act shall be construed in such manner as best ensures the attainment of its purpose and that it shall prevail over any other enactment inconsistent with it.

[27] However, notwithstanding such exhortations in the Labour Act, it is not correct to conclude that its seemingly over-arching purpose directly or implicitly provides for the general registration of all awards made pursuant to the Act. In *Chingombe & Another v City of Harare & Ors SC 177/20*, the court examined the above provisions and commented as follows at Para 26:

> "A perusal of the section makes it clear to the reader that the intended purpose is to ensure that employees are accorded the legal framework for the enforcement of their rights within the workplace as guaranteed by law. However, for present purposes s 2(1) (f) is the pertinent provision as it seeks to ensure the securing of a just, effective and expeditious resolution of disputes and unfair labour practices." (*Emphasis added*)

[28] Thus it may be concluded that where the legislature intended to facilitate the registration of orders for purposes of execution, it explicitly created specific mechanisms in the Labour Act for the registration of such awards. These mechanisms are, as stated, provided for in s 92B, 93(5a) dealing with registration of the Labour Court`s own judgments, and s 98 (2) as read with s 98 (14) and (15), dealing with resolutions of disputes in terms of the Arbitration Act. From the foregoing, it appears that the Legislature deliberately excluded the designated agent`s award from registration.

[29] Away from the Labour Act, there are other instances in which the Legislature has created mechanisms for the registration of awards or determinations by quasi-judicial authorities. There is the registration and transferability of maintenance orders in terms of section 18 and 20 of the Maintenance Act [*Chapter 5:09*]. The Mines and Minerals Act [*Chapter 5:09*] firstly vests, in s 345, mining commissioners with judicial powers to adjudicate disputes arising from mining and mineral rights and exploitation. Secondly, it explicitly grants authority to these quasi-judicial officers to issue writs of execution in the form used by the magistrates' courts for the recovery of monies awarded by them by way of costs. The messenger of courts is enjoined to treat such writs in the same manner as he would those writs issued by the magistrates' courts under that court`s normal scope of adjudicative functions. Part V of the Consumer Protection Act [*Chapter 14:14*] provides for the resolution of consumer disputes through consumer protection officers. These officers` powers and authority are similar to those of labour officers appointed in terms of the Labour Act. Section 60 of that Act sets out the procedure for disposing of disputes or complaints through arbitration and s 60 (10) and (11) provide for the registrability and effect thereof of arbitral awards.

[30] It goes without saying therefore that where quasi-judicial bodies are granted authority to resolve disputes, or address matters within the sphere of that authority, the extent of that authority is always circumscribed by statute. The process of enforcement of any subsequent awards made by such authority are also spelt out with clarity. For example, in the case of military courts as set out in terms of the defence statutes such as the Defence Act [*Chapter 11:02*], the authority even extends to the imposition of sentences of imprisonment including capital punishment. Accordingly, it seems logical that where no specific provision is made for the registration of orders, as in the instance of the designated agents, that power cannot be created by assumption or deduction.

[31] *In casu*, the applicant seeks to persuade the court that in the absence of specific provisions relating to the registration of the designated agents` orders with a particular court for enforcement purposes, then the High Court must exercise its inherent jurisdiction and accept registration of these orders. In *Derdale Investment (Pvt) Ltd v Econet Wireless (Pvt) Ltd & Ors* 2014 (2) ZLR 662 (H), DUBE J (as she then was) had occasion to examine the issue of the inherent jurisdiction of the High Court at length. Relevant portions of her judgment read:

"The High Court is a superior court of record and has original jurisdiction in all civil and criminal matters. It has unlimited original jurisdiction which it exercises unless its jurisdiction is specifically ousted. It has concurrent jurisdiction and may exercise its jurisdiction over matters which other courts have jurisdiction. ……. The High Court also has inherent power conferred upon it by s 176 of the Constitution to protect and regulate its own process and to develop the common law or the customary law.

……

The concept of inherent jurisdiction has its roots in the English common law that a superior court has the inherent jurisdiction to hear any matter that comes before it unless that authority is expressly excluded or limited by some statute or rule of law. The concept of inherent jurisdiction is described by Jerold Taitz in "The Inherent Jurisdiction of the Supreme Court" (Cape Town, South Africa; Juta Publishers, 1985) as follows,

> 'The inherent jurisdiction of the supreme court may be described as the unwritten power without which the court is unable to function with justice and good reason. As will be observed below, such powers are enjoyed by the court by virtue of its very nature as a superior court modelled on the lines of an English superior court….'
>
> In Halsbury's Laws of England, 4 ed. (London, Butterworth's), inherent power is defined as follows;
>
> 'In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them'
>
> In *Martin Sibanda and Anor v Benson Chinemhute and Anor* HH 131/04 MAKARAU J gives a graphic distinction between a court of inherent jurisdiction and one without and remarks thus,
>
> 'I have always visualised the difference between a court of inherent jurisdiction and one without as two buildings open to the citizenry. One has all its doors and windows open to all and for all reasons (and in all seasons), apart from those expressly and clearly forbidden entry by statute. Where a point of entry is hitherto non-existent for a member of the public in the form of procedure, one is inherently created in the interests of justice. This is the court of inherent jurisdiction. The sentry manning the building is less stern and less demanding than his counterpart at the gates of the other building. This other building representing the court without inherent powers is generally closed up apart from a few windows to allow access to those expressly defined in the statute creating the court, on certain terms and for certain specified purposes. Where the statute does not create a point of entry, the court cannot open one for anyone. In this country that distinction boils down to classification of courts on the basis of superior courts and inferior courts.'
>
> …….
>
> The mischief behind the concept is to ensure that justice is done between the parties by ensuring that due process of law is observed, proceedings are fair and are conducted in accordance with real and substantial justice."

[32] A fairly extensive assessment of the subject of inherent jurisdiction was also conducted by Marcelo Rodriguez Ferrero in his article *The Inherent Jurisdiction and its Limits*, published in the New Zealander University of Otago`s Otago Law Review [2013 Vol 13 Number 1. The author traced the history of the doctrine of inherent jurisdiction from its roots in English common law, to its application in various jurisdictions including England, Canada, New Zealand, Singapore and Australia. The critical guidance to draw from the surveyed authorities and principles have been summarised in the judgement by my brother. The High Court, as a superior court, does enjoy inherent jurisdiction. It has the intrinsic authority to exercise such jurisdiction. What the authorities also say is that this jurisdiction is not open-ended, unfettered or limitless.

[33] The Singaporean Appeal Court decision of *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd [2010] SGCA 39 [1*] stated that:

> "… 'Inherent power' should not be used as though it were the joker in a pack of cards, possessed of no specific designation and used only when one [does] not have the specific card required."

Another scholar, J. Farley in his article titled *Minimize Codification by Expanding Use of Inherent Jurisdiction* [(2007) 27 Lawyers Weekly 13, 13], sounded similar cautions stating that:

> "….Inherent jurisdiction is not palm tree justice. Rather, as an element related to the common law, it should be used sparingly (cautiously), but as often as truly required."

The High Court can hear matters, conduct trials, inquiries, determine matters, uphold or overrule preliminary or interlocutory issues, quash proceedings and orders in reviews and appeals respectively as well as carry out a wide array of other activities in the exercise of inherent jurisdiction. It must exercise the usual caution in the discharge of its discretionary mandate. This ensures that it stays true to its judicial function and avoids going on "*a frolic of its own"* (see *Mubaiwa v Chiwenga* SC 86/20).

[34] The applicant confined its focus to the court`s "*inherent jurisdiction*". It is necessary to examine whether the court may grant the relief sought under its "*inherent powers*". TSANGA J explained the distinction in *Machote v Zimbabwe Manpower Development Fund* HH 813-15 in the following way:

> "Jurisdiction of a court essentially refers to the authority that a court has to hear and determine a dispute that is brought before it. This is in distinction to the court's *"inherent power*" to do something as dealt with by s 176 of our Constitution. In terms of this section, the Constitutional Court, the Supreme Court and the High Court all have *inherent powers* 'to protect and regulate their own process and to develop the common law or customary law taking into account the interests of justice and the provisions of this Constitution.' Such *inherent powers* can thus be inherent procedural powers or inherent substantive powers and are exercised on the premise that the court in question already has jurisdiction in the first place. Thus regulation of process as exhorted by s 176 would be largely an exercise of inherent procedural powers while development of common law and customary law as per s 176 would be largely an exercise of inherent substantive powers. Respondent's argument was founded on the *jurisdictional authority* of the High Court in terms of s 171 (a) to hear and determine a civil matter, in this instance a labour dispute."

[35] From the above, the court must have recourse to its inherent powers in circumstances where there is no other tool, mechanism or option open to a litigant. As indicated earlier, the designated agent`s determinations are not covered with a specific statutory roadmap providing for their instantaneous registration with this or any other court for purposes of execution. Such omission by the Legislature may have been deliberate.

[36] It is necessary to recognise further, that whenever awards or orders are registered with a court for enforcement purposes, specific guidelines are set out to lead the registering court on the qualifying criteria. There are different considerations associated with registration of orders, especially from the checks or due diligence which the registering court must carry out. In many instances, the guidelines or considerations differ depending on the source, the nature, effect or purpose of the order .As an example, the Civil Matters Mutual Assistance Act [*Chapter 8:02*], which deals with the registration of foreign judgments, the registration of orders obtained elsewhere is a matter revolving around authenticity, verification, transmission and reliability of such orders. Thus, where a court takes it upon itself to register an order issuing from another tribunal, the integrity of the order has to be scrupulously scrutinised. For a registering court to be able to do so, it needs to be guided by the relevant statute providing for the registration of the award or order. Sections 18 and 20 of the Maintenance Act, for instance, are quite detailed and deal with matters relating to family, child rights and support concerns and safeguards. Rule 77 of the High Court Rules sets out detailed guidelines to be followed by the court when registering foreign judgments for purposes of execution. This means that considerations which a registering court ought to take into account are a matter of legislative prescription.

[37] Following on the analogy of MAKARAU J in the *Sibanda* case above (relating to buildings and their special entry points) it seems this court exercises such jurisdiction mindful of the specialities of those points of entry. The court has various platforms for litigants to prosecute their claims. These platforms include trials, applications, petitions, appeals, reviews and many others. Even in these specific instances, the court recognises and accords those litigants with urgent and pressing requests the right to "jump the queue" under appropriate circumstances. By the same token, those litigants who enjoy the privilege of statutory approval will be permitted to follow a simple procedure of registering their awards obtained in other fora. If such applicants pass the prescribed procedures they will walk away armed with writs of execution in their favour. Litigants may also approach the court armed with indisputable evidence of rights and entitlements such as acknowledgements of debts, bonds, guarantees or indemnities. Such litigants are directed to a special "entry point" through which they may pursue their debtors and obtain relief with expedition. Similarly, persons in possession of various certificates of title, possession or ownership can also vindicate their rights to property and entitlement through following certain simple procedures.

[38] In all these instances, the Legislature did not privilege such litigants, (notwithstanding their possession of strong proof of entitlement), with the right to register their claims and walk away with an order to execute. They must litigate. In this instance, the designated agent`s award becomes but another version of an advantageous positioning of a litigant. The applicant can found the basis to approach the court and seek relief under any of the truncated processes without going through the lengthy cycles of full blown litigation such as trials.

[39] Notwithstanding my conclusion on the application, I would not say it was obviously the intention of the Legislature to relegate a statutorily appointed adjudicator`s award to the status of a debt collector`s IOU, bounced cheque, dishonoured promissory note and other debt instrument as used in commerce. The authority of the designated agent is indisputable. The Constitutional Court endorsed that position beyond doubt in the *Isoquant Investments* (or *ZIMOCO*) decision. Evidently it was the deliberate decision of the Legislature, mindful of the need to attain industrial justice, to set up dispute resolution mechanisms by making provision for the appointment of designated agents and clothing them with certain adjudicatory powers. But registration of awards by a court is something quite different. There is no statutory

authority for it. That seems to leave the determination by a designated agent at the level of a liquid document or some such instrument of debt. In my view, there is an obvious need for the Legislature to step in and correct the anomaly. In the premises I would also dismiss the applications.

25 February 2022

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Lawman Law Chambers, legal practitioners for the applicant