BOZIMO TRADE AND DEVELOPMENT CO (PVT) LTD *v* FIRST MERCHANT BANK OF ZIMBABWE LTD & ORS 2000 (1) ZLR 1 (HC)

Citation	2000 (1) ZLR 1 (HC)
Case No	Judgment No. HH-12-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	September 7, 1999*(1)
Judgment	September 7, 1999*(2)
Annotations	None

Civil application

Flynote

Legal practitioner - conduct and ethics - representation of party - legal practitioner chairman of applicant company - practitioner allowed to represent company but as agent of company and not as officer of court - practitioner emotionally involved in proceedings - advisability of employing counsel to argue case

Practice and procedure - affidavit - supporting affidavit filed in opposition to claim - false statements in affidavit - whether such opposition defective

Practice and procedure - interdict - anti-dissipation interdict - interdict sought in respect of assets outside jurisdiction - may be granted where will be effective - requirements for issue of anti-dissipation interdict - such interdict is a species of interim interdict - requirements for interim interdict must be satisfied - only necessary for applicant to show prima facie case

Practice and procedure - party - non-suiting of - grounds - allegations of falsehood in respondent's affidavits - whether this can be basis for non-suiting party

Headnote

The applicant company applied for an anti-dissipation interdict in respect of assets situated outside Zimbabwe. It contended that it intended to commence legal proceedings against the first respondent in the United States of America and that the interdict was necessary to stop the respondents from dissipating assets in order to frustrate the execution of any judgment the applicant might obtain. A legal practitioner, who was the chairman of the applicant company,

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sought to represent a company in respect of which he was the chairman. He had made a number of depositions on behalf of the company. The applicant

argued that the affidavits of the respondents contained many deliberate falsehoods and because of this their opposition was defective.

Held, that the legal practitioner should be allowed him to represent the company as agent of the company instead of its legal practitioner. He was entitled to represent the company as its agent as he was its *alter ego*, although he was not the sole or majority shareholder in the company. However, he had such a deep-seated perception of unfair play on the part of the respondents that he might end up prejudicing the applicant's case by representing the company. It would be better for him to hand over the case to legal counsel.

Held, further, that even if, as claimed by the applicant, the alleged false statements by the respondents in affidavits did amount to contempt of court or verge on criminality, this was not a proper basis for non-suiting the respondents whose case on the merits was strong. Such circumstances could be dealt with by way of a punitive award of costs or by committal for contempt.

Held, further, that an anti-dissipation prohibitory interdict is a form of interlocutory interdict. It is not necessary for the applicant to show that the respondent has no *bona fide* defence; the applicant must simply establish a *prima facie* case, even if it is open to some doubt. It must also establish an infringement, or a reasonable apprehension of an infringement, of the right, the absence of any other satisfactory remedy and a balance of convenience in favour of granting the interdict.

Held, further, that the court may issue an order prohibiting a person within its jurisdiction from doing something outside the jurisdiction, but before doing so the court must be satisfied that its order will be effective. Considerations to be taken into account in this regard include whether the respondent is an *incola* or a *peregrinus.* If the applicant satisfied the court that all the requirements for the granting of interlocutory interdict are present, it is not a bar to the granting of an anti-dissipation interdict that the assets involved are held outside the country. In such a case, it does not necessarily have to be proved that the respondent has assets within the area of jurisdiction of the court Where the person against whom a prohibitory interdict has been granted remains within the jurisdiction of the court, such court can always enforce compliance with its order through the use of contempt of court proceedings.

Held, further, that in the present case the requirements for the granting of this interdict had not been proven. In respect of three of the respondents, it had not been proven that they intended to dissipate their assets in order to frustrate any judgment that the applicant might obtain against them. In respect of the remaining respondent, there was evidence that this respondent had plans to dissipate its funds in the United States of America so as to frustrate any judgment that might be obtained in that country. However, the balance of convenience was against the granting of the interdict in respect of this respondent. If the interdict were to be granted this respondent would suffer greater prejudice than the applicant would suffer if the interdict were refused. Even if the respondent were to secrete its funds in the United States of America any

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judgment obtained there could be enforced in Zimbabwe.

Cases Considered

Cases cited:

Bester v *van Niekerk* 1960 (2) SA 363 (E)

C M Asbestos Co (Pty) Ltd v *King Chryostyle Asbestos Mines (Pty) Ltd & Ors* 1953 (3) SA 431 (W)

Hugo v *Wessels* 1987 (3) SA 837 (A)

Knox d'Arcy Ltd & Ors v *Jamieson & Ors* 1995 (2) SA 700 (W)

Lees Import & Export (Pvt) Ltd v *Zimbank* 1999 (2) ZLR 36 (S)

Min of Agriculture v *Grobler* 1914 AD 221

Noormahamed v *Patel* 1987 (2) ZLR 324 (S)

Setlogelo v *Setlogelo* 1914 AD 221

South Atlantic Islands Development Corp v *Buchan* 1971 (1) SA 234 (C)

Winter Ex p 1948 (3) SA 377 (W)

Zimbank v *Pindi Electrical & Ors* S-80-99

Case Information

Applicant represented by its chairman, *A Kara*

A P de Bourbon SC, for the respondent

Judgment

Chatikobo J: In these proceedings the applicant seeks an anti-dissipation interdict *in securitatem debiti* against all four respondents, a group of companies which, so it seems, have a mutuality of shareholdings and directorships. The facts upon which the application have been premised fall within a very narrow compass but the deponent to the applicant's papers, who is the chairman of applicant has included matter which is not relevant to the relief sought. The prolix nature of the papers militates against a concise rendition of the facts. The chronology of events given by Mr *de Bourbon* in his heads of argument is helpful in extracting the pith of the dispute. It is this. In September 1993, the first respondent (as plaintiff) sued the applicant in case No. H-7078-93 claiming an amount in excess of $14 million. Like Charles Dickens' *Jarndyce and Jarndyce*, that matter is proceeding at a snail's pace. No pre-trial conference has yet been held. The judgment in an application for directions which was argued before Garwe J on 7 June 1999 was handed down on 24 June 1999. Nothing further has happened in that

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matter since then.

On 20 July 1994, the applicant issued summons against the third respondent, (Hawk Ventures) and three individuals. Although the pleadings have been closed, no pre-trial conference has been held. It should be mentioned that in case No. H-7078-93 the applicant counterclaimed for certain monetary relief. In both cases, the applicant's claims amount to $20 million. In this application, the applicant has stated that it is intended to commence proceedings in the United States of America against the first respondent. The total amount to be claimed in this country and in the United States is given as $465 528 583.54.

Mr *de Bourbon* did not contend that I should hold that the applicant has not established a *prima facie* case warranting the granting of an interlocutory interdict. What he contended was that it has not been shown that it is the intention of the respondents to dissipate assets in order to frustrate the execution of any judgment which the applicant might get. This is the issue I have to decide. The concession by Mr *de Bourbon,* which was correctly made, obviates the need to recount the facts upon which the causes of action were based.

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Before dealing with the merits, I propose to deal first with the numerous preliminary points raised on both sides. I shall ignore those points *in limine* which were not pursued in argument.

REPRESENTATION

The first objection raised by Mr *de Bourbon* was that Mr *Kara*, an officer of this court, should not be allowed to appear as counsel for the applicant because he would be giving voice to depositions made by himself on behalf of the applicant in the supporting affidavits. Mr *de Bourbon* readily appreciated that if Mr *Kara* appeared as agent and not as counsel for the applicant then different considerations would apply. Such stance is in keeping with the ratio in *Lees Import & Export (Pvt) Ltd* v *Zimbabwe Banking Corp* 1999 (2) ZLR 36 (S) and *Zimbabwe Banking Corp* v *Pindi Electrical & Ors* S-80-99, that where a person proves that he is the *alter ego* of the company which he seeks to represent he should be allowed to act on its behalf, for to deny him that opportunity would amount to a failure to afford him the protection of the law enshrined in the Constitution. Although Mr *Kara* is neither the sole nor the majority shareholder in applicant, his association with and the extent of his interest in the applicant is such that he should be permitted to represent the applicant. Although he appeared before me robed as counsel, I ruled that he could only represent the applicant as its agent and he did so on that basis.

IDENTITY OF THE PARTIES

The second objection raised on the papers and in argument on behalf of the respondents concerns the identity of the parties to this application. The first respondent is the plaintiff and defendant in reconvention in case No. H-7078-93. Hawk Ventures is the first defendant in case No. H-4587-94. There is no litigation pending between the applicant, on the one hand, and the second and fourth respondents, on the other. Consequently, the second and fourth respondents complain that they should not be made party to this application because the applicant will not be

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seeking judgment against them. The applicant says, however, that it intends to make application to have them joined as parties. It does not say to which case they are to be made parties. The applicant, in dealing with the facts on the affidavits, does not make specific averments as to what each respondent did. Mr *Kara*, the deponent, merely made collective accusations against what he calls "The FMB-Anglo" Group.

It is not open to doubt that an interlocutory interdict can be issued in respect of a party against whom it is intended to institute proceedings, but whether

or not this is an appropriate case for doing so depends largely on where the balance of convenience lies. I will therefore defer this preliminary point so that I return to it when I come to deal with the balance of convenience.

ALLEGATIONS OF FALSEHOODS ON RESPONDENT'S AFFIDAVITS

The deponent to the applicant's affidavits makes rather forceful allegations of the existence of false statements in the affidavits sworn to on behalf of the first, second and fourth respondents. The deponents to these affidavits are accused, in strong language, of perjury, fraud, contempt of court, attempting to defeat the course of justice, subornation of perjury and unethical behaviour. It is contended that because of these falsehoods the opposition is defective. I have examined the statements complained of and I am satisfied that they do not merit the categorisation attributed to them. More importantly, even if they merited such categorisation, the fact that a deponent has made a false statement on oath or that his conduct is contemptuous or verges on criminality does not in itself make the opposition defective. It is no more than conduct which would in appropriate circumstances be penalised by the court either by a punitive award of costs or by committal for contempt. Such falsity can be no ground for non suiting a party whose case on the merits is strong unless an inference of frivolity and vexatiousness can be made. In context, no such inference can be made. In fact, the language to which the applicant's chairman resorted is unfortunate, especially coming from a senior member of the legal profession. The falsehoods complained of are no more than denials of the applicant's own averments. Mr *Kara*'s objectivity may have been coloured by the treatment he has received at the hands of officers of the respondent, which he perceives to be unfair. The papers reveal such a deep seated perception of unfair play that Mr *Kara* runs the risk of prejudicing his own case if he continues to represent the applicant. He would do well to act through counsel.

FAILURE TO ANSWER APPLICANT'S CASE

It is true that the respondents have not responded to the applicant's averments paragraph by paragraph. However, the prolix nature of the founding papers is such that the papers would have been overburdened with irrelevancies if there had been a detailed response to each averment. The failure by the respondents to make specific responses, if it be a failure, would in normal circumstances, reduced to the benefit of the applicant. The applicant should have treated any omission by the respondents as an extra arrow in its quiver, as opposed to a ground of objection.

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ISSUE OF JURISDICTION

This is the last preliminary point which I will deal with separately from the merits. The point taken by the respondents in this regard is that this court cannot make an anti-dissipation order in respect of assets which are situated outside Zimbabwe. In this regard, reliance is placed on the cases of *Noormahamed* v *Patel* 1987 (2) ZLR 324 (S) at 335D-E and *Knox d'Arcy Ltd & Ors* v *Jamieson & Ors* 1994 (3) SA 700 (W) at 706C.

In *Noormahamed supra*, the applicant had not applied for an interdict and there was no evidence before the court which justified the grant of an interdict. Counsel argued unsuccessfully that the matter should be treated as if it was an application for an anti-dissipation interdict. The *situs* of the property concerned was Zimbabwe and not a foreign country. It was in the light of these facts that Dumbutshena CJ (as he then was) observed at 336G:

"In all the jurisdictions I have mentioned above, to obtain an interim interdict or a Mareva injunction in order to recover money or property from a defendant, the plaintiff must have reasons to believe that the defendant has assets within the jurisdiction to meet the judgment but might deal with the assets whether by removal out of the jurisdiction or disposing of them within the jurisdiction so that they are not available to satisfy the plaintiff's judgment given against the defendant."

Given the fact that there had been no application for an interdict and the further fact that there was no evidence upon which an interdict could have been granted, these remarks were clearly *obiter* and since the assets involved were in Zimbabwe, the learned Chief Justice cannot be understood to have intended to lay down as a proposition of law that our courts have no jurisdiction to prohibit the dissipation of assets situated outside the country. In my considered judgment, the case of *Know d'Arcy supra* did not lay down as a rule of law that the court lacks jurisdiction to grant an anti-dissipation interdict *in securitatem debiti* where the goods are situated beyond the court's area of jurisdiction. Although some of the assets involved in that case were beyond the court's jurisdiction, the jurisdictional point did not arise because separate proceedings had been issued in the United Kingdom and in Switzerland.

There is in fact a number of cases, as well as respectable academic authority, which deal directly with the point in issue. The cases and the textbook writers draw a distinction, firstly, between the types of interdict sought and, secondly, between whether the person against whom the interdict is sought is an *incola* or a *peregrinus*. Where the applicant seeks a mandatory interdict, namely, one which seeks to compel the respondent to do something, then the court will decline jurisdiction. If the interdict sought is a prohibitory one, in the sense that it is intended to prohibit a person who is within the area

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of the court's jurisdiction from doing something abroad, then the court will, under normal circumstances, assume jurisdiction. In this respect, *Pollak on Jurisdiction* 2 ed pp 115-6 says:

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"Thus having regard to the territorial nature of jurisdiction and the principle of effectiveness a South African court has jurisdiction to grant an interdict, whether prohibitory or mandatory, if the act is to be prevented or done, as the case may be, within the area over which the court exercises jurisdiction. Concisely, if a South African court were to determine what act should be done in another country it would infringe the sovereignty of that other country and, in any event, the court would not be able to give effect to its order. A South African court therefore, has no jurisdiction to grant a mandatory interdict which is to be carried out outside the Republic. The position in regard to a prohibitory interdict is quite different from that of a mandatory interdict. A South African court, in granting a prohibitory interdict against the doing of an act in another country, is not infringing the sovereignty of that other country. The person interdicted may remain in the Republic and abide by the terms of the interdict. He is not compelled to act elsewhere in violation of the rights of any other state. A person may, therefore, be restrained by a South African court from acting anywhere."

Prest, in *The Law and Practice of Interdicts* p 286, is to the same effect. He places reliance on the passage from *Pollak* quoted above as well as the leading cases on the subject. Forsyth, in *Private International Law* p 192 while agreeing with *Pollak*, criticises the latter on the reasons he gives for the court assuming jurisdiction. *Pollak* argues that one of the reasons for the court assuming jurisdiction where a prohibitory interdict is sought is that a court which prohibits a person who is within its jurisdiction from doing something outside the area of its jurisdiction, does not infringe the sovereignty of another state whereas Forsyth's contention is that the better rationale is the doctrine of effectiveness. Both are agreed, however, that the court has jurisdiction to order a person to abstain from doing something abroad. Where the person against whom a prohibitory interdict has been granted remains within the jurisdiction of the court, such court can always enforce compliance with its order through the use of contempt of court proceedings.

As far as case authority is concerned, I wish to refer firstly to the case of *South Atlantic Islands Development Corp* v *Buchan* 1971 (1) SA 234 (C), where a prohibitory interdict was refused, principally on the grounds of effectiveness. There the court refused to restrain the respondent from fishing off the islands of Tristan de Cunha in the South Atlantic, outside the area over which the court exercised jurisdiction. At p 240D-E, Diemont J stated that:

"Where the relief asked for is such that it will not be enforceable, the judgment becomes illusory and the court should not undermine its authority by giving such a judgment. This no doubt is why it has been repeatedly stated that the principle of effectiveness is the basis of jurisdiction."

The merit of this statement is beyond question but that is as far as it goes. Buchan was a *peregrinus* in Cape Town; the conduct sought to be prohibited

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was to take place outside the court's area of jurisdiction, so even though Buchan was temporarily in Cape Town at the time the order was sought, the court appreciated the fact that once he left for Tristan de Cunha and started fishing there was nothing the court could do to enforce its order. Before the court can issue a prohibitory interdict, it has to satisfy itself of its ability to enforce the order. That fact was readily apparent to the Appellate Division of South Africa in *Hugo* v *Wessels* 1987 (3) SA 837 (A). The decision in *Hugo* v *Wessels supra* is consistent with many cases decided before it. See, for example, *Minister of Agriculture* v *Grobler* 1914 AD 221, Ex p *Winter* 1948 (3) SA 377 (W) and *C M Asbestos Co (Pty) Ltd* v *King*

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Chrysotyle Asbestos Mines (Pty) Ltd & Ors 1953 (3) SA 431 (W).

For the sake of completeness, I should say that an anti-dissipation interdict *in securitatem debiti* is a prohibitory interdict. It is, therefore, one in respect of which our courts can exercise jurisdiction if the person against whom it is sought resides within the court's area of jurisdiction. In the event of the applicant satisfying the court that all the requisites for an interlocutory interdict *in securitatem debiti* are present, there would be no bar to this court ordering the respondents not to dissipate any assets which they hold outside the country. The respondents are here. If they remain within the country, which they are likely to do, they may choose to abide by the terms of any order which the court may make for fear of the consequences of non-compliance.

I turn now to deal with the merits.

It was Mr *de Bourbon*'s submission that before the applicant can succeed he must establish: (a) that it has an apparently valid claim; (b) that there is no *bona fide* defence to the claim; (c) that the respondents have assets within the jurisdiction; (d) that it is the intention of the respondents to dissipate the assets; and (e) that such disposal is aimed at defeating the applicant's claim.

In view of what I have said above concerning the court's jurisdiction to issue a prohibitory interdict for assets whose *situs* is beyond the jurisdiction of the court, I have to hold that it is not necessarily the case that it must always be proved that the defendant has assets within the area of the court's jurisdiction. Similarly, the requirement that it be shown that there is no *bona fide* defence to the claim seems to be based on the authority of such cases as *Bester* v *van Niekerk* 1960 (2) SA 363 (E) at 365H in which it was stated:

"It seems well established that an applicant for such an interdict pending action (where the claim is not vindicatory) must show *prima facie* that the respondent has a *bona fide* defence to the action and that, objectively considered, there are good grounds for fearing that he intends to make away with his assets in order to defeat the applicants claims."

STEGMANN J in *Knox d'Arcy supra* carried out an extensive analysis of this case and all others which held that it had been to be shown that there was no *bona fide* defence to the action and concluded at p 600B:

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"For all of the reasons set out above, I come to the conclusion that there is no requirement of law that an applicant for an interlocutory interdict *in securitatem debiti*, aimed at restraining a respondent from dissipating or concealing his assets pending the outcome of an action, must show that the respondent has no *bona fide* defence to the action. The legal requirements for such an interlocutory interdict are no different from the legal requirements for any other interlocutory interdict."

I respectfully agree with this conclusion, which accords with common sense and has the further advantage of removing the seeming contradiction which is inherent in the formulation that an applicant who has shown that he has a *prima facie* case, though open to doubt, must also show that there is no *bona fide* defence to that *prima facie* case which is open to doubt.

After setting out the requirements for an interlocutory interdict the learned judge pertinently

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observed as follows at 503F-H:

"The point which is presently of importance is the absence from these general requirements for relief in the form of an interlocutory interdict of any express requirement that the applicant should show *prima facie* that the respondent has no *bona fide* defence to the applicant's claim. The absence is by no means surprising. What would be surprising would be its inclusion: for such a requirement does not properly fit in with the undoubted requirement that the applicant show either a clear right or a *prima facie* right even if it is open to some doubt. If the applicant has shown 'a clear right' he will undoubtedly also have shown the absence of any *bona fide* defence on the part of the respondent so that such a requirement would be otiose. If the applicant has merely shown a *prima facie* right, though open to some doubt, the addition of the requirement that he should disprove the existence of any *bona fide* defence detracts from the sufficiency of the requirement of a '*prima facie* right even if it is open to some doubt', to the point that such requirement for practical purposes becomes indistinguishable from a 'clear right'."

One must then recall the traditional requirements for an interlocutory interdict. They were originally set out in *Setlogelo* v *Setlogelo* 1914 AD 221 and have been repeated in numerous subsequent cases. STEGMANN J repeats them in *Knox d'Arcy supra* at 593C-D. What the applicant needs to establish is:

(a) a *prima facie* right, even if it is open to doubt;

(b) an infringement of such right by the respondent or a well-grounded apprehension of such an infringement;

(c) a well-grounded apprehension of irreparable harm to the applicant, if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally;

(d) the absence of any other satisfactory remedy; and

(e) that the balance of convenience favours the granting of an interlocutory interdict.

As I have already pointed out, I am prepared to accept, and Mr *de Bourbon* did not argue to the contrary, that there is a *prima facie* case, even if it is open to doubt, that the applicant holds some prospect of establishing his claim

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against the respondent. In similar vein, I am prepared to accept that requirement (d) above, namely, the absence of an alternative remedy, is not one that needs to be proved separately in the context of this case, in the sense that once it is proved that the respondents intend to dissipate their assets, either by disposal or by concealment, it will naturally follow that once that happens, the applicant will be left without an adequate remedy. If the applicant fails to prove the intention to dissipate assets on the part of the respondents, then the question of an adequate remedy will not arise. I am left, therefore, with requirements (b), (c) and (e). As far as requirement (b) is concerned, namely, that there has been an infringement of the applicant's right or that there is a reasonable apprehension of such an infringement, the position is that there has been no infringement yet. The allegation is not that there has been a disposal or concealment of assets by the respondents. What is feared is that it may happen. The issue in this regard is, therefore, whether there is evidence to support the applicant's apprehension that

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assets may be secreted in order to frustrate the execution of any judgment which the applicant might obtain. Reliance is placed on annexures "AK1", "AK2" and "AK45". Annexure "AK1" is a letter dated 3 April 1996 addressed by the American Express Bank to the first respondent. The author of the letter, refers to a previous meeting with officers of the first respondent in Harare about a pending lawsuit involving the first respondent. The letter goes on to report on some advice given by a London based official of American Express Bank on whether an order obtained in the United States can be enforced in the United Kingdom and concludes by saying that "the funds of FMB in the US are more vulnerable than funds outside of the US". The applicant contends that this letter proves that the respondents intend to move their funds from the United States in order to frustrate the execution of any judgment which it might obtain in the United States. The respondents contend otherwise.

Annexure "AK2" is a letter dated 30 April 1996 addressed to the first respondent by its legal practitioners in which advice is proffered on the implications of the first respondent being sued by the applicant in the United States. Annexure "AK45" is a circular to the first respondent's shareholders concerning the increase of its authorised share capital intended to give effect to the merger of first respondent and another bank, Heritage Investments Bank Ltd.

The first point taken by the respondents regarding annexures "AK1" and "AK2" is that these documents are privileged. I do not accept that annexure "AK1" is privileged. It is, in essence, a communication from a banker to its customer. Such a communication is not covered by privilege. However, annexure "AK2" is in a different category. It is a communication between a legal practitioner and his client concerning litigation which is contemplated.

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Such a communication is clearly privileged. The allegations made by the applicant concerning the commission of fraud and other criminal conduct seem to have been made with reckless abandon and in the context of these two documents the allegations are unfortunate. Irrespective of whether the documents are privileged or not, there is nothing in annexure "AK2" which leads to the inference that the first respondent is disposing of or concealing assets. It does not advance the applicants' case. I think, however, that annexure "AK1" justifies the inference urged upon me by the applicant. It is clear from that letter that the first respondent was seeking ways of removing its funds from the reach of the arm of the law in the United States. It is not far fetched to suggest that what was contemplated was the transfer of the first respondent's funds held by American Express Bank in the United States to that bank's London branch. What is suggested in that letter followed a meeting between an official of American Express Bank and those of the first respondent in Harare about the pending law suit between the applicant and the first respondent. Why would a customer hold a meeting with his bankers concerning a suit for damages to be brought by a third party? And, when the meeting is followed by inquiries on how to shield the customer's funds against judicial attachment, the conclusion becomes inescapable that the customer, against whom proceedings are contemplated, intends to dispose of or to conceal assets from the reach of law enforcement agencies.

I can see nothing in annexure "AK45" which points to an intention on the part of the first respondent to dissipate its assets. The circular deals with a merger with another financial

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institution, a move which is no doubt intended to enhance the asset base of the first respondent.

It will have become apparent that these three documents involve the first respondent only. None of them emanates from the other three respondents. The applicant has referred to the other three respondents as the "FMB-Anglo" group and made general accusations against them and linking them to annexures "AK1", "AK2" and AK45", without making specific allegations about the manner in which they evinced an intention to dissipate their assets. I am not prepared to find that there is a reasonable apprehension that the second, third and fourth respondent intend to dissipate their assets in order to frustrate the execution of any judgment which the applicant might obtain against them.

Even if the second, third and fourth respondents had been party to any conspiracy with the first respondent, I would still have considered that no interdict can be issued against the second and fourth respondents. They are not party to any litigation involving the applicant. The threat to join them as parties in case Nos. H-7078-93 and H-4587-94 has been hanging over them for over five years, yet nothing has been done. Issues of prescription have

now become live issues, at least as far as the local claims are concerned. As far as the proceedings to be instituted in the United States are concerned, the cause of action against them has not been spelt out with the degree of specificity that would inspire confidence in me. There is no indication of what assets they have abroad which they may dissipate. In all these circumstances, I cannot say that the balance of convenience favours the applicant. Any risk of irreparable harm which the applicant might suffer, should the interdict not be granted, will be attributable to its own dilatoriness. Many years have elapsed since the cause of action arose.

As for the third respondent against whom an action is pending, I have already found that there is no evidence to suggest that it is dissipating assets. That should really be the end of the matter. I remark in passing, however, that the balance of convenience favours the third respondent.

Accordingly, no order will be made against the second, third and fourth respondent.

The case of the first respondent is more problematic. There is clear evidence of an inquiry as to how best the respondent could protect it s funds in the United States against attachment. The applicant's apprehension is, therefore, clearly well grounded. If the respondent finds a way of actuating its intentions, the applicant will no doubt suffer irreparable harm. The evidence of the intended dissipation relates solely to the funds in the United States, whereas the applicant is also litigating with the first respondent locally. The question which then arises is whether to interdict the respondent against the disposal of assets anywhere in the world or only in the United States.

In view of the conclusion I have come to on the last requirement, namely, the balance of convenience, it is not necessary to resolve the problematic issue of which of the respondent's assets should be interdicted.

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The proceedings in progress in this country have been dragging on rather slowly for well over six years. This application itself was launched in October 1997. In all the time that the proceedings have been pending, nothing has happened to warrant the inference that respondent intends to frustrate the execution of any judgment granted against it in this country. Had the proceedings been proceeded with expeditiously, they would probably have been finalised by now, even when the congestion of the court calendar is taken into account. It seems to me to be unfair to seek to curtail the respondent's freedom to deal with its assets, six years after the commencement of the proceedings.

The applicant asks me to order the respondent to preserve assets worth half a million dollars. The local claim totals $20 million. It is not clear how the first respondent should apportion the value of the assets to be preserved

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locally and abroad, nor is it clear if the funds sought to be interdicted abroad are sufficient to meet the claim to be instituted there. The assets to be preserved locally have not been identified. How then is the court going to supervise the order? One wonders what would happen if, after an order has been made, the first respondent were to dispose of some of its assets. Would the court have to order an audit to determine if enough assets remain to satisfy the applicant's claim? Clearly, any order which the court makes would be illusory. The same applies to any order which might be made concerning the external assets. I appreciate the fact that the respondent has not denied having sufficient funds abroad to meet the applicant's claim, but how much of its funds in the United States should be made the subject of the interdict and how best can that be achieved without jeopardising the respondent's legitimate business dealings? The applicant has not applied for a discovery of assets to enable the court to identify the assets to be restrained. A consideration of all these factors leads me to the conclusion that if the interdict is granted the respondent would suffer greater prejudice than the applicant would suffer if the interdict is refused. Even if the respondent were to secrete its funds in the United States, any judgment obtained there could be enforced in this country. I am sure it is not mere speculation to say that respondent's local assets far exceed half a million dollars.

The applicant must fail.

I have considered awarding costs on the higher scale, but have decided not to do so, mainly because I appreciate that some of the wanton accusations and intemperate language employed by applicant's chairman may have been the result of uncontrollable bitterness. As the main case is still to be tried, Mr *Kara* would do well to resort to the use of counsel to ensure that his bitterness does not cloud the merits of his case.

Accordingly, the application is dismissed with costs.

Coghlan, Welsh & Guest, first and second respondents' legal practitioners

Gill, Godlonton & Gerrans, third respondent's legal practitioners

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Scanlen & Holderness, fourth respondent's legal practitioners

COOPER *v* LESLIE & ORS 2000 (1) ZLR 14 (HC)

Citation	2000 (1) ZLR 14 (HC)
Case No	Judgment No. HH-151-99
Court	High Court, Harare
Judge	Devittie J
Heard	October 11, 1999*(3)
Judgment	October 11, 1999*(4)
Annotations	None

Flynote

Practice and procedure - application - Anton Piller order - what is - validity of such order in Zimbabwe - court's discretion - factors which should be taken into account

Headnote

An Anton Piller order is a modern legal remedy devised to cater for modern problems in the prosecution of civil actions. The procedure allows a party to make an *ex parte* application, without notice to the other side, for the attachment and removal of documents or other evidence. It has its genesis in English law. Originally, its use was confined to cases involving intellectual property, but has since been extended to cover other civil cases. It has, after some initial reluctance and some contradictory judgments, been accepted by the courts of South Africa and should be accepted as part of the law of Zimbabwe.

An the applicant for an Anton Piller order must *prima facie* establish:

1. that he has a cause of action against the respondent which he intends to pursue;
2. that the respondent has in his possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant's cause of action, but in respect of which the applicant cannot claim a real or personal right; and
3. that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial or to the stage of discovery.

The remedy may, if used indiscriminately, become an instrument of oppression, so the court

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must proceed with caution and impose safeguards to protect the rights of the party against whom the relief is sought. In exercising its discretion, the court must pay regard to the cogency of the *prima facie* case established with reference to the three items listed above; the potential harm that will be suffered by the respondent if the order is granted, as compared to the potential harm to the applicant if it is not; and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant.

Cases Considered

Cases cited:

Anton Piller v *Manufacturing Processes Ltd & Ors* [1976] 1 All ER 779 (CA)

Cerebos Food Corp v *Diverse Food SA (Pty) Ltd* 1984 (4) SA 149 (T)

Continental Wholesalers v *Fashion Fantasy (Pty) Ltd* 1983 (1) SA 683 (D)

Distributori Automatic Italia SPA v *Holford General Trading Co Ltd & Anor* [1985] 3 All ER 750 (QB)

Dyantyi & Anor Ex p 1989 (4) SA 826 (Ck)

Easy Find International SA (Pty) Ltd v *Install Plan Hldgs & Anor* 1983 (3) SA 917 W)

Economic Data Processing (Pty) Ltd & Ors v *Pentreath* 1984 (2) SA 605 (W)

Emmanuel v *Emmanuel* [1982] 2 All ER 342 (FamD)

Jafta v *Min of Law & Order & Ors* 1991 (2) SA 286 (A)

Petre & Madko (Pty) Ltd v *Sanderson-Kasner & Ors* 1984 (3) SA 850 (W)

Roamer Watch Co SA & Anor v *African Textile Distributors* 1980 (2) SA 254 (W)

Shoba v *OC Temporary Police Camp, Wagendrift Dam & Anor* 1995 (4) SA 1 (A)

Universal City Studios Inc & Ors Network Video (Pty) Ltd 1986 (2) SA 734 (A)

Universal Thermosensors Ltd v *Hibben & Ors* [1992] 3 All ER 257 (Ch)

Wilrose Timbers (Pty) Ltd v *C E Westergard (Pty) Ltd & Ors* 1980 (2) SA 287 (W)

Yousif v *Salama* [1980] 3 All ER 405 (CA)

Case Information

S E Rowland, for the applicant

Judgment

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Devittie J:

"Anton Piller is a die-hard alright. Even moreso than I thought in *Economic Data Processing (Pvt) Ltd & Ors* v *Pentreath* 1984 (2) SA 605 (W) at 606. He has also the best of the British luck on his side. I had believed that this decision had contributed a nail to the coffin in which he was thereafter finally laid to rest by the full court of the Transvaal Provincial Division in *Cerebos Food Corporation* v *Diverse Food South Africa (Pvt) Ltd & Anor*. But something happened on the way to the funeral. Apparently he escaped. For if Mr *Heher*'s argument on behalf the applicant upon this return day of an Anton Piller order is correct, he is probably alive and tolerably well and living in Johannesburg": *per* Coetzee J in *Trade Fairs and Promotion* v *Thompson* 1984 (4) SA 177 (W) at 179.

Anton Piller is indeed a die hard. For it seems that, having established his residence in South Africa, he crossed the Limpopo river some time ago and is now living in Harare. I have little doubt that Anton Piller type orders have been granted by this court in chamber applications that have gone unreported. My research in this regard has brought to light one such case - it is the unreported case of *Microsoft Corp* v *Zimbabwe Express Airlines (Pvt) Ltd* (H-4053-99), in which Ziyambi J granted an order which bears all the hallmarks of an Anton Piller order. In so far as I am aware, there is no reported case in which an Anton Piller order has been granted in this jurisdiction.

There are two respects in which an Anton Piller order is unusual. Firstly, it is akin to a search warrant, in that the plaintiff and his attorneys are authorised to enter the respondent's premises and to inspect them or remove documents or other goods. Secondly, no prior notice is given to the respondent.

In the case dealt with by Ziyambi J, the applicant was an American company engaged principally in the development of computer software programmes for personal computers. It created several such programmes at considerable time and expense. A former employee of the respondent informed the applicant that the respondent was using pirated software on several of its computers. The applicant claimed that the respondent was infringing copyright in its computer programmes. It intended to institute copyright action, claiming *inter alia* an interdict restraining infringement and delivery of infringing copies. It also wished to search the respondent's

premises to locate and preserve infringing copies as evidence in the proposed proceedings. The applicant averred that it feared that, if prior notice were given, the respondent would destroy the infringing copies. In an *ex parte* chamber application, Ziyambi J issued an order which, *inter alia*, authorised the Deputy Sheriff to enter and search the respondent's premises without the respondent being given prior notice, and to attach and make an inventory of specified computer software.

I turn now to the facts of the present case. The applicant commenced employment with the third respondent in January 1998. She states that in June 1998 the third respondent entered into a hire purchase agreement with Stanbic Zimbabwe Ltd for the purchase of a Mazda 323 vehicle. She in turn entered into an agreement with third the respondent in terms of which she would become owner of the vehicle upon payment of the full purchase price of the vehicle. A deduction of a monthly instalment of $4 250 was to be effected from her salary towards

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payment of the purchase price. She states that the agreement was reduced to writing and signed in the presence of the first and second respondents. According to the applicant, she requested a copy of the signed agreement at the time but was informed that this was not necessary. When she terminated her services in December 1998, instalments had been deducted from her salary at the agreed rate. A week after leaving work, she handed over the Mazda 323 vehicle. She offered to pay the balance of the purchase price but her employer refused. She was not reimbursed any of the instalments she had made. The applicant goes on to state that:

"I propose to institute legal proceeding on the contract referred to above. However, I am hindered in doing so by the refusal of the second respondent to furnish me with a copy of the memorandum of agreement ... I humbly submit that there is a risk of perverse conduct on the part of the respondents if they are given notice of this application and that they are likely to act so as to defeat, wholly or in part, this application should such notice be given. In particular, fearing the respondents may try to destroy or hide the agreement in question."

The application discloses that on 19 January 1999, her legal practitioners wrote to the third the respondent requesting a copy of the agreement and threatening legal proceedings if this was not done. No response was forthcoming and the matter came before me by way of a chamber application.

The interim order sought is in the following terms:

"The Deputy Sheriff be and is hereby authorised to enter and search the premises of the respondents at Studio one and two Browning Drive, Harare, in the presence of the applicant, to locate, attach and remove the memorandum of agreement entered into by the applicant and the third respondent, represented by the first respondent, on the 5th day of June 1998."

The final order is in terms that the Deputy Sheriff be authorised to make available to the applicant the retrieved memorandum of agreement, for her to make a copy thereof and return the original to the respondents.

DEVITTIE J

In deciding upon this application, I first have to consider whether I have the power to grant an order of the type sought. Clearly, it is an Anton Piller order that the applicant seeks. It is well that therefore that I begin by tracing the journey that Anton Piller has travelled to date. I am indebted to Mr *Rowland* in this regard for his well researched argument.

An Anton Piller order, as it has now become commonly known, has its genesis in the English case of *Anton Piller* v *Manufacturing Processes Ltd & Ors* [1976] 1 ER 779 (CA). In that case, the plaintiff was a German company conducting business as manufacturers of electric motors and generators for use in computer hardware. Their manufactured products included high frequency converters specially designed for International Business Machines. The defendant was an agent of the plaintiff and its principal function was to sell the plaintiff's machines to customers in England. The plaintiffs also supplied the defendants with information of a highly confidential nature, including a manual showing the operations of the machines and drawings. All this information was the subject of copyright. The plaintiff received information which indicated that its English agent, that is, the defendant, was planning to supply competitors of the

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plaintiff with information belonging to the plaintiff. This would have enabled the competitors to manufacture a product similar to the plaintiff's. The plaintiff intended to bring proceedings to restrain the defendant from infringing the copyright and divulging confidential information. It feared that if notice of the intended suit was given, the defendant would destroy the documents or take them outside the jurisdiction of the court, so that the documents would not be in existence at the stage of discovery. Accordingly, the plaintiff made an *ex parte* application for an order requiring the defendants to permit them to enter their premises in order to inspect and remove copies of documents belonging to the plaintiffs.

LORD DENNING held that, in the exercise of an inherent jurisdiction, such an order may be made if certain conditions were met, namely: (a) where the inspection is essential in order to do justice between the parties; (b) if the giving of notice to the defendant would create a grave danger of vital evidence being destroyed or taken outside the court's jurisdiction so that the ends of justice would be defeated; and (c) when the inspection would cause no real harm to the defendant or his case.

In England, the Anton Piller procedure was initially limited to litigation involving intellectual property. Subsequently, it was extended to cover cases not involving intellectual property. In *Yousif* v *Salama* [1980] 3 All ER 405 (CA), a case which involved a commercial dispute, an order was made for the preservation of documents which were not a subject matter of the action. See also *Distributori Automatic Italia SPA* v *Holford General Trading Co Ltd &*

DEVITTIE J

Anor [1985] 3 All ER 750 (QB) and *Emmanual* v *Emmanual* [1982] 2 All ER 342 (FamD), *Universal Thermosensors Ltd* v *Hibben & Ors* [1992] 3 All ER 257 (Ch).

In South Africa, the earliest reported judgment in which an Anton Piller order was granted is *Roamer Watch Co South African & Anor* v *African Textile Distributors* 1980 (2) SA 254 (W). The applicant claimed its trade name was being infringed. An order was granted, *inter alia*, directing the respondent to disclose the place of storage of all watches bearing the applicant's trade name and to deliver these to the Deputy Sheriff for safekeeping. Cilliers AJ stated that in matters involving intellectual property, and where there exists good grounds for fearing that a defendant may, if given notice of the application, destroy or remove evidence which is unlawful, then the only way the court could come effectively to the assistance of the innocent party may be to make an order without notice for the attachment and removal of documents. The learned judge examined the English authorities on the Anton Piller procedure. He set out in great detail the principles which ought to govern the grant of an Anton Piller order. He did not, however, examine the validity of an Anton Piller type order in South African law. He held that, like the English courts, South African courts had an inherent jurisdiction to grant an Anton Piller type order.

In several reported decisions that followed the *Roamer* case, the Transvaal courts granted Anton Piller type orders without questioning their validity in South African law. Not a murmur of dissent was raised. See *Wilrose Timbers (Pty) Ltd* v *C E Westergard (Pty Ltd & Ors* 1980 (2) SA 287 (W), *Continental Wholesalers* v *Fashion Fantasy (Pty) Ltd* 1983 (1) SA 683 (D), *Easy Find*

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International SA (Pty) Ltd v *Install Plan Holdings & Anor* 1983 (3) SA 917 (W), *Petre & Matko (Pty) Ltd* v *Sanderson-Kasner & Ors* 1984 (3) SA 852 (W).

It was COETZEE J in *Economic Data Processing (Pty) Ltd & Ors* v *Pentreath* 1984 (2) SA 605 (W) who took the bold step of investigating the validity in South African law of the Anton Piller order. It was the first time that a South African court had done so. COETZEE J's investigation prompted VAN DIJKHORST J in *Cerebos Food Corp* v *Diverse Food (South Africa) Ltd* 1984 (4) 149 at 163 to remark that:

"Into this wilderness, like some prophet of old, strode Coetzee J in *Economic Data Processing (Pvt) Ltd & Ors*."

COETZEE J held at p 616 that there was no jurisprudential basis in South African law for an Anton Piller order:

"Until it can be demonstrated to me, without the aid of English or other foreign judgments, where in our common law the jurisprudential basis exists for a claim for anticipatory discovery and for any kind of right to a search warrant so as to invade another's privacy, I shall not grant such applications when they come before me."

DEVITTIE J

In rejecting the argument that a South African court had inherent jurisdiction to order pre-action discovery, the learned judge stated that the existence of the right to pre-action discovery was a matter of substantive law and the enforcement of the right was a matter of procedural law; the inherent power of the court was limited to the conduct of litigation and procedural matters. The court cannot, he stated, in the exercise of its inherent power, create rules of substantive law without developing existing principles - it was for Parliament to decide whether our law should develop along the lines of an Anton Piller order. As to the desirability of Parliament legislating such a right he stated that:

"It is not the policy of the courts to encourage a person to search among the books and documents of another in order to find out whether or not he has an action against that person."

In the *Cerebos* case *supra*, VAN DIJKHORST J had occasion to consider the decision in the *Economic Data* case. The learned judge drew a distinction between orders for the attachment of documents or property, where the plaintiff has a real or personal right to the property claimed, and orders where no such right is claimed. He stated that an order for the interim attachment of property in which a real or personal right is claimed was not a true Anton Piller order, as the courts had always granted such orders. In regard to orders for the attachment of documents and other property where no personal right to the property is claimed, save that they should be preserved and produced as evidence in an intended court action, he held that no such right existed.

We see in the *Cerebos* case and in the *Economic Data* case a rejection of the jurisprudential basis upon which Anton Piller type order was nurtured and grew in England. At p 163, VAN DIJKHORST J stated:

"As Stanes *Modern Law Review* mentions, the development of the Anton Piller order has arisen from equity as part of the English 'judge made law'. It must be emphasised that the English 'Law of Equity' is peculiar to England. It has no counterpart analogy in South African law. The Anton Piller order is a perfect example of 'judge made law' originating

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in the Court of Chancery which supplies the law of equity."

It must have seemed, at the time, that Anton Piller would not survive the formidable resistance posed by these judgments. But two years after the *Cerebos* case, the Appellate Division sounded a welcome signal. In *Universal City Studios Inc & Ors* v *Network Video (Pty) Ltd* 1986 (2) SA 734 (A), Corbett JA (as he then was) in an *obiter dictum* approved of the Anton Piller principle in these terms (p 754):

"Now I am by no means convinced that in appropriate circumstances the court does not have the power to grant *ex parte* and without notice to the other party i.e. the respondent (and even, if necessary, *in camera*) an order designed *pendente lite* to preserve evidence in the possession of the respondent. It is probably correct, as so cogently reasoned by the court in the *Cerebos Food* case *supra* that there is no authority for such a procedure in our

common law. But of course, the remedies devised in the *Anton Piller* case *supra* and other subsequent cases for the preservation of evidence are essentially modern legal remedies devised to cater for modern problems in the prosecution of commercial suits."

Whilst the learned JUDGE OF APPEAL accepted the remarks in the *Cerebos* case that the court does not have an inherent power to create substantive law, he observed that the dividing line between substantive and adjectival law was not an easy one to draw.

The next case that needs mention in tracing the history of the Anton Piller order in South African law is in Ex p *Dyantyi & Anor* 1989 (4) SA 826 (Ck). The applicants sought Anton Piller relief in order to preserve evidence in a proposed action for damages against the police for assault. The court granted an order that the station commander of the Ciskei Security Police Headquarters permit the applicants, their attorney and the Deputy Sheriff access to the Headquarters for the purposes of searching for and identifying any instruments of torture present, and of examining and making an inventory of them.

Heath J rejected the reasoning in the *Cerebos* case. He stated at p 834:

"In my view, the mere fact that no provision has been made or the fact that no common law principle exists covering a situation provided for by an Anton Piller order does not mean the Supreme Court cannot grant such an order if it is in accordance with sound and logical principles and where it is clear that the needs of the community have developed to such an extent that the interests of a member of such a community can only be recognised and safeguarded by such an order ... In my view, therefore, accepting that there is no direct legal principle that provides for such a situation, the Supreme Court is entitled to recognise such a need and to grant the necessary relief and that the approach in the cases of *Economic Data Processing* v *Pentreath* was wrong and not in accordance with well known principles in respect of the function of a court and the question of whether relief of the nature of Anton Piller relief can be granted."

In *Jafta* v *Minister of Law and Order & Ors* 1991 (2) SA 286 (A), the Appellate Division again left the question open whether the Anton Piller order was part of the South African law. It accepted that the court *a quo* had been correct in its conclusion that it was precluded by the *Cerebos Food Corporation* case from making an Anton Piller order.

It was in *Shoba* v *OC Temporary Police Camp*, *Wegendrift Dam & Anor; Maphanga* v *Officer Commanding, South Africa Police Murder and Robbery Unit*, *Pietermaritzburg, & Ors* 1995 (4)

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SA 1 (A) that the Appellate Division finally settled the debate on the validity of the Anton Piller procedure in South African law. This is how Corbett CJ put it at 15:

"At this point, it is necessary to give a decision in regard to what was left open in both *Universal City Studios*' case *supra* and *Jafta*'s case *supra*, *viz* whether an Anton Piller order directed at the preservation of evidence should be accepted as part of our practice. In my view, it should; and I would define what an the applicant for such an order, obtained *in camera* and without notice to the respondent, must *prima facie* establish, as the following:

DEVITTIE J

(1) that he, the applicant, has a cause of action against the respondent which he intends to pursue;

(2) that the respondent has in its possession specific (and specified) documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant cannot claim a real or personal right); and

(3) that there is a real and well founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery."

The learned CHIEF JUSTICE did not find cause to examine in depth the legal validity of the Anton Piller remedy in South African law and the argument against its adoption in the *Cerebos* and *Economic Data* cases *supra*. He seemed content to rely on the *obiter dicta* in the *Universal Studies* case *supra*. At p 8, the learned CHIEF JUSTICE makes reference to the following passage from the *Universal Studio* case (p 775):

"In a case where the applicant can establish *prima facie* that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the court to make an order designed to preserve the evidence in some way, is the court obliged to adopt a *non-possumus* attitude?"

In the *Universal Studio* case, the court, in leaning in favour of the adoption of the Anton Piller procedure, stated that the remedy is a "modern legal remedy devised to cater for modern problems in the prosecution of commercial suits". In the *Shoba* case, Anton Piller relief was sought to preserve evidence of torture. The court granted an order that the applicant's attorney be granted access to the police station to inspect the premises for the purposes of identifying apparatus used to administer electric shocks as described in the affidavits.

In my judgment, an Anton Piller order directed at the preservation of evidence should be accepted as part of our law. The remedy may, if used indiscriminately, become an instrument of oppression, wielded by over-zealous litigants. This means that the court must proceed with caution and impose safeguards that are appropriate to protect the rights of the party against whom the relief is sought.

Thus, CORBETT CJ in the *Shoba* case laid emphasis on matters the court must have regard to in exercising its discretion:

"The court has a discretion whether or not to grant the remedy and upon what terms to grant it. In exercising this discretion, the court pays regard *inter alia*, to the cogency of the *prima facie* case established with reference to the

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matters listed in (1), (2), and (3) above; the potential harm that will be suffered by the respondent if the remedy is granted as compared

DEVITTIE J

with, or balanced against the potential harm to the applicant if the remedy withheld; and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant."

I do not propose to examine in detail the above requirements in relation to the evidence the applicant has been proferred. It will suffice to say that in so far as the first requirement is concerned, namely, "that the applicant must have a cause of action which he intends to pursue", it is not clear to me what the applicant's cause of action is. The applicant herself does not state the relief she intends to seek. It seems to me that she wishes to examine the document, if indeed it exists, to determine if she has a cause of action. I am far from satisfied that the applicant satisfies any of the three requirements enunciated by Corbett CJ in the *Shoba* case.

The application is accordingly dismissed.

Coghlan, Welsh and Guest, applicant's legal practitioners

NDAWANA *v* NASHO & ORS 2000 (1) ZLR 23 (HC)

Citation	2000 (1) ZLR 23 (HC)
Case No	Judgment No. HH-201-99
Court	High Court, Harare
Judge	Mungwira J
Heard	February 24, 1999
Judgment	October 13, 1999*(5)
Annotations	None

Civil action

Flynote

Damages - delictual - personal injury - assessment of damages - pain and suffering - comparison with cases decided in other jurisdictions - effect of inflation and decline in value of money

Insurance - contract - condition requiring notification in writing to insurer as soon as possible after accident - whether complied with - further condition regarding maintenance of vehicle in efficient condition - whether

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complied with

Headnote

A pedestrian had been knocked down by a motor vehicle which had veered off the road. The pedestrian claimed damages for the serious injuries that he had sustained. The second defendant, the insurer of the vehicle under a statutory policy, sought to repudiate liability on the policy as between itself and the third party on the basis of breach of two conditions contained in the insurance policy and to claim indemnity from the third party for any damages it was ordered to pay to the plaintiff under the statutory policy.

Held, that as regards the insurer, the statutory insurance policy required that the insurance company be notified in writing about any accident and that the insured take reasonable steps to maintain the vehicle in efficient condition and roadworthy state. Both these conditions had been breached. The giving of verbal notice to the receptionist of the insurer did not constitute compliance with the condition that there be written notice. That condition was aimed at protecting the interests of the insurer by ensuring that it had a written record of information so that it could investigate the claim. The insured had not taken reasonable steps to maintain the vehicle in an efficient and roadworthy state. The insurance company was therefore entitled to be indemnified by the third party in respect of any payment of damages by it in terms of the judgment.

Held, further, that the damages awarded in similar South African cases could be taken into account in assessing the amount of damages to be paid to the plaintiff.

Held, further, that the court should also apply an increase to take account of inflation and the declining value of the local currency.

Cases Considered

Cases cited:

Chikanda v *Mukumba* HH-210-88

J v *Min of Defence* HB-60-88

Min of Defence & Anor v *Jackson* 1990 (2) ZLR 1 (S)

Muchechetere & Anor v *Boka & Anor* HH-148-89

Prairie Oil Co v *Standard Mutual Fire Ins Co* (1910) 19 Man R 720

Case Information

S Wernberg, for the plaintiff

First defendant in default

A J Dyke, for the second defendant

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J Chinyama, for the third defendant

Judgment

Mungwira J: The plaintiff claims as against the first and second defendant payment of the sums of $80 000 as damages for pain, shock, suffering and permanent disability, $75 000 for loss of income, and $2 080 for accommodation and travelling expenses.

It is common cause that the plaintiff, a pedestrian, was on 23 March 1994, injured in a motor vehicle collision, which motor vehicle was driven by the first defendant. It is alleged that the first defendant drove the said vehicle negligently.

The plaintiff's claim against the second defendant is under by virtue of a statutory policy of insurance, in terms of which the second defendant insured the vehicle which collided with the plaintiff.

As against the third party, the driver of the vehicle, the second defendant claims that if it is found that the third party was in breach of the policy of insurance entered into between the third party and the second defendant, the second defendant is entitled as between the third party and itself to repudiate liability on the policy of insurance and the second defendant will be entitled to judgment against the third party in a similar amount to any judgment granted against the second defendant.

More specifically the second defendant claims that:

(a) the first defendant and the third party failed to report to the second defendant the accident which forms the subject matter of the present proceedings;

(b) the third party failed to take reasonable steps to maintain the motor vehicle in question in efficient condition, resulting in the motor vehicle being driven with inefficient brakes at the time of the accident.

These are said to be breaches of conditions 1 and 6 of the Statutory Private Car Policy, Exhibit 4.

The first defendant was in default at the trial, this after his legal practitioners who had filed a defective renunciation of agency had been notified of the trial date. These legal practitioners had, upon enquiry, undertaken to produce the first defendant on the day to which the matter was postponed but failed to do so. The legal practitioners were themselves not in attendance at the trial.

The plaintiff testified on his own behalf. He was, he stated, on 23 March

1994 walking along Willowvale Road, Harare, in the company of a friend who is now deceased. The two were destined for a Marongwe Garage which is situated along that road. According to the plaintiff, he was walking along a cycle track used by pedestrians. This track was according

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to the plaintiff a fair distance from the road. He in fact indicated a distance of about 5 metres.

As the two were walking, he was struck by the motor vehicle driven by the first defendant. The witness was unable to say how the accident occurred as the accident happened suddenly and unexpectedly. A factor contributing to his lack of recollection is that he lost consciousness almost immediately. He was, however, adamant that he had not rushed into the road.

As a result of the accident, the witness sustained a broken leg - more specifically, fractures to the femur, tibia and fibula. He suffered from severe pain and spent 5 months in plaster. He experienced pain for about a year. He was to date still experiencing slight pain in the leg. Asked if he had experienced a change of lifestyle as a result of the injury he indicated that he now required the assistance of a walking stick, whereas before the accident he had been able bodied.

The applicant, as at the date he testified, was aged 70 years.

Before the accident, he was a commercial farmer and has been growing tomatoes, vegetables and maize for sale. He stated that he had been in the habit of keeping records pertaining to his affairs and income, but that these records had been destroyed when his hut had been destroyed by fire. The plaintiff was, therefore, in a difficult position as regards proof of loss of income. The second defendant and third party tendered an amount of $15 000 for loss of income in the event the court determined the issue of liability in favour of the plaintiff. The plaintiff was amenable to the offer.

When cross-examined, the witness accepted that his evidence-in-chief suggested that the vehicle driven by the first defendant had veered off the road completely. Asked to comment on the point of impact, "X" on Exhibit 2 he stated that he had been struck by the motor vehicle as he was off the road. He was unable to comment on point "C" of Exhibit 2, that is the spot where the motor vehicle came to rest after the accident. He states he had lost consciousness at that stage.

It was put to the plaintiff that, in another document secured from his legal practitioners, the police had indicated that that before he was struck by the vehicle he had been walking on the side of the road. The plaintiff remarked that he was not in a position to say whether or not the police were mistaken, but all he could say was that he had been on the cycle track. The police report was put in as Exhibit 3.

The only other witness for the plaintiff was Dr Divecha, a consultant orthopaedic specialist. He had first seen the plaintiff after his admission to the

ward and had been involved in post admission care. He had compiled a report pertaining to the condition of the plaintiff in January 1997. His report was produced as Exhibit 1. The following injuries are noted:

1. fracture right femur; and

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2. compound fractures right tibia and fibula.

He described the second injury as having been very complicated, as it involved serious damage to the skin and the bones had broken through the skin.

He described the pain caused by this type of injury as very severe. Painkillers had to be administered as the patient was in a lot of pain and antibiotics for the prevention of infection had been prescribed.

Treatment had taken the form of internal fixation of the femur by using a nail. The compound fracture was treated with plaster of Paris after debriding the wound. The plaintiff had been in plaster for a period of about 5 months. Regular follow ups were required, as well as a course of physiotherapy. In respect of injuries of this nature, pain would persist until the fractures were "solidly healed" and thereafter the pain would become moderate.

In response to a question as to the long term effects of the injury, the witness stated that when he examined the plaintiff on 9 January 1993, he noticed that he had a stiff knee and ankle joints which are the normal complications of keeping a leg in plaster. The *sequela* was the possible development of traumatic arthritis of the joints which could amount to permanent disability. Arthritis occurred naturally in older people but was aggravated by injury even in younger patients. Early arthritis was known to develop in cases involving trauma. His assessment of disability was 15%. Dr Divecha agreed with the plaintiff when he said that the injury had resulted in his being unable to do heavy manual jobs.

On the question of residual pain and difficulty in moving without the aid of a stick, his comment was that any fracture sustained usually leaves some amount of pain, whether healed or not, and it was likely that the pain complained of was as a result of the fractures. Stiffness of the joints was also likely to cause pain.

In answer to a question as to whether the plaintiff's difficulties were not exacerbated by old age, the witness stated that he did not in this case consider age to be contributory. Old age and arthritis were, however, related.

Dr Divecha stated that he had used a schedule to calculate the degree of disability.

It had to be borne in mind that the plaintiff sustained two fractures, one of them serious, and that as a result the joints above and below the fractures were affected. This could lead to secondary arthritis of the joints, thus the assessment of disability at 25%. It was difficult to tell if the patient had a pre-existing

arthritic condition, but the X-rays had revealed no evidence of a previous arthritic condition. In assessing the degree of disability, consideration had been given to the patient's occupation in the patient's pre-accident and post-accident periods.

The second defendant led evidence from its claims manager. He confirmed that the third party's vehicle was insured with the second defendant under a statutory policy. The private car policy

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was admitted in evidence as Exhibit 4. In terms of such policy it was essential that the insured adhered to the terms of the policy, one of which terms was that an insurer be notified as soon as possible in writing of any occurrence.

In so far as maintenance of the vehicle, it was a term of the policy that the vehicle be kept in a roadworthy condition. It was in this particular instance alleged that the accident involving the insured's vehicle and the plaintiff had not been reported.

The set procedure was that when an insured approached the insurance company after an accident he or she would be required to complete a claim form. Verbal notification was not acceptable. There being no claim form, it was unlikely that the third party had made a report. Asked to comment on the third party's allegation that his effort at making a report had been met with instructions from the second defendant's employee to report to the police, the witness responded that this was unlikely.

On whether the condition of the vehicle had been brought into question by any of the parties, the witness stated that he was not aware of this; the only thing was that the police had found a deficiency in the brakes.

The insurer could not rely on a verbal report in the absence of the record of such a report. If the insured had come to the offices, he would have been advised accordingly. The procedure was that upon reporting at the reception the insured would be referred to the claims department. It was put to the witness that the third party claimed to have, following the occurrence, reported at the offices of the second defendant and had been advised at the reception to first report to the police. The witness indicated that he was not in a position to give a reply as this sounded very unlikely. He, however, went on to explain that he could not dispute this as the second defendant at times makes use of temporary receptionists.

The insurer had only come to know of the defective brakes through the police. The insurer was unable to tell if the fault with the brakes was in existence prior to the accident.

According to the second defendant, a deposit fine had been paid in respect of the defective brakes and it was immaterial as to who had paid. The second defendant was unable to call the police detail who attended the scene as he had since died.

MUNGWIRA J

The third party, Duncan Kamupira, gave evidence. He was the owner of the motor vehicle which injured the plaintiff. It was he who had insured the vehicle with the second defendant. The vehicle was at the time in use as an emergency taxi. The first defendant was his employee and the driver of the motor vehicle on the day of the accident. He had himself come to know of the accident on the day after it occurred.

Some three days after the accident had been brought to his attention, he had approached the offices of the second defendant intending to make a report. He had advised the receptionist of his intentions, only to be told to bring a letter from the police. He had not seen the receptionist again as it is not he but the first defendant who had gone to the police. He had thereafter not

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done anything further and had come to know that civil proceedings had been instituted in 1995 or 1996.

As for the defective brakes, it was not he who paid the deposit fine. He was not aware that the brakes of the vehicle were defective. He had, it seems, been satisfied to receive the benefit from the use of the vehicle for hire or reward but had not assumed responsibility or any obligation for the condition or the maintenance of the vehicle. He in fact went to the extent of expressing his lack of interest in the condition of the vehicle. He had been informed by his driver, the first defendant, that the brakes had been fixed after the collision.

When requested to comment on the portion of his pleadings wherein it is stated that he went to the insurers on several occasions, his response was unsatisfactory.

When it was put to him in closing that he had not reported the accident and that he had not kept the vehicle in a roadworthy condition, his only comment was that he had just bought the motor vehicle and had himself no knowledge of motor vehicles.

Turning to the issue of liability, if one has due regard to the point of impact on the sketch plan, Exhibit 2, one can clearly see that the accident occurred on the verge of the road. This is supportive of the plaintiff's version that the collision did not occur as he was in a bid to dash across the road. The plan is consistent with the plaintiff's statement to the extent that it is the vehicle driven by the first defendant which veered off its path of travel. The second defendant has in its submissions conceded that there was no verbal evidence to contradict that of the plaintiff, the first defendant having elected to be in default at the trial. Again the second defendant is hesitant to suggest that the plaintiff deliberately lied in his evidence, there being no grounds upon which to make this suggestion.

There is evidence in the police report Exhibit 3 which is indicative of the first defendant having been charged with contravening of s 51(1) of the Road Traffic Act [*Chapter 13:11*] (driving without due care and attention) and

contravening a section pertaining to deficient brakes: That there was payment by the motorist of deposit fines in respect of both offences has not been placed in issue. Although on its own not conclusive evidence of liability, this is all supportive of the plaintiff's claim that the motorist must have been the negligent party.

The sum total of the evidence before the court is such that it has not been shown that whatever caused the accident was other than in the control of the motorist.

I would therefore agree with the submission of the plaintiff's counsel to the effect that this is an appropriate case for the application of the doctrine of *res ipse loquitur*.

The plaintiff was undoubtedly not up to the mark and had a rather hazy and unclear recollection of events on the day of the accident. He suggests that he was walking on a track parallel to the road when the vehicle driven by the first defendant swerved off the road and struck him whereas

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there is no sign of a cycle track on the sketch plan.

I would tend to agree with the closing submissions of the second defendant in that the plaintiff's version of events as to the circumstances of the collision was faulty and that given the content of the police sketch plan, Exhibit 2, and the police report, Exhibit 3, the plaintiff was mistaken as to his position prior to the collision.

It is unfortunate that the court did not have the benefit of other evidence from eye witnesses or oral testimony from the attending detail(s) as all available witnesses are now deceased.

I am, however, satisfied on the balance of probabilities that even in the absence of a causal *nexus* between the faulty brakes and the accident, it was the sole negligence of the motorist in failing to exercise proper control over his vehicle and in veering from his path of travel which resulted in the accident.

There is no evidence to prove or suggest contributory negligence on the part of the plaintiff.

It is common cause that the plaintiff sustained a compound fracture of the right tibia and fibula and a fracture of the right femur. I have above dealt in detail with the content of Exhibit 1 - the medical report and oral evidence of Dr Divecha, the orthopaedic surgeon. The injuries are not in issue and, although the plaintiff is getting along in years and by virtue of age is at risk of arthritis, the evidence of the doctor is that the plaintiff is likely to suffer from arthritis as a direct consequence of the injury. As at the date of the accident, X-rays had not revealed the presence of this disease. The inability of the plaintiff to move unaided by a stick, it is suggested, confirms the prognosis with regards to the development of arthritis in the damaged leg.

2000 (1) ZLR p30

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Counsel for the plaintiff has made reference to seven cases from Corbett and Honey *The Quantum of Damages in Bodily and Fatal Injury Cases*, Vol IV and three local cases which deal with fractures of the tibia and fibula, or of femurs, or both.

For ease of reference, I shall reproduce the table, prepared by counsel.

This reads as follows:

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Yeko v *Eagle Insurance Co Ltd* Corbett & Honey *The quantum of damages in Bodily and Fatal Injury Cases* E3-1	Fracture of right Femur requiring insertion of nail. Patient started walking with crutches one and a half months later. Tenderness noted over right knee. Subsequent development of osteo-arthritis. Right leg shortened; external rotational deformity of femur. Distinctive injuries: In this case, head injury with prolonged headaches. *Per contra*, the claimant did sustain fractures of tibia and fibula.	Judgment date: May 1986 (Ciskei Supreme Court) General damages awarded: R12 000 Current value: R44 000 (Koch p 30)
Ncunyana v President Insurance Co Ltd Corbett & Honey *The quantum of damages in Bodily and Fatal Injury Cases* E3-7	Comminuted fracture of femur; internal fixation with pin; traction in thomas splint not leading to union followed by open reduction and bone grafting. Hospitalised for six months and discharged with large plaster to be worn for further three months. Shortening of leg. Distinctive features: greater post accident medical care than in the instant case. *Per contra*, no injury to tibia and fibula.	Judgment date: April 1993 (ECD) General damages awarded: R18 000 Current value: R27 000 (Koch p 19)

MUNGWIRA J

Gqangeni v *Ciskei Motor Vehicle Accident Fund* Corbett & Honey *The quantum of damages in Bodily and Fatal Injury Cases* E5-1	Grossly comminuted (ie broken with jagged splintered ends) fracture of tibia and fibula. Hospitalised for 14 days and discharged with plaster which was worn for 2 1/2 months with smaller cast for another month thereafter. Severe pain first 24 hours but some acute pain suffered during subsequent procedure. Claimant could walk with limp but still endured pain during bad weather. Distinctive features: slightly shorter period in plaster than plaintiff in this case: further, no fracture of femur.	Date of judgment: May 1991 (Ciskei Supreme Court) General damages awarded: R10 000 Current value: R19 000 (Koch p 13)

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Charlie v *President Insurance Co Ltd* Corbett & Honey *The quantum of damages in Bodily and Fatal Injury Cases* E5-4	Comminuted fracture of tibia with severe fragmentation and displacement with resultant angulation. Four procedures; more than 12 months on crutches. Hospitalised 6 weeks. Plaster cast for 6 months. Reduced walking ability and need for stick. Claimant unable to perform former work as mechanic or anything requiring manual labour. Distinctive features: no fracture of femur or fibula; no suggestion of arthritis.	Judgment date: May 1993 (ECD) General damages awarded: R18 000 Current value: R27 000 (Koch p 10)

2000 (1) ZLR p32

MUNGWIRA J

Havenga v *Parker* Corbett & Honey *The quantum of damages in Bodily and Fatal Injury Cases* E5-18	Fracture of left fibula (by gunshot) with metal fragments remaining in surrounding tissue. Leg in plaster 6 1/2 months. Pain acute for first week, thereafter constant for 2 weeks before subsiding. Further surgery required. Distinctive features: no fracture of tibia or femur. No permanent loss of amenities of life.	Date of Judgment: February 1993 (TPD) General damages awarded: R10 000. Current value: R15 000 (Koch p 13)
Didla v *President Insurance Co & Anor* Corbett & Honey *The quantum of damages in Bodily and Fatal Injury Cases* J2-7	Fracture of left femur and pelvis. Fracture of right tibia and fibula with skin degloving, injuries to both ankles. Right leg now shorter. Lengthy hospitalisation. Extensive surgery required with future surgery, including hip replacement necessary. Inability to jog or run. Uneven surfaces negotiable with difficulty. Unable to undertake strenuous work. Distinctive features: no hip injury or future surgery indicated in the instant case.	Date of judgment: October 1991 (TPD) General damages awarded: R22 000. Current value: R41 000 (Koch p 11).

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Muller v *Mutual & Federal Insurance Co Ltd* Corbett & Honey *The* quantum *of damages in Bodily and Fatal Injury Cases* J2-56	Closed comminuted fracture of femur. Fracture of tibia and fibula. Femur repaired with nail. Tibia and fibula fixed with plates. Hospitalised 7 weeks. Distinctive features: injuries included fracture of wrists and injury to pelvis. 13 operations performed including bone grafts.	Judgment date: April 1993 (CPD) General damages awarded: R75 000. Current value: R112 000 (Koch p 19)

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Chikanda v *Mukumba* HH-210-88	Compound fracture of tibia and fibula. Hospitalised for 50 days. Leg an inch shorter. Arthritic symptoms had begun to develop. Prolonged pain suffered. Permanent limp. Distinctive features: no injury to femur.	Date of judgment: May 1988. General damages awarded: $7 000 (High Court, Harare)
J v *Minister of Defence* HB-60-88	Fracture of left tibia & fibula: midshaft fracture of femur. Slow painful recovery. Distinctive features: claimant in this case also suffered head injury with resultant loss of sense of smell, memory and suffered double vision.	Date of judgment: 1988 (High Court, Bulawayo). General damages awarded: $35 000.
Muchechetere & Anor v *Boka & Anor* HH-148-89	Fracture of femur; also laceration of scalp. Suffered pain 73 days with severe pain for first week. Subsequently, able to participate in soccer but with discomfort thereafter. 10% external rotation of femur with 8% permanent disability. Distinctive features: no fracture of tibia and fibula or compound fracture of any kind.	Date of judgment: July 1989 (High Court, Harare). General damages awarded: $6 000

The following table was provided by counsel for the plaintiff for a quick comparison of the South African cases referred to above, the current value of the awards and plaintiff's submission as to the comparison between the injuries in those cases and those of the plaintiff in the instant matter:

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Case	Current Value of Award	**Distinctions / Similarities**
Yeko	R44 000	Not much difference. The plaintiff in *Yeko* suffered head injury but *per contra*, lesser injuries to leg. Sequelae similar (arthritic development)
Ncunyana	R27 000	Greater post-injury medical treatment required. Similar treatment of femur. *Per contra*, no injury in *Ncunyana* to lower leg and no compound fracture.
Gqangeni	R19 000	Similar femur injuries with similar treatment (requiring a shorter time in plaster in *Gqangeni*. No injury to lower limb and no appreciable long term *sequelae*. Present case, it is submitted, is worse.
Charlie	R27 000	Similar in many aspects but with no injury to femur and no suggestion of development of arthritis.
Havenga	R15 000	Fracture left tibia only (not compound). No permanent disability.
Dladla	R41 000	Injuries similar (femur, tibia and fibula) but additional injuries to pelvis and ankles. Future surgery indicated but similar long term *sequelae*.
Muller	R112 000	Similar injuries including femur, tibia and fibula. Treatment roughly comparable. Additional injuries however to wrist and pelvis with considerably greater post accident surgery required.

MUNGWIRA J

With respect to the local cases cited, it was submitted that it is always a difficult matter to ascertain the current value of those awards, but that the court will always endeavour to take into account the erosion of the value of money.

The court was asked to take judicial notice of the fact that, according to the official government line, inflation has been at least in the twenty plus percent margin between the late eighties and 1998. It is further submitted that it is generally accepted that inflation now exceeds 100%.

It is suggested that taking an extremely conservative approach if one took just 20% *per annum* between l985 and the present as an average note of inflation the local awards referred to above could be determined on the following basis:

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	Current value of 7000 in 1988 at average inflation rate of 20% *per annum* (*Chikanda* v *Mukumba*)	Current value of 35000 in 1988 at average inflation rate of 20% *per annum* (*J* v *Minister of Defence*)	Current value of 6000 in 1988 at average inflation rate of 20% per annum (*Muchechetere & Anor* v *Boka & Anor*)
1988	7 000	35 000	6 000
1989	8 400	42000	7 200
1990	50 400		

It is submitted that taking into account the foregoing in this particular case an award in the region of $50 000 would not be inappropriate.

The second defendant agrees that the cases referred to by counsel for the plaintiff as to *quantum* are, to the extent that the injuries are similar, relevant to this matter. It is submitted, however, that the argument adduced for the plaintiff is flawed in respect of the decline in the value of the Zimbabwe Dollar. The cost of living index and the depreciation in the value of money are, it is submitted, indirect factors which may be taken into account but should not be statistically followed. See *Minister of Defence & Anor* v *Jackson* 1990 (2) ZLR 1 (S).

This court is urged to take into account that the plaintiff, at the time of the accident, was of retirement age and that as a result his damages should not be similar to that awarded to a much younger person. A maximum award of $20 000 is acceptable and appropriate.

When seen on 29 January 1997, the plaintiff was still complaining of a

painful and stiff right knee and ankle. He was walking reasonably well. The right knee was stiff with flexion limited to 90°. Both fractures had healed and the ankle had limitation of movement.

As a result of the injury, he is now unable to do a lot of manual work or heavy manual jobs. His degree of permanent disability was assessed at 25% with no prospect of improvement.

As a self-employed farmer his ability to prove his farming activities has been severely curtailed. This is to be considered against the background that the plaintiff is no longer a young man: he is aged 70 years of age.

Bearing in mind that, in assessing general damages, one is dealing with the valuation of a non-monetary loss which is not in real terms susceptible of measurement in money, this court would have attained greater benefit from the provision of more detail but in the circumstances is obliged to rely on the foregoing. Not overlooking that due and proper weight should be accorded to the marked reduction in the value of money in recent years, albeit conservatively, I have come to the conclusion that an amount of $30 000 would be fair and reasonable

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compensation for the plaintiff. That is the figure at which I would assess his general damages.

It is common cause that the plaintiff's claim against the second defendant is under and by virtue of a statutory policy of insurance in terms of which the second defendant insured the vehicle which collided with the plaintiff. It is accepted by the second defendant that should the plaintiff be granted any sum as and by way of damages he is entitled to judgment against the second defendant in terms of his right to sue under Part IV of the Road Traffic Act [*Chapter 13:11*].

The second party submits that its claim against the third party is based on the third party's failure to abide by the terms and conditions of the policy of insurance, Exhibit "4". The specific clauses breached in the general conditions are 1 & 6 which read respectively:

"CONDITIONS

1. Notice shall be given in writing to the company as soon as possible after the occurrence of any accident or loss or damage and in the event of any claim ...

6. The insured shall take all reasonable steps to safeguard from loss or damage and maintain in efficient condition any motor car described in the Schedule hereto and the company shall have at all times free access to examine such motor car."

Counsel for the second defendant has urged that this court should reject as untruthful the explanation by the third party that he was fobbed off and insulted by a receptionist at the second defendant's place of business when he went to file the accident report.

According to the third party, the verbal report which he submitted sufficed. The court is urged to accept that such verbal report was made. The second

defendant's witness, it is submitted, has conceded that the second defendant at times employed temporary receptionists who might not have appreciated fully the procedures to be followed in such situations and that accordingly the third party was not properly advised.

Reference is made to the *South African Law of Insurance* 2 ed by Gordon and Getz at pp 269-70, where it is explained that the condition as regards notice:

" ... is plainly imposed for the insurer's benefit. The insurer wants to know of the loss immediately so that it may investigate the cause and effect under the most favourable circumstances."

It is therefore submitted that the facts of the notice to the insurer and not its form is the vital ingredient. Thus, the verbal report meets with the requirements of Condition 1 of Exhibit 4.

This submission is, in my view, untenable. Were one to find that a verbal report to a receptionist suffices that would run counter to the interests of the insurer and defeat the object of the condition, as the insurer would then have no record of the details of the information which would enable the insurer to investigate.

That the notice be given in writing is an express condition. The reduction of the notice to writing is, in my view, an integral and vital element of compliance. The failure of the third party to

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submit notice in writing was therefore a material breach in that the insured did not fulfil the condition. That the insurers may have received notice of the loss verbally does not absolve the insured from his failure to comply (*Prairie Oil Company* v *Standard Mutual Fire Insurance Company* (1910) 19 Man R 720 cited by Ivamy in *General Principles of Insurance Law* 4 ed). Even if it were accepted that the third party was advised by a receptionist to make a report to the police, this would not, I am convinced, amount to a waiver of the condition that the notice be in writing. In any event, the third party has not pleaded waiver.

As for condition 6, it is submitted by the third party that, as the second party had unlimited access to the insured motor vehicle, if it wished to check if the motor vehicle was being kept in an efficient condition, the second defendant failed to exercise such right. The only evidence that the motor vehicles was not maintained is that a deposit fine was paid for the use of the motor vehicle with inefficient brakes. The court, it is said, is thus in the dark as to when the condition of the alleged inefficient brakes developed.

In his testimony, the third party confessed to having had little or no interest in the state or condition of the motor vehicle. He blatantly states that he bought the vehicle for use and once having handed it over to the first defendant he took no steps, reasonable or otherwise, to maintain the motor vehicle in an efficient and roadworthy state at any time prior to its being in

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an inefficient condition. He did not, it seems, take any trouble to enquire from the driver of the vehicle as to the condition of the motor vehicle. The issue, as I see it, is not whether the accident was caused by the inefficient brakes or the stage at which this condition developed. The question to be answered is - "Did the third party check the vehicle and take steps to prevent the vehicles from deteriorating into a dangerous and inefficient condition?" It is clear that the answer is in the negative. That being the case, it follows that the third party breached a condition of the policy and in so doing did not ensure that the insurer was not involved in an additional risk.

That the vehicle was in the hands of the first defendant, the agent of the third party, does not in the circumstances absolve him even if it is the agent who failed to take the requisite care. The agent has not been shown to be a person possessed of the necessary mechanical skills or expertise to effect the necessary repairs or maintenance to the vehicle. I am satisfied that this is an appropriate case for the application of the maxim *respondeat superior*.

The second defendant has not pursued its claim against the first defendant.

It is accordingly ordered that judgment with costs be and is entered granted in favour of the plaintiff against the first and second defendants jointly and severally as follows:

1. (a) general damages: $30 000 together with interest at the prescribed rate on that sum from the date of judgment to the date of payment;

   (b) special damages:

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(i) travelling and accommodation - $2 080.

(ii) loss of income - $15 000.

2. It is ordered that second defendant is hereby indemnified by the third party in respect of any payment made to the third party to the plaintiff in terms of this judgment.

Danziger & Associates, plaintiff's legal practitioners

Manase & Manase, first defendant's legal practitioners

Atherstone & Cook, second defendant's legal practitioners

INDEPENDENT AFRICAN CHURCH *v* MAHEYA 2000 (1) ZLR 39 (HC)

Citation	2000 (1) ZLR 39 (HC)
Case No	Judgment No. HH-206-99
Court	High Court, Harare
Judge	Devittie J
Heard	October 13, 1999
Judgment	October 13, 1999
Annotations	None

Civil trial

Flynote

Church - dispute - resolution - principles to be applied by courts

Headnote

A schism had appeared in a congregational church. Both sides in the dispute claimed to be the legitimate church and to be entitled to the church's immovable property.

Held, that where the resolution of a church property dispute involves matters of church doctrine and practices, the courts should not become immersed in a consideration of the merits of doctrinal matters; they ought instead to apply "neutral principles of law".

Held, further, that all questions involving a voluntary association may be resolved in terms of its constitution, using a common sense interpretation.

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Held, further, that where the church's constitution is democratic, it may be permissible to accept the majority view, provided that it is equitable to do so. Circumstances where it may be inequitable include a breach of trust involving a fundamental departure from the tenets of the church or unfairness, as where the minority's contribution to the property is greater than the majority's.

Held, further, that if the facts allow, an equitable distribution of the property may be ordered. In this case, the evidence relating to the minority's contribution was unclear, so the majority principle had to be applied.

Cases Considered

Cases cited:

Eastern Orthodox Diocese of the US & Ors v *Miligojemvu* 426 US 696 (1976)

Free Church of Scotland v *Overtoun* [1904] AC 515

Independent African Church v *Maheya* 1998 (1) ZLR 552 (H)

Jones v *Woolf* 443 US 596 (1979)

Case Information

R H Wood, for the plaintiff

T Masendeke, for the defendant

Judgment

Devittie J: In 1946, members of the Manicaland Congregation of the United Methodist Church became disgruntled with their brethren in Harare. Those amongst them who had taken up residence in Harare felt that they were less than welcome at the Harare Services. Amongst the disgruntled worshippers in Harare was one Machingura. He called a meeting of all dissenters at which it was decided to break away from the mainstream church. The dissenters formed a separate church, called the African Independent Church (Mushakata). Machingura was later to become the President and then the Bishop of the Church.

DEVITTIE J

With the passage of time the Independent African Church grew - if not in numbers - certainly in spiritual terms and organisational strength. But now the unity of purpose which characterised the church no longer prevails. A schism occurred in 1993. It has rocked the very foundations of the church. Many founder members who were young women and men at the inception of the church, and upon whom the ravages of time have taken their toll, overcame their physical infirmities during the course of this trial to give evidence with no little passion on why they believe that the faction they have sided with represents the true faith.

The reserves that this dispute has exacted in emotional and financial terms is demonstrated by

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the trail of litigation that precedes this trial. The matter first came before me in *Independent African Church* v *Maheya* 1998 (1) ZLR 552 (H) as an opposed matter and was argued on the papers. The sole issue defined was the right of the wife of Bishop Maheya (who was by then deceased) to occupy church residential property. Concerned at the very real potential that a wider dispute was about to engulf the parties on the question of which congregation represented the true church, I referred the matter to trial with leave that the parties file further affidavits. My concern was that all remaining disputes be resolved. The order I granted was *inter alia* in the following terms:

" 2. The applicant be and is hereby given leave to file further affidavits and serve them on the respondent within ten days of the day of this order showing:

(a) the assets of the Independent African Church and the extent to which its members have contributed thereto;

(b) why a finding should not be made that the members have constituted themselves into two separate church organisations or congregations;

(c) why the court should not in the exercise of an equitable discretion, make an order in terms of which the assets and the right of occupation of church property are divided between the separate congregations;

(d) the number of members in each congregation.

3. The respondent and/or the organisation of which she purports to be a member shall file and serve on the applicant an opposing affidavit touching on the issues as formulated above within ten days of receipt of applicant's further affidavit.

4. At the hearing of this matter -

(a) the parties may adduce such further oral evidence as may be adduced in respect of the issues as set out above; and

(b) the parties may adduce such further oral argument as they wish."

In essence, this is a dispute over church property and the evidence has established that the parties to the dispute are two separate and distinct congregations who have constituted themselves and function as such. Each claims that it is the lawfully constituted authority of the Independent African Church. In this judgment, I shall refer to the one congregation as the Mapisaunga congregation (plaintiff) and the other as the Chitanda congregation

(defendant). The Chitanda congregation was not cited in the initial proceedings as a church entity - but by consent of the parties the Chitanda congregation was joined as a party and it was agreed that all disputes be ventilated and that the order this court makes would bind the congregation led by Bishop Chitanda.

The main dispute relates to Stand No. 4070 Old Highfield, on which stand the improvements are a church building and a residential dwelling. The plaintiff claims the exclusive use of the church building and prays for an order of eviction against Mrs Maheya, the late Bishop's wife, from the

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church residence. The Church's occupation of the Highfield properties, in terms of a lease with the City of Harare. The Chitanda congregation contend that they are entitled, as the legitimate church, to use the church building. They oppose the eviction of Mrs Maheya on the grounds that:

(a) they (the Chitanda congregation) are the legitimate church;

(b) Mrs Maheya, as the wife of the late Bishop, has the authority of the legitimate church to occupy the house.

In resisting her eviction, Mrs Maheya herself also relied on the authority of the Chitanda congregation. The Mapisaunga congregation asserted that it was the legitimate church and Mrs Maheya had no authority to occupy the church house since her husband had been deposed as bishop and, in any event, since her death a new head of the church had been appointed who was entitled to occupy the church house.

There is also a dispute concerning the use of church buildings in areas outside Harare. After the schism, running battles were fought between the two congregations over the use of church buildings in Highfields and other centres. Mr Maviza, the Conference Chairman for the Chitanda faction, did state that his church prayed for an order granting his church the exclusive use of the churches built in Chipinge, Highfield, Bulawayo and other centres. Both counsel are agreed that this court should resolve the dispute regarding the rest of the Church property.

It emerges from the presentation of the evidence that some of the issues that have been advanced as "triable" issues by the warring parties are not readily definable as legal disputes. This court does not, for example, have jurisdiction to determine whether the bishop of a church has conducted himself so badly as to merit his dismissal. In resolving this property dispute, therefore, the court cannot resolve issues concerning loyalty to the bishop or other matters of church doctrine or practice. And yet, as far as the chief protagonists are concerned, this dispute is not really about procedural irregularities such as the failure to give notice or any other such strict legal dispute. The evidence reveals a tension between faith and legality. Although it is a dispute about church property, it brings to the fore matters whose resolution fall outside the

permissible area of court intervention. Notwithstanding the strictures imposed by rules of evidence, the parties all too often placed before the court, as issues to be tried, matters of faith, church doctrine and practice. The passion which matters of faith generate was such that I was loathe to deny the parties the opportunity to vent feelings close to their hearts. I find it convenient therefore to deal with the evidence under broad categories that represent the main arenas over which the parties chose to do battle. The categories are not of course confined to issues material to the determination of the dispute. They are:

- whether the vote of no confidence at the 1993 Conference conferred legitimacy on the Mapisaunga congregation;

- whether, after the vote of no confidence the Chitanda congregation constituted itself as the

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legitimate authority of the African Independent Church;

- whether the legitimate congregation is that which has adhered to church doctrine and practice;
- which congregation constitutes the majority.

The essential question I have to resolve is which congregation has the right of use and occupation of disputed church property. The answer to this question, if there is to be no equitable division of disputed property, depends upon a determination of which congregation is the legitimate authority of the Independent African Church.

A. THE VOTE OF NO CONFIDENCE

The hierarchical structure of the church under the 1949 Constitution is as follows - the head of the church is the President. Below him are four District Superintendents involved on a full time basis in the administration of the four national provinces. Below them, are sixteen reverends. Below the reverends come the deacons and there are 5 deacons; and then there are the evangelists who are chosen by the lay pastors.

After the death of Machingura the founding father, Isaac Maheya, was appointed Bishop in 1986. This decision was taken at the Annual Conference of the Church attended by all delegates. The Annual Conference is the supreme authority of the Church. In the run up to the April 1993 Annual Conference, there were murmurs of discontent against Bishop Maheya's leadership. The apparent cause of the discontent were claims that the Bishop's leadership style was autocratic. The evidence by the Mapisaunga Congregation was that when the conference was in motion, a delegate accused the Bishop of being a "dictator". The Bishop, in response, stormed out in protest and shouted "I resign". The conference ended in disarray and no business was concluded.

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Those opposed to Bishop Maheya re-convened the annual conference in May 1993. It was apparently stated that one of the purposes of that meeting was to pass a vote of no confidence in the Bishop. According to Mapisaunga, the Conference Chairman, an overwhelming majority passed a vote of no confidence in the Bishop. A letter followed to the Bishop advising him that he was no longer a member of the church and that he should vacate the church property.

The above account of the events at the April 1993 Annual Conference varies in one major respect from the defendant's version. Members of defendant's congregation denied that Maheya had resigned officially - they said that on the following Sunday he presided over church services. They denied any knowledge of the May conference at which a vote of no confidence was passed in the Bishop - as far as they were concerned the Bishop's removal was not constitutional because the Bishop had not authorised that meeting.

I have to say that the minutes of the meeting show that an overwhelming vote of no confidence in Bishop Maheya was passed at the May conference. I must confess that I do not consider that

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a resolution of the question whether the Bishop resigned or not to be material to the resolution of the issues before me. Nor does anything turn on the vote of no confidence per se. It is clear from the evidence that at this stage the church had split into two camps. It is also clear from the evidence that the one faction boycotted the May conference at which a vote of no confidence was passed. The point was made that the "vote of no confidence" conference had not been properly convened by the Mapisaunga congregation and that no proper notice had been given to those loyal to Bishop Maheya. The quality of the evidence in this regard does not enable me to make a firm finding. Moreover, I am loathe to make this matter turn on procedural technicalities, given the circumstances of this case. I think that to make an issue of this point this begs the question whether, at that stage, two separate congregations had emerged. As the schism was unfolding, loyalties to either faction had yet to crystallise and the evidence affords no clear indication as to which the faction constituted the majority during these times. In the confusion that prevailed, I am not certain procedural requirements were adhered to and the evidence is unclear as to whether all disaffected members were given due and proper notice of the meeting at which a vote of no confidence was passed. I therefore find myself unable to conclude that on the evidence before me I can make the finding that the vote of no confidence constituted the Mapisaunga congregation at the legitimate church.

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B. THE EMERGENCE OF TWO CONGREGATIONS

Bishop Maheya did not accept the decision by the annual conference of May 1993 to "defrock" him. He resisted legal proceedings instituted to evict him from the Church property. He held a separate annual conference attended by those loyal to him. He re-constituted the main organs of the church and filled positions of those who had defected, by direct appointment or election. There existed therefore two separate congregations each claiming to be the true Church. Bitter rivalry ensued over the control and use of church property in Harare, Bulawayo and Mutare and Chipinge. At times, intimidation and violence took the centre stage. When Bishop Maheya died he was succeeded by Chitanda who was ordained Bishop. The position that prevails at present is that the one congregation has as its head Bishop Chitanda and the other has as its head a President, Dangarembwi. A great deal of the evidence demonstrated the existence of two rival churches, each claiming to be the rightful church. The Chitanda congregation argued that they represented a continuous and unbroken line of succession: they argued that Machingura was the founding father in whom the wisdom and authority of the church was reposed; that he in turn appointed Bishop Maheya, and now, they, as adherents of Maheya, had continued the line of succession. They constituted an unbroken chain and the Mapisaunga faction was a mere aberration. In established churches, steeped in centuries of tradition, this argument may hold sway in an ecclesiastical court. But I have no legal basis upon which to accede to this argument as the basis of resolving this dispute.

C. CHURCH DOCTRINE AND PRACTICE

In advancing the contention that it was the legitimate church, each party brought into the fray matters of church doctrine and practice. Bishop Maheya was much maligned by the defendants. Evidence was produced of previous convictions for fraud incurred in his early youth. Further

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evidence was produced of a conviction for theft - which occurred after the schism. This prosecution was instigated by those seeking to oust the Bishop. In response to these slurs on the Bishop's moral integrity, the defendant's witnesses involved Biblical tenets - "Who is not a Sinner" they asked - "Even Paul was redeemed on the road to Damascus". Like the Catholic faithfuls of South America who, in Graham's Green's novel "The Power and the Glory", keep faith with their priest, Bishop Maheya's followers' faith in him, notwithstanding his moral lapses, was unyielding.

The Mapisaunga congregation also dealt at some length with the failure of the defendant's church to adhere to church doctrine. Bishop Chitanda had not

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been properly ordained and he had two wives - this was contrary to church practice, they argued. I decline to have regard to matters of church doctrine and practice in the resolution of this dispute.

D. WHICH IS THE MAJORITY CONGREGATION?

As the trial progressed, it became clear that the unchallenged evidence was that the plaintiff's congregation in time came to command the overwhelming majority of the support of those who were members at the time of the split. There was evidence that at some stages loyalties had shifted back and forth. Even at the trial loyalties tended to shift. The defendant's witnesses attributed this to the fact that those who had defected were enticed by money and others had been intimidated by repeated acts of organised violence. It was not disputed that the majority of what constituted the hierarchy of the congregation prior to the schism - that is, the church elders, the executive committee, the annual conference, the district superintendents, the deacons and the pastors - remained with the plaintiff's congregation but for a minority who followed the Chitanda congregation. The task of determining the majority was not made easy by the fact that no membership records were produced to demonstrate the number of members that had moved to the two separate congregations. It was for this reason that I did not consider it appropriate to order that elections be conducted. Such an exercise would have been fraught with practical difficulties. Some degree of blame in this regard must lie on the parties, because the desirability of leading clear evidence on the number of members in each church had been adverted to in the interim order I made.

I have to determine which congregation represents the legitimate Independent African Church and in turn which congregation is entitled to the use of church property? Before I do so I propose to revisit some of my obiter remarks in *Independent Africa Church* v *Maheya supra*. In that judgment, I expressed concern that we had yet to develop a separate corpus of principles to govern the resolution of church property disputes: I then examined a number of American Supreme Court precedents and expressed the opinion that the example of the American experience in developing a separate body of church principles served as a useful example for the course which we should adopt in relation to Zimbabwean church property disputes.

The most commonly accepted definition of a voluntary association is that it is a "legal

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relationship which arises from an agreement among three or more persons to achieve a common object, other than the making and division of profits". See Bamford *The Law of Partnership and Voluntary Association in South Africa* 3 ed. In Zimbabwe today, many congregational churches

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have constitutions which function along the lines of a voluntary association. The law of voluntary associations does not always provide adequate answers to the peculiar difficulties that arise in church property disputes. As I stated in *Independent African Church* v *Maheya supra* at 556:

"Religious associations have features which distinguish them from other associations one needs only mention the tension which exists between the democratic principles that normally govern the operation of a voluntary association ad which all its office bearers are subject to, and the exalted position which the head of an independent church in Zimbabwe or indeed any church, occupies. He is a revered figure, in whom is reposed the wisdom to determine and interpret the principles of the faith. He has no equal. He stands in sharp contrast to the chairman of, say, a jockey club, who is an ordinary mortal amongst the members."

The tension between faith and legality has surfaced in this case. The armoury both congregations have unleashed is steeped in matters related to church practice and doctrine. It is often the case that the parties to a church property dispute, notwithstanding an attempt in the pleadings to confine the dispute to strict legal niceties, will present to the court evidence involving church doctrine and practice. This raises the question whether a dispute over church property that is made to turn on church doctrine and practise is cognisable in a civil court. The American Supreme Court has held that it is a constitutional requirement that courts refrain from resolving church controversies over church doctrine - and that this principle applied equally to church practice and administration. Thus, the evaluation of testimony concerning church procedures was held to be inappropriate. This was held to be so even where the property right follows as an incident from decisions of the church on ecclesiastical issues. See *Serbian Eastern Orthodox Diocese of the United States & Ors* v *Milivojemvu* 426 US 696 (1976). The context of United States Supreme Court decisions is that they involved hierachial churches where the court could defer to an adjudicative authority, higher than the congregation. The difficulty arises where, as is the case with many churches in Zimbabwe, the dispute is a congregational dispute and there is no higher authority to which the court can defer.

Bamford *op cit* at 849 submits as follows:

"In the case of religious associations, it is submitted that a court, in order to resolve questions of property, is entitled to resolve questions of ecclesiastical doctrine ..."

The learned author does not expand on this statement, which stands in stark contradiction to the principle adopted by the American Courts that the courts have no business to interfere in religious doctrine. In my judgment, in the case of a congregational schism, where the resolution of a church property dispute involves matters of church doctrine and practices, the courts should not become immersed in a consideration of the merits of doctrinal matters. They ought instead, to use a term applied by the American courts, to apply "neutral

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principles of law". In *Jones* v *Woolf* 443 US 595 (1979), the court had the following to say on the neutral principles approach:

"This method relies exclusively on objective, well established concepts of trust and property law and formulae familiar to lawyers and judges. It thereby promises to free civil courts completely from the entanglement of religious doctrine, policy and practise."

It is open to the Zimbabwe courts to apply any one or more of the following approaches which confer with the neutral principles approach.

(a) All questions involving voluntary associations may be resolved in the terms of its constitution. That, too, should be the position regarding the resolution of property disputes involving churches that are voluntary associations. One should, however, in seeking to resolve a property dispute, approach the inquiry in a common-sense way, and not insist on meticulous compliance with trifling details of the constitution.

(b) It is permissible in a congregational church whose constitution upholds democratic principles to resolve a property dispute by applying the majority principle. Where there are difficulties in determining the majority on the evidence, it may be appropriate to order that elections be held.

(c) An example of an instance where the court declined to apply the majority principle is in England the House of Lords in *Free Church of Scotland* v *Overtoun* [1904] AC 515 at 546.

Certain movable property was held by trustees, the respondents, in trust for the Free Church of Scotland. The Free Church of Scotland was a voluntary association of Christians who held common religious tenets and principles of worship, discipline and church government. The appellants claimed that the trustees had breached their trust by applying Trust property to purposes alien to the purposes of the trust, and to a newly constituted congregation of persons who had no title to be members of the Church. The appellants contended that their tenets and principles represented the true principles of the association for whose benefit the trust was funded. The majority of the Law Lords, in upholding the view of the minority congregation that there had been a breach of trust, declined to accept the doctrine that it was competent for a majority to depart from the original tenets of a church without breaking trust. The significance of the decision in the *Free Church of Scotland* case for present purposes is two fold: firstly, it demonstrates circumstances may arise where, in a voluntary religious association, the principle that the majority decision always prevails, may be displaced by other weighty considerations. Secondly, where a trust is created, the case demonstrates that it is permissible for civil courts to resolve matters of church doctrine by applying ordinary

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principles of law, without debating the merits of a church doctrine and practice.

(d) It may often be the case that the award of church property to a majority would not be in conformity with justice and fair play. This may arise, for instance, where the minority constitute a separate congregation whose contribution to the acquisition of the church property far exceeds that of the majority. In such circumstances, I ask, is it competent to order an equitable division of the property? In considering this question I steady myself by dwelling on the jurisdiction of this court to exercise an equitable discretion in church property disputes. Does this court have an inherent power to hold the scales of justice in balance where the law does not provide for a given situation? Or is it that the inherent power with which this court is vested, is not to be likened to the law of equity which the English Court's of Chancery apply?

In an *obiter dictum* in *Independent Church* v *Maheya*, I ventured the opinion that the court could apply an equitable discretion by dividing church property between the parties in order to avoid injustice to a minority who had made a contribution to the acquisition of the property in dispute. In the present case, there can be little doubt on the evidence that the minority congregation have over the years contributed materially to the church. I am aware that this is not a court of equity. In my view, where it is clear that the needs of the community have reached a state where certain interests may only be protected by granting the relief sought, then, such a course should be adopted. I think that this is the situation that prevails with the rapid development of congregational churches in Zimbabwe.

I turn now to the facts of this case. Firstly, I consider whether I may exercise an equitable discretion as to the disputed property. The witnesses called on behalf of Chitanda's congregation paid little attention in their evidence to the necessary detail in regard to the property outside Harare that they laid claim to. No inventory of assets was compiled. The location of the property in dispute was not detailed. No details emerged as to the description of the properties concerned, the nature of the church's title to such property, and more importantly no evidence was led as to respective constitution of the church members to the disputed property. In these circumstances, there was very little evidence on which to rest the exercise of an equitable discretion. I make mention that these matters were specifically addressed in the interim order I made in the earlier case.

In regard to the Highfield property, the church does not hold this property under title and there are real difficulties in dividing its use. The conclusion I have come to is that this dispute can best be resolved on the basis of the

majority principle. I have little doubt that if an election were held at the time of the schism, and even now, the Mapisaunga congregation would command an overwhelming majority. Bishop Chitanda did not dispute this. Accordingly, I find that the Mapisaunga congregation is the legitimate authority of the African Independent Church.

In regard to costs, I do not propose to award costs against the minority congregation. They had

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a genuine grievance. The deposition of Bishop Maheya they saw as an act of sacrilege. They have failed solely on the majority principle. I have sympathy for them, many of whom probably made significant contributions to the growth of the church over a life time. Had practical difficulties not existed, I may have been inclined to order an equitable distribution of the property.

It is ordered that:

1. (a) That the defendant Bessie Maheya shall give the plaintiff vacant possession of the residential building on Stand 4070 Old Highfield (the "church house") within 90 days of the date of this order.

   (b) That if the defendant or any persons occupying the property through her remain in occupation of the church after that date the Deputy Sheriff be and is hereby authorised to remove her or them and their possession from the said property.

   (c) The members of the congregation represented by defendant and or Bruce Chibanda are interdicted from interfering with services of worship at Stand No. 4070 Highfield Township, Harare on or after 30 November 1999.

2. The congregation whose conference chairman is Mapisaunga is hereby declared to be the legitimate African Independent Church (Mushakati).

3. Each party is to bear its own costs.

Atherstone & Cook, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

CENTRAL AFRICAN BUILDING SOCIETY *v* DUBE 2000 (1) ZLR 50 (HC)

Citation	2000 (1) ZLR 50 (HC)
Case No	Judgment No. HB-75-99
Court	High Court, Bulawayo
Judge	Sibanda J
Heard	November 30, 1999
Judgment	December 2, 1999*(6)
Annotations	None

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Chamber application

Flynote

Practice and procedure - service of process - mortgage agreement in which vacant plot named as domicilium citandi et executandi - whether service could be effected by affixing process to prominent tree on plot

Headnote

The defendant borrowed money from the plaintiff in order to build a dwelling house on a vacant plot of land owned by him. The loan was secured by a mortgage bond over the plot. In the standard form mortgage contract the plot was named as the defendant's *domicilium citandi et executandi*. Before any building had been constructed on the vacant plot, the defendant defaulted on his loan repayment and the plaintiff claimed the recovery of the loan amount. The Deputy Sheriff went to the defendant's plot to serve the process. Finding that the plot was vacant, undeveloped and unoccupied, the Deputy Sheriff purported to serve the process by affixing it to a prominent tree on the plot.

Held, that this method of service did not constitute proper service of the process. In terms of the High Court Rules process must be served on a responsible person at the address chosen for service. Only if the person to be served cannot be found after a diligent search or that person obstructs and frustrates service, may the process be served by leaving it in a conspicuous place. In the present case, the defendant may not have seen the process.

Held, further, that in the present case the defendant had not freely chosen the address for service. The provision relating to the address for service was contained in a standard form mortgage contract that was not negotiable. The contract envisaged the construction of a dwelling house on the property. Where, as in the present case, no dwelling had been constructed the provision relating to the address for service inevitably fell away. To overcome this sort of problem, the mortgagor should be asked to nominate a second address for service of his own choice.

Held, further, that even if the method of service had technically complied with the rules, the court had a discretion to require further steps to be taken to effect service. This was such a case and service of the summons should be effected upon the defendant or a responsible person at his residence or place of business or employment.

Cases Considered

Cases cited:

Abt v *Geldenhuys* (1901) 18 SC 114

Colonial Govt v *Matthys* (1900) 17 SC 339

CABS v *Kufa* 1998 (1) ZLR 303 (H)

Founders Bldg Soc v *Willoughby* 1960 R&N 263 (SR)

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Gerber v *Stolze & Anor* 1951 (2) SA 166 (T)

Hollard's Est v *Kruger* 1932 TPD 134

I'ons v *Freeman & Frock* 1916 WLD 64

Johnson v *Johnson* 1931 AD 391

Lindup v *Lowe* 1935 NPD 189

Loryan (Pty) Ltd v *Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W)

Madeiros v *Rebello* 1924 SR 167

Mason v *Mason* (1885) 4 EDC 330

Min of the Interior v *Cowley NO* 1955 (1) SA 307 (N)

Mullen v *Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W)

Pretoria Hypotheek Maatschappij v *Groenewald* 1917 TPD 170

Prudential Bldg Soc v *Botha* 1953 (3) SA 887 (W)

Reeves v *Reeves* (1832) 1 Menz 244

Standard Bank of SA v *Mason* 1928 WLD 220

Legislation considered:

High Court Rules 1971 (RGN 1047/71), rr 39(2)(b) & 40

Judgment

Sibanda J: This matter was placed before me in chambers in an application for judgment in default of appearance to defend the action.

The summons discloses that the defendant is indebted to the plaintiff in respect of the sum of money advanced and secured by a mortgage bond over stand No. 4273 Emganwini Township of lot 400A Umganini situate in the District of Bulawayo. In terms of the agreement of loan, the stand is designated as the *domicilium citandi et executandi***.**

The Deputy Sheriff served the court process at that address. He found the stand undeveloped and vacant. Seemingly, that did not appear important to him, for he nonetheless purported to discharge his duty -

"By affixing a copy together with copies of the annexure A and B to a prominent tree at the *domicilium citandi et executandi* of the defendant Mthulisi Dube, namely, stand No. 4273 Emganwini Township, Bulawayo."

The service of a court process being effected upon "a prominent tree" did not make any sense to me. As I could not conceive what the nature of relationship between the defendant and "a prominent tree" was on the one hand and stand No. 4273 on the other hand could be, I queried the propriety of the service of summons. I indicated that I was not satisfied with the return of

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service.

My query was conveyed to the plaintiff by the Assistant Registrar in the normal way ie by a memo from the Assistant Registrar dated 29 July 1998 addressed to the plaintiff's legal practitioners, Calderwood, Bryce Hendrie & Partners. Mr *Fuzwayo* for the plaintiff sought to resolve the predicament by addressing a letter to the Assistant Registrar dated 3 August 1998. His letter read in part:

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"The defendant has chosen *domicilium citandi et executandi* at stand No. 4273 Emganwini Township, Bulawayo, and the fact that he has not built his house at the time the process was served does not alter the fact that the defendant has in fact chosen *domicilium citandi et executandi* at stand No. 4273 Emganwini Township Bulawayo."

He went on:

"If the defendant has chosen to have the process served at that address we believe this should be accepted ..."

Of course I did not accept that service as I did not consider that serving the summons upon the defendant, by affixing it upon "a prominent tree", regardless of its proximity to the vacant and undeveloped stand, could constitute sufficient service. I took the view that, although rr 39(2)(b) and 40(b) were technically complied with, the service was insufficient and declined to grant judgment.

Mr *Fuzwayo* responded to my further queries. He asserted, in his letter of 19 October 1998, that it was not in dispute that the defendant had specifically chosen an address for service, this being his *domicilium citandi et executandi*, cited on the summons. In his view, the service complies with rr 39(2)(b) and 40(b) of the High Court of Zimbabwe Rules 1971.

At common law a person who elects *domicilium citandi et executandi*, at his own discretion, at which service of a court process may be effected in the event of litigation is bound by that choice. See Voet 5.1.93 (Gane translation). The position at common law is ably enunciated by Margo J in *Loryan (Pty) Ltd* v *Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 at 847D-F where he said:

"... [S] ervice of any process may be effected by delivering or leaving a copy thereof at the *domicilium* chosen by the party concerned. Such service is then good, even if the process may not be received, for the very purpose of requiring the choice of a *domicilium* is to relieve the party causing service of the process from the burden of proving actual receipt. Hence the decisions in which service at a *domicilium* has been held to be good, even though the address chosen was vacant ground, or the party was known to be resident abroad or had abandoned the property or could not be found."

In South Africa, the common law practice set out by Voet and enunciated by Margo J *supra* is embraced in r 4(1v) of the Uniform Rules of Court of the Supreme Court of South Africa, which provides the manner of service upon a person who has chosen a *domicilium citandi et executandi*. It states:

"If the person so to be served has chosen a *domicilium citandi,* by delivering or leaving a copy thereof at the *domicilium* so chosen."

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See Erasmus *Superior Court Practice* at B1-15.

The *domicilium* so chosen is deemed to be the place of abode of the person to be served with any court process in judicial proceedings and service effected at the chosen address has been held good service and valid. See *Loryan (Pty) Ltd* v *Solarsh Tea and Coffee (Pty) Ltd supra*. In *Colonial*

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Government v *Matthys* (1900) 17 SC 339, the chosen domicile was a farm. The return of service of the Sheriff stated:

"... having been unable after diligent search to find defendant or any of his household, I have duly served within summons by leaving a copy thereof at his last known residence and posting the same on the farm Mierhoop Pan, at the spot where in the absence of a dwelling house his last known residence appeared to have been."

Buchanan ACJ held that service to be good service.

In *I'ons* v *Freeman & Frock* 1916 WLD 64, the defendants had chosen *domicilium citandi* at the last premises, a vacant plot of ground used as a timber yard. Personal service was effected upon the first defendant and the second defendant at the *domicilium citandi.* Ward J stated:

"The cited cases show that service at a last known place of residence is good even though the residence is destroyed and the summons is affixed to the soil. The same principle should apply to the case where *domicilium citandi* has been chosen."

He proceeded to hold that to be good service.

See also *Pretoria Hypotheek Maatschappij* v *Groenewald* 1915 TPD 170; *Abt* v *Geldenhuys* (1901) 18 SC 114; *Hollard's Estate* v *Kruger* 1932 TPD 134; *Gerber* v *Stolze & Anor* 1951 (2) SA 166 (T) at 170D-H; and *Prudential Building Society* v *Botha* 1953 (3) SA 887.

In *Mullen* v *Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 Boshoff J at 331H, after coming to the conclusion that:

"... generally speaking a person who chooses a *domicilium citandi et executandi* chooses a place where summons may be served on him and execution may be levied against his property";

discusses, at 332B to 333, the common law practice of service at the *domicilium citandi*.

However, in *Standard Bank of SA* v *Mason* 1928 WLD 220, a mortgagor had chosen his *domicilium citandi et executandi* for all processes under the bond at his "residence at South African Railways Pretoria". Service of summons was effected on the manager of the compound. The manager stated that the defendant had left years ago and his present address was unknown. TINDALL J held that that service was bad as the defendant at the time of service had no residence at the compound.

The cases cited above were concerned with the South African rule cited *supra,* which rule is said to reflect the common law practice. See *Loryan (Pty) Ltd* v *Solarsh Tea and Coffee (Pvt) Ltd supra* at 847A; Herbstein & van Winsen's *Civil Practice of Supreme Court of South Africa* (4

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ed by van Winsen Cilliers & Loots & Dendy) at 287.

Under our rules of court, the common law practice for service of court process at a *domicilium* chosen is embraced, though differently from the

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South African rules of court, in r 39(2)(b) of the High Court Rules 1971 and it provides that process may be served:

"by delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service."

This rule must be read with r 40 which authorises the Sheriff and this provides:

"Where any process is to be served and -

(a) ...

(b) the person to effect service of any process is unable, after diligent search at the residence, place of business or employment, address for service or office of the person to be served, to find that a person or a responsible person referred to in paragraph (b), (d), (e) or (f) of subrule (2) of rule 39;

it shall be sufficient to leave a copy of the process in a letter box at or affixed to or near the outer or principal door of, or in some other conspicuous position at the residence, place of business or employment, address for service or office as the case may be."

It is apparent that the alternative method of service is permitted where either the person to be served obstructs and frustrates service or the Deputy Sheriff, after diligent search, is unable to find the person to be served or a responsible person at the place where service of the process is to be effected.

Our rule pertaining to service of process at a *domicilium* chosen, for purposes of service of court process, came under close consideration by Gillespie J in the case of *CABS* v *Kufa* 1998 (1) ZLR 303 (H) at 306. The learned judge observed:

"The same provision used previously to be formulated in two separate paragraphs permitting service:

'(a) to the respondent personally or to his duly authorised agent;

(b) at his residence or place of business or employment to some responsible person;

(c) if the person to be served has chosen a *domicilium citandi*, at the domicile so chosen in the manner provided by subparagraphs (a) and (b) of this rule ..."

The rule as previously formulated was considered by MACDONALD J (as he then was) in *Founders Building Society* v *Willoughby* 1960 R&N 263 (SR) at 265F, where he said:

"The requirement, however, in subpara (c) that service shall be 'in the manner provided by subpara (b)' is not surplusage and effect must be given to it. Where it is desired to serve at a *domicilium citandi*, service in the ordinary way must be 'to some responsible person ...'"

I agree entirely with GILLESPIE J in *CABS* v *Kufa supra*, where he says that the former

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subparagraphs were combined into one rule under the present rule and that such condensation did not alter the requirement that under our rule service, even at a *domicilium citandi,* should be made upon a responsible person. Any departure from the express provisions of the rule is permissible only when a responsible person cannot be found after a diligent search and

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where, to frustrate service, the premises are kept locked by the person to be served, that service may be effected by leaving the process affixed to the premises in the manner expressly provided by the rule.

In this case, defendant's chosen *domicilium* is founded upon a standard form contract pre-prepared by the plaintiff for purposes of lending money to members of the public, in general. The defendant was advanced by the plaintiff a sum of money in order to finance the construction of a house on the said stand. The loan was secured by a mortgage bond, to which was attached a standard form contract, referred to as a schedule, setting out the terms and conditions of the loan.

Clause 26 of the schedule contains what has been referred to as the chosen *domicilium* for the defendant for service of court process. It provides *domicilium citandi et executandi*:

"For the purposes of this bond and of any proceedings which may be instituted by virtue hereof, and for the service of any notice *domicilium citandi et executandi* is hereby chosen by the mortgagor at the mortgaged property ..."

Thus the agreement signed by the parties is a standard form contract whose terms and conditions of the said loan were pre-determined. The defendant would have had no input into the terms and conditions of the said contract, and choice of the *domicilium*. The defendant's chosen *domicilium* forms part of the rest of the terms of the said contract which to him are non-negotiable. The *domicilium citandi et executandi* is to the defendant conditional upon the successful construction of the intended dwelling which is to be financed by the loan. It seems to me that, since the loan is advanced for and is secured by a dwelling to be constructed, the chosen *domicilium* must depend on the success of the entire contract, ie the construction, completion of the dwelling and subsequent occupation by the defendant.

I am of the view that there is need to draw a clear distinction between a *domicilium* expressly chosen by the defendant and that forming part of the terms and conditions of a standard form contract, which are common and applicable to any applicant seeking a loan thus attributed to the defendant.

However, the chosen *domicilium* in the latter situation is subject to a resolutive condition. Where the very essence of the loan agreement is the construction of a dwelling, such as the situation in the instant case, or business premises which construction subsequently fails, with the result that the debtor is unable to take occupation of the *domicilium* so chosen, the chosen *domicilium citandi* must inevitably also fall away, as do the rest of the terms of the agreement save the repayment of any money that may have already been disbursed. Once the underlying cause of the agreement, upon which the chosen *domicilium* is dependent, has failed, I can see no reason

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why the *domicilium citandi et executandi* should not be seen to have equally fallen away.

The issue of *domicilium* that has arisen in this case need not arise. In my opinion, in addition to the *domicilium citandi et executandi* already designated as chosen in the standard form contract, the mortgagor should be asked to provide his present *domicilium* so as to be incorporated as a second so chosen *domicilium*. This will ensure that, in the event of the subject of the loan failing after part of the loan has already been disbursed and that such failure results in a situation akin to the present case, service can always be effected upon the second chosen *domicilium.* The present impasse would not arise as service on the second chosen *domicilium* would be sufficient service, irrespective of the fact that the defendant may have abandoned that *domicilium* in the interim.

In my view, there is justification for the adoption of the dual *domicilium* concept for transaction such as the present one. The concept of two chosen *domicilia citandi et executandi* seems, in my opinion, to be part of our common law. This view finds support from Voet (5.1.92) where, he defines *domicile* thus:

"*Domicile* defined everyone can also be sued by virtue of *domicile* in the place, that is to say, in which he has set up his home and the main body of his property and fortunes, from which he is not likely to depart if nothing calls him away, and which when he has left he appears to be travelling abroad."

That definition was approved in *Reeves* v *Reeves* (1832) 1 Menz 244 at p 249; *Johnson* v *Johnson* 1931 AD at p 398; *Madeiros* v *Rebello* 1924 SR 167 at p 169; and *Minister of the Interior* v *Cowley NO* 1955 (1) SA 307 (N) at p 311D-E.

Voet (5.1.92 and authorities there cited) further states:

"In the same way, conversely, the wise are agreed that one can have *domicile* in two places, if one has so arranged oneself at both of them that one does not thereby appear any the less to have settled with one or other set of persons. In such cases, it also appears that a plaintiff should be awarded an election to sue a defendant in which place of *domicile* he will, according to what has been said above of the concurrence of a number of fora or we might prefer to say with writers mentioned below that he ought to be sued in that *domicile* where he is staying with his wife and children or household at the time of summons to law."

In *Mason* v *Mason* (1885) 4 EDC 330 at 347), Barry JP cited with approval the passage *supra* and stated at p 347:

"On the other hand, the Roman-Dutch law also admits that a man may have at the same time more than one domicile (Voet 5.1.92 and authorities therein cited)."

The provision for two *domicilia citandi et executandi* in the standard form contract would accord with common law as set out by Voet in the passage cited *supra*. The plaintiff would have two options from which to elect a

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domicilium for service. At least, the plaintiff would not have to contend with the current situation, where service is sought to be effected on a vacant piece of land.

I am, entirely in agreement with Gillespie J, when having surveyed numerous authorities analysed the High Court rules both in this country and in South Africa and the common law, on service of a court process at a *domicilium citandi et executandi* in *CABS* v *Kufa supra*, and came to the conclusion that:

"Our rules therefore clearly impose a more of an obligation on the person seeking to effect service at a *domicilium citandi* than does the common law (or the South African law). The question is whether they nevertheless permit of service as a *domicilium* which is a vacant piece of land. The point is by no means clear on the wording of the rules.

On the other hand, an indication arises from the wording that service by leaving process at an undeveloped vacant stand is impermissible. This could follow from the fact that service must in the first place be on a responsible person, and only failing that may process be left in a letter box, affixed to the outer principle door, or in some other conspicuous position. That wording seems to exclude leaving process under a stone in an empty plot. On the other hand, it might be thought that the rules ought to be interpreted as detracting from common law only to the extent to which such alteration is expressed or necessarily implied. Service at a vacant land is certainly not expressly included and the implication may well be thought to be by no means necessary."

That conclusion finds support in *obiter dictum of* Macdonald J (as he then was) in *Founders Building Society* v *Willoughby supra*, cited with approval by Gillespie J, where the learned judge had this to say in respect of the rule, as formerly formulated as regards service at a *domicilium citandi* which consist of a vacant land at 265H:

"It will be appreciated, however, that the language used in rr 4 and 5 does not permit of service on a *domicilium citandi* which consists of vacant land. The Chief Justice has read this judgment and authorises me to say that he agrees with the views expressed."

I also entirely agree with Gillespie J when he went on to hold:

"In the light of that *dictum*, therefore, I hold that no matter what the common law position, under the rules of court as presently formulated, service at a *domicilium citandi* which is vacant land cannot be effected."

See *CABS* v *Kufa supra* at p 307.

The purported service, in the instant case, was, according to the return of service effected at a *domicilium citandi et executandi*, which consists of a vacant land, by affixing the process on "a prominent tree". I am not satisfied that, in the circumstances, such service constitute valid service as required by the rules.

In the event that I may be wrong in my conclusion, I have had due regard to order 1 r 4C of the High Court Rules 1971, which gives the court or judge an unfettered general discretion to depart from rules of court and such departure would in any event form part of the inherent jurisdiction of the court to regulate its own proceedings.

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It would seem that at common law, also, the court retains a discretion to give any further directions as regards service, even though such service may be technically valid.

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In *Lindup* v *Lowe* 1935 NPD 189 (N), FEETHAM JP at 193 had this to say:

"Even where the service is good, when considered in the light of the rules so read, the court must be regarded as having discretion to require some further step to be taken if there are any special circumstances which appear to make such a step desirable."

See *CABS* v *Kufa supra.*

See also Erasmus *Superior Court Practice* B-24; Herbstein and van Winsen *op cit*.

In the light of the *obiter dictum of* MACDONALD J in *Founders Building Society* v *Willoughby supra*, although not binding, but undoubtedly a persuasive authority and more importantly, in view of Gillespie J's judgment on the point in *CABS* v *Kufa supra*, service in the instant case even if it were technically within the ambit of the rules could not be effected on a vacant land.

It is difficult to hold the defendant to his chosen domicile in this case. The chosen *domicilium citandi et executandi* is to be found in a standard form agreement of loan prepared by the plaintiff now the party seeking to effect service. The *domicilium* selected in the standard form is the property which, in terms of the agreement, is to be mortgaged to secure the loan, thus the contracting parties were certainly not contracting on equal terms.

The chosen *domicilium* of the defendant was not expressly so chosen by him, but was merely accepted by him as part of the non-negotiable terms of the agreement of loan. I have no doubt that had the defendant been asked to provide his own chosen *domicilium* he would not have selected a vacant piece of land that he had just acquired but most certainly he would either have chosen his residence or place of business or employment. I would, however, add, subject to what I have said elsewhere in this judgment, that it seems to me it may be undesirable to incorporate, in a standard form contract a clause, only in respect of the mortgaged property as *domicilium citandi et executandi* which, to the knowledge of the parties is an undeveloped and vacant piece of land, but that there should also be provision for an alternative *domicilium* chosen by the mortgagor as suggested, *supra*.

To compound the problem, the service of the summons was effected by affixing the said copy of the summons on "a prominent tree", in such circumstances that the defendant may not have seen it as there appears to have been no development that would have compelled him to visit that site. In any case, even if he may have visited the site and saw the summons affixed on a tree, he may not have even associated such piece of paper stuck on a tree with himself. It would, therefore, be unfair to hold that the service was

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sufficient in those circumstances. I would, consider that were a vacant stand has been chosen as a *domicilium,* in a case such as the present, the court would insist that service, be effected at the defendant's current residence.

For the foregoing reasons, judgment is refused. I therefore, direct that service of the summons be effected upon the defendant or a responsible person at the defendant's residence or place of business or employment. In the event that defendant's present address is unknown, then an

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application for directions for substituted service, is to be made in terms of the rules.

Calderwood, Bryce Hendrie and Partners, plaintiff's legal practitioners

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HACKLETON INVESTMENTS (PVT) LTD *v* TIME BANK OF ZIMBABWE LTD 2000 (1) ZLR 60 (HC)

Citation	2000 (1) ZLR 60 (HC)
Case No	Judgment No. HH-4-00
Court	High Court, Harare
Judge	Smith J
Heard	November 29, 1999; December 1, 1999
Judgment	January 5, 2000
Annotations	None

Civil application

Flynote

Practice and procedure - exception - requirement that all exceptions be filed at one time - withdrawal of exception filed in error and substitution of correct exception - excipient entitled to do this

Headnote

The defendant in a civil action filed an exception to the plaintiff's declaration. The exception was withdrawn, as an incorrect draft had mistakenly been filed. The plaintiff objected on the grounds that the rules of court require that all exceptions and special pleas must be made together at one time.

Held, that a party should be permitted to withdraw an exception or special plea which he realises is not in order, or can be improved upon, and replace it with an improved draft, provided that this is done timeously. If the other side is put to expense in considering or dealing with the exception or plea that is withdrawn, then the party filing it would have to tender wasted costs. In the present case the second exception made the same points as the first exception, but more elegantly, and it should be considered.

Held, further, that although the exception was upheld, it was not appropriate to dismiss the action. The objectionable parts of the declaration should be struck down and an opportunity given to rectify the declaration.

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Cases Considered

Cases cited:

Stanbic Bank Zimbabwe Ltd v *Dickie & Anor* 1998 (1) ZLR 205 (H)

Case Information

Miss *E Mushore*, for the applicant

P Nherere, for the respondent

Judgment

Smith J: The applicant (hereinafter referred to as "Crown Securities") issued summons against the respondent (hereinafter referred to as "Time Bank of Zimbabwe Ltd") and four other defendants, namely, Streisand Securities, Francis Nhema, Torongo Torongo and Austin Nhema, claiming payment of three separate amounts, being $10 009 315.07 (hereinafter referred to as "Claim A"), $8 824 230.14 (hereinafter referred to as "Claim B") and $15 453 041.14 (hereinafter referred to as "Claim C"). The other defendants (hereinafter referred to as "the four defendants") have pleaded to

SMITH J

the summons, denying liability, and the individuals also deny personal liability on the grounds that all the transactions in question were done by them on behalf of Streisand Securities. Time Bank of Zimbabwe Ltd, however, excepted to the declaration of Crown Securities on the grounds that it was bad in law and disclosed no cause of action. It claimed that the declaration is vague and embarrassing and contains irrelevant, superfluous and evidentiary matter and is so fundamentally flawed that it cannot be cured by amendment. The exception was filed on 16 September and a second one, in very much the same terms, was filed on 17 September. Crown Securities took issue with the filing of two exceptions. Time Bank of Zimbabwe Ltd then withdrew the exception filed on 16 September.

Crown Securities then filed this application for leave to apply for directions. It is seeking an order that Time Bank of Zimbabwe Ltd file its plea on the merits in the main action within 10 days and that the exception filed on 17 January be struck from the roll. Its case is as follows. Rule 139 of the High Court Rules provides that a party shall state all its special pleas and exceptions and make all its applications to strike out at one time. Therefore Time Bank of Zimbabwe Ltd is not permitted to file two exceptions. As it has withdrawn the first exception, and since the second exception was invalid, therefore it now has no option but to plead. Time Bank of Zimbabwe Ltd opposes the application. Its legal practitioner said that she prepared the exception and then revised the first draft. In error, her first draft was filed on 16 September; the final draft was filed on the following day.

When the matter was set down for hearing, the issue of whether or not there was a valid exception was argued and it was agreed that argument on the merits of the exception should

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also be heard, so that if it was found that the exception was validly before the court, the matter could be dealt with on the merits at the same time, instead of piece-meal.

The point raised by Time Bank of Zimbabwe Ltd that Crown Securities was not entitled to file two exceptions has little merit. I accept that r 139 of the High Court Rules provides that all special pleas and exceptions must be made at one time. The reason for that provision is, to my mind, quite clear. It is there to prevent a party from delaying a matter being heard by, for example, filing an exception and, when that has been disposed of, filing another exception and again, when that has been disposed of, filing yet another. That is not the case here. The legal practitioner of Time Bank of Zimbabwe Ltd inadvertently filed an exception which was not the draft she intended to file. A glance at the two exceptions shows that there is no real difference between the two. The second is drafted more elegantly but makes the same points. I can see no reason why a party should not be permitted to withdraw an exception or special plea which he or she realises is not in order,

or can be improved upon, and replace it with an improved draft, if that is done timeously. If the other side has been put to some expense in considering or dealing with the exception or plea that is withdrawn, then the party filing the exception or special plea would have to tender wasted costs. In *Stanbic Bank Zimbabwe Ltd* v *Dickie & Anor* 1998 (1) ZLR 205 (H), the court did refuse to permit Stanbic Bank to file a fresh application for summary judgment after withdrawing an earlier application for summary judgment but that was because the applications were for summary judgment. At 206G-H, I said:

"Ordinarily, I would find nothing wrong if a party filed a court application, withdrew it and then filed a second application seeking substantially similar relief. As long as wasted costs were paid, and in such a case I consider that they should be paid on a legal practitioner and client scale, the respondent would have little to complain about. However, where the application is for summary judgment, different considerations apply."

Mr *Nherere* argued that a defendant was obliged to take exception to pleadings that are defective; if he did not do so, it might well be that he would not be able to recover his costs. Pleadings are intended to crystallize the issues in the particular case. The declaration must state the plaintiff's case clearly and concisely. If it does not do so, the defendant is obliged to except to the declaration. Failure on his part to do so could lead to an escalation of costs or an abortive trial. I agree with these submissions. The essence of any case is contained in the pleadings. They must be clear and concise. If the plaintiff's declaration does not establish a *prima facie* case against the defendant, then the defendant is obliged to except to the declaration so that the matter can be determined at an early stage before the costs have escalated to unacceptable levels.

For the above reasons, I am of the view that the exception filed on 17 September must be considered.

[*His Lordship considered the exception and concluded:*]

Accordingly, the exception is upheld. However, I do not consider it appropriate to dismiss the

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action against Time Bank of Zimbabwe Ltd. I consider that the objectionable parts of the declaration should be struck out and Crown Securities be given an opportunity to rectify its declaration,

It is ordered that:

1. The second and third sentences of paragraph 6 of the declaration are struck out.

2. Paragraphs 32 to 36 of the Declaration are struck out.

3. Paragraph 39 of the Declaration is struck out.

4. The plaintiff, Crown Securities, is given leave to amend the declaration by setting out its claim against the 5th defendant, Time Bank of Zimbabwe Ltd. Any such amendment shall be filed before 1 February 2000, failing which the action against Time Bank of

SMITH J

Zimbabwe Ltd shall be dismissed and plaintiff pay 5th defendant's costs.

5. The application for directions is dismissed with costs.

McNaught Wickwar, applicants' legal practitioner

Ziumbe & Mtambanengwe, respondent's legal practitioners

S *v* MANGIRAZI 2000 (1) ZLR 64 (HC)

Citation	2000 (1) ZLR 64 (HC)
Case No	Judgment No. HH-254-99
Court	High Court, Harare
Judge	Gillespie J
Heard	January 5, 2000
Judgment	January 5, 2000
Annotations	None

Criminal review

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Flynote

Criminal procedure (sentence) - common law offences - incest - approach to be taken - factors to be considered

Headnote

Incest is an offence which may be committed over an extremely broad spectrum in varied circumstances, so sentence can only be imposed after proper consideration of all the relevant factors. It might involve, at one extreme, the wicked and harmful, such as where a lustful father takes advantage of a juvenile daughter's innocence; and at the other, a step-parent and step-child of full age and real affection for one another. The factors to be considered include: the relationship between the parties; their relative ages; whether one party stands in what ought to be a protective relationship in relation to the other; whether a child was born and the consequences of that birth, such as genetic impairment; and social and other consequences, such as divorce, estrangement from the home, ostracism and familial disruption.

Cases Considered

Cases cited:

A-G's Reference No. 1 of 1989 [1989] 3 All ER 571 (CA)

R v *Kandewonda* GS-49-69

Judgment

Gillespie J: The accused was properly convicted, on his plea of guilty, of incest. The punishment, however, imprisonment for eighteen months, with six months suspended on condition of good behaviour, seems to me outrageous. I suppose that convictions are sufficiently rare that magistrates have no familiarity with sentence for such an offence and with the relevant factors and principles affecting sentence. It is that lack that I now address.

Incest is an offence which may be committed over an extremely broad spectrum of varied circumstances. It might involve at one extreme, the wicked and harmful, such as where a father takes lustful advantage of a juvenile daughter's innocence, corrupting her and scarring her emotions, if not worse. At the other could be found the step-parent and step-child of full age and real affection for one another for whom a physical expression of their love may be criminal. The prohibition on incest

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GILLESPIE J

"derives from a complex of social, eugenics, religious and moral considerations; not all of which adequately explain the law's interference with basic human rights."1(7)

It is not my purpose to query the concept of the offence2(8) but rather to identify a consistent approach to punishment of the offence on the existing law.

It is axiomatic that the use of force should not be expected to be present. Violence, if applied,

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would generally place the offence in some other category - preferably rape. Injury, however, might well be caused to one of the parties. That injury might take a number of forms, from physical damage or disease to emotional and psychic trauma, even if the relationship is consensual. The infliction of such harm must be a serious feature of aggravation.

Such harm is most likely to be expected where there is a disparity in age between the parties or where one stands in what ought to be a protective relationship to the other. The betrayal of that relationship and the abuse of one's seniority is in itself an exacerbating circumstance.

The actual product of any act of sexual intercourse being the birth of a child, the possibility of such an event is relevant to the offence of incest. It is relevant as a factor augmenting blameworthiness if only for the burden of responsibility such a birth might impose upon one more or less fitted to discharge it. Bearing in mind the eugenic rationale behind the offence, a birth may be relevant for that reason as well, particularly if the unfortunate offspring of the illicit relationship is genetically impaired.

Even in the absence of force as hypothesised above, incestuous behavior might have more subtle consequences. It might cause hurt and offence to other persons, particularly family members. Divorce; estrangement; expulsion from the home; withdrawal of support; ostracism and familial and social disruption generally might well occur and be not confined to the principal actors in the drama. Any such consequence makes the offence serious.

That the offence may excite moral abhorrence *in vacuo* in itself a factor to consider but is perhaps less compelling a circumstance in the absence of any more tangible result of the incest. All other potential features of aggravation, common to any offence, are of course also to be given due weight.

The offence might conversely be attended by factors of real mitigation. The supposedly criminal perversion charged may be no more than an unnatural extension of the natural affection between relatives. The emotions underlying the relationship may be powerful and genuine. There may be mutual

commitment and support. There may be a relationship laudable in every respect save one, and that in an intimate respect that might be thought to be none of the law's business.

Between the two extremes, the range of possible offences is such that sentence can only be imposed after proper consideration of all relevant factors. In this case, the agreed facts, in their stark brevity, show no more than that:

"Sometime during the month of April l995, the accused, being a natural brother to M, proposed love to her and they started having sexual intercourse, staying as husband and wife.

The two now have a child aged four from their sexual relationship."

This provides no basis at all for assessing sentence and the magistrate who contented himself

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with that formulation deserves criticism.

There is nothing in those facts which suggests any harm, such as I have hypothesized above. The only possible "harm" that could have occurred is the birth of a child, but even that is not shown to be attended by any adverse consequences of practical effect. So far are the circumstances from causing obvious prejudice to anyone that it is difficult to see how the affair came to the attention of the law. Had that been investigated, perhaps some further factor of blame would be shown, but one cannot speculate so.

On the side of mitigation, the accused was a young man at the time. Full consent seems to have been given. Real affection may subsist between the two. The accused pleaded guilty. He is gainfully employed. He is said to be married now (apparently to someone other than his sister). Where is the justice in imprisoning this man? And, also, the injustice in treating his sister as the complainant!

It is true that the star-crossed lovers of myth and history, from Pyramius and Thisbe to Abelard and Héloise, appear to have been punished, whether by gods or man, more extravagantly than their offence deserved. Even where their illicit love involved incest, ie in the case of the unhappy exemplars of that complex relationship, Oedipus and Jocasta, the unhappy beloveds are remembered more with pity at their tragedy than with censure at their infamy.

I am sure that at a more serious level this court has in the past approved sentences of imprisonment for incest where no harm was proven. 3(9) I must hold, however, that at a certain level, the crime of incest may warrant no more than nominal punishment. Authority to this effect is to be found in the *dictum*:

"At one end of the scale is incest committed by a father with his daughter in her late teens

or older who is a willing participant and indeed may be the instigator of the offence. In such a case, the court would do little more than mark the fact that there has been a breach of the law and little, if anything, is required in the way of punishment."4(10)

While I might be hesitant to adopt such an approach in the case involving father and daughter, no such reluctance need be entertained where the parties are brother and sister, on otherwise equal (and equally fond) terms with one another.

In this particular case, I would probably have been inclined, at first instance, to postpone passing of sentence on conditions suitably conceived. 5(11) Since the accused has in this case has already suffered imprisonment of over one month since conviction; since he has probably also suffered pre-trial incarceration for up to five months before (the police docket having been opened as the crime register number reveals) - a fact that the magistrate lamentably failed to investigate; since the accused may well have suffered egregiously and grievously in his employment; I now propose otherwise.

I will do no more than mark that there has been a breach of the law. The sentence imposed is

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set aside. In its stead, the accused is cautioned and will be discharged.

BARTLETT J agrees.

LEVY *v* MODUS PUBLICATIONS (PVT) LTD 2000 (1) ZLR 68 (HC)

Citation	2000 (1) ZLR 68 (HC)
Case No	Judgment No. HH-3-00
Court	High Court, Harare
Judge	Smith J
Heard	January 5, 2000
Judgment	January 5, 2000
Annotations	None

Civil action

Flynote

Damages - delictual - defamation - assessment - purposes of awards of damages in defamation cases - reasonable belief by defendants that what they said was true - little or no effect on plaintiff's reputation - date at which damages must be assessed

Interest - date from which runs - award of damages - defamation case - interest to run from date of judgment

Headnote

The plaintiff was the subject of two articles published by the defendant. The articles dealt with the construction by the plaintiff of a shopping complex and the fact that the building operations had begun before the grant of the building permits. The Supreme Court had held that the articles were defamatory, in that they implied that the plaintiff was a crook who had used his wealth and political connections to subvert Ministers and officials. The matter had been remitted to the trial court for assessment of damages.

Held, that the rule that delictual damages are assessed at the date of commission of the delict does not apply to defamation cases, where the court should be guided by current decisions in defamation cases, even though those decisions were made long after the publication of the articles in question.

Held, further, that although the articles had been found to be defamatory, they were not written *animo injuriandi*. The authors believed - and their belief was not unreasonable or negligent - that

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the plaintiff had in fact broken the law and committed a criminal act. This belief was held by the minority in the Supreme Court and mirrored the views of many of the public. It was unlikely that the article would have caused any loss of the esteem with which the plaintiff was held.

Held, further, that this would not be an appropriate case in which to award nominal damages. Taking into account the factors normally considered, the defamation was not a serious one and damages of $20 000 would be appropriate.

Held, further, that since the plaintiff's cause of action arose in 1990, before the Prescribed Rate of Interest Act [*Chapter 8:10*] was amended to provide that interest on an illiquid claim would run from the date when the cause of action arose, the court could only order that interest should run from the date of the judgment.

Cases Considered

Cases referred to:

Botha v *Pretoria Printing Works Ltd* 1906 TS 710

Chinamasa v *Jongwe Printing & Publishing Co (Pvt) Ltd* 1994 (1) ZLR 133 (H)

Fitzpatrick & Anor v *K Hensman Invstms (Pvt) Ltd & Ors* HH-149-90

Henks Construction (Pvt) Ltd v *Zimbabwe Defence (Pvt) Ltd* 1998 (1) ZLR 49 (S)

Levy v *Modus Publications (Pvt) Ltd* 1998 (1) ZLR 229 (S)

Mahomed v *Kassim* 1972 (2) RLR 517 (A); 1973 (2) SA 1 (RA)

Monumental Art Co v *Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C)

Mujuru v *Moyse & Ors* 1996 (2) ZLR 642 (H)

Scrooby v *Engelbrecht* 1940 TPD 100

Shamuyarira v *Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H)

Tekere v *Zimbabwe Newspapers (1980) Ltd & Anor*

Victor NO v *Constantia Ins Co Ltd* 1985 (1) SA 118 (C)

Wigham v *British Traders Ins Co Ltd* 1963 (3) SA 151 (W)

Zimbabwe Newspapers (1980) Ltd & Anor v *Bloch* 1997 (1) ZLR 473 (S)

Zvobgo v *Kingstons Ltd* 1986 (2) ZLR 310 (H)

Zvobgo v *Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H)

Legislation considered:

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Prescribed Rate of Interest Act [*Chapter 8:10*], s 6(1)

Case Information

J C Andersen SC, for the plaintiff

E W W Morris, for the defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "Levy") instituted an action for defamation against the defendant (hereinafter referred to as "Modus") claiming damages in the sum of $25 000. The action arose out of two articles published by Modus in June 1990. The matter came to trial in June 1995. I was of the opinion that the facts set out in the articles complained of were generally true and that the comments based on those facts were fair. It seemed to me to be a case where Levy had received an important benefit due to political favouritism. I therefore, dismissed his claim with costs. He appealed against my decision. The Supreme Court, by a majority of two to one, upheld the appeal and ruled that the articles in question were defamatory and remitted the matter for the assessment of damages and the award of costs - see *Levy* v *Modus Publications (Pvt) Ltd* 1998 (1) ZLR 229 (S).

The three judges who heard the appeal each delivered a separate judgment. In dealing with the two articles published by Modus, Korsah JA said that they implied that Levy was a crook, that he had corruptly used his wealth and his political connections to subvert Ministers and officials who ought to have prevented the development of the shopping complex from continuing and that he had bent the rules and violated the law in the process of pushing through the development of the shopping complex. He went on to find that Levy had not committed a criminal offence by failing to comply with certain regulatory procedures and that there was no proof whatsoever that he used political influence and bribes to overcome obstacles to the carrying out of his development project. He also said that to impute that a person has a bad

general character, by implying that a person is a crook, is not in law justified by citing an isolated instance of a spurious business transaction or a single transgression of the law. Such an imputation can only be justified by proof of a series of unsavoury commercial transactions which unequivocally establish that the person who has been branded as a crook is a dangerous person with whom to enter into any business or commercial transaction. EBRAHIM JA concurred with the views expressed by KORSAH JA. He too considered that by continuing with building operations at the site before the grant of the requisite permits, Levy was not carrying on any illegal activity; he was doing no more than risking having to demolish the structures erected without the grant of the requisite permits, but with no likelihood of incurring any criminal sanction.

MUCHECHETERE JA disagreed with the views of his brother judges. He was of the view that Levy had acted unlawfully when he started clearing the land for the building of the shopping centre, despite receiving a letter from the Town Clerk demanding that he stop uprooting the

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trees. He felt that when Levy defied the order of the local planning authority and continued with the development, he must have been liable to prosecution and therefore his actions were *prima facie* criminal. Consequently, he was of the opinion that the facts set out in the articles complained of are generally true and that the comments based on those facts are fair.

Mr *Andersen* submitted that when assessing *quantum*, regard should be had to the comment by Korsah JA at p 247A that the "law jealously guards against the assassination of a person's character". He argued that this was a very serious case of defamation, since the articles alleged that Levy was a crook who was guilty of suborning Ministers and officials and offering bribes. With regard to the basis for assessing damages, he submitted that although the articles were published in l990 the court should look at, and be guided by, current decisions in cases of defamation. Generally, in cases of delict, damages are assessed as at the time of the injury. In *Wigham* v *British Traders Insurance Co Ltd* 1963 (3) SA 157 (W) Bekker J at 156B said:

"It is of course quite true that the general principle requires the amount of damages to be assessed as at the date of the wrong."

See too *Scrooby* v *Engelbrecht* 1940 TPD 100 at 103, *Monumental Art Co* v *Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118G and *Victor NO* v *Constantia Insurance Co Ltd* 1985 (1) SA 118 (C) at 120E (confirmed on appeal: 1986 (1) SA 601 (A)). In *Victor*'s case at 120E, Friedman J said:

"It is common cause that the time at which delictual damages must be assessed is the date of the commission of the delict because it is then that the loss is suffered."

However, in cases dealing with defamation, the position is different. Mr *Andersen* referred the court to a number of cases where regard was had

to cases decided long after the defamatory statements under consideration were published. In *Shamuyarira* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H), where the defamatory statements were published in l988, Robinson J, in assessing damages, had regard, *inter alia*, to the awards made in *Chinamasa* v *Jongwe Printing & Publishing Co (Pvt) Ltd* 1994 (1) ZLR 133 (H). In *Mujuru* v *Moyse & Ors* 1996 (2) ZLR 642 (H) and *Zimbabwe Newspapers (1980) Ltd & Anor* v *Bloch* 1997 (1) ZLR 473 (S), the court also had regard to cases decided long after the publication of the defamatory statements under consideration. He argued that the *quantum* of the awards was creeping steadily upwards and that an award of $25 000 was modest. He submitted that Levy could have claimed more but his stance was that he would donate to charity whatever he was awarded. He wanted to vindicate his character and a claim for, or an award of, less than $25 000 would not have that effect.

Mr *Morris* argued that the majority decision in the Supreme Court was based on the finding that Levy had not broken the law or acted illegally in going ahead with the development of the shopping centre when he did not have the necessary development order. Section 24 of the Regional, Town and Country Planning Act [*Chapter 29:12*] (hereinafter referred to as "Chapter 29:12") (which was s 25 of Act 22 of l976) provides that, unless permitted in terms of a

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development order, no person shall carry out any development other than development which is carried out in accordance with the terms of a permit. It is an excusable error for the authors of the articles under consideration to believe that it was wrong for Levy to carry on with the development of the shopping centre when he did not have the necessary development permit. Even judges had held that belief. He referred the court to two cases of that. In *Fitzpatrick & Anor* v *K Hensman Investment (Pvt) Ltd & Ors* HH-149-90, Sandura JP pointed out that no permission or authority had been given to the first respondent to continue with the building operations and went on to say:

"These operations are therefore being carried out unlawfully. I cannot see any basis upon which this court can condone such unlawful operations."

In the appeal from the judgment of SANDURA JP, MCNALLY JA said:

"Where a development proceeds in flagrant disregard of the law, an interested citizen has every right to object. To criticise him or her for doing so, indeed to go so far as to suggest that improper motives are behind his or her objections, is in my respectful view dangerous."

See S-176-91 at p 5 of the cyclostyled judgment.

These cases, so he argued, were relevant in considering the mitigatory circumstances.

Mr *Morris* argued that the allegations in the articles in question were not

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made *animo injuriandi*. The authors genuinely believed, and their belief was not unreasonable or negligent, that Levy was breaking the law. That belief led to the second error which was that Levy was corrupt. However, that allegation was put forward, not as a firm statement, but as an interrogatory one. Even though s 72 of Chapter 29:12 provides that where any matter is, by or in terms of the Act, forbidden to be done and such act so forbidden to be done is done, then in every such case every person so offending against such prohibition shall be guilty of an offence, the majority in the Supreme Court found that Levy had not committed an offence. However, the layman reading s 72 would conclude that anyone who carried out any development which was not permitted in terms of a development order and without having the necessary permit, would be guilty of an offence. MUCHECHETERE JA came to a similar conclusion - see p 253B of the judgment. Therefore, the error on the part of the authors of the articles, and of Modus, was reasonable in the circumstances.

Mr *Morris* argued that the purpose of damages in an action for defamation were twofold: firstly, punitive against the defendant and, secondly, compensation for the plaintiff. He submitted that because, in the present case, the belief by the authors of the letters and Modus that the law was being broken and that Levy had to explain his conduct, no punitive damages should be awarded. Only the compensatory element was relevant in this case. He further submitted that Levy had suffered no loss of reputation. The views expressed in the articles were commonly held. Levy never came out in public to set the record straight, saying that he had no permit but was confident that he would get it. The development was uppermost in everyone's thoughts. Many people supported the development of the shopping centre but many others strongly

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opposed it. The articles in question did not influence anyone but merely mirrored the views held by many. In *Mahomed* v *Kassim* 1972 (2) RLR 517, token damages of $1 were awarded. He submitted that that is what should be done in this case.

In *Mahomed*'s case *supra*, the Appellate Division was considering an appeal in a case where the court *a quo* had awarded Kassim, who had been the plaintiff and had claimed damages in the sum of $5 000 which he alleged he had suffered as a result of a defamatory statement made about him by Mahomed, damages in the sum of $50. When dealing with the *quantum* of damages the judge said:

"It is unlikely that defendant's intemperate attack would have caused any of the members present to think less of the plaintiff than they did before the attack. Those of the pro-Kassim group would still hold him in esteem; those of the anti-Kassim group would still hold him in disesteem."

In my view, similar considerations apply in this case. In *Mohamed*'s case

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supra, the Appellate Division allowed the appeal and reduced the award of damages to $1 on the grounds that Kassim had not proved that he had suffered any damages at all. In doing so, however, Beadle CJ referred, with approval, to *Botha* v *Pretoria Printing Works Ltd* 1906 TS 710 at 715 where Innes CJ said:

"I think the court should, by its attitude, impress upon all concerned, that attacks upon the private character of public men are not to be lightly made, and that if they are made, apart from privilege, they must be justified."

The issue before this court is solely that of *quantum* of the damages suffered by Levy. In my view, it would not be appropriate to award nominal damages as was done in *Mahomed*'s case *supra*. In *Shamuyarira*'s case *supra*, Robinson J at p 503 set out eight factors which he considered to be the relevant factors to be taken into account in assessing damages. They included factors such as the content of the articles in question; the nature and extent of the publication; the plaintiff's standing, that is to say, his reputation, character and status; the nature of the defamation; comparable awards of damages in other defamation suits and the declining value of money. The learned judge found it appropriate, in the circumstances of the case, to award Shamuyarira damages in the sum of $15 000. In awarding that amount, Robinson J said at p 520:

"By this award, the plaintiff's reputation has been completely vindicated and the wrong done to him righted, which it was clear to me from his evidence was what he primarily sought to achieve by pursuing this action against the defendants."

I accept that the factors set out by Robinson J in *Shamuyarira*'s case *supra* at p 503 are appropriate in relation to this case. At p 502 thereof, Robinson J prefaced his reasoning by drawing attention to the difficulties inherent in assessing damages in cases of defamation. As Burchell comments in *The Law of Defamation in South Africa* at 291:

"Compensation in defamation is primarily for sentimental loss, which, by its very nature, is not easily translated into monetary terms."

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In *Defamation in the Law of South Africa and Ceylon* Amerasing he described the difficulty as follows:

"The assessment of damages for injury to feelings stemming from the loss of an abstraction such as reputation is not easy, since it involves the placing of a money value upon abstractions."

As pointed out by ROBINSON J, our courts and the South African courts have not been generous in their awards for *solatium*. An action for damages is a method whereby a plaintiff vindicates his reputation; it is not a road to riches.

In my view, having regard to the content of the articles in question, the nature of the defamation and the probable consequences thereof, I do not

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consider that the defamation is as serious as were the defamatory articles in *Shamuyarira*'s case *supra*. I consider that regard must be had to the fact that the belief by the authors of the articles and Modus that Levy was in fact breaking the law, and committing a criminal act when he continued with the development of the shopping centre without having any development order or permit, was reasonable. I agree with the submissions by Mr *Andersen* that regard must be had to comparable awards of damages in other defamation suits, even though made long after the publication of the articles in question and to the declining value of money. In this latter regard, I consider that the value of money as at the date the question of damages was argued is the relevant date.

As I have mentioned above, in *Shamuyarira*'s case *supra*, damages were awarded in the sum of $15 000. In *Zvobgo* v *Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H), Malaba J described that as "an award that tends to the lower limits of damages". He awarded Zvobgo damages in the sum of $20 000. Malaba J also referred to *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) where an award of $14 000 was given and said that that "was decided in 1986 and inflation has since reduced the value of money which is the measure of damages". In *Tekere* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H), the total award of damages was $20 000. Although I agree that inflation is an important factor to be taken into account, the status and position of the person defamed is also of some importance.

Having regard to all the relevant factors, I consider that it would be appropriate to award Levy damages in the sum of $20 000.

In *Bloch*'s case *supra*, the Supreme Court considered that the trial judge had not erred when he ordered interest on the damages awarded from the date of publication of the defamatory articles. At 485F Muchechetere JA said:

"In my view, although the provisions of the said section (ie s 6(1) of the Prescribed Rate of Interest Act [*Chapter 8:10*]) came into effect some six months after the defamatory statements were published, that is, on 20 May 1994, the relevant and important date on the question of interest is when the trial court adjudicated on the matter."

However, in *Henks Construction (Pvt) Ltd* v *Zimbabwe Defence (Pvt) Ltd* 1998 (1) ZLR 49 (S),

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the Supreme Court came to a different conclusion. At 56C, Korsah JA said:

"Since s 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*] had no retrospective effect, the parties' vested rights at common law, as they existed at the time the cause of action arose in 1990, were not affected by any legislation in 1994 whose operation had not been made retroactive either expressly or impliedly.

It follows that the application for the award of interest, from the time the cause of action arose until the award was made, must fail. The application is accordingly dismissed with costs. I have sought the opinions of the Chief Justice and McNally JA and have obtained

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their permission to say that they agree with the view expressed in respect of the prospective effect of s 6 of the Prescribed Rate of Interest Act."

Mr *Andersen* conceded that this statement of the law on this matter must be accepted as definitive. He then argued that although interest could not be ordered to run from the date of publication of the articles concerned, it should run from 20 May l994 which was the date with effect from which s 6(1) of the Prescribed Rate of Interest Act [*Chapter 8:10*] became part of the statute law. The said s 6 was inserted into the Prescribed Rate of Interest Act 1985 by Act No. 2 of 1994, which came into operation on 20 May 1994. Prior to the enactment of that Act, interest on illiquid claims ran from the date of the judgment or order fixing the amount of the damages. The first two subsections of s 6 read as follows:

"(1) Subject to this section and unless otherwise agreed, every debt arising out of an unliquidated claim shall bear interest calculated at the prescribed rate on the amount of the debt from the date when the cause of action arose, whether or not the amount of the debt is fixed by agreement between the parties, by or by the judgment of a court.

(2) Where a court considers it fair and just in the circumstances of the case to do so, it may direct, in relation to a claim referred to in subsection (1), that -

(a) no interest shall be payable on the amount of the debt; or

(b) interest shall be payable on only part of the amount of the debt; or

(c) interest shall be payable in respect of only a part of the period since the cause of action arose, or shall be calculated to run from a specified date; or

(d) interest shall be payable at a rate lower than the prescribed rate;

or may give any two or more of such directions."

In *Henks supra*, the Supreme Court held that s 6 had no retrospective effect. The parties' vested rights at common law, as they existed at the time the cause of action arose in 1990, were not effected by the legislation of 1994. That being the case, since Levy's cause of action also arose in 1990, the so-called vested rights of the parties were not affected by Act No. 2 of 1994. Therefore, this court cannot order that interest run from any date other than the date of this order. It is unfortunate that Korsah JA did not, in the judgment he delivered in the *Henks*' case *supra*, refer to the reasoning in *Bloch*'s case *supra*, or *Marufu* v *Mawara & Ors* 1996 (1) ZLR 593 in connection with the "retrospective" operation of s 61(1) of the Prescribed Rates of Interest Act.

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It is ordered that defendant pay plaintiff:

1. the sum of $20 000 with interest thereon at 25% *per annum* from the date of this judgment to the date of payment;

2. costs of action both prior to the appeal and subsequent thereto.

Wintertons, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

CHITONGO *v* CHITONGO 2000 (1) ZLR 76 (HC)

Citation	2000 (1) ZLR 76 (HC)
Case No	Judgment No. HH-8-00
Court	High Court, Harare
Judge	Gwaunza J
Heard	September 2, 1999
Judgment	January 5, 2000
Annotations	None

Matrimonial action

Flynote

Family law - child - custody - principles affecting award of custody - suitability of parent to have custody - when moral transgressions on part of parent makes him or her unsuitable as custodian - gender of parent - relevance of in determining suitability as custodian - separation of siblings - desirability of avoiding

Headnote

In determining the issue of custody of minor children, the children's best interests are the paramount consideration. For the moral transgressions of one parent to render him or her unsuitable as a custodian parent, they must not only be coupled with other conduct that is equally reprehensible, but must be committed in circumstances that can only compound the situation. Such conduct only becomes relevant if the seriousness of the moral transgression, and the circumstances under which it is committed, can result in the children's best interests being adversely affected. A bad husband or wife is not necessarily a bad parent.

The gender of the parent is relevant in determining which is more suitable to have custody. Gender refers to the socially and culturally defined roles of men and women, and finds

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expression in the all too entrenched sexual division of labour which results in women generally taking on the prime responsibility for child care. This situation, which obtains in most marriages, is generally extended to the post marriage situation. As long as the sexual division of labour is maintained (and it is more entrenched in some societies than in others and very much so in the society that comprises the majority of the population of Zimbabwe), the quality of parental care will continue to be greatly influenced, if not determined, by gender. This is not to say that the quality of the parental role of a mother is better than that of a father, or *vice versa*. The roles are equally important and complementary. Ideally they should be performed together. Where there has been a divorce, the children have to contend with the next best.

The courts accept as a general principle that, unless there is a good reason for doing so, minor children should not be separated from their siblings. Siblings experiencing the trauma of divorce tend to form a bond with each other. It would also be undesirable to separate them on the grounds of their respective ages or sex.

Cases Considered

Cases cited:

Mohaud v *Mohaud* 1964 (4) SA 348 (T)

Rosa v *Rosa* 1980 ZLR 387 (G)

van der Linde v *van der Linde* 1996 (3) SA 509 (O)

Case Information

Miss *Y Mahlunge*, for the plaintiff

D Matimba, for the defendant

Judgment

Gwaunza J: The plaintiff seeks a decree of divorce on the grounds of irretrievable breakdown of the marriage, custody and maintenance of the 4 minor children, an order for the division of the matrimonial assets in terms of paras 5, 7, and 8 of her declaration and costs of suit.

The plaintiff is a school teacher while the defendant owns a driving school and pursues other income generating ventures.

The main issue for determination at the trial was the question of custody of the two older children of the marriage, namely, Alec Tinashe (born 28 October 1985) and Allen Shingai (born 11 November 1986) and the related issues of maintenance for and access to all the children respectively. This followed agreement or concession by the parties:

(a) that the marriage had irretrievably broken down (the defendant denies being violent or neglectful towards the plaintiff and the family but admits to a troubled marriage and an adulterous relationship resulting in the birth of 2 children. However, medical reports

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indicating the plaintiff received treatment following assaults and a peace order against the defendant belie the defendant's denial of a violent nature);

(b) that custody of the two younger children of the marriage, Audrey Varaidzo Shingai (born 25 May 1991) and Annabella Fadzai (born 18 May 1993) be awarded to the plaintiff with the defendant enjoying reasonable access thereto;

(c) that each party was entitled to 50% of the net value of the matrimonial home being stand No. 446 Norton Road, Norton; and

(d) that, irrespective of who is granted custody thereof, the two older children of the marriage, namely, Alec Tinashe and Allen Shingai, were to be enrolled at a boarding school for their secondary education, with the non-custodian parent having access to the children every alternative school holiday.

No opposition was raised by the defendant in respect of the plaintiff's suggestion that the movable matrimonial assets be apportioned between them in terms of paras 8.1 and 8.2 of her declaration. The defendant also did not dispute the quantum of maintenance for the 4 minor children of the marriage, set at $11 145.84 per month by the plaintiff, nor that he should pay half this amount per month, that is $5 572.92 in the event that custody of all the children was granted to the plaintiff. He, however, requested time to secure sufficient funds to buy off the plaintiff in respect of her 50% share in the matrimonial home, a request that the plaintiff opposed for reasons that I will go into later.

GWAUNZA J

It is common cause that the parties have been living separately since around January 1998, with the plaintiff living in Harare with her parents and the defendant in the matrimonial home in Norton. It is also common cause that the plaintiff subsequently filed for, and was awarded, custody of the two younger children, while the two older children remained in the defendant's custody. Both parties however, were allowed access to the children in the custody of the other.

The plaintiff avers it would be in the interests of the two older children, Alec and Allen, for their custody to be awarded to her. She contends the children are young enough to still require their mother's care; that they would not get that care from a stepmother or stepmothers; that the defendant, because of his adulterous relationships with two named women, did not set a good example for the children's moral upbringing; and that by abusing her verbally and physically in the presence of the children, the defendant demonstrated lack of care for the children's sensibilities. Lastly, the plaintiff argues that it would not be in the interests of all the children to be brought up separately from their sisters and brothers. This was in reference to the fact that the two older children are boys while the two youngest ones are girls. The plaintiff also avers that the defendant's shortcomings as a custodian parent were further demonstrated by the neglect apparently suffered by, and evident in, the children following the parties' separation. She contends she used to observe the children coming to school in Norton (where she taught) without shoes, stockings or, sometimes, bus fare. A further indication of the defendant's failings as a custodian parent, avers the plaintiff, was his habit of having the two boys shifted from one

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relative of his to another, for no apparent reason, and without notifying her, beforehand, of such actions. This, she claims, left her in the dark as to where the children were at any particular time. She contends that she, on the other hand, would always keep the children personally in her custody, since as a school teacher she would have all the time to do so during the school holidays. Miss *Mahlunge* for the plaintiff contends the defendant cannot be trusted to act responsibly following the divorce, as he seemed to be easily "swayed" by events and circumstances around him. She contends that if the defendant lost no time in finding comfort in another woman's arms after the plaintiff's father temporarily "impounded" her some years ago to force him to pay the balance of the *lobola*, would he not behave equally irresponsibly following the loss of his wife, home and family? As he was likely to do so, he was by that token not fit to be a proper custodian parent for the two boys.

The defendant denies that the interests of the two boys would be served by custody being granted to the plaintiff. He denies being violent or abusive towards the plaintiff in general and in the children's hearing in particular. He

denies having failed to care properly for the children son after the parties' separation but before the plaintiff successfully sued him for custody of the younger children, saying the same maid who had looked after the children before the separation had continued to do so. He asserts that there is insufficient accommodation for the plaintiff and all the children at her parent's home in Highfield, Harare. The defendant avers the strongest reason for his wanting custody of the two boys was the fact that, as teenagers, they needed their father's guidance and good counsel. While not denying that the two boys had spent their holidays with him in Norton, his brother's family in Harare and his mother in Murewa, the defendant denies that this was an indication of neglect on his part. He explained the children were happy to be visiting with their paternal relatives in that manner. Lastly, the defendant argues that it would be disruptive to uproot the children from the environment in Norton that they were brought up in and in which their friends lived**.** Mr *Matimbe* for the defendant adds that, while the latter may have had an adulterous relationship, this in no way detracted from his suitability as a custodian parent, nor was such relationship so out of the ordinary as marriages go, as to be injurious to the children's interests.

It is trite law that in determining the issue of custody of minor children, the children's best interests are the paramount consideration. The paramountcy of these interests is stressed in the following passage in *The Law of Parent and Child*:1(12)

"the interest of the child is, in the words of Schreiner JA (*Fletcher* v *Fletcher* 1948 (1) SA 130 (A) at 134), the main or paramount consideration or guiding principle to which the rights of the parties have to yield."

It is important to note that, in contending that the interests of the two boys would be better served if their custody were awarded to him or her, neither party has suggested the other was abusive or uncaring of the children. Indeed, it was the evidence of both that the children loved both parents equally and did not wish to be separated for long from either. It is in this respect commendable that the parties have agreed that whatever the outcome of the dispute relating to custody of the two boys, the non-custodian parent would have access thereto every alternative

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school holiday. The two children are very close in age, having been born a year apart. At the time of the trial, the older of the boys was already in boarding school at Sandringham School in Norton, doing Form 1. The younger one, then doing Grade 7, was intended to and very likely will, soon join his brother in boarding school at the same school.

The plaintiff alleges against the defendant conduct that adversely affects

the children's moral and social welfare, albeit indirectly. Counsel for the plaintiff, Miss *Mahlunge*, contends that the situation obtaining in the parties' household was far from normal, being characterised, as it was, by adultery and violence on the part of the defendant. She urges the court to take a serious view of the moral transgressions of the defendant in so far as they reflect on his suitability as a custodian parent and consequently his ability to serve the interests of the children. Mr *Matimbe* counters by contending that the defendant's moral transgressions did not go beyond the ordinary person's, and on the basis of *Mohaud* v *Mohaud*,2(13) should as such not be regarded as indicating his unsuitability as a custodian parent. My perusal of this case suggests that Mr *Matimbe*'s argument is based on the following *dictum* by Vieyra J at p 252H:

"As I have already said, the fact of being highly sexed is not to be considered as a criticism of the plaintiff but it is in her case coupled with a disregard for the norms of natural morality ... That adultery has taken place is not *per se* a bar to a claim for custody. But I must bear in mind the circumstances in which it took place ..."

In that case, the plaintiff, a mother of three children, aged between seven and almost three years, got so intensely involved in an extra marital relationship that "the standards of the plaintiff in relation to her home and children sank to a deplorable depth". The learned judge concluded she was "so emotionally unstable, so lacking in discretion, so confused in her moral ideas" that, despite the youthfulness of the children, it would not be in their interests to entrust their custody to her if there existed a better choice. Despite his shortcomings, the learned judge found the defendant to constitute a better choice and awarded custody to him.

It would appear that for a defendant's moral transgressions to render him or her unsuitable as a custodian parent they must not only be coupled with other conduct that is equally reprehensible, but must be committed in circumstances that can only compound the situation. My understanding of the learned judge's contention is that such conduct becomes relevant if the seriousness of the moral transgression, and the circumstances under which it is committed, can only result in the children's interests being adversely affected. After all, a bad husband or wife is not necessarily a bad parent. On the evidence before me *in casu*, the plaintiff has not established exactly how the defendant's admitted moral transgressions have impacted on the children's best interests. The allegation is made that the age of the defendant's extra-marital children (younger than the parties' two boys but older than the two girls) is evidence that he "flauted" (*sic*) his adulterous relationship with the woman in question before the children. No evidence of this "flauting" nor

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how it affected the children was put before the court. It is contended further for the plaintiff that the relationship between the parties was far from normal, particularly as it meant that the family was turned into a *de facto* polygynous union. Again, no evidence was put before the court to suggest in what exact manner the children's interests were harmed by such conduct. It was not suggested, for instance, that the defendant brought his extra-marital family to live under the same roof with the children, a situation that, being potentially explosive and tension-ridden, might have adversely affected the children's interests. The situation thus revealed is one where the defendant committed adultery, resulting in the birth of two extra-marital children, but does not appear to have done so in circumstances that directly or adversely affected the children's interests. Had that been the only basis upon which the plaintiff claimed custody of the two children, her chances of success might not have been so bright.

There, however, were other contentions which I found to have merit. The plaintiff asserted she was better placed than the defendant to provide, as the mother of the children, close care and attention to them as well as monitoring any care they received from any other person, for instance a maid. In countering this argument, Mr *Matimbe* for the defendant contends, on the basis of *van der Linde* v *van der Linde*,3(14) that the quality of a parental role is not determined by gender. Part of the headnote of the judgment, at p 510, reads as follows:

"These days mothering is also part of a man's being. The concept 'mothering' is indicative of a function rather than a *persona* and this function is not necessarily situated in the biological mother. It includes the sensitive attachment which flows from the attention devoted from day to day to the child's needs of love, physical care, nutrition, comfort, peace, security, encouragement and support. Only the parent who can satisfy this need will succeed in forgoing a psychological bond with the child and it is in this parent's care the child can experience his existence and still having meaning, and which will be sheltered and protected with affection, ... mothering assumes the showing of unconditional love without necessarily expecting anything in return. Mothering is not just a component of the woman but also part of the man's being. In the past, society expected men to suppress that part of their personality because it did not fit the image of a men. Today, the man has the freedom to reveal and to live out his mothering feeling. A father can be just as good a 'mother' as the biological mother and naturally a mother can be just as good a 'father' as the biological father. The quality of a parental role is simply not determined by gender."

While I concur with the learned judge's assessment of mothering and what it entails, I find, with the greatest of respect, that there is some contradiction implicit in the contention that the quality of a parental role is simply not determined by gender. By definition, gender refers to the socially and

culturally defined roles of men and women. This definition finds expression in the all too entrenched sexual division of labour which results in women generally taking on the prime responsibility for childcare. This situation, obtaining in most marriages, is generally extended to the post marriage situation.4(15) My view is that, for as long as the sexual division of labour is maintained (and I will admit it is more entrenched in some societies than others, and very much so still in the society that comprises the majority of the Zimbabwean population), the quality of parental care will continue to, simply, be greatly influenced, if not determined, by gender. *In casu*, there are indications that, consciously or unconsciously, the defendant has created a

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situation where the quality of his parental role is influenced by his gender. He admits to having, during the school holidays, having shifted the two boys from him to his brother and from there to his mother. He does not deny that part of the reason for his doing so had to do with placing the children in an environment where there was female supervision and nurturing. Indeed, Mr *Matimbe* contends that, at sixty or so years, the defendant's mother was not too old to discharge the responsibility of nurturing the two children. 5(16) The capability or otherwise of the defendant's mother to care for the two children is, of course, not the issue. The issue is why it should be a consideration at all. If the quality of a parental role was indeed not determined by gender, then there would be no need for the defendant to feel that he has to seek some type of surrogate mother to the children rather than personally care for them. The difference in the quality of parental care lies between being personally and directly responsible for the care of the children, and assigning such care to another woman who is not the children's mother. While there no doubt are instances where the quality of care given to minor children by their father, with the assistance of another woman, may be better than that rendered directly by their own mother, such cases are generally the exception rather than the rule. The case of *van der Linde* v *van der Linde supra*, where the defendant felt it necessary to move his own mother into the family to care for the children, is a good example of such a case. However, even in that case, the division of labour was maintained, albeit with different players. Instead of their mother, the children received the motherly care from their grandmother.

In my view, it would be more accurate to say the quality of a parental role is determined definitely by sex and to a very great extent by gender. This is not to say the quality of the parental role of a mother is better than that of a father, or *vice versa*. There can be no doubt that the roles are equally

important and complementary. Ideally, the roles should be performed together, i.e. with the parents living together and jointly bringing up their children. Divorce unfortunately does not provide the ideal situation and the children have to contend with next best. *In casu,* to the extent that the plaintiff would herself provide that personal care while the defendant would have to entrust it to his mother, sister-in-law or even his new wife, there can be little doubt of the difference in the quality of parental care that each of the parties would give to the children. This, of course, is not to undermine the quality of the defendant's parental role. It is rather, in my view, a question of considering which situation, given the particular circumstances of this case, would better serve the interests of the children in question. While the defendant can and might very well, on the facts of this case, perform well as a custodian parent, my view is that the plaintiff and her situation, particularly in so far as she will retain custody of the two other children of the marriage, presents a better choice. Her evidence, which the defendant did not challenge, is to the effect that she would be on hand to closely monitor the children's welfare both during term time and school holidays. The plaintiff's suitability is enhanced by what I consider to be the most compelling argument advanced for the plaintiff in her bid to secure custody of the children. This is the undesirability of separating the children from their sisters. The defendant has not claimed custody of the two youngest children and is content to leave them in the custody of their mother. The courts accept as a general principle that, unless there is a good

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reason for doing so, minor children should not be separated from their siblings. This position is stressed in the following passage from the headnote in *van der Linde* v *van der Linde supra* at p 510:

"The question of whether children should be separated in applications for custody comprises two enquiries: (a) is it desirable that children should be separated from each other; and (b) is the quality of a parental role determined by gender? With regard to (a) all being equal, siblings should not be unnecessarily separated from each other. The reason being that siblings experiencing trauma of a divorce tend to form a bond with each other. A bond which to a great extent gives them a feeling of security against the 'onslaught from outside'."

In casu, I am not satisfied that a case has been made for the separation of the children. Separating the children would, in my view, be particularly undesirable in as much as it would amount to separating them both by age and sex. Distance as well, if the defendant continues to live in Norton. As already indicated I am, however, satisfied the quality of the parental roles of the parties will be determined by their gender. Given the circumstances of this case, the plaintiff, I find, has an edge over the defendant.

This is despite the contention by the defendant that, given the age of the two

boys (both in their early teens and having reached puberty), it was important that he be allowed the opportunity to offer them the necessary masculine guidance and counsel. It is true that the courts have regarded the age of minor male children in a disputed custody case, a significant consideration in awarding custody thereof to the father. While I do not dispute the merit in such contention, I do not believe it should be accepted without consideration of the other features of the case. The parties have agreed that the non-custodian parent will have access to the children every alternate school holiday. In my view, this will afford ample opportunity for the defendant to exert the necessary masculine influence on the two boys. Whether he is granted custody or not, he was not, in any case, going to be able to exert this influence on the boys during term time as they would be away at school. I find therefore that this concern falls away. I also find the other concern of the defendant's to be academic in the light of my determination of the issue pertaining to the house in Norton. The defendant contends that to remove custody from him to the plaintiff would interfere with the *status quo* under which the children were settled in Norton and had established ties of friendship with the other children. While not categoric as to his ability to raise the necessary funds to "buy the plaintiff off" in respect of her 50% stake in the matrimonial home, thereby making it possible for the children to continue living in the house they are accustomed to, the defendant has not indicated what he intended to do in the event, which on the evidence before me appears real, that he failed to raise these funds and had to have the house sold. In the event of that happening, it may not be possible to restore the *status quo ante*. Against the uncertainty of the nature and location of the alternative accommodation that the defendant would offer to the children in the event that the matrimonial home is sold, there is the certainty - albeit temporary and not so expensive - of the accommodation that the plaintiff will offer the children in her father's house in Highfield. Her presence in the same house and the opportunity it offers her to closely monitor the children's welfare is an added advantage.

All in all, weighing the merits of the plaintiff's contention as against those of the defendant on

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the question of custody of the two boys, I am satisfied their interests would be better served by awarding their custody to the plaintiff.

[*The remainder of the judgment is not material to this report.* - Editor.]

Wintertons, plaintiff's legal practitioners

Muskwe & Associates, defendant's legal practitioners

CHARUMA BLASTING & EARTHMOVING SERVICES (PVT) LTD *v* NJAINJAI & ORS 2000 (1) ZLR 85 (SC)

Citation	2000 (1) ZLR 85 (SC)
Case No	Judgment No. S-137-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	September 16, 1999
Judgment	January 7, 2000
Annotations	None

Civil appeal

Flynote

Appeal - court's powers on appeal - appeal against order involving judicial discretion - error by judge when exercising discretion - power of appeal court to interfere with such decision

Practice and procedure - interdict - interim interdict - requirements for - whether must prove irreparable harm would be caused where clear right exists

Sale - double sale - sale of property already sold to another person - position when second buyer has knowledge of earlier sale of property

Headnote

The second respondent, who was owner of a piece of land, had entered into a contract to sell a piece of land to the appellant. He subsequently cancelled the sale because of non-payment of an instalment. The appellant filed an urgent application in the High Court for an order setting aside the cancellation on the grounds that it had not been given thirty days' notice of the cancellation as required by s 8(1) of the Contractual Penalties Act [*Chapter 8:04*]. (When later this application was heard it was successful.) Before this application was heard, however, the

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second respondent sold the land to the first respondent and the transfer was effected by registering it in the Deeds Registry. The appellant then applied to the High Court for a temporary interdict restraining the first respondent from disposing of the property to any other person. The High Court dismissed the application, holding that there was no need for the interdict because the property had already been transferred to the first respondent. On appeal:

Held, that an appeal court will generally not interfere with the exercise of a judicial discretion by the lower court. However, the appeal court is entitled to substitute its discretion for that of the lower court where the lower court's exercise of its discretion was based on an error, such as where it has acted on a wrong principle, or it took into account extraneous or irrelevant matters or did not take into account relevant considerations or it was mistaken about the facts.

Held, further, that the High Court had made an error. The judge had misconstrued the reason why the temporary interdict was being sought. The reason why it was sought was to restrain the first respondent from disposing of the property pending the determination of the application for an order setting aside the cancellation of the sale of the land to the appellant. It was

meant to prevent further complications by preserving the *status quo*. It was meant to protect the appellant's interests in the property. The judge had thus misdirected himself and had dismissed the application for the wrong reasons. The appeal court was thus justified in interfering with his decision.

Held, further, that the party applying for a temporary interdict must establish a *prima facie* right, even though open to some doubt, a well-grounded apprehension of injury and the absence of some other adequate and ordinary remedy. Regarding the requirement of injury, the court must weigh the prejudice to the applicant if the interdict is not granted against the prejudice to the respondent if it is granted. The stronger the applicant's prospects of success, the less his need to rely on prejudice to himself. Where a clear right is established which is not open to doubt, it is not necessary for the applicant to prove that the failure to grant the interdict will lead to irreparable injury to himself.

Held, further, that in the present case the appellant's prospects of success in the action to have the cancellation of the sale of the land to it were excellent and it had established a clear right, not open to any doubt whatsoever. It was therefore not necessary to establish that irreparable damage would result. There was no other adequate remedy available to the appellant to achieve the object of preserving the *status quo*, pending the determination of the application to have the cancellation set aside. The balance of convenience was in favour of the appellant. The prejudice to the appellant would be very much greater than the prejudice to the first respondent. In fact, the first respondent would not be prejudiced in any way, as he had indicated that he did not intend to dispose of the land.

Held, further, that when dealing with the sale of the same property to two buyers, a factor that the court takes into account when deciding upon the remedy is whether the second buyer was aware of the earlier sale of the same property. In the present case, although the second respondent was not aware of the prior sale at the time he entered into the sale contract, he was

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certainly aware of this at the time he took transfer.

Held, therefore, that the interim order should thus have been granted.

Cases Considered

Cases cited:

Barros & Anor v *Chimphonda* 1999 (1) ZLR 58 (S)

Crundall Bros (Pvt) Ltd v *Lazarus NO & Anor* 1991 (2) ZLR 125 (S); 1992 (2) SA 423 (S)

Eriksen Motors (Welkom) Ltd v *Protea Motors, Warrenton & Anor* 1973 (3) SA 685 (A)

Preston v *Charuma Blasting & Earthmoving Svcs (Pvt) Ltd & Anor* 1999 (2) ZLR 201 (S)

Setlogelo v *Setlogelo* 1914 AD 221

Case Information

C Hungwe, for the appellant

E Mugugu, for the first respondent

No appearance for the second and third respondents

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which dismissed the appellant's application for a provisional order.

The facts are as follows. On 16 July 1998, the appellant ("Charuma") and the second respondent ("Preston") concluded an agreement of sale in terms of which Charuma purchased from Preston a piece of land at Ruwa ("the property"). The agreed purchase price was $2 500 000, which was to be paid to an estate agent. Payment of the purchase price was to be by way of a deposit

of $500 000 on or before 22 July 1998, and four monthly instalments of $500 000, the first instalment being payable on or before 5 August 1998. Subsequent instalments were to be paid on or before the 5th day of each month.

In addition, it was agreed that the property would only be transferred to Charuma after the purchase price had been paid in full. It was also agreed that if Charuma failed to pay any instalment by the date when it was due, Preston was entitled to call upon Charuma to remedy the breach within fourteen days, and that if Charuma failed to pay the instalment within that period, Preston was entitled to cancel the sale and repossess the property.

After the sale agreement had been signed by the parties, Charuma paid the deposit as well as

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the first instalment, although both were paid late. The payments were made on different dates.

When the second instalment was not paid by 5 September 1998, the estate agent, acting for Preston, wrote to Charuma giving it fourteen days within which to pay the balance of the purchase price in full, and when that payment was to made he cancelled the sale.

Charuma then filed an urgent application in the High Court on 14 October 1998 seeking an order setting aside the cancellation of the sale. The order was subsequently granted on 2 March 1999, on the ground that in terms of s 8(1) of the Contractual Penalties Act [*Chapter 8:04*] ("the Act"), Charuma should have been given thirty days within which to remedy the breach.

However, before the cancellation of he sale was set aside, Preston sold the property to the first respondent in this case ("Njainjai") for $1 500 000 on 1 November 1998. Thereafter, Njainjai paid the required deposit of $500 000 on 27 November 1998.

At the time of the conclusion of the second sale agreement Preston did not disclose to Njainjai that Charuma had an interest in the property and that on 14 October 1998 it had filed an application in the High Court challenging the termination of the first sale agreement.

However, when Charuma became aware of the second sale, it wrote a letter to Njainjai on 7 December 1998 informing him of the first sale and advising him that the property should not be transferred to him. Thereafter, Njainjai telephoned Charuma and was fully briefed about the first sale.

Subsequently, on 15 December 1998, Charuma's legal practitioner ("Warara") had a lengthy telephone conversation with Njainjai's legal practitioner ("Mugugu"). In that conversation, Warara fully briefed Mugugu about the first sale agreement and the purported cancellation of that agreement. He also informed him about Charuma's application for an order setting aside the purported cancellation on the ground that in terms of the Act Preston

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should have given Charuma thirty days within which to remedy the breach before terminating the agreement. Before the conversation ended, Warara undertook to send to Mugugu a copy of Charuma's application for an order setting aside the purported cancellation of the first sale, and Mugugu undertook to send to Warara a copy of the second sale agreement. That was subsequently done.

Nevertheless, in February 1999, Preston transferred the property to Njainjai. When Charuma became aware of the transfer, it filed an urgent application in the High Court against Njainjai, Preston and the Registrar of Deeds. In that application, it sought a provisional order calling upon the respondents to show cause why a final order should not be made: (a) setting aside the transfer of the property to Njainjai; (b) directing Preston to transfer the property to Charuma; (c) directing Njainjai to vacate the property; and (d) directing that the costs of the application be paid by Njainjai and Preston on the legal practitioner and client scale.

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In addition, Charuma sought a temporary interdict restraining Njainjai from selling, transferring or mortgaging the property, and also restraining the Registrar of Deeds from registering any transfer, mortgage or encumbrance relating to the property in favour of any other person.

The application was dismissed on 19 March 1999. Aggrieved by that result, Charuma appealed to this court.

The main reason for dismissing the application was the belief by the learned judge in the court *a quo* that there was no need for an interdict because the property had already been transferred to Njainjai. In his judgment he said the following:

"I also come to the conclusion that there is no basis on which a court should be asked to grant an interdict at this stage. The act and event which the applicant claims violated his right to own the disputed property, namely the sale and transfer to the first respondent, already occurred in October and December 1998. The applicant could have interdicted the transfer of December 1998 but clearly failed to do so ... Having failed to stop the transfer which was imminent, to seek an interdict at this stage is trying to lock the stable door when the horse has bolted."

With respect, the learned judge clearly misconstrued the reason why Charuma sought the temporary interdict. The reason was that, pending the determination of the application for an order setting aside the cancellation of the first sale, Charuma intended restraining Njainjai from selling or otherwise disposing of the property. The temporary interdict was intended to prevent further complications by preserving the *status quo*. It was meant to protect Charuma's interest in the property. This was made clear in its founding affidavit, filed by its financial director paras 14 and 15 of which read as follows:

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" 14. I verily believe that at the time (the) first respondent (Njainjai) obtained transfer he was fully aware that there was an agreement between (the) applicant (Charuma) and (the) second respondent (Preston) and that (that) agreement had not been cancelled or at the very least cancellation of that agreement by (the) second respondent (Preston) was contested in a court of law and the matter was still pending. (The) first respondent (Njainjai) acted with a clear intention of defeating (the) applicant's (Charuma's) claim to the property as both him (sic) and his legal practitioner were fully appraise (*sic*) of the legal basis on which cancellation of the first agreement between the applicant (Charuma) and (the) second respondent (Preston) was being challenged. It must have been evident to Mr Mugugu that our claim was not in bad faith.

15. I verily believe too that if (the) first respondent (Njainjai) is not restrained from proceeding to sell the property he will proceed behind everyone's back and sell this property to defeat (the) applicant's (Charuma's) claim, as he knows the risk he faces which risk he was avoiding in the first place when he pressed on with transfer with full knowledge of (the) applicant's (Charuma's) rights over the property. I also believe that no prejudice will be caused by such a restraint as (the) first respondent (Njainjai) has occupation and only recently (about two weeks ago) got transfer of the property."

In the circumstances, the learned judge clearly misdirected himself and dismissed Charuma's application for wrong reasons.

What an applicant for an interdict should establish in order to succeed has been set out in many previous cases.

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In *Setlogelo* v *Setlogelo* 1914 AD 221, Innes JA (as he then was) said the following at 227:

"The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

Subsequently, in *Eriksen Motors (Welkom) Ltd* v *Proten Motors, Warrenton & Anor* 1973 (3) SA 685 (A) Holmes JA, dealing with the issue of temporary interdicts, said the following at 691C-G:

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear, the court's approach in the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo* v *Setlogelo* 1914 AD 221 at p 227. In general, the requisites are:

(a) a right which, 'though *prima facie* established, is open to some doubt';

(b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

In exercising its discretion the court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him ... Viewed in that light, the reference to a right

which, 'though *prima facie* established, is open to some doubt', is apt, flexible and practical, and needs no further elaboration."

I respectfully associate myself with those comments. A preliminary assessment of the merits of the applicant's case is, therefore, essential in each case.

I now turn to the facts of the present case. As already stated, in the main application Charuma sought an order setting aside the termination of the first sale agreement by Preston on the ground that Preston had not given it thirty days within which to remedy the breach as required by subss (1) and (2) of s 8 of the Act. Preston did not dispute that allegation but averred that he acted in terms of the first sale agreement. That, in my view, is to a good argument. It is quite clear from the papers that Preston called upon Charuma to pay the balance of the purchase price in full within fourteen days contrary to the provisions of the Act. Charuma's prospects of success in the main application were, therefore, excellent, and the learned judge in the court *a quo* should have found that Charuma had established a clear right not open to any doubt whatsoever.

As a matter of fact, when the main application was heard in March 1999, Charuma was successful and the purported termination of the first sale agreement was set aside. A subsequent appeal to this Court by Preston was dismissed with costs. See *Preston* v *Charuma Blasting & Earthmoving Services (Pvt) Ltd & Anor* 1999 (2) ZLR 201 (S).

Since Charuma proved a clear right, it was not necessary for it to establish that it would suffer irreparable harm if the interim interdict was not granted. Support for this conclusion is found in

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what Innes JA (as he then was) said in *Setlogelo* v *Setlogelo supra* at 227. There the learned Judge of Appeal said:

"The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's *Institutes* where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though *prima facie* established, is open to some doubt. In such cases, he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party: van der Linden *Inst.* (3, 1, 4, 7). But he certainly does not lay down the doctrine that where there is a clear right the injury complained of must be irreparable in order to justify an application for an interdict."

Thus where, as in the present case, the right is clear, the damage need not be irreparable.

I now wish to deal with the requirement that there be no other adequate remedy. In seeking the interim interdict, Charuma intended protecting its

SANDURA JA

right to the property by preserving the *status quo* and preventing any further complications in the equation, pending the hearing of the main application in which its prospects of success on the merits were excellent because it had a clear-cut case. In my view, no other remedy would have achieved that objective. In any event, the balance of convenience was overwhelmingly in favour of Charuma. The prejudice to Charuma if the interdict was refused was very much greater than the prejudice to Njainjai if the interdict was granted. In fact, the granting of the interim interdict would not have prejudiced Njainjai in any way because he indicated that he did not intend selling or otherwise disposing of the property.

In the circumstances, I am satisfied that on the facts of this case the learned judge should have exercised his discretion in favour of Charuma and granted it the interim interdict.

I now wish to consider whether this court can, in the circumstances, interfere with the discretion of the learned judge since his refusal to grant the interim interdict clearly involved the exercise of a judicial discretion.

The circumstances in which this court can interfere with the exercise of a judicial discretion were clearly set out by Gubbay CJ in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S). At p 62F-63A, the learned CHIEF JUSTICE said:

"The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first - one which clearly involved the exercise of a judicial discretion, see *Farmers' Co-operative Society (Reg.)* v *Berry* 1912 AD 343 at 350 - may only be interfered with on limited grounds. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing."

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In the present case, as stated earlier in this judgment, the learned judge quite clearly misconstrued the reason why Charuma sought the interim interdict. He, therefore, mistook the facts and this court is justified in interfering with his decision.

Finally, I wish to deal with the provisional order application by Charuma. The learned judge, having decided against granting the interim interdict, dismissed the provisional order application. As stated earlier, in that application Charuma sought a provisional order which, *inter alia*, called upon Njainjai to show cause why a final order should not be made setting aside the sale of the property to him. Preston had sold the property to Njainjai after he purportedly cancelled the sale of the property to Charuma.

SANDURA JA

I now turn to consider whether Charuma made out a *prima facie* case for the issue of the provisional order against Njainjai.

The principles which apply where a person sells a property to two or more persons separately were set out by this court in *Crundall Brothers (Pvt) Ltd* v *Lazarus NO & Anor* 1991 (2) ZLR 125 (S) at 132G-133C; 1992 (2) SA 423 (S) at 429H-430A as follows:

"This approach was set out as follows by Professor McKerron in (1935) 4 *SA Law Times* 178 and repeated with approval by Professor Burchell in (1974) 91 *SALJ* 40:

> 'It is submitted that where A sells a piece of land first to B and then to C - and the position is the same *mutatis mutandis* in the case of a sale of a movable of which the court would decree specific performance - the rights of the parties are as follows:
>
> (1) ...
>
> (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A. If, however, C had knowledge at either of these dates, B, *in the absence of special circumstances affecting the balance of equities*, can recover the land from him, and in that event C's only remedy is an action for damages against A.'

It is relevant at this stage, since the question of *mala fides* has been canvassed extensively in argument, to point out that the doctrine of notice, as it is called, requires nothing more than notice or knowledge of the prior claim. It is not necessary to prove *mala fides* or fraud."

Applying these principles to the facts of the present case, I am satisfied that Charuma made out a *prima facie* case for the issue of the provisional order. Although it appears to have been common cause that at the time Preston and Njainjai concluded the second sale agreement Njainjai was unaware of the earlier sale of the property to Charuma, he was certainly aware of it at the time he took transfer. He and his legal practitioner, Mugugu, were informed about the sale by Charuma. They were also informed that an application had been filed in the High Court seeking an order setting aside the purported cancellation of the first sale by Preston. In addition, Mugugu was given a copy of the application by Charuma. The provisional order should, therefore, have been granted.

In the circumstances, the appeal is allowed with costs. The order of the court *a quo* is set aside

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and the following is substituted:

"The application is granted in terms of the draft order."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

VS Nyangula & Associates, appellant's legal practitioners

Mugugu & Associates, first respondent's legal practitioners

MUGWEBIE *v* SEED CO LTD & ANOR 2000 (1) ZLR 93 (SC)

Citation	2000 (1) ZLR 93 (SC)
Case No	Judgment No. S-141-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 1, 1999
Judgment	January 7, 2000
Annotations	None

Civil appeal

Flynote

Employment - employee - disciplinary proceedings against - code of conduct in effect - failure to follow provisions of code - effect - action taken by employer a nullity - declaratory order granted

Headnote

The appellant was employed by the respondent company. The company had a registered code of conduct. The code of conduct stipulated that, where misconduct was suspected, the company had to appoint a designated officer whose duty it was, within a period of 14 days, to investigate the alleged offence, notify the employee of the nature of the alleged offence and suspend the employee, either with or without pay.

The appellant was suspected of having defrauded the company, which notified the police. He was arrested and remanded on bail. The company's marketing manager wrote to him, informing him that he had been suspended indefinitely without pay or other benefits. Three months later, the appellant applied to the High Court for an order setting aside his suspension, reinstating him

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without loss of pay and other benefits, and permanently staying the misconduct proceedings His main contention was that the company's failure to complete the misconduct proceedings within the required 14 days rendered the suspension unlawful and inoperative. Shortly after that, the company appointed a designated officer and instructed him to proceed against the appellant in terms of the code of conduct. The outcome of the proceedings was that the appellant was dismissed.

In the High Court, the judge ruled that, as the application was one for review, it should have been brought within 8 weeks of the end of the 14 day period which began with the appellant's suspension. On the merits, the judge ruled that, although the provisions of the code had not been complied with, the appellant should have sought an order compelling the company to comply with the code, rather than one setting aside the suspension. On appeal:

Held, that, assuming that the application was one for review, the judge should have condoned the delay in bringing the application.

Held, further, that because of the company's failure to comply with the code of conduct, the suspension of the appellant was a complete nullity and the subsequent proceedings were of no force or effect.

Held, further, that as the suspension was a nullity, there was really no need for a court order to set it aside, though it was convenient for the court to declare the action null and void. Because the appellant was really seeking a declaratory order, the time limits for review did not apply, and the court was justified in interfering with the trial judge's discretion.

Cases Considered

Cases cited:

Barros & Anor v *Chimphonda* 1999 (1) ZLR 58 (S)

Kadir & Sons (Pvt) Ltd v *Panganai & Anor* 1996 (1) ZLR 598 (S)

MacFoy v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC)

Case Information

Appellant in person

C Kahuni, for the respondents

Judgment

Sandura JA: This is an appeal against a judgment of the High Court, which dismissed with costs the appellant's application for an order setting aside his suspension from the first respondent's employment, and granting other relief.

The relevant facts are as follows. The appellant was employed by the first respondent ("the company") with effect from 1 July 1992. The company had a registered code of conduct ("the

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code") and the second respondent was the company's employee responsible for administering the code.

In September 1998, the company suspected that the appellant had committed fraud and caused his arrest by the police on 18 September 1998. On 21 September 1998, the appellant was released on bail.

Subsequently, on 9 November 1998, the company's marketing manager wrote to the appellant informing him that he had been suspended indefinitely without pay and other benefits. The letter was in these terms:

"This letter is to advise you that in (the) light of further developments in the Sales Office investigations, we are suspending your services, without benefits, indefinitely.

Depending on the final outcome of these recent developments, your status will be reviewed."

Thereafter, on 22 February 1999, the appellant filed a court application in the High Court against the respondents, seeking an order: (a) setting aside his suspension; (b) reinstating him in his employment without any loss of salary and other benefits; and (c) permanently staying the misconduct proceedings instituted against him. The application was opposed by the company.

The appellant's main contention in the application was that the company's failure to complete the disciplinary proceedings within fourteen days as required by the code rendered his continued suspension unlawful and inoperative.

Nevertheless, a few days later, on 5 March 1999, the company appointed Mr Mupotaringa as its designated officer and instructed him to proceed against the appellant in terms of the code.

Shortly thereafter, on 8 March 1999, the company's human resources manager wrote to the appellant informing him: (a) that he was required to appear at the company's head office on 12 March 1999 at 10 am to answer a charge of fraud, the allegation being that he had fraudulently sold some of the company's seed with the intention of converting the proceeds to his own use; (b) that Mr Mupotaringa would be the company's designated officer (i.e.

the second respondent); and (c) that he could bring with him any member of the Workers' Committee or staff as his witness.

On 12 March 1999, the appellant attended the disciplinary hearing and was found guilty. As a result, the company dismissed him.

Thereafter, the appellant's application for an order setting aside his suspension was heard by the High Court on 14 September 1999 and was dismissed with costs. Aggrieved by that decision, the appellant appealed to this court. He was not legally represented in the court *a quo* or in this court.

In the court below, the appellant's argument was as follows. He was suspended from duty on 9 November 1998. In terms of the provisions of the code, which I shall set out later, the

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disciplinary proceedings against him should have been completed within fourteen days after 9 November 1998, ie they should have been completed by 23 November 1998. As they were not completed by that date, his continued suspension thereafter was unlawful and inoperative.

The learned judge in the court *a quo* ruled that, as the application was one for a review of the earlier proceedings, in terms of r 259 of the High Court Rules 1971, it had to be brought within eight weeks after 23 November 1998, and that as it had not been brought within that period and the appellant had given no satisfactory reason for failing to do so, the delay in bringing the application before the court could not be condoned.

Having come to that conclusion, the learned judge, out of caution, proceeded to deal with the merits and considered whether the appellant was entitled to an order setting aside his suspension on the ground that the disciplinary proceedings had not been completed within fourteen days as required by the code. He concluded that although the provisions of the code had not been complied with, the appellant should have sought an order compelling the company to comply with the provisions of the code, and not one setting aside his suspension.

Before I consider whether the learned judge was correct in his conclusion, I would like to set out the relevant provisions of the code.

Paragraph 2.1 reads as follows:

"'designated officer' means a person appointed in terms of paragraph 3.3 of this code."

And paragraph 3.3 of the code reads as follows:

"The employer, after consultation with the Works Council, shall appoint in writing one or more persons in his employment to be the 'designated officer' for the purpose of administering this code."

Finally, para 4 of the code reads as follows:

"Where it appears to a designated officer that an employee has committed an offence, he shall forthwith investigate the circumstances of the alleged commission of the offence, and, in particular, shall -

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4.1 Notify the employee in writing of the nature of the alleged offence and of the impending investigations;

4.2 In the event of an offence warranting his dismissal in terms of Part IV and Part V, suspend the employee with or without pay as the Officer shall stipulate, pending his decision on the matter in terms of paragraph 5.2;

4.3 Gather and record all evidence to the alleged offence;

4.4 Afford the employee the chance of presenting his/her case either personally or with a chosen representative, and of calling witnesses in his defence; the employer shall release such witnesses to enable them to attend the hearing for the purpose of giving evidence;

4.5 Conduct his investigation in accordance with the principles of natural justice;

4.6 Prepare a comprehensive summary of his investigations, including such summary of any decision made and action taken in terms of paragraph 5; and

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4.7 Give a decision within fourteen (14) days of receipt of such case."

Assuming for a moment that the learned judge was correct when he concluded that the appellant's application was one for a review of the disciplinary proceedings, as opposed to one for a declaratory order, I think that this is a case in which the learned judge should have exercised his discretion in favour of the appellant and condoned the delay in bringing the application. I say so because, in dealing with the appellant, the company completely ignored the provisions of the code.

In the first place, the appellant was suspended by the company's marketing manager who was not the company's designated officer. This was in breach of para 4.2 of the code, which provides that it is the designated officer who suspends an employee whom he suspects to have committed an offence. It should be noted that in terms of para 4.2 of the code the power to suspend an employee only arises when the penalty for the alleged offence is dismissal. In terms of Part IV of the code the penalty for fraud is dismissal.

Secondly, Mr Mupotaringa was appointed the company's designated officer and instructed to proceed against the appellant on 5 March 1999, about four months after the appellant had been suspended by the company's marketing manager. He should have been appointed before the appellant was suspended. In fact, in terms of para 4 of the code, no disciplinary proceedings can be instituted against any employee unless it appears to a designated officer that the employee in question has committed an offence. Even then, it is the designated officer, and no-one else, who is empowered by the code to notify the employee in writing of the nature of the alleged offence and the impending investigations. And it is he, and he alone, who is empowered to suspend the employee and determine whether such suspension is with or without pay, where the penalty for the alleged offence is dismissal.

The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. In this respect, I can do no better than quote what

SANDURA JA

Lord Denning said in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. *There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.* And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse" (emphasis is mine).

In my view, these comments apply to the facts of the present case with equal force. The suspension of the appellant was a nullity and all the subsequent proceedings were of no force or effect. It is, therefore, unnecessary to consider the effect of the failure to give a decision within fourteen days.

As the appellant's suspension was a nullity, there was really no need for a court order to set it aside, though it was convenient to have the court declare it null and void so that the parties

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knew their respective positions.

In the circumstances, it seems to me that the relief sought by the appellant was effectively the issue of a declaratory order, and that the provisions of r 259 of the High Court Rules 1971 did not apply. As the Chief Justice said in *Kadir & Sons (Pvt) Ltd* v *Panganai & Anor* 1996 (1) ZLR 598 (S) at 600C:

"Although there was debate before this court as to whether the learned judge was justified in condoning the first respondent's non-compliance with the provisions of r 259, it seems to me that, as the relief sought was effectively the issue of a declaratory order, no extension of the time period for the lodging of the application was required in the particular circumstances. See *Bayat & Ors* v *Hansa & Anor* 1955 (3) SA 547 (N) at 552C-D, approved by ROBINSON J in *Musara* v *Zinatha* 1992 (1) ZLR 9 (H) at 14H-15G."

These comments are pertinent to the facts of the present case. In the particular circumstances of this case, the time limit of eight weeks in r 259 did not apply.

Finally, as the refusal by the learned judge to condone the appellant's delay in filing his application involved the exercise of a judicial discretion, it is incumbent upon me to say why this court should interfere with his decision.

The circumstances in which this court may interfere with a decision involving the exercise of a judicial discretion were set out recently by the CHIEF JUSTICE in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S). The learned CHIEF JUSTICE said at 62G-63A:

"It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing."

In the present case, the learned judge did not take into account that the

appellant's suspension was a nullity and that the subsequent proceedings were of no force or effect. This court is, therefore justified in interfering with the decision of the learned judge.

In the circumstances, the appeal is allowed with costs. The order of the court *a quo* is set aside and the following substituted:

" 1. The suspension of the applicant by the first respondent is null and void.

2. The first respondent shall pay to the applicant the salary and other benefits due to him from the date of his suspension, being 9 November 1998, to the date when he is lawfully suspended without pay and other benefits, minus whatever sum he is proved to owe the first respondent."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, respondents' legal practitioners

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CHAGARESANGO *v* CHAGARESANGO & ORS 2000 (1) ZLR 99 (SC)

Citation	2000 (1) ZLR 99 (SC)
Case No	Judgment No. S-134-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 16, 1999
Judgment	January 7, 2000
Annotations	None

Civil appeal

Flynote

Customary law - chieftainship - appointment of chiefs by President - requirement for President to give due consideration to applicable customary principles of succession - inquiry by court into appointment made by President - no "proper" consideration of customary principles - decision reviewable

Customary law - chieftainship - Shona system of succession - not proper for appointed chief to abdicate in favour of son - chieftainship must go to next claimant in line

Headnote

The Shona system of succession to chieftainships is a complicated one, whereby the chieftainship passes from the head of one of the "special" families to the head of another. It is not permissible for a person appointed as chief to abdicate in favour of his own son; if he is unwilling or unable to accept the appointment, it goes to the next claimant in line.

Chiefs are appointed by the President, who is obliged to give due consideration to the customary principle of succession applicable to the community over which the chief is to preside. While ordinarily it is not competent for a court to investigate how the President has exercised his discretion, it may investigate whether the relevant Minister and his officials, in formulating their advice to the President, acted on sound principle. Where it was shown that the appointment of a chief deviated from the ordinary customs and traditions of the clan in question, and that the Minister had not given due consideration to the customary principles of succession before making his recommendation to the President:

Held, that the Minister should recommend that the President remove the person appointed contrary to the ordinary customs of the clan.

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Held, further, that the clan elders should deliberate on the matter and elect a candidate for appointment as chief and that their conclusions should be forwarded to the Minister to form the basis for his recommendation to the President on the appointment of the next chief.

Cases Considered

Cases cited:

Chief Motlolegi & Anor v *President of Bophuthatswana & Anor* 1992 (2) SA 480 (BA)

Rushwaya v *Min of Local Govt & Anor* 1987 (1) ZLR 15 (S)

Ruzane v *Paradzai & Anor* 1989 (1) ZLR 118 (H)

Ruzane v *Paradzai & Anor* 1991 (1) ZLR 273 (S)

Legislation considered:

Chiefs and Headmen Act [*Chapter 29:01*], s 3

Case Information

T P Kawonde, for the appellant

Mrs *J Zindi*, for the respondents

Judgment

Muchechetere JA: This is an appeal against the judgment of the High Court, Harare on 9 October 1997 in which the appellant's application to have the appointment of the first respondent as Chief Nenguwo set aside was dismissed.

The appellant stated the following in paras 7 to 10 of his affidavit:

" 7. The reasons for the application is my contention that (the) first respondent is not eligible for chieftainship of the Nenguwo clan. The reasons why are set out as follows.

8. The Nenguwo chieftainship is in the Masarirambi family. To understand why (the) first respondent is ineligible it is essential to show the family tree diagram of the family in question:

FIRST FAMILY	Father SIMON SHONHIWA CHAGARESANGO
	(Deceased November 1991)
his sons are	CEPHAS CHAGARESANGO
	HYGIENE CHAGARESANGO
	OBERT CHAGARESANGO

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SECOND FAMILY	Father GIDEON CHAGARESANGO
	(Deceased April 1996)
his sons are	SILAS CHAGARESANGO
	WILLIAM CHAGARESANGO
	AUGUSTINE CHAGARESANGO
	(First respondent)
	RUBEN CHAGARESANGO
	ANYWHERE CHAGARESANGO
THIRD FAMILY	Father NICHOLAS CHAGARESANGO
	(Deceased 1994)
his sons are	TIMOTHY CHAGARESANGO
	PETER CHAGARESANGO
	ONIAS CHAGARESANGO

According to the custom and tradition of the Nenguwo clan, chieftainship goes by seniority. There is no voting, or appointment by persons outside the clan. I belong to the first family. I am the eldest amongst all sons. In terms of the history of this chieftainship I am the inevitable clan choice. The basis appears below.

9. My late father was next in line in chieftainship after the late Chief Nenguwo, Gideon Mashapaidze. In expectation of this eventuality, he made the necessary ritual preparations, and he liaised with the fourth respondent's officials. It was expected that he was going to be chief. Meetings were held these were documented with the third respondent's office. However, I cannot attach any since I have been denied access to them.

MUCHECHETERE JA

10. In the above circumstances, my late father fell ill and died in 1991. When he died he had not been appointed as yet. In place of the late Mr Mushapaidze there was an acting chief. Matters remained in this state of limbo for a while. In 1994, Nicholas Chagaresango died leaving Gideon Chagaresango as the only remaining member of the 'founding fathers'. Although chieftainship should have devolved upon myself, Gideon made preparations to assume chieftainship. He liaised with the second respondent, who was about to bestow upon him chieftainship. However Gideon fell ill. Due to this fact he realised that he would not be chief during his lifetime. He then connived with (the) second respondent to confer chieftainship on Augustine the first respondent his third born son.

11. Arrangements were made in secret for the above aim to be realised. They were facilitated by the second respondent who is particularly interested in the said appointment. These goings on came to my knowledge around February 1996 when I heard through hearsay that first respondent was going to become chief. I

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started making enquiries. Gideon Chagaresango died in April 1996.

12. I approached the second respondent Mr Murinda and I indicated to him that the chieftainship turn belonged to our family. This is because we are the first family. I as the eldest son should be appointed chief. The second respondent indicated to me that he had given the chieftainship to Gideon. I reminded him that Gideon was dead whereas he replied that Augustine would take his place. I indicated to him that this was an error and it was uncustomary for chieftainship to devolve in this selective way. I approached the third respondent who maintained that he ratified the decision of the second respondent."

The appellant further stated that he approached the Provincial Administrator who stated that he could not change the second and third respondent's ruling. This was also the attitude of the fourth respondent's office which had set the date 17 May 1996 for the appointment of the first respondent as chief and had indicated that the appointment could not be postponed. At the appellant's prompting, the second and third respondents were ordered to conduct consultations at the grassroots level. At a meeting held at Tabanga, the first respondent's proposed appointment as chief was overwhelmingly rejected by the general populace. At another meeting held on 5 July 1996 the third respondent's confirmation that he endorsed the chieftainship of the first respondent was again rejected by the general populace. The conclusion was that further consultations were necessary before the appointment of a chief in the Nenguwo clan could be regarded as settled. Before any further consultations were made, the first respondent was appointed chief on 13 July 1996.

The appellant concludes that the appointment of the first respondent as chief was most irregular. He pointed out that the first respondent is a junior even in his own family and that with the demise of the founding fathers the chieftainship should devolve upon himself (the appellant) as the eldest of the Masarirambi family. And that should the family of the late Simon Shonhiwa Chagaresango be "skipped" in the chieftainship line it will mean they will lose the right to hold this chieftainship power and that would be an irreparable loss.

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The first respondent states, in his opposing affidavit, that proper and valid meetings on the issue of the Nenguwo chieftainship were held resulting in his being appointed chief. He went on to state that it is the clan that conducts deliberations as to who is to be appointed chief and that the chieftainship revolves around particular houses. And that the criteria for the election of the chief are therefore a clan decision and not necessarily in terms of seniority only but that seniority is just one of the factors that come into play.

He further states in this case thirteen meetings were held by the Nenguwo clan leaders from 1991 to 1993 on the matter. And that all the families of the clan were represented at the meetings by their elders. The unanimous decision was that the chieftainship should be awarded to the Masarirambi house. And Gideon Chagaresango was nominated chief in accordance with custom. According to the first respondent, there was no objection to the appointment. He states that the appellant attended some of the meetings but never challenged the appointment. He also states that at the time there were three eldest surviving members of the clan and that they concurred with the decision to appoint Gideon Chagaresango. He pointed out that the previous chieftainship had been with the Nyahunzi house which was a junior house to the Masarirambi

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house.

The first respondent went on to explain that at the time Gideon Chagaresango was 78 years old and in poor health and had bad eyesight. Because of this, the seven elders of the clan met in 1995 and chose the first respondent to take the place of Gideon Chagaresango. According to the first respondent, the appellant was informed of the decision. The first respondent further states the following in para 13 of his affidavit:

> "13. I was not present when the decision was made. I never wanted the chieftainship but I only accepted the position when the clan conferred the chieftainship on me. I never connived with anybody to assume the chieftainship."

The first respondent went on to state when he was introduced as the new chief on 10 January 1996 whilst Gideon Chagaresango was still alive the whole clan, with the exception of the appellant, was present. He states that the second respondent got involved in that he verified as to whether the proceedings were proper and that his role was to respect the wishes of the clan. He went on to state the following in paras 19 and 20 of his affidavit:

> "19. I aver that applicant has approached the wrong forum to redress this issue neither has sufficient proof been shown that he communicated with all the respondents in order to verify how decisions were made.
>
> 20. I repeat that it is the elders of the family who can call for a clan meeting should they not be happy about my appointment and the applicant or the High Court is not entitled at customary law to compel the elders to meet in order to sit as some form of court inquiry on the issue. The clan cannot sit as some form of court to investigate whether its own ruling was right or wrong. Applicant has not really shown any

> cause why the respondents must be ordered to call for a clan meeting when this was already done. The proper procedure would be for applicant himself to approach members of the clan who made the decision and challenge their decision at that level and not through the High Court."

In another opposing affidavit, one Willard Anasi Chiwewe ("Chiwewe") the Permanent Secretary in the fourth respondent's Ministry ("the Ministry") stated that the first respondent was appointed as chief on 29 November 1995 and was installed on 13 July 1996. He went on to state that the appointment was in accordance with customary and traditional principles of succession of the Nenguwo chieftainship and that the first respondent was eligible for the chieftainship. He stated the following in paras 8, 9, 10 and 12 of his affidavit:

"8. *The turn to assume the Nenguwo chieftainship is in the Masarirambi family.* The nomination of the first respondent was done according to the Nenguwo clan customs. Several meetings were held (See Annexures "A"). First respondent was nominated on the fourth February 1994 by the elders of the Masarirambi family contrary to applicant's claims. According to the proceedings of the meeting of 25 December 1993, Gideon Chagaresango should have succeeded since he was the eldest surviving father in the Masarirambi family. *Due to ill health he recommended the selection of his son the first respondent to take over the chieftainship - a decision which got the blessing of other clan members. This meeting was attended by the applicant although he left the meeting before it ended for his own reasons.*

9. *Ad paragraph 9* (of appellant's affidavit).

It is true that applicant's father Simon Shonhiwa was next in line but he passed away leaving Gideon Chagaresango, his brother as the eldest surviving father. Accordingly applicant could not get the turn to rule since

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Gideon was still alive. Due to ill health he decided to hand over the turn to his son, the first respondent and this was endorsed by all clan members.

10. *Ad Paragraph 10*

The death of applicant's father left Gideon Chagaresango as the next rightful successor. *There was no basis for applicant to be selected for chieftainship when Gideon was the eldest surviving father.* It is mischievous for applicant to suggest that Gideon Chagaresango connived with the Assistant District Administrator so that he would be chosen for the post as a series of meetings held indicate that the selection of first respondent was selected in accordance with the traditional customs of Nenguwo.

...

11. *Ad paragraph 12*

The present chief was nominated to be the next chief before the death of his father. The father then handed over the post to him on ill health grounds. Consequently, the President appointed first respondent on 29 November 1995 well before his father's death. *Apparently, the turn should have gone to applicant had Gideon died before the selection process*" (my emphasis).

In the replying affidavit, the appellant attached five affidavits. The first one was by one Jayiwa Chakadengu Nyahunzvi ("Nyahunzvi"), who claimed to belong to the Nyahunzvi family of Nenguwo clan. The second was by one

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Wilson Jeche Patsanza ("Patsanza"), who claimed to belong to the Patsanza family of Nenguwo clan. The third was by one Tachiweyi Rupere Chigere, who claimed to belong to the Chigere family of Nenguwo clan. The fourth was by one Muneka Madamombe, who claimed to belong to the Madamombe family of Nenguwo clan. And the fifth was from one Tichawenyika Paradzi Chidembo ("Chidembo"), who claimed to belong to the Chidembo family of Nenguwo clan. All five claimed to be elders of Nenguwo clan. They deny the first respondent's contention that the elders of Nenguwo clan sat and chose him to be chief. They state that all elders, to a man, dissociated themselves from what they call "the uncustomary proceedings by Augustine Chagaresango and the District Administrator". They also state that the elders should meet and proceed to choose a chief after due consideration of the customary methods of choosing a chief.

The appellant states the following in paras 3(d) 5,6, and 7 of his replying affidavit:

" 3(d). *There is no way that Gideon Chagaresango could have chosen his own third born son to be chief in his lifetime.* No one could sanction such an abomination. This is the reason why all the elders have rallied as can be seen from their affidavits. *Even in his paragraph 12 Willard Chiwewe agrees that indeed it is I (who) was in the natural course of thing(s) (who) should have been chief ...*

5. *Ad Paragraph 15-17* (of first respondent's affidavit)

This is denied. When first respondent was introduced as chief, the whole clan was disgusted. The wishes of the clan were never considered. They were overridden. That is why the District Administrator cancelled the meeting at Tabanga.

6. *Ad Para. 18-19*

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The appointment of first respondent is not in accordance with the customary mores of the Nenguwo clan. It is a sham with no validity at all. *The High Court has powers of review and redress and where good cause is shown it can make an appropriate order.*

7. *Ad Para. 20*

The clan elders were agog with indignation at the appointment of first respondent. They voiced their feeling at Tabanga. But they were deceived into believing that further consultations were to be conducted. Up to now, they are livid at the breach of the customary ways of doing things in the said appointment. They are fully behind me in this application. It is the only way open to nullify this calmuny (calumny)" (my emphasis).

In connection with the affidavit of Chiwewe the appellant states that Chiwewe's knowledge of the matter should have been deposed by the second and third respondents. The second respondent later gave evidence in the court *a quo*. The appellant denies that he agreed to the first respondent being made a chief over him. In this connection, he stated that he would have never stood by whilst the first respondent was usurping his birthright. And that this would be against all known customary mores the ancestors have observed in dealing

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with this honoured institution (of chieftainship), break the succession line and create an evil precedent for all other houses which await chieftainship. He points out that it is admitted that his (appellant) father was next in line as chief and that it would have been improper to appoint him chief before his death. And further that chieftainship is not private property and that it cannot be handed over by will.

The appointment of chiefs is made in terms of s 3(1) and (2) of the Chiefs and Headmen Act [*Chapter 29:01*] ("the said Act") which reads:

"3 (1) The President shall appoint chiefs to preside over communities.

(2) In appointing a chief in terms of subs (1), the President *shall give due consideration to the customary principles of succession*, if any, applicable to the community over which such chief is to preside" (my emphasis).

The first issue which arose in this matter, at the instance of this court, is whether it is competent for the courts to inquire into an appointment which had been made by the President in terms of the above provisions of the said Act. This issue arose in the case *Rushwaya* v *Minister of Local Government & Anor* 1987 (1) ZLR 15 (S) whose facts were similar to those of this case. At pp 15 and 16 of the judgment Dumbutshena CJ put the issue as follows:

"At the hearing of this matter in the High Court the appellant based his application on two grounds. It was said that:

'1. the second respondent, a descendant of Chimire family, has no title or claim to the chieftainship;

2. the officials of the Ministry of Local Government and Town Planning who were responsible for conducting inquiries into this matter, had acted *mala fide*, and contrary to custom.'

The learned judge *a quo* did not examine these two issues in his judgment. He dismissed the application on the sole ground that:

'The appointment of a chief is made by the President in terms of the Chiefs and Headman Act No. 29 of

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> 1982 (the said Act), and it is my view that it is not competent for this court to inquire into the merits of this application at all. Section 66 of the Constitution of Zimbabwe provides in subs (1) that 'the President shall act on the advice of the Cabinet ...', and subs (3) of this section is to the effect that the court shall not, *inter alia* inquire into 'the manner in which the President has exercised his discretion.'

Mr *Gillespie*, for the appellant, and Mr *Chatikobo,* for the two respondents, are agreed that the reasons for dismissing the application are not correct. I shall give their reasons later."

The learned CHIEF JUSTICE went on to consider the submissions of counsel in the case and at pp 18F-19B of the judgment stated the following:

"It was Mr *Gillespie*'s submission, however, that the wording of subs 66(3) does *not preclude the investigation of the question whether the advice admittedly given was properly formulated*, nor is it forbidden to determine whether the decision is rational. I can only assume, without deciding the point, that Mr *Gillespie* is right in his interpretation of s 66(3) or the effect of subs (3) in relation to judicial review.

MUCHECHETERE JA

I agree with both counsel that the rules of judicial review apply in this case. The court can review the Minister's advice to the President on three grounds, namely, illegality, irrationality and procedural impropriety. See *Patriotic Front-ZAPU* v *Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (S) at 326B-G; 1986 (1) SA 532 (ZS) at 548E-I; [1986] LRC (Constitutional) 672 at 690c-691a; *Council of Civil Service Unions & Ors* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 950h-951d.

Mr *Gillespie* did not ask the court to investigate how the President exercised his discretion. What Mr *Gillespie was asking was whether the Minister - that is the first respondent - in formulating his advice to the President, acted on sound principle.* In this regard he confined his argument to procedural impropriety in that the Minister acted *mala fide* in giving advice to the President" (my emphasis).

I consider that the above applies to the present case. The appellant in this case is also not asking the court to investigate how the President exercised his discretion but whether the Minister and his officials in formulating their advice to the President acted on sound principle. He argues that they deliberately ignored or disregarded the customary principles of succession of the Nenguwo clan. It is therefore to be an examination as to whether the advice admittedly given to the President was properly formulated. *Mala fides* are also being alleged in that the second and third respondents are alleged to have colluded with the first respondent in the appointment. See also the case of *Chief Motlolegi & Anor* v *President of Bophuthatswana & Anor* 1992 (2) SA 480 (BA) where a similar provision in South Africa was considered by the Appellate Division of the Bophuthatswana High Court. The headnote of the judgment at p 481 reads:

"The designation of chiefs and acting chiefs of tribes in Bophuthatswana vests in the President of Bophuthatswana in terms of s 57(1) of the Bophuthatswana Constitution Act 18 of 1977 (B). The recognition of chiefs resides in the President in terms of s 36(1) of the Traditional Authorities Act 23 of 1978 (B). In recognising a chief, the President must, in terms of s 36(1) of the latter Act, do so 'with due observance of the law and customs of the tribe concerned'. *'Due' means 'proper'. Observance of the wrong law and customs cannot be proper or due observance of law and customs.* If there is a conflict as to what are the law and customs of the tribe concerned, the situation cannot be approached on the basis that both the wrong and the right laws are observed or that it is recognised that a conflict exists. *Proper steps should be taken to establish the correct law and customs and they and no other, should be duly observed. The conflict must accordingly be resolved before the President can properly exercise his powers*" (my emphasis).

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In our case, there should be "due consideration", that is "proper" consideration, of the law and custom of succession of the Nenguwo clan. The issue being raised by the appellant is that there was "no proper" consideration because the wrong customs and laws were taken into consideration and that there was collusion in the appointment.

In the circumstances, I consider that this review was properly before the court. I observe that this issue was not raised in the court *a quo*. Its consideration of the review was therefore proper.

MUCHECHETERE JA

On the facts in this case, I observe that certain issues are common cause. In the first instance, it is common cause on the affidavits that the chieftainship was due to be assumed by the Masarirambi family. The appellant's contentions that the Masarirambi family consisted of three houses is not disputed. It is also not disputed that the appellant's house is the first and that his father, Simon Shonhiwa Chagaresango, being the oldest member of the first house, was due to inherit the chieftainship before he died in November 1991. It is also not in dispute that the appellant was the first son of Simon Shonhiwa Chagaresango. Further, it is common cause that Gideon Chagaresango was the father in the second family and that the first respondent was his third born child. It has also not been disputed that the father of the third family, Nicholas Chagaresango, died in 1994.

The appellant claims that, according to the Nenguwo clan, chieftainship goes by seniority and that as the eldest of the children and the first child in the first house he had preference over the first respondent who was in any case a third born male in his own house. This means that he also by-passed his own brothers in his family. The first respondent, on the other hand, states that there are other considerations besides seniority which come into play but does not elaborate.

In Goldin and Gelfand's *African Law and Custom in Rhodesia* at p 46 the learned authors say:

"The territory occupied by the Shona-speaking people is divided into what is customarily referred to as clan areas (Chiefdoms) or *Nyika*. Each clan area (Chiefdom - *Nyika*) is under its chief, who was elected by the ruling or dominant clan living in it.

Whilst among the Ndebele, the chief (*induna*) is selected by a system of primogeniture in which, upon his death, the office is passed on to his eldest son, a more complicated one is adopted by the more numerous Shona-speaking. Their chiefs are chosen by a collateral system in which the position is passed from the head of one of the 'special families' to that of another. Each of these families is known as an '*imbahuru*' or 'royal family' and on the death of a chief (*ishe*, *mambo*) his successor is selected from the representatives of two, three or even four 'royal families' in the clan. Thus when a chief dies his office passes on to the representative of the next family until each has had its turn, when the cycle is repeated. It may take 50 years or longer before one of these families has another chance to provide a chief."

And in *Ruzane* v *Paradzai & Anor* 1991 (1) ZLR 273 (S) at p 279H-280A, MANYARARA JA said:

"Finally, it is a notorious fact that, unlike the Ndebele, the Shona have a very complicated system of succession which is correctly summarised by Harold Child *op cit* (*The History and Extent of recognition of Tribal Law in Rhodesia*) at p 6 (1 ed) as follows.

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'Younger brothers succeed to elder brothers until the succession has been held by each in turn, when it reverts to the son of the first chief and then to the sons of the collateral lines. There are tribal variations and the system is not always complete'."

MUCHECHETERE JA

See also *Ruzane* v *Paradzai & Anor* 1989 (1) ZLR 118 (H).

In my view, the above is in line with the appellant's contention that chieftainship in a Shona tribal system, and it is accepted that the Nenguwo clan is one such, generally goes by seniority. The above position was supported by Nyahunzvi who gave evidence for the appellant in the court *a quo*. He added to that that the person to be appointed had to be of good reputation and the right descent. His evidence on that issue went on as follows:

"Q. So the chieftainship is between the descendants of Gwata and the descendants of Muriva?

A. Precisely, your Lordship.

Q. And who are the elders of the clan, how do you determine the elders of the clan?

A. We are aware of the elders, we know these things. How can I fail to know.

Q. Is that everyone of the same age?

A. What actually happened your Lordship is that we also, we not only take into account the ages, we also look at the order in which the sons ... sons roughly that is to say, if chieftainship is to be involved in a certain house at any particular time *we look at the ages, that is to say we ensure that the first son gets the chieftainship. And then in the event that the chieftainship comes back to the same house we appoint the second son so that each of them has the chieftainship.*

...

Q. Right, sorry. *Having selected the house, they invite a person, a man from that house, to be the next chief to be according to age and reputation. It will be the oldest man unless he has that (bad) reputation?*

A. *Very well your Worship.* They also take into account the ages of the children, they take the order in which they were once appointed. Say maybe the first one was appointed, they will then appoint the second son. *But if the second son is not well behaved, or his is of he has a bad reputation* (sic)*, they go on to choose the next one.*

Q. *So it's bad, sorry, age, reputation and descent that is if the eldest person of good reputation himself is of somebody who was a chief will go to another person?*

A. *They take the other your Lordship, in fact they take into consideration the ages, in fact if it is found that the whole house have got sons of bad reputation none of them get to be a chief*" (my emphasis).

Nyahunzvi denied that he was present and that he approved of the first respondent being appointed chief. Under cross-examination, he stated that the appellant was supposed to be appointed as chief and not the first respondent and that the procedure used to appoint the first respondent was not the right one. The evidence of Nyahunzvi was generally supported by that of Chidembo and Patsanza who all indicated that the chieftainship should have been given to the appellant because he was the eldest son in the Masarirambi family. The evidence established the primacy of rotational succession and that no election or other consensus could deprive a candidate like the appellant whose fate had so worked that he was in line of

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succession.

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The first respondent and Chiwewe did not give any other customary variations, that is besides age, reputation and descent which are customarily taken into account when the appointment of a chief in the Nenguwo clan is under consideration. They did not allege that the appellant had a bad reputation and it is conceded that his descent is proper.

It is also clear that the first respondent was chosen by his father Gideon Chagaresango to replace him as chief. The first respondent and Chiwewe have not indicated any custom of the Nenguwo clan which allows a person to abdicate his own appointment in favour of his son. This would clearly be uncustomary because it would by-pass other legitimate claimants. As the appellant graphically put it, chieftainship is not private property which can be donated or willed to one's son. If one is unable or unwilling to accept an appointment it goes to the next claimant in line. This is also the consensus in the evidence of Nyahunzvi and Chidhembo.

From the above, it is, in my view, clear that the appointment of the first respondent as chief deviated from the ordinary customs and traditions of the Nenguwo clan in the appointment of their chief. It was, therefore, irregular. The respondents however seek to justify the deviation or irregularity by indicating that the elders in any event approved of the appointment - in other words approved the deviation. This fact is denied by the appellant who after the death of his father had become the elder of his house. His contention that he was not present when the elders of the family allegedly approved the appointment is, in a way, supported by Chiwewe who stated in his affidavit that the meeting which approved the appointment "was attended by the applicant (appellant) though he left the meeting before it ended for his own reasons" and the first respondent who stated in his affidavit that the appellant was not present when he was presented to the family as the new chief. It was paramount that the appellant in particular agreed to the irregular appointment because as the oldest son in the Masarirambi family he was the person most eligible to be appointed chief. That this had to be so is confirmed by Paradzai Nharaunda who said the following during cross-examination:

"It is not possible to hold a meeting excluding a particular eligible house because each and every house is trying to protect its interest because of jealousy."

The elders who deposed affidavits for the appellant and gave evidence deny that they attended meetings mentioned and approved the appointment. Some of them even sought to deny that the Masarirambi family was chosen to supply the chief.

One Denford Murimba ("Murimba"), the Assistant District Administrator, who was the official involved in the appointment, could not categorically say the appellant and the elders who testified in this case attended the family meetings and the meetings he called on the issue. All he

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could say was that the elders informed him that they approved of the appointment. He did not certify that all the houses had indeed approved the appointment. The first respondent himself admits that he was not present when the elders allegedly agreed to his father's indication that he should be chief in his place. All he says is that he was later informed of the decision. Further, no-one present at the alleged meeting gave evidence to support the allegation. In my view, this is where the learned judge *a quo* fell into error. There was no clear evidence to the effect that the whole family, including the house of the appellant, approved the substitution of the first respondent as chief in the place of his father.

It is also significant that Murimba admitted that he had no knowledge of the relevant customs and traditions of the Nenguwo clan and that his office did not verify as to whether these were or were not observed during the deliberations of the family. Under cross-examination the following occurred:

"Q. You mentioned that arising out of the meeting held at Chagaresango family on 25 December 1993, a name was submitted to your office.

A. That is right.

Q. What was that name?

A. Augustine Chagaresango.

Q. And thereafter a meeting was subsequently held in which you say you were verifying the name of this chief from the Chagaresango family?

A. Yes.

Q. And you were satisfied that the name Augustine Chagaresango was the proper name in which was chosen by the Chagaresango family?

A. We called for a meeting then we called the defendant, the respondent to stand up, that is Augustine Chagaresango. To our surprise, he looked far younger than most men there. We were then informed there was yet another elderly person from the Chagaresango family and that his name was Gideon Chagaresango, who had originally been given the post of chieftainship by the Chagaresango people ...

We further asked which person was suitable and we were supplied with the information that Gideon Chagaresango was the person that had been appointed by the Masarirambi people but then, due to old age and ill health he was not in a position to take up the chieftainship. *He therefore decided that his own son, who is Augustine Chagaresango should take over. We even asked that is Gideon Chagaresango if he at all wanted his son Augustine Chagaresango to assist him in running the Nenguwo area. But that was not the case, his reply was that he wanted him to take over as chief. We then went on to very (verify) with the elders from the Chagaresango if they were satisfied with what Gideon had said. And they said it was in accordance with their desire.*

...

Q. Were you aware before you went to this meeting of the structure of the Chagaresango family?

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A. I was not aware of the structure.

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...

Q. Did you know whether the whole of the Chagaresango family was present at the meeting [called by the District Administrator's Office]?

A. I do not know them personally. I cannot comment.

Q. Did you not foresee that perhaps certain members of the Chagaresango family who might have an interest in the matter might not have been available?

A. I think I mentioned earlier on, my Lord, that we expected something of that sort to occur and I also went on to give an example of what happened when deciding which house was to be of the chieftainship [objections were raised and resolved].

Q. In other words, your office decided to proceed nonetheless, all you were concerned with was that the formal aspect of the meeting be concluded?

A. How was I going to tell that there were some people who were not present? After all I do not know them personally.

...

Q. I put it to you that in fact the choice of the first respondent was that of Gideon Chagaresango and not of the Chagaresango family. What do you say?

A. *The DA's office did not have anything to do with how the individual from the Chagaresango family was appointed, all the DA's office was concerned with was the name of the particular individual and that was all.*

Q. You did not care that the traditions and customs of the Nenguwo people had been followed, all you wanted was a name: is that what you are saying?

A. *I know nothing about the traditions and their norms in fact that is best known to the people of the Chagaresango who were to provide a particular individual for themselves.*

Q. But *are you not charged with the functions as part of your office, the District Administrator's office, to find out that your recommendation, in your recommendation in your office of who is to be chief that the customs and traditions of Nenguwo people have been followed and that you should try and satisfy yourself that that has been done?*

A. *That is the position, that is why we held meetings in order to verify which particular individual was suitable.*

Q. But you were indifferent whether in fact those meetings were achieving the purpose for which you were holding them?

A. I believe the DA's office acted in its best capacity when handling the issue" (my emphasis).

From the above, it is, in my view, clear that there was no due consideration of customary principles of succession before the fourth respondent made his recommendation to the President.

In the result, the appeal is allowed with costs. The costs are to be paid by the second and fourth respondents jointly and severally, the one paying the other to be absolved. The order of the court *a quo* is set aside and the following is substituted instead that:

1. it is hereby declared that the customary principles of succession to the

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Nenguwo chieftainship were not given due consideration in the appointment of the first respondent as Chief Nenguwo.

2. the fourth respondent forthwith make a recommendation to the President for the removal of the first respondent from the chieftainship of the Nenguwo clan.

3. the second, third and fourth respondents cause a meeting of the elders of the Nenguwo clan to be convened to investigate and deliberate on the customary principles of succession to the Nenguwo chieftainship and thereafter, to elect a candidate for appointment as Chief Nenguwo.

4. the conclusions of the meeting of the elders of the Nenguwo clan be recorded and be forwarded to the fourth respondent and form his basis for a recommendation to the President on the appointment of the next Chief Nenguwo.

5. the respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Kawonde & Partners, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

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S *v* KUIPER 2000 (1) ZLR 113 (SC)

Citation	2000 (1) ZLR 113 (SC)
Case No	Judgment No. S-140-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Sandura JA
Heard	November 25, 1999
Judgment	January 7, 2000
Annotations	None

Criminal appeal

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Flynote

Appeal - remittal - for further evidence - grounds upon which may be remitted - evidence emerging after trial and which is likely to be true - appeal court hearing evidence and deciding matter

Headnote

The appellant was convicted of common assault. He appealed against conviction. A few days before the appeal was heard he filed an application in the Supreme Court for an order setting aside the conviction and sentence, and remitting the matter to the trial court so that the appellant could lead further evidence. The further evidence which he sought to have introduced consisted of a video recording which he said would corroborate his version of what happened.

Held, that the requirements which the applicant must satisfy are well established. There must be a satisfactory explanation of why the evidence was not led at the trial; there must be a *prima facie* likelihood that the evidence is true; and the evidence must be materially relevant to the outcome of the trial. Where the appeal court is satisfied that those grounds exist, it may either remit the matter or hear the evidence itself and decide the matter on the basis of the new evidence.

Held, further that these requirement had been satisfied in the present case. There was a satisfactory explanation for not leading this evidence at the trial. The police had taken the video recorder after the incident and the prosecutor had told the appellant that the video tape had been wiped clean. It was only after the video recorder was returned to the appellant after the completion of the trial, that the appellant discovered that it had not been wiped clean. There was a *prima facie* likelihood that this evidence was true and the evidence was materially relevant to the outcome of the trial.

Held, further, that the court should itself view the new evidence.

Held, further, that on the basis of this evidence the conviction and sentence should be set aside.

Cases Considered

Cases cited:

R v *Difford* 1937 AD 370

R v *M* 1946 AD 1023

S v *de Jager* 1965 (2) SA 612 (A)

S v *Mutters & Anor* 1987 (1) ZLR 202 (S)

S v *Osborne* 1989 (3) ZLR 326 (S)

Case Information

Z F Joubert SC, with him *E T Matinenga*, for the appellant

H S M Ushewokunze, for the respondent

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Judgment

Sandura JA: The appellant was charged with common assault and appeared before a senior magistrate at Karoi magistrates court. He pleaded not guilty but was convicted and sentenced to a fine of five hundred dollars or, in default of payment, thirty days' imprisonment with labour. He appealed against the conviction but not against the sentence.

The background facts are as follows. The appellant and the complainant ("Julie") were husband and wife until their marriage was dissolved in November 1996. When they divorced they had only one child, a daughter aged about sixteen months. The custody of that child was granted to Julie subject to the appellant's right of access.

At the relevant time, Julie was thirty-two years old and lived with her mother ("Hazel") and her stepfather ("Brian") on a farm in the Karoi District in Zimbabwe. The appellant, who was fifty-six, lived in Johannesburg in South Africa.

At about 8 a.m. on 5 January 1997, the appellant arrived at the farm intending to see his daughter. He had in his possession a video camera ("the camera") because he wanted to videotape his daughter.

As the child was having breakfast in the kitchen, the appellant started videotaping her. Julie objected to this and told the appellant to wait until the child had finished eating breakfast. She added that the pictures should then be taken, not inside the house, but outside and under her supervision.

In the course of the argument which ensued, Julie took possession of the camera in the kitchen and went to the lounge. The appellant followed her in order to retrieve the camera from her. What happened thereafter was not common cause.

According to Julie, what happened was as follows. She took away the camera because she objected to the appellant videotaping the child whilst she was eating breakfast. When she entered the lounge, the appellant followed her, carrying the child. After throwing the child onto a sofa, he advanced towards her, stamped on her foot with his booted feet and pushed her backwards against a coffee table behind her. She fell onto the floor on her back. As she lay on her back, the appellant bent over her and assaulted her with clenched fists on her face and chest. Acting in self-defence, she struck the appellant's face with the camera several times. Hazel then came into the lounge and took away the child. Shortly thereafter, Brian came in and pulled the appellant away. Julie then got up and struck the appellant's face with clenched fists several times before the appellant was taken out of the house by Brian.

It was Julie's evidence that when she followed the appellant outside the house she had a scuffle with him near his motor vehicle as she tried to take the camera from him. She finally succeeded in doing so after Brian and

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SANDURA JA

Brian's gardener came to her assistance. She said that she took the camera because, having used it in attacking the appellant in self-defence, she required it as evidence of that fact.

On the other hand, the appellant's version was as follows. When Julie took the camera from the kitchen into the lounge he followed her in order to retrieve it from her. She refused to hand it over to him and started moving backwards as he advanced towards her. As she moved backwards, she tripped over a coffee table and fell onto the floor on her back. As she fell, the appellant grabbed the camera from her and was about to leave the lounge when Brian arrived and assaulted him with clenched fists all over his body. The appellant then left the house with the camera, which all along had been switched on and had recorded what had been said. He went to his motor vehicle which was parked outside.

Shortly thereafter, Julie followed the appellant and talked to him at the motor vehicle. He told her that the camera had recorded what had happened. It was only then that she showed renewed interest in the camera and called out to Brian, informing him that everything had been recorded. Brian and his gardener then came to the motor vehicle and assisted Julie in forcefully taking the camera from the appellant. the appellant then went to the police station and reported the matter.

He later returned to the farm with a policeman in order to retrieve the camera, but discovered that Brian had taken it to a neighbouring farm. He and the policeman then went to that farm and collected the camera. They later returned to the police station where it was decided to charge the appellant with common assault.

At the trial, the appellant denied having assaulted Julie. He stated that on the day in question he was not in a position to risk being involved in any assault because he had a fractured jaw. He denied that it was Julie who assaulted him and maintained that it was Brian who did so.

The senior magistrate disbelieved the appellant and found him guilty. The question which now arises is whether that decision was correct.

A few days before the appeal was heard, the appellant filed an application in this court seeking an order setting aside the conviction and sentence, and remitting the matter to the trial court so that the appellant could lead further evidence. That evidence related to the events recorded by the camera during the altercation on the day in question. The appellant contended that the evidence corroborated his version of what happened. The application was opposed by the respondent.

The basic requirements which must be satisfied by an applicant in an application of this nature were set out by Holmes JA in *S* v *de Jager* 1965 (2) SA 612 (A). At 613A-E, the learned Judge of Appeal said:

"This court can, in a proper case, hear evidence on appeal; see *R* v *Carr* 1949 (2) SA 693 (AD); but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the

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hearing of the further evidence, as was done, for example, in *R* v *Mhlongo & Anor* 1935 AD 133. However, it is well settled that it is only in an exceptional case that the court will adopt either of the foregoing courses. It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. Accordingly, this court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the court's reluctance to re-open a trial. They may be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial. See *R* v *de Beer* 1949 (3) SA 740 (A) at p 748; *R* v *Weimers & Ors* 1960 (3) SA 508 (A) at pp 514-5; *R* v *Madikane* 1960 (4) SA 776 (A) at p 780; *R* v *Nkala* 1964 (1) SA 493 (A) ..."

Subsequently, the requirements set out above were quoted with approval by this court in *S* v *Mutters & Anor* 1987 (1) ZLR 202 (S) at 204G-205B; and *S* v *Osborne* 1989 (3) ZLR 326 (S) at 336C-G.

Applying the test set out by Holmes JA to the facts pertaining to the appellant's application, we were satisfied that the appellant had made out a good case for either this court hearing the further evidence, or setting aside the conviction and sentence and remitting the case to the trial court for the hearing of the further evidence.

In the first place, the appellant gave a sufficient explanation why the further evidence which he sought to lead had not been led at the trial. This is what he said in his founding affidavit:

"On my arrival at the magistrates court, I went to the prosecutor's office together with my legal representatives. I was then represented by Advocate Carter. I then saw that the prosecutor was, together with Mrs Ribnick (Julie), listening to a sound recording by using a set of headphones at the time. The prosecutor indicated that the entire contents of the videotape had been erased, including the sound recording. The battery of the camera also became flat, so that there and then the tape contents could not be checked by anybody. I reluctantly accepted the assurance of the prosecutor that the tape was wiped clean. I believed at the time that the stepfather (Brian) had purposely wiped the tape clean in order to destroy the evidence which would have supported my version. I was a little reluctant simply to accept the word of the prosecutor. My advocate, the late Mr Carter, however, trusted the word of the prosecutor that the tape was wiped clean. Upon his assurance that we would not have been misled in any way, I reluctantly accepted that the tape could contain no evidence although I was hopeful that it still might have done. As will emerge hereunder, the prosecutor, either in error or on purpose (which I do not insist was the case), misinformed us as to the fact that the tape was wiped clean. In fact, it contains crucial evidence which I will advert to hereunder and which I

submit would have had a significant bearing on the finding that the trial court made in this case."

At this stage, I think that it should be pointed out that from the time the police took the camera from Brian to the time the appellant saw it in the prosecutor's office the appellant had no access to it. It was only after the completion of the trial that the camera was returned to the appellant. Thereafter, the appellant discovered that, contrary to what the prosecutor had said at the

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magistrate's court, the videotape had not been wiped clean.

Secondly, the appellant also satisfied the second requirement laid down by HOLMES JA in *S* v *de Jager supra*, i.e. that there be a *prima facie* likelihood of the truth of the evidence which it is sought to lead. As indicated earlier, the further evidence which the appellant intended leading consisted of a recording of what happened and what was said when the altercation between the appellant, Julie and Brian took place on the day in question. In this regard, counsel for the respondent did not challenge the genuineness of the recording.

Thirdly, it is clear that the final requirement, i.e. that the further evidence which it is sought to lead should be materially relevant to the outcome of the trial, was also satisfied. In this regard, the appellant averred that the further evidence which he intended leading supported his contention that on the day in question he did not assault Julie. After viewing the videotape and listening to those parts of the audio recording which had not been erased, we formed the opinion that the further evidence which the appellant intended to adduce was materially relevant to the outcome of the trial. That opinion was subsequently strengthened by the contents of the transcript of the audio recording which was made available to us after the hearing of the appeal.

In the circumstances, the appellant made out a good case for leading the further evidence. However, instead of setting aside the conviction and sentence and remitting the matter to the trial court for the hearing of the further evidence, we decided to receive the further evidence and then determine the appeal in the light of that evidence. We adopted that course in order to achieve an early final determination of the matter, and with the concurrence of counsel.

Having said that, I now wish to determine whether, in view of the further evidence before us, the appellant was properly convicted. I do not think so.

It is clear from the transcript of the audio recording that during the relevant time neither Julie nor Brian ever alleged that the appellant had perpetrated the alleged assault by means of clenched fists, or that he had stamped on Julie's foot with his booted feet. According to the transcript, the only allegation made by the two witnesses during the altercation was that the appellant had "thrown her (Julie) over the table". Unless one interprets this allegation to mean that the appellant had pushed Julie against the table, it was not even

made by Julie when she gave evidence at the trial. Nevertheless, it is clear from the transcript that the allegation that the appellant had thrown Julie over the table was repeatedly denied emphatically and unhesitatingly by the appellant.

It does, therefore, seem to me that the further evidence adduced by the appellant tends to support his contention that he did not assault Julie as alleged or at all.

However, quite apart from the effect of the further evidence adduced on appeal, I do not think that the magistrate was justified in rejecting the appellant's version.

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The test to be applied before the court rejects the explanation given by an accused person was set out by Greenberg J in *R* v *Difford* 1937 AD 370. At 373, the learned judge said:

"... no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal ..."

Similarly, in *R* v *M* 1946 AD 1023, Davis AJA said the following at 1027:

"And, I repeat, the Court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

In my view, the explanation given by the appellant, i.e. that as he advanced towards Julie she walked backwards, tripped over the coffee table, and fell on her back, was not improbable. It seems to me that what was highly improbable was that Julie was assaulted by the appellant with clenched fists on her face and chest. In her statement to the police Julie said:

"... the accused was pinning me down and at the same time delivering to me a flurry of blows."

If that had occurred, and bearing in mind that the appellant is a much bigger person than Julie (he is six feet tall and she is only five feet tall), Julie would have received serious injuries. And yet the doctor who examined her only observed bruises on the left forearm, left thigh and right foot, as well as a tender left shoulder. It is of great significance that the doctor did not observe any injuries on Julie's face and chest.

In addition, it was not improbable that Julie might have sustained the minor injuries observed by the doctor when she forcefully dispossessed the appellant of his camera as the appellant resisted that unlawful act which was carried out near the appellant's motor vehicle parked outside Brian's house. In any event, the doctor conceded that the injuries could have been caused by a fall or by bumping against furniture.

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Furthermore, there were other unsatisfactory features in the evidence of the State witnesses. I shall refer to only two of them because they are the most important ones.

The first unsatisfactory feature was the reason given by Julie for the desire to retain the appellant's camera in her possession. She said that she required the camera as evidence of the fact that she had used it in attacking the appellant in self-defence. In my view, that was a ridiculous explanation.

However, the real reason, in my opinion, came out when she was cross-examined, as the following question and answer show:

"Q. Your allegation that (the) accused further assaulted you after (he) caught up with you at his car. Did you have his video camera with you?

A. No. He had it and I was demanding ... the video camera. He said he would turn (the) evidence against my stepfather and lodge an assault charge against him. *It* (the camera) *was of evidential value to me*" (emphasis is

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mine).

Julie's answer clearly indicates that the real reason for taking the camera from the appellant was to deprive him of the evidence on the videotape. After all, he had told Julie that the whole incident had been videotaped.

The second unsatisfactory feature in the State evidence was that shortly after Julie and Brian had taken the camera form the appellant, Brian took it to a neighbouring farm. It was later collected from that farm by a policeman. Surprisingly, the State gave no explanation for Brian's conduct.

In my view, these two features strengthen the suspicion that it must have been Julie and Brian who attempted to erase the videotape. If that is correct, they could only have done that because they knew that the videotape would provide evidence which would be damaging to their case.

In the circumstances, I am satisfied that the appellant's conviction was not justified, having regard to the evidence.

The conviction and sentence are, therefore, set aside.

GUBBAY CJ: I agree.

MCNALLY JA: I agree.

Musunga & Associates, appellant's legal practitioners

LUPU *v* LUPU 2000 (1) ZLR 120 (SC)

Citation	2000 (1) ZLR 120 (SC)
Case No	Judgment No. S-138-99
Court	Supreme Court, Bulawayo
Judge	Gubbay CJ, Ebrahim JA and Sandura JA
Heard	November 29, 1999
Judgment	January 7, 2000
Annotations	None

Civil appeal

Flynote

Contract - performance - impossibility - principles - when a contract becomes a nullity because of impossibility

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of performance

Family law - husband and wife - divorce - consent paper following - immovable property awarded to wife, "subject to" her paying a portion of the outstanding bond on house - effect - agreement made in consent paper becoming impossible of performance - effect

Headnote

The parties in this matter were husband and wife. Following their divorce, it was ordered that their proprietary rights were to be governed by a consent paper previously signed by them. The consent paper stated, among other things, that the wife was to take the matrimonial home, "subject to the [mortgage] bond to the extent of $70 000" as at the date of the agreement. The balance was to be met by the husband. The total amount outstanding at the date of the agreement was $168 000.

The consent paper also provided that the husband was to retain the wife on the medical aid scheme provided by his employer, a bank. The scheme was intended for the bank's employees, spouses and children, but did not cover former spouses. Nonetheless, the wife continued to receive benefits from the scheme, but because she did not possess a medical aid membership card, she had to apply to the medical aid society for written authority to use the husband's medical aid. When the divorce was subsequently brought to the attention of the medical aid society, it informed the husband that the wife was no longer entitled to benefits under the scheme.

For nearly 2 years, the parties paid their own monthly instalments on the mortgage bond. The wife then demanded that the husband pay off the amount outstanding on his account as she wanted the property transferred to her. He refused, claiming that the agreement entitled him to discharge his liability by monthly instalments. He sought a declaratory order to this effect. The wife applied for an order directing the husband to pay off the balance as a lump sum and to give her a medical aid card of her own or arrange for one to be issued. The husband claimed that it was impossible for him to carry out his obligation in respect of the medical aid.

Held, that the words "subject to" meant that the benefit the wife was to obtain in respect of the house was subject to the burden of the existing mortgage bond to the extent of $70 000, while the balance was to be paid by the husband. There was nothing in the consent paper to suggest that either party was obliged to pay off his or her part of the mortgage bond in a lump sum. This view of the consent paper was confirmed by the subsequent conduct of the parties.

Held, further, that the agreement that the wife should benefit from the husband's medical aid scheme had become impossible of performance. A contract is a nullity if it is impossible of performance. This principle has four qualifications, which were met in this case. Firstly, the impossibility was absolute, as opposed to probable, in that there was not just a likelihood that the contract would be impossible to perform. Secondly, the impossibility must be absolute, as opposed to relative. Neither the husband nor anyone else could carry out his obligations under the agreement. Thirdly, the impossibility was not the fault of either party. Fourthly, there was no contrary common intention of the parties. They both genuinely agreed that what was agreed

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upon could be implemented. Consequently, that part of the agreement could not be enforced.

Cases Considered

Cases cited:

Macduff & Co Ltd v *Johannesburg Consol Invstm Co Ltd* 1924 AD 573

Morrison, Ex p, in re *Morrison* v *Morrison* (1910) 102 LT 530

Rossouw v *Haumann* 1949 (4) SA 796 (C)

Case Information

W Sansole, for the appellant

T A Cherry, for the respondent

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which granted the respondent's application for a declaratory order with costs, and dismissed the appellant's cross-application with costs.

The facts are as follows. Prior to 16 June 1995, the parties were husband and wife. When they divorced on 16 June 1995, it was ordered that their proprietary rights were to be governed by a consent paper previously signed by them. The respondent was then a bank manager employed by the Standard Chartered Bank ("the bank").

Only two paragraphs of the consent paper are relevant for the purposes of this appeal. They are paras 1 and 4.

The relevant part of para 1 reads as follows:

" 1. That the defendant (the appellant) shall be awarded the following items of movable and immovable property:

1.1 Stand No. 1494 Khumalo Township of Bulawayo Township Lands, situate in the District of Bulawayo. The defendant (the appellant) takes the property subject to the Bond to the extent of $70 000 as at the date of signing this document.

It is hereby recorded that the balance of the mortgage calculated as at the date of signing this agreement is to be met by the plaintiff (the respondent)."

At the relevant time, the total amount outstanding on the mortgage bond was $168 000. As the sum of $70 000 was to be paid by the appellant, the balance of $98 000 was to be paid by the respondent.

Paragraph 4 of the consent paper reads as follows:

" 4. Further, it is recorded that the plaintiff (the respondent) shall retain the defendant (the appellant) in his medical aid."

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Following the dissolution of the marriage, the parties agreed to split the mortgage bond into two and, with the concurrence of the building society concerned, two separate mortgage bond accounts were created, one in the appellant's name in respect of the sum of $70 000 and the other in the respondent's name in respect of the sum of $98 000. Thereafter, for about twenty months, each party paid his/her monthly instalment into his/her account without any complaint. The respondent was the registered owner of the property in question.

Then, suddenly the appellant demanded that the sum outstanding on the respondent's account be paid off immediately as she wanted the property to be transferred to her. She alleged that by making that demand she was merely enforcing the provisions of para 1.1 of the consent paper.

Whilst the respondent was prepared to make arrangements for the transfer of the property to the appellant, he refused to make a lump sum payment of the balance outstanding on his account. He maintained that in terms of para 1.1 of the consent paper he was entitled to discharge his liability by means of monthly instalments.

As the parties could not agree on the interpretation of para 1.1 of the consent paper, the respondent filed a court application seeking a declaratory order to the effect that the provisions of the paragraph in question did not require him to make a lump sum payment of the balance outstanding on his account. The application was opposed by the appellant who filed a cross-application.

In that cross-application, the appellant sought an order directing the respondent to: (a) pay off the balance on his account and transfer the property to her; and (b) give her a medical aid card or arrange with his medical aid society to issue a medical aid card to her. The cross-application was opposed by the respondent.

The learned judge in the court *a quo* granted the declaratory order sought by the respondent but dismissed the cross-application. Aggrieved by that decision, the appellant appealed to this court.

There are two issues to be determined in this appeal. The first issue concerns the interpretation of the provisions of para 1.1 of the consent paper, the question being whether those provisions require the respondent to make a lump sum payment of the balance on his account. The second issue concerns the provisions of para 4 of the consent paper, the question being whether the respondent should be directed to give a medical aid card to the appellant or arrange with his medical aid society to issue a medical aid card to her.

I now proceed to deal with the first issue. As already indicated, in terms of the consent paper the property was awarded to the appellant "subject to the Bond to the extent of $70 000". The phrase "subject to" has been judicially

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interpreted in a number of cases and its meaning depends upon the context in which it is used.

In an old case, Re *Morrison, Morrison* v Morrison (1910) 102 LT 530, referred to in *Words and Phrases Judicially Defined* Vol 5, Parker J said the following at p 531:

"In this case, the testator has, by his will, given to his trustees a sum of £270 000, subject to death duties, upon trust to invest the same and deal with the investment in the manner directed in his will. Now, when a property or legacy is given subject to duties, or subject to death duties, it appears to me that it may mean one of two things: it may mean that the testator in describing the property is describing the legal incidents to the property and connoting in his own mind the fact that the duties will have to be paid, or the intention may be to subject the subject of the gift to some burden in favour of somebody else which would otherwise be borne."

In the present case, it seems to me that the second meaning referred to by PARKER J is more appropriate than the first. The parties clearly agreed that the appellant would take the property together with the burden of the existing mortgage bond to the extent of $70 000, whilst the balance of $98 000 was to be paid by the respondent.

In my view, there is nothing in para 1.1 of the consent paper to suggest that either party had to pay off his/her part of the mortgage bond in a lump sum. Had that been the intention of the parties, it would have been very easy to say so. In addition, the parties would have stated by what date the money had to be paid.

The conclusion I have reached is strengthened by what happened after the dissolution of the marriage. The parties agreed to split the mortgage bond into two and, with the concurrence of the Building Society concerned, two separate mortgage bond accounts were created. One account was in the appellant's name in respect of the sum of $70 000, and the other was in the respondent's name in respect of the sum of $98 000. Subsequently, for more than twenty months, both parties paid their monthly instalments into their respective accounts. During that period, the appellant did not call upon the respondent to pay off the balance on his account, nor did she give him a date by which the sum had to be paid.

In the circumstances, I am satisfied that the learned judge in the court *a quo* correctly interpreted the provisions of para 1.1 of the consent paper.

I now wish to deal with the second issue raised in this appeal. This concerns the provisions of para 4 of the consent paper. That paragraph provided that the respondent was to retain the appellant on his medical aid scheme. When the parties signed the consent paper the respondent was a member of the bank's medical aid scheme ("the medical aid scheme") which was intended for the bank's employees, as well as their spouses and children. At the time of signing the consent paper the parties overlooked, or were unaware of, the

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fact that the medical aid scheme did not cover former spouses of the bank's employees.

Nevertheless, after the dissolution of the marriage, the appellant continued receiving benefits from the medical aid scheme. She, however, complained that every time she required medical

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treatment she had to go through a cumbersome procedure, because she did not possess a medical aid card. She averred as follows in her Dcross-application:

"The applicant (the respondent) has refused to give me written authority or a card to facilitate my use of his medical aid. Each time I need to avail myself of his medical aid, I have to go through a process of writing to the medical aid society for written authority to use the applicant's medical aid. It would be a simple matter if the applicant (the respondent) were to arrange for a card to be issued to me outright, so that I may use it whenever the need arises. Accordingly, ... I ask that the court direct the applicant (the respondent) to give me written authority or [a] medical aid card for my use at all times."

It is pertinent to note, however, that the respondent did try to accommodate her as far as the medical aid card was concerned. Unfortunately, this was very much to her detriment because as soon as the bank's medical aid society became aware that the parties had divorced, it informed the respondent that the appellant was no longer entitled to any medical benefits under the scheme.

In the circumstances, it was submitted on behalf of the respondent that he could not carry out the obligation set out in para 4 of the consent paper because it was impossible for him to retain the appellant on the medical aid scheme as previously agreed. I must add that the allegation that after the dissolution of the marriage the appellant was no longer entitled to the benefits of the medical aid scheme was not challenged by the appellant. Whilst the respondent is no longer employed by the bank, having retired some time ago, he remains a beneficiary of the medical aid scheme.

The issue which arises from the submission made on behalf of the respondent is what happens when an agreement concluded by the parties becomes impossible of performance. That issue has been considered in a number of cases.

In *MacDuff & Co Ltd* v *Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 600, Solomon JA commented as follows:

"Now it is a clear principle of our law that a contract is discharged if it has become impossible of performance after it has been entered into: *Peters Flamman & Co* v *Kokstad Municipality* (1919 AD 427)."

That principle was subsequently applied in *Rossouw* v *Haumann* 1949 (4) SA 796 (C). In that case, the parties concluded an agreement which was later made an order of court by consent. The agreement provided, *inter alia*, that the parties would share equally the cost of constructing certain works for the protection of their respective farms, and that certain named engineers should be requested to formulate a scheme which was not to cost more than

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a certain agreed amount. When the engineers reported that the amount required to furnish the scheme would far exceed the amount agreed upon by the parties, Haumann started certain works which were in direct conflict with a certain clause in the consent paper. Rossouw then sought an interdict restraining Haumann from proceeding with the works. Haumann opposed the application and contended that he was no longer bound by the agreement because it had become impossible of performance. The court held that as the parties agreed that the

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agreement was impossible of performance, Rossouw no longer had any right under the agreement. His application for an interdict was, therefore, dismissed.

Finally, in *The Law of Contract in South Africa* 3 ed by RH Christie, the learned author has this to say at pp 101-102:

"The Roman law principle that a contract is a nullity if at the time it was made it was impossible of performance forms part of our law.

> 'By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D50.17.185).'

But the principle thus stated may easily be misunderstood and requires immediate qualification in four respects. First, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Second, the impossibility must be absolute as opposed to relative. If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. Third, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. Fourth, the principle must give way to the contrary common intention of the parties. This intention may be expressed, as when a seller expressly represents or promises that the *merx* exists. If it is found not to have been in existence at the time the contract was made, he will be liable for damages for breach of his promise or for his false representation if fraudulent or negligent. Or the common intention of the parties may be implied, as in the case of the sale or lease of a *res aliena*. The seller or lessor impliedly undertakes to deliver the property or to pay damages if he is unable to do so."

I am entirely satisfied that the learned author has accurately stated the law on this topic.

Applying the principles set out above to the facts of the present case, I am satisfied that the agreement set out in para 4 of the consent paper is a nullity because at the time it was concluded and made part of the court order it was impossible of performance.

I am also satisfied that the impossibility of performance of the agreement in this case satisfied all the requirements laid down by Professor Christie.

First, the impossibility was absolute, as opposed to probable. It was common cause that the medical aid scheme did not cover the former spouses of the bank's employees. It was, therefore, absolutely certain that the respondent could not retain the appellant on the medical aid scheme.

Second, the impossibility was absolute, as opposed to relative. What the

respondent promised to do (ie retain the appellant on the medical aid scheme) was not something which, in general, could be done. It could only be done if the appellant were the respondent's wife, which she no longer was after the dissolution of the marriage.

Third, the impossibility was not the fault of either party. This was common cause. Neither party, therefore, could be said to have caused the impossibility.

Lastly, the parties did not have any contrary common intention. They genuinely believed that

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what they had expressly agreed upon could be implemented.

In the circumstances, the learned judge in the court *a quo* correctly dismissed the appellant's cross-application.

However, in the view of the fact that the respondent had undertaken an obligation to retain the appellant on the medical aid scheme, the appellant should, perhaps, have made an application for the amendment of para 4 of the consent paper in order to remove the impossibility referred to above. This she can still do if so advised by her legal practitioner.

The appeal is, therefore, dismissed with costs.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Sansole & Senda, appellant's legal practitioners

Joel Pincus, Konson & Wolhuter, respondent's legal practitioners

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ZIMBABWE NEWSPAPERS (1980) LTD *v* NDLOVU 2000 (1) ZLR 127 (SC)

Citation	2000 (1) ZLR 127 (SC)
Case No	Judgment No. S-142-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 18, 1999
Judgment	January 13, 2000
Annotations	None

Civil appeal

Flynote

Employment - Labour Relations Tribunal - proceedings before - whether Tribunal entitled to raise matter not relied on by either party - matter affecting validity of proceedings - Tribunal entitled to raise such matter

Headnote

The respondent had been dismissed after disciplinary proceedings had been held in terms of a code of conduct. The code had not been registered as required by s 101(1) of the Labour

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Relations Act [*Chapter 28:01*] and was thus not valid or binding. When the matter came before the Labour Relations Tribunal, neither party raised the issue of the validity of the code of conduct. The Tribunal *mero motu* decided that as the code of conduct was invalid, because it had not been registered, the dismissal of the respondent was also invalid.

Held, that the Tribunal was quite correct in raising itself the issue of the invalidity of the code of conduct and in setting aside the disciplinary proceedings on that ground. The Tribunal could not be expected to ignore the fact of the invalidity of the proceedings simply because the parties had not raised the issue.

Cases Considered

Cases cited:

Musara v *Zinatha* 1992 (1) ZLR 9 (H)

S v *Prinsloo* 1970 (3) SA 550 (O)

Case Information

L T Biti, for the appellant

E Marondedze, for the respondent

Judgment

Sandura JA: This is an appeal against a judgment of the Labour Relations Tribunal ("the Tribunal") which allowed the respondent's appeal with costs.

The matter has had a long history, but fortunately it is not necessary to state that history in any great detail.

The relevant facts are as follows. The respondent ("Kalani") was employed by the appellant ("the company") as a circulation manager. The company had a code of conduct which was registered in June 1992 ("the 1992 code").

Subsequently, the company amended the 1992 code, but it appears that the

amended code ("the 1994 code") was not registered with the Registrar of Labour Relations.

Nevertheless, acting in terms of the 1994 code the company charged Kalani with gross incompetence and inefficiency in the performance of his duties. After several disciplinary hearings held in terms of the 1994 code, Kalani was found guilty and was dismissed. He then appealed to the Tribunal and heads of argument were filed by both parties.

In the heads of argument filed on behalf of Kalani, a number of points *in limine* were raised. They included the following:

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"Also the appellant (Kalani) is going to challenge the validity of the code of conduct on the following further grounds:

(a) the code appears not to have been registered because it does not bear a stamp by the Labour Relations Department. Should that be the case then the code is not valid. The onus is on the employer (the company) to prove the validity of its code."

The heads of argument filed on behalf of the company dealt with that issue as follows:

"6.1.1. A submission is made in the form of an objection *in limine* to the effect that the respondent's (the company's) code of conduct is invalid. Now that code has been registered and is therefore a binding document enjoying (the) protection of the Labour Relations Act [*Chapter 28:01*].

6.1.2. In addition this court can only presume by operation of law that it was validly registered. The *maxim omnia praesumunter* (*sic*) *rite esse aita* (*sic*) is part of our law. See *Chidoda* v *Mhangaki* (*sic*) 1996 (2) ZLR 105 (S). In fact, as a question of fact the code indeed was registered validly."

When the matter subsequently came before the Tribunal, the legal practitioner who appeared for Kalani was not the one who had prepared the heads of argument. He informed the Tribunal that he was not persisting with the points *in limine* raised in the heads of argument, and proceeded to deal with the merits of the appeal. Thereafter, counsel for the company presented his argument.

After both counsel had presented their arguments on the merits, the Tribunal was satisfied that the 1994 code had not been registered and that in terms of s 101(1) of the Labour Relations Act [*Chapter 28:01*] it was not valid and binding. As it was common cause that the disciplinary proceedings against Kalani had been conducted in terms of the 1994 code, the Tribunal allowed Kalani's appeal with costs and set aside his dismissal. Aggrieved by that decision, the company appealed to this court.

Although the 1992 code was not part of the record before us, the learned Deputy Chairman of the Tribunal quoted the relevant section of the code in his judgment. I should add that the 1994 code was part of the record.

Looking at the section which deals with appeals in each code, it is clear that there are substantial differences between the two codes. However, for the

purpose of deciding the issue before me, it is not necessary to set out the differences.

Counsel for the company submitted that the Tribunal should have determined the matter on the merits, not on the basis of the invalidity of the 1994 code because that was not an issue between the parties. He did not submit, as he had done before the Tribunal, that the 1994 code had been registered and was, therefore, valid and effectual. In addition, he did not seek leave to adduce further evidence on appeal to establish his contention before the Tribunal that the 1994 code had, in fact, been registered with the Registrar of Labour Relations. If indeed the 1994 code had been registered, it would have been relatively easy to prove that.

Although the invalidity of the 1994 code was not an issue between the parties when they appeared before the Tribunal, in the sense that Kalani's counsel did not persist with the point *in*

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limine set out in the heads of argument, it was certainly an issue in this court. It was, therefore, surprising that counsel for the company did not seek leave to adduce the further evidence required to establish that the 1994 code had been registered, if indeed it had been registered. In the circumstances, I am satisfied that the Tribunal correctly found that the 1994 code had not been registered.

The question which now arises is whether the Tribunal was entitled to raise an issue which neither party sought to rely upon, and determine the matter before it on that basis. I am certain that it was entitled to do that. Having discovered that the 1994 code had not been registered, the Tribunal could not be expected to ignore the fact that the disciplinary proceedings conducted against Kalani in terms of that code were a nullity.

That conclusion is supported by the decision in *S* v *Prinsloo* 1970 (3) SA 550 (O). The English translation of the headnote of that case reads as follows:

"Invalid proceedings are by nature void *ab initio* and a court of appeal ought not to hesitate to intervene *mero motu* and set such proceedings aside. It would indeed be unpardonable to ignore the proved fact of invalidity merely because it is not raised in the notice of appeal, because thereby the court would assure that justice will not be done and would thereby ignore its fundamental duty."

Subsequently, in *Musara* v *Zinatha* 1992 (1) ZLR 9 (H) at 13F-H ROBINSON J, commenting on *Prinsloo*'s case *supra*, said:

"Although, admittedly, *Prinsloo*'s case is a criminal case, I consider that the same approach should be adopted by the court in a civil case where, on the papers before it - the more so where those papers seek a declaratory order - an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void *ab initio* on some technical ground would, I agree, be to ignore the court's fundamental duty to see that justice is done which, after all, is the duty which the layman expects the courts to discharge."

SANDURA JA

Those comments apply to the facts of the present case with equal force.

In the circumstances, there is no substance in this appeal. However, there is nothing to prevent the company from commencing fresh disciplinary proceedings against Kalani, provided it proceeds in terms of its registered code.

The appeal is, therefore, dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

Sibusiso Ndlovu, respondent's legal practitioners

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MASVINGO RURAL DISTRICT COUNCIL *v* CHIKWENYA & ORS 2000 (1) ZLR 131 (HC)

Citation	2000 (1) ZLR 131 (HC)
Case No	Judgment No. HH-15-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	January 19, 2000
Judgment	January 19, 2000
Annotations	None

Application for review

Flynote

Practice and procedure - review - civil matter - only party to the proceedings may bring matter on review - not competent for judicial officer to bring matter on review even if he considers decision to have been erroneously given

Headnote

The magistrate at Masvingo submitted the record in a civil matter to the High Court, with a request that the proceedings be reviewed. The matter had concerned an application by the plaintiff council to evict the defendants from the properties they occupied. Default judgment had been entered against the defendants by the clerk of court and a warrant of ejectment issued. The magistrate considered that the default judgment was granted in error because, he said, the magistrates court did not have jurisdiction, the right of occupation of the defendants being worth more than the financial jurisdiction of the court.

Held, that the rules of the magistrates court and the High Court provided a procedure whereby a party against whom default judgment has been given may apply for the judgment to be rescinded or varied. The rules contemplate that an application for rescission or variation must be made to the court which gave the judgment by a party affected by the decision - usually the defendant - and that the application must be made on notice to the other side. No such application had been made in this case.

Held, further, that review proceedings may only be brought by a party to the case, not by the magistrate or other person performing judicial or quasi-judicial functions.

Held, further, that review proceedings are intended to apply to a case where a decision was arrived at by a tribunal, court or other adjudicating authority after proceedings of some sort have taken place. A default judgment is not preceded by anything in the nature of proceedings and so

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a request for a review of a default judgment could not competently be brought before the High Court, even by a party to the matter.

Held, therefore, that the matter was not properly before the High Court.

Cases Considered

Case cited:

L F Boshoff Invstms v *Cape Town Municipality* 1969 (2) SA 256 (C)

Legislation considered:

High Court Act [*Chapter 7:06*], ss 26 & 27

High Court Rules 1971 (RGN 1047/1971), r 256

Magistrates Court (Civil) Rules 1980 (SI290/1980), Order 30 r 2

Judgment

Chinhengo J: The magistrate at Masvingo submitted the record in this matter to me in terms of s 27(1)(a) of the High Court Act [*Chapter 7:06*] with a request that the proceedings be reviewed. He pointed out that the clerk of court erroneously entered a default judgment against the defendants and issued a warrant of ejectment against the defendants believing that he had authority to do so in terms of Order 11 r 4(1) of the Magistrates Court (Civil) Rules SI 290 of 1980 as read with Order 26 r 1(1)(c). He explained that the clerk of court had acted on the basis that, since the seventy nine defendants had failed to enter appearance to defend the plaintiff's claim within the *dies induciae* and the plaintiff had applied for default judgment, he was authorised to grant judgment against the defaulting party.

The magistrate stated that the default judgment was granted in error because in terms of s 11(1)(b)(ii) of the Magistrates Court Act [*Chapter 7:10*] the magistrates court did not have jurisdiction in the matter. He stated further that the jurisdiction of the magistrates court is $10 000, but the right of occupation of the defendants was "obviously greater than $10 000". The magistrate asked that "the default judgment be set aside and appropriate remedial action be taken. The error is sincerely regretted".

The legal practitioner for the plaintiff filed written submissions opposing the order sought by the magistrate. He contended that default judgment was properly entered against the defendants. The defendants had been duly served with the summons. They had failed to enter an appearance to defend the plaintiff's claim. In regard to the question of jurisdiction, the plaintiff's legal practitioner submitted that there was no basis upon which it could be inferred that the right of occupation exceeded $10 000 which would have ousted the court's jurisdiction. He submitted that:

"There are no facts before him (the magistrate) for him to consider the right of occupation to be above $10 000 ... In fact, persons occupying similar land owned by Council (the plaintiff) pay $75 a year as rent levy which follows that if one goes by rent levy as a guide to (*sic*) oust the value of occupation practice, obviously the claim is within the

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magistrates court jurisdiction."

The applicant's legal practitioner submitted further that there was no dispute over the right of occupation. The defendants were simply unlawful occupiers. As such, the reviewing judge did not have to concern himself with the value of the right of occupation. The request for a review had no merit at all.

The facts in this matter are that the plaintiff issued summons whose particulars of claim were framed in the following terms:

"Illegal settlement and cultivation in planned Mushandike Government Resettlement Areas/Scheme."

The summons was issued on 17 November l997. To it was attached a list

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of the seventy nine defendants. On 13 October l999, Mugabe & Partners, legal practitioners, filed a notice of assumption of agency for the plaintiff. On 14 October l999, Mugabe & Partners filed a notice of amendment of the summons thereby adding the following clause to the particulars of claim:

" (a) The plaintiff prays that the defendants be evicted from the property mentioned on which they are in illegal occupation."

This amendment was sought in the recognition that the summons did not contain a prayer, that is to say, it did not specify any relief which the plaintiff was seeking. The amendment was served personally upon seventeen defendants. Seventeen other defendants were served by leaving the summons with responsible persons at their respective residences. There is no proof of service of the amendment on the other defendants. With respect to the original summons, there is only one return of service on file indicating that only one defendant, the second defendant, was served with the summons.

The application for default judgment was made on 2 December 1999 against the thirty four defendants on whom the notice of amendment of the summons had been served. The warrant of ejectment was, according to the record, issued on 2 December 1999 and it is not clear when it was served on the defendants. It must be noted, however, that judgment was entered against all the seventy nine defendants. This is made even clearer by the warrant of ejectment.

It appears that the original summons and the amendment thereof may not have been served on all the defendants. That, however, is not a matter of moment. The issue which arises and which did not occur to the plaintiff's legal practitioners or to the magistrate is whether the matter was properly before me on review.

Section 26 of the High Court Act empowers the High Court to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. Section 27 outlines the grounds upon which the decisions of inferior courts may be reviewed. It stipulates absence of jurisdiction, interest in the cause, bias, malice or corruption and gross irregularity in the proceedings or decision concerned. Section 28 provides that on a

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review of any civil proceedings the High Court may set aside or correct the proceedings or decision.

In order to determine whether this matter is properly before me, regard must be had to the rules of court - the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980) and the High Court Rules 1971 (RGN 1047/71).

SI 290 of 1980 provides in Order 11 r 2(a) that if a defendant fails to enter an appearance to defend and has not consented to judgment, the plaintiff may lodge with the clerk of the magistrate's court a written request to have judgment entered against the defendant for relief claimed. Rule 4 authorizes

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the clerk of court to enter judgment in terms of the plaintiff's request, subject to the provisions of other subrules which are not relevant for present purposes.

Order 30 of SI 290 of 1980 provides that any party against whom a default judgment is given may, within one month after he has knowledge of the judgment, apply to court to rescind or vary such judgment. The application for rescission or variation shall be an affidavit and shall state briefly the reason for failing to enter an appearance and the grounds of defence to the action or proceedings in which judgment was given. In terms of Order 30 r 2, the court may, on hearing the application, rescind or vary the judgment and give such directions and extensions of time as may be necessary for the further conduct of the action or application.

SI 290 of 1980, therefore, clearly spells out the procedure which a party against whom a default judgment has been entered must follow in order that the judgment may be set aside or varied. The rules contemplate that an application for rescission or variation must be made by a party affected by the decision, usually the defendant, and that that application must be made on notice to the other party. The application must be made to the court which gave the judgment.

RGN 1047 of 71 provides in Order 33 r 256 the procedure in terms of which proceedings may be brought on review. It provides that:

"Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial or quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer, or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected."

This rule must be understood to mean that the party referred to is a party to the proceedings and not the person performing judicial or quasi-judicial functions. In this case, either the plaintiff or one or all, the defendants would be the "party" contemplated under the rule and not the magistrate. The word "party" is defined in Order 1 r 5 of SI 290 of 80 as meaning "a party to the proceedings". The word has, in my view, the same meaning in SI 1047 of 1971 r 256.

It must be apparent that where a default judgment has been entered against a party in the magistrates court it is only that party which is entitled to apply for its rescission or variation.

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This is not the case in the papers placed before me. The magistrate recognised, and probably correctly so, that the clerk of his court had entered a judgment against the defendants in error. The party against whom the judgment was entered has not applied to the court for it to be set aside or rescinded or varied. For all one knows, the defendants may be

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content with the judgment. It was therefore not for the court itself, in a civil matter, to take note of a possible misdirection by itself and to apply for the setting aside of the judgment. The magistrate or the clerk of court are not parties to the proceedings. They are not entitled to bring the matter to the High Court on review. They have no *locus standi* in terms of the rules of the court.

Where a default judgment has been entered in error, the correct procedure is for the affected party to apply to the same court for the judgment to be set aside. It is not within the contemplation of the High Court Act or the rules of the High Court and the magistrates court that any person other than a party affected by the decision should bring review proceedings or apply for the setting aside of a judgment granted in default.

The magistrate who submitted the proceedings in this matter misdirected himself, as I have endeavored to show. He was not a party to the proceedings. He was not a person affected by the judgment. In any event, a default judgment may be set aside only by an application for rescission made to the court which granted the judgment. A matter is brought on review to the High Court only by a person affected by the decision of an inferior court and by way of an application served on the other party to the proceedings.

The reason why default judgments, regardless of the grounds on which they are challenged, are not ordinarily brought up on review is because review proceedings were intended to apply to a case where a decision was arrived at by a tribunal court or other adjudicating authority after something in the nature of proceedings (of which a record is kept) have taken place - *L F Boshoff Investments* v *Cape Town Municipality* 1969 (2) SA 256 (C) at 274-5. A default judgment is not preceded by anything in the nature of proceedings and therefore a request for the review of a default judgment is not competent.

It is accordingly ordered that papers in this matter be and are hereby returned to the court concerned, without a review of them having been undertaken by this court.

Mugabe and Partners, plaintiff's legal practitioners

EHLERS *v* STANDARD CHARTERED BANK ZIMBABWE LTD 2000 (1) ZLR 136 (HC)

Citation 2000 (1) ZLR 136 (HC)

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Case No	Judgment No. HB-4-00
Court	High Court, Bulawayo
Judge	Malaba J
Heard	September 16, 1999
Judgment	January 20, 2000
Annotations	None

Civil application

Flynote

Interest - date from which runs - in duplum rule - whether interest begins to run again from date of litis contestatio

Headnote

The *in duplum* rule is based on a public policy designed to protect borrowers from being exploited by lenders, by prohibiting injurious abuse. Interest runs only until the sum of the interest unpaid is equal to the sum of the capital. If the lender thereafter brings an action for the recovery of the capital plus the interest, interest begins to run afresh from the date of *litis contestatio*, which is the date of service of the summons. This principle is based on the fact that up to that date the creditor can, by timeously instituting action, prevent prejudice to the debtor and the application of the *in duplum* rule. After service of the summons, however, the creditor ceases to be in control of the process by which interest accumulates. A creditor cannot be said to exploit a debtor who, with the assistance of the delays inherent in legal proceedings, keeps the creditor out of his money. The view that interest only begins to run again from the date of judgment does not give effect to the policy behind the *in duplum* rule, nor does it recognise the discretion enjoyed by the court in the matter.

Cases Considered

Cases cited:

Commercial Bank of Zimbabwe Ltd v *M M Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H)

Georgias & Anor v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S)

Standard Bank of SA v *Oneanate Invstms (Pty) Ltd* 1995 (4) SA 510 (C)

Standard Bank of SA v *Oneanate Invstms (Pty) Ltd* 1998 (1) SA 811; [1998] 1 All SA 413 (SCA)

Case Information

A P de Bourbon SC, for the applicant

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G S Wernberg, for the respondent

Judgment

Malaba J: This is an application made on 8 December 1998 for a partial rescission of a default judgment granted against the applicant in favour of the respondent on 7 November 1996. The order required the applicant to pay the sum of $2 052 346.42 with interest thereon at the rate of 41% p*er annum* from 1 September 1995 to the date of payment.

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The applicant, a commercial farmer, had three accounts with the respondent, a financial institution. These were the Mimosa Farm account, the Richman Poorman account and the Drought Relief Loan account. The unpaid capital amount on each of the accounts on 1 September 1995 was as follows:

Mimosa Farm account	-	$899 081.91
Richman Poorman account	-	$148 072.74
Drought Relief Loan account	-	$ 13 334.00

The unpaid interest in respect of the Richman Poorman account and the Drought Relief Loan account had become equal to the unpaid capital.

The respondent issued summons on 2 October 1995, claiming from the applicant payment of the sum of $2 052 346.42 with interest thereon at the rate of 41% *per annum* as from 1 September 1995. The applicant received personal service of the summons on 13 October 1995 but failed to enter appearance to defend the action. Default judgment was entered against him on 7 November 1996. At the time the unpaid interest in respect of the Mimosa Farm account had also become equal to the unpaid capital. It is not in dispute that the amount the respondent could legitimately have claimed from the applicant is a sum of $2 120 977.30.

It is common cause that on 14 October 1997 the applicant paid an amount of $3 535 696.80 in terms of the default judgment. The amount includes interest charged by the respondent and recovered in terms of the judgment for the period extending from 1 September 1995 to 7 November 1996.

The application is based on the allegation that the respondent breached the *in duplum* rule in charging and claiming interest for the period extending from 1 September 1995 to 7 November 1996. The *in duplum* rule is to the effect that once unpaid interest is equal to the unpaid capital it stops running.

The applicant avers in the founding affidavit that, in terms of the *in duplum* rule, unpaid interest that has become equal to the unpaid capital only starts to run afresh as from the date of judgment. He alleged that as the unpaid interest had become equal to the unpaid capital as on

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1 September 1995 in respect of the Richman Poorman Loan account and the Drought Relief Loan account, the respondent had no right to charge interest during the period extending from 1 September 1995 and 7 November 1996. According to him, the court which granted the default judgment on 7 November 1996 unlawfully ordered him to pay interest as from 1 September 1995. The order should have required him to pay interest as from the date of judgment, that is to say, 7 November 1996.

The applicant averred that, as a result of the payment he made to the respondent on 14 October 1997 in compliance with the order of 7 November 1996, he overpaid interest in the sum of $602 271.03. He asked that the judgment be rescinded partially by granting him leave to defend the claim of

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interest from 1 September 1995 to 7 November 1996. If successful the terms of the order requiring him to pay interest at the rate of 41% *per annum* from 1 September 1995 to 7 November 1996 would be deleted and the sum of $602 271.03 refunded to him.

The application was made some 761 days after the date of judgment. Rule 63(1) of the High Court Rules 1971 requires a party who has had a judgment given against him in default to make an application for it to be set aside not later than 30 days after he has had knowledge of the judgment. Under r 63(3), the party is presumed to have had knowledge of the judgment within two days after the date thereof unless he proves to the contrary.

An application has been made for the condonation of the non-compliance with the rules. Presenting the application, Mr *de Bourbon* urged the court to look at the reasons for the failure to make the application for rescission of judgment timeously and not be unduly influenced by the length of the delay. The reasons given for the inordinate delay are these. The applicant thought at the time of service of the summons upon him that the amount claimed by the respondent was correct. He was not aware of the *in duplum* rule then. When he became aware of the *in duplum* rule he took time to calculate the interest allegedly overcharged by the respondent in breach of the rule. Part of the delay was occasioned by the respondent, which sought and awaited legal opinion from senior counsel. The applicant also said his erstwhile legal practitioner was too busy with other matters to make the application for rescission of judgment before 8 December 1998.

Two issues are for decision. They are: whether the explanation of the default is reasonable and acceptable; and whether the defence sought to be raised has any prospects of success on the merits.

The applicant was legally represented at the time default judgment was entered against him. The judgment in *Commercial Bank of Zimbabwe Ltd* v *M M Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H) restating the *in duplum* rule was handed down on 30 October 1996. It is not said why the applicant's legal practitioners did not draw his attention to the judgment. The applicant admits knowing of the *in duplum* rule at the end of September 1997, but still paid the judgment debt on 14 October 1997.

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Even if one accepted the explanation that the applicant needed time to calculate the interest allegedly overcharged by the respondent, no reason is given for failure to act after the amount had been ascertained. On 6 January 1998, the applicant's legal practitioner wrote to the respondent, demanding payment of the amount said to represent the overcharged interest. He threatened to make an application for rescission of judgment should the respondent not pay the money within seven days of the date of the letter. On 27 January 1998, the respondent wrote back, vehemently denying that it had

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overcharged the applicant interest and promising to defend the application for rescission of judgment should it be made.

No reason has been given by the applicant for his failure to make the application for rescission of judgment within 30 days of receipt of the letter from the respondent. The absence of an explanation suggests that the applicant was in willful default. He was now aware of the fact that the respondent intended to defend the judgment. Instead of doing what the applicant was expected to do in the circumstances, his legal practitioner chose to arrange a meeting with the respondent's representative on 9 March 1998.

It is not clear what information the applicant wanted from the respondent without which he could not make the application for rescission of judgment. It is not said whether he wanted to persuade the applicant to consent to a rescission of the judgment. It was at that meeting, however, that the respondent promised to seek legal opinion from senior counsel.

On 15 October 1998, the respondent wrote to the applicant advising that, on the opinion of senior counsel, it was unable to entertain the claim for a refund of interest. Notwithstanding receipt of the letter, the applicant failed to make the application for rescission of judgment until 8 December 1998. The explanation that the applicant's legal practitioner was busy attending to other matters is not acceptable.

I now turn to decide whether there are prospects of success on the merits. The defence the applicant intends to raise to the claim for interest from 1 September 1995 to 7 November 1996 derives support from the decision of GILLESPIE J in *Commercial Bank of Zimbabwe Ltd* case *supra* at pp 436C-438C. The learned judge, with the concurrence of Smith and BLACKIE JJ, rejected a view of the *in duplum* rule which regarded interest as commencing to run afresh from the date of *litis contestatio,* despite the fact that it would have become equal to the unpaid capital. This view of the law is expressed in Joubert *Law of South Africa* Vol 15 p 199 para 297 where the writer states that:

"Interest runs only until the sum of the interest unpaid is equal to the sum of the capital, with the result that the lender can never claim interest in an amount exceeding the sum of the loan. *After* litis contestatio *interest will commence to run again so that the court may award interest from that time in addition to the permitted interest*" (emphasis is mine).

The learned judges preferred the view that interest only commences to run anew as from the date of judgment. I must, with respect, express my dissent from the decision in *Commercial Bank of Zimbabwe*'s case *supra* on the date from which interest commences to run afresh in a

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case where the *in duplum* rule applies. This view of the law does not give effect to the policy behind the

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in duplum rule, nor does it recognise the discretion enjoyed by the court in the matter.

In *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 495D, Gubbay CJ said that the *in duplum* rule is based upon a public policy designed to protect borrowers from the exploitation of lenders by prohibiting usurious abuse. The principle that interest commences to run afresh from the date of *litis contestatio,* which in this case is the date of service of summons, is based upon the recognition of the fact that from that date the creditor ceases to be in control of the process by which interest accumulates.

The decision in *Commercial Bank of Zimbabwe*'s case *supra* followed that of Selikowitz J in *Standard Bank of South Africa* v *Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C). On appeal, the Full Bench of the Supreme Court of Appeal of South Africa in *Standard Bank of South Africa Ltd* v *Oneanate Investments (Pty) Ltd* [1998] 1 All SA 413 (SCA) rejected Selikowitz J's view of the application of the *in duplum* rule on the date from which interest commences to run afresh. After reviewing the authorities on which that decision was based and questioning their correctness, Zulman JA said at p 432b-d:

"Neither Huber nor Sande's reasoning is in consonance with our law, simply because a judgment does not in a real sense novate the debt [*Swadif (Pty) Ltd* v *Dyke NO* 1978 (1) SA 928 (A)].

It might at this stage be helpful to repeat the justification for the *in duplum* rule. There is a useful collection of authorities in the judgment of Boruchowitz J in *Leech*'s case *supra* (at 313C-314D). It appears, as previously pointed out, that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double. Since the rule as formulated by Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it.

A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process."

Action was instituted on 2 October 1995 when summons was issued. Personal service was effected upon the applicant on 13 October 1995. The applicant did not pay what he knew he owed to the respondent. He kept the respondent out of its money until 14 October 1997 when he paid the sum of $3 535 669.80.

The interest that accumulated in excess of the double after the institution of the action was as a result of the delay by the applicant in paying what he clearly admitted was a debt payable to the respondent. The accumulation of

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the interest was not in anyway a result of exploitation of the applicant by the respondent. It is clear, therefore, that the defence, based entirely on the proposition that interest starts to run afresh only after the date of judgment where the *in duplum* rule applies and that the court which ordered the applicant to pay interest from a date earlier than 8 November 1996 was wrong, has no prospects of success on the merits.

The application for condonation of the late institution of the application for rescission of judgment in case No. HC-3232-95 is refused and the application for rescission of judgment dismissed with costs.

Coghlan & Welsh, applicant's legal practitioners

Winterton Holmes & Hill, respondent's legal practitioners

MOYO *v* FRASER NO & ANOR 2000 (1) ZLR 142 (HC)

Citation	2000 (1) ZLR 142 (HC)
Case No	Judgment No. HB-7-00
Court	High Court, Bulawayo
Judge	Malaba J
Heard	December 3, 2000
Judgment	January 20, 2000
Annotations	None

Civil application

Flynote

Insolvency - sequestration - rights of creditors - purchaser of land - transfer not effected before sequestration - no right to claim transfer of land

Headnote

The applicant had contracted with another person to buy a piece of land. The land was a sub-division of a larger piece, but by the time the sub-division had been approved and registered, the seller had become insolvent. The insolvent seller could not perform his contractual duty of transferring the property to the applicant because he was divested of that

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power by the sequestration order.

The applicant, having been advised by the trustee in insolvency that he had no right to transfer of the land, claimed the return of the purchase price from the insolvent estate. He received a portion of the price. When he became aware that the trustee was proposing to sell the plots, sub-division having taken place, he sought an order to transfer the plot to himself.

Held, that the applicant had no real rights to the land at the time the sequestration took place,

Held, further, that the *dominium* in the land passed to the trustee at the time of the sequestration. The trustee's duties under the Insolvency Act [*Chapter 6:04*] were to deal with the land in the best interests of all the creditors. The applicant, as purchaser, was not entitled to prevent the trustee from disposing of the property to a third person as such disposal was in the best interests of all the creditors.

Held, further, that had there been an endorsement on the title deed, in terms of s 64 of the Deeds Registries Act [*Chapter 20:05*], that the piece of land sold to the applicant was subject to a contract of sale with payment being made by instalments and had the other statutory requirements been met, the applicant would have had the right to take transfer of the land, subject to the payment of the outstanding balance under the prior real right secured by the registered bond. In the present case there was no such endorsement.

Cases Considered

Cases cited:

Harris v *Buissinne's Trustee* (1840) 2 Menz 105

Singleton Ex p 1963 R&N 1 (SR)

Case Information

Applicant in person

P Dube, for the respondents

Judgment

Malaba J: On 12 March 1999, the applicant was granted a rule *nisi* calling upon the first respondent to show cause why a final order should not be made

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directing that a certain piece of land, being Lot 4 of subdivision L of stand 178 of stands 178, 179 and 180 Matsheumhlophe, situate in the District of Bulawayo, be transferred into his name. An interim relief was granted to the applicant pending the confirmation or discharge of the rule *nisi* interdicting the first respondent from transferring the said piece of land to a third party.

At the conclusion of the argument on 3 December 1999, which was the return day, the court

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discharged the provisional order and ordered the applicant to pay the costs of the application. Oral reasons were given for the judgment but the applicant wrote on 15 December 1999 asking that the reasons be reduced to writing. The following are the reasons of the court.

The first respondent was made a party to these proceedings in his capacity as trustee in the insolvent estate of J M Ngwenya. The insolvent estate was sequestrated on 15 September 1995. The second respondent is a firm of legal practitioners. It is cited in these proceedings because the legal practitioners were instructed by first respondent to attend to the registration of the transfer of the piece of land referred to in the provisional order to a third party.

At the date of the sequestration of his estate, the insolvent had registered in his name, subdivision L of stand 178 of stands 178, 179 and 180 of Matsheumhlophe. He held the land under Deed of Transfer No. 1161/92.

The encumbrances against the registered title were a mortgage bond registered against the property and two caveats endorsed on the title deed in favour of C David and J David. There was nothing on the title deed to suggest that the applicant had any interest in the insolvent's immovable property.

The applicant had, in fact entered into an agreement of sale with the insolvent on 30 May 1994. In terms of the agreement, J M Ngwenya sold to the applicant a piece of land, being Lot 4 of subdivision L of stand 178 at a purchase price of $25 000, payable in instalments. The first instalment of $10 000 was to be paid on the day the written agreement was signed. The balance was payable in monthly instalments of $5 000. The full purchase price was paid on 15 September 1994.

At the time the parties entered into the agreement of sale, Lot 4 of sub-division L of stand 178 was not a separate piece of land with a title deed relating to it. It was to be created out of a division of sub-division L of stand 178 of stands 178, 179 and 180 into two parts, to be known as sub-division L of stand 178 of stands 178, 179 and sub-division M of stand 180. Sub-division L of stand 178 of stands 178, 179 was to be further sub divided into five lots, of which lot 4 was one.

A diagram showing the boundaries of the various sub-divisions had been drawn up at the time the agreement of sale was signed. The proposed subdivisions were approved by the local town planning authority on 2

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November 1994. At the date, the insolvent's estate was sequestrated the proposed subdivisions had not been registered.

The applicant, through his legal practitioners, contacted the trustee demanding the transfer of Lot 4 into his name. He was advised that he had no right at law to the transfer of the land which was registered in the insolvent's name at the time of sequestration of the insolvent estate, even if he had paid the purchase price for the property. The applicant then decided to pursue the remedy of claiming the refund of the purchase price from the insolvent estate. At a meeting of

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creditors held on 31 July 1996, he proved a claim for $25 000 against the insolvent estate. He later received a dividend of $7 500 on the proved claim.

The applicant was aware of the fact that the trustee was processing the registration of the various proposed subdivisions of subdivision L of stand 178 of stands 178, 179 and 180 so that each piece of land had a separate title deed. He was also aware at the completion of the registration that the trustee was offering the various subdivisions, including Lot 4, for sale to the public.

The trustee entered into an agreement of sale with a third party in terms of which he sold Lot 4 to that party for $25 000. Just before the transfer of the land was about to be registered at the Deeds Registry, the applicant made an urgent chamber application for the provisional order and the interim interdict preventing the trustee from going ahead with the registration of the transfer of the property to the third party.

The point involved in the application is a short one. It is whether the applicant has a right to the transfer of Lot 4 into his name. He entered into a contract of sale with a person who became insolvent before performing the personal obligation of transferring the immovable property to him.

At the time the insolvent's estate was sequestrated, the applicant had no real rights in the land. The *dominium* of the land lay with the insolvent. The applicant only had a personal right to claim transfer of the land from the insolvent.

The insolvent could not perform his contractual duty of transferring the immovable property registered in his name to the applicant because he was divested of that power by the sequestration order. The sequestration of his estate rendered the insolvent incapable of discharging the obligation, which was one of a personal nature. He was therefore in breach of the contract of sale.

The trustee was vested with the ownership of the immovable property registered in the insolvent's name by virtue of the sequestration order. He took over the *dominium* of the land for the benefit of all creditors of the insolvent estate. Unlike the insolvent, whose duties towards the applicant

were governed by the terms of the contract of sale entered into personally, the right and duties of the trustee were governed by the Insolvency Act [*Chapter 6:04*]. His obligations were not of a personal nature as were those assumed by the insolvent under the contract of sale. He took over the ownership of the immovable property registered in the name of the insolvent in an official capacity and had to deal with it in the best interests of all creditors.

The position of a purchaser of land who paid the purchase price but had not received transfer of the property at the date of sequestration of the seller's estate is that he has no right at common law to the transfer of the land. The purchaser is not entitled to prevent the trustee in an insolvent estate from transferring the property to a third party if that is in the best interests of creditors: Ex

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p *Singleton* 1963 R&N 1 (SR).

In *Harris* v *Trustee of Buissinne* (1840) 2 Menz 105, the plaintiff entered into a contract of sale with Buissinne in terms of which he bought the latter's house for £1 050, £400 of which it was stipulated should be paid immediately in cash, and for the balance £650 the plaintiff agreed to pass a mortgage bond in favour of the directors of a savings bank. On the same day, the plaintiff paid Buissinne the £400 he took possession of the house. Buissinne was unable to give the plaintiff transfer of the house so that he might perform his obligation to execute a mortgage in favour of the savings bank. The plaintiff took out summons against Buissinne who surrendered his estate as insolvent and it was placed under sequestration. In an action in which the plaintiff prayed for an order condemning Buissinne to give him a legal transfer, the trustee of the insolvent estate pleaded that he was not liable to give transfer to plaintiff.

Giving judgment for the trustee of the insolvent estate the court said at pp 107-108:

"By the law of Holland, the *dominium* or *jus in re* of immovable property can only be conveyed by transfer made *coram lege loci*, and this species of transfer is as essential to divest the seller of, and invest the buyer with, the *dominium* or *jus in re* of immovable property as actual tradition is to convey the *dominium* of movables, and that the delivery of the actual possession of immovable property has no force or legal effect whatever in transferring its *dominium.*

Consequently, the agreement of sale between Harris and Buissinne, and the delivery of the possession of the house by Buissinne to Harris, gave Harris nothing more than a *jus ad rem* and a personal claim against Buissinne to convey the *jus in re* to him by transfer *coram lege loci*. And, therefore, on the day on which Buissinne's estate was placed under sequestration, the *dominium* of the house in question was still vested in Buissinne and then formed part of his estate and that by the order placing his estate under sequestration this house became instantly and wholly vested in the Master and ultimately in the trustee for behoof [benefit] of the creditors of Buissinne.

On these grounds, it followed that Harris had only a personal claim against Buissinne's

MALABA J

estate for the damage which he has sustained by the non-fulfillment of his undertaking to perfect the sale, by making legal transfer of the house to Harris, and for restitution of that part of the price which he has paid, and in respect of this personal claim, he has no preference on the house in question, or on any other part of the estate, and is only entitled to be ranked concurrently with the other personal creditors of Buissinne."

As pointed out above, there was no endorsement on the title deed that the piece of land sold to the applicant by the insolvent was subject to a contract of sale by instalments. Had such an endorsement been made in terms of s 64 of the Deeds Registries Act [*Chapter 20:05*] and all the other requirements prescribed thereunder met, the applicant would have had a statutory right to take transfer of the land subject to the payment of the outstanding balance under the prior real right secured by the registered mortgage bond.

Without the protection provided by an endorsement on the title deed in terms of s 64 of the Act, the applicant had no right to demand transfer of the land into his name once the trustee decided that the transfer of the immovable property to him was not in the best interests of all the creditors of the insolvent estate and elected to sell the property to a third party. The court has no power in the circumstances to impose on the trustee a duty which the law says he does not

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owe the applicant.

In proving his claim for $25 000 against the insolvent estate and receiving a dividend of $7 500 on that claim, the applicant pursued the remedy consonant with his position as a concurrent creditor of the insolvent estate. He had no legal basis however upon which to demand transfer of Lot 4 of sub-division L of stand 178 from the trustee. He also had no right to prevent the trustee from transferring the property to a third party.

The provisional order granted on 12 March 1999 is therefore discharged with costs.

Coghlan & Welsh, respondent's legal practitioners

COMMISSIONER OF TAXES *v* EDGARS STORES LTD 2000 (1) ZLR 147 (SC)

Citation	2000 (1) ZLR 147 (SC)
Case No	Judgment No. S-2-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Ebrahim JA
Heard	January 11, 2000
Judgment	January 20, 2000
Annotations	None

Civil appeal

Flynote

Revenue and public finance - sales tax - exemptions from - services received by registered operator and intended to be used in the "normal course of business" - meaning - airfares, advertising, servicing of equipment, and consultancy fees - whether exempt

Headnote

The respondent was a registered operator in terms of the Sales Tax Act [*Chapter 23:08*]. At the time the relevant transactions took place, s 13(1)(d), as read with s 8(1), of the Act provided that a registered operator was exempt from sales tax in respect of services purchased from another registered operator which were intended to be used in the "normal course of business" of the first operator. The Commissioner of Taxes argued that this exemption from sales tax only applied if the cost of the service was passed on to the customer for whom, or on whose behalf, the service was obtained. It did not apply where the services purchased were used by the

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registered operator for himself.

Held, that "normal course of business" meant "ordinary course of business". Services are used in the ordinary course of business when they are utilised or consumed. The word "used" would not have been employed if the intention was to exempt from sales tax only if the cost of such services were passed on to the customer.

Held, further, that the Act specifically provided that if an operator purchased services on behalf of, or for the benefit of, a customer, no sales tax was payable by the operator where he passed the cost of the sales tax on to the customer. This provision would not have been necessary if the legislature had intended s 13(1)(d) to apply only where the cost of the services purchased in the ordinary course of business by the operator was to be passed on to the customer. The provisions would then have been tautologous.

Held, further, that even if it could be said that there is some ambiguity in the wording of s 13(1)(d), it would fall to be resolved in favour of the taxpayer on the basis of the *contra fiscum* principle.

Held, further, that for Edgars Stores to conduct its retail business efficiently and successfully, it was necessary for it to incur the ordinary expenses it had in respect of which it was claiming sales tax exemption. These services were purchased in the normal course of its business and were exempt from sales tax.

Cases Considered

Cases cited:

A v *CoT* 1969 (2) RLR 170 (G); 31 SATC 66 (R)

Anderson Tpt (Pty) Ltd v *Chrmn, National Tpt Commission & Ors* 1985 (2) SA 97 (C)

BM & Ors v *CoT* 1970 (1) RLR 13 (G)

CIR v *Louis Zinn Organisation (Pty) Ltd* 1958 (4) SA 477 (A)

Downs Distributing Co (Pty) Ltd v *Assd Blue Star Stores (Pty) Ltd* (1948) 76 CLR 463

(High Ct of Australia)

Egan v *Min of Defence* 1987 (2) SA 264 (NC)

Endeavour Foundation & Anor v *CoT* 1995 (1) ZLR 339 (S)

Glen Anil Development Corporation Ltd v *Sec for Inland Revenue* 1975 (4) SA 715 (A)

Meman & Anor v *Controller of C & E* 1987 (1) ZLR 170 (S)

T v *CoT* 1978 RLR 309 (G)

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Legislation considered:

Sales Tax Act [*Chapter 23:03*], s 13(1)(d)

Case Information

E W W Morris, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Gubbay CJ: This is an appeal brought in terms of s 11 of the Fiscal Appeal Court Act [*Chapter 23:05*]. It is against the judgment of the learned President directing the present appellant ("the Commissioner") to amend the assessment he issued to the respondent ("Edgars Stores") for the payment of sales tax for the period from February 1994 to September 1996, to reflect an amount due of $64 639.25.

The judgment, which is reported as *ITC No. 1651* 61 SATC 83, upheld the contention advanced by Edgars Stores that by virtue of the then s 13(1)(d) of the Sales Tax Act [*Chapter 23:08*] ("the Act") certain services, purchased by it from another registered operator, were exempt from sales tax as having been used in the normal course of its business. Rejected was the contrary submission of the Commissioner that the provision did not permit a registered operator to avoid the payment of sales tax on services purchased for which it was itself the user. Expressed differently, that such services could not be considered to have been used in the normal course of business of the registered operator unless passed on to a customer.

Edgars Stores is a large retailer of men's, women's and children's clothing. It has its head office in Bulawayo, a second and main office in Harare and outlet branches in Bulawayo, Harare and other centres throughout Zimbabwe. Over the period in question, the services purchased by Edgars Stores, which it claimed were used "in the sales tax ring", fell into the following four categories:

(a) airfares for the management staff to travel between Harare and Bulawayo, all such travel being undertaken in the conduct of its business;

(b) expenses incurred in respect of repairs and servicing of its equipment which, in the main, related to computers and motor vehicles;

(c) expenses incurred in respect of advertisements placed by it in various newspapers, confined entirely to the nature of its business operation and the type of goods sold by it to the public;

(d) consultancy fees paid to Unitech (Pvt) Ltd, a company in Bulawayo, which supplied computer bureau services consisting of general computer processing and the production of

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statements and financial reports.

At the issue of the assessment on 18 December 1996, s 13(1) of the Act stipulated that:

"Where a registered operator purchases from another registered operator or from any person through a registered operator acting as the agent of the said person -

(a) goods intended for resale, including goods intended for resale as food, whether after preparation or otherwise; or

(b) goods intended to be -

(i) so used or dealt with that those goods or some element thereof will form a part of goods to be manufactured and will remain in the manufactured goods as an element essential to them in their completely manufactured condition; or

(ii) used exclusively as an ingredient, catalyst or chemical processing agent in a process of manufacture;

or

(c) goods intended to be used as containers, or for the packaging or wrapping, of goods sold by him; or

(d) services, other than -

(i) services supplied by a hotel; or

(ii) services provided by the Posts and Telecommunications Corporation of Zimbabwe; or

(iii) the supply of electricity by the Zimbabwe Electricity Supply Authority;

intended to be used in the normal course of business;

he shall declare that he holds a certificate, and the registered operator from or through whom he purchases such goods or services shall record such declaration, in such manner as may be prescribed."

With effect from 28 November 1997, para (d) was amended by the Finance Act 1997. The words "intended to be used in the normal course of business" were replaced by "whose price he will recover, wholly or substantially, from a customer".

Exemptions from sales tax are provided for in s 8 of the Act which, in material part, reads as follows:

"(1) No tax shall be payable in terms of this Part in respect of -

(a) ...

(b) ...

(c) ...

(d) the sale of goods or the supply of services in accordance with subsection (1) of section *thirteen*;

(e) ...

(f) ...

(2) No tax shall be payable by a registered operator in respect of a service, where the registered operator -

(a) receives the service for the benefit of his client or on his client's behalf; and

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(b) has charged or will charge the sales value of the service to his client."

GUBBAY CJ

The crucial phrase in s 13(1)(d) of the Act was, of course, "intended to be used in the normal course of business". The words "intended to be" related to both the state of mind of the registered operator and to the word "used". These two elements had to be present before the purchase of the services could qualify as being "in the normal course of business".

The word "used" connoted some positive action in connection with the services, namely, that they were to be "utilised, expended, consumed or absorbed". See *The Oxford English Dictionary* Vol XI at 471; and *Egan* v *Minister of Defence* 1987 (2) SA 264 (NC) at 269A-D. Indeed, it was accepted by the Commissioner that Edgars Stores had *itself* utilised or consumed the four categories of services purchased from other registered operators.

The learned President was of the opinion that the meaning of the phrase "in the normal course of business" was to be equated with the term "ordinary course of business", as construed in many decisions; the test being whether the disposition or acquisition would cause an ordinary businessman surprise. He cited with approval the pronouncement of Rich J in *Downs Distributing* Co (Pty) Ltd v *Associated Blue Star Stores (Pty) Ltd* (1948) 76 CLR 463 (High Court of Australia) at 476, that:

"It means that the transaction must fall into place as part of the undistinguished common flow of the business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

After referring, in addition, to *dicta* in cases from this jurisdiction such as *A* v *Commissioner of Taxes* 1969 (2) RLR 170 (G) at 172F-173A; 31 SATC 66 (R) at 68-69; *BM & Ors* v *Commissioner of Taxes* 1970 (1) RLR 13 (G) at 18 B-E, 33 SATC 1 (R) at 9; and *T* v *Commissioner of Taxes* 1978 RLR 309 (G) at 315A-F, 40 SATC 178 (R) at 184, the learned President went on to say (*supra* at 88):

"... it seems to me that the expenditure incurred by (Edgars Stores) on the four categories of services which I have earlier described would be regarded as 'designed expenditure' as defined by Beadle CJ (see *Commissioner of Taxes* v *Rendle* 1964 RLR 463 (A) at 465 *in* fine- 466C). They were therefore incurred in the ordinary or normal course of business."

The argument advanced for the Commissioner, both before the learned President and in this court, was that seen in the context of the Act as a whole, the purchase of services could only be regarded as being "used in the normal course of business" of a registered operator if the sales tax payable in respect thereto was *passed on* directly to the customer for whom, or on whose behalf, the service was obtained. The exemption was, therefore, inapplicable where the services purchased had been utilised by the registered operator for himself, for such use would not be in the normal course of business; the services not being used "in the sales tax ring".

GUBBAY CJ

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The Act as originally promulgated in 1963 imposed a sales tax only upon the sale of goods. It was some thirty years later that the ambit of the Act was enlarged to embrace *se*rvices. Various sections were amended and others added to effect the change.

Against this legislative history, I am not persuaded that any section of the Act implicitly supported an intention by the lawmaker to impart a restrictive meaning to s 13(1)(d). In particular, while it is true that s 4 of the Act specifies the circumstances in which sales tax is to be raised, it did not, as contended for by the Commissioner, assist in ascertaining what meaning was to be given to the phrase "in the normal course of business". To the contrary, it seems to me that if the intention had been to treat sales and services in the same manner and to exempt from sales tax only such services as were passed on, the word "used" would not have been employed. It was out of place with the restrictive sense urged by the Commissioner.

But perhaps the feature most destructive of the Commissioner's stance is that highlighted by the learned President. I can do no better than to quote the relevant passage in the judgment (*supra* at 88-89):

"In terms of subs (1) of s 8 of *Chapter 23:08* certain specific sales are exempt from sales tax. Paragraph (d) thereof refers to the sale of goods or the supply of services in accordance with s 13(1). Subsection (2) then provides that no sales tax shall be payable by a registered operator in respect of a service where the registered operator receives the service for the benefit, or on behalf, of his client and he charges the sales tax value of the service to his client. Thus, since subs (2) specifically provides for exemption from sales tax in the case of a service where the client or customer is specifically charged with the sales tax value of that service, why would para (d) of subs (1) provide for the same exemption?"

Obviously, a construction which avoids tautology is to be preferred to one that does not. See *Commissioner for Inland Revenue* v *Louis Zinn Organisation* (Pty) Ltd 1958 (4) SA 477 (A) at 485H; *Anderson Transport (Pty) Ltd* v *Chairman, National Transport Commission & Ors* 1985 (2) SA 97 (C) at 101G.

It follows, in my view, that for Edgars Stores to conduct its retail business efficiently and successfully, it was necessary for it to incur the ordinary expenses it did on the four categories of services - all of which were purchased in the normal course of its business. They were part of the general expenses of doing business.

I am also in respectful agreement with the learned President that if there were some ambiguity in the wording of s 13(1)(d), as read with s 8(1), of the Act (which I do not find), it would fall to be resolved in favour of the taxpayer on the basis of the *contra fiscum* principle. See *Glen Anil Development* Corp Ltd v *Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 727F-G; *Meman & Anor* v *Cont*roller of Customs and Excise 1987 (1) ZLR 170 (S)

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at 174-5; *Endeavour Foundation & Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at 362D-E.

Finally, it is not without significance that the legislature deemed it prudent to amend s 13(1)(d) in the manner already indicated. On the Commissioner's argument, the amendment was

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unnecessary as it afforded no new meaning to the replaced words. I disagree. I think the basis of the exemption is now different. At the very least, however, the amendment suggests that in the mind of the legislature some ambiguity attached to the meaning of s 13(1)(d) which required to be cured.

Accordingly, and for the reasons given, I would dismiss the appeal with costs.

MCNALLY JA: I agree.

EBRAHIM JA: I agree.

Civil Division of the Attorney-General's Office, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

STANDARD CHARTERED BANK ZIMBABWE LTD *v* RICHARDSON 2000 (1) ZLR 153 (SC)

Citation	2000 (1) ZLR 153 (SC)
Case No	Judgment No. S-3-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA and Sandura JA
Heard	January 17, 2000
Judgment	January 25, 2000
Annotations	None

Civil appeal

Flynote

Employment - employee - disciplinary action against - employee given final warning for act of misconduct falling into one category of offences - during currency of warning committing act of misconduct of a different class - not a "further offence" warranting dismissal

Headnote

The respondent, an employee of the appellant bank, was given a final warning on the third occasion she overdrew her bank account, an act of misconduct of a type falling into a specific category in the appellant's code of conduct. The code of conduct provided that an employee was liable to dismissal if he or she committed "any further offence" during the currency of the final warning. Before the expiry of the final warning, the respondent committed an act of

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negligence causing serious financial loss to the bank. Such an act fell into a different category of acts of misconduct. A disciplinary hearing was held and the respondent was dismissed. She appealed successfully to the Grievance and Disciplinary Committee, and the appellant appealed against the Committee's ruling to the National Employment Council Appeals Board and then to the Labour Relations Tribunal. The Tribunal held that a final written warning did not apply to a subsequent breach of the code of conduct unless the breach was for the same offence as that for which the warning had been given. On a further appeal to the Supreme Court:

Held, that the phrase "any further offence" must be taken to mean "any further offence in the same category". As dismissal is a peremptory progression for the commission of an offence in the same category for which a previous final warning has been given, such other sanctions as suspension without pay or demotion may not be substituted. It would be a manifest absurdity to dismiss an employee who was under final warning for an offence of one class if he were subsequently held to have committed an offence of a different class.

Case Information

S E Rowland, for the appellant

A Maguchu, for the respondent

Judgment

Gubbay CJ: The respondent was employed as a check clerk by the appellant at its Gweru Branch. Her duties included checking telex messages forwarded to her by a cables clerk.

On 16 January 1995, the respondent was found guilty of overdrawing her bank account to the extent of $7 658.81 without the prior authority of the

appellant. In so doing, she had breached item 9 of the acts of misconduct listed in category B of the code of conduct applicable to the Banking Undertaking, published in SI 111 of 1994. As the respondent had been warned on two previous occasions in respect of the same offence, the penalty imposed was a final written warning, which was to remain in force for a period of twelve months.

On 3 May 1995, the respondent failed to detect an error in a typed clearance settlement message for $2 085 851.07, made by the cables clerk, which resulted in such sum being debited to Stanbic Bank of Zimbabwe Ltd instead of Barclays Bank of Zimbabwe Ltd. In the event, the appellant was prejudiced in the amount of $17 909.17 claimed by Stanbic Bank of Zimbabwe Ltd as interest on the erroneous entry.

The respondent was duly charged with a contravention of item 15 of the acts of misconduct listed in category D of the code of conduct, namely, "gross negligence causing a serious and substantial loss to the Bank". A disciplinary hearing held on 21 and 22 August 1995 found her guilty and imposed the penalty of dismissal.

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Disturbed at the severity of the punishment, the respondent appealed to the Grievance and Disciplinary Committee, a right afforded her under the code of conduct. On 9 September 1995, that body was of the opinion that the respondent's negligence was not gross. It accordingly found her guilty of contravening item 2 of the acts of misconduct listed in category C, namely, "negligence causing a substantial loss to the Bank". A final written warning was passed.

The decision of the Grievance and Disciplinary Committee was brought before the National Employment Council Appeals Board at the instance of the appellant. It held that two final written warnings could not run concurrently regardless of whether they related to acts of misconduct falling under different categories of the code of conduct.

The learned Deputy Chairman of the Labour Relations Tribunal, who heard the next appeal, came to a different conclusion. He expressed the view that as the first final written warning made no reference to any other offence, it was to be understood simply as a warning to the respondent not to overdraw her account again without prior authority over the ensuing twelve month period. More importantly, he held that, in any event, a final written warning did not apply to a subsequent breach of the code of conduct unless such breach was for the *same* offence as that for which the warning had been given.

I cannot agree with the learned Deputy Chairman that dismissal may only follow after a final written warning if the nature of the subsequent breach was the same as the previous one. Indeed the proposition was not supported by the respondent.

2000 (1) ZLR p155

GUBBAY CJ

To my mind, the question of law that arises for determination is whether it was competent under the code of conduct to order dismissal for the commission of an act of misconduct during the currency of a final written warning, where such subsequent act fell within a different category of misconduct to the first. Thus related to the present matter, the crucial issue is whether the Grievance and Disciplinary Committee was empowered to dismiss the respondent and, if so, had no option but to do that, since it found her guilty of negligence causing a substantial loss to the bank (an item 2 offence under category C), because she was serving a final written warning for having an unauthorised overdraft (an item 9 offence under category B).

Paragraph 3 of the general provisions of the code of conduct reads as follows:

"The warning/penalty system is progressive where an individual commits *any further offence* before the expiry date of any previous offence has lapsed" (my own emphasis).

What meaning is to be given to the phrase "any further offence"? Is it that urged by the appellant, which is "any further offence in any other category"? Or is the respondent correct in her understanding that the further offence must be another offence in the same category?

In my view, the meaning suggested by the respondent must be taken to be what was intended by the parties. It avoids the manifest absurdity that, for example, it would be mandatory to dismiss an employee who was under a final written warning for a failure, without reasonable cause, to put on protective clothing (an act of misconduct specified in category B) if

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subsequently he or she were held to have misused the bank's stationery (an act of misconduct specified in category A). As dismissal is a peremptory progression for the commission of an offence in the same category for which a prior final written warning had been given, such sanctions as recovery of losses, suspension without pay for a period not exceeding three months or demotion, which are specified in para 5 of the general provisions of the code of conduct, may not be substituted therefor.

In the result, I am in respectful agreement with the order granted by the learned Deputy Chairman, albeit for somewhat different reasons. I would therefore dismiss the appeal with costs.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

PTA BANK *v* ELANNE (PVT) LTD & ORS 2000 (1) ZLR 156 (HC)

Citation	2000 (1) ZLR 156 (HC)
Case No	Judgment No. HH-19-00
Court	High Court, Harare
Judge	Smith J
Heard	January 18, 2000
Judgment	January 26, 2000
Annotations	None

Civil action

Flynote

Arbitration - arbitration clause in contract - clause requiring referral to arbitration when there is dispute - need for dispute to exist before matter may be referred to arbitration - onus on party seeking to oust court's jurisdiction to show that dispute exists

Headnote

The plaintiff bank loaned money to the first defendant, the other defendants standing as guarantors. In terms of the loan agreement and the deed of guarantee there were arbitration

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clauses, requiring that any controversy, difference or dispute which could not be settled by mutual agreement had to be referred for arbitration by an arbitration tribunal. The first defendant did not pay as agreed and the bank claimed the amounts due. The defendants filed a special plea, in which they submitted that the dispute between the parties had not been settled by mutual consent and thus had to be referred to arbitration.

Held, that the arbitration clauses in the agreements could not completely oust the jurisdiction of the courts.

Held, further, that the question of whether a dispute fell within the arbitration clause was primarily a question of interpretation of the agreement and the arbitration clause.

Held, further, that the existence of a dispute must be apparent from the papers filed of record. The decision as to whether there is a dispute at all can be determined by the court, rather than by the arbitrator. There was no evidence of a dispute. Apart from raising a special plea to the jurisdiction of the court, the defendants had only requested further particulars, which had been supplied.

Cases Considered

Cases cited:

Delfante v *Delta Electrical Industries Ltd* 1992 (2) SA 221 (C)

Independent Mining (Pvt) Ltd v *Fawcett Security Ops (Pvt) Ltd* 1991 (1) ZLR 268 (H)

Scotfin Ltd v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H)

ZBC v *Flame Lily Broadcasting (Pvt) Ltd* 1999 (2) ZLR 448 (H)

Case Information

D Foroma, for the plaintiff

F Girach, for the defendants

Judgment

Smith J: The plaintiff (hereinafter called "the PTA Bank"), loaned the first defendant, (hereinafter referred to as "Elanne") UAPTA 340 000 (equivalent to US$499 557.94). The terms and conditions of the loan were set out in a loan agreement. The second and third defendants signed a deed of guarantee, in

which they guaranteed that Elanne would make full payment of the facility granted together with interest and all other charges which were due and payable to the PTA Bank under the loan agreement. The obligation of the guarantors was to pay in United States dollars or the currency of disbursement the amount due to the PTA Bank. The loan was repayable in ten equal

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half-yearly instalments, with Elanne having an option to pay in twenty equal half-yearly instalments. The first instalment fell due one year after the date of the first disbursement under the loan agreement. Interest accrued at the rate of 12% *per annum*, with an additional penalty rate of 9.5% per month on overdue instalments. In the event of any instalment remaining unpaid for a period of thirty days from due date, the whole balance outstanding became due and payable. The first disbursement under the loan agreement was made on 6 November 1996.

The PTA Bank alleges that Elanne has not paid anything towards reduction of the capital and has paid only US$8 456.89 towards the reduction of accrued interest. It is indebted to the PTA Bank in the sum of US$638 155.67 as at 31 December 1998. Despite written demand on 27 May 1999, Elanne has not paid. Accordingly, the PTA Bank issued summons claiming payment of the amounts due and owing under the loan agreement.

Clause 16.12 of the loan agreement between the PTA Bank and Elanne provides as follows:

"Any dispute or difference which may arise between the parties hereto or as to the rights or obligations of either party hereto or as to the rights and obligations of either party hereunder or otherwise in connection with this Agreement which shall not have been settled by mutual agreement of the parties shall be finally settled under the Rules for the time being of conciliation and arbitration of the International Chamber of Commerce sitting in London by an Arbitration Tribunal consisting of three Arbitrators of whom one shall be appointed by each party separately and the third shall be appointed by the joint agreement of the first two Arbitrators. The arbitration award shall be final and binding on both parties."

Clause 13 of the deed of guarantee signed by the second and third defendants provides as follows:

"Any controversy, dispute or question arising out of, in connection with or in relation to this Agreement or its interpretation, performance or non-performance or any breach thereof which shall not have been settled by mutual agreement of the parties shall be referred for decision to an Arbitration Tribunal consisting of three arbitrators of whom one shall be appointed by each party separately and the third shall be appointed by agreement jointly by the parties or failing such agreement the dispute or difference shall be referred to the PTA Centre for Commercial Arbitration based at Djibouti in Djibouti. The decision of the arbitrator shall be final and binding upon the parties and may be enforced in any court of competent jurisdiction."

The defendants filed a special plea to the PTA Bank's claim. Elanne admitted that it had entered into the loan agreement and the second and third

defendants admitted that they had signed the deed of guarantee. However, they went on to state that the dispute between the parties had not been resolved by mutual agreement and therefore the matter must be determined by arbitration rather than by action in the High Court. They sought an order that the PTA Bank's claim be dismissed or permanently stayed.

This matter was set down on 30 September 1999 for hearing on 18 January 2000. On 17 January, a supplementary affidavit by a messenger in the employ of the lawyers for the defendants filed a supplementary affidavit setting out his experiences in the High Court Registry in the period 30 September to 5 October when he tried to have this matter set down. There was no application for leave to file the supplement affidavit and the reasons why it was filed are not

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clear. Mr *Foroma* objected to it being accepted. His objection is well founded. To wait for more than three months after having a matter set down, and then to file an affidavit a day before the hearing, without the courtesy of advising the other side of the intention to file the affidavit and without application for leave, is not acceptable. For one thing, the other side has no opportunity to respond to anything raised in the affidavit. In addition, the court is not furnished with any basis for granting leave to file the supplementary affidavit. It is clear that the defendants are not entitled, in terms of the High Court Rules, to file supplementary affidavits whenever they feel so inclined - see r 235 of the High Court Rules 1971. Accordingly, I ruled that the supplementary affidavit was not properly before the court. It was thereafter ignored.

Mr *Foroma* also argued that the special plea was not properly before the court because the provisions of rule 138 of the High Court Rules 1971, had not been complied with. Rule 138 provides as follows. When a special plea has been filed, the parties may consent, within ten days of the filing of such plea, to it being set down for hearing (para (a)). Failing consent, either party may, within a further period of four days, set the matter down for hearing (para (b)). Mr *Foroma* submitted that the provisions of para (b) were not complied with since the matter was not set down within the four days. However, in a letter dated 20 September 1999 the lawyers of PTA Bank wrote to the lawyers of the defendants, saying:

"We acknowledge receipt of your clients special plea and letter dated 13th September 1999.

Our client is not aware of any dispute between themselves and the borrower. The fact that your client has unsuccessfully requested our client to restructure the loan is not a dispute.

Our client has no intention of withdrawing its claim and accordingly consents to set down of the matter in terms of Order 21 Rule 138(a). Please proceed to set down the special plea according to the Rules."

It seems, therefore, that para (b) of r 138 was not applicable. However, it

appeared to me that the point raised was a technicality which should not be allowed .to delay the determination of the special plea. Both parties have filed heads of argument and were prepared to argue the merits. Mr *Foroma* conceded that his client would not be prejudiced if the application were to be dealt with on the merits. In the interests of justice, which should not be unnecessarily delayed, I decreed that any non-observance of rule 138 would be condoned. As intimated by Mr *Girach*, it may well be that the provisions of r 138 should be examined in the light of current procedures in the High Court, to see whether they needed to be recant.

Mr *Girach* argued as follows. On a plain reading of the two clauses (16.2 and 13) set out above, it is apparent that any matter arising out of the agreement of loan or the deed of guarantee must be referred to arbitration. In *Independent Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 (H) at 20 G the learned judge said:

"the question of whether a dispute between parties to a contract falls within the arbitration clause is primarily a question of interpretation of the agreement and in particular the arbitration clause."

Clause 14 of the loan agreement provides specifically that any dispute or difference as to the rights or obligations of either party "or otherwise in connection with this agreement" must be

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referred to arbitration. Clause 13 of the deed of guarantee goes further and states that any "controversy, dispute or question arising out of, in connection with or in relation to the agreement, its interpretation or performance or non-performance or any breach thereof which shall not have been settled by mutual agreement" shall be referred to arbitration. Clearly, it was envisaged by the parties that, where either of them sought to assert or enforce any right relating to the loan agreement or the deed of guarantee, then such matter should be referred to arbitration. It is not essential that there is a dispute. Mr *Girach* went on to point out that the provisions of r 13(5) of the High Court Rules had not been complied with; the PTA Bank had no right to appropriate payments made by Elanne towards interest, rather than capital; the PTA Bank is not entitled to charge collection commission and costs on the legal practitioner and client scale. Even if such rights exist, the manner in which the claim has been made cannot be sustained - see *Scotfin Ltd* v *Ngomahuru* 1997 (2) ZLR 567 (H). Therefore, even on the claims made in the summons, there is a dispute.

Mr *Foroma* argued as follows. On a proper construction of clause 16.12 of the loan agreement, there must be some dispute or difference that has arisen as to the rights or obligations of one of the parties which is to be referred to arbitration. Likewise, in relation to clause 13 of the deed of guarantee, what must be referred to arbitration has to be a controversy or dispute or question arising from, or in relation to, the agreement, its interpretation, performance

or non-performance thereunder or any breach thereof, which has not been resolved by mutual agreement. The loan agreement and deed of guarantee do not totally oust the court's jurisdiction by importing that any matter arising out of either document must be referred to arbitration. It is a condition precedent to the reference of any matter arising from the loan agreement or deed of guarantee to arbitration in terms thereof that there must be some controversy or dispute. The defendants have not, in their special plea, indicated any dispute, controversy or difference between the parties.

Zimbabwe has, by virtue of the provisions of the Arbitration Act, 1996 (No. 4 of 1996), adopted the UNCITRAL Model Law as modified in terms of the said Act. Article 8(l) of the Model Law as modified, which is set out in the Schedule to the Arbitration Act 1996 provides as follows:

"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall if a party so requests not later than when submitting his first statement on the substance of the dispute, *stay those proceedings* and refer the parties to arbitration unless he finds that the agreement is null and void, inoperative or incapable of being performed."

Before a court will stay proceedings and refer the parties to arbitration, it must be satisfied that the matter in question is one which is the subject of an arbitration agreement. I accept that, as was held in the *Independent Mining* case *supra*, the question of whether a dispute between parties to a contract falls within the arbitration clause is primarily a question of interpretation of the agreement and in particular the arbitration clause. It must be noted that in so holding the learned judge referred to a dispute between the parties.

When one looks at clause 16.12 of the loan agreement one sees that it starts by saying, - "Any

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dispute or difference which may arise between the parties". I agree, therefore, with the submission by Mr *Foroma* that the existence of a dispute or difference between the parties is a prerequisite to the arbitration clause becoming applicable. Likewise, in relation to clause 13 of the deed of guarantee, the clause starts with the words "Any controversy, dispute or question arising out of, in connection with or in relation to this agreement or its interpretation, performance or nonperformance, or any breach thereof". Clearly, therefore, there must be a "controversy, dispute or question". The existence of some difference, dispute or controversy must be apparent from the papers filed of record.

In *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H), the defendant excepted to the claim brought by plaintiff, on the grounds that the dispute should be referred to arbitration. The alleged dispute between the parties was not apparent from the papers and so the defendant was required to file its plea so that the court would decide whether or not there was a genuine dispute between the parties,

such as was referred to in the arbitration clause in the agreement entered into by the parties.

In Butler & Finsen *Arbitration in South Africa Law and Practice*, the learned authors start, as is normally done, with an introduction which begins by defining what is meant by arbitration. They say:

"Arbitration is a procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties. The reference to the arbitrator takes place pursuant to an agreement between the parties. The arbitrator, in resolving the dispute, is not an ordinary court of law but a person chosen by the parties.

From the above definition, it is possible to identify the following five essential characteristics of arbitration.

First, arbitration is a process for resolving a dispute between the parties regarding their existing rights. The requirement of a dispute is used to distinguish arbitration from certain other contractual provisions for referring matters to a third party, namely valuation and certification. Apart from being an essential characteristic of arbitration, the existence of a dispute is necessary to render an arbitration agreement enforceable and to establish the arbitrator's jurisdiction."

At p 64, the learned authors go on to say that a party filing a special plea that proceedings be stayed and the matter referred for arbitration bears the onus of showing that there is a dispute and that the dispute falls within the ambit of a valid arbitration agreement. In *Delfante* v *Delta Electrical Industries Ltd* 1992 (2) SA 221 (C) at 227E-I, Gauntlett AJ said:

"I should perhaps add that, this procedural objection aside, the application in my view is to be refused for further reasons. The first is that - in the absence of the filing of opposing papers in this matter, or at least an exchange of correspondence between the parties included in founding papers - it did not appear to me that a question or issue such as is contemplated by clause 63 of the amending agreement as requiring arbitration has arisen. Merely because reference is made in the single (and unanswered) letter by the applicants' attorney to which I have referred, to the interpretation of a clause in the amending agreement does not in my judgment create the kind of dispute or difference contemplated by clause 63. After all, in the classic definition by Romilly MR, '(a)n arbitration is a reference to the decision of one or more persons ... of a particular matter in difference between the parties'. See *Collins* v *Collins* (1858) 28 LJ Ch 184. It is not even apparent on these papers, as counsel for the applicants pointed out, that the writer

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of the two letters invoking art 55(4) was ever aware of clause 49 of the amending agreement. If he was not, what is there to be submitted to arbitration? As counsel for the respondents acknowledges, it cannot be that on every occasion the 'interpretation' of any one of the many provisions in the amending agreement is in some loose sense moot that there is to be a referral to arbitration. There must be an issue, palpable and genuine. (See further, in this, regard, *Russell op cit* at 171; Mustill and Boyd *Commercial Arbitration* 2 ed (1999) at 12, 123)."

In the *Source book of Arbitration Materials* edited by Donovan, McMillan and Masunda at 5-13, the learned authors set out the provisions of Article 8 of the UNCITRAL Model Law and then they comment thereon. At 5-14, they say:

SMITH J

"There is authority that Article 8 also presupposes the existence of a dispute. In *CLOUT Case 63,* the Hong Kong High Court refused to stay legal proceedings where the defendant had admitted the plaintiff's claim unequivocally, both as to liability and *quantum*. The court appears to have been reluctant to deny the applicant the speedy remedy of summary judgment where it was clear that there was no defence to the claim. In *CLOUT Case 61*, however, a stay of proceedings was ordered where the letter relied on was not an unequivocal admission of liability. In England, the arbitration law specifically provides that the absence of a dispute is a ground for refusing a referral to arbitration. Nevertheless, it was emphasised in *Hayter* v *Nelson and Home Insurance Co* [l990] 2 Lloyds Rep 265 that:

> 'only in the simplest and clearest case i.e. where it is readily and immediately demonstrable that the respondent has no ground at all for disputing the claim, should the party be deprived of his contractual right to arbitrate.'

Although there are decisions to the effect that the court can intervene to determine whether there is a dispute and although it has been said that the extent of the court intervention will be limited, the question of court intervention at all is debatable. Thus, it may be forcefully argued that once the parties have agreed upon arbitration for the settlement of their dispute, it should be for the arbitrator to determine the existence of the dispute as well as the rights of the parties in relation to the dispute. This would be in keeping with the concept of arbitral autonomy which the Model Law promotes. Where the arbitrator finds there is no dispute, he can, in an appropriate case, make an interim or final award. Furthermore, the perceived advantage of speedy summary judgment proceedings may prove illusory if an appeal against the judgment is lodged and entertained."

For my part, I do not agree that it should be for the arbitrator to determine the existence of the dispute. I prefer to support the decisions to the effect that the court can intervene to determine whether or not there is a dispute.

Finally, I would refer to Redfern & Hunter *Law and Practice of International Commercial Arbitration* 2 ed. At p 8, the learned authors say:

"If there is to be a valid arbitration, there must first be a 'dispute or difference' between the parties. It may be objected that this is a statement of the obvious. If there is not a dispute or difference between the parties, why should they go to arbitration? Indeed, why should they seek any form of dispute resolution if they are not in fact in dispute?"

Then at p 10-11, they go on to say:

"The Geneva Protocol of 1923 and the New York Convention do not contain any specific reservation for litigation to take priority over arbitration agreements where there is no dispute between the parties. Under Article 11.3 of the New York Convention, the parties must be referred to arbitration unless the agreement to arbitrate is null and void, inoperative or incapable of being performed. These reservations do not include the specific English qualification in Section 1 of the Arbitration Act 1975 that the litigation shall be stayed 'unless ... there is not in fact any dispute between the parties ...' It is said in relation to the absence of this wording from the requirements of the New York Convention that:

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'This explicit wording has some advantages in that it sets more clearly the conditions that there be a dispute, although its omission would not have been fatal as the condition is self-evident. It should, however, not be readily assumed that a dispute does not exist.'

SMITH J

Although there is no explicit reference to a dispute or difference in Article 11.3 of the New York Convention, the 'agreement' to which Article 11.3 applies is defined in Article 11.1 as an agreement to submit to arbitration 'all or any differences'. It is thus evident that there must be a dispute between the parties before a court is obliged to refer the parties to arbitration. The UNCITRAL Model Law in Article 7 defines an arbitration agreement as an agreement to submit 'disputes'.

Procedures for summary judgment are available under the rules of civil procedure in many countries. In British Columbia (before the enactment of the Model Law) a stay was refused on the basis that there was no dispute between the parties where the only reason for the defendants' refusal to pay monies owing under one term of a contract was a claim of set-off in relation to monies owing them under a different term of the contract. The Arbitration Act of British Columbia then applicable contained a section modelled on s 4 of the English Arbitration Act 1950 which allows the court a discretion in relation to a stay of litigation in favour of the arbitration agreement. The court ruled that:

'It is clear, therefore, that as a prerequisite to the exercise of its discretion, the court must first find that there is a dispute or difference between the parties on any matter with respect to the agreement.'

The application for summary judgment was allowed to continue and a stay refused in respect of the obligation to pay which was not in dispute and the claim for set-off was referred to arbitration."

Mr *Girach* sought to argue that clauses 16.12 of the loan agreement and 13 of the deed of guarantee were so widely cast that they would include matters where there was no dispute, difference or controversy. I do not agree that the clauses are so wide. However, even if it were to be accepted that such a wide interpretation could be placed on them, I consider that they would have to be interpreted in a more limited manner so as to apply only to disputes, by whatever name called. That is because, if there is no dispute, there is nothing that can be referred to arbitration.

In his heads of argument, Mr *Girach* argued further that just on the papers filed by PTA Bank, there were matters that must be disputed. These are as follows. The PTA Bank has not asserted a right to appropriate payment made towards interest rather than capital; PTA Bank is not entitled to charge interest on interest; PTA Bank cannot claim both collection commission and costs on the attorney and client scale - see *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd supra*. It seems to me that matters such as these cannot be raised in heads of argument and then used to establish the existence of a dispute. Furthermore, as regards the claim for collection commission and costs, I consider that such a claim is peculiar to proceedings in the High Court and is not relevant to a submission to arbitration.

In this case, there is no allegation of any dispute, or controversy. The defendants, after filing their special plea requested further particulars which were duly supplied. They appear to me to answer satisfactorily the queries raised, without raising any dispute or difference.

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SMITH J

The arbitration clauses in the loan agreement and the deed of guarantee cannot completely oust the court's jurisdiction. As I have said earlier, it is only if there is some controversy or dispute that the matter must be referred to arbitration. Since the PTA Bank merely seeks enforcement of its claims against the defendants, then it is only right that it should have recourse to the High Court.

The special plea is dismissed with costs.

Sawyer & Mkushi, plaintiff's legal practitioners

Zamchiya Costa, defendants' legal practitioners

HUNT *v* HUNT 2000 (1) ZLR 165 (HC)

Citation	2000 (1) ZLR 165 (HC)
Case No	Judgment No. HH-23-00
Court	High Court, Harare
Judge	Smith J
Heard	November 8, 2000
Judgment	January 26, 2000
Annotations	None

Civil application

Flynote

Appeal - civil case - right of appeal - against interlocutory order - no right unless leave given - what is an interlocutory order - provisional order is an interlocutory order

Headnote

Section 43(2)(d) of the High Court Act [*Chapter 7:06*] provides that no appeal to the Supreme Court lies from an interlocutory order given by a High Court judge without the leave of the judge. An order is an interlocutory one if it does not have a final and definitive effect and may be set aside by the judge who granted it. A preparatory or procedural order is an interlocutory order unless its effect is such as to dispose of any issue or any portion of the issue in the main action.

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A provisional order is thus an interlocutory order and there is no right of appeal against it without the leave of the judge. It is only when the provisional order has been confirmed or discharged that an aggrieved party has the right to appeal without leave.

Cases Considered

Case cited:

South Cape Corp (Pty) Ltd v *Engineering Mgmt Svcs (Pty) Ltd* 1977 (3) SA 534 (A)

Case Information

B G Venturas, for the applicant

A Ebrahim, for the respondent

Judgment

Smith J: On 28 June 1999, the respondent instituted proceedings against the applicant claiming a decree of divorce and ancillary relief - case No. H-9384-99. The applicant entered appearance to defend and filed a claim in reconvention. On 27 October 1999, she filed an urgent application seeking an order that the respondent vacate the matrimonial property pending the determination of the divorce proceedings. As is usual in urgent applications, the applicant sought a provisional order setting out the terms of the final order sought and the interim relief claimed. The respondent opposed the application. He argued that the matter was not one of urgency and, further, that the applicant had not made out a case for the relief she was seeking. The parties were heard in chambers on 8 November 1999 and a provisional order was granted. It is not necessary for the purposes of this judgment to set out the details of the dispute between the parties.

SMITH J

In terms of r 247(4) of the High Court Rules, 1971, once a provisional order has been issued, rr 238 to 240 shall apply, *mutatis mutandis*. That means that either the applicant or the respondent should file heads of argument and then apply for the matter to be set down. Thereafter the provisional order would be confirmed, with or without amendment, or discharged. However, that was not done in this case. The respondent's legal practitioner noted an appeal against the provisional order granted. I was asked to furnish my reasons for granting the order for purposes of the appeal. I refused to do so as I consider that the respondent has no right of appeal against a provisional order without the leave of the judge. Such leave has not been sought. It is only when the provisional order has been confirmed or discharged that an aggrieved party has the right to appeal without leave. Before appealing, the respondent must comply with rr 238 and 239.

Section 43(1) of the High Court Act [*Chapter 7:06*] confers a right of appeal in any civil case to the Supreme Court from any judgment of the High Court. In terms of subs (2) of s 43, however, that right is qualified in the case of certain specified orders. By virtue of para (d) of subs (2), no

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appeal shall lie from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge, or, if that has been refused, without the leave of a judge of the Supreme Court. There are some exceptions to this but they are not relevant to this case. The terms "interlocutory order" and 'interlocutory judgment' are not defined in the High Court Act.

The question of whether or not an order of court is interlocutory has been considered in many cases in South Africa. Some of those cases were reviewed by the Appellate Division in *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A). In that case, the court was dealing with the question of whether an order of court granting leave to execute was an interlocutory one or not. Corbett JA in the course of his judgment, referred to a number of cases where the courts had considered whether or not an order was interlocutory. He then, at pp 549-551, set out what he considered to be the general effect of the series of decisions. The four paragraphs which are relevant to this case are paras (a), (b), (c) and (e) which read as follows:

"(a) In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper', which do not ...

(b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word 'interlocutory', or other words of similar import, are taken to refer to simple interlocutory orders.

SMITH J

In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation ...

(c) The general test as to whether an order is a simple interlocutory one or not was stated by Schreiner JA in the *Pretoria Garrison Institutes* case *supra*, as follows (at p 870):

> '... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing.'

This test has been followed and applied in a considerable number of cases including three in this court ...

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the judge who granted it any time before final judgment, whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*."

I consider that the principles enunciated by Corbett JA are applicable in this case. In applying them, there can be no doubt that a provisional order must be interlocutory. Firstly, it does not have a final and definitive effect in that it is merely provisional. Secondly, it may be altered or set aside by the judge who granted it.

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For the reasons set out above, I consider that the respondent should have sought leave before noting his appeal.

Byron Venturas & Partners, applicant's legal practitioners

Ali Ebrahim, respondent's legal practitioners

S *v* MUPARIWA 2000 (1) ZLR 168 (HC)

Citation	2000 (1) ZLR 168 (HC)
Case No	Judgment No. HH-24-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	January 26, 2000
Judgment	January 26, 2000
Annotations	None

Criminal review

Flynote

Criminal procedure - juvenile offender - procedure after conviction - offender a child in need of care - courses open to court - not competent for court to both pass sentence and deal with offender as a child in need of care

Headnote

The accused, a juvenile, pleaded guilty to and was convicted of theft of clothing. The theft was committed out of need and the circumstances showed that the accused was living on his own. His mother was dead and his father was not taking care of him. The magistrate sentenced the accused to corporal punishment and ordered that he be detained in custody and on remand whilst the probation officer looked for an institution to place the accused in.

Held, such order was incompetent. In the first place, if a child or young person has to be detained pending being dealt with in terms of the Children's Protection and Adoption Act [*Chapter 5:06*], he may only be detained in a "place of safety", which by definition does not include a prison. Secondly, after convicting the accused, the magistrate had one of two course open to him. He could either pass sentence on the accused (which he did), or he could refrain from passing sentence and order that the accused be dealt with in terms of the Act. He could not combine the procedures, even though the accused was a child in need of care and it would

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have been desirable to have dealt with him as such.

Legislation considered:

Children's Protection and Adoption Act [*Chapter 5:06*], ss 16 and 84

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 351(2)

Judgment

Chatikobo J: The 16 year old juvenile who is the accused in this case was convicted on his own plea of guilty of the crime of housebreaking with an intent to steal and theft. He was sentenced to receive two strokes with a rattan cane. It appears that at the time of his trial and conviction he was in remand prison, a fact which offends against the provisions of s 84(1) of the Children's Protection and Adoption Act, [*Chapter 5:06*] ("the Act") which provides that:

"A child or young person who is charged with an offence shall not before conviction be detained in a prison or police cell or lock-up unless his detention is necessary and no suitable remand home is conveniently available for his detention."

CHATIKOBO J

The apparent illegality of such pre-trial detention does not appear to have been appreciated by the trial magistrate, because he ordered that, after the corporal punishment was administered, the accused was to remain in custody and on remand "whilst the probation officer looks for an institution to place the accused in".

I am concerned by two aspects which, in my view, render the proceedings irregular. The first relates to the pre-trial detention of the accused, which in itself is tainted with illegality. The offence was committed on 15 October 1999 and the trial only took place on 3 November 1999. The delay is difficult to understand given the fact that the accused was pleading guilty. The accused stole clothes valued at $1 755, of which property valued at $1 560 was recovered. I can find no possible justification for subjecting a 16 year old juvenile to the rigours of corporal punishment for stealing property whose value is insignificant and most of which was recovered. More importantly, the fortnight which the accused spent in custody was a more severe punishment than any court would impose on a 16 year juvenile who commits a similar offence. The trial court should have ensured that any punishment it passed did not lead to the further incarceration of the accused. Furthermore, the offence was committed out of need, a fact which was properly accepted by the trial court. The accused told the court that he stole the clothes for himself because his father was not buying clothes for him. The accused's father, who gave evidence in court, confirmed not only that he had not been living with the accused for 12 months, but did not even know where the accused was living. The accused's mother is deceased. A judicial officer who is faced with an offender who is knee-deep in such misery and desperation and who has been subjected to what is clearly an avoidable pretrial incarceration, is duty bound to be merciful. It is refreshing to recall the words of Portia in Shakespeare's *Merchant of Venice* that "(T)he quality of mercy is not strained. It droppeth as the gentle rain from heaven" and that "mercy seasons justice". The case cried out for a non-custodial and

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non-corporal sentence blended with compassion, such as postponing the passing of sentence on appropriate conditions.

It was equally wrong for the magistrate to pass sentence without first obtaining a probation officer's report. The reason he gives for adopting this course, namely, that the probation officer for the area concerned was in the habit of not compiling reports timeously, was unsatisfactory. I am sure that if he had been ordered by the court to prepare a report, the probation officer would have complied.

The second disturbing feature in these proceedings was the magistrate's decision to order the accused to remain in custody and on remand pending the obtainment of a remand home to which the accused could be sent. I asked the

CHATIKOBO J

magistrate why he adopted this course and in response he has told me that he was of the view that he was empowered to do so by s 16 and s 84 of the Act. Section 84 of the Act does not apply. It outlaws the detention of a juvenile prior to his conviction and lays down the procedure to be followed and the factors to be taken into account in determining the suitability of any place for the detention of a child or juvenile. Section 16 provides as follows:

"Any child or young person who -

(a) has been taken to a place of safety in terms of this Act or who has sought refuge in a place of safety, may be detained therein; or

(b) has been ordered by a court, which has convicted him of an offence, to be dealt with in terms of this Act, may be detained in a place of safety;

until he has been brought before and dealt with by a juvenile court."

The phrase "place of safety" is defined in s 2 of the Act and it does not include a remand prison.

It can thus be seen that s 16 is intended to cater for a situation where a court has convicted a child or young person and has decided that the child or young person should be dealt with in terms of the Act. Pending the appearance of such child or young person before a juvenile court, he can be detained in a place of safety, but not in a prison. The power to order a child or young person to be dealt with in terms of the Act is derived from s 351(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Code") which provides that:

"Any court before which a person under the age of nineteen years has been convicted of any offence may, instead of imposing a punishment of a fine or imprisonment for that offence, subject to subsection (1) of section *three hundred and thirty seven* -

(a) order that he shall be taken before a juvenile court and dealt with in terms of the Children's Protection and Adoption Act [C*hapter 5:06*]; or

(b) after ascertaining from the Minister responsible for social welfare that accommodation is available, order that he shall be placed in a training institute in Zimbabwe or in a reform school in the Republic of South Africa for the period specified in subsection (1) of section *three hundred and fifty two*."

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The power which a magistrate has to order that a person under the age of nineteen years be dealt with in terms of the Act is exercisable only after he has convicted such a person of an offence but before he has passed sentence and if he considers that a sentence of a fine or imprisonment is inappropriate. In other words, the referral of a convicted person to a juvenile court is permissible only as an alternative to the passing of sentence. Once a magistrate passes sentence he cannot further invoke the provisions of s 351(2) which are intended to relieve a magistrate's court of the duty to pass sentence on a juvenile, a responsibility which is simultaneously shifted to the juvenile court. *In casu*, the order to detain the accused in prison pending his placement in an institution is therefore not supportable either under the Act

CHATIKOBO J

or the Code, notwithstanding the fact that a court of a magistrate is deemed, in terms of s 3 of the Act, to be a juvenile court for the area over which the magistrate exercises jurisdiction if no juvenile court has been established. The simple and logical reason for this is that the magistrate was exercising jurisdiction as a magistrate's court. He was not sitting as a juvenile court because a juvenile court lacks jurisdiction to try people facing criminal charges.

While sitting as a magistrate, exercising jurisdiction in terms of the Magistrates' Court Act [*Chapter 7:10*], the court *a quo*, after convicting the accused, had two options open to it, that is, either to pass sentence on the accused, which it did, or to refrain from passing sentence and order that the accused be dealt with in terms of the Act. There is no power, either in the Act or the code, to combine the two procedures. Each is exercisable only in lieu of the other.

As things stand, the accused has now been placed in Kadoma Training Institute following upon the magistrate's order. His detention in that institution is illegal. A magistrate can only order a juvenile to be detained under the circumstances provided for in Part IV of the Act, in particular s 16. The circumstances provided for in s 16 do not include the situation where the magistrate has convicted and sentenced an accused person.

I have to accept that the magistrate's finding - that the accused was a child in need of care - was perfectly justified on the evidence before him. His error lay in passing sentence on the accused. He should have refrained from passing sentence. Had he done so, he could have easily achieved his intention - I may say a noble one - of having the accused treated as a child in need of care, by directing that he be dealt with in terms of the Act.

The difficult I now face is that it seems that the detention of the accused in an institution is in his best interests, but he has entered the institution through an illegal route. I cannot sanction this illegality. I must order his immediate release.

However, I have to direct, and this direction must be complied with urgently, that the Provincial Welfare Officer for Mashonaland West must cause an investigation to be conducted in terms of the Act to establish the true circumstances of the accused and, if satisfied that he is a child in need of care, steps should be taken to bring him before a juvenile court, there to be dealt with in terms of the Act.

In the premises, I find myself unable to say that the proceedings in this case were in

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accordance with real and substantial justice.

It is ordered that the accused be released from his detention in Kadoma Training Institute.

BARTLETT J agrees.

WASTE MANAGEMENT SERVICES *v* CITY OF HARARE 2000 (1) ZLR 172 (HC)

Citation	2000 (1) ZLR 172 (HC)
Case No	Judgment No. HH-20-00
Court	High Court, Harare
Judge	Smith J
Heard	January 18, 2000
Judgment	January 26, 2000
Annotations	None

Civil action

Flynote

Arbitration - contract - arbitration clause in contract - one party requesting matter be referred to arbitration - court obliged to grant request

Contract - illegality - provision contrary to public policy - provision requiring that dispute be referred to employee of one party for determination - illegality of - saving of by further provision for arbitration

Headnote

A dispute arose between the Harare City Council and the firm contracted to undertake its waste management services. The dispute concerned the amount of money that was owed by the Council to the contractor for services rendered. The contract had a provision that in the event of a dispute the matter was to be referred to the Council's Director of Works for decision, and that if the contractor was dissatisfied with the Director's decision, the matter would then be referred to arbitration.

Counsel for the contractor argued that the provision was a breach of the *nemo judex in sua causa* principle of natural justice and was contrary to public policy. This was because, as an employee of the Council, the Director could not be an impartial and unbiased arbiter. A referral for arbitration was in effect an appeal against the decision of the Director. Both these provisions were contrary to public policy. Counsel for the contractor also argued that the court had a

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discretion as to whether to refer the matter to arbitration.

Held, that public policy is a vague and elusive concept and the power of the court to declare a contract, or part of a contract, to be void as being contrary to public policy should be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts results from an arbitrary and indiscriminate use of the power.

Held, further, that if the contract had provided that the Director was to make the final decision about how the dispute was to be settled, that provision would have been contrary to public policy and would have been void because this would have meant that a potentially biased person would decide the matter. However, this objectionable provision was remedied by the provision providing for referral of the matter to independent arbitration in the event of the contractor being dissatisfied with the decision of the Director. As it was arguable whether or not the provision required that the contractor has to comply with the Director's decision even though he has required that the matter be referred for arbitration, the

provision should be interpreted in a way that would allow it to be upheld rather than be nullified on the ground of public policy.

Held, further, that the Arbitration Act 1996 provides that where there is an arbitration clause, the court is obliged to refer the matter to arbitration where one party so requests, as the Council did in this case. The court had no discretion to decide not to order referral to arbitration.

Cases Considered

Cases cited:

Donelly v *Barclays National Bank Ltd* 1990 (1) SA 375 (W)

Enterprise Wholesalers (Pty) Ltd v *Ebrahim* 1954 (2) SA 262 (N)

Independence Mining (Pvt) Ltd v *Fawcett Security Ops (Pvt) Ltd* 1991 (1) ZLR 268 (H)

Karimanzondo v *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S)

Min of Justice, Ex p, In re *Nedbank Ltd* v *Abstein Distributors (Pty) Ltd & Ors* and *Donelly* v *Barclays National Bank Ltd* 1995 (3) SA 1 (A)

Nedbank Ltd v *Abstein Distributors (Pty) Ltd & Anor* 1989 (3) SA 750 (T)

R v *Sussex Justices* Ex p *McCarthy* [1924] 1 KB 256

S & R Valente (Pty) Ltd v *Benoni Town Council* 1975 (4) SA 364 (W)

Sasfin (Pty) Ltd v *Beukes* 1989 (1) SA 1 (A)

Standard Bank Financial Nominees Ltd v *Bamberger & Anor* 1993 (4) SA 84 (W)

Street v *Dubin* 1961 (2) SA 4 (W)

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Transvaal Mines Labour Co Ltd v Robinson Group of Mines 1911 WLD 191

ZBC v *Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H)

Legislation considered:

Arbitration Act 9 of 1996, Schedule, article 8(1)

Case Information

F Girach, for the plaintiff

L T Biti, for the defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "WMS") entered into a contract with the defendant (hereinafter referred to as "the City") to carry out refuse collection services on its behalf. A dispute arose between the parties in relation to the charges raised by WMS. WMS claimed that it was owed $7 345 503.85, whereas the City believed that the proper amount outstanding was $4 881 543.61. WMS issued summons claiming $7 345 503.85. The City offered to pay the amount it considered due, in full and final settlement, but WMS refused to accept the offer. The City then filed a special plea. It claimed that, in terms of clause 25 of the agreement entered into by the parties, any dispute between them was to be referred to the Director of Works and then, if he could not settle the dispute, the matter was to be referred to arbitration. Therefore WMS had instituted proceedings in the wrong forum and so its claim should be dismissed with costs.

Clause 25 of the agreement entered into by the parties reads as follows:

"(a) In the event of any dispute arising between the City Council and the Contractor in connection with or arising out of the contract, it shall be referred to the Director of Works who shall state his or her decision in writing and give notice of same to the

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Contractor within 15 days of the dispute having arisen. Such decision shall be binding upon the Contractor and shall forthwith be given effect to by the Contractor.

(b) Should the Contractor be dissatisfied with the decision of the Director of Works he or she may, within 28 days after receiving notice of such decision, require that the issue or issues shall be referred to a single arbitrator to be agreed upon between the parties or, failing agreement, to be nominated by the President of Zimbabwe Institution of Mechanical Engineers: and any such reference shall be deemed to be submission to the arbitration of a single arbitrator. The award of the arbitrator shall be final and binding on both parties.

(c) Not later than one week after receipt of notice calling for arbitration the Council may give notice to the Contractor that it desires the issue or issues to be settled by Court of Law having jurisdiction.

(d) The declaration of a dispute and the institution of proceedings for the settlement of such a dispute shall not, in any way, vitiate or invalidate the contract and the Contractor shall continue to supply an uninterrupted service in terms of the contract."

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Mr *Biti* argued that there is a clear dispute between the parties relating to the amount that is due by the City to WMS. Therefore, WMS is obliged to comply with the provisions of clause 25 of the agreement between the parties. If WMS is not prepared to accept the offer made by the City, it must refer the matter to the Director of Works for his or her decision. If WMS is dissatisfied with the decision of the Director of Works then it should require that the issues be referred to an arbitrator in terms of para (b) of clause 25 of the agreement. The arbitration clause operates to exclude the jurisdiction of the court and is lawful, legitimate and enforceable - see *Transvaal Mines Labour Co Ltd* v *Robinson Group of Mines* 1911 WLD 191, *Enterprise Wholesalers (Pty) Ltd* v *Ebrahim* 1954 (2) SA 262 (N), *Street* v *Dubin* 1961 (2) SA 4 (W) and *S & R Valente (Pty) Ltd* v *Benoni Town Council* 1975 (4) SA 364 (W). Therefore, the special plea should be upheld and the claim by WMS dismissed with costs.

Mr *Girach* argued that clause 25 set out above is of no force or effect in that it offends against the rule *nemo iudex idoneus in propria causa est*. Alternatively, he argued that the provisions of that clause are contrary to public policy. Alternatively, he argued that this court should exercise its discretion and decline to refer the matter to arbitration. The Director of Works, being an employee of the City, has a direct interest in the decision that has to be made and could hardly be regarded as a person who would be impartial and unbiased, especially in view of the fact that the letter notifying WMS that it had been awarded the contract had been signed by the Acting Director of Works. As was said by Lord Hewart in *R* v *Sussex Justices* Ex p *McCarthy* [1924] l KB 256 at 259:

"Justice should not only be done but should manifestly and undoubtedly be seen to be done."

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Mr *Girach* then argued that if para (a) of clause 25 was a nullity, para (b) thereof should equally be unenforceable because the effect of the arbitration is an appeal against the decision of the Director of Works. The two paragraphs hang together and if one fails, then so must the other. However, both paragraphs are contrary to public policy in that they are "clearly inimical to the interests of the community ... run counter to social or economical expedience" - see *Sasfin (Pty) Ltd* v *Beukes* 1989 (1) SA 1 (A) at 8D. Finally, Mr *Girach* argued that the court should exercise its discretion and decline to refer the matter to arbitration - see *Independence Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 (H).

In the *Sasfin* case *supra*, at 7-8, Smalberger JA said:

"Our common law does not recognise agreements that are contrary to public policy (*Magna Alloys & Research SA (Pty) Ltd* v *Ellis* 1984 (4) SA 874 (A) at 891G). This immediately raises the question what is meant by public policy, and when can it be said an agreement is contrary to public policy. Public policy is an expression of 'vague import' (*per* Innes CJ in *Law Union & Rock Insurance Co Ltd* v *Carmichael's Executor* 1917 AD 593 at 598), and what the requirement of public policy are must needs often be a difficult and contentious matter. Wessels *Law of Contract in South Africa* 2 ed vol 1 para 480 states that '(a)n act which is contrary to the interests of the community is said to be an act contrary to public policy'. Wessels goes on to state that such acts may also be regarded as contrary to the common law, and in some cases contrary to the moral sense of the community. The learned author 'Aquilius', in one of a series of articles on 'Immorality and Illegality in Contract' in 1941, 1942 and 1943 *SALJ,* defines a contract against public policy as -

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> 'One stipulating performance which is not *per se* illegal or immoral but which the courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community' (1941 *SALJ* 346). Wille in his *Principles of South African Law* 7 ed at 324 speaks of an agreement being contrary to public policy 'if it is opposed to the interests of the State, or of justice, or of the public'. The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.'

At p 9, he went on to say:

> 'No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy, should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness'."

Can it be said that clause 25 of the agreement is contrary to public policy? Had the clause provided that any dispute between the parties was to be referred to the Director of Works and his or her decision would be final, then clearly the clause would be contrary to public policy. In *Nedbank Ltd* v

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Abstein Distributors (Pty) Ltd & Anor 1989 (3) SA 750 (T), the court considered the validity of a clause in a deed of suretyship which provided that a certificate of indebtedness signed by the bank manager would be conclusive proof of the surety's indebtedness. Le Roux AJ held that the clause in question was *contra bonos mores* and therefore void. In reaching that conclusion, the learned judge relied, *inter alia,* on the decision of the court in *Sasfin (Pty) Ltd* v *Beukes* 1989 (1) SA 1 (A). In delivering judgment in that case Smalberger JA at 14J-15D said:

> "The effect of the provisions of clause 3.24.2 is that such certificate cannot effectively be challenged on any ground save fraud. It constitutes the sole memorial of Beukes' indebtedness, and is conclusive proof of such indebtedness and the amount thereof. These clauses purport to oust the court's jurisdiction to enquire into the validity or accuracy of the certificate, to determine the weight to be attached thereto or to entertain any challenge directed at it other than on the ground of fraud. As such they run counter to public policy. *Cf Schierhout* v *Min of Justice* 1925 AD 417 at 424. Although perhaps not *per se* contrary to public policy, the provisions of clause 3.21.3.1 are indicative of the extreme lengths to which the deed of cession goes in curtailing the rights of Beukes."

In *Standard Bank Financial Nominees Ltd* v *Bamberger & Anor* 1993 (4) SA 84 (W), Levy AJ held that a clause in an agreement which rendered a certificate signed by any director or secretary of a company conclusive proof of the amount of the surety's indebtedness was contrary to public policy.

In *Donelly* v *Barclays National Bank Ltd* 1990 (1) SA 375 (W), the court came to a different conclusion, with Kriegler J holding that the effect of the decision in the *Sasfin* case *supra* was not that which was relied upon by Smalberger JA in the *Nedbank* case *supra*. Kriegler J held that a clause which provided that a certificate of indebtedness signed by a bank manager would be conclusive proof of the amount stated therein was due and owing was part of established banking practice both in South Africa and in the United Kingdom, and there was no reason for

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holding that such clauses offended against public policy. The conflict between the decisions in the *Nedbank* and *Donelly* cases *supra* was referred by the Minister of Justice to the Appellate Division for resolution. The decision of the Appellate Division was given in *Min of Justice*: Ex p, In re *Nedbank Ltd* v *Abstein Distributors (Pty) Ltd & Ors* and *Donelly* v *Barclays National Bank Ltd* 1995 (3) SA 1 (A) where the court held that the interpretation adopted by Le Roux AJ in the *Nedbank* case was correct; namely that a "conclusive proof clause" in favour of a creditor in an agreement in terms whereof the creditor is to be the author of the certificate of balance issued under such a clause is *contra bonos mores* and therefore void. See, too, *Karimazondo* v *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S). Where the author of the certificate of balance or indebtedness is a third party, and not the creditor, then a "conclusive proof clause" may well be held not to be *contra bonos mores*.

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In the *Nedbank* case *supra*, at 751H-I, Le Roux AJ said in relation to a certificate constituting proof of indebtedness:

"In my view, there is, however, no comparison between *prima facie* proof and conclusive proof. In the first-mentioned instance, the certificate would not even transfer the onus of proof in the proper sense of the word. In the last-mentioned instance, it would dispose of proof of the extent of even existence of the debt."

The function of the Director of Works under clause 25(a) of the agreement is to try to settle the dispute which has been referred to him. Although it is provided in para (a) of clause 25 that his or her decision shall be binding on WMS and shall forthwith be given effect to by WMS, para (b) goes on to gainsay that provision. It provides that if WMS is dissatisfied with the decision of the Director of Works, it may require that the issue be referred to an arbitrator. Paragraph (a) of clause 25 of the agreement, read by itself, would undoubtedly be contrary to public policy. Since, however, para (b) of that clause remedies the objectionable part of the paragraph, I do not consider that the clause can be regarded as being contrary to public policy. As was stated in the *Sasfin* case *supra,* at 9, the power to declare a contract, or part thereof, to be contrary to public policy should be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts results from an arbitrary and indiscriminate use of the power.

Mr *Girach* argued that because the last sentence in para (a) of clause 25 provides that the decision of the Director of Works shall forthwith be given effect to by WMS, the effect is that WMS must comply with the decision even though it is dissatisfied with the decision and requires it to be submitted to arbitration. Mr *Biti* countered that such an interpretation was not the only one and that it should not be implied as that is not expressly stated. I agree that such an interpretation is arguable. If such a meaning could be attributed to para (a) and the effect thereof would be that the provisions of para (a) would be contrary to public policy, then a different interpretation would have to be placed on the provisions in question so that the provisions could be upheld and enforced rather than be nullified.

In *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H), it was pointed out that, although it had been held in the *Independence Mining* case *supra* that the court had a discretion as to whether or not a matter should be referred to arbitration, in so ruling Chidyausiku JP had been dealing with the provisions of s 6(1) of the

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Arbitration Act [*Chapter 7:02*]. That Act has since been repealed by the Arbitration Act 6 of 1996 which came into operation on 13 September l996. That Act applies, with modifications, the UNCITRAL Model Law for the purpose of giving effect to domestic and international arbitration agreements.

SMITH J

Article 8(1) of the Model Law as modified, which is set out in the Schedule to Act No. 6 of l996, provides as follows:

"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement *shall,* if a party so requests not later than when submitting his first statement on the substance of the dispute, *stay those proceedings and* refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Since the City has so requested, this court has no option but to stay proceedings under this case and refer the parties to arbitration in terms of clause 25(b) of the agreement they entered into.

It is ordered that the proceedings in terms of the summons issued by the plaintiff are stayed and the issue shall be referred to an arbitrator in accordance with the provisions of para (b) of clause 25 of the agreement entered into by the parties. The plaintiff shall pay the costs of suit.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

ZAMBEZI CONFERENCE OF SEVEN DAY ADVENTISTS CHURCH (1) *v* SEVENTH DAY ADVENTIST ASSOCIATION OF SOUTHERN AFRICA (1); GENERAL CONFERENCE OF SEVENTH DAY ADVENTISTS & ANOR (2) *v* ZAMBEZI CONFERENCE OF SEVENTH DAY ADVENTISTS 2000 (1) ZLR 179 (HC)

Citation	2000 (1) ZLR 179 (HC)
Case No	Judgment No. HH-261-99
Court	High Court, Harare
Judge	Smith J
Heard	January 25, 2000; January 26, 2000; January 27, 2000
Judgment	January 29, 2000
Annotations	None

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Civil action

Flynote

Church - property - local church breaking away from mother church - right of local church to retain properties acquired before secession

Delict - passing off - applicability of action other than in trade relationships - church - whether church can claim such protection for its name - right of body breaking away from church to continue to use name of church - church entitled to require body breaking away from it to use another name that will not cause confusion

Headnote

The plaintiff church broke away from its mother church. It claimed certain properties from the mother church. The mother church in turn claimed the return of certain properties and sought an order that the local church should cease to use the name of Seventh Day Adventist Church.

Held, that when the properties in question were acquired, the members of the church had donated to the local church as part of the mother church. There was thus no basis upon which the local church could claim to be successor in title to the mother church.

Held, further, that there is ample authority for applying the principles of a passing-off action to the unauthorised use of the name of a non-trading body. The mother church is a long established and well-known religious body, with branches world-wide and is entitled to the protection of the law insofar as its name is concerned. The use of the name of Seventh Day Adventists Church by the local church that has broken away from the mother church is bound to cause confusion and it would be ordered not to use this name or any similar name that might cause confusion.

Cases Considered

Cases cited:

Apostolic Church of Africa v *Non-White Old Apostolic Church of Africa* 1975 (2) SA 684 (C)

Ethiopian Church of Trustees v *Sonjica* 1926 EDL 107

Case Information

E Matinenga, with him Miss *E Mushore,* for the plaintiff

J C Andersen SC, for the defendant

Judgment

Smith J: Each of the parties hereto have instituted an action against the other. The Zambezi Conference of Seventh Day Adventists Church (hereinafter referred to as "the Zimbabwe Conference") broke away from the General Conference of Seventh Day Adventists (hereinafter referred to as "the General Conference") and the Zambezi Union of Seventh Day Adventists (hereinafter referred to as "the Zambezi Union"), which I will refer to collectively as being part of

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the "Mother Church". The Zimbabwe Conference is claiming from the Seventh Day Adventists Association of Southern Africa, a component body of the Mother Church, the transfer of certain property, whereas the General Conference and the Zambezi Union are seeking an order that the Zimbabwe Conference cease to use the name "Seventh Day Adventists Church" or any similar name which is likely to cause confusion and that the Zimbabwe Conference return to them certain properties. At the pre-trial conference it was agreed that the onus lay on the Zimbabwe Conference to establish its right to ownership of the properties it was claiming and to use the name Seventh Day Adventists Church (hereinafter referred to as "SDA") and therefore it would lead off. After the Zimbabwe Conference had led evidence and closed its case, Mr *Andersen* applied for the case to be dismissed as it had not established a *prima facie* case. Mr *Matinenga* argued that the Zimbabwe Conference had made its case. After hearing counsel I granted the order set out at the end of this judgment, giving my reasons therefor. The reasons were as follows.

I will deal with the two issues separately, first the use of the name SDA and then the ownership of the various properties.

NAME

Mr *Matinenga* submitted that the name SDA was not a trade mark and could therefore be freely used by any body or institution as long as that body, or the doctrines it upheld, subscribed to the tenets and beliefs of the Mother Church. He did not quote any authority for his submissions. In my view, they are not tenable. The Mother Church is a long established and well-known religious body, with branches world-wide. It is entitled, in my opinion, to the protection of the law insofar as the use of its name is concerned. I can think of no legal principle that could found an argument that a body which is not part of, or affiliated to, the Mother Church may use the name SDA without any qualification to show that it is not the same entity as, or affiliated to, the Mother Church. In *Old Apostolic Church of Africa* v *Non-White Old*

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Apostolic Church of Africa 1975 (2) SA 684 (C), the court had to deal with the case where a church objected to the use of a name similar to its own by a number of former members who had broken away and formed their own church. At p 686-687, Watermeyer J said:

"The first question for decision is whether the principles connected with passing-off actions have any application outside the field of trade. I was referred to only one decided case in our courts where such an order has been made, namely, *Society of Incorporated Accountants and Auditors* v *Powell* 1929 CPD 453. In that case, an order was granted, at the instance of a society formed to provide a central organization for accountants and auditors to watch over the interests of its members and to protect the profession, restraining the respondent, who was not a member of the society, from describing himself as an 'Incorporated Accountant (South Africa)' or 'Incorporation Accountant (S.A.), Sutton J, held that the respondent's conduct in so doing was calculated to deceive and lead persons into the belief that he was a member of the applicant society and that he was not entitled to use the reputation of the society for his own private benefit. The learned judge referred to several similar cases in England and Scotland where like orders had been made.

The question of the unauthorised use of the name of a non-trader is discussed at some length in Kerly *Law of Trade Marks and Trade Names* 10 ed, pp 365, and also in Chowles & Webster *South African Law of Trade Marks* 2 ed, p 308. I was referred by counsel for the applicant to two English cases which appear to me to be in point, namely,

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British Legion v *British Legion Club (Street) Ltd* (1931) 48 RPC 555, and *British Medical Association* v *Marsh* (1931) 48 RPC 565. In both these cases, injunctions were granted at the instance of non-trading organisations. The British Legion was a well-known organisation which collected funds from individuals and the general public, which it applied for the benefit and welfare of ex-service men and women, their children and dependants. The court granted an injunction restraining the defendant company, which was formed for the purpose of a political social club, from using the words 'British Legion' as part of its name on the ground that the ordinary person, unless well instructed to the contrary, would from the use of those words think that the defendant company was connected in some way with the plaintiff, either as a branch of it, or in some way amalgamated with it, or under its supervision, or that the plaintiff had in some way made itself responsible for defendant. It was further held that damage to plaintiff was likely to result from such confusion.

In *British Medical Association* case, the plaintiff association had a large number of members and was a body that represented the medical profession as a whole. It succeeded in obtaining an injunction against the defendant, Marsh, who was carrying on the business of selling drugs and using the letters 'B.M.A.' in connection therewith. No actual damage to the plaintiff was proved but, after reviewing the authorities, Maugham J said at p 576:

> 'In the present case, I find as an inference of fact, that the acts of the defendant tend to injure the plaintiff's in their business both by tending to cause existing members of the Association to leave the Association and to cause qualified medical men not yet members of the Association to abstain from joining. The plaintiffs as a corporation have, in my opinion, a business: they subsist on subscriptions, and mainly on subscriptions of persons who become members. They are a purely voluntary body, and anybody may leave the Association or join it as they will. I am satisfied that people who may see these shops may come to the conclusion, and ordinary members of the public will come to the conclusion, that the British Medical Association is in some way connected with these shops. I have given my reasons for coming to that conclusion. Accordingly, my opinion

> is that the acts of the defendant tend to injure and to cause damage to the plaintiff's in their business, and that as a matter of law that is sufficient ground for granting an injunction in the present case.'

From the aforegoing, it will be seen that there is ample authority for applying the principles of a passing-off action to the case of a non-trader and, in principle, I can see no reason why that should not be so. Like the British Medical Association, a church requires money to carry out its functions and this money is provided by way of voluntary contributions or donations, mostly from its members, and anyone may join it or leave it at will. Although it does not trade it has something akin to a business and if this business is likely to be adversely affected by the unlawful activities of another I can see no reason why the court should not grant an order restraining those activities."

From the evidence led in this case, it is clear that the various churches in the Mother Church rely on contributions and tithes paid by the members to enable them to function. I am of the opinion that the Zimbabwe Conference has not discharged the onus of proving that it is entitled to call itself the Zambezi Conference of Seventh Day Adventists Church. The use of that name is bound to cause confusion and to lead people to believe that it is part of the Mother Church. It is not necessary, in my opinion, to hear any evidence from the Mother Church on this issue. The fact that the name used by the Zimbabwe Conference is identical to that of the Mother Church is sufficient in itself. Therefore the Zimbabwe Conference must change its name. In selecting a new name it must not choose one that is liable to cause confusion.

PROPERTIES

After the Zimbabwe Conference broke away from the Mother Church, it took possession of certain property, both movable and immovable, including some shares and monies, which the Mother Church claims belongs to it. The issue in regard to the ownership of the properties is not

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so clear-cut as that of the use of the name.

The Seventh Day Adventists Church was established in the United States of America in the last century and has spread world-wide. At the head of the Church there is the General Conference. The administration of the church is divided into ll Divisions world-wide, each of which has jurisdiction over the area assigned to it. Zimbabwe falls under the Eastern Africa Division, the offices of which are situated in Harare. The administration of the Church within each Division is conducted by Union Missions, in consultation with Conferences and/or Fields within its area of jurisdiction. The various churches in each area are united under the local Conference organization, like the Zambezi Conference or Union. They appoint to the local Conference session delegates who are duly authorised to represent the churches in the councils of the Conference.

SMITH J

Natural persons are members of the congregation of any church. The churches are joined together under a Conference. The Conference is financially self-supporting. Previously in this country, there was the Rhodesian Conference, which was exclusive to members of the White community, and the Zambezi General Field, which served the coloured and Black communities. In 1977, they amalgamated to form the Zambezi Conference, which catered for all races. In June 1991, the Eastern Africa Division wrote to the Zambezi Union Mission telling it to dissolve the Zambezi Conference. Then in April 1992 the General Conference voted to assist the Eastern Africa Division to disband the Zambezi Conference.

Some members of the Zambezi Conference were not prepared to accept the dictation of the General Council. Accordingly, acting in terms of its Constitution, a special session of the Zambezi Conference was convened in December 1992. On 20 December, it was decided by the delegates at that session that the Zambezi Conference should secede from the Mother Church. Accordingly, from 20 December 1992, a new body (the Zimbabwe Conference) emerged. It is claiming ownership of the properties of its predecessor.

The evidence which was led establishes the following. If any congregation wishes to build a church, it requires the approval of a higher body in the organization of the Mother Church. Only when that approval has been given will the members then be able to buy the land and erect the building. Occasionally, a congregation may be fortunate enough to get financial assistance from the Mother Church but that does not often happen. Usually, the members of the congregation have to raise the entire cost of the project themselves. If any assistance is given by the Mother Church, it is not a significant proportion. However, when the land is purchased, it is not registered in the name of the church or even the governing Conference. It is registered in the name of a company called the Seventh Day Adventists Association of Southern Africa (hereinafter referred to as "the SDAA"). That body is the registered owner of the land. It is a non-profit company which cannot pay dividends. Its income and property are to be applied solely towards the promotion of the objects of the association. The witnesses said that the churches are held in trust for members of the relevant congregation. That is not specified in the memorandum of association. There can be no doubt, however, that that is the factual position. Evidence was given by one member of the church in Gweru that the land was purchased by

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one or more members of that church and the members of the church raised money to erect the building. There was no such evidence however in respect of any of the other churches.

Has the Zimbabwe Conference established that it has a claim, as of right,

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to the ownership of the property previously held by its predecessors? I do not think that it has done so. It may be that the members of the individual congregations, as a group, may have some sort of claim to the use of the property. I do not say they do. However, that is not the case that has been presented. It is the Zimbabwe Conference that is asserting the right, in its own name, to the ownership of the properties in question.

Mr *Matinenga* submitted that the Zimbabwe Conference is a *universitas*; it was a *universitas* before 20 December 1992; and, after the session on that date when certain sections of its constitution were amended to reflect changes which it wanted to show the outside world, it remained a *universitas*. There was no change in its status. The Zimbabwe Conference was empowered, in terms of its constitution, to amend that constitution and, in fact, the constitution had been amended from time to time to meet the exigencies of the day. The evidence led by the Zimbabwe Conference clearly showed by whom, and for whose benefit, the various churches were built. It would be inequitable for the parishioners who built the churches to be told that the sacrifices and contributions they had made, and the tithes they had paid, belonged to a body based in Washington in the United States of America. He conceded that the immovable properties were registered in the name of the SDAA but submitted that the SDAA merely held the properties in trust for the churches which had contributed towards the purchase and construction of the various properties. Registration in the name of the SDAA did not carry much weight and was only relevant for the requirements of the Deeds Office.

I cannot agree with the submissions of Mr *Matinenga*. His arguments would be valid if the Mother Church was being dissolved and its assets were being divided amongst the various components which made up the Mother Church. In such a situation, clearly the local Conferences or Fields or church parishioners or congregations would be entitled to such properties as lay within their areas of jurisdiction. However, that is not the case here. The Mother Church is not breaking up. There are still members of the Mother Church in Zimbabwe who recognize the sovereignty of the Zambezi Union and the General Conference. The Mother Church still continues to hold services and evangelize in Zimbabwe and to encourage persons to join the church. The Zimbabwe Conference has seceded from the Mother Church. It has made its own Unilateral Declaration of Independence.

In *Ethiopian Church Trustees* v *Sonjica* 1926 EDL 107, the court was faced with a situation very similar to that in this case. The applicant in that case applied for an order that the respondent, as minister in charge of a "circuit" of the church and as being in possession of church property, both movable and immovable, deliver up possession of the property. It was common cause that the respondent and most of his congregation had seceded from the

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SMITH J

church. When the respondent was called upon to give up the properties, he refused to do so on the grounds that they had been paid for by himself and his congregation. However, it was shown that they were obtained for, and in the name of, the church. In that case, the respondent said that in 1915, the members of the local congregation approached the Ethiopian Church for funds to enable them to purchase a church building, but were told that they must buy such building by themselves, which they did. In its replying affidavit, the applicant admitted that the conference of the church did not assist the Korsten congregation to purchase the church building, saying that it was unusual for the conference so to assist local congregations. At p 115-116, PITTMAN J said:

"On the evidence, despite the form in which it comes before me, I am satisfied that not only were the properties both at Korsten and Uitenhage acquired for the applicant's church, the Ethiopian Church of South Africa, the former in 1915 and the latter in 1921, but that since such acquisition until at least quite recently the work carried on in connection therewith has purported to be conducted under the auspices of that foundation. The precise points of disagreement between respondent and his former church are not clearly set out, but that he and his adherents constitute the seceding party is expressly admitted, and, whatever such admission implies, there is enough before me to show that he is breaking away from the original purposes of the church, not merely complaining, that, while he adheres thereto, the latter has conceived others inconsistent therewith. If this conclusion be well-founded, then on the authority of the *Free Church* decision reported in [1904] AC 515, I think that applicants are entitled to be placed in the possession, which they claim. I think that this would be so even had respondent carried with him into secession the whole of his local congregations, but it is unnecessary here to decide that point for I am satisfied on the evidence that both at Korsten and at Uitenhage there are members of the Ethiopian Church, who formerly worshipped in the buildings in question, and have not joined respondent in his secession. The situation, as I understand it, appears in its essential features to reproduce that which gave rise to the application of *Stewart & Ors* v *Mzimba & Ors*, reported in (1899) 9 CTR 96, and which is described by De Villiers CJ in these terms, *viz* ...

> '... it seems that Mzimba, after having been for several years a minister of this Free Church, ministering to congregations belonging to the Free Church, came to the conclusion that it was advisable to secede from that church, and to form what he calls the Presbyterian Church of Africa, and in this secession he seems to have carried with him several office-bearers of the church. But the very fact that they admitted that they seceded from the Free Church shows that at one time they must have belonged to the Free Church, and if the property did belong to the Free Church, the fact that there has been no transfer and no title deeds in the Free Church, ought not to affect the present case. The respondent, however, claims that inasmuch as he is in possession of these different churches, and as the other seceders with him had been in actual possession, and as the applicant can show no title, the applicant is not entitled to dispossess them from these churches. But if once it is admitted that the possession by Mzimba and the other seceders was possession on behalf of the Free Church of Scotland, the fact that the applicant has no title does not really affect the present case.'

and I think that the relief there granted would not rightly be withheld from present applicants."

SMITH J

I accept the submissions by Mr *Andersen* that when members of a particular congregation, before December 1992, gave their tithes and offerings to a church falling under the jurisdiction of the predecessor of the Zimbabwe Conference, they were giving that money to the church as part of the Mother Church. When bequests were made to a church, they were made in the light of the recipient being part of the Mother Church. When the delegates at the session in December 1992 decided that they would break away from the Mother Church, they established a new entity, separate from the Mother Church. On what basis can that new entity claim to be

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the successor of its predecessor and therefore heir to the assets of its predecessor? Even if it could so claim, however, with regard to the immovable property, the predecessor of the Zimbabwe Conference was not the registered owner thereof. Therefore, I can see no basis on which the Zimbabwe Conference can claim ownership of the land and buildings. At most, the individual church congregations might have some sort of claim, but the Zimbabwe Conference does not. Even if the SDAA holds the properties in trust, that does not mean that any individual church can, at any time, approach the SDAA and demand that the property be transferred into its name. That being the case, the Zimbabwe Conference has even less right to do so. The properties in question were acquired and registered in the name of the SDAA long before December 1992, which is when the Zimbabwe Conference came into existence.

The strongest case the Zimbabwe Conference has is that it is the lawful successor to the movable property and to the monies held by its predecessor in the bank and building society accounts. Having given this aspect very careful consideration, I feel that the weight of authority does not support the Zimbabwe Conference. The funds which were used to buy the movable property or to be deposited in the various accounts, were collected from or through members of the various congregations who gave their tithes and offerings on the basis that they were being made to entities within the Mother Church. That being the case, when the Zimbabwe Conference broke away from the Mother Church it lost its claims to the movable property and monies held by its predecessor. Most of the property in question was acquired long before December 1992 which is when the Zimbabwe Conference came into existence. It therefore could not have purchased any of the property or raised money to service any loans raised to purchase the property.

It is hereby ordered as follows:

(In this order, the Zimbabwe Conference is referred to as the plaintiff, and the other parties are referred to as the defendants.)

1. The plaintiff shall refrain from continuing to use the name "Zambezi Conference of Seventh Day Adventists" or any name similar thereto that might cause confusion.

SMITH J

2.1 The plaintiff shall deliver to the defendants, in accordance with paragraphs 2.2 and 2.3 hereof, the immovable properties specified in Annexure A hereto and the movable property, consisting of furniture, fittings and other items for the purposes of worship or the administration of the churches, halls or offices, situated on the said immovable properties which were so situated on 20 December 1992.

2.2 Delivery of the immovable properties specified in Part I of Annexure A hereto, and the movable properties situated therein, shall be given with effect from no later than 8 days (not court days) from the date of this order, excluding today's date.

2.3 Delivery of the immovable properties specified in Part II of Annexure A hereto, and the movable properties situated therein, shall be given with effect from no later than 28

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February 1999.

2.4 The defendants shall have the right -

(a) to immediate access to the properties specified in Annexure A hereto in order to make an inventory of the movable property therein and the state of the buildings, subject to reasonable notice of any intended visit being given to any representative or employee of the plaintiff;

(b) to convene meetings at any of the immovable properties specified in Part I of Annexure A hereto, of which due notice has been given, on 6 February 1999 or any Sunday thereafter;

3. The plaintiff shall pay to the defendants the moneys, if any, held in the following accounts as at 20 December 1992 -

(a) CABS Paid-up Permanent Shares Account No. 5050134801;

(b) CABS Savings Account No. 9050393 337;

(c) Beverley Building Society Savings Account No. 36-02-158;

(d) Standard Chartered Bank of Zimbabwe Ltd Account No. 0976393, with interest thereon at 25% *per annum* from 20 December 1992 to date of payment.

4. The money held by the plaintiff on fixed deposit in an account with the Standard Chartered Bank of Zimbabwe Ltd as at 29 January 1999, together with any interest accruing thereon after that date, shall not be withdrawn from the said account until the final determination of this matter:

Provided that the plaintiff may, within 30 days of the date of this order, withdraw $400 000 from the said account.

5. The plaintiff shall pay the costs of this action.

Manase & Manase, appellant's legal practitioners

Sawyer & Mkushi, first and second respondents' legal practitioners

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SULTAN *v* FRYFERN ENTERPRISES (PVT) LTD & ANOR 2000 (1) ZLR 188 (HC)

Citation	2000 (1) ZLR 188 (HC)
Case No	Judgment No. HH-25-00
Court	High Court, Harare
Judge	Chatikobo J

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Heard January 25, 2000
Judgment February 2, 2000
Annotations None

Civil application

Flynote

Company law - winding up of company - application - grounds - just and equitable - when company may be wound up on those grounds - criteria to be used in deciding - deadlock between directors of small company - breakdown of confidence and trust - no alternative remedy available

Headnote

The applicant applied in terms of s 206(g) of the Companies Act [*Chapter 24:03*] for an order provisionally winding up a company on the basis that it was just and equitable for the company to be wound up.

By providing in s 206(g) of the Act that a court can order the winding up of company when it is just and equitable to do so, the court is given a very wide discretionary power, the only limitation being that the power must be exercised judicially, with due regard to the justice and equity of the competing interests of all concerned. The court may order the winding up of a company on the ground that it is just and equitable to do so if there is justifiable lack of confidence in the conduct and management of the company's affairs which stems from the conduct of the directors with regard to the company's business or if there exists a deadlock between the members of the company. Such a deadlock may exist in a small domestic company if the personal relationship of confidence and trust similar to that which must prevail between partners in a partnership is eroded and the members cease to act towards one another honestly, reasonably and with friendly co-operation in managing the affairs of the company. Where this is the situation, those members not responsible for the destruction of the relationship between the members are entitled to seek a winding up of the company on the basis that this course of action is just and equitable.

A further requirement for winding up is set out in s 208(2) of the Companies Act. This is that the court can grant a winding up order on the ground that it is just and equitable to do so only if there is no alternative remedy available to the person seeking the order and the person seeking the remedy is not acting unreasonably in seeking the order. A winding up order will not be granted where in the particular case there is some other reasonable and sufficient remedy whereby the applicant's interests in the business can be protected. Where such a remedy exists and it can be resorted to with a minimum of expense and bickering, it would be unreasonable for the applicant to insist that the company be wound up. If, however, the alternative remedy is one that involves protracted negotiations, the outcome of which is uncertain at the time the proceedings are determined, the courts should be reluctant to decline to order the winding up of the company. To be a realistic option, it must

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be one that is available at the time of the proceedings and it must be capable of restoring the lost confidence between the "partners."

In the present case, the company involved was a small domestic company. The applicant and his wife were directors in the company and the other two directors were another woman and her husband. The applicant had established, at least p*rima facie*, that the actions of the other two directors had led to a justified loss of confidence and trust on his part. There was no available remedy available to the applicant that would effectively protect his interests.

Held, that the court could not rectify the situation by making an order in terms of s 198 of the Companies Act regulating the future conduct of the company's affairs and requiring the company to refrain from the oppressive conduct complained of. The problems that existed were not just a matter of mismanagement of the company, The second respondent had made sustained efforts to drive the applicant and his wife out of the company and this had led to a loss of confidence and trust. The only way that the business interests of the applicant could be effectively protected was to order the winding up of the company.

Cases Considered

Cases cited:

Ebrahimi v *Westbourne Galleries Ltd* [1972] 2 All ER 492 (HL)

Emphy & Anor v *Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D)

Erasmus v *Pentamed Invstms (Pty) Ltd* 1982 (1) SA 178 (W)

Moosa NO v *Mavjee Bhawan (Pty) Ltd & Anor* 1967 (3) SA 131 (T)

Rogers Ex p 1989 (3) ZLR 272 (H)

Legislation considered:

Companies Act [*Chapter 24:03*], ss 206(g) & 208

Case Information

F Girach, for the applicant

J Samkange, for the respondent

Judgment

Chatikobo J: In this case, the applicant applies in terms of s 206(g) of the Companies Act [*Chapter 24:03*] ("the Act") for the order provisionally winding up Fryfern Enterprises (Pvt) Ltd ("the company") on the ground that it is just and equitable to do so. The company was incorporated in December 1996 with a share capital of $20 000 divided into 20 000 ordinary shares of $1 each of which 1 200 shares are fully paid up. Of the issued shares, 51 are held by

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the second respondent ("Rozen") and 49 are held by the applicant.

At the time of the company's incorporation, the directors were the applicant and his wife, Barbra Rozen and her husband Tzvika Rozen. The company operates an art gallery at Victoria Falls under the style of "La Gallerie". At the inception of the business the applicant and Rozen contributed $20 000 each which was invested in the business.

The applicant asserts and Rozen admits that the company was formed as a joint venture or "partnership" for the purposes of operating La Gallerie. The understanding was that in spite of the fact that the shareholding of the parties in the company was weighted in favour of Rozen, the parties would share equally in the management, profits and losses of the company. This

understanding had been reduced to writing in a partnership agreement which stipulated, *inter alia*, that the parties would contribute equally towards the initial funding of the business, the parties would have equal signing powers on the company's bank account with one signature from each couple being required for each transaction and, as already stated, with the parties sharing equally in the expenses, profits and losses of the business. Current bank accounts were opened for the company at the Avondale and Victoria Falls branches of Standard Chartered Bank Ltd. Subsequently, a savings account was opened at the Avondale branch of the same bank. All this is admitted by Rozen, who, however, claims that although this was the original arrangement it was frustrated by the applicant in that the latter did not work for the business as originally agreed. He simply came to collect directors' fees without doing any work. The applicant did not market the company's business outside the country nor did he do work for the company on a daily basis as he had undertaken to do. The applicant was only prepared to work one morning per week as he was travelling regularly to France and the United States of America where he had similar businesses. These averments are denied by the applicant. The resultant dispute is not resolvable without hearing oral evidence.

The applicant complains that Rozen and her husband have conducted themselves in a manner which is inconsistent with the letter and spirit of the "partnership agreement" between the parties which forms the rock upon which the business was founded in the first place. The facts upon which this allegation is based are these.

1. During the first six months of 1998, Rozen and her husband opened an art gallery next to La Gallerie to compete with the latter without consulting either the applicant or his wife. This fact is admitted by Rozen. Her explanation for starting an art gallery next to La Gallerie is that it was done because she had become aware of the fact that the applicant had similar businesses in Zimbabwe and in France and that he was carrying out international exhibitions at which he promoted his own business but not the business of La Gallerie. She therefore felt that she, together with her husband, should start their own separate business. This business, which is situated next to La Gallerie, is kept separate from the operations of La Gallerie.

2. The applicant states that sculptures which formed part of the stock of La Gallerie have been

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transferred to Rozen's art gallery without the applicant's consent or that of his wife. This allegation is denied. The applicant states, without demur from Rozen, that the art gallery operated by Rozen and her husband exhibits the works of the same artists as those who supply La Gallerie and that these are sometimes exhibited on the

same front lawn used by La Gallerie. Rozen regularly withdraws money from the safe at La Gallerie without consulting the applicant or his wife. Moneys realised from sales at La Gallerie are sometimes not deposited into the bank. On 17 August 1998, Rozen tried to withdraw the sum of $209 700 from the company's savings account at Avondale but the cheque was recalled after the applicant and his wife protested. On 7 September 1998, Rozen and her husband withdrew $238 000 from the company's savings account without the consent of the applicant or that of his wife.

3. Rozen and her husband have opened new bank accounts for the company at the Victoria Falls branch of Barclays Bank without prior consultation with the applicant and his wife and the applicant and his wife are not signatories to this account. Proceeds of the sales from La Gallerie are deposited into this account. This allegation is admitted by Rozen who states that these accounts were only opened after the applicant had offered to sell his shares. It was considered that as Rozen and her husband were willing to purchase the applicant's shares they could open these accounts so as to operate the business as their own.

4. Rozen and her husband purchased a Mitsubishi Rodeo Colt motor vehicle for $700 000 without the knowledge or consent of the applicant and his wife. This purchase is admitted but it is averred that the vehicle is used for the business.

5. One of the most serious complaints levelled against Rozen and her husband is that, not only have they removed the applicant's wife as secretary and replaced her with Secretaries and Finance (Pvt) Ltd, but they have also changed the company's registered office and removed the applicant and his wife from their directorships in the company through the use of Rozen's majority shareholding. In this regard, it is averred that Rozen called a special meeting on 2 September 1998 for the sole purpose of removing the applicant and his wife as directors of the company. No reasons were given as to why this action was being taken. Rozen simply says that they were removed as directors because they were receiving directors' fees without working for the company.

The upshot of these events was that the applicant and his wife resolved to sell their shares in the company. This decision was communicated to Rozen and her husband by the applicant's legal practitioners. Nothing concrete has come of this offer. Although Rozen claims that she is prepared to buy the shares at a reasonable price, the parties' respective positions on the value of the shares are poles part, as evidenced by the communication between the applicant's legal practitioners and Rozen's accountants. Faced with such a

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situation the applicant contends that it would be just and equitable for the company to be wound up.

Section 206(g) of the Act has been said to postulate not facts, but only a broad conclusion of law, justice and equity, as a ground for winding up.

"In its terms and effect (the section) confers upon the court a very wide discretionary power, the only limitation originally being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned":

per TROLLIP J in *Moosa NO* v *Mavjee Bhawan (Pty) Ltd & Anor* 1967 (3) SA 131 (T) at 136H.

The courts in England, South Africa and this country have over the years evolved principles which serve as guides on how this broad discretionary power should be exercised. The landmark decision of the House of Lords in *Ebrahimi* v *Westbourne Galleries Ltd* [1972] 2 All ER 492 (HL) has been consistently followed in South Africa and in this country. Before restating some of the factors which guide the courts in the exercise of their judicial discretion, Lord Wilberforce, speaking of the words "just and equitable" said (at 500a-b) that:

"The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision, does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

The learned Lord of Appeal in Ordinadry then proceeded to enumerate some of the factors which should normally be taken into account as follows:

1. The fact that an association which is formed or is continued on the basis of a personal relationship which involves mutual confidence such as exists when a pre-existing partnership is converted into a limited liability company can properly be wound up on the just and equitable principle.

2. If it is agreed expressly, or if it can be implied, that all the members or shareholders shall participate in the management of the business, the exclusion of one or more of the shareholders from the conduct of the business of the company will offend the just and equitable principle.

3. The principle may also be properly invoked in those cases where there are restrictions on the transfer of the member's interest in the company

CHATIKOBO J

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such that when confidence is lost or a member is removed from management, he cannot take out his stake and go elsewhere.

What emerges from these guidelines is that if there is justifiable lack of confidence in the conduct and management of the company's affairs which stems from the conduct of the directors with regard to the company's business or if there exists a deadlock between the members of the company, then a company can be wound up on the "just and equitable" principle. The "deadlock" principle is founded on the analogy of a partnership and is confined to small, domestic companies. If, in such a small domestic company, the personal relationship of confidence and trust similar to that which must prevail between partners is eroded and the members cease to act towards one another honestly and reasonably and with friendly co-operation in managing the affairs of the company, then those members who are not responsible for the destruction of that relationship will be entitled to claim that it is just and equitable for the company to be wound up on that ground. See *Moosa*'s case at 137G-H; *Emphy & Anor* v *Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 366H-367A-C; *Erasmus* v *Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) and Ex p *Rogers* 1989 (3) ZLR 272 (H) at 275.

It is a further requirement of the Act (s 208(2)), that the court can only grant a winding up order on the ground that it is just and equitable to do so if there is no alternative remedy available to the person seeking the order and then only if satisfied that the person who is applying for the order is not acting unreasonably in seeking the order. I perceive this to mean that there should, in the particular case, be a realistic, sufficient and reasonable remedy, other than a winding up order, by which the applicant's interests in the business can be protected. Where such a remedy exists and it can be resorted to with minimal expense and bickering, it would be unreasonable for the applicant to insist that the company be wound up. If, however, the alternative remedy is one which involves protracted negotiations whose outcome is uncertain at the time the proceedings are determined, the court should be reluctant to decline to wind up the company. The alternative remedy, to be a realistic option, must be available to the applicant when he launches the proceedings and, I venture to suggest, it should be one which is capable of restoring the lost confidence between the "partners".

I turn then to deal with the facts in the light of these principles. In doing so I will bear in mind that this is an application for a provisional order for which the applicant need only establish a *prima facie* case. In determining whether the applicant has made out a *prima facie* case, I will also bear in mind that two points have been argued by counsel on behalf of the respondents. The first is that it has not been established that there ever existed between the applicant and Rozen a personal relationship whose destruction would

adversely impact on the conduct of the business of the company. I am prepared to accept that this seems to be so. The second argument advanced on behalf of the respondents is that winding up should not be ordered because the applicant has available to him two alternative remedies, that is, the sale of his shares to Rozen or an application under ss 196 and 198 of the

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Act.

As far as the argument that there is no personal relationship of confidence and trust which has been undermined by Rozen, it is my view that this argument overlooks the other equally important principle involved, namely, that a company can be wound up on the just and equitable principle if it is shown that there is justifiable lack of confidence in the manner in which the affairs of the company are being conducted. This in fact is the kernel of the applicant's cause of complaint. The conduct which he complains of, which I have tabulated above, most of which is admitted by Rozen, justifies his loss of confidence. While it is not possible to resolve fully the veracity of the allegations made on the affidavits before me, I am however satisfied, at least *prima facie*, that the applicant's loss of confidence in Rozen's conduct of the company's business is justified.

As to whether there is an alternative remedy available to the applicant, I can quickly dispose of the first alternative on the basis that Rozen has not demonstrated a lot of enthusiasm in agreeing a price for the shares. The queries raised by the applicant concerning the accounts of the company have not been adequately addressed. There is, therefore, no guarantee that a price will be agreed. I do not consider this to be a realistic option.

An order made in terms of s 196 and s 198 of the Act may regulate the future conduct of the company's affairs, require the company to refrain from the oppressive conduct complained of, authorise the commencement of civil proceedings in the name of the company by the oppressed member or direct the purchase of the shares of the member by other members or by the company. What is, however, revealed on the papers is a sustained effort by Rozen to drive the applicant and his wife out of the company. It is not just a question of mismanagement of the company. Such conduct, which undermines the confidence and trust which must exist between "partners" in a small domestic business enterprise, cannot be rectified by an order under s 198 of the Act. Winding up is the only course which can effectively protect the applicant's interests in the company. I consequently do not regard that an application made in terms of s 196 and s 198 is a realistic option either.

I have deliberately refrained from making definitive findings of fact because it may well be that further affidavits (if any are filed for the return date) or oral evidence may justify a different conclusion. At this stage I am concerned only with the question whether a *prima facie* case has been shown. I am satisfied it has.

CHATIKOBO J

As far as costs are concerned I think it is fair to reserve them for determination by the court which will deal with the matter on the return date. No doubt the findings which will be made then will shed light on who should bear the costs.

Accordingly it is ordered:

1. That a provisional order be and is hereby granted in terms of paras 1-5 of the draft order.

2. The costs occasioned by the opposition of the application for the provisional order are

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reserved for determination on the return date.

Dube Manikai & Hwacha, applicant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

HARDY *v* SKARAMANGAS 2000 (1) ZLR 196 (HC)

Citation	2000 (1) ZLR 196 (HC)
Case No	Judgment No. HH-27-00
Court	High Court, Harare
Judge	Omerjee J and Gwaunza J
Heard	February 2, 2000
Judgment	February 2, 2000
Annotations	None

Civil appeal

Flynote

Family law - child - custody - child born out of wedlock - when custody may be awarded to father - child's views as to parent with which he wished to reside - weight to be given to such views

Headnote

The respondent and appellant lived together for some time as husband and wife but did not get married. This relationship had resulted in the birth of a child. The parties then separated and the appellant initially had custody of the child. After she started to have a relationship with another man, the child began to harbour feelings of anger and resentment towards his mother. One day the child arrived at the respondent's flat in a distressed state and seemed to be unwilling to return home to live with his mother. The respondent then applied successfully to the juvenile court for custody of the child. The mother appealed against this order of custody.

Held, that the mother of a child born out of wedlock is the natural guardian and custodian of the child and cannot be deprived of the custody of the child unless special grounds existed. Special grounds include detrimental and undesirable effects upon the physical, moral and psychological or educational welfare of the child. The mother can thus be deprived of custody for a reason involving harm or danger to the child's welfare. The position of the father of a child born out of wedlock is like that of a third party who can be granted custody if he can satisfy the court that

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this is in the best interests of the child.

Held, further, that in the present case it was not disputed that the mother had been a good and caring parent. There was nothing to suggest that the mother had done anything that involved harm or danger to the child's welfare and there were no special grounds for depriving her of the custody of the child.

Held, further, that the magistrate had placed undue weight on the child's preference to stay with his father. The child's resentment at the advent of a new man in his mother's life was influenced by a passing sense of insecurity and was not reflective of the child's own interests. The relationship between the appellant and the other man did not so detract from the appellant's competence as a custodian parent that it posed a serious danger to the child's interests and welfare. It did not justify the forfeiture of her legal right to the custody of the child.

Cases Considered

Case cited:

Masama v *Nyoni* S-154-96

Case Information

A A Brooks, for the appellant

J Muzangaza, for the respondent

Judgment

Omerjee J: This is an appeal against the judgment of the Magistrates Court of the 14 April 1998 which granted custody to the respondent of his son born out of wedlock. The appellant is the mother of that child.

The facts of this case are as follows. The appellant and the respondent cohabited prior to the birth of their child. As a result of that relationship, a son was born on 5 February 1988. I shall refer to him as "X" for the purposes of these proceedings. The parties, however, decided not to get married for reasons not relevant for purposes of this appeal. They decided initially to live together. Later, they lived separately but near each other for the sake of their child. X had been living with the appellant who effectively exercised custody, whilst the respondent exercised rights of access every weekend. The three of them constituted a family. They remained close keeping daily contact. X had not known of another partner in his father's life. By the same token, he was not aware of another person in his mother's life. In early January of 1998, the appellant began to have an affair with another man. It is common cause that this development affected X. He felt that his position in his mother's life and affections had been usurped by her new partner. The respondent had access to X during the weekend beginning Friday 30 January 1998 as per the normal arrangement. On Tuesday 2 February 1998, X arrived at the respondent's flat emotionally distressed. He complained that he had been beaten by the appellant for enquiring as to the why the appellant was using her motor vehicle to ferry her partner around. X appeared

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unwilling to return home to live with his mother.

The respondent accordingly lodged an *ex parte* application in the juvenile court in the following terms:

" 1. That a rule *nisi* do issue, returnable to this Honourable Court on the 31 day of March 1998, calling upon the respondent to show cause, if any why -

(a) custody of [the minor child] should not be granted to the appellant, with her exercising reasonable access rights;

(b) she should not pay the costs of this application.

2. That pending the return date, this rule *nisi* operate as a temporary order as follows:

(a) allowing the appellant to retain [the minor child] in his custody;

(b) requiring the appellant to ensure that [the child] continues with his education at the Hellenic School, Harare.

(c) interdicting the respondent from taking [the child], from the appellant's residence, from the Hellenic School, or wherever [the child] be found, without consent of the appellant; and

(d) ordering and requiring the respondent, within 24 hours of service of this order on her, to hand over the appellant [the child's] school uniforms and school books.

That service be effected by the messenger of court as follows;

(a) a copy of this order and of the application, on the respondent, at her residence or her workplace, and

OMERJEE J

(b) a copy of this order on the Headmaster of the Hellenic School, Harare.

BY THE COURT

MAGISTRATE"

This application was granted on 4 February 1998. A subsequent hearing on the issue of custody of X took place before the juvenile court on 31 March 1998. In those proceedings, the appellant testified as well as the respondent. In addition, the court interviewed X. There was also put before the court *a quo* an affidavit by Sally Tasker, a qualified clinical social worker, who interviewed X. This report was compiled at the behest of the appellant. There was also produced in evidence affidavits by two other persons who may be described as acquaintances of the appellant.

It would appear from a reading of the record of proceedings that the presiding magistrate placed considerable reliance, in deciding the issue of custody, on the sentiments of X. Whilst it was appropriate to have regard to X's testimony, the magistrate ought to have paid heed to all the surrounding circumstances. The important feature in this case, and one that was not generally in dispute, was that X harboured feelings of anger and resentment towards his mother *at that particular time*, due to her association with another man (emphasis is mine). The impression one gains is that X needed time, and perhaps counselling, to come to terms with the new

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situation before normality could be restored as between him and the appellant. It was not in dispute that to all intents and purposes, the appellant had been a good and caring parent towards X.

The law with regard to the question of minor children born out of wedlock was dealt with in *Masama* v *Nyoni* S-154-96 in particular at p 2 of the cyclostyled judgment where Ebrahim JA stated as follows:

"It is true that under our law the natural father has no automatic right to the custody of his illegitimate child. See s 5 Guardianship of Minors Act [*Chapter 5:08*]. The interests of a child will always be the paramount consideration in any case relating to the custody of a child, regardless of whether customary law or any other law is applied. In the case of *Mudzimirwa* v *Kamunga* S-52-89 MANYARARA JA outlined the approach to be followed thus:

> 'It follows that it is the common law principles which must now be applied to custody disputes. The starting point is therefore the cardinal common law principle that the mother of an illegitimate child is its legal custodian from its birth until some special order of court is made. See Spiro's *Law of Parent and Child* 4 ed p 454'."

And further at p 3 of the same judgment the learned Judge of Appeal stated as follows:

"Counsel for both parties were agreed on the law applicable in this case. This is to the effect that the natural custodian of illegitimate children is their mother and that the father of illegitimate minor children cannot claim the custody of the minor children as of right. He can, however, claim custody of the minor children in the same way as other third parties

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and will be granted this if he can satisfy the court that it is in the best interests of the children - see *Docrat* v *Bhayat* 1932 TPD 125; *Douglas* v *Mayers* 1987 (1) SA 910 (ZH); and Ncube's *Family Law in Zimbabwe* at pp 110-113. The test to be used to deprive a parent of custody of her children and award them to a third party was laid down by Goldin AJA (as he then was) in *W* v *W* 1981 ZLR 243 (A) at 247H where he stated:

> 'A court will only deprive a natural parent of custody and award it to a third party upon special grounds. Such special grounds include detrimental and undesirable effects upon the physical, moral and psychological or educational welfare of a child. The test is still not whether a third party can provide materially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare as mentioned above'."

The judgment which is the subject of the present proceedings was given on 14 April 1998. A period of 20 months has elapsed since then. This delay is to be regretted, particularly in so far as it may have occasioned changes in the circumstances of the child. Counsel for both parties, in their respective heads of argument, have sought to place before this court additional information as to matters arising since the decision of the magistrate. Such information has not been placed before this court in the proper form. Furthermore, there are material disputes between the parties as to the veracity of such information. Accordingly it is not possible to have regard to that information in determining this matter.

The child X was born out of wedlock and the appellant is its natural guardian and custodian. As indicated in the *dictum* cited above, the court will only deprive a natural parent of custody and award it to a third party upon special grounds. We are not satisfied that such special grounds have been established. By the respondent's own admission, the appellant was a good and caring mother. We have found nothing in the record of the trial to suggest the appellant did

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anything that involved harm or danger to the child's welfare. To the contrary, the appellant, without any legal obligation to do so, allowed a close relationship to develop between father and child, and in addition allowed the child to use its father's name and be indoctrinated into his religious faith and culture. This to us is further evidence of the appellant's credentials as a mother. The child's resentment at the advent of a new man in her mother's life, understandable though it was, could only have been temporary. So could his stated preference for the respondent. In our view, the magistrate placed undue weight on this preference, given that it was motivated by a passing sense of insecurity on the part of the child. We do not find the relationship between the appellant and the other man to have so detracted from the appellant's competence as a custodian parent that serious danger was posed to the child's interests and welfare. It certainly does not justify the forfeiture, by her, of hr legal right to custody of the child, particularly if it is in favour of someone who is, at law, regarded as a third party.

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Another consideration strengthens the appellant's case. The respondent concedes he has partially entrusted the care of the child to his brother and sister-in-law. He is therefore not in a position to personally and daily supervise the child's welfare. On the other hand, the evidence before us suggests that the appellant was personally responsible for the child's care. In our view, a situation where a parent regarded by law as a third party has temporary custody of the child but partially entrusts such custody to yet another third party is not to be preferred over a situation where the natural parent will have direct responsibility for the child.

In the premises, the appeal is allowed with costs.

GWAUNZA J: I agree.

Ziumbe & Mtambanengwe, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

CHITZANGA *v* CHAIRMAN, PUBLIC SERVICE COMMISSION & ANOR 2000 (1) ZLR 201 (HC)

Citation	2000 (1) ZLR 201 (HC)
Case No	Judgment No. HH-28-00
Court	High Court, Harare
Judge	Blackie J
Heard	February 4, 2000
Judgment	February 4, 2000

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Annotations None

Civil application

Flynote

Administrative law - review - grounds for - audi alteram partem rule - effect of - failure to observe - applicability of rule to disciplinary proceedings under Public Service Act

Public service - disciplinary proceedings - audi alteram partem rule - whether applicable to such proceedings

Headnote

The applicant, a public servant, was dismissed after a departmental inquiry into allegations of misconduct involving fraudulent claims. He was notified of the charges against him and of the date of the inquiry, but did not attend it. The inquiry found the charges were substantiated and referred the matter to the Public Service Commission, with a recommendation that the applicant be discharged. The Commission discharged the applicant. The applicant sought a review of the decision, on the grounds that the *audi alteram partem* rule had not been followed.

Held, that the applicant's failure to attend the inquiry was his own fault; the inquiry was entitled to proceed without him.

Held, further, that the regulations did not oblige the Commission to hold a hearing or invite the applicant to make submissions. If the applicant had chosen to make submission, the Commission would have been obliged to consider them, but its duty went no further than this.

Cases Considered

Cases cited:

Heatherdale Farms (Pty) Ltd v *Deputy Min of Agriculture & Anor* 1980 (3) SA 476 (T)

Metsola v *Chrmn, PSC & Anor* 1989 (3) ZLR 147 (S)

Mukwawaya v *Minerals Marketing Corporation of Zimbabwe & Anor* HH-238-91

Sec for Tpt & Anor v *Makwavarara* 1991 (1) ZLR 18 (S)

Case Information

D Drury, for the applicant

Miss *Y Dondo*, for the respondents

Judgment

Blackie J: The applicant has been dismissed from the public service for misconduct. He applies for a review of the proceedings that led to his dismissal. He prays for the dismissal to be set

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aside and reinstatement in his

BLACKIE J

employment. The application was filed out of time. There is a preliminary application for condonation of the late filing. The respondents oppose the application for condonation and the review.

The applicant was employed in the ministry of the second respondent (the Ministry). He submitted claims for traveling and subsistence, totaling $8 110.40, to the Ministry. The claims were based on receipts from the Mverechena Hotel (the hotel) showing that he had stayed and had meals at the hotel while on Ministry business. The Ministry received a report that the claims were fraudulent. It proceeded against the applicant in terms of the Public Service (Disciplinary) Regulations 1992 (the regulations). He was suspended in terms of s 8 of the regulations, advised in writing, in terms of s 4(3), of the nature of allegation against him and instructed to make a written reply to it. The applicant replied to the allegation both by personal letter and through a legal practitioner. Thereafter the Ministry held an inquiry (the inquiry) into the allegation against the applicant. The inquiry was held at the hotel. The applicant was notified of the time and place of the inquiry and invited to attend it. He did not do so. At the end of the inquiry, the Ministry found the applicant guilty of misconduct. It referred the matter to the commission of the first respondent (the PSC), in terms of s 19 of the regulations, with a recommendation that the applicant be discharged from the public service. The PSC discharged the applicant. He was advised by letter that the PSC, "after having carefully considered all the misconduct documents submitted to them, ruled in terms of s 18(1)(a) of the (regulations) that (he) was discharged from the (service) ..." The applicant wrote to the PSC, saying: "I am appealing so that my case can be reconsidered in view of the fact that the court (has) withdrawn the (criminal) case (against me) before judgment" and "when I was called to (the hotel) on 31 May for an inquiry ...my bail conditions had already been set and did not allow me to go to the hotel until the case was over". The applicant was later advised that "the (PSC) ... having carefully considered your appeal in terms s 20(3) of (the regulations) turned down your appeal and the decision to discharge is upheld".

This application to review the decision to discharge the applicant is based on two grounds. Firstly, the proceedings of the inquiry, the decision to dismiss him and the appeal were improper in that the applicant was not able to attend the inquiry and was not given notice of and permitted to attend the dismissal proceedings and the hearing of his appeal and because neither the Ministry nor the PSC has produced reasons for the respective decisions reached by them. Secondly, the decisions to find the applicant guilty of misconduct, to dismiss him and to reject his appeal were grossly unreasonable in that at no time was the writing on the receipts, on which the charges of

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fraud were based, examined by a handwriting expert, despite the applicant's denial that he had

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written the receipts and his expressed request that they should be examined by such an expert. The applicant submits that, without that examination, no reasonable tribunal could have found him guilty of the misconduct charged.

It is necessary to deal first with the application for condonation for the late filing of this application.

Rule 259 of the rules of this court requires that an application for review be filed within eight weeks of the proceedings or the decision against which the application is made. That period may be extended on "good cause shown". The onus is on the applicant to show good cause.

The factors generally, taken into account by the court, when considering an application for condonation, are well established. Important, but not exclusive, factors are the length of the delay, the explanation for the delay, the merits of the application and any prejudice to or effect upon the opposing or a third party by the delay. The factors mentioned are sufficient to deal with this application.

I have accepted 24 August as the date on which the applicant received notice that the PSC had dismissed his appeal. The application for review should, therefore, have been filed by the last week of October that year. It was filed on 21 November of the following year - over 12 months out of time. That is a considerable delay. It requires a satisfactory and substantiated explanation from the applicant.

The applicant gives two reasons for that delay - he did not have the funds required by his legal practitioners to start the application and the PSC failed, despite being asked to do so, to provide him with the reasons for the Ministry's decision to find him guilty of misconduct and PSC's decisions to dismiss him and to reject his appeal. He needed these reasons to prepare this application.

There is nothing in the papers to support the applicant's statement that he did not have sufficient funds to pursue this application in due time. I do not suggest that his statement is untrue. However, a bald statement, unaccompanied by any evidence to support that statement, is not sufficient in an application of this sort to discharge the onus on the applicant to establish good cause.

It is common cause that the PSC did not provide the applicant with the reasons that he requested. It merely advised him, first of all, that he had been found guilty of misconduct and was dismissed from the service and, secondly, that his appeal had been rejected. It is also common cause that the applicant's legal practitioner wrote to the PSC on 2 September, following the applicant's receipt of the PSC's decision on his appeal on 24 August, stating that he had

not been provided with "the reasons or basis upon which the Board of Inquiry determined that (the applicant) was discharged" and that, "We urgently request a copy of the reasons for the dismissal to enable us to consider the same to enable us to advise our client of the propriety of

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such decision". No reply was received to this request.

I accept the general need for a tribunal to provide reasons for its decisions and that the reasons requested by the applicant should have been provided to him. However, there is nothing in the papers to suggest that the applicant made any further request for those reasons after 2 September or made any attempt to enforce his claim to those reasons. No reminder of the request for reasons was sent to the PSC. No other action was threatened or taken. The application was filed eleven months later without having received the reasons. Even if there was an obligation on the respondents to provide reasons to the applicant for their decisions, the applicant does not appear to have taken any reasonable steps to ensure that the PSC complied with that obligation. He appears to have been content to let things drift for nearly a year before taking action. Unexplained inaction does not establish good cause.

On the merits of the application, the applicant alleges three failures by the respondents in the proceedings against him, which vitiate those proceedings: (1) he was not present at the hearings of the inquiry and not given notice of and permitted to be present at, the proceedings relating to his dismissal and the appeal; (2) the PSC has not provided him with the reasons for inquiry's finding of misconduct against him and its own decision to dismiss him and reject his appeal; (3) there has been no expert examination of the handwriting of the receipts, on which the charge of misconduct was based; and no reasonable tribunal could reach the decisions made in this case without that evidence.

It is common cause that the applicant was not present at the inquiry, the dismissal proceedings and the appeal. The applicant submits that his absence from these proceedings constitutes a breach of the breach of the *audi alterem partem* rule and the proceedings are accordingly vitiated.

It is necessary to draw a distinction between the inquiry proceedings and the PSC proceedings dealing with the applicant's dismissal and his appeal. The applicant was notified of the time and place of the inquiry. There was a formal sitting of the inquiry. There was no formal sitting in respect of either the proceedings by which PSC resolved to dismiss the applicant and no such sitting when his appeal was rejected. Further, the applicant was not given any notice in regard of either of the proceedings before the PSC or invited to make representations to the PSC at those proceedings.

In respect of the inquiry the applicant says he could not attend because the Ministry, in addition to proceeding against him under the regulations, had

laid a charge of fraud against him with the police. He had been arrested, put on remand and released on bail. One of the conditions of bail was that he should not go to the hotel or communicate with any officer or employee of the hotel. That condition was in force at the time of the inquiry was held and it prevented him from appearing.

The applicant's explanation as to why he did not attend the inquiry shows that it was his own fault that it took place without him. He received due notice of the inquiry. He did not attempt to

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tell the inquiry of his difficulty in attending and ask it either to meet in another place or to postpone the inquiry so that he could attend. Nor did he try to have his bail conditions altered to deal with his need to attend the inquiry. He did nothing. He just did not turn up. He seems to have expected the inquiry to have known of his conditions of bail and to have acted to protect his interests when he took no steps to do so himself. He is asking too much. The respondents say that they were unaware of the applicant's bail conditions. The inquiry was entitled under, s 14(3) of the regulations, to proceed without the applicant if he did not attend after receiving due notice. In the circumstances, it was justified in doing so.

The procedure used by the PSC for its decisions, both to dismiss the applicant and to reject his appeal, was similar. A dossier was prepared which contained the record of the inquiry, the papers from the PSC file relevant to the charge and the inquiry, together with a summary of those documents and the comments and recommendation of the Discipline and Staff Relations section of the PSC. Specifically, the papers included the charge against the applicant, his reply to the charge, the proceedings of the inquiry and the decision and recommendation of the Ministry. This dossier was circulated among the commissioners of the PSC. The decision of each commissioner was endorsed on the dossier and signed by each commissioner. All the commissioners present and consulted stated that the applicant should be dismissed from the service and also that his appeal should be dismissed.

The applicant submits that the PSC was obliged to conduct the proceedings in respect of his dismissal and the appeal as hearings, for he was entitled to notice and at which he was entitled be present, be legally represented and to make submissions. He goes further concerning the appeal. He says the appeal was to be a full rehearing of the matter and not an appeal on the record. Anything less, he submits, would be a breach of the *audi alterem partem* rule.

The *audi alterem partem* rule encompasses a simple concept - the need to hear the other or both sides. That simple rule encapsulates a variable bundle of rights and duties not all of which are applicable to every situation

BLACKIE J

but which is governed by the fundamental need for fairness. *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 154E.

The method by which the rule is to be satisfied, the obligations imposed and the extent of the rights granted by it are not constant and can vary from what I will refer to loosely as a full hearing or appeal - a hearing (if an appeal, either on the record or a rehearing), personal appearance, legal representation and oral submissions - to no more than an opportunity to make representations, to place one's own version before the tribunal and to rebut evidence against oneself.

In *Heatherdale Farms (Pty) Ltd & Ors* v *Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T) at 486D Colman J noted that:

"It is clear on the authorities that a person who is entitled to the benefit of the *audi alterem partem* need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing; or

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allowed representation by an attorney or counsel; he need not be given an opportunity to cross examine; he is not entitled to discovery of documents."

See *Secretary for Transport & Anor* v *Makwavarara* 1991 (1) ZLR 18 (S) *per* Korsah JA at 20F-21A. See also *Mukwawaya* v *Minerals Marketing Corporation of Zimbabwe & Anor* HH-238-91.

The regulations do not expressly set out the procedure that the PSC should follow in dealing with applications, in terms of s 17, for dismissal of a public service, or an appeal, in terms of s 20 from a decision to find a member guilty of misconduct. Nor do they expressly deal with the rights of a person affected by decisions to be made by the PSC in terms of those sections. Section 17(4) requires the PSC "where ... the member is found guilty of misconduct ... (to) proceed to determine the penalty to be imposed on the member". Section 20, subsections (2) and (3), dealing with appeals to the PSC, require only that the "head of Ministry ... forward the notice of appeal and all relevant papers, together with his reasons for the decision appealed against, to the (PSC) within 14 days and that, on consideration of the appeal the (PSC) may direct that such further investigation be conducted or direct the holding of an inquiry, as it may deem fit, and may confirm, set aside or vary the decision appealed against".

No duty to hold a hearing or right to be present and make oral submissions to the PSC, prior to it making decisions in terms of the relevant sections, can be implied from the general wording or from individual words of those sections. Rather, the words used to describe the duties of the PSC in dealing with a dismissal hearing and an appeal appear, by implication, to exclude any idea of a full hearing. In addition, the fact that a right to appear is expressly set out the sections dealing with inquiries shows that the legislature was

aware of the general right of a person in that regard but chose to exclude that right from dismissal and appeal hearings. It seems to me that that the applicant's right in respect of the *audi alterem partem* rule under the regulations was limited to the right to make written representations before any decision on his case was made.

The question remains as to whether, if the applicant had the right to make representations to the PSC before he was dismissed and his appeal was rejected, was there a duty of the PSC on invite the applicant to make such representations before it made its decision or was the PSC's duty limited to considering such representations that the applicant put before it. In general, it seems to me that the latter should apply. The duty of the PSC was limited to considering what the applicant put before it. It did not have to invite the applicant to make those representations. If I am wrong in the general principle which I have just expressed, then it seems to me that, in this case, there was no obligation on the PSC to ask for further representations from the applicant before it dismissed him and before it rejected his appeal. In respect of the decision to dismiss the applicant, the applicant had had the opportunity to appear at the tribunal, which was concerned with both the conviction and the penalty to be imposed after conviction, and had had his opportunity to put his submissions on penalty to the inquiry. He neglected to take that opportunity. In respect of the appeal, the notice of appeal was more that a simple statement of

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an intention to appeal. The applicant included in his notice of appeal the reasons why he wished to appeal. I do not see a duty on the PSC to call from more reasons from the applicant.

Finally, there is the question whether, by failing to have the receipts examined by a handwriting expert to determine their authorship, both the inquiry, and the PSC on appeal, reached decisions which are grossly unreasonable. An examination of the record shows that the inquiry did not find that the receipts had been, or must have been, written by the applicant. It accepted that the applicant might not have written the receipts. It considered that they had been produced in collaboration with the hotel staff. Whether, therefore, the applicant wrote them or not was not central to the decisions of either the inquiry, the dismissal proceedings or the PSC on appeal. The decisions of the inquiry and the PSC on the facts before them cannot be described as grossly unreasonable on the grounds advanced by the applicant or on any other grounds.

Accordingly, although the applicant may have a justifiable complaint, on the merits, against the PSC for its failure to provide the reasons by which the inquiry found him guilty of misconduct and its own reasons for dismissing him from the service and rejecting his appeal, the lack of action by the

applicant in enforcing his right to those reasons and the delay in bringing this application render it undesirable that this matter should be reopened.

In the result, condonation for the late filing of the application is refused and the application is dismissed with costs.

Gollop & Blank, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners

THOMAS *v* MURIMBA 2000 (1) ZLR 209 (HC)

Citation	2000 (1) ZLR 209 (HC)
Case No	Judgment No. HH-31-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	January 26, 2000
Judgment	February 9, 2000
Annotations	None

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Application for default judgment

Flynote

Damages - defamation - assessment of damages - object of award of damages - application for default judgment - court's duty to take account of possible defences - effect of qualified privilege

Delict - defamation - defence of qualified privilege - when duty or right to communicate defamatory matter - scope to be widened in interests of social transparency

Headnote

The defendant was a guard in a security company. The plaintiff was a general manager in the company. In his capacity as the secretary of the workers' committee for the company, the defendant wrote letters to the managing director of the company complaining about the conduct of the plaintiff. He alleged that the plaintiff was a racist and was unprofessional and was victimising employees. The defendant referred to the plaintiff in similar terms when he appeared on a television programme that was broadcast.

Held, that the purpose of delictual damages for defamation is compensatory and not to punish the defendant.

Held, that when assessing the damages that were to be awarded for this defamation, because the plaintiff was applying for a default judgment the court had to consider what defences could have been raised by the defendant and the mitigatory factors that would have emerged had the defendant opposed the action.

Held, further, that in respect of the defence of qualified privilege, the range of duties or rights to communicate defamatory matter is wide and must be widened even further for the greater good of social transparency. The range spans legal, moral and social duties or rights and interests. The law must develop and the list cannot be fixed but will inevitably be widened. In the social setting in Zimbabwe, with its history of racial discrimination and continuing racist tendencies, it is even more imperative to widen the scope of qualified privilege.

Held, further, that the defendant had a right or legitimate interest in communicating the defamatory matter to the management of the company and was not actuated by malice. By communicating information about the problems that he perceived in the company, he was seeking to preserve the good image of his company. Nominal damages were therefore appropriate in respect of this publication.

Held, further, that as regards the utterances on the television programme, the harm to the plaintiff's reputation was not particularly great, although the broadcast was seen by many people. In a society where racism rears its ugly head quite frequently, the labelling of a

person as a racist is not likely to have a devastating effect. Although the plaintiff was a high-ranking employee, it was a mitigatory factor that the defendant was in an emotional state

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and had uttered the words in context of a labour dispute which had already received widespread coverage in the local media. The managing director of the company had not believed the allegations against the plaintiff.

Cases Considered

Cases cited:

Aitken v *Zimbabwe Newspapers (1980) (Pvt) Ltd* 1997 (1) ZLR 383 (H)

Borgin v *de Villiers & Anor* 1980 (3) SA 556 (A)

de Waal v *Ziervogel* 1938 AD 112

Levy v *Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (H)

Vaughan & Anor v *Ford* 1953 SR 108; 1953 (4) SA 498 (SR)

Case Information

Miss *B C Mamutse*, for the plaintiff

Judgment

Chinhengo J: This is an application for a default judgment in a defamation suit. The summons and declaration were served on the defendant's wife at the defendant's place of residence on 18 March 1998. I am satisfied that proper service was effected upon the defendant. The defendant had six days within which to enter an appearance to defend. He did not do so. The plaintiff applied for default judgment and set the matter down for hearing on 1 December 1999. It came before me on the motion roll on that day and I ordered a postponement of the matter until the plaintiff's legal practitioner had filed heads of argument to assist the court in reaching a decision on the plaintiff's claim. After the heads of argument were filed, the matter again came before me on the motion roll on 26 January 2000. I reserved judgment.

The plaintiff's suit arises from the following facts as appear in his declaration. The plaintiff is the general manager of Fawcett Security Operations (Pvt) Ltd ("Fawcett"). He reports to the managing director of Fawcett. He is therefore an employee of Fawcett. The defendant was employed by Fawcett as a sergeant major. On 2 July 1997, the defendant wrote a letter to the managing director of Fawcett and sent copies of the letter to two other persons, Mr T Magaya and Mr M Makiwa. He signed the letter in his capacity as the secretary of the workers' committee. Mr Magaya and Mr Makiwa are also employees of Fawcett, but the reason for which the letter was copied to them is not apparent from the papers before me. I assume that they were either senior employees of Fawcett or that they were members of the workers' committee. There would be no other reason to my mind why the defendant would send copies of the letter to them if they had no right or duty to receive the letter in any respect whatsoever. No such other reason was suggested by the plaintiff. The letter by the defendant reads:

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CHINHENGO J

"Dear Sir,

A Letter to Air My Displeasure

My displeasure goes against the company General manager - Mr D.B. Thomas who victimised me on 1/7/97 at 845 hours in his office.

I will never forget his words - he said three times 'You are a fool, stupid Kaffir'. He went on to say I do not know how to negotiate.

All this started when I was followed home on 30/6/97 by one of our sergeants with the word that I was wanted promptly at our company. When I came I was told the general manager wanted to talk to me on the 1/7/97 at 8.00 a.m.

On 1/7/97 I was with the vice-chairman of the Workers' Committee - Mr E. Chitsime and at 0840 hours we were in Mr D.B. Thomas's office who asked us about the notice you got from the subcommittee of security industry. Mr E. Chitsime said he knew nothing and was told to leave the office.

Mr D.B. Thomas asked various questions and said various commentaries such as: 'What do you mean by industrial action? Did you sign this letter? Are you the organising secretary? You forced some members of the subcommittee to sign this letter, did you? You were foolish enough to sign this; You are stupid; You know nothing; You are a fool; You stupid kefa. You do not know how to negotiate. You do not know/tell me what to do. I tell you what to do'; etc.

Such attitude to me is intolerant, such victimization was beyond the scope and operations of the company.

Furthermore the words used directly to a person of my position showed me the true colour of the general manager. If you accept this in your company I will know what is meant by Fawcett Security - different to the present meaning.

If any hearing is to take place concerning this allegation, I would want Fawcett National Chairman of the Workers' Committee, Fawcett Harare Branch Chairman of the Workers' Committee, Mr W. Vengere to be present.

Your failure to resolve the issue within fourteen days from 7/7/97 I will refer the issue to the following:

1. Fawcett Board of Directors 2. ZANU PF Youth League 3. ZANU PF Central Committee 4. Zimbabwe Parliament 5. The C.I.O. of Zimbabwe and the Zimbabwe Sheriff's Office 6. Zimbabwe Human Rights 7. The President's Office 8. ZCTU Union and C.W.U. Zimbabwe 9. Ministry of Home Affairs and Ministry of Labour and Social Welfare.

Finally, I am looking forward for your response patiently and attentively.

Your ever obedient worker

Nyaya Murimba 2387S/M

Secretary of the Workers Committee.

cc To Mr T. Magaya

Mr M. Makiwa"

The plaintiff complains that this letter was published and published with the intention to defame him and to injure his reputation. The words used in the letter are wrongful and defamatory of him in that the words were intended

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to mean and were understood by those to whom they were published to mean that the plaintiff used his position as general manager to victimise the defendant; that the plaintiff was a racist and generally that he was unprofessional, vindictive and of an unworthy character. The plaintiff claims that as a result of the publication of the letter he was injured in his reputation and suffered damages in the sum of $10 000. This was the plaintiff's first claim against the defendant.

The second claim arose from the following facts. On 12 July 1997, the defendant and three other persons appeared on a Zimbabwe Broadcasting Corporation live television programme, AM Zimbabwe, in which conditions of employment of security guards were discussed following upon the industrial action by security guards employed in most security firms in Harare on 10 July 1997. During the industrial action, the plaintiff had "in an attempt to protect his life, the life of other Fawcett employees ... and in an attempt to protect Fawcett Security's property, fired some shots from a shot gun at security guards who were throwing stones at him and at Fawcett Security premises causing extensive damage to property." This shooting incident according to the plaintiff attracted wide publicity from the local media and was widely communicated to the general public.

Whilst participating in the programme mentioned above the defendant uttered words to the effect that on 1 July 1997, he was called into the office of the manager who shot at the security guards and was victimized and called a "fool" and a "stupid kaffir". The plaintiff complaints that in the context of the programme it was clear and it was intended to be made clear by the defendant to the general public that reference to the manager who shot at the security guards would readily mean, or be associated with, the plaintiff. The words uttered by the defendant in the context of the programme were wrongful and defamatory of him and were intended and understood by the audience to mean that the plaintiff was a racist and was unfeeling, vindictive and unprofessional. The plaintiff claims that as a result of such defamation he was injured in his reputation and suffered damages in the sum of $25 000.

Arising from these facts and causes of action the plaintiff claims a total of $35 000 from the defendant. This being a claim for default judgment in respect of an unliquidated claim, the plaintiff filed in terms of r 60 of the Rules of this court an affidavit of evidence to prove the quantum of his damages. In his affidavit, the plaintiff pointed to the first paragraph of the letter quoted above as containing an allegation by the defendant that he (the plaintiff) as general manager victimized the defendant. That paragraph, he averred, was intended to mean and it was understood to mean that the plaintiff was unprofessional and used his position to victimize the defendant. He points to the second paragraph of the letter as containing the allegation that the

plaintiff had addressed the defendant as a "fool, stupid kaffir". This paragraph, he says, was understood by the addressees of the letter to mean that the plaintiff was a racist.

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The plaintiff stated further that as a result of the letter he was asked by his managing director to respond to the allegations in writing. He said that the allegations were very serious. Fawcett is the largest security organisation in the country and for a high ranking person such as the plaintiff "to be seen practising racism seventeen years after independence is something despicable" and despicable, too, is that a person of his standing in Fawcett should victimize a very junior employee. The plaintiff stated that he was very distressed that the defendant had written such a letter. He stated that had the managing director believed the allegations (and fortunately for him the managing director did not believe them), he may very likely have been disciplined or even dismissed from employment. He also stated that the managing director showed that he was concerned that the allegation had been made against him, because he requested the plaintiff to respond in writing. He said that the allegations made against him were maliciously made because they had no foundation whatever and that they were designed to injure him in his good name and reputation in the eyes of the individuals to whom the letter was addressed. He stated that he was further distressed by the defendant's failure to make an apology.

The words complained of are *per se* defamatory. I am satisfied that any reasonable recipient of the letter concerned would have concluded that the plaintiff was an unprofessional individual who victimised junior employees and that he was a racist.

The question which immediately arose in my mind in respect of quantum is whether the nature of the defence which the defendant could have raised if he had defended the action would have no bearing on the quantum. I think it has. In assessing the quantum where a claim for defamation is undefended, as in this case, I think that I have the discretion to examine all the facts, all the circumstances of the case, including any defences which if they had been pleaded, would have had a bearing on the quantum. This approach is in my view justified, if it is adopted, not to question liability, but only to assist me in determining the amount to be paid to the plaintiff.

It is trite that three categories of occasions are accorded the defence of qualified privilege. These are: (i) statements published in the discharge of a duty, the exercise of a right or the furtherance of a legitimate interest; (ii) statements published in the course of judicial or quasi-judicial proceedings; and (iii) reports of proceedings of courts, parliament and public bodies - see Jonathan M Burchell *The Law of Defamation in South Africa* at p 244.

On the same page and on p 245, the same learned author elaborates on the

first category amd it is relevant to this case. He states that:

"It is lawful to publish a defamatory statement in the discharge of a duty or the exercise of a right to a person who has a corresponding right or duty to receive the information. Even if a right or duty to publish material and a corresponding right to receive it does not exist, it is sufficient if the publisher had a legitimate *interest* in publishing the material and the publishee had a legitimate *interest* in receiving the material. As has been shown, the law of delict, and defamation in particular, is really concerned with the balancing of interests, and an over-emphasis on 'rights', which is a narrower term than interests, may unduly restrict the ability of the law to develop in order to meet the changing conditions.

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Since the basis of the defence is one of public policy, there is no closed list of rights, duties or interests that are considered as legitimate for the purpose of the defence of privilege. To attempt to categorise the legal decisions in which the duty or interest has been held to be legitimate might tend to create the impression that the categories are fixed."

I find myself in full agreement with the learned author. It is also my view that the range of duties or rights to communicate defamatory matter is wide and must be widened even further for the greater good of social transparency. The range spans the legal, moral and social duties or rights and interests in respect of which a list cannot be fixed. I embrace the view that the law must develop and in that process the widening of the interests, rights or duties involved becomes inevitable. In a social setting such as that prevailing in this country, with a historical background of racial discrimination and intolerance and an apparently continuing inclination among members of our society to perpetuate the socially destructive tendency towards racism, the widening of the rights, duties and interests mentioned herein is even more imperative. As a nation we must mature and accept that our perceptions and attitudes differ depending on the socialisation factors affecting us individually or as a group. To my mind we have for too long avoided to face the reality of our situation in respect of these perceptions and attitudes.

In the present case, we have a background, alluded to in the defendant's letter to the managing director, of an impending industrial action in the private security service industry. The letter was written on 2 July 1997 and in paragraph 5 thereof a indication is made that the industrial action was threatened by the security guards. That industrial action was embarked upon and by 10 July 1997 almost all security firms in Harare were affected - see para 9 of plaintiff's affidavit. It is against this background that the defendant wrote the letter to the managing director complaining about certain treatment he had been subjected to by the general manager. He brought up the matter as a grievance and at the same time made remarks that were defamatory of the plaintiff. The defendant was a sergeant major in the security firm and he was also the secretary of the workers' committee. The persons to whom he addressed the letter were the managing director and two other persons whom I have, I believe correctly, assumed to have been either higher ranking

employees of Fawcett or members of the workers' committee at that undertaking.

Can it be said that the defendant did not have a right or a legitimate interest to communicate defamatory matter to the addressees? And can it be said that the addressees, and in particular the managing director, had no right or a legitimate interest to receive the communication? I think that the publisher and the publishees in this case had such a legitimate interest in the communication. The interest of the defendant was to preserve the good image of his employer, which it had apparently maintained up to that point. This is clear from a reading of the seventh and eight paragraphs of his letter. He was communicating to persons who had an interest in the image of the company. In addition, there was on the horizon an impending industrial action which was prejudicial to the interests of the company as testified by later events. In recognising such interest on the part of the publisher and the publishee, I cannot even say that I have, in this case, widened the range of legitimate interests that could found a defence of qualified

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privilege. See generally *de Waal* v *Zievogel* 1938 AD 112. I find the words of Corbett JA (as he then was) in *Borgin* v *De Villiers & Anor* 1980 (3) SA 556 (A) at 577D-G to be most apposite. The learned Judge of Appeal stated that:

"the particular category of privilege which ... would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty to receive it ... The test is an objective one. The court must judge the situation by the standard of the ordinary reasonable man having regard to the relationship of the parties and the surrounding circumstances. The question is: did the circumstances, in the eyes of a reasonable man, create a duty or interest which entitled the party sued to speak in the way he did? And in answering the question, the court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one."

Against the background facts, which I have mentioned above in particular, the employment relationship between the parties and other surrounding circumstances, I am satisfied that, in the eyes of a reasonable man in the circumstances, a duty and an interest was created which would have entitled him to communicate in the manner of the defendant. The defence of qualified privilege does not avail a defendant if he was actuated by malice. There is nothing that can be gleaned from the facts of this case, or from the surrounding circumstances or from the employment relationship of the parties, that would suggest malice on the part of the defendant. Personal malice is definitely absent. The defendant had an interest, whether it be called moral, legal or social, to communicate to the addressees who similarly had an interest, moral legal or social, to receive that communication. In specific terms, an employee has a duty, and therefore an interest to defend the good name of his employer if it is attacked or threatened by another, whether by

word or by conduct. I am constrained to the conclusion that any damages which I must award, because liability has not been put in issue for lack of opposition to the action, can only be token.

Assuming that I have been wrong in the approach I have adopted above, I think that the *de minimis r*ule applies in this case. Its application would also result in a token award or in no award at all. The managing director did not believe the allegation made against the plaintiff. That is mitigatory of damages. See *Vanghan & Anor* v *Ford* 1953 SR 108; 1953 (4) SA 498 (SR). The other addressees are likely to have been loyal employees of Fawcetts and loyal subordinates to the plaintiff. They knew the plaintiff and would not have had their estimation of him that much effected. There is no evidence as to their reaction. I must decide myself what effect the letter might have had on them. I am satisfied that, in all probability, it had no effect. On this consideration, the damages can only be token.

I turn now to the second claim for damages in the sum of $25 000. The plaintiff stated in paras 10 and 11 of his affidavit that during the industrial action on and around 10 July 1997:

"10. ... a mob of security guards numbering more than two thousand moved towards Fawcett Security premises ... chanting slogans and singing revolutionary songs and in the process throwing stones at the building damaging valuable property belonging to Fawcett Security. As the most senior manager present at the time, and in an attempt to protect the life of other security employees who were occupying the offices at the time, I fired some

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shots from a shot gun at security guards who were throwing stones at me and at Fawcett Security premises. In the process some of the security guards were injured.

11. The industrial action and the shooting incident received wide publicity from the local media and international media as well."

The plaintiff provided this background as a prelude to his allegation that when the defendant participated in the television programme he repeated the allegations he had made against him in the letter of 2 July. He stated that the defendant had during the live televised discussion indicated that the plaintiff had victimised him and called him a "fool and stupid kefa" (*sic*). The plaintiff used the background facts given above to show that, even though he was not mentioned by name, the fact that the shooting incident had received wide publicity made it clear to the viewers that when the defendant referred to the manager who had shot the security guards during the industrial action as the manager who had called him "a fool and stupid kefa", the defendant was referring to him. I am satisfied that the plaintiff has proved that, although he was not mentioned by name in the television interview, the words uttered by the defendant were understood as defamatory of him. The words were *per se* defamatory. I am also satisfied, from the wide publicity given to the shooting incident, that the persons who heard the broadcast knew those facts and associated the shooting incident with the defendant.

CHINHENGO J

It appears from the papers before me that the defendant said the words complained of - that is, he said of the plaintiff that he had victimised him and had called him "a fool and *kefa*". There is substance in the plaintiff's averment that, as a general manager of the largest private security firm and a former chief superintendent in the Ministry of Home Affairs who has dealt, and still deals with many people, the allegation that he victimised the defendant and called him "a stupid kaffir" was understood by the viewers to mean that he was a racist and that he was unfeeling, vindictive and unprofessional. I am satisfied that a cause of action has been disclosed. What remains is to assess the damages to be awarded.

The assessment of damages in a defamation suit is dependant on two fundamental principles - that of punishing the defamer and that of compensating the victim. The law of delict is concerned not with punishing the wrong-doer but with compensating the victim for the damages he has suffered. Discussing the conceptual distinction between punitive damages and compensatory damages, Burchell *op cit* at p 291 states the following:

"Compensation in defamation is primarily for sentimental loss, which by its very nature, is not easily translated into monetary terms. It is extremely difficult to separate the punitive and the compensatory element in damages for defamation. A thin line divides "aggravated" but yet compensatory damages, on the one hand, and punitive damages, on the other hand. In fact it is not easy to determine whether in certain South African decisions the court was considering the former or the latter variety of damages.

A conceptual distinction can be drawn between punitive damages that focus on the conduct or state of mind of the defendant and compensatory damages that focus on the injury to the plaintiff but in practice a lump sum award of damages taking account of aggravating (and mitigating) factors surrounding the delict may tend to blur this already fine distinction."

I am inclined towards the school of thought that defamation damages should be awarded to

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compensate the plaintiff for the injury he has suffered and not to punish the defamer for his conduct. Punishment is the province of the criminal law and not the law of delict. Where aggravating factors exist, the award of damages must be increased but they must remain compensatory in nature. If I inclined towards the school of thought that damages in this kind of suit must have a punitive element, the quantum would still be low on a consideration of the defendant's financial position. The defendant was, in the words of the plaintiff, a low level employee. He was only a sergeant major. No evidence was placed before me on his financial circumstances. I must decide the matter by reference to the general circumstances of persons in defendant's position in our society. That the financial position of the defendant can be taken into account is supported by A R B Amerasinghe in *Defamation in the Law of South Africa and Ceylon* at pp 565-566 where he discusses this principle and says:

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"We have seen, however that this general rule (that the defendant's financial position is irrelevant because courts do not in a civil action impose a penalty) does not apply to actions for defamation and therefore the courts are entitled to take the defendant's financial position into account in deciding whether a particular amount is condign. There are at least two reported cases in which the financial position of the defendant has been taken into account. In *Grafton* v *Cosins*, Charter J, in reducing the damages awarded in the court *a quo* said that the defendant was not a man of wealth and that 'What might prove a light penalty to a man in a better position might prove to him and also his family ruin'. In *Vorster* v *van der Walt*, MacGregor J said that the question of assessment is difficult where, as in the case before him, the defendant happens to be 'a person in a comparatively modest and not affluent walk of life'."

I subscribe to this sentiment. The quantum *in casu* will reflect this view.

The factors which are useful in assessing the level of damages are the extent of publication of the defamatory matter, the nature of the imputation and the standing of the plaintiff, the plaintiff's character, partial justification and retraction and apology. Also to be put into the equation are such factors as whether the defamation was oral or written, for there "seems no reason ... why in assessing damages the court could not take into account that oral defamation *may* have a more transient impact than written defamation and that the latter may well be the product of greater deliberation than the former" (Burchell *op cit* at p 300).

The present case calls for a consideration of some of the factors I have mentioned above. There is no doubt that a live television broadcast is a wide publication of any statement made in such a programme. The programme AM Zimbabwe is, however, broadcast in the early hours of the day. I cannot say how may people view the programme. What I can say, though, is that fewer people are likely to view the programme at that time of the day compared to the number of people who may view a similar programme screened during the early part of an evening. The fact, however, remains that television broadcasts reach a very large section of the community and therefore the publication of defamatory matter is extensive. The nature of the imputation in the present case, that the plaintiff victimises his employees, that he is unprofessional and that he is a racist, has not as much damaging effect in a country which has not completely rid itself of racism. In Zimbabwe, racism which is a legacy of our colonial history, rears its ugly head quite frequently. Its ugly head pops up here and there but our society is not necessarily surprised when that happens because racism has strong, colonial state-sanctioned roots. The injury caused to a person who is labelled a racist has no such devastating effect as it would

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have in other societies where racism has largely been exorcised from the minds of the people. I therefore do not think, with this country's history of racism and the attitudes and perceptions to which I have already referred, the plaintiff is likely to have

been that much shunned or avoided or treated with ridicule or contempt by his peers because he was labelled a racist by a very low level employee at his workplace.

The papers before me disclose the plaintiff's standing in society. He said that he is a former chief superintendent in the Ministry of Home Affairs and that he is a high ranking employee of Fawcett. He no doubt has some standing in the private security industry and in society generally. I consider, however, that despite these factors which would seem to justify a higher award, I should not lose sight of the totality of the circumstances under which the defendant made the derogatory statements. There was an industrial action. Emotions were high among employees of the private security organisations and I should assume that the defendant's emotions were also high. In all likelihood he must have perceived himself as engaged in a struggle with his employers and the employers in the industry for the betterment of the conditions of service of employees in that industry. The emotional state of the defendant at the time he uttered the defamatory words is mitigatory of damages - *Vanghan & Anor* v *Ford supra*. Additionally, the question of the plaintiff's standing is a double-edged sword. It may mitigate or it may aggravate damages. The plaintiff seems to be a person so well established in his position that his reputation would be unaffected, relatively speaking, by the defamation. His own managing director did not believe the allegations made against him. Nor would the people he has dealt with or still deals with.

Another consideration is that when the defendant made the defamatory statement on television there had already been wide publicity in the local media about the shooting incident and the Commercial Workers' Union had condemned the shooting incident - see Annexure A to plaintiff's affidavit which is a report captioned "Striking security guards shot". In *Aitken* v *Zimbabwe Newspapers 1980 (Pvt) Ltd* 1997 (1) ZLR 383 (H), Blackie J discussed the effect of wide publicity and said that it has a mitigatory result on the damages claimed. At 388C, he said:

"Nevertheless, there are certain other factors which must be also taken into account. The plaintiff was at that time facing a number of serious criminal charges. The charges and the proceedings in connection with them had received much publicity. These would obviously have taken a toll on the plaintiff's personal and professional status by 1 July 1993."

I must recognise a difference in the extent of the toll taken on plaintiff's status from the publicity given in the wide circulating *The Herald* newspaper on 11 July 1997 and that in *Aitken*'s case *supra*. That difference is a matter of degree. I must therefore hold that indeed the plaintiff's reputation had already been tarnished by the time that the defendant appeared on television on 12 July 1997.

Had the defendant opposed the relief sought by the plaintiff, I think that

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CHINHENGO J

these factors in mitigation of damages would have emerged. I am satisfied that the award must reflect that I have taken all these factors into account. The award must also reflect that the award is essentially compensatory in nature, and that the injury suffered by the plaintiff was not as devastating as he would like the court to believe. An award of $100 in respect of the first claim and $5 000 in respect of the second claim would seem to me to be appropriate. Interest will be ordered from the date of judgment - see *Levy* v *Modus Publications (Pvt) Ltd* HH-3-2000 at pp 9-11.*(17)

It is accordingly ordered that judgment with costs be and is hereby entered for the plaintiff in the sum of $5 100 together with interest from the date of this judgment to the date of payment.

Atherstone & Cook, plaintiff's legal practitioners

FIRST MERCHANT BANK OF ZIMBABWE LTD v FORTRESS INDUSTRIAL INVESTMENTS (PVT) LTD & ANOR 2000 (1) ZLR 221 (SC)

Citation	2000 (1) ZLR 221 (SC)
Case No	Judgment No. S-7-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA and Sandura JA
Heard	January 18, 2000
Judgment	February 10, 2000
Annotations	None

Civil appeal

Flynote

Prescription - interruption of - acknowledgment of debt by debtor or his agent - tacit acknowledgement - what constitutes - debtor's words and conduct must be taken into account - third party, with consent of creditor, entering into deed of suretyship to secure immoveable property in place of property pledged by debtor

Headnote

The appellant entered into a written agreement under which the respondent was loaned money to buy an industrial stand in Harare. The loan was to be repaid within 10 months. As security for the loan, the respondent provided the unlimited guarantee of two companies. The second company's guarantee was supported by a pledge of a deed of transfer and a power of attorney

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to register a mortgage bond over the same industrial stand. Some 30 months after the loan agreement was entered into, the second respondent executed a surety bond in favour of the appellant over a piece of land in a residential area of Harare.

The loan was not repaid as required, and nearly 4 years after the loan fell due the appellant issued summons against the respondents. The respondents filed a special plea in abatement, averring that the claim was prescribed. The appellant argued that prescription was interrupted by the execution of the surety bond.

The special plea was upheld, the judge a quo ruling that the acknowledgement of liability by the second respondent was made, not to the appellant, as the creditor, but to the Registrar of Deeds. On appeal:

Held, that the debtor or his agent must expressly or tacitly acknowledge an existing liability to the creditor before the running of prescription is interrupted. Acknowledgement to a third party is ineffective.

Held, further, that acknowledgement of liability can take various forms, such as part payment of the debt; payment of interest on the debt; or giving of security for payment of the debt. In determining whether tacit acknowledgment of the debt has taken place, the debtor's words and conduct must be taken into account. Conduct alleged to constitute a tacit acknowledgement must be seen in proper context. An objective assessment must be made of what the debtor's conduct conveyed with respect to whether or not it was subjectively intended to acknowledge liability.

Held, further, that in registering the suretyship together with a mortgage bond over the second respondent's property, the Registrar of Deeds was not acting as agent for any of the parties: he was acting as a public official, carrying out his official duties.

Held, further, that although the mortgage bond was registered over the second respondent's property, the substitution of the property to be mortgaged must have been approved by the appellant; and the second respondent, in executing the security bond, was, as authorised agent of the first respondent, acknowledging the first respondent's liability to the appellant and implementing the first respondent's undertaking that the indebtedness would be secured by a mortgage bond over immovable property.

Cases Considered

Cases cited:

Agnew v Union and South West Africa Ins Co Ltd 1977 (1) SA 617 (A)

Benson & Anor v Walters & Ors 1984 (1) SA 73 (A)

Cape Town Municipality v Allie NO 1981 (2) SA 1 (C)

Markham v SA Finance & Industrial Co Ltd 1962 (3) SA 669 (A)

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Oertel & Ors NNO v Director of Local Govt & Ors 1981 (2) SA 77 (T)

Pentz v Govt of the Republic of SA 1983 (3) SA 584 (A)

Petzer v Radford (Pty) Ltd 1953 (4) SA 314 (N)

Legislation considered:

Prescription Act [Chapter 8:11], s 18(1)

Case Information

A Morris-Davies, for the appellant

Miss *W T Miles*, for the respondents

Judgment

Gubbay CJ: This is an appeal from the High Court (Mungwira J). It is convenient first to set out the relevant facts and thereafter to consider the issues which arise.

On 11 December 1990, the appellant and the first respondent entered into a written agreement of loan in term of which $850 000 was advanced to the first respondent in order to assist it in financing the purchase of an industrial stand in Ardbennie, Harare. The loan was to carry interest at two per centum above the ruling base lending rate. It was to be repaid in full on or before 30 September 1991. As security for the facility, the first respondent undertook to provide the appellant with:

1. the unlimited guarantee of Huddy Diamond Crown Setting Company (Pvt) Ltd; and
2. the unlimited guarantee of BR Property Development and Investment (Pvt) Ltd, supported by a pledge of deed of transfer No. 3167/86, dated 13 May 1986, and a power of attorney to register a mortgage bond over the same property.

On 22 April 1994, the second respondent appointed Jack Hubert Bennett, under a written power of attorney, to appear before the Registrar of Deeds in Harare and, on his behalf, to pass and execute in favour of the appellant a surety bond in terms of the bond annexed.

The surety bond mentioned in the power of attorney was duly registered before the Registrar of Deeds on 22 June 1994 by Mr Bennett as the appearer.

GUBBAY CJ

After referring to the second respondent as the mortgagor, the preamble to the bond recited that:

"AND the said Appearer did declare THAT WHEREAS

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(hereinafter referred to as 'the Principal Debtor') is truly and lawfully indebted to and on behalf of

FIRST MERCHANT BANK OF ZIMBABWE LIMITED

(hereinafter referred to as 'the Mortgagee') in the sum of

$1 000 000 (ONE MILLION DOLLARS)

(hereinafter referred to as 'the Principal Debt') arising from and being money lent and advanced and money to be lent and advanced by the Mortgagee to the Principal Debtor;

AND WHEREAS it was a condition of the granting of the loan by the Mortgagee to the Principal Debtor that repayment of such loan shall be secured by the suretyship of the Mortgagor and by the registration hypothecating the hereinafter mentioned property "

Then followed these clauses of the bond in which the appearer:

"2. did by these presents declare and acknowledge that the Mortgagor is hereby bound as surety in solidum and joint co-principal debtor with the Principal Debtor for the due fulfilment by the Principal Debtor of all the Principal Debtor's obligations in relation to the Principal Debt;

3. did accordingly by these presents declare and acknowledge the Mortgagor to be held firmly bound as surety aforesaid unto and behalf of the said

FIRST MERCHANT BANK OF ZIMBABWE LIMITED

its successors in title or assigns, in the sum of

$1 000 000 (ONE MILLION DOLLARS)

arising from and being for the causes and considerations more fully set out in the preamble hereto, with additional preference for the sum of $1 000 000 (ONE HUNDRED THOUSAND DOLLARS) as a preferent charge for costs, insurance premiums or other disbursements made or required to be made by the Mortgagee to preserve its rights and security in terms of this Bond:

4. as further security for the due and proper payment of all sums owing under the Principal Debt whether by way of capital, interest, costs or other disbursements and for the due and proper fulfilment of all the terms of this Bond, and to secure all costs and other disbursements made by the Mortgagee in securing and preserving or exercising its rights under this Bond, the Appearer, q.q. hereby binds specially as a FIRST Mortgage the following property:

CERTAIN	piece of land situate in the District of SALISBURY
CALLED	CHAKA OF SUBDIVISION B OF SUBDIVISION D OF MTHABA OF GLEN LORNE

GUBBAY CJ

MEASURING	4.0662 hectares
HELD	under Deed of Transfer No. 326/81 dated the 21st day of January 1981."

Consequent upon the failure of the first respondent to repay any portion of the amount

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advanced either by 30 September 1991 or thereafter, the appellant issued summons against both the respondents on 14 September 1995. As against the first respondent it claimed payment of the sum of $1 586 988.87, together with interest arising thereon at the rate of 37 per centum per annum from 1 July 1995 to date of payment; and as against the second respondent, as surety in solidum and co-principal debtor for repayment of the debt of the first respondent, payment of the sum of $1 000 000. Costs of suit were sought against each respondent.

The respondents filed a plea in abatement. It averred that as the cause of action had arisen no later than 30 September 1991 the failure to institute action no earlier than 14 September 1995 had resulted in the prescription of the claim in terms of s 15(d) of the Prescription Act [Chapter 8:11] ("the Act").

The appellant's response was that the running of prescription was interrupted and commenced to run afresh from 22 June 1994, being the date of execution of the surety bond.

The special plea was upheld with costs. The learned judge appreciated that by virtue of s 18(1) of the Act it is the debtor or the debtor's agent who must expressly or tacitly acknowledge an existing liability to the creditor or the creditor's agent before the running of prescription is interrupted; acknowledgement to a third party being ineffective. See Markham v South African Finance & Industrial Co Ltd 1962 (3) SA 669 (A) at 676F; Pentz v Government of the Republic of South Africa 1983 (3) SA 584 (A) at 594B-C; Oertel & Ors NNO v Director of Local Government & Ors 1981 (2) SA 77 (W) at 83A. She reasoned, as had been submitted to her on behalf of the respondents, that the nature and extent of the so-called acknowledgement of liability, was one given by the second respondent through an agent (the appearer) to the Registrar of Deeds for the purpose of registering a mortgage bond in security for a debt incurred much earlier. It was not therefore made to the appellant, as the creditor, but to the Registrar of Deeds who could not be deemed to be the agent of the appellant; and was made solely to enable the appellant to register security in the form of a mortgage bond.

Section 18(1) of the Act, like its counterpart in s 14(1) of the South African Prescription Act 68 of 1969, does not provide examples of conduct constituting an acknowledgement of liability (compare s 6(1)(a) of the former South African Prescription Act 1943). Acknowledgement may therefore take the form of part payment of the debt or payment of interest

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thereon (see Cape Town Municipality v Allie 1981 (2) SA 1 (C) at); or, the giving of security for payment of the debt (see Markham v South African Finance & Industrial Co Ltd supra at 676E). And an acknowledgment of partial liability for the debt interrupts prescription in respect of the entire indebtedness.

The use by the legislature of the word "tacit" in s 18(1) is important. It signifies that the debtor's words and conduct should be taken into account. See Cape Town Municipality v Allie supra at 7D). However, conduct alleged to constitute a tacit acknowledgement of liability must be seen in proper context. See Benson & Anor v Walters & Ors 1984 (1) SA 73 (A) at 87C-88A.

Finally, in the review of the general principles applicable to the interruption of prescription, it

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should not be overlooked that in the determination of whether an existing liability was acknowledged an objective assessment must be made of what the debtor's conduct conveyed in respect to whether or not it was subjectively intended to acknowledge liability. See Agnew v Union and South West Africa Insurance Co Ltd 1977 (1) SA 617 (A) at 623B-C. That inquiry will always be a factual one. See Petzer v Radford (Pty) Ltd 1953 (4) SA 314 (N) at 318E.

It was properly conceded, in my view, that in registering the suretyship together with a mortgage bond over the property of the second respondent, the Registrar of Deeds was not acting as the agent for the appellant, the first respondent or the second respondent. He is a public official, enjoined by the nature of the duties attaching to his position to record such transactions in the appropriate registry to which members of the public are afforded access.

It is true, of course, that the mortgage bond, as security for payment to the appellant of the indebtedness of the first respondent, was not registered over the latter's own property but over that of the second respondent. Nonetheless, it does not necessarily follow that the effect of the power of attorney and security bond which authorised it, when viewed in historical context, did not constitute an acknowledgement of liability by the first respondent to the appellant.

It is apparent from the agreement of loan that as security for such facility the first respondent was to furnish the unlimited guarantee of BR Property Development and Industrial (Pvt) Ltd, together with a power of attorney to register a mortgage bond over its property held under deed of transfer No. 3167/86. The second respondent's power of attorney was provided on 22 April 1994 to which was annexed a copy of the security bond which it was proposed to execute before the Registrar of Deeds. The property to be mortgaged was different from that described in the agreement of loan. It was the second respondent's property held under deed of transfer No. 361/81. Such a change could only have been sanctioned by the appellant. It must have

called upon the first respondent to made good its undertaking under the agreement of loan and when advised that the indebtedness could not be secured by the mortgage of the property initially offered, consented to the substitution that was effected on 22 June 1994. No other conclusion is possible. This in signing the power of attorney with its annexed security bond the second respondent was, as the authorised agent of the first respondent, acknowledging the latter's liability to the appellant and fulfilling the first respondent's undertaking that the indebtedness would be secured by a mortgage bond over immovable property. In the result, the signing of the power of attorney and the registration of the mortgage bond were acts done between debtor and creditor and constituted an interruption of prescription in terms of s 18(1) of the Act.

For the reasons aforementioned, I find myself in respectful disagreement with the decision reached by the learned judge. I would accordingly allow the appeal with costs against the respondents jointly and severally, the one paying the other to be absolved, and alter the order of the court a quo to read:

"1. The application is dismissed with costs against the defendants jointly and severally, the one paying the other to be

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absolved.

2. The defendants are to file the plea/pleas within fourteen days of the date of this order."

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Wintertons, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners

MUSHAYAKARARA & ANOR *v* CHIDYAUSIKU NO & ORS 2000 (1) ZLR 227 (HC)

Citation	2000 (1) ZLR 227 (HC)
Case No	Judgment No. HH-34-00
Court	High Court, Harare
Judge	Bartlett J
Heard	February 10, 2000
Judgment	February 10, 2000
Annotations	None

Chamber application

Flynote

Constitutional law - referendum - what may be put to the voters in a referendum - draft constitution produced by commission of inquiry appointed by President - draft subsequently amended by President - amended draft put to the voters - President not obliged to put original draft to the voters - President entitled to put to voters any matter he sees fit

Headnote

By Proclamation 7 of 1999, the President set up a Constitutional Reform Commission in terms of the Commissions of Inquiry Act [*Chapter 10:07*]. Its mandate was to seek the views of the people of Zimbabwe and produce a draft constitution. The commission consisted of some 400 people and was chaired by the first respondent. The commission adopted a wide-ranging programme in its endeavours to carry out its functions. This involved setting up various subcommittees and thematic committees, and arranging over 4000 meetings around the country in an endeavour to arrive at the views of the people. The meetings were attended by over 700 000 people. Provincial reports were prepared and some 7000 written submissions

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were made by individuals.

At the end of its deliberations, the commission produced a draft constitution. In many important respects the draft diverged from the views expressed by the people generally and even by the commission's thematic committees. The draft was submitted to the President, who caused it to be published in the *Gazette*. Subsequently, the President published a further draft, containing what were called "corrections and clarifications" to the draft produced by the commission. The second draft was contained in a proclamation, which declared that a referendum was to be held to ascertain the views of the voters on the draft constitution produced by the commission, as "corrected and clarified".

The applicants, who were two of the commissioners, sought an urgent order to prevent the referendum from being held. They argued that the commission did not make a full, faithful and impartial inquiry, as required by the proclamation setting up the commission. Their case in this regard was premised on an alleged fraud perpetrated by certain of the respondents. The applicants claimed that these persons railroaded the process of the commission, and adopted a draft over the objections of members of the commission. They sought an order that the "corrections and clarifications" were of no force or effect.

Held, that the President lawfully exercised his powers to set up the commission, and duly carried out the requirement to publish the draft produced by the commission. He was empowered under the Referendums Act to declare that a referendum be held. He was not, however,

required by law to put to the voters a constitution approved by the commission; he could lawfully put to the voters any draft he wished. Accordingly, he was entitled to make whatever corrections, alterations or amendments he wished to the draft produced by the commission. He could even have discarded the draft completely and put forward his own draft.

Held, further, that given the difficulties of the mandate of the commission, there was insufficient basis for the court to order for the referendum to be postponed pending the hearing of the application as to whether the commission carried out its mandate properly.

Legislation considered:

Referendums Act 19 of 1999

Case Information

L T Biti, for the applicants

P A Chinamasa, Attorney-General, for the respondents

Judment

Bartlett J: This matter was handed to me at 8.30 a.m. yesterday morning as I was about to commence a pre-trial conference before hearing the motion roll. I realised that I would not have time to read the papers before the afternoon but on glancing at the nature of the relief sought,

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realised I would need to give directions as to the hearing of the matter before being able to read the papers. I accordingly directed, shortly after 8.30 a.m. yesterday, that the applicants serve notice on the respondents by 11 a.m. yesterday, and that the application would be argued in chambers before me at 11 a.m. today. I thought that the shortest possible time I could allow for presentation of argument by the respondents. Once I had the opportunity of reading the papers yesterday afternoon, I would have liked to have brought the hearing time forward but it would not have been possible at that stage to do so. My reason for wanting the matter to be heard as soon as possible is that it is, I believe, important that I hand down an immediate decision - be it yes or no - to enable the party who is unsuccessful to have the opportunity, if it is so able and so advised, to endeavour to place the matter before the Supreme Court tomorrow.

I now proceed to hand down that immediate decision. I have read the papers, read the relevant legislation and listened to the argument addressed. My reasons will because of the need for immediacy be brief and, I hope, to the point.

The applicants urgently seek a provisional order barring the second, third and fourth respondents from holding the referendum scheduled for Saturday and Sunday on the draft constitution - until such time as a court application filed by the first and second applicants under H-1661-2000 will have been determined.

The latter application in substance seeks an order that the Constitution Reform Commission (the CRC) did not make a full, faithful and impartial

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inquiry into the matters specified in the Presidential Proclamation 6 of 1999 (SI 138A/99) and that the adoption of the draft constitution by that CRC should be set aside as null and void. It also seeks an order that any alterations, "corrections or clarifications" to the CRC draft made after 29 November 1999 are of no force and effect. Certain alterations referred to, styled corrections and clarifications to the Commission's Draft Constitution, were published in a *Gazette Extraordinary* on 19 January 2000. The Constitution to be put before the proposed referendum in terms of the Referendums Act 1999 (No. 24/99) and Proclamation 1 of 2000 (SI 5A/2000) is the draft constitution published by the CRC on 29 November 1999, as altered by the "corrections and clarifications".

I have used my discretion to hear the application as a matter of urgency. It is a matter of national importance and, in view of the imminence of the referendum, in my opinion, clearly urgent. I would, however, point out that on the first issued raised by the applicants the urgency is, at least in part, of their own creation. The draft constitution was published on 30 November 1999 and an urgent application could have been made much earlier - by the middle of December, for example - when reasonable provision could have been made for the filing of opposing and answering papers and heads of argument, without the referendum looming 48 hours ahead. But the application was only filed on 1 February 2000 and even then not as an urgent application - in the perhaps naïve belief that its mere filing would persuade the respondents to postpone the machinery, presumably then fully in motion, to carry out the referendum. It was only late in the afternoon of 9 February, upon the failure of the respondents

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to respond to the applicants' letter of 3 February requesting postponement that the urgent application was filed. The second issue, relating to the legality of the corrections and clarifications, came to the applicant's notice on 19 January 2000 with the publication of the *Gazette Extraordinary*. Their action in regard to that, though much more rapid than in respect to the first issue, still resulted in an urgent application coming before the court a full three weeks after the matter came to the knowledge of the applicants and three days before the scheduled referendum.

I am entirely satisfied that the applicants, as former constitutional commissioners, have *locus standi* and that, since the first respondent and the third respondent are cited in their official capacities, the proceedings can be commenced without seeking leave.

I begin now to consider the merits of the application. I emphasise that I have listened to, and given as careful consideration as I am able, given the very pressing constraints of time, to the various arguments presented. I do not propose to burden the judgment with references to, or analysis of, authorities. As I have stated, what is required in my view is an immediate decision, with

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the basic reasons therefor - to give the unsuccessful party the opportunity, given the extremely limited time constraints, to attempt to take my decision on appeal if it so wishes. The Supreme Court, if it is able to and favours hearing the matter tomorrow, will undoubtedly be able to listen to the same arguments, consider the same authorities, read my reasons and decide whether my decision is right or wrong.

I propose to deal with the second issue first - firstly, because I am not a mathematician and, secondly, because I find it easier to answer.

The second issue is the argument that the referendum should be postponed as a matter of urgency until a court decides whether or not the alterations, corrections or rectification's to the CRC's draft are of no force and effect.

The basic competing background factors are the referendum looming over my shoulder with all the immense preparation and organisational and administrative expenses incurred in seeking to bring it to fruition - and against that the enormity of the prejudice that would be incurred if the amendments tabled in the *Gazette Extraordinary* of 19 January 2000 are of no force and effect.

I have heard argument on the respective contentions. In my opinion, if I am satisfied at this stage that the applicants' argument has limited prospects of success, I should be hesitant to order a postponement of the referendum. If I consider that it has reasonable prospects of success, I should give most careful consideration to granting the relief sought.

My distillation of the position is this. The third respondent, in Proclamation 7 contained in SI 138A/99, lawfully exercised his powers to set up the CRC. The CRC was required to carry out its mandate and produce a draft constitution. That it did. The third respondent was required, in terms of that proclamation, to publish the draft and consider it. That he has, in my view, done.

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He is empowered in terms of the Referendums Act 19 of 1999 to declare that a referendum be held to consider the views of the voters on any question or issue. He has done that, declaring that a referendum be held to ascertain the views of the voters on the draft constitution published by the CRC as corrected and clarified by the *Gazette Extraordinary*.

The third respondent is not, in my view, required to put before the voters a constitution approved by the CRC. He is entitled, as President, lawfully exercising his powers, to put any draft constitution he so wishes to ascertain the views of the voters. It is up to the voters to decide what they think of the third respondent and the draft constitution he puts forward and vote accordingly.

The third respondent, therefore, in my view, is lawfully entitled to make any corrections, clarifications, alterations or amendments to the draft constitution he so wishes. If he so wished, having published and considered

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the CRC draft, he could even have discarded it completely and put his own draft before the electorate in terms of the Referendums Act. The point, I reiterate, is that it is up to the people to vote yes or no, as they see fit, for the constitution put forward by the third respondent.

I can see nothing unlawful in the publication of the corrections and clarifications in the *Gazette Extraordinary* on 19 January 2000 under the signature of the second respondent on the instructions of the third respondent, as is clear from a reading of the Proclamation 1 of 2000. The third respondent does not require the approval of Parliament, or indeed anyone else, to put a draft constitution before the voters. It may or may not be considered unwise to make changes to a document produced by a body specifically set up to produce a draft constitution, but it is certainly not unlawful. Again, I reiterate, the answer lies with the voters.

I would also point out that I do not consider that the various statutory instruments to which I have referred indicate that the third respondent is purporting to pretend that the draft constitution being put forward for consideration at the referendum is the draft produced by the CRC. Proclamation 1 of 2000 states that it is the draft produced by the CRC with corrections and clarifications. It says that these corrections and clarifications are made "after consultation with" the CRC's Executive Committee - not that they are made with the agreement of the CRC. At any rate, I reiterate that the third respondent is not, to my mind, required by law to put before the electorate only a document produced by the CRC.

Giving the matter as careful consideration as I am able, I do not consider that the second issue raised by the applications has more than very limited prospects of success. Accordingly, I do not consider it a basis for granting the urgent provisional order and postponing the referendum until after case No. H-1661-2000 has been decided.

I turn now to the first issue raised - the issue of the CRC failing to make a full, faithful and impartial inquiry and of its adoption of the draft constitution being fatally flawed.

The papers filed indicated that the CRC adopted a wide ranging programme in endeavoring to

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carry out its functions. This involved setting up various subcommittees and thematic committees and arranging country wide meetings in an endeavour to arrive at the views of the people. The applicants' papers refer to 4 321 meetings being held nationwide attended by some 556 276 people and a further 150 000 attending special meetings. Provincial reports were prepared and some 7 000 written submissions made by individuals. I glean this from the first respondent's letter attached to the applicants' papers.

I would simply observe that the CRC had an enormously difficult task. It was, in my view, seriously hampered by its ridiculously unwieldy size -

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even the first respondent, in his letter attached to the applicants' papers, refers to the difficulties deriving from the size of the CRC. To get a committee of 9 or 10 people to agree on anything can often be a major undertaking. To get a commission of close on 400 people of wildly different political persuasions to agree on what the will of the people is would require little short of a miracle. Inevitably, individuals or groups of individuals would regard their will as the will of the people. The mass of meetings, provincial reports, individual reports etc. would also make it very difficult to distill a concoction that could reasonably be regarded as meeting the description "the will of the people". How representative the reports were; what degree of representation the provincial reports reflected; how the meetings reflected the population of the area; all would need to be analysed. The sort of scientific polls consulted to guess the will of the people at elections in other countries might have assisted - but would very probably not be easily arranged in Zimbabwe.

The point I am hoping to make is that, the documentation provided by the applicants themselves indicates that the CRC made a deliberate and serious effort to carry out its very difficult task assiduously and thoroughly. Given its unwieldy nature and the difficulty of its task, the papers attached to the applicants' papers make it difficult to state that it appeared not to make a full, faithful and impartial inquiry into the matters before it. In view of the very disparate political views within its constituents, plenary sessions could only have been tumultuous.

The applicants' case is premised on an alleged fraud perpetrated by certain of the respondents. It is alleged that they railroaded the process of the CRC; prepared a document not reflecting the views represented to it by the people; adopted a draft over the objections of the members of the CRC; and put forward a draft constitution not bearing the *imprimatur* of the CRC. But the report of the first respondent to the third respondent shows that in many, and important aspects, the draft diverges from views expressed by the people generally and even by the thematic committees of the CRC. The divergences are not, in my view, however, arbitrary - but are considered against important competing matters of moment. Whether one agress with them or not, I do not think they reflect a failure to make a full and faithful inquiry and to produce a considered draft constitution.

The first respondent, in his letter to the third respondent which is attached to the papers, acknowledges that aspects of the draft produced differ from the perceived will of the people a gleaned from the meetings etc. He endeavours to explain why this is so. I find the explanations

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reasoned and impartial. Whether one agrees with them or not, I do not think they reflect a failure to make a full and faithful inquiry and to produce a considered draft constitution.

I accept the applicants' concern at the acceptance of the draft by acclamation

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- that is perhaps the most appropriate point made. I would observe, however that the two applicants are the only two commissioners, out of close on 400, to make an application suggesting that the majority of the commissioners did not approve the draft. A further 22 are referred to as having signed a petition to the third respondent. But the applicants' papers indicate that in all a total of only 24, out of about 400, commissioners are of the view that the draft was not properly adopted.

Given the difficulties of the mandate of the CRC, I do not consider that the applicants have established a sufficient basis for me to order that the referendum be postponed pending the hearing of the application as to whether the CRC carried out its mandate properly and adopted the draft constitution properly.

I emphasise that this does not prevent the applicants proceeding with the application. It simply prevents the referendum being postponed pending the hearing of the application. If the applicants proceed with the application once opposing and answering papers are filed, heads of argument considered and any necessary oral evidence heard - it may be that a court might decide in their favour. If that were the case the future court would need also to consider the effect of its decision on whatever the result of the referendum turns out to be.

As it is, I do not consider that the applicants' papers establish a sufficient basis for postponing the referendum pending the hearing of the main application. I am not satisfied that the applicants have established sufficient a *prima facie* case or that the balance of convenience requires such an order. Accordingly, the application for the provisional order sought by the applicants is dismissed with costs. I do not consider that an order for costs on the higher scale is appropriate.

I would simply add that what the people can expect is that the referendum should be organised honestly and with an acceptable degree of administrative efficiency. I, as one of the people, can only hope and pray that the people collectively, for the sake of a suffering Zimbabwe, make the correct choice.*(18)

Honey & Blanckenberg, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

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UNIVERSAL MERCHANT BANK ZIMBABWE LTD *v* THE ZIMBABWE INDEPENDENT & ANOR 2000 (1) ZLR 234 (HC)

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Citation 2000 (1) ZLR 234 (HC)
Case No Judgment No. HH-43-00
Court High Court, Harare
Judge Bartlett J
Heard February 11, 2000
Judgment February 11, 2000
Annotations None

Urgent *ex parte* chamber application

Flynote

Practice and procedure - interdict - application - interim interdict - application made ex parte - such interdict having effect of final interdict - requirements for final interdict must be met - what such requirements are - final order should not be granted ex parte

Headnote

In the early hours of the morning on which a weekly newspaper was to be published, the applicant bank sought an interim interdict preventing the publication of the paper. The paper contained an article which the bank said would be damaging to it. There also had been an article in the previous edition of the paper in which it was said that the bank was in trouble.

Held, that, in the circumstances, the interdict would effectively be a final one and the requirements for a final interdict would have to be met. The order would only be granted if the bank satisfied the court on a balance of probabilities that the article contained fundamental, serious inaccuracies, that the consequences it feared were substantially likely and that there was no satisfactory alternative remedy available. Because of the *ex parte* nature of the application, each of these aspects should be very clearly established.

Held, further, that a newspaper has a duty to act responsibly and to take reasonably adequate steps to satisfy itself of the veracity of the reports it publishes. This is particularly so when a report alleges that a bank is in serious financial difficulties because of the reaction such report can generate from the bank's customers. In the present case, however, the bank had produced no proof that the article was false and the bank had not shown that it would be harmed by the article, particularly as there had been a previous article which gave an equally bleak picture of the bank's financial situation.

Held, further, that there were other remedies available. The bank could sue for defamation and it could also take steps to get a supporting letter from the Minister of Finance.

Held, further, that the bank had not satisfied the requirements for the grant of either an interim interdict or a final interdict; and furthermore, since the order sought was effectively a final

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interdict, such an interdict could not at any rate be granted *ex parte*.

Cases Considered

Cases cited:

Aussenkehr Farms (Pty) Ltd v *Walvis Bay Municipality* 1966 (1) SA 180 (C)

Buthelezi v *Poorter* 1974 (4) SA 831 (W)

Chinamasa v *Jongwe Printing & Publishing (Co) Ltd & Anor* 1994 (1) ZLR 133 (H)

Clegg v *Priestly* 1985 (3) SA 950 (W)

Flame Lily Invstm Co (Pvt) Ltd v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G)

Fourie v *Uys* 1957 (2) SA 125 (C)

Heilbron v *Blignaut* 1931 WLD 167

Hix Networking Technologies v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A)
Mandela v *Falati* 1995 (1) SA 251 (W)

Matongi v *Kumbula & Ors* 1992 (2) ZLR 241 (H)

Network Video (Pty) Ltd v *Universal Studios Inc & Ors* 1984 (4) SA 379 (C)

Phillips Electrical (Pvt) Ltd v *Gwanzura* 1988 (2) ZLR 117 (H)

Rhodesian P & P Co Ltd v *Howman NO* 1967 RLR 318 (G)

Roberts v *The Critic Ltd & Ors* 1919 WLD 26

Sage Hldgs Ltd & Anor v *Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W)

Sanachem (Pty) Ltd v *Farmers Agri-Care (Pty) Ltd* 1995 (2) SA 781 (A)

Schweppes (CA) Ltd v *Zimbabwe Newspapers (1980) Ltd* 1987 (1) ZLR 114 (H)

Setlogelo v *Setlogelo* 1914 AD 221

van Zyl & Anor v *Jonathan Ball Publishers (Pty) Ltd & Ors* 1999 (4) SA 571 (W)

Case Information

J Samkange, for the applicant

Judment

Bartlett J:

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"Awake for Morning in the Bowl of Night

Has Flung the Stone which puts the Stars to Flight."

Or so says the Rubaiyat of Omar Khayyam*(19).

But in this judge's case it was the persistent, strident ringing of a telephone which flung all prospect of further sleep to flight, at 2.30 a.m. on 11 February, while the stars were still in peaceful harmony in the heavens and morning four hours of disturbed rest away.

The phone call was from the High Court's Acting Registrar who had been similarly disturbed in the night by the applicant's legal practitioner seeking to make an urgent *ex parte* chamber application.

Having been up for most of the previous night preparing for the hearing of another urgent chamber application I was not amused by this request in the early hours of the morning. But such can be the lot of the duty judge. I spoke to the applicant's legal practitioner whose assiduousness in seeking to secure his client's interest cannot but be admired. I established that he wished to make the application not only *ex parte* and in the middle of the night but verbally as well. I do not believe that I would be far wrong in thinking that many of my fellow judges would have regarded that combination of factors sufficient cause to terminate the conversation and return to bed! I was sorely tempted so to do but invited further explanation from the applicant's legal practitioner.

He explained that the basis of the application would be that an article was to be published in the *Zimbabwe Independent* this very morning containing

serious, untruthful comments about the applicant. In particular, he alleged that the article would state that the applicant's banking licence was about to be cancelled and that this was untrue and would likely cause a run on the bank by its customers and consequent financial ruin. He stated that the fact that the story to be published was untrue would be confirmed personally by the Minister of Finance and that he would be able to provide an affidavit from the said Minister to that effect. He indicated that any damages claim the applicant might have against the *Zimbabwe Independent* would be dwarfed by the enormity of the loss against the likely ability of the newspaper to meet such a claim. He accordingly stated that the applicant would be seeking an order preventing the distribution of the *Zimbabwe Independent* of 11 February 2000.

I was also informed that the offending article was already there for all the world to read - or all the world with access to the information superhighway of the Internet - on the online copy of the *Zimbabwe Independent* of 11 February, which had gone online several hours earlier. And that the distribution of the terrestrial version of the newspaper, if not already in motion, would be commencing within the next few hours.

I indicated over the phone to the applicant's legal practitioner that I would not countenance the hearing of the application verbally. I pointed out that, in my (albeit half asleep) view, an application could only be made verbally as opposed to in writing in circumstances amounting to

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an extreme emergency and the circumstances described did not approach that definition.

I pointed out, however, that if the applicant wished to make the application urgently and *ex parte* I would consider such application if it was made in writing - as soon as the applicant was able to put it forward in written form. Mr *Samkange* indicated that this could be done by 4.30 a.m. and I agreed to attend at chambers at that time to hear the application. In the interim, since further sleep was now a forlorn prospect, and having access to the Internet, I downloaded and printed out the article in question from the online version of the *Zimbabwe Independent*. It was not on the front page, but, in local news (probably on p 2) and headed - "Unibank given February 16 ultimatum".

I also checked the online archives of the newspaper for any previous articles on the same subject and found a front page article had been published the previous week headed - "Universal Merchant Bank in Trouble". The applicant's legal practitioner had not referred to this article in his telephone conversation with me. Had he done so, I would have been much less amenable to agreeing to an urgent hearing in the early hours of the morning to stop the distribution of the following edition of the newspaper. I would have probably said that the damage feared had already been done or not done as the case may be - and that the applicant should proceed to sue for damages

for defamation, if it so wished, and gone back to bed. As it is, I downloaded and printed out the earlier article, and made my way into chambers.

The applicant's legal practitioner, accompanied by representatives of the applicant, arrived at my chambers shortly after 4.30 a.m. but said the application was still being typed. I indicated that I would wait for it to be completed. The written application was presented at about 5.10 a.m. and after taking the opportunity to read the papers I heard detailed verbal argument commencing shortly after 5.20 a.m. At the conclusion of argument I gave a fairly detailed verbal judgment (as an immediate decision was obviously required), dismissing the application and indicated that a full written judgment would be handed down at a later date. It was finally at about 6.30 a.m. that I left chambers to go home for a quick cup of coffee before returning for the day's work!

The papers filed did not include Form 29B of the High Court Rules, the basic form for a chamber application. They also did not comply with r 242(2)(a) and (b) of the High Court Rules, in that neither the applicant in the founding affidavit, nor the applicant's legal practitioner in an accompanying certificate, had specified reasons as to why the application should be heard *ex parte*. However, in the circumstances I condoned the failure to file Form 29B on the basis that such form would be filed later in the day. I also condoned the failure to comply with r 242(2)(a) and (b) and allowed the submissions on this aspect to be made verbally. They were that the lateness of the hour and the shortness of the time made service on the respondents not possible.

The basis of the applicant's founding affidavit, as sworn by its chief executive, was that the

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applicant had received a fax on 3 February from the second respondent (the editor of the first respondent) asking various questions concerning various alleged financial difficulties at the applicant bank. The applicant replied that day also by fax indicating that the questions would be answered in writing by no later than February 8. But on 4 February, the first respondent published on its front page on article headed - "Universal Merchant Bank in Trouble". The article alleged that the applicant bank had been called on to show cause why its banking license should not be withdrawn by the Ministry of Finance and made various serious and detailed assertions of major financial difficulties facing the bank. The applicant responded to this article by having a meeting with the second respondent, informing him that the article contained misrepresentations, and that the newspaper was being used by disgruntled ex-employees of the applicant to fight a malicious campaign against the applicant.

It is the applicant's contention that the second respondent promised to publish an apology and requested a list of the inaccuracies in the article. The

applicant provided, on 10 February, a list of the alleged inaccuracies published in the article of 4 February and awaited the apology it said it had been promised. Instead, it received a fax, the same day, from the second respondent, saying that there was a misunderstanding and that the only undertaking that had been given was that the first respondent was ethically bound to make any corrections that it deemed necessary - after consultations with the applicant and the newspaper's sources. The applicant then discovered late last night (10 February) from the Internet that the first respondent's edition of 11 February contained an article headlined "Unibank given February 16 ultimatum". The article commenced by alleging that "Embattled Universal Merchant Bank has been given a deadline of 16 February to convince the Ministry of Finance that its fortunes are turning around and that new investors will be coming to shore up its ailing book with a minimum of $295 million". The article then continues, outlining an extremely parlous financial position for the applicant bank and chronicling the concern of the bank regulation authorities and major shareholders of the applicant.

The picture painted is certainly an alarming one. And it is the alarming nature of the picture which forms the basis of the applicant's argument. The applicant avers that the article contains serious inaccuracies. The applicant's legal practitioner argues that the most damaging allegation is that the applicant's banking licence is about to be suspended and refers to a letter signed in his presence by the Minister of Finance, on 10 February, stating that he is not withdrawing the applicant's banking licence. But he argues the publication of the article would cause a run on the bank resulting in depositors withdrawing all their funds and the applicant bank collapsing. This, he argues, would be seriously against the interests of both the banking sector and the applicant bank and irreparable loss would be caused to the applicant. It is for these reasons, it is argued, that an urgent *ex parte* interdict should be issued preventing the distribution of the *Zimbabwe Independent* of 11 February 2000 (see in general, Burchell *The Law of Defamation* at 308-9: see also by comparison *Phillips Electrical* v *Gwanzura* 1988 (2) ZLR 117 (H) and *Matongi* v *Kumbula & Ors* 1992 (2) ZLR 241 (H)).

The necessary requirements for an interim interdict are set out in *Hix Networking Technologies*

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v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) at 398I-399A as:

"(a) a *prima facie* right;

(b) a well grounded apprehension of irreparable harm if the relief is not granted;

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy.

To these must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion."

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See also, *Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G).

But although the relief the applicant seeks is described as being interim it is, in my view, in fact, final in form (see *Fourie* v *Uys* 1957 (2) SA 125 (C) at 126E). The interim order is in essence the same as the final order - to stop the distribution of 11 February edition of the respondent newspaper. The constraints of time are such that by the time the respondents could seek to have any interim order discharged, the distribution of 11 February edition of its newspaper, on 11 February, would have been finally prevented. To order a newspaper set for publication on 11 February not to be published on 11 February, is in effect a final order against that newspaper. The 11 February edition is bound to contain topical stories relevant to February 11 and not any other day. Indeed perusal of the online version of the respondent newspaper confirms that to be so. This is particularly the case, since this 11 February is the day before a referendum on a question of overriding national importance - the acceptance or otherwise of a proposed new draft constitution. Distribution of the 11 February edition on a subsequent day is something completely different. Much of the news will be stale - even for a weekly newspaper, which the first respondent is - and particularly for a weekly newspaper, its readers and market are likely to be geared for its appearance on the day it is ordinarily published (see for comparison the comments of Joffe J in *Sage Holdings Ltd & Anor* v *Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W) at 127G-H).

It is accordingly my view that I should consider the matter on the basis of the establishment of the necessary requirements for a final interdict - see in this regard the approach adopted in *Sage Holdings supra* at 127H-128A, where the factual situation and the order sought are not very dissimilar from the present matter. Although in case I am wrong in this approach, I will also consider whether the requirements for a temporary interdict have been met.

The requirements for a final interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy (see *Sage Holdings supra* at 128A, *Setlogelo* v *Setlogelo* 1914 AD 221 at 227, and *Sanachem (Pty) Ltd* v *Farmers Agri Care (Pty) Ltd* 1995 (2) SA 781 (A) at 789B-C.

The reference to a clear right in respect of a final interdict, as opposed to a *prima facie* right in regard to a temporary interdict, means no more than a clear right must be established on a

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balance of probabilities. See *Aussenkehr Farms (Pty) Ltd* v *Walvis Bay Municipality* 1996 (1) SA 180 (C) at 188F-G; Silberberg & Schoeman *The Law of Property* 3 ed at 146.

The relief the applicant seeks is of course of a drastic nature. To prevent the distribution of a newspaper at the last minute of the eleventh hour is an action

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which can only have very serious financial consequences for the newspaper - in terms of publishing costs, and lost revenue from sales and advertising. It is difficult (particularly at 5 a.m.) to speculate what the amount of such loss might be but it could certainly run into millions of dollars. And it is something I am asked to do *ex parte* - without giving the newspaper a chance to state its case. I am satisfied that, applying the requirements for a final interdict, I should only consider granting the order the applicant seeks if it satisfies me on a balance of probabilities that the article contains fundamental, serious inaccuracies, that the consequences it fears are substantially likely and that there is no satisfactory alternative remedy available. It is also my view that, because of the *ex parte* nature of the application, each of these aspects should be very clearly established. See, for example, the observation by HERBSTEIN J in *Fourie* v *Uys supra* at 126F.

I should point out that I also take account of the approach in regard to this aspect of the matter laid down in *Roberts* v *The Critic Ltd* 1919 WLD 26 at 28-9 and *Heilbron* v *Blignaut* 1931 WLD 167 at 168-9, which was quoted with approval by Mtambanengwe J in *Schweppes (CA) (Pvt) Ltd* v *Zimbabwe Newspapers (1980) Ltd* 1987 (1) ZLR 114 (H) at 117G-118B. There is, however, a conflict of authority in this regard which was not adverted to in *Schweppes supra* - but as pointed out in Burchell *op cit* at 308-9. COETZEE J in *Buthelezi* v *Poorter* 1974 (4) SA 831 (W) at 834H-836F elucidated the approach in *Heilbron* (which elucidation was referred to with approval in *Mandela* v *Falati* 1995 (1) SA 251 (W) at 256F-G). In *Hix Networking Technologies supra*, the Appellate Division considered the differing approaches and decided they were reconcilable (at 399F-400A).

I need to emphasise that I realise that all the authorities I am referring to do not deal with an application made *ex parte*. But their relevance is that they all consider the importance of an interdict not being granted unless it is clear that the defendant has no defence. I would distill from this the principle that where the application is made *ex parte*, a court should be clearly satisfied with the strength of the applicant's case - and further distill this into requiring (as I have indicated) that the applicant should satisfy myself that the article contains fundamental, serious inaccuracies.

I would finally refer to the observation of PLEWMAN JA (with which CORBETT CJ, GROSSKOPF JA, HARMS JA and SCHUTZ JA concurred) in *Hix Networking Technologies supra* at 402C and 402E-F:

"To sum up, cases involving an attempt to restrain publication must be approached with caution ... And in the exercise of its discretion in granting or refusing an interim interdict, regard should be had*, inter alia*, to the strength of the applicant's case; the seriousness of the defamation; the difficulty a respondent has in proving, in the limited time afforded to it in the case of urgency, the defence which it wishes to raise and the fact that the order may, in substance

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though not in form, amount to a permanent interdict."

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I would add that these requirements must be given particular weight when the application is made *ex parte*. And I reiterate that I consider that this can only be done by requiring the applicant to put evidence before the court to satisfy the court that the article contains fundamental, serious inaccuracies.

I will comment later on the fundamental impact of the *ex parte* nature of the application when seeking in effect a final order - but propose first to deal with the above specified requirements for the granting of an interdict.

I turn to deal with the first requirement I have referred to - the need for the applicant to satisfy myself on a balance of probabilities that it has a clear right. That is, that in the context of this matter, that the article complained of contains fundamental, serious inaccuracies.

I do not consider that the applicant's papers meet the necessary onus. What I have in front of myself is the newspaper article complained of making serious allegations as to the financial state of the applicant bank and the applicant's assertion that the article contains various serious inaccuracies and misrepresentations. The applicant's papers, apart from denying the assertions made, put no documents or other evidence forward - apart from its bald say-so - to substantiate their falsity. I appreciate the applicant is acting in circumstances of urgency. But it is also correct to note that it has been aware for a week of the respondent's allegations and of the need to respond to them - if only to dissuade the respondents from publishing articles the applicant does not want published. But nothing substantial to show - as opposed to allege - the falsity of the article, has been put in front of me. I am accordingly left with the applicant's assertion that the article contains serous inaccuracies without any clear, detailed basis supporting such assertions. That does not provide a sufficient basis for the drastic remedy the applicant seeks. Even though the applicant is seeking radical, *ex parte* relief, it has not put forward any evidence of substance to indicate that the article is inaccurate - although it would have had the considerable advantage, if it had done so, in an *ex parte* environment, of not having to face the prospect of the respondents having the opportunity to counter the evidence put forward.

Mr *Samkange,* while acknowledging this weakness in the applicant's papers, seeks to argue that the fundamental point is the respondent newspaper's assertion that the applicant's banking licence is to be cancelled on 16 February. He argues that the Minister of Finance's letter stating that "As the Minister of Finance, I confirm that I am not withdrawing Universal Merchant Bank Zimbabwe Ltd - Unibank's licence", establishes that assertion to be untrue.

I have two difficulties with Mr *Samkange*'s argument in this regard. The first is that the article complained of does not state that the applicant's

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banking licence is to be cancelled on 16 February - it says "Embattled Universal Merchant Bank has been given a deadline of February 16 to convince the Ministry of Finance that its fortunes are turning around and that new investors will be coming in to shore up its ailing book with a minimum of $295 million". It then paints a bleak picture of the applicant's financial prospects - but it does not state that the applicant's licence is to be cancelled on 16 February.

The second difficulty I have on this point is the extreme brevity of the Minister of Finance's letter. It consists of a single sentence as stated above. It makes no reference to being aware of the assertions made in the articles complained of and to seek to comment on their contents and to point out the areas of inaccuracy. It makes no assertion that the writer is aware of the detailed financial circumstances of the applicant through reports provided by the relevant regulatory authorities and that he is accordingly able to comment authoritatively on its viability. I would have expected, even taking full account of the urgency of the matter, a substantially more detailed statement from the Minister - a document of at least several paragraphs alluding to the aspects I have referred to. I would certainly expect the necessary further detail if the applicant is seeking to rely on the letter to interdict the distribution of a newspaper on an *ex parte* basis. I would also point out that the letter concerned - though signed in the presence of the applicant's legal practitioner, is a letter and not an affidavit.

Accordingly, I do not consider that the article states that the applicant's licence is to be cancelled on February 16 or that the Minister of Finance's letter of 10 February, because of its stark brevity, is of any material assistance to the point the applicant needs to establish, to allow the drastic relief it seeks.

I turn now to the second aspect the applicant seeks to establish - an injury actually committed or reasonably apprehended. In the context of this matter, I am satisfied that what the applicant needs to establish is that if the distribution of the newspaper is not stopped there will be a rush on the applicant bank and it will collapse, causing irreparable damage to itself, its depositors and investors. While I accept that the import of the article complained of would be to cause alarm to those with deposits and investments in the applicant's bank, there are two factors, which to my mind, detract substantially from the credence of the applicant's assertion.

The first and most fundamental factor is that the article the publication of which the applicant seeks to interdict, is not the first article published making dire assertions about the applicant's viability. The first respondent had published (as has already been stated) a front page article the previous Friday headlined - "Universal Merchant Bank in trouble". That article painted a very bleak picture of the applicant's financial state. If there was to be a run

on the applicant bank causing its collapse, it would seem most probable that such a run would have been instigated by the previous article. But the applicant's founding papers only allege that in the intervening week there have been no deposits but several withdrawals. The number and quantity of these withdrawals is not specified even in general terms.

It needs to be also emphasised that the previous article was on the front page with the very

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damaging headline - "Universal Merchant Bank in trouble". While the article in question is on the second page with the somewhat less damaging headline - "Unibank given February 16 ultimatum". But the point I endeavour to make is that while either article could easily cause alarm to depositors, the fact of the prior publication of the first article, not having the alarming consequences the applicant fears, weakens and seriously undermines, the argument for the drastic remedy of interdicting distribution of the newspaper. As to the effect of prior publication, see *van Zyl* v *Jonathan Ball Publishers (Pty) Ltd* 1999 (4) SA 571 (W) at 572H-I and 589A-C.

The second factor I would refer to is that the applicant is a merchant bank as opposed to an ordinary commercial bank. Its customers would not be individuals but corporate bodies and institutions, which would, in my view, be substantially less likely to act impulsively on scare stories - and conversely give mature and careful consideration before withdrawing funds. The reaction the applicant had to the article published on 4 February would seem to support that observation.

Accordingly, while I understand the applicant's concern, I do not consider that it has established within anything like sufficient clarity that the consequence its fears from the publication of the article are substantially likely. If it had established that the contents of the article were clearly inaccurate and the article was the first publication of the story - then it would have been in a substantially stronger position in seeking to convince a court of the need for the order sought.

I turn now to consider the third aspect I feel the applicant seeks to establish - that there are no satisfactory alternative remedies available.

The obvious alternative remedy available to the applicant is to sue the newspaper for damages for defamation. A newspaper, has, in my view a duty to act responsibly and to take reasonably adequate steps to satisfy itself of the veracity of the reports it publishes - see for example *Rhodesian Printing and Publishing Co Ltd* v *Howman NO* 1967 RLR 318 (G) at 326B-C and *Chinamasa* v *Jongwe Printing & Publishing Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 172D. This is particularly so when a report alleges that a bank is in serious financial difficulties - because of the reaction such a report can generate from the bank's customers. The articles are, very arguably, defamatory of the applicant bank and unless one of the defences of justification,

fair comment or qualified privilege were established, the applicant might have a substantial claim for damages. The applicant's contention is that if the consequence it fears transpires, the claim for damages would be so enormous as to be way beyond the newspaper's capacity to pay. Just as I have no evidence before me of what the financial position of the applicant is, I similarly have no evidence as to the financial status of the first respondent. I accordingly cannot speculate on what sort of damages claim it may or may not have the capacity to meet. The applicant is, however, in the position to take immediate meaningful steps to mitigate any damage it might suffer. A detailed and clear statement from the Minister of Finance, or bank regulator, as to the financial status of the applicant bank, should be able to ease the applicant's fears in regard to a possible run by depositors. The applicant has been able, at what must have been very short notice, to obtain the one sentence letter from the Minister of Finance. It should

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accordingly be reasonably possible for it to obtain from him without undue delay an appropriately worded statement to assuage the fears of the depositors - and to give such statement appropriate publicity in a daily newspaper. It should also be possible for the applicant to prominently publish its own disavowal of the newspaper reports, with such disavowal preferably supported by the bank regulating authorities.

Accordingly, I am satisfied that there are alternate remedies available other than the drastic remedy of interdicting the distribution of the 11 February edition of the first respondent.

It cannot, therefore, be stated that the applicant has established the requirements for the granting of a final interdict. If I am wrong in my view that the order sought is in effect a final interdict, I am nevertheless satisfied that the requirements for an interim interdict have also not been met. I do not consider that the applicant has established a *prima facie* right - as to the difference between a *prima facie* right and a clear right see Silberberg and Schoeman *The Law of Property* 3 ed at 147-8. All the applicant has effectively done, as I have indicated, is to state that the various assertions made by the first respondent in the article complained of are inaccurate - without putting forward any evidence of any substance to substantiate that inaccuracy. That does not, to my mind, go sufficiently far to establish a *prima facie* right (see the approach quoted above by Plewman JA in *Hix Technologies supra*). I also do not consider, for the reasons I have given in respect of the claim for a final interdict, that the other requirements for a temporary interdict have been established. Nor do I consider that the applicants' papers or argument have established that the balance of convenience would have favoured the granting of an interim interdict.

I indicated earlier that I would comment on the effect of seeking what

amounts to a final order on an *ex parte* basis. As stated by Le Grange J in *Clegg* v *Priestly* 1985 (3) SA 950 (W) at 954F-G, it is a "fundamental principle of our law that the court will not make a final order that may prejudice the rights of a person without notice to him: *cf Network Video (Pty) Ltd* v *Universal Studies Inc & Ors* 1984 (4) SA 379 (C)". See also Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 232.

Accordingly, if I am correct that the order sought was effectively a final order, the *ex parte* nature of the application precluded the granting of the order sought - and the applicant would, despite the lateness of the hour and the shortness of the time, have needed to serve the papers on the respondents and given them an opportunity to appear. The applicant had elected, however, to seek to have the matter dealt with on an *ex parte* basis and by the time this particular difficulty emerged in argument (shortly before 6 a.m.), the applicant acknowledged that it was too late for it to endeavour to serve the respondents - and then seek the order asked for.

The application, for all the reasons I have given, is dismissed.

I would simply add that it is, as far as I know, the first Internet generated urgent application in Zimbabwe. But despite the online version of the newspaper being the *sine qua non* for the

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application, the applicant, ironically, did not seek to interdict the distribution of the newspaper in cyberspace - but only wanted it not to appear on the streets of Harare and Bulawayo!

Byron Venturas & Partners, applicants' legal practitioners

SITHOLE & ORS *v* MINISTER OF JUSTICE & ORS 2000 (1) ZLR 246 (HC)

Citation	2000 (1) ZLR 246 (HC)
Case No	Judgment No. HH-52-00
Court	High Court, Harare
Judge	Smith J
Heard	February 11, 2000
Judgment	February 11, 2000
Annotations	None

Civil application

Flynote

Constitutional law - referendums - conduct of - functions of Registrar-General - laid down by statute - court may not divest him of such functions

Headnote

In promulgating the dates of the referendum on a draft new Constitution, the President appointed the Registrar-General and the constituency registrars as returning officers, as he was empowered to do in terms of s 3 of the Referendums Act [*Chapter 2:10*]. The applicants sought to set aside the appointment of the Registrar-General on the grounds of previously demonstrated bias, partiality and lack of transparency and because he had an interest in the outcome of the referendum, since the draft constitution would abolish his office. They sought an order appointing the Acting Chairman of the Electoral Supervisory Commission to conduct the referendum. In the certificate of urgency, the legal practitioner for the applicant claimed that if the relief sought was not granted, the applicants would be prejudiced in that the referendum would be held in circumstances that are not to the common good of the citizens of Zimbabwe whom they represent. This was so because there was a high risk that the ruling party would intimidate or manipulate the Registrar-General and his officials and, in any event, the appointment of the Registrar-General as a returning officer is contrary to the wishes of the majority of Zimbabweans, especially those who were consulted by the Constitutional

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Commission.

The respondents took the preliminary point that the President should have been cited as a party, as the applicants were challenging the appointment of the Registrar-General who was appointed by the President. They also argued that the legislation required the participation of the Registrar-General. If the incumbent was unsuitable, a timeous application should have been made for his removal from office and replacement.

Held, that the President should have been cited as a party since it was the exercise of his powers under the Referendums Act was being challenged.

Held, further, that under the Referendums Act, the provisions of the Electoral Act and regulations apply to referendums. The Registrar-General has specific statutory functions in respect of elections and referendums and the court could not divest him of those functions.

Cases Considered

Cases cited:

Dongo v *Mwashita & Ors* 1995 (2) ZLR 228 (H)

Misihairabwi v *Min of Home Affairs & Ors* S-120-97

Legislation considered:

Referendums Act [*Chapter 2:10*], ss 3 and 10

Case Information

B Kagoro, for the applicants

B Patel, with him Mrs *P Machaka*, for the respondents

Judgment

Smith J: In Proclamation No. 1 of 2000 (SI SA of 2000), which was promulgated in terms of the Referendums Act [*Chapter 2:10*] (hereinafter referred to as "Chapter 2:10"), the President declared that a referendum would be held on 12 and 13 February. The purpose of the referendum was to ascertain the views of the voters on whether or not the draft Constitution prepared by the Constitution Reform Commission (hereinafter referred to as "the CRC"), as read with a number of specified corrections and clarifications, should be enacted as the Constitution of Zimbabwe. In the exercise of the powers conferred on him by s 3 of Chapter 2:10, the President appointed the Registrar-General and the constituency registrars to be returning officers for the purposes of the conducting of the referendum.

The applicants have filed this urgent application, in which they are seeking an order setting aside the appointment of the third respondent (hereinafter referred to as "the Registrar-General") and the constituency registrars as returning officers for the referendum which is to be held on 12 and 13 February (which is tomorrow and the day after) and directing

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and ordering the Acting Chairperson of the Electoral Supervisory Commission to conduct the holding of the referendum.

In the certificate of urgency, the legal practitioner claims that if the relief sought is not granted, the applicants will be prejudiced in that the referendum will be held in circumstances that are not to the common good of the citizens of Zimbabwe whom they represent because there are high risks that the ruling party will intimidate or manipulate the Registrar-General and his officials and, in any event, the appointment of the Registrar-General as a returning officer impinges upon the wishes of the majority of Zimbabweans, especially those who were consulted by the CRC.

The founding affidavit is deposed to by the first applicant and it is supported by affidavits deposed to by Morgan Tsvangirai, on behalf of the second applicant, and Margaret Dongo, on behalf of the third applicant, as well as a further affidavit from Lovemore Madhuku, on behalf of the National Constitutional Assembly. Sithole's case is as follows. Section 3 of Chapter 2:10 does not necessarily imply that the Registrar-General has to be the returning officer at the voting at the referendum. The functions specifically assigned to the Registrar-General by Chapter 2:10 are set out in subs (3) and (4) of s 8 thereof. The Act does not envisage him being the returning officer

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as well. Accordingly, the appointment of the Registrar-General is *ultra vires*. However, even if it were shown to be *intra vires*, such appointment is grossly unreasonable in its defiance of logic and should be set aside. He is an interested party in the outcome of the referendum, in that the proposed draft constitution proposes to abolish his office. Moreover, nine out of the ten provinces that were consulted by the CRC in the execution of its mandate specifically stated that they did not want the Registrar-General or his office to have anything to do with elections.

In her supporting affidavit, Mrs Dongo said that, in her view, the activities of the Registrar-General's office are not transparent. She referred to the case *Misihairabwi* v *Minister of Home Affairs & Ors* S-120-97 wherein Muchechetere JA, in deliverying the judgment of the court, said that, at the prompting of ZANU-(PF), the Registrar-General had intervened in the case. In her own case, the many voting irregularities resulted in the setting aside of the initial election - see *Dongo* v *Mwashita & Ors* 1995 (2) ZLR 228 (H). There were other instances, such as that of Fidelis Mhasha, where the Registrar-General had been strongly criticised for showing partiality and lack of transparency in electoral processes. The affidavits by Tsvangirai and Madhuku supported the founding affidavit and concurred with the contents thereof.

In the opposing affidavit, which was deposed to by the first respondent, the following points were made. *In limine*, the President should have been cited, as it is his decision which forms the subject matter of the application. The President acted in terms of the powers expressly conferred on him by s 3 of Chapter 2:10. The Registrar-General and constituency registrars and their supporting staff constitute the only State department with the capacity to administer effectively the process of voting at the referendum. The appointment of the Registrar-General and his staff in terms of Proclamation No. 1 of 2000 is in accordance with the provisions of

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Chapter 2:10. The Registrar-General is, in effect, the chief returning officer and the constituency registrars are his principal deputies. Presiding officers monitor the actual voting process at individual polling stations and submit their returns to their constituency registrars who are also returning officers. Their function is to oversee the counting of votes and to present their reports to the Registrar-General who then declares the results of the votes cast throughout the country. The Registrar-General does not adjudicate the voting process; his function is to ensure that the voting process is conducted effectively and efficiently. The first respondent denied the contentions in the founding and supporting affidavits as to the unreasonableness of the appointment of the Registrar-General. The Minister pointed out that preparations for the referendum have been completed. Ballot papers have been printed, ballot boxes manufactured and distributed, personnel trained and deployed and all other preparations

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made. $279.3 million of taxpayers' money has been committed to the running of the referendum and, of that amount, a sum of $142.3 million has already been spent.

Mr *Kagoro* argued that the applicants were not challenging the authority of the President to declare the holding of a referendum and to appoint returning officers. The sole issue was whether or not the person he appointed was suitable. Therefore, it was not necessary to cite the President as a party. It is the Minister responsible for administering the relevant Act who should be cited as a party. From the evidence gathered by the CRC, it is clear that the majority of the people do not regard the Registrar-General as being impartial; they do not want him to conduct elections as he has shown himself to be biased and partisan. The applicants want a free and fair, democratic election process with a level playing field. The provisions of subs (3) and (4) of s 8 of Chapter 2:10 clearly imply that officials other than the Registrar-General would be appointed as returning officers. It means that he will have to submit a report to himself.

Mr *Patel* pointed out that the application was not for the purpose of stopping the referendum process but to prevent it being conducted by the Registrar-General. The applicants want the Acting Chairman of the Electoral Supervisory Commission to administer the election, using the staff of the Registrar-General's Office. The applicants are challenging the appointment of the Registrar-General, therefore they are clearly challenging the President's exercise of his powers and so he should be a party to these proceedings. With regard to the merits of the application, the applicants have misconceived the operational framework of the conduct of the voting process. The function of the Registrar-General, as chief returning officer, is to ensure that the voting process is conducted fairly. In terms of s 8(1) of Chapter 2:10, the returning officers count the votes and then send the results to the Registrar-General - subs (3) - who adds the results obtained from the various returning officers and then announces the final result based on the total number of votes cast throughout Zimbabwe. Section 10 of Chapter 2:10 provides that the Electoral Act [*Chapter 2:01*] (hereinafter referred to as "the Electoral Act") and the regulations made thereunder apply to any referendum as if it were a general election. In terms of s 15(3)(a) of the Electoral Act, the Registrar-General may exercise any function vested in an official by that Act therefore it was not strictly necessary for him to be appointed as a returning officer. Mr *Patel* accepted that the capacity of the Registrar-General has been questioned. However, that is

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not sufficient to justify his being removed from the voting process for the referendum. If the applicants are not satisfied that he is the right person, then they should apply for him to be removed from office and such an application should not be made the day before the election. It was for

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the people to accept or reject the draft Constitution; the Registrar-General had no power to affect that decision. However, he was an important cog in the administrative machine. It would be impossible to conduct the election only with constituency registrars and returning officers. Even if the appointment of the Registrar-General as a returning officer was set aside, he would still continue in office as Registrar-General.

Mr *Kagoro* did not persist with the application insofar as it related to the appointment of the constituency registrars as returning officers.

After hearing counsel, I dismissed the application with costs. I gave my reasons therefor. They are as follows. Section 3 of Chapter 2:10 empowers the President to declare that a referendum shall be held to ascertain the view of voters on a particular question or issue. He then fixes the day or days and hours for voting and appoints returning officers. Section 10 of Chapter 2:10 provides that the Electoral Act and the regulations made thereunder shall apply to any referendum as if it were a general election. When one looks at the Electoral Act one sees that the Registrar-General is given specific functions in connection with the holding of elections. The constituency registrars and other officials responsible for the conduct of elections fall under his jurisdiction. In terms of s 15(3)(a) of the Electoral Act, he can assume and exercise any of the functions which are vested, in terms of the Act in a constituency registrar or other official in his department. These powers are conferred by statute. This court cannot therefore deprive him of such powers.

The Electoral Act clearly provides that the Registrar-General is to preside over a general election. Therefore, by virtue of s 18 of Chapter 2:10, he must preside over the referendum. As long as the present incumbent remains as Registrar-General, he is empowered to exercise the functions of that office and the court cannot divest him of any of those functions. To nullify his appointment as a returning officer would be meaningless.

I also agree with the submission by Mr *Patel* that the President should have been cited as a party since it is the exercise of his powers under Chapter 2:10 that is being challenged.

Kantor & Immerman, applicant's legal practitioners

LEOPARD ROCK HOTEL COMPANY (PVT) LTD *v* VAN BEEK 2000 (1) ZLR 251 (SC)

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Citation	2000 (1) ZLR 251 (SC)
Case No	Judgment No. S-6-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	January 25, 2000
Judgment	February 14, 2000
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - suspension followed by dismissal - dismissal found to be unlawful - employee does not revert to being under suspension - remedies - can claim reinstatement plus back pay or damages which could include back pay and other elements

Headnote

The respondent, who was an employee of the appellant hotel, was suspended from duty for failing to obey an order to return for hotel use over weekends a motor vehicle which she had been using. The hotel then alleged that she had compounded the earlier offence by publishing in the press a false story about the hotel. It then applied to a Labour Relations Officer to dismiss her. The application was successful. Several months after her dismissal, the respondent found another job. The Labour Relations Tribunal later ruled that her dismissal had been unlawful.

Counsel for the respondent argued that the effect of the ruling by the Labour Relations Tribunal was that she reverted to being under suspension. Because of this she was obliged to hold herself available to work for the employer. Thus, it was argued, she was entitled to back pay from the time of her suspension until the time she terminated her employment by getting another job.

Held, that the Labour Relations Tribunal was correct in finding that the dismissal of the respondent was unlawful but the reason it had given for its finding was not the correct one. The Tribunal had found that as she had already been punished for her offence of refusing to hand over the motor vehicle she could not be punished again for the same offence. This was not correct, as there may be occasions where management can legitimately increase a punishment imposed. Secondly, the respondent was not being punished twice for the same offence. She was being punished for compounding the first offence. However, the subsequent misconduct had not been proved and this left only the original offence and that offence had been dealt with by a written warning. Thus the dismissal was unlawful but for a different reason.

Held, further, that the employee did not revert to being under suspension after the ruling of the Labour Relations Tribunal. However, under s 96 of the Labour Relations Act [*Chapter 28:01*] wide powers are given to afford equitable relief where there has been unlawful dismissal As the

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respondent had been unlawfully dismissed she was entitled to either reinstatement or to damages. If she claimed reinstatement, the only additional thing she could claim was her back pay. Reinstatement does not necessarily imply retrospectivity. That is why there is a separate provision for back pay and various other payments. In the alternative, she could claim damages. Damages are wider than back pay. They will

normally include back pay, but may include other elements, such as compensation for loss of promotion prospects, interest and other elements as appropriate. Damages remains an option even where reinstatement is not possible, such as where the employee has found another job. However, it may be that reinstatement may still be possible where the employee has taken another job. The employer may be willing to reinstate and the ex-employee may prefer to abandon her new job and return to the old one. The question as to whether reinstatement can be ordered in such circumstances would be left open.

Held, further, that the respondent was entitled to back pay from the time of her suspension until the time when, with reasonable diligence, she could have found another job. Although the Labour Tribunal should have required oral evidence on the important question as to whether she could not have found another job earlier, its finding that she had taken steps to try to find another job could not be upset.

Cases Considered

Cases cited:

Ambali v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S)

Blue Ribbon Foods Ltd v *Dube NO & Anor* 1993 (2) ZLR 146 (S)

Chegutu Municipality v *Manyoro* 1996 (1) ZLR 262 (S)

Gauntlett Security Svcs (Pvt) Ltd v *Leonard* 1997 (1) ZLR 583 (S)

Madondo v *ZUPCO* S-185-95

Myers v *Abrahamson* 1952 (3) SA 121 (C)

Zimbabwe Sun Hotels (Pvt) Ltd v *Lawn* 1988 (1) ZLR 143 (S)

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 96

Case Information

R Y Phillips, for the appellant

L T Biti, for the respondent

Judgment

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McNally JA: The appellant ("the hotel") employed Mrs van Beek as a bookkeeper from 7 June 1993 to 4 January 1995 on which date she was suspended pending approval of her dismissal by a labour relations officer ("LRO").

Dismissal was approved by the LRO and by a senior labour relations officer ("SLRO"). The Labour Relations Tribunal ("the Tribunal") reversed their decisions and ordered reinstatement or damages. It transpired that she had found alternative employment in January 1997. The Tribunal awarded her back-pay for twenty-four months which was calculated (by consent) to be $287 138.89. The appellant now appeals against that award.

The relevant events leading to the dismissal were as follows. On Saturday 3 December 1994, Mrs van Beek was instructed in writing to release for general hotel use over the weekend a Mazda motor vehicle belonging to the hotel which she had been using. She did not do so. On 7 December 1994, the Financial Manager wrote to her saying, *inter alia*, "I am left with no other choice but to issue you with this written warning for having disregarded an instruction".

MCNALLY JA

The background to this was apparently a contention by her that the allocation of vehicles was racially motivated. She lived in Mutare, some considerable distance from the hotel.

On the same date, 7 December 1994, she was sent on fully paid leave until 3 January 1995. She was given a very good reference ("extremely hardworking and totally efficient ..."). It seems to have been thought, or expected, by the management, that she would find another job and would not return.

LAWFULNESS OF THE SUSPENSION/DISMISSAL

The grounds for her suspension (without pay) were set out clearly in the hotel's letter to the SLRO of 4 January 1995. They were:

"Violation of SI 371 (1985) s 3(b) and (a) in which the employee chose to ignore a written instruction from the Department Manager, and her subsequent misconduct as a result of that decision. The misconduct took the form of false allegations levelled against the company and senior employees through the press."

The basis of the Tribunal's decision was that she had already been pnished once for this offence and therefore could not be punished again. I am not very happy with that formulation. Firstly, because there may be occasions where senior management may legitimately increase a punishment imposed or recommended at a lower level. See, for instance, *Madondo* v *ZUPCO* S-185-95. Secondly, because she was not in fact being punished twice for the same offence. She was being punished for compounding the first offence by "her subsequent misconduct".

If the subsequent misconduct had been proved, I think we would have been compelled to find in favour of the hotel. But it was not proved. It is common cause that it was not proved. It was not possible to establish that the "false allegations against the company and senior employees" emanated from her. This was a finding of fact, with which we cannot interfere unless it was grossly unreasonable. We cannot say it was grossly unreasonable when the hotel does not

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seriously dispute it.

It has been argued that her failure to report back from leave was the "last straw". But that is not what was alleged in the complaint to the SLRO. For that reason, we declined to allow an amendment to the notice of appeal to cover the point.

It is clear to me that the hotel failed to prove the "subsequent misconduct". There remained only the original offence. That offence had been dealt with by the written warning. That is the end of the matter. Accordingly, though for somewhat different reasons, I would uphold the Tribunal's conclusion that she was wrongfully dismissed.

MCNALLY JA

ASSESSMENT OF DAMAGES/BACK-PAY

The finding of the Tribunal was that Mrs van Beek was entitled to back-pay up to the time she found alternative employment. Mr *Phillips*, for the hotel, argued that there was no evidence that she could not have found a job earlier. There should have been an investigation. He relied on *Gauntlet Security Services (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S) at 586 and *Ambali* v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S).

Mr *Biti* took a more radical approach. He relied on the wording of s 96 of the Labour Relations Act [*Chapter 28:01*]. He pointed out that the section sets out a series of optional remedies for a wronged employee. One option (s 96(1)(a)) was to award "back pay from the time when the dispute or unfair labour practice arose". Another (s 91(1)(c)) was to order "reinstatement or employment in a job; provided that any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment".

"Back-pay" and "damages", argued Mr *Biti*, are thus different things. We must not confuse them. What was awarded here was "back-pay". It had to be so, because reinstatement was no longer an option. Mrs van Beek had accepted alternative employment. If reinstatement was not possible, damages could not be awarded, because damages come into the picture only as an alternative to reinstatement. If the one is not possible, nor is the other.

Moreover, he continued, if the court has found - as it has - that Mrs van Beek was wrongly dismissed, then she reverts to being suspended. She was suspended on 4 January 1995 and remained suspended until she herself terminated the relationship by taking other employment. It follows that it is not necessary or even permissible to consider whether she should have looked for employment. As an employee on suspension, she was "obliged to hold herself available to perform her duties" (*Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S) at 150-151). Therefore, she had no obligation to look for work. Rather the reverse.

These submissions, it seems to me, are interesting but not ultimately convincing. The powers given under s 96 to SLROs and LROs are intended to be very wide indeed, enabling them to do justice and grant equitable relief in a wide variety of circumstances.

The introductory words of subs (1) of s 96 include two expressions indicative of a wide interpretation. The first is the phrase "without derogation from the generality of ss 93 and 95 ...".

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The second is the use of the word "may" in the phrase "a determination made in terms of those sections may provide for - ...".

Looking at the provisions in this light, it seems to me that "back-pay" and

MCNALLY JA

"damages" are indeed different concepts, but only in the sense that "damages" is a wider concept. It will normally include back-pay, but may include, for example, compensation for loss of promotion prospects, interest, and other elements as appropriate.

"Reinstatement", as we have already ruled in *Chegutu Municipality* v *Manyoro* 1996 (1) ZLR 262, does not of itself imply retrospectivity. That is why the section makes separate provision for back-pay, promotion, etc.

Nor do I accept that where an employee suspended in terms of the regulations or of a code of conduct is then dismissed, she reverts to being suspended if ultimately declared to have been wrongfully dismissed. Mrs van Beek was dismissed, retrospectively to 4 January 1995, when the hotel's application was approved by the appropriate LRO. The fact that the LRO's decision has been upset on appeal does not mean she reverts to being suspended. It means she was wrongfully dismissed.

Her remedy under the statute is reinstatement plus back-pay, etcetera, as appropriate, or damages. Those damages are to be calculated broadly in the manner provided for under the common law.

We have previously (*Gauntlet Security Services* case *supra*) relied, in the formulation of the measure of such damages, on *Myers* v *Abrahamson* 1952 (3) SA 121 (C) at 127C-E. I rely particularly on the passage of the judgment of van Winsen J (as he then was) which reads:

"I have found no precedent for awarding surrogate damages, ie damages which are substituted for specific performance. The measure of damages a0ccorded such employee is, both in our law and the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract, *less any sum he earned or could reasonably have earned during such latter period in similar employment*" (my emphasis).

In the present case, therefore, Mrs van Beek's remedies are the statutory remedies set out in s 96. She is not be to regarded as having remained on suspension until she "repudiated" her contract by taking other employment.

Finally, with regard to the interpretation of s 96, I consider that "damages" remains as an option even when reinstatement is not possible, eg, where the employee concerned has taken another job. In so saying, I do not wish to be understood as saying that reinstatement is impossible where the ex-employee has taken another job. There may be circumstances, where the employer is willing to reinstate, and the ex-employee would prefer to abandon her new job and return to the old one. I leave that question open. It does not arise here. What I say in this paragraph is, in my view, entirely consistent with what I said in *Blue Ribbon Foods Ltd* v *Dube NO & Anor* 1993 (2) ZLR 146 (S) at 152A-F.

"Back-pay" is thus a concept associated with reinstatement. If an employee is reinstated she will normally be awarded back-pay. If she succeeds in

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MCNALLY JA

proving wrongful dismissal, but is not reinstated, she will be entitled to "damages", a major element of which will be back-pay. Perhaps, more correctly, one should say the damages will be assessed by reference to the back-pay lost. But here the back-pay will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment. See *Ambali supra* and *Myers supra*.

THE FACTS ON THE QUESTION OF DAMAGES

A ruling by the Tribunal on damages is a ruling on fact and thus not appealable unless it can be categorised as wholly unreasonable. This may (but not must) be the situation where the Tribunal has misdirected itself on the law as to the criteria to be taken into account in assessing damages.

In the present case, it is unfortunate that the Tribunal did not require oral evidence on the very important question of whether Mrs van Beek could not reasonably have been expected to find alternative employment in a shorter period than two years. The only evidence to support her contention is a letter she herself wrote to the Minister of Labour on 12 September 1996. There she speaks of her having to move from Mutare to Harare after sixteen months of destitution and unemployment because she had to support her two children. She had anticipated that she would readily find a job in Harare. But despite numerous interviews in Harare for jobs as a bookkeeper, she had been unsuccessful. The letter was written in mid-September 1996. By the end of the year, she had secured a job.

I suppose one may infer from this that she had previously tried to find a job in Mutare. This must have been the view of the Tribunal, because the Chairman's finding was:

"... it is common cause that the appellant looked for and found another job. She did not sit and fold her arms."

I do not think one can categorise that finding as wholly unreasonable.

I would therefore dismiss the appeal with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

GOTO *v* GOTO 2000 (1) ZLR 257 (HC)

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Citation	2000 (1) ZLR 257 (HC)
Case No	Judgment No. HH-35-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	October 11, 1999; October 12, 1999; October 13, 1999; October 14, 1999
Judgment	February 16, 2000
Annotations	None

Divorce action

Flynote

Family law - child - custody - following divorce - principles affecting award of custody - decision about which parent should have custody - relevance of gender of child in deciding - primary consideration is best interests of child - relevance of African customary law in determining which parent should have custody

Legal practitioner - conduct and ethics - address at end of case - should be made orally - when practitioner may be deprived of costs of submitting written arguments after the hearing

Practice and procedure - address - counsel's address at close of case - should be made orally - undesirability of allowing counsel time to prepare written arguments

Headnote

A legal practitioner should be in a position to address the court at the end of the trial and where counsel is unable to do so due to lack of preparation and applies for leave to file written arguments, the court may deny the legal practitioner the costs associated with the preparation of written arguments.

In determining which parent should have custody of a child following divorce, there is no binding principle that girls should be placed in the custody of their mothers. It is only a starting presumption that girls should go with their mother and boys to their father, but this is not a principle of law as it would be contrary to the rule that, in deciding on custody of a child, the primary or paramount consideration is the best interests of the child. The presumption may be rebutted by facts that show that the best interests of the child will be served by awarding custody of girls to the father.

Where the parties are Africans to whom African custom has some application or relevance, it may also be proper to take into account that the strongly patrilineal nature of African society. Where everything else is finely balanced, this aspect may tip the balance in favour of the father. But the primary consideration always remains what is in the best interests of the child. In the present case the father had rebutted the presumption in favour of custody going to the mother.

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Cases Considered

Cases cited:

B v *K* 1983 (1) ZLR 212 (H)

C (A) (an infant), Re [1970] 1 All ER 309 (CA)

Goba v *Muradzikwa* 1992 (1) ZLR 212 (S)

Hackim v *Hackim* 1988 (2) ZLR 61 (S)

Jeche v *Mahovo* 1989 (1) ZLR 364 (S)

Manning v *Manning* 1975 (4) SA 659 (T)

Mutaisa v *Muzondo* HH-250-99

Nenguke v *Kabbaku* HH-47-99

Nugent v *Nugent* 1978 RLR 66 (G); 1978 (2) SA 69 (R)

W v *W and C* [1968] 3 All ER 408

Case Information

D M Foroma, for the plaintiff

M Mugandiwa, for the defendant

Judgmnet

Chinhengo J: In the matter between *Nenguke* v *Kabbaku* HH-47-99, I had occasion to say the following in respect of legal practitioners who, after the close of the case for the defendant in a civil trial, request the court for leave to prepare and file their final addresses in written form instead of making their addresses orally:

"Legal practitioners should be prepared and ready to address the court at the end of a trial. It is the time honoured practice for all legal practitioners to do so. It saves the court's time. It facilitates the immediate handing down of a judgment. It is an indication that the legal practitioner has closely followed the proceedings, understood them and has prepared himself to persuade the court as to his client's cause. The practice of routinely requesting the court to file written addresses must be discouraged. In future, I would not hesitate, as a general approach, to deny a legal practitioner the costs associated with the preparation of written addresses where he has been unable, because of unpreparedness, to make an oral closing address to the court."

What happened in the present case graphically illustrates the correctness of the statement I made and the concern I expressed in Nenguke's case. The present is a simple divorce case in which the bone of contention between the parties is the custody of two minor children and the division and apportionment of immovable matrimonial property. The facts and the legal issues involved are not complicated. Yet at the end of the defence case, the legal practitioner for the plaintiff requested for leave to prepare and file a written closing address. I obliged only because of the need to be seen to be even handed. To have refused to accede to the legal practitioner's request could very easily have resulted in justice not being seen to be done. The plaintiff's legal

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practitioner submitted his written address on 21 October 1999. It was not until I had on at least three occasions asked the registrar to remind the defendant's legal practitioner to file his written address that he did so on 11 January 2000. By then, the High Court legal year had commenced and I did not have time on my hands to immediately write this judgment.

CHINHENGO J

The written addresses by each of the parties' legal practitioners are some nine type-written pages. They must have taken some considerable time to prepare. The costs to the parties are, no doubt, that much more than they would have been had each legal practitioner made a twenty minute oral address. The judgment can only be delivered some four months after the trial ended. I will mark the court's displeasure by refusing an award of costs associated with the preparation and filing of the written address to the defendant's legal practitioner.

The present action between the parties was preceded by two other proceedings. On 31 July 1997, the defendant issued a summons out of this court in Case No. HC-7261-97 claiming a decree of judicial separation, an order that the plaintiff vacates the matrimonial home and custody of the children. The summons were served on the plaintiff in early September and she entered an appearance to defend and filed same on 12 September. Those proceedings were abandoned after the plaintiff instituted the present action. About twelve months later, the plaintiff prosecuted to finality a court application in Case No. HC-1114-97 which she had commenced in November 1997 and in which she claimed a contribution towards her costs in the present action, maintenance *pendente lite* for herself and the minor children and custody of the minor children. An order was made in her favour but only in respect of her claim for a contribution towards her legal costs. The costs of that application were reserved for determination at the hearing of the present action.

The plaintiff claims a decree of divorce, custody of two minor children both of them girls - Eunice, born February 1984, and Kudzai, born May 1988. She also claims maintenance for each of the minor children in the sum of $2 500 per month and an equal division and apportionment of matrimonial property as well as the legal costs.

The plaintiff and the defendant were married by Christian rites at Nyanyadzi in 1972. They have six children, two of whom are still minors. Due to marital differences between them, the plaintiff left the matrimonial home in September 1997 for the reasons I shall outline later on in this judgment. Since then the minor children and some of the grown up children have lived with the defendant at the matrimonial home. The parties had been married for twenty four years as at the time that the plaintiff left the matrimonial home. The defendant opposed the relief sought by the plaintiff. In particular, he stated in his pleadings that he did not think that their marriage of twenty four years was irretrievably broken down. But the plaintiff thought otherwise. It was only during the trial that the defendant conceded that the marriage was indeed beyond resuscitation.

CHINHENGO J

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[*His Lordship then dealt with the background to the dispute, and continued:*]

In this jurisdiction, as in many others, the primary consideration in matters of custody is the best interests of the child. The interests of the child in any dispute concerning custody have been described as "paramount", predominant" or "the sole consideration" - *Nugent* v *Nugent* 1978 (2) SA 69 (R) at 70-71A) and *Jeche* v *Mahovo* 1989 (1) ZLR 364 (S). The contention by the plaintiff that in this case the fact of the children being girls should weigh in her favour in respect of custody is not based on any principle of law. It can not be so based because it would run counter to the basic principle in custody disputes - that of the interest of the child. That female children should be placed in the mother's custody it is not a principle of law appears to have been accepted in *Hackim* v *Hackim* 1988 (2) ZLR 61 (S) where at 720 Dumbutshena CJ quoted with apparent approval the statement by Franklin J in *Manning* v *Manning* 1975 (4) SA 659 (T) at 663A to the effect that:

"Our courts, so far as I am aware, have never adopted this general principle and have preferred to judge each case on its own particular facts."

The learned Chief Justice went on to say that this was the view followed in this country. He quoted further with approval the words of Harman LJ in Re C (A) (an infant), C [1970] 1 All ER 309 (CA) at 311F where it was stated that:

"I do not agree with expressions of opinion which have fallen, perhaps per incuriam, from judges that a boy should as a matter of *principle*, be with his father, just as much as I disagree with the other 'principle', which has altogether been abandoned that a girl under three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which must weigh with the judge where the scales are nicely balanced."

In *Hackim*'s case *supra*, Dumbutshena CJ did not consider nor was he guided by this "principle" in reaching his decision. His decision was based solely on the consideration whether the respondent (father in that case) was better than the mother in her care and upbringing of their son or in her plans and arrangements for the son's future. He found in favour of the mother, see *Hackim*'s case at p 73A-C. Perhaps because Dumbutshena CJ did not base his decision in *Hackim*'s case on the "principle" that the interests of female children are better served by placing them in the custody of their mother and therefore did not definitely decide on the applicability of the "principle", Gubbay CJ in *Goba* v *Muradzikwa* 1992 (1) ZLR 212 (S) had the leeway to state that there is a presumption that the interests of female children are better served by placing them in the custody of the mother. He said at 214B-C that:

CHINHENGO J

"In this case, I am satisfied that the presumption that the interests of female children of tender years are better served in the custody of their mother was not rebutted by the respondent. I need only refer to the sagacious words of Broome J (as he then was) in the celebrated case of *Dunsterville* v *Dunsterville* 1946 NPD 594 at 597 ..."

He proceeded to quote the relevant passage.

Quite evidently Gubbay CJ did not say that it was a principle of law that the interests of female children (of tender years) are better served by placing them in their mother's custody. He stated that there is a presumption to that effect. A presumption and a principle are quite different

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concepts. The former is an inference from known facts and may be rebutted whilst the latter is enduring in its effect.

It has often been stated that the transplantations of legal concepts are hardly the best course for countries with different cultures, customs and levels of social and economic development. Viewed from the perspectives of a European culture the argument may be persuasive that the sex of the child may be an important consideration in deciding custody disputes as appears to have been the persuasion in *W* v *W and C* [1968] 3 All ER 408 at 409C as quoted in *Hackim*'s case *supra* at 72A-B. Though it is clear from that case that the English Courts may since have rejected any such persuasion the considerations for rejecting the same must be different in this country. Our society is strongly patrilineal. The payment of roora (lobola) is still very much a general practice. Inheritance is still biased in favour of the children inheriting from the patri-estate with the matri-estate being, in the main, treated differently (*Mutaisi* v *Muzondo* 1999 (2) ZLR 435 (H) at 438F-439D). Where therefore other things being equal, and subject to the predominance of the interest of the child, a court may legitimately have regard to these considerations in determining the question of custody so as to tilt the scales in favour of the father. In my view, therefore, where the scales are "nicely balanced" the court may properly be persuaded to grant custody to the father on a consideration of these additional factors in particular when the litigants are Africans to whom African custom has some application or relevance. In saying this, I am quite aware of what the Supreme Court stated in *Jeche*'s case *supra*. It stated that the presiding officers in the lower courts had based their decision awarding custody to the father for the reason, among others, that the father had paid roora (lobola). Commenting on this, MANYARARA JA said at 366E:

"As I have indicated, the best interests of the children are the paramount consideration in determining questions concerning custody. It seems, with respect, that the presiding officers below have no understanding whatsoever of the meaning and effect of that principle."

He stated further at 368E-F that:

CHINHENGO J

"I would add that the form of an order which one often encounters, that the mother shall deliver custody of her minor child to the father when that child attains a certain age, is meaningless because it is the child's best interests which remain paramount until the child attains its majority, when it is legally free to decide with which parent it will live. In this regard, the payment or non-payment of *roora chiredzwa,* or any other customary payment is irrelevant."

After reading the judgment twice in order to assure myself that I understood it, I do not think that the learned Judge of Appeal intended to lay down a principle that these considerations were irrelevant in all cases regardless. I understand him to be saying that these consideration cannot supercede the principle of the interest of the child or be the sole consideration in custody disputes. That obviously is the correct position. In the present case, the plaintiff has not, on a balance of probabilities, established that the best interests of the girl-children are better served by awarding custody to her. The defendant's evidence has in my assessment rebutted the presumption mentioned in *Goba*'s case. In any event, the courts also have to have regard to the views of the custodian parent. I am satisfied that the plaintiff has not put forward any cogent reason for awarding the custody of the minor girl-children to her. There is no principle of law

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operating in her favour as contended on her behalf. Neither would the fact of puberty alone suffice - see *B* v *K* 1983 (1) ZLR 212 (H). In all the circumstances, I am convinced that the best interests of the two minor children lie with the defendant retaining custody. There is also the additional consideration that other grown up children are living with the defendant and it does not seem beneficial to the children to separate them.

[*His Lordship then dealt with the dispute over the division and apportionment of matrimonial assets, and continued:*]

The order which I make is the following:

1. A decree of divorce be and is hereby granted.

2. The custody of the minor children Eunice Goto (born 7 February 1984) and Kudzai Goto (born 15 May 1988) be and is hereby awarded to the defendant, provided that the plaintiff shall be accorded reasonable rights of access in respect of the two girls.

3. Each party shall retain those items of movable property presently in their possession as their sole and individual property.

4. (a) The Registrar of the High Court shall appoint a valuer, being a member of the Estate Agents Council of Zimbabwe or some other person as the Registrar deems fit to value Stand No. 9420 26 Patrenda Way, Glen View 1, Stand No. 4753 Glen View 3, and Stand No. 8145 Kuwadzana I;

(b) The defendant shall retain, if he so wishes, the matrimonial home as his sole and exclusive property subject to subpara (c);

(c) Of the value of the immovable properties referred to in subpara (a) the plaintiff be and is hereby awarded 45% thereof and the defendant 55% thereof. Twenty *per centum* (20%) of the value of the property determined in terms of subpara (a) shall be paid by the defendant within fourteen days of the date of the submission of the valuation report to the Registrar and the balance within four months from the same date;

(d) In the event that the defendant fails or neglects to pay to the defendant within four months from the date on which the valuation report is submitted to the Registrar, her entitlement in terms of subpara (c) hereof, the properties referred to in subpara (a) shall be sold by public auction and the proceeds thereof distributed in accordance with subpara (c) hereof.

5. The plaintiff be and is hereby awarded one of the two grave sites at Warren Hills Cemetery.

6. The costs of the valuation shall be paid by the defendant and he may recover them from the proceeds of the sale of the immovable properties or one half thereof from the plaintiff upon her receiving her share as in this order made.

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7. The defendant shall pay the plaintiff costs in this matter and in the application *pendente lite* in HC-11141-97 provided that the defendant's legal practitioner shall not charge or be paid any costs in respect of the preparation and filing of the written address filed of record on 11 January 2000.

Sawyer & Mkushi, plaintiff's legal practitioners

Wintertons, defendant's legal practitioners

HARARE SPORTS CLUB & ANOR *v* UNITED BOTTLERS LTD 2000 (1) ZLR 264 (HC)

Citation	2000 (1) ZLR 264 (HC)
Case No	Judgment No. HH-36-00
Court	High Court, Harare
Judge	Gillespie J
Heard	February 9, 2000
Judgment	February 16, 2000
Annotations	None

Civil application

Flynote

Practice and procedure - judgment - rescission - principles - judgment given by consent - court's broad discretion to rescind judgment

Trade - competition - restrictive practices - unfair trade practices - distinction between - agreement between sports club and seller of bottled drinks giving seller monopoly to sell drinks in particular packaging - not contrary to public policy - not one restricting competition to a material degree

Headnote

The applicants had entered into an arrangement in terms of which the second applicant, in return for a consideration, had the first applicant's permission to market its 500 ml "PET" pack of soft drink to the exclusion of any competitor's right to market a similarly packaged soft drink at the first applicant's cricket ground during a series of matches to be played there. The respondent objected, regarding the arrangement as an "unfair trade practice" or a "restrictive practice" in terms of the Competition Act 1996. It brought an urgent application to the High Court, seeking an order that it be allowed to rescind, vary or correct its judgment. This power has traditionally been stated in extremely circumscribed terms, because of the principle of

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functus officio, the desirability of finality in litigation and considerations of *res judicata*, but the perceived strictures of the common law have been abated by rules of court. These allow the rescission, for "good and sufficient cause", of default judgments and judgments entered in terms of a written contract, and the rescission, variation or correction of judgments or orders on the grounds of error. Where a judgment was given in default, there is no question of a final judgment given on the merits, so there is no question of *functus officio* or *res judicata*. Even where the judgment is given in the presence of the parties, and after consideration of the merits, the court retains a power to rescind the judgment, although the power would be more sparingly exercised. But justice demands that a judgment tainted by fraud, or given in ignorance of relevant facts, should not be allowed to stand.

Held, further, that where the judgment or order is given by consent, the court retains a broad discretionary power to rescind the judgment. In this matter, the order purported to affect the rights of third parties. The apparent agreement was either incomplete or not honoured. It was also stated to be merely a record of a business arrangement, rather than a decision on the merits Rescission was therefore in order.

Held, further, that an "unfair trade practice"and a "restrictive practice" are different things. An

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unfair trade practice is absolutely prohibited and its undertaking constitutes an offence. A restrictive practice may only be prevented or regulated by the Competition Commission where it holds the practice to be contrary to the public interest. The Commission may authorise, either wholly or on conditions, a restrictive practice. "Unfair trade practice" does not include all restrictive practices; it means only those restrictive practices specified in the schedule to the Act, and any other conduct similarly so specified.

Held, further, that although the functions of the Competition Commission are set out in detail, the jurisdiction of the courts is not ousted. On the contrary, the clear need for the court to act is readily to be envisaged. In the absence of the clearest express provision, the court will uphold a presumption against the ouster of its jurisdiction.

Held, further, that the definition of "restrictive practice" is wide enough to include the conduct complained of, but that would not necessarily entitle the aggrieved party to relief. To obtain an interdict prohibiting the sports club from preventing its entry onto the grounds in favour of the second applicant, the respondent would have to show the existence of a restrictive practice. To obtain a permanent interdict, it would have to establish a clear right.

Held, further, that the respondent could not hope to discharge the burden on it. The agreement in this case was not one between two competitors manipulating the market. Such an agreement would be contrary to public policy, as would a practice engaged in by a person with substantial market control over the commodity in question. The agreement was one whereby one competitor, for consideration, has secured from an individual an arrangement which favours it over another competitor. A restrictive practice is only restrictive for the purposes of the definition if it restricts competition to a material degree. The restriction in this case was not a

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material one, since it only applied to one particular form of pack. The respondent was entitled to market its other products at the sports club.

Cases Considered

Cases cited:

Childerley Ests Stores v *Standard Bank of SA Ltd* 1924 OPD 163

de Wet & Ors v *Western Bank Ltd* 1979 (2) SA 1031 (A)

Firestone SA (Pty) Ltd v *Genticuro AG* 1977 (4) SA 298 (A)

Georgias & Anor v *Standard Chartered Finance Zimbabwe Ltd* 1998 (1) ZLR 356 (H)

Georgias & Anor v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S)

Mchechesi v *Field NO* 1997 (2) ZLR 191 (S)

Mudzingwa v *Mudzingwa* 1989 (2) ZLR 182 (S)

Mukundadzviti v *Mutasa* 1990 (1) ZLR 342 (H)

Promedia Drukkers & Uitgewers (Edms) Bpk v *Kaimowitz & Ors* 1996 (4) SA 411 (C)

Nyingwa v *Moolman NO* 1993 (3) SA 508 (T)

Roland & Anor v *McDonnell* 1986 (2) ZLR 216 (S)

Theron NO v *United Democratic Front (Western Cape Region) & Ors* 1984 (2) SA 532 (C)

Tshivhase Royal Council & Anor v *Tshivase & Anor; Tshivase & Anor* v *Tshivase & Anor* 1992 (4) SA 852 (A)

Uzande v *Katsande* 1988 (2) ZLR 47 (H)

Washaya v *Washaya* 1989 (2) ZLR 195 (H)

Legislation considered:

Competition Act 7 of 1996, ss 2, 30, 31, 42, 43

High Court Rules 1971 (RGN 1047/1971), r 449

Case Information

P C Paul, for the applicants

G V Mamvura, for the respondent

Judgment

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Gillespie J: There is a Corner at the Harare Sports Club's cricket ground. This is strange. In common with most such venues the ground is round. The Corner is named for a beverage enjoying considerable brand recognition. So well-known is the beverage, and its eponymous Corner, that each is associated, in Pavlovian reflex, with sporting contests at that ground. That intoxicant, for such it is, is, however, by no means the only beverage purveyed to slake the collective thirst of the sea of faces adorning the terraces surrounding the wicket.

Another beverage is that distributed by Bevdis: R C Cola. Not to be confused with the product of United Bottlers, touted as the real thing. However illusory may be the thing of Bevdis, it is real enough at the Sports Club's cricket ground. It is there exposed for sale in accordance with an agreement whereunder, in return for consideration, the Bevdis enjoys the permission of the Sports Club to market its 500 ml PET pack to the exclusion of any competitor's right to market a similarly packaged soft drink at the ground.

United Bottlers objects to this arrangement. It considers it to be an "unfair trade practice", or at least a "restrictive practice".1(20) It wishes to sell its own product at cricket matches. Specifically, in December last year it wished to sell them at three matches to be played at the Sports Club's ground between Zimbabwe and Sri Lanka. It therefore made an urgent application calculated to achieve this relief.

But not very well calculated. It came before me on 15 December 1999. I was concerned at the averment of urgency; at the failure to cite the distributors of RC Cola; and at the cause of action. I nevertheless entertained the argument of counsel. During the hearing in chambers, or rather during a brief interruption of it, an accommodation was reached. I was accordingly asked to make an order, by consent, in these terms:

"That the respondent [the sports club] shall permit the applicant [United Bottlers] to sell and distribute its product at the respondent's premises on the same terms upon which the producers of RC Cola are permitted by the respondent to market their goods at the respondent's premises."

I expressed reservations over the propriety of such an order.

First, I indicated I would not make an order thus interfering with the contractual rights of a third party without hearing that party. I was assured that the third party had consented to the order. Second, I stated that I doubted whether good cause existed for the order and that I did not wish the order to be regarded as a judicial pronouncement upon the correctness of the underlying legal point. I was assured that the compromise, and the resultant order, were

no more than a pragmatic business arrangement and not seen as a legal precedent. On those assurances, and on those alone, I made the order.

The applicants now repent of their doings. They bring the present application, again urgently, for the rescission of my first order. Again a series of cricket matches looms. The English, feeling keenly the humiliation of being beaten by Zimbabwe at the game they invented, seek to re-assert some sporting mastery over their *bêtes noirs*. Two matches will be played at the first

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applicant's grounds this month. All those not imbibing at the popular Corner, will be looking instead for a Cola. Profits should blossom like a - Flower.*(21)

I have again extended an urgent hearing to the applicants. Partly because I did so in the earlier case. Partly because I doubt that my order was of any application other than in respect of the three games in December.

The applicants claim that my earlier order was justified solely by the consent of all the parties. That the consent of Bevdis, and to a lesser extent of the Sports Club, was conditional upon the acceptance by United Bottlers of the participation by Bevdis at any venues or events where United Bottlers might have a similar exclusive agreement to that under challenge. This condition, though not expressed to me at the earlier hearing, was allegedly agreed. Subsequent to that, however, United Bottlers has declined to confirm any such agreement. The consent given is therefore said to have been vitiated.

There are in principle major obstacles to a court interfering with its own judgment. The first of these is the principle "*functus officio*". Where a court has determined a cause and given its decision then to the extent to which its function has been discharged it has no power to revisit the matter. 2(22) Second, and reinforcing the first, is the desideratum of finality in litigation. Third, considerations of *res judicata* have also entered the equation.

Despite this the common law recognises the power of the court to rescind, vary or correct its judgment. This power has traditionally been stated in extremely circumscribed terms. Hence, a party might claim *restitutio in integrum*, on the grounds of fraud or *iustus error*.3(23) In addition, certain other categories were acknowledged where a judgment could be set aside on discovery of new documents after judgment. 4(24)

Proof of *iustus error* was said to involve proof of "a supremely just cause free of all blame whatsoever".5(25) This ground of rescission applied pre-eminently

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to cases of default but was also extended (questionably?) to certain idiosynchratic instances6(26) and to judgment given by consent.

The perceived strictures of this common law were seen as abated by rules of court. These permit the rescission of default judgment "on good and sufficient cause";7(27) the rescission, variation or correction of judgments or orders for error;8(28) and the rescission of judgments entered in terms of a written consent for "good and sufficient cause".9(29) The rules (especially rr 56 and 63) were seen as relaxing the common law.10(30)

Our law, however, is not aptly a casuistic set of rules and exceptions but rather a just and logical application of principle. It is therefore not surprising, and most to be welcomed, that this rigid and brittle view of this area of the law has been reconsidered. It is now recognised that the complicated rules may be explained in principle and that the principle is by no means as intractable as was defined earlier in the last century.

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Thus, where the judgment sought to be rescinded was given in default, no question of a final judgment having been given on the merits can arise. Hence, no considerations of *functus officio* or *res judicata* apply to thwart an application for rescission. In such a case, even at common law, it is recognised that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default. 11(31)

Even where judgment is given in the presence of the parties, and where the merits of the cause are considered, the court still retains a power to rescind that judgment. 12(32) The power in this case would be more sparingly exercised since final judgment would be *res judicata* as between the parties and would appear to be a complete discharge of the court's office. On principle, however, justice demands that a final discharge tainted by fraud should not be permitted to stand. The other traditionally recognised exceptions are also explained on the basis that policy prefers to regard a judgment procured in some circumstances of ignorance of relevant documents to the contrary (for example) as not constituting a final discharge of the court's function.

Further instances where the court is not held to be *functus officio* are

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those specified in r 449. As has been said in connection with the counterpart in South Africa of this rule,13(33) this rule -

"sets out exceptions to the general principle that a final order, correctly expressing the true decision of the court cannot be altered by the court ... the court has a general discretion whether or not to grant an application for rescission under r 42(1)."14(34)

The apparently ill-assorted, eclectic instances gathered under that rule do share the common thread that in each case there are sound policy reasons, counteracting any suggestion of *functus officio*, for recognising a court's discretion to revisit its order. The rule does not provide statutory exceptions to, but has been said to codify (or perhaps better consolidate) the common law.15(35)

I turn at last to judgments by consent. The very restrictive approach in *Childerley* has, in this instance too, been substantially reconsidered, although not in this jurisdiction with reference to principle. A rule exists which permits of a broad discretion to rescind a judgment given in terms of that order.16(36) That rule, however, relates specifically to the filing of a signed consent. The approach has thus been to restrict the application of that rule to causes of signed consents to judgment. In other cases, the common law was resorted to.17(37)

In apparent contradiction to this approach, however, are three cases. In *Roland & Anor* v *McDonnell*,18(38) a broad approach to rescission of consent judgments was adopted. It was said to be -

"right in proper cases for a defendant to apply to court for rescission of a consent judgment if he has good grounds or a new defence to the claim which he did not know he had or had to discover later."

There is no indication that this case involved a consent in terms of the rules. In *Washaya* v

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*Washaya,*19(39) Greenland J regarded the rule as more restrictive than the common law and was prepared to allow rescission on proof of absence of consent without the need to "visit on the applicant the onus of proving good and sufficient cause".20(40) In *Georgias & Anor* v *Standard*

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anything, too restrictive. The favoured common law approach to the question of rescission of a consent judgment was held to be a broad discretionary one.

This approach was enunciated without any cognizance being given to unequivocal *dicta* apparently to the contrary. I have in mind not only *Childerley* itself and many cases applying the *dictum* therein, but also:

"Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon which *restitute in integrum* would be granted, such as fraud or some other just cause, including *iustus error*."24(41)

Nevertheless, not only is the approach in *Georgias* binding on me as being the more particular and recent of the two apparently inconsistent approaches, but also I agree most respectfully with that approach. It is in accordance with the wider discretionary approach shown in *de Wet* to be the correct understanding of the law and continues the development I have attempted to understand in this judgment.

Applying this broad discretion then, I consider the following factors. Firstly, the order purported to affect the rights of third parties. It was only given in the assurance that all parties agreed. Secondly, that the apparent agreement was either incomplete or not honoured is not substantially in dispute. Mr *Mamvura*, for United Bottlers has, somewhat equivocally, denied a mandate to agree the condition stipulated by Bevdis while at the same time moving for the respondent a variation of the earlier order so as to record precisely that condition. This despite the earlier refusal by the client to commit to the condition. Thirdly, the order was expressly stated by me not to be a decision on the merits but to be merely a record of a business arrangement.

Where the arrangement cannot be enforced because of disagreement, the retention of the order would be unjust. Moreover, those merits, so it seems to me, do not support the granting of an order in the absence of compromise.

I turn therefore, to the merits of the point of law. I do so not only in order to determine this application for rescission, but also to enable myself to make some final order disposing of this and the original application. Both Mr *Paul* and Mr *Mamvura* agreed to such a course and were prepared with argument on the point.

The question is whether the agreement between the sports club and Bevdis is an unfair trade practice, or a restrictive practice, in terms of the Competition Act. "Unfair trade practice" is defined as *meaning*:25(42)

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"a restrictive practice or other conduct specified in the third schedule".26(43)

GILLESPIE J

The argument on this point centred on whether the adjectival clause "specified in the third schedule" should be construed as qualifying only the general term "other conduct" or also the reference to "restricted practice". I have no doubt in preferring the latter position.

The Act defines separately, "restrictive" practices and "unfair" trade practices. It makes entirely different and incompatible provisions for each. An unfair trade practice is absolutely prohibited and its undertaking constitutes an offence. 27(44) A restrictive practice may be only prevented or regulated by the Competition Commission where it holds the practice to be contrary to the public interest. 28(45) It may, on application, authorise, either in whole or on conditions, a restrictive practice. 29(46) It is therefore not possible to read the definition of "unfair trade practice" as including all restrictive practices. It means only those restrictive practices specified in the schedule and any other conduct similarly so specified.

This conduct is not specified in the schedule. It is therefore not an unfair trade practice.

A restrictive practice is defined at some length and in broad terms.30(47) The definition is wide enough to include the conduct complained of. It is conceivably, in the words of the definition, "an agreement ... restricting the entry into any market of persons producing or distributing any commodity ... " Or possibly even "restricting the distribution of any commodity ... " But that would not necessarily entitle the aggrieved party to relief.

This now introduces a question of the jurisdiction and function of this court in matters relating to the Competition Act. The rationale of the Act is to create a commission to investigate and to approve, conditionally or otherwise, or to prohibit, restrictive practices, mergers and monopolies. In doing so, the commission is enjoined to consider a number of wide ranging and varied factors. It may act with a very broad power, including the function of negotiating compromises and of altering its own orders. Its orders are appealable to the administrative court.

There is, however, no provision ousting the jurisdiction of this court. There is no clear intendment to that effect. On the contrary, the clear need for this court to act, whether urgently or not, for instance, to grant prohibitive or mandatory interdictory relief, is readily to be envisaged. In the absence of the clearest express provision, or of the most pressing necessary indication, the court will uphold a presumption against the ouster of its jurisdiction. 31(48) I am

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therefore satisfied that this court has jurisdiction to declare on restrictive practices and grant relief as appropriate.

In issuing an interdict prohibiting the sports club from restricting its entry to its ground in favour of the Bevdis, or in obtaining a declaratory order to that effect, United Bottlers must show the existence of a restrictive practice. To obtain a permanent interdict it must prove its case, i.e.

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establish a clear right. For a temporary interdict it must show at least a *prima facie* right, i.e. the likelihood that the commission would prohibit the practice, and a balance of convenience sufficient to move the court's discretion in its favour.

I hold that the United Bottlers cannot hope to discharge that burden. Certainly not on the evidence given to me. I hold this after consideration of the many factors relevant to an investigation and decision of the commission on the point.

The most important factor (by itself decisive in this case) is that the restrictive practice (assuming it to be such) -

"does not directly or indirectly restrict or discourage competition to a material degree ... and is not likely to do so."32(49)

Only if it does so can it be contrary to public policy and subject to any adverse order.

This is not an agreement between two competitors manipulating their market. It is an agreement whereunder one competitor, for consideration, has secured from an individual an agreement which favours it over another competitor. The availability of such an agreement may indeed be said to enhance competition, in that it should encourage competition between the rival producers for the favours of the sports club.

In like manner, a practice is contrary to public policy only -

"if it is engaged in by a person with substantial market control over the commodity ... to which the practice relates."33(50)

There is no evidence, indeed, I would be surprised if there were, of Bevdis or Harare Sports Club enjoying "substantial market control", to the exclusion of the bottlers of Coca Cola, of sweetened, carbonated cola-type soft drinks.

Finally, a restrictive practice is only restrictive for the purposes of the definition of it -

"restricts competition directly or indirectly to a material degree."34(51)

The restriction here is by no means material. Certainly, it has not shown to be so. It applies only to the 500 ml PET pack. The respondent's product, packaged in any other fashion, may be marketed at the sports club. That might

produced a marketing advantage for RC Cola. It might be significant at a cricket match - I do not know. But it does not seem to be material restriction of competition.

I therefore, hold that the merits of the original application are considerably adverse to United Bottlers. The Sports Club's defence is persuasive. Had I been called to decide the original application I would almost certainly have refused relief. I gave an order by consent clearly stating that it constituted no finding on the law nor a precedent. That was accepted. In the light of the circumstances of this application, therefore, I have no doubt at all that the order should in

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justice be rescinded.

That leaves the original application undetermined. It was an urgent chamber application brought on the face of it to regulate matters at two particular cricket matches then imminent. In reaching the still-born agreement, the parties may well have intended it to apply permanently. No such intention was expressed in the argument or in my order by consent. I would have regarded the order as applying only to those matches - any indication to the contrary could only have been present had the hidden condition been intimated to me and expressed in my order. I would therefore regard the original application as now moribund - overtaken as it is by events.

If called upon to determine the matter, as I am, having heard argument in it, both previously and now, I would refuse it. I would do so both on the merits and the lack of urgency then and its anachronistic nature now. Even had I not heard argument, I would still determine the issue being seized of it and entitled to act in urgent chamber applications without hearing the parties.

I would therefore resolve this matter as follows:

IT IS ORDERED THAT -

1. The order given by consent in case No. H-18314-99 shall be and is hereby rescinded.
2. The application in case No. H-18314-99 shall be deemed to have been dismissed.
3. The present respondent shall bear the costs in this application and those in case No. H-18314-99.

I would add, for the avoidance of doubt, that in view of the deplorable paucity of the original application I have approached the decision on the basis of a failure to discharge an onus and intend my order in para 2 thereof to have the effect of absolution from the instance.

Wintertons, applicants' legal practitioners

Scanlen & Holderness, respondent's legal practitioners

ZIMBABWE LAWYERS FOR HUMAN RIGHTS & ANOR *v* PRESIDENT OF THE REPUBLIC OF ZIMBABWE 2000 (1) ZLR 274 (SC)

Citation	2000 (1) ZLR 274 (SC)
Case No	Judgment No. S-10-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	February 7, 2000
Judgment	February 21, 2000

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Annotations None

Civil application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 24(1) - action brought against President - whether leave of court required to bring action

Practice and procedure - parties - action against the President - when leave of court must be obtained

Headnote

Two organisations concerned with issues of human rights and the advancement of justice applied in terms of s 24(1) of the Constitution for an order that the President make public the findings of two commissions of inquiry which had been given to the President but had not been made public. The organisations argued that the failure by the President to publish the findings of these inquiries, which documents were in his possession or control, hindered their members and persons seeking advice and assistance from them in the exercise of their right of freedom of expression. The respondent raised a preliminary procedural objection, arguing that the applicants were not entitled to proceed against the President without first obtaining the leave of the court to do so.

Held, that although s 30 of the Constitution provides that the person holding the office of President has immunity from civil and criminal proceedings whilst he is in office, legal proceedings can still be brought against the office of the President in his official capacity.

Held, further, that whereas r 18 of the High Court Rules requires that a litigant must obtain the leave of the court to issue legal process against the President, there is no similar provision in the Supreme Court Rules requiring that a litigant to obtain leave from the Supreme Court before legal process is issued against the President.

Held, further, there is a need to preserve the dignity and status of the office of the President and the office of the President must not be harassed with frivolous and vexatious legal proceedings. Where an alternate means of obtaining redress is available to the claimant it should be pursued.

Held, further, that it is not necessary for a person to obtain leave from the Supreme Court to proceed against the President where he is alleging that there has been an infringement of the Declaration of Rights provisions in the Constitution. Section 24(1) of the Constitution allows anyone who is complaining of an infringement of his fundamental rights to come

directly to the Supreme Court. This right is subject to various restrictions and limitations. For instance, the court can protect the President against harassment by vexatious litigation by using its power to determine an application without hearing it where it is of the opinion that the

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application is merely frivolous and vexatious.

Held, further, that, as a general rule of procedure, a respondent who wishes to raise a preliminary issue against an application should file an affidavit on the merits of the matter within the normal time limits prescribed by the rules of court and should not risk relying solely upon a preliminary point. But this rule is not rigid or inflexible and situations may arise where it is permissible to rely solely on the preliminary point. The present case was one of those where it was in order for the respondent to rely solely on the preliminary issue.

Cases Considered

Cases cited:

Bader & Anor v *Weston & Anor* 1967 (1) SA 134 (C)

Chidyausiku v *Nyakabambo* 1987 (2) ZLR 119 (S)

Gluck v *The Governor* 1947 SR 143

Governing Body of the Winterberg Agricultural High School v *President of the Eastern Cape* [1996] 3 All SA 71 (E)

Matamisa v *Mutare City Council* 1998 (2) ZLR 439 (S)

Min of Home Affairs v *Bickle & Ors* 1983 (2) ZLR 400 (S); 1984 (2) SA 439 (ZS)

President of the Republic of SA & Ors v *SA Rugby Football Union & Ors* 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC)

Standard Bank of SA Ltd v *RTS Techniques & Planning (Pty) Ltd & Ors* 1992 (1) SA 432 (T)

Valentino Globe BV v *Phillips & Anor* 1999 (3) SA 775 (SCA)

Zinyemba v *Min of Public Service & Anor* 1989 (3) ZLR 351 (S)

Legislation considered:

Constitution of Zimbabwe 1980, ss 24(1) and 31K

High Court Rules 1971 (RGN 1047/1971), r 18

State Liabilities Act [*Chapter 8:14*], s 4

Case Information

A P de Bourbon SC, for the applicants

Miss *C Machaka*, with her Mrs *L R Goredema*, for the respondent

Judgment

Gubbay CJ: The first applicant is a *universitas*. It was established on 2 February 1996 in conformity with the laws of Zimbabwe and has a legal personality separate from that of its

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members. Its main purpose is to foster a culture of human rights in Zimbabwe and to encourage the growth and strengthening of human rights at all levels of society. In particular, it strives to protect, promote, deepen and broaden, the human rights provisions in the Constitution of Zimbabwe.

The second applicant is a charitable and educational trust, registered on 18 July 1984, and entitled to sue and be sued in its own name. Its objects include the support of organisations which furnish legal advice to the public and the provision of assistance for any activity which, in the opinion of the trustees, is likely to advance the interests of law and justice in Zimbabwe and the people in general.

GUBBAY CJ

The contention of both the applicants is that their members, and the persons who seek assistance and advice from them, are being hindered in the enjoyment of their freedom of expression, enshrined in s 20(1) of the Constitution, with respect to the non-disclosure of certain information in the possession or control of the President of Zimbabwe. Accordingly, they apply to this court, pursuant to s 24(1) of the Constitution, for an order that:

"The President of the Republic of Zimbabwe cause to be made public through the Government Printer within sixty days of the date of the order at a reasonable cost the reports made to him when he was Prime Minister of the Commission of Inquiry into events concerning Entumbane 1 and 2 known as the 'Dumbutshena Report 1982', and the Chihambakwe Committee of Inquiry into events between December 1982 and March 1983 known as the 'Chihambakwe Report 1984'."

It is unnecessary to outline the averments made by the applicants in support of the relief claimed. For a preliminary objection has been raised by the respondent that the right to obtain redress from the court under s 24(4) of the Constitution must be predicated on leave having been obtained to bring the application; and leave was not even sought. The further point taken in the opposing affidavit that s 30 of the Constitution precludes suits brought against the President in his official capacity, was abandoned. It was right to do so. Section 30 is clearly designed to afford immunity against civil and criminal proceedings to the person holding the office of President whilst in office. Such person is not to be held personally liable in any court. The present proceedings are not being brought against the person holding the office of President, but against *the office of the President* in his official capacity. Moreover, the citation of the President is in accordance with s 4 of the State Liabilities Act [*Chapter 8:14*]. If the intention had been to make the President immune from suits in his official capacity, the reference to him in s 4 would be superfluous.

The argument that the grant of leave from this court is a pre-requisite to the institution of an application under s 24(1) of the Constitution, against the office of the President, is founded on r 58(1) of the Rules of the Supreme Court, as read with r 18 of the Rules of the High Court.

Rule 58(1), which is headed "Application of High Court Rules", provides that:

"In any matter not dealt with in these rules the practice and procedure of the Supreme Court shall, *subject to any direction to the contrary* by the court or a judge, follow, as near as may be, the practice and procedure of the High

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Court" (my emphasis).

The situations in which leave of court is required for the issue of process are not specified in the Rules of the Supreme Court. Hence, so it was urged, regard is to be had to r 18 of the Rules of the High Court. This rule which, in the appropriate wording of the time, has been in force for the past six decades, now reads:

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"No summons or other civil process of the court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application being made for that purpose."

In *Gluck* v *The Governor* 1947 SR 143 at 146, 1948 (1) SA 494 (SR) at 497 *in fine* - 498, Tredgold J (as he then was) said of r 14 of the 1939 Rules of Court (the present Rule's predecessor) that:

"(It) may be assumed that the rule was not intended to deny a hearing to anyone who has a substantial cause of action. It was simply intended to avoid the possibility that the Governor might be harassed by frivolous or vexatious claims or unnecessarily made the nominal defendant in matters which could equally well be ventilated in some other way."

In refusing leave, the learned judge held that the applicant's claim was essentially one against the Crown in its Government in Southern Rhodesia and that action could be brought by citing the Minister concerned.

Much the same safeguard, but in relation to the institution of an action against a judge of the High Court, was expressed in *Chidyausiku* v *Nyakabambo* 1987 (2) ZLR 119 (S) at 122B. And more recently in *President of the Republic of South Africa & Ors* v *South African Rugby Football Union & Ors* 1999 (10) BCLR 1059 (CC) at 1160D; 2000 (1) SA 1 (CC) at 107H, albeit in a somewhat different context, the Constitutional Court of South Africa underscored the need to preserve the dignity and status of the office of President, and observed that an understanding of the implications of his busy schedule must be sensitively and carefully considered.

I respectfully agree with that sentiment. The office of the President is not to be harassed by being faced with frivolous and vexatious proceedings. Where an alternative means of obtaining redress is available to the claimant it is to be pursued. It should not be overlooked, however, that in neither *Gluck*'s case nor that of *Chidyausiku supra* was the court called upon to consider the applicability of the appropriate rule in the setting of a constitutional right similar to that afforded by s 24(1) of the Constitution.

Thus to be resolved is whether it is necessary to obtain the leave of the Supreme Court before a person, alleging that the Declaration of Rights has been, is being or is likely to be, contravened in relation to him, may apply to the court for redress against the office of the President.

The fundamental purpose behind s 24(1) of the Constitution is to afford anyone who has lawful cause for complaint to come directly before the Supreme Court. Yet the right to do so is subject to certain in-built limitations.

First, where the question as to a contravention of the Declaration of Rights was not referred by

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the High Court or a court subordinate to the High Court in terms of s 24(2), no application for the determination of such question will lie to the Supreme Court under subs (1).

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Second, the Supreme Court in the exercise of its original jurisdiction may, by virtue of s 24(4)(a), determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious. See, for instance, *Matamisa* v *Mutare City Council (Attorney-General intervening)* 1998 (2) ZLR 439 (S) at 446C-D. This stricture is a sufficient protection against the possibility of harassment being caused to the cited respondent. Where therefore the relief claimed is against the office of the President, the aim of r 18 is recognised and implemented in subs (4)(a).

Third, in accordance with the proviso to s 24(4) the Supreme Court may, in the exercise of its discretion, decline to entertain an application under s 24(1), or a referral under s 24(2), if satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the Constitution or under any other law. See *Minister of Home Affairs* v *Bickle & Ors* 1983 (2) ZLR 400 (S) at 432D-F, 1984 (2) SA 439 (S) at 441G-H; *Zinyemba* v *Minister of the Public Service & Anor* 1989 (3) ZLR 351 (S) at 355D-E. This is precisely the same consideration material to an application for leave under r 18.

Section 31K of the Constitution is also of relevance to a determination of the respondent's objection. In my opinion, its existence points inevitably to an intention on the part of the framers not to restrict the right to apply under s 24(1) other than by the limitations expressed in ss 24(2), 24(4)(a) and the proviso to s 24(4). The section specifies a number of situations in which a court is not permitted to inquire into the actions of the President. In all other matters, no fetter is placed upon the court and no immunity is accorded the office of the President. If the intendment had been that leave of the Supreme Court were necessary before proceedings under s 24(1) may be taken against the office of the President, it would have been spelt out in s 31K.

Finally, it should not be overlooked that in terms of s 24(9)(a):

"A written law may make provision with respect to the practice and procedure -

(a) of the Supreme Court in relation to the jurisdiction and powers conferred upon it by or under this section; ..."

As yet no such law has been passed. Parliament has not therefore deemed it necessary to impose any additional limitation upon the right to make an application under s 24(1) of the Constitution.

Wholly consistent with the absence of a requirement to obtain leave in order to cite the office of the President in an application under s 24(1) of the Constitution, is s 4 of the State Liabilities Act. It reads:

"Whenever the President or a Vice-President or any Minister, Deputy Minister or public official is cited in any action or other proceedings in his official capacity he shall be cited by his official title and not by name."

Viewed in the context of the two previous sections which permit claims

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against the State to be brought against the headship of the Ministry or department concerned as nominal defendant or respondent, it is plain to my mind that s 4 permits of an absolute right to bring proceedings against the President in his official capacity provided he is cited by his official title and not by name. That is the sole restriction. Had the legislature intended that the institution of any such action or proceedings be preceded by the grant of leave from the High Court or the Supreme Court, it surely would have said so. Certainly, there is no justification for reading such a requirement into the section. Needless to state, anything in r 18 of the Rules of the High Court cannot be understood to override either s 4 of the State Liabilities Act, or any provision of the Constitution, which exhibits a contrary intention.

It follows that, in my judgment, the objection taken on behalf of the respondent is without merit.

Counsel for the applicants did not press the submission made in his heads of argument that the omission by the respondent to file an opposing affidavit to the merits of the application meant that if the preliminary objection failed the applicants would become entitled to the order sought.

It is true to say that such cases as *Bader & Anor* v *Weston & Anor* 1967 (1) SA 134 (C) at 136E-G; *Governing Body of the Winterberg Agricultural High School* v *President of the Eastern Cape & Ors* [1996] 3 All SA 71 (E) at 77e-i; and *Valentino Globe BV* v *Phillips & Anor* 1998 (3) SA 775 (SCA) at 779I-780B, lay down, as a general rule of procedure, that a respondent who wishes to raise a preliminary issue against an application should file an affidavit on the merits of the matter within the normal time limits prescribed by the rules of court. In other words, a respondent is at risk in relying solely upon a preliminary point. But the rule is not rigid or inflexible. See *Standard Bank of South Africa Ltd* v *RTS Techniques and Planning (Pty) Ltd & Ors* 1992 (1) SA 432 (T) at 442A-E. Situations may arise where the procedure of merely taking a preliminary point is unexceptionable.

To my mind, the present is just such a situation. The respondent sought to challenge the right to institute proceedings against him without the leave of the court. His claim was that the application had been made prematurely and that until leave was granted he was not properly before the Supreme Court. Consequently, he was not obliged to file an affidavit as to the merits, since the point he took had nothing to do with whether the averments in the application failed to make out a sufficient case for the relief sought. See *Bader*'s case *supra* at 136B-D.

I am satisfied that the procedure adopted by the respondent was correct and that he is now to be given an opportunity to oppose the application on the merits.

In the result, the preliminary objection is dismissed with costs. If the

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respondent is minded to oppose the application, he is to file a notice of opposition together with one or more opposing affidavits with the Assistant Registrar of the Supreme Court within twenty

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days of the date of this judgment.

MCNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Kantor & Immerman, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners

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WENTWORTH-WEAR v ZVIPUNDU 2000 (1) ZLR 281 (SC)

Citation	2000 (1) ZLR 281 (SC)
Case No	Judgment No. S-12-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Muchechetere JA
Heard	February 10, 2000
Judgment	February 21, 2000
Annotations	None

Civil appeal

Flynote

Delict - vicarious liability - employer's liability - prohibition placed on employee - effect - prohibition limiting sphere of employment - employer not liable

Headnote

The appellant was injured in a motor accident caused solely by the negligence of the driver of a commuter omnibus. She sued the respondent, the driver's employer. The respondent claimed that the driver was not in his employment at the time, having been discharged for non-payment of traffic fines incurred while in previous employment. The driver had nonetheless driven the vehicle involved in the accident, directly contrary to instructions that he was not to drive.

Held, that there are two different types of prohibition in the relationship between employer and employee. One limits the sphere of employment, and the other deals with conduct within the

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sphere of employment. A transgression of the latter type leaves the sphere of employment intact, and will not prevent recovery of compensation from the employer. A transgression of the former type has the result that the employee has gone outside the sphere of his employment. In this case, the driver had disregarded a prohibition which limited the sphere of his employment, and not one which merely dealt with his conduct within the sphere of his employment. He was thus not acting within the course of his employment, and the respondent could not be held to be vicariously liable.

Cases Considered

Cases cited:

Benmax v *Austin Motor Co Ltd* [1955] 1 All ER 326 (HL)

Canadian Pacific Rly Co v *Lockhart* [1942] 2 All ER 464 (PC)

Feldman (Pty) Ltd v *Mall* 1945 AD 733

Ngubetole v *Admin, Cape & Anor* 1975 (3) SA 1 (A)

Ngwenya v *Bhebhe & Anor* HB-125-95

Nyahondo v *Hokonya & Ors* 1997 (2) ZLR 457 (S)

Plumb v *Cobden Flour Mills* [1914] AC 62

SAR&H v *Albers & Ors* 1977 (2) SA 341 (D)

Swain v *Soc of Advocates, Natal* 1973 (4) SA 784 (A)

Case Information

F Girach, for the appellant

M Hogwe, for the respondent

Judgment

Gubbay CJ: In this appeal, I entertain not the slightest doubt as to the soundness of the judgment of the High Court.

GUBBAY CJ

The question for decision is: did the accident between the appellant's Honda Accord motor vehicle and the respondent's Mazda TS 35 commuter omnibus, which was caused solely by the negligence of the driver Solomon Chigariro, arise out of his employment with the respondent?

During the late afternoon of 17 September 1997 and at the intersection of Upper East and Brighton Roads, Harare, the two vehicles came into collision. The commuter omnibus was carrying fare-paying passengers and was proceeding along its authorised route. The appellant

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spoke to Chigariro at the scene and noticed another male person who appeared to be the conductor. The Honda Accord sustained extensive damage.

As was to be expected, the appellant instituted action against the respondent in an effort to recover the sum of $178 923.69, being the reasonable cost incurred by her in the repair of the vehicle. She alleged that the respondent was vicariously liable for the negligence of Chigariro who was acting in the performance of his duties as driver of the commuter omnibus. The defence raised was that at the time of the accident Chigariro was no longer in the respondent's employ.

At the trial, the respondent and his nephew Michael testified. The respondent is a corporal in the Zimbabwe National Army. On 14 September 1997, while posted temporarily at Nyanga, he was advised by telephone that the commuter omnibus was off the road as Chigariro had been arrested. He returned to Harare the following day and found the vehicle parked outside his residence in Hatcliff. He went to the Central Police Station where Chigariro was being held and was informed that Chigariro has been arrested for the non-payment of traffic fines amounting to $4 000. These violations had been committed while in previous employment. Annoyed that the commuter omnibus had been out of commission for some five days, and faced with the prospect of Chigariro having to serve a period of imprisonment, the respondent spoke to him at the police station. He informed Chigariro that he was terminating his employment forthwith and that he intended to engage the services of another driver.

The respondent advised Michael, whom he employed as conductor and whose duty it was to guard the commuter omnibus, not to permit Chigariro to drive.

On 17 September 1997, the respondent was detailed to go to Darwendale on duty. On his return that evening, he learned that Michael had come to his place of work to speak to him about the commuter omnibus. So he went to the commuter omnibus rank in the city to ascertain what the problem was. It was there that he received a report that his vehicle had been involved in an accident. He hurried to the scene. Michael was there and told him that it was Chigariro who had driven the commuter omnibus. The respondent then

proceeded to Avondale Police Station, but Chigariro had been released earlier after a statement was recorded from him. Thereafter Chigariro disappeared. He did not appear at the trial.

In evidence, Michael explained the circumstances in which Chigariro came to drive the commuter omnibus. He said that at about 11.00 a.m. on the day in question he was seated in the vehicle listening to music. Chigariro arrived stating that he was reporting for duty. Michael informed him that the respondent had instructed that he was not to drive and that another driver was to be employed. Chigariro replied that he intended to speak personally to the respondent. With that he assumed the driver's seat, started the engine and drove to the commuter omnibus rank. It was there that Michael alighted. He asked a friend, Admire Bonzo, to act as conductor and collect the fares from passengers as he had to go to report to the respondent that Chigariro insisted on driving the commuter omnibus.

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Michael went to the respondent's workplace and requested to speak with him. After a long delay he was told that the respondent was out on duty. He left a message for the respondent that Chigariro had taken the commuter omnibus by force and was driving it. Returning to the rank later that afternoon he heard that the vehicle had been involved in a collision. He went to the scene and from there to Avondale Police Station. Chigariro was at neither place. When at home Michael learned that a young brother had been handed the fares collected by Admire Bonzo.

The appellant was obviously unable to give direct evidence as to the nature of the relationship between the respondent and Chigariro at the time of the collision. But the admissions by the respondent that he was the owner of the commuter omnibus and that until a few days prior to 17 September 1997 Chigariro had been employed by him as a driver, constituted *prima facie* evidence that at the critical moment the commuter omnibus was being driven in the course of his employment. Accordingly the onus rested on the respondent of satisfying the trial court that as at 17 September 1997 Chigariro's employment had been "terminated", thereby freeing the respondent from being held vicariously liable for the accident. See *Nyahondo* v *Hokonya & Ors* 1997 (2) ZLR 457 (S) at 459F-460B.

The learned judge was impressed by the manner in which the respondent and Michael testified. He believed the respondent's assertion that Chigariro had been informed at the police station that his employment was terminated with immediate effect, and Michael's evidence that he had warned Chigariro not to drive the commuter omnibus. Notwithstanding the favourable impression made upon the learned judge by the two witnesses, counsel for the appellant argued with much force that their version of events with respect to the dismissal of Chigariro was so improbable that it ought not to have been accepted.

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I have given earnest consideration to all the criticisms put forward and I trust counsel will forgive me if I do not mention them. Suffice to say that, although there are aspects of Michael's evidence which reveal that he could have acted more prudently than he did to prevent Chigariro from driving, and continuing to drive, his account provided weighty support for that of the respondent. Both read well in print.

An appellate court is confined to the record of evidence and the reasons given by the trial court for its decision. In such circumstances, the powers of the appellate court are restricted. It is obliged in appeals based solely on fact to recognise that the trial court enjoyed an advantageous position to observe the demeanour of the witnesses. When, as in this matter, the trial court has made positive findings on the credibility of certain witnesses, an appellate court is enjoined to take cognisance of the personal assessment made of their individual performances. It is only therefore in rare cases that an appellate court can be satisfied that the trial court has reached a wrong decision about the credibility of a witness. See the remarks of Lord Reid in *Benmax* v *Austin Motor Company Ltd* [1955] 1 All ER 326 (HL) at 328I-329E, and those of VAN BLERK JA in *Swain* v *Society of Advocates, Natal* 1973 (4) SA 784 (A) at 787B-C.

Given the facts as found by the learned judge, the respondent's liability hinged upon whether Chigariro was still to be regarded as in his employ on 17 September 1997. If so, then in driving

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the commuter omnibus he was undoubtedly acting in the performance of his duties.

In order to terminate lawfully the employment of Chigariro, it was necessary for the respondent to comply with the provisions of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, SI 371 of 1985. He had no authority to dismiss Chigariro summarily; only to suspend him pending an application to a labour relations officer for an order terminating his employment. But what was the practical effect of Chigariro being told at Avondale Police Station that he was dismissed from employment? It was an instruction from the respondent that henceforth he was prohibited from driving the commuter omnibus.

In *Plumb* v *Cobden Flour Mills* [1914] AC 62 Lord Dunedin drew a distinction between two different types of prohibition in the relationship between employer and employee. He said at 67:

"(There) are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

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This distinction was applied by the Privy Council in *Canadian Pacific Railway Co* v *Lockhart* [1942] 2 All ER 464 (PC) at 467 *in fine* - 468B, and was referred to with approval in the dissenting judgment of Greenberg JA in *Feldman (Pty) Ltd* v *Mall* 1945 AD 733 at 762-763. See also *Ngubetole* v *Administrator, Cape & Anor* 1975 (3) SA 1 (A) at 11A-C; *South African Railways and Harbours* v *Albers & Anor* 1977 (2) SA 341 (D) at 346 *in fine* - 347B; and, in this jurisdiction, *Ngwenya* v *Bhebhe & Anor* HB-125-95 (unreported).

It is clear to me that in driving the commuter omnibus - albeit for the apparent benefit of the respondent and in the hope that by so doing the latter would be prepared to retract what must have been viewed as a lawful dismissal - Chigariro disregarded a prohibition which limited the sphere of his employment; and not one which dealt only with his conduct within the sphere of his employment. As he was thus not acting within the course of his employment at the time of the collision, the principles of vicarious responsibility for his negligence cannot be extended to embrace the respondent.

In the result, and for the reasons given, the appeal must be dismissed with costs.

MCNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Lofty & Fraser, appellant's legal practitioners

Mangwana, Hogwe & Partners, respondent's legal practitioners

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KONDONI *v* EAGLE INSURANCE CO LTD & ANOR 2000 (1) ZLR 286 (HC)

Citation	2000 (1) ZLR 286 (HC)
Case No	Judgment No. HH-44-00
Court	High Court, Harare
Judge	Smith J
Heard	October 19, 1999; February 16, 2000
Judgment	February 23, 2000
Annotations	None

Civil action

Flynote

Interest - date from which runs - delictual damages - injury arising out of motor vehicle accident - special damages - medical expenses - interest to run from date on which expenses incurred - general damages for pain and suffering - damages assessed as at date of judgment - interest to run from date of judgment

Headnote

The plaintiff was injured in a motor vehicle accident caused by the negligence of the driver of the bus in which she was travelling. The first defendant was the insurer of the bus. The plaintiff claimed, among other things, special damages arising out of the medical expenses she had incurred, and general damages for pain and suffering. A claim for loss of future earnings was made but later abandoned. The *quantum* of the other claims was accepted and the question arose as to the date from which interest on those claims should run.

Held, that although s 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*] provides that interest on an unliquidated claim runs from the date on which the cause of action arose, the court may, if it considers it fair and just in the circumstances of the case to do so, direct that interest should run from another date.

Held, further, that the general rule is that damages are calculated as at the date of the injury. In respect of the claim for special damages, this could be no earlier than the date on which the medical expenses were incurred. Had there been evidence as to when that was, interest would have been awarded from that date. In the absence of such proof, interest would be ordered to run from the date of the service of the summons.

Held, further, that in respect of general damages the position was less clear. In this and other cases involving physical injury, where damages are assessed having regard to factors such as pain and suffering, loss of amenities and disfigurement, the court invariably fixes the level of damages having regard to the value of money and other economic circumstances as at the date of judgment, not as at the date of injury. That being the case, it would be inequitable for the

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court to order that interest should run from the date of the cause of action or even from the date the summons was served. As a general rule, therefore, and subject to any special circumstances, interest in respect of general damages should run from the date on which the damages are assessed, which would be the date of judgment.

Cases Considered

Cases cited:

Levy v *Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (H)

Marufu v *Mawona & Ors* 1996 (1) ZLR 593 (H)

Monumental Art Co v *Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C)

Philip Robinson Motors (Pty) Ltd v *M M Dada (Pty) Ltd* 1975 (2) SA 420 (A)

Rusike v *Tenda Tpt (Pvt) Ltd & Anor* 1997 (1) ZLR 495 (H)

Scrooby v *Engelbrecht* 1940 TPD 100

Shamuyarira v *Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H)

Victor NO v *Constantia Ins Co Ltd* 1985 (1) SA 118 (C)

Wigham v *British Traders Ins Co Ltd* 1963 (3) SA 151 (W)

Zimbabwe Newspapers (1980) Ltd & Anor v *Bloch* 1997 (1) ZLR 473 (S)

Legislation considered:

Prescribed Rate of Interest Act [*Chapter 8:10*], s 6

Case Information

P Nherere, for the plaintiff

A P de Bourbon SC, for the respondent

Judgment

Smith J: On 13 December 1994, the plaintiff (hereinafter referred to as "Kondoni") was a passenger in a bus when a vehicle which was being driven by an employee of the second defendant collided with the bus. The first defendant (hereinafter referred to as "Eagle") was the insurer of the vehicle which belonged to the second defendant. Kondoni issued summons on 10 December 1996 claiming from the defendants special damages in the sum of $11 398.63, general damages in the sum of $120 000 and damages for loss of future earning capacity in the sum of $462 000. The general damages were made up as follows: loss of amenities ($10 000); pain, suffering, disability and disfigurement ($100 000); future pain and suffering ($10 000). Kondoni alleged that at the time of the accident she was self-employed and was making

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about $5 000 a month from the proceeds of the sale of goods she purchased in South Africa and resold in Zimbabwe. Because of her injuries she would not be able to continue such practice. The defendants opposed Kondoni's claim. They did not admit the averments as to negligence, the injuries suffered and the *quantum* of damages and put Kondoni to proof thereof. As regards the claim for loss of future earning capacity, they averred that Kondoni was making a living by illegal means and was acting in contravention of the Customs and Excise Act [*Chapter 23:02*] and accordingly she was not entitled, in law, to claim any loss in respect of earnings or earning capacity.

The parties appeared in court on 19 October 1999. Eagle tendered payment of an amount of $120 000 with costs up to that date in full and final settlement. The special damages of $11 398.63 had been paid on 31 March 1999. Kondoni refused to accept the tender and persisted in her claim for the $462 000 for loss of future earning capacity.

When the trial resumed on 16 February Mr *Nherere* advised that Kondoni had accepted the tender of $120 000 and had abandoned her claim for damages for loss of future earning capacity. Accordingly, no witnesses were

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called. Mr *Nherere* argued that Eagle should be required to pay interest, at the rate of 25% *per annum*, on the $120 000 from the date the cause of action arose, by virtue of the provisions of s 6(1) of the Prescribed Rate of Interest Act [*Chapter 8:10*] (hereinafter referred to as "Chapter 8:10"). With regard to the special damages, he argued that interest should run from the date summons was served to the date of payment. As it was necessary for Kondoni to come to court to obtain an order for the payment of interest on her claim for general damages, she should be paid her costs, other than the costs for the day when she applied for a postponement and the court ordered that she pay the wasted costs.

Mr *de Bourbon* said that the reason why it had taken so long for this case to reach finality was the obduracy of Kondoni in regard to her claim for damages for loss of earning capacity. That was why the trial had been postponed on 19 October 1999. If interest were to start from the date of the accident, which was 13 December 1994, the *in duplum* rule would be breached. Although it is provided in subs (1) of s 6 of Chapter 8:10 that interest on illiquid claims shall run from the date the cause of action arose, subs (2) of that section gives the court a discretion that interest on the damages, or on a portion thereof, shall run from a later date. In this case, it would be fair and just that the court orders that interest runs from the date of judgment. With regard to costs, he argued that Kondoni should be ordered to pay the costs incurred by Eagle since 18 October 1999. Had Kondoni accepted the tender made on 19 October she would have been paid then and no further costs would have been incurred.

Section 6(1) and (2) of Chapter 8:10 provides as follows:

"6 **Interest on illiquid claims**

(1) Subject to this section and unless otherwise agreed, every debt arising out of an unliquidated claim shall bear interest calculated at the prescribed rate on the amount of the debt from the date when the cause of

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action arose, whether or not the amount of the debt is fixed by agreement between the parties or by the judgment of a court.

(2) When a court considers it fair and just in the circumstances of the case to do so, it may direct, in relation to a claim referred to in subsection (1), that -

(a) no interest shall be payable on the amount of the debt; or

(b) interest shall be payable on only part of the amount of the debt; or

(c) interest shall be payable in respect of only part of the period since the cause of action arose, or shall be calculated to run from a specified date; or

(d) interest shall be payable at a rate lower than the prescribed rate;

or may give any two or more of such directions."

Would it be fair and just, in the circumstances of this case, to direct that interest on the special damages and the general damages should run from a

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date other than that on which the cause of action arose? As regards the special damages, both Mr *Nherere* and Mr *de Bourbon* agreed that interest should not run from a date prior to that on which the medical expenses were incurred by Kondoni. Had she established, either on the papers or in giving evidence, the date or dates on which the expenses were incurred, I would have ordered that interest would run from such date or dates. In the absence of any such proof, however, I will order that interest runs from the date that summons was served, which is 11 December 1996.

As regards the general damages, the position is not so clear cut. The general rule is that damages are calculated as at the date of injury. See *Scrooby* v *Engelbrecht* 1940 TPD 140 at 103, *Wigham* v *British Trading Insurance Co Ltd* 1963 (3) SA 157 (W) at 156B, *Monumental Art Co* v *Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) and *Victor NO* v *Constantia Insurance Co Ltd* 1985 (1) SA 118 (C) at 120E (confirmed on appeal: 1986 (1) SA 601 (A)). In *Philip Robinson Motors (Pty) Ltd* v *M M Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 429F Holmes JA said:

"The time at which to measure the delictual damages is ordinarily the date of the delict, because that is when the owner's patrimony is reduced."

If that is done, then clearly it is only right and proper that interest should run from the date of the delict to the date of payment. However, in *Levy* v *Modus Publications (Pvt) Ltd* HH-3-2000*(52) it was pointed out that in cases dealing with defamation, the position is different. In that case, and in many others referred to therein, the court, in assessing *quantum* of damages, had regard to awards made some years after the defamatory statements that were the subject matter of the case in question. Therefore, the court was fixing *quantum* having regard to the economic circumstances and the value of money as at the date of judgment. Thus in *Shamuyarira* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H) where Robinson J at 503, set out the relevant factors which he was going to take into account when assessing damages in relation to the circumstances of that case, one of the factors was the comparable awards of

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damage in other defamation suits and the declining value of money. After referring at 514-519 to a number of cases, he concluded at 520C:

"I am now in a position to make my assessment of damages in this matter. Taking into account all the factors to which I have referred and having regard to the awards made in comparable cases in our jurisdiction and giving due weight to the decline in the value of money since those awards were made, I find it appropriate, in the circumstances of this case, to award the plaintiff damages in the sum of $15 000."

It is clear that ROBINSON J was quantifying the plaintiff's damages in

accordance with the economic circumstances pertaining as at the date of judgment and not the date the cause of action arose. I accept that in *Zimbabwe Newspapers (1980) Ltd & Anor* v *Bloch* 1997 (1) ZLR 473 (S), Muchechetere JA concluded at 486D that the learned trial judge had not erred in ordering interest in that case from the date the defamatory statements were published. However, in so concluding, he was merely considering the application of s 6(1) of the Prescribed Rates of Interest Act [*Chapter 8:10*] and did not give any consideration as to whether the court should exercise the powers conferred by subs (2) of s 6.

Likewise, in this case and in other cases involving physical injury, where damages are assessed having regard to factors such as pain and suffering, loss of amenities and disfigurement, the court invariably fixes the level of damages having regard to the value of money and other economic circumstances as at the date of judgment and not the date of injury. That being the case, it seems to me that it would be inequitable for the court to order that interest should run from the date the cause of action arose or even from the date that the summons was served. When the court assesses the damages, it fixes the *quantum* which it considers is adequate compensation for the pain, suffering, loss of amenities, disfigurement, etc that the plaintiff has suffered and will, to some extent, continue to suffer for the rest of his or her life. By the time this case has finally been settled, just over six years have elapsed from the date of the injuries. If the court considers that an award for general damages in the amount of $124 100 in present day circumstances, is adequate, why should that figure be increased by 100% or 150% because of the interest factor over 4 or 6 years? Had the *quantum* of damages been fixed as at 13 December 1994, when the injuries were sustained, I am sure that it would have been less than $120 000, but then interest would have accrued, which would have compensated for the delay of 6 years. It is not as though there was some pecuniary loss which was incurred on the date the cause of action arose, that must needs be mitigated by the payment of interest thereon during the period of the delay between the date the pecuniary loss was caused and the date when payment of the damages is made.

In *Marufu* v *Mawona & Ors* 1996 (1) ZLR 593 (H), I considered the question of interest that was payable in respect of an award of general damages. At 596-597, I said:

"Section 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*] provides that every debt arising out of an unliquidated claim shall bear interest at the prescribed rate on the amount of the debt from the date when the cause of action arose unless the court, in terms of subs (2) thereof, otherwise directs. The court is empowered by subs (2) to direct otherwise where it considers it fair and just in the circumstances to do so. In this case, the accident occurred on 29 November 1993, so that was when the cause of action arose. All the pain and suffering experienced by the plaintiff

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occurred after that date. The summons was served

SMITH J

on the third defendant on 20 December 1995. I have assessed the damages suffered by the plaintiff on the basis of the value of the Zimbabwe dollar as at March 1996 when the application was made. In the circumstances, I do not think it would be fair and just if interest were to run from 24 November 1993. Prior to the enactment of Act 2 of 1994, which inserted s 6 in the Prescribed Rate of Interest Act [*Chapter 8:10*], interest ran on debts arising out of an unliquidated claim with effect from the date of judgment. The legislature changed that by introducing s 6 into the Act [*Chapter 8:10*]. From the amendment it is clear that the legislature considered that interest should run from a date prior to the date of judgment unless the court considered that such date was appropriate in the circumstances. It seems to me that in this case the date of service of the summons on the third defendant would be a reasonable date from which interest should run."

In *Rusike* v *Tenda Transport (Pvt) Ltd & Anor* 1997 (1) ZLR 495 (H), BARTLETT J, after referring to *Marufu*'s case *supra*, said at 503C:

"Obviously, [there have been] *quantum* changes in terms of the criteria laid down by Gubbay CJ in *Min of Defence* v *Jackson* 1990 (2) ZLR 1 (S) at 7-8. If, however, there is a substantial time gap between the date of service of the summons and the trial date, a court would need to consider ordering interest to run from a date closer to the trial date. I have considered that option. But in the exercise of my discretion I am of the view that in this matter interest from the date of service of the summons is appropriate."

It seems to me that, as a general rule and subject to any special circumstances, interest in respect of special damages should run from the date that the loss was incurred or, if such date is not established, then the date of summons and, in respect of general damages from the date on which the damages are assessed, which would be the date of judgment.

As regards costs, Eagle has agreed to pay costs up to and including 18 October 1999. As Kondoni has not been successful with her claim for interest, it must follow that she pays the subsequent costs.

It is ordered that judgment is entered for the plaintiff in the sum of $120 000 in damages, with interest thereon at the rate of 25% *per annum* from the date of judgment; and further an amount equivalent to interest on the sum of $11 398 at the said rate from 11 December 1998 to 31 March 1999. Costs of suit up to and including 18 October 1999 shall be paid by the first defendant and thereafter by the plaintiff.

Stumbles & Rowe, plaintiff's legal practitioners

Granger & Harvey, defendant's legal practitioners

VAN BUUREN *v* MINISTER OF TRANSPORT 2000 (1) ZLR 292 (HC)

Citation 2000 (1) ZLR 292 (HC)

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Case No	Judgment No. HH-39-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	February 1, 2000
Judgment	February 23, 2000
Annotations	None

Civil trial

Flynote

Aviation - aerodrome - liability of owner of aerodrome - defect in surface over which aircraft were habitually taxied - liability of aerodrome owner to operator of aircraft damaged by defect

Delict - negligence - liability - owner of aerodrome - defect in surface over which aircraft were habitually taxied - whether duty cast on owner to maintain aerodrome to safe standards - whether failure on part of aerodrome employees to detect defect was negligent

Headnote

The plaintiff was the owner of an aircraft which was operating out of Charles Prince Airport, Harare. He taxied his aircraft along a tarmac taxiway to a point opposite the threshold of the runway then being used and carried out the pre-takeoff checks. When cleared by the air traffic controller for takeoff, he started to taxy across the patch of grass between the taxiway and the runway. The aircraft moved only a few metres, then its nosewheel fell into a hole in the patch of grass. The propeller struck the ground and was badly damaged. The subsequent repairs also entailed the removal of the engine so that it could be checked for internal damage.

The official holding position for the runway was some hundreds of metres away. Although there was a published prohibition against taxying on grass surfaces at the airport, pilots had for many years taxied across that particular patch of grass, and the air traffic controllers had never enforced the prohibition, nor had they warned pilots that they could taxy across the grass at their own risk. There was evidence that the grass patch was inspected daily because pilots used it.

It was claimed, for the plaintiff, that the defendant's employees were negligent, in that, among other things, they had omitted to comply with their statutory duty to maintain the aerodrome in a safe condition; they had omitted to ensure that the runways and taxiways were maintained in a condition suitable for the safe taxying of aircraft; and they had omitted to fill in a hole in the taxiway.

Held, that although the Minister was empowered by s 6 of the Aviation Act [*Chapter 13:03*] to establish and maintain aerodromes, the words used in the legislation were permissive. Where the legislature has not positively enjoined that something shall be done but has merely satisfied itself with permitting something to be done, no duty to act can be implied. A litigant who

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contends that the legislature intended to impose an obligation bears the onus of showing that a duty can be implied from the wording of the statute. The power reposed in the Minister by the Act was discretionary. He could not be directed to exercise it. It

therefore did not create a duty giving rise to delictual liability. His liability could only arise if the exercise of his statutory power caused injury to another, and the power had been exercised negligently.

Held, further, that before the defendant could be held liable, it would have to be shown that his servants were aware of the existence of the hole or that their failure to notice it was due to negligence. The duty to guard against the likelihood of harm presupposes that the defendant is aware of the existence of a source of danger. In this case, the employees did what was reasonably prudent to ensure the safety of the aerodrome. They had not been shown to be negligent.

Cases Considered

Cases cited:

Admin, Cape v *Preston* 1961 (3) SA 562 (A)

Blackwell v *Port Elizabeth Municipality* 1978 (2) SA 168 (SE)

Breede River (Robertson) Irrigation Bd v *Brink* 1936 AD 359

Desai v *Wessels & Torlage & Anor* 1964 (1) SA 783 (D)

Julius v *Lord Bishop of Oxford* (1880) 5 AC 214

Moller v *SAR&H* 1969 (3) SA 374 (N)

Moulang v *Port Elizabeth Municipality* 1958 (2) SA 518 (A)

SAR&H v *Tvl & Consol Land & Exploration Co Ltd* 1961 (2) SA 467 (A)

Legislation considered:

Aviation Act [*Chapter 13:03*], s 6

Case Information

R Y Phillips, for the plaintiff

Mrs *L Hove*, for the defendant

Judgment

Chatikobo J: The plaintiff, who farms in the Burma valley, owns a Cessna 210 aircraft whose registration number is Z-BVB. On 26 February 1999, he flew from Burma Valley and landed at Charles Prince aerodrome where he intended to have an instrument fitted before proceeding to

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Harare Airport, there to reposition in preparation for a flight to Malawi the following day. He trained and qualified as a pilot in Mutare in 1973. His final pre-qualification tests were done at Prince Charles aerodrome. He has maintained his licence since then and has landed at Prince Charles aerodrome frequently over the last 25 years.

While the instrument was being fitted to the plane, the plaintiff walked to the control tower so that he could submit a flight plan in accordance with procedure. When that was accomplished, he returned to the hangar where his aircraft was parked. Before his time of departure came, he started up the engine, switched on the radio and contacted the control tower to request taxying instructions and to enquire as to which runway he was going to use. The air traffic controller instructed him to taxi to the holding position for runway 32. He then proceeded to taxi down to the threshold of runway 32. He stopped opposite the beginning of runway 32, then turned to face the runway until his aircraft was abeam the threshold of runway 32. He then went

through the set down pre-take off procedures so as to ensure that the aeroplane was ready for flight. Between the point where he was stopped and the threshold of runway 32, there is a grass patch. In order to access runway 32 from this point, the plaintiff had to taxi across the grass patch for some fifty metres. It was common ground that this is not the official holding position for runway 32. While in this position, the plaintiff called the air traffic controller and requested take-off instructions, but he was advised to hold his position because there was an aircraft about to land on the same runway. He was subsequently called by the air traffic controller who asked him if he was ready for an immediate take-off, which he said he was. The controller then told him to line up for an immediate take-off. The plaintiff pushed his throttle forward and commenced to taxi towards runway 32 across the grass patch. The aircraft moved for three metres before its nose wheel fell into a hole. The propeller which normally stands at 150 millimetres above the ground struck the ground and it was badly damaged. Damage to the propeller always necessitates the removal of the engine so that it is checked for internal damage. The plaintiff reported the accident to the controller. As a result of the accident the aircraft was incapable of any further flight operations.

The plaintiff said the hole into which the nose wheel fell must have been in existence for some time because on inspection he found that there was mature grass growing in the hole. He sought to taxi across the grass patch because he had been required by the controllers to use runway 32. It is the controller who dictates which runway should be used and the controller's decision is in turn dictated by the speed and direction of the wind. The plaintiff stated that whenever he has had to use runway 32 he has always accessed it by taxing across the grass patch. The difference between runway 32 and the others is that between the taxi way and the runway there is no tarred link. This much is apparent from the landing chart for Charles Prince airport which was produced as exhibit one. The official holding position for runway 32 is at the opposite end, near the control tower. For an aircraft to take off from the official holding position it would have to taxi up to the control tower, a distance of almost 900 metres. If it enters the runway from this position it would then have to backtrack along the runway to the threshold of the runway, execute a U-turn before taking off. It was inconvenient for both pilots and the

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controller to resort to the official holding position. A procedure was adopted whereby pilots could taxi across the grass patch. While he was awaiting taxing instructions, his aircraft was visible to the controller who has a 360° vision from the tower. When the controller gave the instruction that the plaintiff should taxi to runaway 32 he had the plaintiff's aircraft in full view and could tell that he was going to cross the grass patch. No instruction was given for plaintiff to desist from taxing across the grass. When the plaintiff

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was told from where he was, to expedite an immediate take-off, he took this to mean that he should taxi across the grass in order to take off immediately.

Evidence was also led from Craig Joseph Guthrie in support of the plaintiff's case. Guthrie is a commercial flight instructor who operates a flying school at Charles Prince airport. He has about 7 000 hours of flying, most of which have been from Charles Prince. He estimated that he has taken off and landed at Charles Prince 20 000 times or more. He said runway 32 can be accessed either through the official holding position or by cutting across the grass patch at the beginning of the runway.

According to Guthrie, prior to the accident involving the plaintiff's aircraft, only heavy aircraft used to access runway 32 through the official holding position. All the others used to taxi across the grass patch and no one was ever told not to cut across the grass patch. He did say, however, that the ultimate responsibility for the safety of the aircraft lies with the pilot but where there is a controlling authority the practice is to follow his instructions. It has always been possible for pilots to use the official holding position but in practice it was not used, especially during busy times. Controllers did not warn pilots against using the grass patch as a taxi way.

The air traffic controller who was on duty at the time of the accident, Safron Bikoko, gave evidence for the defendant. It was as follows. On the day in question, he opened the station and tested the equipment and ascertained that the wind speed and direction were such that runway 32 was in use that day. There is a tarred taxiway which runs parallel to the runway and leads to the holding position in front of the control tower. Pilots are required to go to that position for their pre-take off checks. When it is time for an aircraft to take off it enters the runway and backtracks to the threshold of the runway and after executing a U-turn it takes off using for the full length of the runway. He said that some pilots have a tendency of avoiding this procedure because it is a long process. Instead, they stop on the taxiway opposite the threshold for runway 32 from where they cut across the grass patch to access the threshold of the runway. It is common to see aircraft parked abeam the threshold of the runway ready to enter and take off. When an air traffic controller sees an aircraft holding in this position he tells the pilot over the radio that he crosses the grass patch at his own risk because it is prohibited to taxi across the grass verge. On the day in question, he told the plaintiff to taxi to the holding position for runway 32, by which he meant the holding position in front of the control tower. The plaintiff did not take that position. He positioned himself opposite the threshold for runway 32. After carrying out pre-take off checks from this position the plaintiff asked for a route clearance. Before giving the plaintiff the necessary clearance, the witness says he told him that he was crossing the grass

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patch at his own risk. He

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acknowledged the warning and clearance was given after the plaintiff had confirmed that he was ready for an immediate take off. As the plaintiff taxied towards the runway the accident occurred. Bikoko denied giving instructions to the plaintiff which required him to cross the grass patch. The option to taxi to the proper holding position remained open to the plaintiff. He denied that the use of the grass patch is of any convenience to the air traffic controllers.

On the day in question, there were puddles of water on the grass patch as it had rained the previous night. There was no pre-existing hole; he knows this because every morning the area of the runway, including the grass patch, is inspected for stones and broken surfaces.

Bikoko said when he told the plaintiff to expedite for an immediate take off, the latter had already decided to use the grass patch and had positioned himself accordingly. Not all light aircraft used the grass patch that day.

The airport manager, Priscilla Fungai Mawire, also gave evidence. She said aircraft are not permitted to use grass patches. There is no tarmacadamised link between the threshold of runway 32 and the corresponding taxi way. That is why aircraft should taxi up to the control tower for pre-take off checks before entering the runway. She is aware that some aircraft using runway 32 were taxying across the grass patch instead of using the official holding position. Air traffic controllers were told during training that they should advise pilots that they taxied across the grass patch at their own risk.

The grass on this portion of the aerodrome was always cut. Since the local pilots used this grass patch it was inspected daily. They told the pilots that they were using the grass patch at their own risk because they were aware of the inconvenience of using the official holding position. Numerous requests have been made to have a tarmac constructed to link the threshold of runway 32 to the taxi way in the area of the grass patch across which aircraft were taxying but this proposal has not been prioritised by the defendant Ministry.

In this trial, the plaintiff contends that the damage caused to his aircraft was due to the negligence of the employees of the defendant who he says were negligent in the following respects:

"(a) they omitted to ensure that the runways and taxiways at Charles Prince Aerodrome were maintained in a condition suitable for the safe taxying of aircraft;

(b) they omitted to fill in a hole on the taxiway;

(c) they omitted to comply with their general statutory duty to maintain the aerodrome in a safe condition;

(d) they gave plaintiff directions which required plaintiff to negotiate the taxiway."

Consequently, so the plaintiff contends, the defendant is liable to him for the cost of repairing the damage to the aircraft. The cost of repairs, which is no longer contested by the defendant, is

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the sum of $613 082.17. I am concerned only with the issue of liability.

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Both the plaintiff and Guthrie stated that the customary procedure at Charles Prince is for pilots flying small aircraft to taxi across the grass patch in order to access runway 32. The plaintiff stated that whenever he landed at Charles Prince and was required to use runway 32, he has taxied across the grass patch without objection from the controlling authorities. Likewise, Guthrie said that before the accident involving the plaintiff's aircraft he had never used the official holding position. He had always taxied across the grass patch. Bikoko and Mawire both acknowledge that pilots used to taxi across the grass patch in order to access runway 32. The evidence led before me leaves me in no doubt that the official holding position for runway 32 was virtually in disuse. This fact was not specifically contested on behalf of the defendant. No such contest could surmount the mass of evidence put before me which is to the contrary. What has been contended on behalf of the defendant, based on the evidence of Bikoko and Mawire was that the pilots - the plaintiff included - were aware that there was a specific prohibition against the use of the grass patch as a taxi way. The plaintiff did not deny knowledge of this prohibition, even though he said he had not seen the Aeronautical Information Publication (AIP) from which the document which is p 10 of exhibit one was extracted. It is apparent from that extract from the AIP that taxing on grass at Charles Prince was prohibited. Guthrie admitted as much but, he stressed, as the plaintiff did, that pilots continued for decades to use the grass patch to access runway 32, notwithstanding the prohibition. Neither Bikoko nor Mawire suggested that the controlling authority ever tried to enforce the prohibition. What they both said was that on each occasion that a pilot used the grass patch as a taxiway he was told that he was doing so at his own risk. Bikoko claims to have warned the plaintiff on 26 February 1998. Mawire could only say that it was part of their training that pilots should be told that they used the grass patch at their own risk.

The question of there being a mandatory practice to warn pilots against the use of the grass patch and the claim that this warning was administered to the plaintiff was raised for the first time in evidence. It was neither raised on the pleadings nor was it alluded to in the summary of evidence prepared for the purposes of the pre-trial conference. I do not accept that there was in existence such a practice or that the plaintiff was warned that he could taxi across the grass at his own risk.

In similar vein, I do not accept the plaintiff's assertion that he was required by Bikoko to taxi across the grass. What the plaintiff said in this regard was that while he was stationery abeam the threshold of runway 32 the controller asked him to line up for an immediate take off. The only way he could take off immediately would be to cross the grass patch so the controller must have been telling him to avoid the official holding position in order to expedite an

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immediate take off. It must be borne in mind that the plaintiff had already positioned himself in

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such a way as to make it obvious that he was going to go across the grass. The plaintiff himself did not go the length of saying he would not have used the grass patch if he had not been required to do so. In fact, he said he would have done so anyway because it was the accepted procedure. What Bikoko did was no more than resign himself to what he knew always happened and was about to happen again. Any suggestion that the plaintiff was led into a hazard by Bikoko is wholly groundless and must be rejected out of hand. This disposes of the fourth particular of negligence relied upon. Of the three grounds of negligence upon which reliance was placed, I propose to deal with the third ground first.

The plaintiff charges that the defendant's employees were negligent in that they omitted to comply with their general statutory duty to maintain the aerodrome and its approaches in a safe condition. It was pleaded on behalf of the defendant, in answer to this claim, that the defendant's employees complied "with their statutory duty of maintaining the aerodrome to prescribed safety standards strictly". The question which should first be answered is whether there is a duty cast upon the defendant to maintain the aerodrome and its approaches in a safe condition. In urging me to hold that such a duty exists, Mr *Phillips*, who appeared on behalf of the plaintiff, placed reliance on s 6 of the Aviation Act [*Chapter 13:03*] (the Act) which provides that the Minister may establish and maintain aerodromes and provide and maintain roads and approaches thereto.*(53) The section is not couched in obligatory terms. The words used are permissive, and words of permission do not as a general rule create a duty in the absence of a specific prohibition or other *indicia* to the contrary. In what are now generally referred to as the Municipality cases in South Africa, the courts have consistently held that where the legislature has not positively enjoined that something shall be done but has merely satisfied itself with permitting something to be done, no duty to act can be implied because in such a case the statute gives only an enabling and discretionary power. A litigant who contends that the legislature intended to impose an obligation bears the onus of showing that a duty can be implied from the wording of the statute. In *Moulang* v *Port Elizabeth Municipality* 1958 (2) SA 518 (A) at 521E, SCHREINER JA stated:

"The liability of municipalities in respect of injuries caused through holes and unevenness in streets has been dealt with in a number of cases in our courts. The most important, for present purposes, appear to be *Liesbeek Municipality* v *Partridge* 4 SC 300; *Halliwell* v *Johannesburg Municipal Council*, 1912 TPD 593; 1912 AD 659; *Kerr* v *Johannesburg Municipality* 1915 WLD 87; *Bulawayo Municipality* v *Stewart* 1916 AD 357; *Cape Town*

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Municipality v *Clohessy* 1922 AD 4; *De Villiers* v *Johannesburg Municipality* 1926 AD 401; *Richards* v *City Council of Johannesburg* 1930 TPD 754. The effect of these cases, and more particularly of the four cases in this court, is that municipalities that have permissive powers in respect of the construction and maintenance of streets and are not by statute required to keep them in repair, are not liable for damages caused by their mere omission to construct or repair them. A municipality is only liable when it has introduced a new danger or source of danger."

See also *Blackwell* v *Port Elizabeth Municipality* 1978 (2) SA 168 (SE) at 170B-C; *Administrator, Cape* v *Preston* 1961 (3) SA 562 (A); *Desai* v *Wessels & Torlage & Anor* 1964 (1) SA 783 (D); *Moller* v *SA Railways & Harbours* 1969 (3) SA 374 (N).

The *dictum* quoted above does not refer to the valid principle of interpretation that a duty can in appropriate circumstances, be implied even in a permissive power, a fact which was properly

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recognised by Botha JA in *SAR & H* v *Transvaal and Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) at 504D-F:

"These passages show, in my opinion, that the most weighty consideration, from which a legal duty may be implied in a permissive power, is that the object of the power is to effectuate either a private or a public right - a right requiring that the power conferred shall be exercised and therefore capable of enforcement."

As long ago as 1880, the then Lord Chancellor (Earl Cairns) in his speech in the House of Lords in *Julius* v *Lord Bishop of Oxford* (1880) 5 AC 214 at 222-3, delineated eloquently and with admirable clarity some of the factors which serve as guides in determining if a permissive power is coupled with a duty:

"The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

...

And the words 'it shall be lawful' being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

I have endeavoured to apply those principles to the words of the statute upon which reliance is placed in the present case in search of any pointers which are suggestive of the existence of an obligation and have convinced myself that the section does not create an obligation. It does no more than authorise the Minister to construct and maintain aerodromes. The power reposed in the Minister is discretionary. He cannot be directed to exercise it

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against his will. It therefore does not create a duty giving rise to delictual liability. The Minister's liability can only stem from prior positive conduct or omission which gives rise to danger or a source of danger. In other words, it is only when the exercise of the power has caused injury to another person that liability arises, but then only if the power has been exercised negligently. In this context, it will suffice to refer to a passage in de Villiers JA's judgment in *Breede River (Robertson) Irrigation Board* v *Brink* 1936 AD 359, as quoted in *Reddy & Ors* v *Durban Corporation* 1939 AD 293 at 299:

"If an interference with private rights is justified, then the exercise of the statutory power is limited by another consideration, namely, that it must be carried out without negligence. If by a reasonable exercise of the powers the damage could be prevented, it is negligence not to make such reasonable exercise of such powers. If a statute authorises a public body to make streets and roads, it may do so ... provided there is no negligence. The public body must take measures reasonably practicable to prevent such injury. The onus lies on the party complaining of such injury to prove such negligence."

The particulars of negligence relied on in this regard - which can be combined into one, namely, that defendant's employees omitted to ensure that runways and taxiways were maintained in a safe condition suitable for the safe taxing of aircraft because they omitted to fill in a hole on the

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taxiway - must be considered against the backdrop of the principles I have just dealt with. The evidence of both Bikoko and Mawire was that the aerodrome - including the grass patch - was inspected by qualified personnel every morning and that these daily inspections revealed no hole in the ground prior to the accident. The cause of there being a hole is unknown. No evidence was led on the point. The hole was situated at a point on the grass patch which was used every day and had been used on the day of the accident by several aircraft, all of which had safely taxied onto runway 32. Can it then be said that the defendant's employees ought to have foreseen that damage might be caused to a taxing aircraft by a hole in the ground of which they were not aware? In the words of Solomon AJ in the *Blackwell* case *supra* at 171F:

"Negligence is the failure to take proper care, and proper care is the care which, according to law, would be taken by a prudent and reasonable man. The question whether in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided upon the consideration of all the circumstances."

And further down the page at para H, the learned acting judge continued:

"The law does not set up impossible standards, and it does not make extravagant demands. Moreover, a person is entitled to assume that others will take reasonable care of themselves and will keep their eyes open."

The hole into which the nose wheel of plaintiff's aircraft fell might conceivably have been caused by any one of a myriad of factors unconnected with defendant's exercise of his powers such as, for instance, burrowing

animals creating a home or searching for food, or other aircraft taxying over earth whose firmness may have been compromised by termites. The presence of the hole was not known to the defendant's employees. They have not been shown to have been negligent in failing to notice the hole. As I have already stated several aircraft taxied across the same grass patch, possibly straddling the hole, with no incident.

Before the defendant can be held liable, it must be shown that his servants were aware of the existence of the hole or that their failure to notice it was due to negligence. The duty to guard against the likelihood of harm presupposes that the defendant is aware of the existence of a source of danger. Had the allegation been made and proved that the defendant's employees allowed the plaintiff's aircraft to taxi across the grass patch notwithstanding that to their knowledge there was a hole in the ground, then one could say they were negligent. See *Moller*'s case *supra* at 377H-378A-B.

It seems to me, then, that the plaintiff has failed to discharge the onus of showing that the existence of the hole was known to the defendant's employees, less still that it is they who caused the excavation. They did what was reasonably prudent to ensure the safety of the aerodrome. They have not been shown to have been negligent.

In all the circumstances, I would dismiss the plaintiff's claim with costs.

Gill Godlonton & Gerrans, plaintiff's legal practitioners

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Civil Division of the Attorney-General's Office, defendant's legal practitioners

MACHIVA *v* COMMERCIAL BANK OF ZIMBABWE LTD & ANOR 2000 (1) ZLR 302 (HC)

Citation	2000 (1) ZLR 302 (HC)
Case No	Judgment No. HH-41-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	February 16, 2000
Judgment	February 23, 2000
Annotations	None

Civil application

Flynote

Property and real rights - immovable property - transfer of - can only be secured by registration in deeds office - until registration effected, seller remains owner

Headnote

A person had sold a piece of land to the applicant. After having paid the full purchase price, the applicant had been forced to obtain a court order to compel the seller to effect transfer of the land to him. After a long delay this order was served on the seller. A few days after it was served, the respondent bank, which had lent money to the seller, caused a mortgage bond to be registered over the land that had been sold in order to secure a loan. The applicant applied for an order that the bank cancel the mortgage bond. He argued that as he had become the beneficial owner upon payment of the full purchase price, the fact that the property was still registered in the seller's name was not conclusive proof that he was still the owner of the property at the time the mortgage bond was registered.

Held, that the principle that registration of title is not conclusive proof of ownership does not apply in a situation where there has been no transfer of title to the buyer. It only applies where, for example, for purposes of expediency, property is registered in the name of an agent.

Held, further, that registration of transfer of immovable property is the equivalent of delivery of movables. Additionally, s 14 of the Deeds Registries Act [*Chapter 20:05*] provides that ownership of land can only be conveyed by means of a deed of transfer.

Held, further, that registration of the land in name of the seller served as notice to the financial

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institutions and others that the seller was the owner of the land and financial institutions are entitled to rely upon such registration records as reflecting ownership.

Held, further, that ownership of the land could only have passed from the seller to the applicant upon registration of the transfer. As transfer had not been effected, legally the seller remained the true owner of the land when the mortgage was registered. The fact that the applicant had personal rights against the seller arising out of the sale did not make him the owner.

Held, therefore, that there was no basis for ordering the bank to cancel the mortgage bond.

Cases Considered

Cases cited:

Frye's (Pty) Ltd v *Ries* 1957 (3) SA 575 (A)

Kassim v *Kassim* 1989 (3) ZLR 234 (H)

York & Co v *Jones* 1961 R & N 490 (SR)

Young v *van Rensburg* 1991 (2) ZLR 149 (S)

Legislation considered:

Deeds Registries Act [*Chapter 20:05*], s 14

Case Information

F Girach, for the applicant

A P de Bourbon SC, for the respondents

Judgment

Chatikobo J: The applicant and the second respondent (Chitanda) concluded a written agreement on 21 August 1984 in terms of which the applicant purchased from Chitanda a piece of land situated in the Marondera area on instalments. The applicant has paid the full purchase price. It appears that after the applicant had paid the full purchase price Chitanda refused to pass transfer to the applicant thereby forcing the latter to seek an order from this court compelling Chitanda to effect transfer. An order to that effect was made on 26 July 1994 but was only served on Chitanda on 6 June 1997. On 2 July 1997, the first respondent (the bank) caused a mortgage bond to be registered over the property to secure a $2 000 000 loan granted to Chitanda.

The applicant now seeks from this court an order declaring that the bond registered over the property by the bank is void *ab initio* and that the bank should be ordered to cancel the bond. The relief sought is based on the contention that the applicant became the beneficial owner of the property upon payment of the purchase price. Consequently, so it is contended, the fact that the property was still registered in Chitanda's name is not conclusive proof that Chitanda was

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still the owner of the property. Reliance is placed on cases and textbook authorities which hold that registration of title in the Deeds Registry is not conclusive proof of ownership. See *Young* v *van Rensburg* 1991 (2) ZLR 149 (S) and *Kassim* v *Kassim* 1989 (3) ZLR 234 (H). In the latter case, Korsah JA observed at p 237B-C that:

"On the authority of *Cunning* v *Cunning* 1984 (4) SA 585 (T) cited in Mr *Gillespie*'s written arguments, the registration of the property in the name of the one party raises a presumption in her favour, that that person has the sole right and exclusive beneficial ownership of the property unless the defendant proves to the contrary. The duty herein lies upon the defendant to prove on a balance of probabilities, his claim that he was a part owner of the property."

See also Silberberg and Schoeman *The Law of Property* 3 ed p 108 and Carey Miller *The Acquisition and Protection of Ownership* p 171-177.

The principle that registration of title is not conclusive proof of ownership does not cause me any difficulty at all. It is the applicability of the principle to the facts of this matter which I find questionable. The principle can only be of application in those cases where, for purposes of expediency, property is registered in the name of an agent or where the true owner agrees to have the property in the name of a spouse or where, for fraudulent reasons, the property is registered in the name of the wrong person or where the

underlying cause for the registration aborts. It does not apply in a situation involving a buyer who has never taken transfer of title.

We are concerned here with a sale of land. Like in any other sale, the sale of immovable property should be accompanied by delivery and, in this context, it must always be borne in mind that registration of transfer is the equivalent of delivery of movables. In the case of *York & Co* v *Jones* 1961 R&N 490 (SR) 493F-494A-C, Murray CJ stated:

"A seller of immovable property is under at least three duties to the purchaser in regard to the delivery of the property. He is firstly bound to effect transfer in the Deeds Office into the purchaser's name. Secondly, he is obliged to give physical possession of the property to the purchaser on or before the stipulated date. Thirdly, he is under a duty even after transfer and giving of possession, to guarantee the purchaser against eviction, that is, subsequent dispossession, total or partial, by third parties claiming a title superior to that which the purchaser has obtained from the seller."

Then, Lee and Honoré *South African Law of Obligations* 3 ed para 241 say:

"The seller is bound to deliver the thing sold to the purchaser. Delivery means: (i) in the case of immovable property: (a) registration in the office of the Registrar of Deeds of transfer into the name of the purchaser, and (b) giving possession to the purchaser: (ii) and (iii) ... not relevant."

The last word on this point is authoritatively spoken by none other than Wessels *Law of Contract* 2 ed paras 4497 and 4498:

"4497 ... In the sale of immovable property, the delivery is effected by registration *coram lege loci*. In Holland, this registration was usually carried out at the Court of the Schout and Schepenen, but in South Africa it takes place at the Deeds Offices of the different provinces.

4498 Immovable property is not considered to have been delivered, and no ownership passes until registration

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> has been effected and, therefore, there cannot be a delivery of land or houses *longa manu.* At the completion of the sale the purchaser acquires a right *in personam ad rem adquirendam* against the seller ..., but he acquires no *jus in re* until the actual registration ..."

This indisputable common law position has been incorporated into s 14 of the Deeds Registries Act [*Chapter 20:05*] which provides that the ownership of land may be conveyed from one person to another "only by means of a deed of transfer executed or attested by a registrar".

The obvious conclusion is that as at 2 July 1997 the applicant had not taken delivery of the *res vendita* and ownership had not passed from Chitanda to him. It was yet to be conveyed. And, while ownership remained vested in Chitanda by virtue of the extant registration in his name, such registration served as notice to the whole world, the bank included, that Chitanda was the owner of the land.

One of the important functions served by the requirement of land registration is the provision of information to members of the public, in particular to financial institutions who may want to encumber properties as security for

money loaned to the owners of those properties. Similarly, people who intend to acquire land also resort to the records held in the Deeds Office to ascertain if the land which they want to purchase is free of any encumbrances. Compare *Frye's (Pty) Ltd* v *Ries* 1957 (3) SA 575 (A). Generally speaking, members of the public are entitled to rely on the records held in the Deeds Office and to assume that such records reflect the position about land ownership and the burdens which may be reflected on the deeds of transfer. If the position were otherwise, the land registration system in the entire country would be a farce and the lending system in the financial sector would be thrown into chaos. However, the basis of my decision is not that the bank in the present matter assumed from the fact that the property was registered in Chitanda's name that he was the owner. Rather, I base my decision on the fact that ownership could only have passed from Chitanda to the applicant upon registration of transfer occurring and that the act of delivery necessary to pass ownership could not have been complete before registration of transfer. Legally, therefore, Chitanda remained the true owner until 2 July 1997 when the mortgage bond was registered. The fact that the applicant has personal rights arising from the sale which he can enforce against Chitanda does not make him the owner of the land before he takes transfer and the only way he can take transfer is by ensuring that the debt for which the land was mortgaged as security is discharged. Unless that happens, the bank is entitled to hold on to the security offered by Chitanda.

There is no merit in the application and it is dismissed with costs.

Stumbles & Rowe, applicant's legal practitioners

Gollop & Blank, first respondent's legal practitioners

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MINISTER OF HOME AFFAIRS & ANOR *v* BANGAJENA 2000 (1) ZLR 306 (SC)

Citation	2000 (1) ZLR 306 (SC)
Case No	Judgment No. S-13-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA and Sandura JA
Heard	February 20, 2000
Judgment	February 24, 2000
Annotations	None

Civil appeal

Flynote

Damages - delictual - unlawful arrest and imprisonment - seriousness of - damages should be exemplary and punitive

Headnote

The respondent brought a claim for damages for unlawful arrest and imprisonment. He was arrested late at night and was held in police custody overnight before being released at midday the next day.

A police officer (the second appellant), who had been in the police force for many years, had gone to a bar together with another police officer. The police officers had been drinking and were apparently drunk. In the bar they encountered the respondent and his friend. The respondent was known to the arresting officer. The respondent and his friend left the bar. They were about to enter a car belonging to the respondent when they were approached by the police officers and accused of trying to steal the car. They were ordered out of the car and searched. The respondent told the officers that the car belonged to him. The second appellant started threatening the respondent and his friend with a firearm. The police officers refused to produce proof of their identities. Thinking that the two officers were car-jackers, the friend tried to run away and the second appellant opened fire on him but missed him. He also fired at the respondent from close range but again missed him. The respondent and his friend were handcuffed and taken to a police station. The respondent tried unsuccessfully to persuade the second appellant to take him to his house which was nearby where he had the documents establishing that he was the owner of the car. The officer in charge of the police station refused to detain the respondent as he knew the respondent to be the owner of the car. The second respondent and his fellow officer then drove the respondent to another police station and attempted to have him detained there. This officer in charge also refused to detain the respondent, saying that he knew him to be the owner of the car. Another officer at the station also refused to detain the respondent, but at the insistence of the second appellant that officer

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allowed the second appellant personally to detain the respondent at that station provided he took full responsibility for the consequences of his action. The next morning the second appellant came to the station and on seeing the respondent he expressed surprise that he had arrested a person he knew and said he would not have arrested him if he had realised this.

The trial court awarded the respondent $20 000 damages. Dismissing the appeal against the quantum of damages:

Held, that deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to personal liberty. Our courts have

properly taken the stance that deprivation of liberty is a very serious infraction of fundamental rights. Damages should be exemplary and punitive in order to deter would-be offenders.

Held, further, that there were aggravating circumstances in the present case and the amount of damages awarded was appropriate.

Cases Considered

Cases cited:

Botha v *Zvada & Anor* 1997 (1) ZLR 415 (S)

Guriranai v *Kwenda & Ors* HH-194-91

Muchenje v *Chinyanganya* HH-95-94

Muzonda v *Min of Home Affairs* 1993 (1) ZLR 92 (S)

Mwete v *Chimanzi & Ors* HB-5-93

Case Information

Miss *L Matanda-Moyo*, for the appellants

T J Nyapadi, for the respondent

Judgment

Muchechetere JA: This is an appeal against an order of the High Court, Harare, on 7 July 1999 awarding the respondent the sum of $20 000 as damages. The appellants had been found guilty of wrongful and unlawful arrest, detention and assault and that they were therefore liable to pay the respondent damages. They only appealed against the *quantum* of damages.

The learned judge took into account the following facts in the assessment of damages. The facts were in accord with the evidence of the respondent and his witnesses. He accepted their evidence as against that of the second appellant and his witnesses. These were to the that the

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second appellant was a police officer of eighteen years' standing. He and a colleague, one Mufaro Chikonyora ("Chikonyora"), a police officer of twenty-one years' standing, were on duty when the incident in question. They went into Alabama Bar at about 11.30 p.m. on the night of 29 April 1998. They found the respondent and his friend, one Trevor Chibanda ("Trevor") drinking beer. The second appellant, who was facially known to the respondent - they had played snooker at the same bar on at least four occasions - and the barman asked the respondent to buy him a beer. The latter obliged and the second respondent was given the beer after he had finished the beer he was drinking.

The appellant and Trevor thereafter left the bar and proceeded to their motor vehicle which was parked some twenty metres or so from the bar in a fully lit area. The motor vehicle's driver's door was damaged and it could not be opened from outside. The respondent had to open the front passenger door for Trevor to get into the motor vehicle first and then open the driver's door for him. No sooner had they done this than the second appellant and his colleague Chikonyora approached them and accused them of being motor

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vehicle thieves. They ordered the two out of the motor vehicle and thereafter to raise their hands and place them on top of the motor vehicle. They complied. They were then searched and were thereafter ordered to sit in the back of the motor vehicle. The appellant protested, saying the police officers had no cause to subject them to such treatment as the motor vehicle belonged to him. The police officers ignored the protest and the second appellant started threatening the respondent and Trevor with a firearm. The police officers also refused to produce their identity.

Whilst the police officers were outside the motor vehicle the respondent and Trevor exchanged views on the identity of their attackers. Trevor was of the view that the two were motor vehicle jackers and decided to run away. The respondent failed to dissuade him from his intended action. He opened the motor vehicle's right-hand door and ran into a corridor nearby. The second appellant fired three times at Trevor, missing him, before his firearm jammed. After that the respondent got out of the motor vehicle. The second appellant then fired at him from close range but also missed. The respondent fell to the ground, was handcuffed and then ordered to sit in the back of the motor vehicle. Another police officer then arrived at the scene. The respondent was thereafter driven to Marlborough Police Station by the newly arrived police officer under the watchful eye of the second appellant. Chikonyora followed them in a police motor vehicle.

The respondent explained that he did not, at the time in question, have in his possession documents to prove that he was the owner of the motor vehicle but told the second appellant that he lived only some five hundred metres away from the scene. He invited them to accompany him to his home so that he could prove his ownership of the motor vehicle. The two police officers refused his invitation and also refused to accept his protestations of innocence.

At Marlborough Police Station the police officer in charge refused to detain the respondent. His reasons were that he knew the respondent as the owner of the motor vehicle in question and that the police station had that night received no report of a stolen motor vehicle. The second

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appellant and Chikonyora instead drove the respondent to Avondale Police Station in an attempt to detain him there. There the police officer in charge also refused to detain the respondent. He also stated that he knew the respondent as an employee of CMED and that he also knew him as the owner of the motor vehicle in question. That officer was finishing his shift and he immediately left. The second appellant approached another officer at the Station who also refused to have the respondent detained. However, upon the second appellant's insistence the officer allowed the second appellant to personally detain the

respondent stating that it was the second appellant who would bear the full consequences of his action. The second appellant thereafter took the necessary steps to have the respondent detained, resulting in the latter being detained at Avondale Police Station overnight.

The following morning the second appellant arrived at Avondale Police Station at about 7.30 a.m. On seeing the respondent, he expressed surprise that he had arrested a person he knew and he would not have detained him if he had realised that he knew him. He then promised that he would have him released later. He went away and returned at about 11.00 a.m. He thereafter took the respondent to Marlborough Police Station and there released him at between 11.00 a.m. and 12.00 noon. The respondent was released without being charged with any offence.

Miss *Matanda-Moyo*, for the appellants, submitted that the damages awarded were manifestly excessive and induced a sense of shock. She stated that the respondent was detained for a relatively short period - twelve hours. In this connection, she cited the case of *Botha* v *Zvada & Anor* 1997 (1) ZLR 415 (S) where a seventy-one year old man, who was arrested and illegally detained for six days, was awarded $20 000 as damages.

She also submitted that although the courts view deprivation of liberty as a very serious breach of a fundamental right they should seek to award damages conservatively. In this connection, she cited the case of *Guriranai* v *Kwenda & Ors* HH-194-91. It is, however, worthy of note that in this case the court was considering damages in connection with a motor vehicle accident. The sentiments expressed therein do not necessarily apply in the present situation where there was unlawful deprivation of personal liberty.

Ms *Matanda-Moyo* also cited as guidelines to just awards in cases of his nature the following cases: *Muzondo* v *Minister of Home Affairs infra* where a man who was detained for twenty-one hours on Christmas Eve was awarded $30 000 as damages; *Mwete* v *Chimanzi & Anor* HB-5-93 where for unlawful detention for two days the plaintiff was awarded $7 500; and *Muchenje* v *Chinyanganya & Ors* HH-95-94 where a senior officer in a political party who was arrested by the police and kept under humiliating and cold conditions in a cell for twenty-nine hours was awarded $5 000 for *contumelia* and $4 000 for physical discomfort and anguish.

Mr *Nyapadi*, for the respondent, submitted that unlawful arrest and detention is a serious offence and that damages to be awarded should be exemplary and punitive in order to deter would-be offenders. I agree. See *Botha* v *Zvada & Anor* 1997 (1) ZLR 415 (S) at 42-43, where KORSAH JA said:

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MUCHECHETERE JA

"As regards the *quantum* of damages, an action for false imprisonment is one of the forms of *actio incurarum* (*sic*), and so proof of actual damage is not necessary to support such action. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to liberty. Our courts have quite properly taken the stance that deprivation of liberty is a very serious infraction of fundamental rights: *Allan* v *Min of Home Affairs* 1985 (1) ZLR 339 (H) at 346.

In *Feldman* v *Min of Home Affairs supra* (1992 (2) ZLR 304 (S)) this court awarded a sum of $2 500 for a detention overnight. In *Muzonda* v *Min of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 101 this court, after observing that awards of damages made in recent decisions provide only general guidance, remarked that:

'Each case is in a sense without parallel, having individual subjective aspects to it', and awarded damages of $3 000 for a detention lasting twenty-one hours."

In the *Botha* case *supra*, the sum of $20 000 was considered appropriate for a seventy-one year old man who was detained at Gweru Central Police Station for six days and had to share a cell with fourteen other persons. See also *Muzonda*'s case *supra* at 100-101 where the CHIEF JUSTICE said:

"The deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. The importance which attaches to such a fundamental right was eloquently spoken (to) by Reynolds J in *Allan* v *Minster of Home Affairs* 1985 (1) ZLR 339 (H) at 346B-D ...

For this type of civil wrong, there must be an exemplary element in the assessment of reparation. I respectfully agree with the comment of McNally JA in *Chikowore* v *Nyamusura* S-7-91 (not reported) that:

> 'The hope must be that the police will take steps to avoid repetitions of such cases if the price of non-compliance is higher rather than lower'."

The respondent in this case was going about his business when he and his friend were set upon by the second appellant and his colleague. The second appellant was wielding a firearm and attempted to shoot both the respondent and his friend, causing them to fear for their lives. The second appellant and his colleague would not listen to the respondent's protestations of innocence and refused his offer to go and prove that the motor vehicle in question belonged to him. They had the respondent handcuffed. On three occasions, at the two police stations, the second appellant would not release the respondent even though he was told by his fellow police officers that the respondent was known to them and they knew that the motor vehicle belonged to him. he insisted on having the respondent overnight. He only released the respondent at midday the next morning.

In my view, the matter was aggravated by the fact that the two policemen had been in the police force for long periods. They were drinking alcohol on duty. And they appear to have been drunk - the second respondent's refusal to listen to the advice of his colleagues at the police stations and the fact that

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he only became aware that he knew the respondent the next morning are evidence of

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drunkenness. They also threatened unarmed civilians with firearms.

All in all, I consider that the award of damages made by the learned trial judge is appropriate. It is even more so when consideration is taken of the dramatic decline in the value of our money since the incident occurred. It should also be stated that the cases cited above as guidelines for the award of damages were decided before the dramatic fall of the country's currency.

In the result, the appeal is dismissed with costs.

GUBBAY CJ: I agree.

SANDURA JA: I agree.

Civil Division of the Attorney-General's Office, appellants' legal practitioners

Gutu & Associates, respondent's legal practitioners

S *v* TSIKIWA 2000 (1) ZLR 312 (HC)

Citation	2000 (1) ZLR 312 (HC)
Case No	Judgment No. HH-48-00
Court	High Court, Harare
Judge	Adam J
Heard	February 24, 2000
Judgment	February 24, 2000
Annotations	None

Criminal review

Flynote

Criminal law - statutory offences - motoring offences - Road Traffic Act [Chapter13:11] - s 55(2) - driving whilst under the influence of alcohol - presumption that driver under the influence to prohibited extent when blood/alcohol level above prescribed limit - what is required to rebut presumption - mere assertion by accused that he would have arrived at destination safely not enough to rebut presumption

Headnote

The accused, who had been drinking alcohol, was stopped by the police. Apart from the fact that he admitted that he was drunk and smelt of alcohol, a breath test showed that his blood/alcohol level was 175 mg/100 ml. He was charged with driving whilst under the influence

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of alcohol to such an extent as to be incapable of having proper control of the vehicle, in contravention of s 55(2) of the Road Traffic Act [*Chapter 13:11*]. Section 55(3) creates a presumption, rebuttable by the accused, that if at the time of the offence his blood/alcohol level was over 150 mg/100 ml, he was under the influence of alcohol to such an extent that he was incapable of having proper control of his vehicle.

At the trial, the accused asserted that he had proper control because, he said, he had driven from where he was to the place where he was stopped and if he had not been stopped he would have arrived safely at his destination. The trial magistrate took this to mean that if the accused had been confronted with an emergency he would have been capable of exercising the skill required of a normal driver. The magistrate considered that the accused had rebutted the presumption and convicted him of the lesser offence of driving when his blood/alcohol level was above 80 mg/100 ml.

Held, that the magistrate had erred. It is not necessary that there be anything irregular about a person's driving before he may be convicted of drunken driving. The purpose of the legislation is clearly to deter drunken drivers from driving at all, with drastic penalties, and the rebuttable presumption is to assist the prosecution in convicting such drivers. What would constitute rebutting evidence would depend on the specific circumstances. A mere assertion by the accused that he would have reached his destination, apart from being self-serving, would not suffice. Evidence that, for example, the breathalyser machine was not working could constitute rebutting evidence.

Cases Considered

Cases cited:

R v *Bezuidenhout* 1953 SR 245

S v *Chipato* HH-202-90

S v *Collington* 1970 (2) RLR 6 (G); 1970 (4) SA 325 (R)

S v *Johnson* HH-50-94

S v *Sibanda* HB-72-86

Legislation considered:

Road Traffic Act [*Chapter 13:11*], s 55(3)

Judgment

Adam J: The accused was charged with the contravention of s 55(2) of the Road Traffic Act, in that he drove a motor vehicle whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle. The provincial magistrate convicted him of driving with a concentration of alcohol of 175 milligrams per 100 millilitres of blood in contravention of s 54(2) of that Act, having found that the presumption under s 55(3)(a) of that

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Act had been rebutted by the accused. The accused had, as shown by a breath test, 175 milligrams of alcohol per 100 millilitres of blood. In terms of s 55(3)(a) of that Act, that concentration of alcohol in his blood raised a presumption, unless the contrary was proved by him, that he was at that time under the influence of alcohol to such an extent as to be incapable of having proper control of his motor vehicle.

In his reasons for judgment, the trial magistrate made reference to *S* v *Collington* 1970 (2) RLR 6, *S* v *Sibanda* HB-72-86, *S* v *Chipato* HH-202-90 and *S* v *Johnson* HH-50-94. He said that the above cases established that, even if the accused drove his vehicle normally, a court could properly convict him of contravening s 55(2) if the court is satisfied that the accused was so intoxicated that it can be inferred that from his intoxication he would not have been capable of exercising the degree of skill required of a normal driver if confronted with an emergency.

In his evidence, the accused said that before he drove his motor vehicle he was drinking beer and that he drove at 7.45 p.m., even though he knew he was under the influence of alcohol. He accepted that he drove under the influence of alcohol. He further admitted that he was drunk. Further, the police officer who stopped him detected a distinct smell of alcohol. The accused said that he had "proper control because he drove from where he was up to when he was stopped" by the police and that if he had not been stopped by them he would have arrived where he was going safely. From what the accused indicated about his driving, the trial magistrate said that this tended to imply that the accused was actually saying that if ever he was confronted with an emergency, he would have been capable of exercising the degree of skill required of a normal driver.

The regional magistrate wrote to the trial magistrate, pointing out that the accused only mentioned that if he had not been stopped, he would have reached his destination. Because he so asserted, he is said by the trial magistrate to have rebutted t0he presumption. The trial magistrate did not

ADAM J

point out anything else to show that the accused had rebutted the presumption. The regional magistrate informed the trial magistrate that those cases referred to by the trial magistrate actually established that if there were no presumption, it would have been impossible for the prosecution to prove the allegations, and that to conclude that where an accused simply asserted that he would safely reach his destination he had rebutted the presumption would defeat the purpose of the presumption. The regional magistrate said that, in this case, it did not appear that the accused had rebutted the presumption. The accused was required to go further then merely mentioning that he would have reached his destination safely. The accused had a very high reading of 175 milligrams of alcohol in his blood. The accused did not dispute that he was driving under the influence of alcohol. No other evidence was led. There was nothing to indicate that he would have managed to control his motor vehicle if he had been faced with an emergency. The regional magistrate said that, from the record, there seemed to be no grounds for the trial magistrate to hold that the accused had rebutted the presumption and the cases cited by the trial magistrate did not bear him out in the absence of any evidence. He invited the trial magistrate to respond. In his reply, the trial magistrate simply stated that he stood by his

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reasons for judgment.

I agree entirely with the regional magistrate. In *S* v *Collington supra*, cited by the trial magistrate, Beadle CJ examined the history of the road traffic legislation before considering the amendment which made it an offence for any person who, when driving or attempting to drive a motor vehicle, was under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of such vehicle. The issue before the court was whether or not the prosecution, in order to show that an accused was intoxicated to such an extent as to be incapable of having proper control of his vehicle, must prove that the accused actually drove in a fashion which showed that he lacked such control. The learned Chief Justice referred to *R* v *Bezuidenhout* 1953 SR 245 which dealt with the offence of driving a vehicle when under the influence of intoxicating liquor. Beadle CJ said at 10-11:

"In *Bezuidenhout*'s case *supra*, TREDGOLD CJ said (see p 246):

> 'The slightly intoxicated driver who is led by his condition to drive at a pace and in a manner when his retarded reactions make him a menace on the road, is just as much within the prohibition in the section as *the more intoxicated driver who proceeds slowly and with exaggerated caution*' (emphasis is mine).
>
> The words underlined make it clear that an accused may be convicted of drunken driving even though there is nothing in his actual driving which is irregular ..."

Then at p 12F-G he went on:

"*Dicta* more in point, however, are those of MILNE AJA, in the case of *S* v *Lombard* 1967 (4) SA 538 (A) ... At p 549, MILNE AJA is reported as saying:

ADAM J

> 'It seems to be quite clear from *R* v *Spicer* that even a slight degree of impairment or diminution of faculties due to the consumption of liquor will suffice for a conviction under the relative legislation ...'."

At p 13A-B he said:

"Nothing emerges plainer from this passage than the fact that an accused may be convicted even though there is nothing irregular in his driving ... If, in order to prove that the accused was drunk within the meaning of the Act, it was necessary to shew, from the manner in which the accused actually drove, that he was drunk, the State could never secure a conviction for an attempt at all, because the same evidence would be required to prove the attempt as would be required to prove the substantive offence ..."

Finally, at p 13G he said:

"I do not want it to be understood, however, that the manner in which the accused actually drives is an irrelevant consideration in determining his guilt under the section. Far from it : the manner in which the accused actually drives is most important evidence proving his state of intoxication; but the State can secure a conviction even though the accused drives perfectly, provided that the court is satisfied, from other evidence, that he was so drunk that the only conclusion which can be drawn is that he was not capable of being in proper control of a car at the time. For example, even though he was driving perfectly at the time, it may be inferred, from his state of intoxication, that, if he was faced with a sudden emergency, he would be incapable of exercising that degree of skill which would be required of a normal driver, and to that extent would be incapable of having proper control of the vehicle. There may be other cases, however, where the accused is not so obviously under the influence of intoxicating liquor, where the manner in which he actually drives may well be decisive in determining whether or not he is capable of exercising proper

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control."

What is very explicit from the judgment of BEADLE CJ is that an accused may be convicted even though there is nothing irregular in his driving. It must not be forgotten, firstly, that BEADLE CJ only cited, as an example, a situation where even though an accused drove perfectly, it may be inferred, from his condition of intoxication, that should he be faced with a sudden emergency he would not be capable of exercising the degree of skill which would be required of a normal driver and so incapable of having proper control of the motor vehicle. Another example could be where, even though an accused drove perfectly until the time he was stopped by a police officer, who at that time detected the distinct smell of alcohol on the accused, on being asked to carry out a finger- to-nose test and to walk on a straight line on the pavement, he failed to complete the tests satisfactorily. From such evidence, the court may find that, from the state of his intoxication, he was incapable of having proper control of the vehicle. Secondly, the legislation with which *S* v *Collington supra* was concerned did not have a provision which created a rebuttable presumption such as s 55(3)(a). The purpose of such legislation is clearly to deter drunken drivers from driving at all, with drastic penalties, and the rebuttable presumption is to assist the prosecution in convicting such drivers by relying on the presumption should an accused fail to provide proof

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to the contrary. What would constitute evidence to the contrary for the purposes of s 53(3)(a) would depend on the specific circumstances in each case. Clearly, a mere assertion without anything more, by an accused person charged with having driven whilst drunk, to the effect that if he had not been stopped by the police he would have reached his destination safely, besides being a self-serving statement, would not suffice. But evidence, for example, to the effect that the breathalyzer machine did not operate properly and so the test results obtained of the concentration of alcohol in the blood were not reliable could constitute evidence to the contrary.

In *S* v *Sibanda supra,* the accused was charged with the contravention of the section equivalent to s 55(2). The prosecutor accepted a plea to the lesser charge of driving with a prohibited concentration of alcohol of 189 milligrams of alcohol to 100 millilitres of blood. In that case the accused was found asleep in his car parked in the middle of the street in Bulawayo at 10.30 p.m., with the doors wide open, the headlights and ignition key on. When he was awoken by the police he protested that the arresting officer was disturbing his sleep. The court held that the prosecutor had failed lamentably in his duties by accepting the plea to a lesser charge; that the facts relied upon by the prosecution and accepted by the accused set out all the elements of the offence which constituted strong proof of the accused's incapability of having proper control of a motor vehicle due to the influence of alcohol.

In *S* v *Chipato supra*, the appellant was convicted of contravening the section of the Act then in force equivalent to s 55(2). He appealed against sentence which was altered to 8 months' imprisonment of which 6 months (instead of the 3 months imposed by the trial magistrate) was suspended. At 8 p.m. in the evening, a few kilometres from Masvingo, he approached a police road-block in his motor vehicle at high speed. When asked to produce his driver's licence the police observed that the appellant was very drunk, could not stand properly, had a distinct smell

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of alcohol on his breath and was very talkative. Subsequently, the blood sample taken from him showed that the concentration of alcohol was 273 milligrams of alcohol to 100 millilitres of blood. The conviction was confirmed.

In *S* v *Johnson*, *supra*, the accused was charged with the contravention of the section equivalent to s 55(2) but was convicted by the trial magistrate of the contravention of a section equivalent to s 54(2). In that case, the accused admitted staggering when he got outside his motor vehicle on the instruction of the police officer and having a concentration of 211 milligrams of alcohol to 100 millilitres of blood. The police officer stated that when he asked the accused to get off the steering wheel he was staggering, which made him suspect that the accused was drunk. In answer to the accused's question that he had only turned on the ignition when he was arrested and had not moved

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the vehicle, the police detail concurred with this. From this, the trial magistrate was of the view that the foregoing was sufficient rebuttal of the presumption of his being incapable of having proper control of the motor vehicle. The magistrate doubted whether the staggering was caused by the drunkenness, considering that he was trying to get out from behind of the steering wheel. The court agreed with the regional magistrate's observation that the trial magistrate attempted "to defend the indefensible. The fact is that the accused staggered out of the motor vehicle (not off the steering wheel) and was found to have 211 milligrams of alcohol per 100 milligrams of his blood which was above the presumptive level. The reasoning by the assistant magistrate betrays a misconception of the operation of the presumption and what is required of the accused to rebut it".

The same applies (to an even greater extent due to his experience) to this provincial magistrate.

Accordingly, I decline to certify the proceedings as being in accordance with real and substantial justice.

HPP STUDIOS (PVT) LTD *v* ASSOCIATED NEWSPAPERS OF ZIMBABWE (PVT) LTD 2000 (1) ZLR 318 (HC)

Citation	2000 (1) ZLR 318 (HC)
Case No	Judgment No. HH-51-00
Court	High Court, Harare
Judge	Adam J
Heard	February 29, 2000
Judgment	February 29, 2000

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Annotations None

Civil application

Flynote

Practice and procedure - judgment - default judgment - late appearance of entry to defend - defendant automatically barred - plaintiff entitled to apply for default judgment - even if indications are that defendant intends to defend the matter, onus is on him to apply for condonation or late appearance or removal of bar

Headnote

The applicant, as plaintiff in an action against the respondent, served summons on the respondent on 3 June 1999. On 18 June, after the respondent had been automatically barred, a notice of appearance to defend was served on the applicant's legal practitioners. It stated, incorrectly, that appearance to defend had been entered on 17 June, the last day on which they could have done so. The applicant's legal practitioners pointed out the error and informed the respondent's legal practitioners that a chamber application for default judgment had been prepared. The application was filed on 21 June. The respondent's legal practitioners replied, stating that if default judgment were obtained, they were instructed to apply for rescission.

On 23 July, the application for default judgment was placed before a judge in chambers, who caused the applicant's legal practitioners to be told that they should apply for the striking out of the appearance to defend. The practitioners queried the need for this, but the judge insisted on it, saying that although the entry of appearance to defend was late, it was on record and indicated that the respondent intended to defend the matter. A chamber application was made but was rejected by Gillespie J, who directed the applicant's practitioners to comply with the procedure he set out in *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526. In that case Gillespie J, with the concurrence of the Judge President, had ruled that where a plaintiff's legal practitioner contemplates applying default judgment, but is aware of some proceedings being taken by the defendant which is an attempt at opposition but does not constitute due and regular entry of appearance to defend, he ought to advise the defendant or his practitioner of the irregularity. Having done this, he may choose between -

A. an application for default judgment; or

B. an application, on notice to the defendant, to strike out the irregular proceedings.

The latter may be joined with an application for default judgment. If he opts to apply for default judgment, he should inform the court of the relevant irregularity and give reasons why the court should exercise its discretion in his favour. The fuller, and preferable course, is an application to strike out, coupled with a prayer for default judgment.

Held, that in the circumstances a court application was completely unnecessary and should be

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struck out in favour of the original chamber application for default judgment.

Held, further, that under r 50 of the High Court Rules, a defendant who has failed to enter appearance is deemed to be barred. Under r 57, where a defendant has failed to enter appearance, the plaintiff is entitled, without notice to the defendant, to make a chamber application for default judgment. It is not necessary for the plaintiff to have to pay for a further court application before he can obtain default judgment. Rather, it should be for the defendant, once his attention has been drawn to the defective proceedings, to make the necessary application to rectify the defect, either by applying to uplift the bar or by seeking condonation of the failure to enter appearance timeously. There is no inherent jurisdiction in the court to compel a plaintiff to apply to set aside an irregular proceeding before he can obtain a default judgment that is his by right.

Cases Considered

Cases cited:

Abramacos v *Roman Gardens (Pvt) Ltd & Ors* 1960 R & N 1 (SR)

Creux & Sons (Pty) Ltd v *Groenewald* 1953 (3) SA 726 (T)

Founders Building Society v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H)

Gibson & Jones (Pty) Ltd v *Smith* 1952 (4) SA 87 (T)

Granville v *Randall* (1881) 2 EDC 11

K D L Motorcycles (Pty) Ltd v *Pretorius Motors* 1972 (1) SA 505 (O)

Levine v *Rick* 1926 CPD 242

Lewis Cox & Co (Pvt) Ltd v *Twentydales Svc Stn (Pvt) Ld* 1956 R & N 338 (SR)

Luck v *Owen* (1885) 3 Menz 456

Radue's Roller Mills (Pty) Ltd v *Hagemann* 1954 (2) SA 115 (E)

Schewe v *Schewe* 1909 TH 149

Stoll v *Crous* (1885) 3 Menz 549

Zapf v *Provident Ins & Trust Co* (1884) 4 EDC 17

Zimbabwe Bldg Soc v *Masendeke* 1995 (2) ZLR 400 (S)

Legislation considered:

High Court Rules 1971 (RGN 1047/1071), rr 48, 49, 50, 57, 83 & 84

Case Information

K Laue, for the applicant

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Respondent in default

Judgment

Adam J: This is a court application brought by the applicant as plaintiff that came before me but which I struck out in favour of the original chamber application filed by the plaintiff for default judgment with reasons to follow. These are my reasons. The application was made on the directions, dated 1 September 1999, of Gillespie J to the effect that the plaintiff must make a court application, with notice to the defendant, seeking the striking out of the irregular proceeding on record and praying for judgment in terms of the summons. This was undoubtedly on the strength of his judgment in *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H).

In this matter, the Deputy Sheriff's return of service disclosed that summons had been served on 3 June 1999 on the service manager for the

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defendant at its place of business. Accordingly, the last day for entry of appearance to defend to be entered was close of business on 17 June 1999. On 18 June 1999 (after the defendant had been automatically barred), a notice of appearance to defend was served on the plaintiff's legal practitioners stating (erroneously) that the defendant had entered appearance to defend at 11.40 a.m. on 17 June 1999 and intimating further that the summons had been served upon it on 14 June 1999. The appearance book revealed that appearance to defend was at 11.40 am on 18 June 1999, not 17 June 1999.

On 18 June 1999, the plaintiff's legal practitioners as a matter of courtesy, wrote, with a copy of that letter to the Registrar, to the defendant's legal practitioners (attaching a copy of the Deputy Sheriff's return of service) pointing out that the appearance to defend incorrectly indicated that the summons had been served on the defendant on 14 June 1999, as could be seen from the Deputy Sheriff's return of service, so it seemed that they had been misinformed by their client. They further said that the *dies induciae* had expired on 17 June 1999 and indicated that, prior to seeing the notice of appearance to defend, they had already prepared a chamber application for default judgment which they subsequently sent to the registry for filing.

In fact, the chamber application for default judgment was only filed on 21 June 1999 in the Registry.

On 25 June 1999, the defendant/respondent's legal practitioners wrote in reply, confirming that they had indeed been misinformed by their client about service of the summons upon them, and that appearance to defend had been entered out of time. They also informed the plaintiff's legal practitioners that, should the plaintiff obtain judgment, they had been instructed to file an application for rescission of that judgment. The Registrar was not sent a copy of this letter.

On 23 July1999, that chamber application was put before a judge whose clerk, on her directions, wrote to the plaintiff's legal practitioners advising them that application must be made

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for the striking out of the appearance to defend.

On 28 July 1999, the plaintiff's legal practitioners replied thereto by mentioning their letter of 18 June 1999 to the defendant's legal practitioners concerning the defective notice of appearance to defend which had been "accepted" by the Registrar, because it was stated therein that the summons had been served on l4 June 1999 when in fact the defendant's legal practitioners had been advised of this error and they had subsequently, in their letter of 25 June 1999, confirmed that they had obviously been misinformed by their client and that their appearance to defend had been entered out of time. The plaintiff's legal practitioners indicated, with respect, that they did not know of any rule which required them to strike out the

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appearance to defend which was clearly invalid. They respectfully sought default judgment, pointing out that the defendant's legal practitioners had intimated that they would be applying for rescission of judgment but had been informed by the plaintiff's legal practitioners that this would be resisted, as their client did not accept that the defendant had a *bona fide* defence of any kind whatsoever. A copy of this letter was sent to the defendant's legal practitioners.

Up till this time, the defendant's legal practitioners, having clearly acknowledged that the defendant's appearance to defend was out of time, had still done nothing to seek rectification of what they knew was an "invalid" appearance.

In response, the judge's clerk again wrote on 3 August 1999 to the plaintiff's legal practitioners saying that the judge insisted that they comply with the directions of 23 July 1999, since entry of appearance to defend, although late, was on record at the time of the application for default judgment and was an indication that it was intended to defend the matter.

A chamber application was accordingly filed on 17 August 1998 with a supporting affidavit by the plaintiff's legal practitioners seeking to strike out the appearance to defend. This was addressed to the Registrar and to the defendant's legal practitioners.

Even this chamber application did not stir the defendant's legal practitioners into action, if the defendant genuinely intended to defend the matter.

Following upon this chamber application of 17 August 1999, the directions of l September 1999 of Gillespie J, advising them that their application to strike out was defective and that they should consult his judgment in the *Dalib* case *supra*, were delivered to the plaintiff's legal practitioners by the Judge's clerk.

What is striking about this particular direction is that it asked that a court application be made to set aside the irregular proceeding and also for judgment in terms of the summons and that it should be by notice to the defendant. It further stated that if the foregoing "step has caused unnecessary complication in this matter, it is because the attorneys had not acted in accordance with his judgment". This direction did not indicate in what way the chamber application of 19 August 1999 was a defective procedure. It would appear that the learned judge may have overlooked the central tenet of his own judgment, which was that legal practitioners

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must courteously give proper warning to the other side's legal practitioners by not "snatching at a judgment" and that the purpose of the rules of court is to expedite the administration of justice as well as to avoid incurring unnecessary costs. It seems that he may also have lost sight of the plaintiff's legal practitioners' "courtesy" letter of 18 June 1999, together with their letter of 28 July 1999

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and the subsequent chamber application of 17 August 1999 to strike out, all of which had been addressed to the defendant's legal practitioners. None of which had elicited any response at all from them. Also, that chamber application made was made on the directions of a judge that there be such an application to strike out without specifying how that was to be done. Having done all this, it could therefore hardly be maintained that the plaintiff's legal practitioners had acted in any way unethically or that they were "snatching at a judgment". The failure by the learned judge to consider this aspect certainly has not "expedited the administration of justice" (in fact quite the contrary) and clearly has not "avoided incurring unnecessary costs". The court application, in the circumstances, appeared completely unnecessary and as indicated was accordingly struck out by me in favour of the original chamber application for judgment in default. In the result, default judgment was granted as prayed in that chamber application. The plaintiff has had to incur unduly the costs of two chamber applications, along with an application to strike out, in addition to this court application, all of it in order to seek a judgment in default which our rules of court provide that he is entitled to obtain. All of this could have been avoided, and if the learned judge was inclined not to have such an "irregular proceeding" on file he ought to have granted the chamber application to strike out which certainly satisfied the "spirit" of his judgment, rather than insisting upon strict compliance with it and about which I have more to say.

The relevant rules, which are rr 47, 48, 49, 50, 57, 83 and 84 provide as follows:

"*Appearance book*

47. There shall be maintained in the office of the registrar at Harare and Bulawayo a book called an appearance book.

Mode of entering of appearance

48. Entry of appearance to defend shall be effected by the defendant or his legal practitioner who shall record in the appearance book at the registry where he has been called upon to enter appearance -

    (a) the title and number of the action;

    (b) notification of his intention to defend;

    (c) an address called an address for service which shall be within a radius of 5 kilometres of the registry;

    (d) his postal address;

    (e) the date of the entry;

and shall sign the entry thus made.

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Notice of entry of appearance

49. Within twenty-four hours of the entry of appearance to defend written notice thereof shall be served on the plaintiff or on his legal practitioner where he sues by a legal practitioner, at the plaintiff's address for service. Such notice shall be in Form No. 8."

ADAM J

Form No. 8 is as follows:

"Form No. 8

Notice of entry of

appearance to defend

Case No: .....

IN THE HIGH COURT OF ZIMBABWE

In the matter between:

Plaintiff

and

defendant

Take notice that at ..... a.m./p.m. on the ..... day of ..... the defendant entered an appearance to defend this action.

The summons was served on the defendant on ..... day of .....

The defendant's address for service is:
.....

The defendant's postal address is:
.....

Signature: .....

Legal Practitioner for defendant

To: ..... defendant

of:

(Plaintiff or Plaintiff's Legal Practitioner)"

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Rule 50 is as follows:

"*Failure to enter appearance: defendant deemed to be barred*

50. A defendant who has failed to enter appearance shall be deemed to be barred."

Rule 57 provides as follows:

"*Claim for debt or liquidated demand only and no appearance entered*

57. In cases where the plaintiff's claim, not being a claim for provisional sentence, is for a debt or liquidated demand only, and the defendant has failed to enter appearance within the period prescribed in the summons for entering appearance, or, having entered appearance, has been duly barred for default of plea, the plaintiff may without notice to the defendant make a chamber application to a judge for judgment, and thereupon judgment may be granted or such order may be made as the judge considers the plaintiff is entitled to upon the summons or declaration."

Rules 83 and 84 provide as follows:

"*Effect of bar*

83. Whilst a bar is in operation -

(a) the registrar shall not accept for filing any pleading or other document from the party barred; and

(b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit;

except for the purpose of applying for the removal of the bar.

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Removal of bar

84.(1) A party who has been barred may -

(a) make a court application to remove the bar; or

(b) make an oral application at the hearing, if any, of the action or suit concerned;

and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may be, thinks fit.

(2) The withdrawal or removal of the bar shall not preclude a subsequent bar for subsequent default."

It is clear from all of the foregoing that the defendant had entered an appearance to defend after it was barred. The plaintiff's legal practitioners had conducted themselves fairly and honestly (in accordance with the ethics of the legal profession) towards the defendant's legal practitioners. The duty of the defendant's legal practitioners to their client, as well as to the plaintiff's legal practitioner, was to have made an application to rectify the defective entry of appearance by removal of the bar or seek condonation for the late entry and all this should have been done well before judgment in default could be obtained against the defendant. Its failure to do so

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entitled the plaintiff to a default judgment, leaving the defendant, if so minded, to its remedy.

Coming to *Dalib*'s case *supra*, the summons had been served on the defendants at their *domicilium citandi et executandi* on 13 January 1998, according to the Deputy Sheriff's return of service. The last day for entry of appearance to defend was therefore close of business on 21 January 1998. The appearance book disclosed that no appearance to defend was ever entered at any time. But a notice of assumption of agency (not required under the Rules), as well as a request for particulars, dated 17 January 1998 was "indicated" as having been filed in the Registry. The request for particulars asked on what basis was it alleged that the first defendant was in arrears to the extent of $171 900, in view of the payment of $126 000 made as per attached receipt, and the other question was whether any demand for the arrears had been made to the first defendant and other defendants. On 22 January 1998, the plaintiff's legal practitioners wrote to the defendant's legal practitioners as follows:

"We have received from you so far a notice of assumption of agency and a request for further particulars but so far have not received a notice of appearance to defend. Has appearance in fact been entered?

In the request for particulars, you referred to a payment of $126 000 and a receipt annexed but that receipt was not annexed. Please let us have it."

Incidentally, the request for further particulars filed in the Registry also did not have a copy of the receipt attached to it.

On receiving the letter from the plaintiff's legal practitioners, it was the

duty of the defendant's legal practitioners, if they had not been given a copy of the notice of entry of appearance to defend when their client instructed them, either to have asked them for the date and time of entry of appearance and for a copy of it or they should, as soon as they were told about the time and date of entry of appearance, simply have checked in the appearance book to find out if such an entry had been made. But on 26 January 1998 the defendants' legal practitioners' reply was as follows:

"We refer to your letter of 22 January 1998 and advise we were of the view that the receipt was attached to our papers. We are taking urgent steps to arrange a replacement. As far as the notice of appearance was concerned we were instructed by client that they had entered appearance to defend before instructing us to take over. We shall arrange to have a copy for you as soon as possible."

It is difficult to understand how they could have been of the view that "the receipt was attached to their papers" when a copy of such a receipt had also not been attached to their papers filed in the Registry. Also, they did not, as promised, "take urgent steps" to provide a copy of it or "arrange as soon as possible" to deliver a notice of entry of appearance to defend. They must have known that their clients were barred, yet they did absolutely nothing. What does one expect the plaintiff's legal practitioners to do other than to conduct themselves in accordance with the Rules, having not been served with a notice of entry of appearance to defend within 24 hours as required by r 49? In those circumstances, how could one hold that they were "snatching at a judgment", since they did what was expected of them according to *Zimbabwe*

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Banking Corporation Ltd v *Masendeke* 1995 (2) ZLR 400 (S)? In that case, service of the summons was made on an accountant at a small branch of the defendant bank in Harare and not at the head office, which resulted in a default judgment. In allowing the appeal to rescind the default judgment McNally JA said at 403:

"Speaking for myself, I would say a lawyer of Mr *Moyo*'s position must have at least suspected, when no appearance was entered by Zimbank, that something had gone wrong. A telephone call to Zimbank's legal department would, as we can now see by hind-sight, have saved a lot of trouble and expense. He did not do that. He obtained default judgment. But he must have at least half expected that what did in fact happen, would happen. In future cases, we may have to consider awarding costs personally against legal practitioners who not only 'snatch at their judgments' but then stubbornly and unreasonably cling to them."

On 5 February 1998, (having waited) some 10 days later, the plaintiff's legal practitioners filed their chamber application for default judgment against the defendants jointly and severally, seeking payment with costs of the whole amount outstanding on the mortgage bond of $1 575 000 and with interest amounting to $418 834. This is not a small amount. The matter was

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placed before GILLESPIE J on 11 March 1998. An examination of the papers before the learned judge would have clearly revealed that the filing of the assumption of agency was not required, as he correctly held, and that the request for further particulars of 17 January 1998 did not have a receipt, which somehow was related to the plaintiff's particulars of claim, attached to it. He could have also discovered that some 5 weeks after the filing of the chamber application the receipt was still not forthcoming and further that no proof of service, in terms of r 42B, had been filed if a notice of entry to defend had been served on the plaintiff's legal practitioners within 24 hours of entry of appearance to defend in the appearance book as required by r 49. The entry of appearance to defend in the appearance book and the service of the notice of entry of appearance to defend are peremptory requirements under our rules. The learned judge ought to have concluded that the defendant's legal practitioners had not conducted themselves with any sense of urgency under the Rules. Therefore in those circumstances one could not hold that the plaintiff's legal practitioners were "snatching at a judgment" - *Masendeke*'s case *supra*. Instead of seeking some kind of an explanation from the defendant's legal practitioners, the learned judge on 13 March 1998 gave directions to an official in the Registry to inform the plaintiff's legal practitioners: "There exists some species of application from the defendant." (It should have been "opposition" instead of "application"). A copy of this query was not sent to defendant's legal practitioners. As Gillespie J readily acknowledged, the "assumption of agency" did not qualify as a "defence" and without some form of an appearance to defend, under the rules the "request for further particulars" would have fared no better. Surely, those two "acts" cannot be said "to confirm" an intention to defend. On 20 March 1998, the plaintiff's legal practitioners replied as follows:

"According to our record, the summons was issued out of the High Court on 23 December, 1997 and served by the Deputy Sheriff on 13 January 1998. So far an appearance does not appear to have been entered nor have we received a notice of appearance to defend. We subsequently received a document called 'notice of assumption of agency' from Messrs C K Mkinya & Partners and also a request for further particulars.

The particulars which have been requested appear to relate to matters of evidence and are not necessary to enable

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the defendant to plead but in any event, since an appearance has not been entered the defendants appear to have been barred. We would accordingly be obliged if arrangements can be made for judgment to be entered."

This reply was placed before GILLESPIE J.

Nothing had been done up to that point by the defendants' legal practitioners to show that they were really intent on defending the matter. No further written communications were directed by the learned judge

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either to the defendants' legal practitioners or to the plaintiff's legal practitioners. However, during May 1998 notice of application to amend pleadings was filed by the defendants' legal practitioners seeking to change the notice of assumption of agency into a notice of entry of appearance to defend. This was not placed before Gillespie J. This purported amendment into a notice of entry of appearance to defend was not in accordance with Form No. 8 as required by r 49. Also, it erroneously stated that entry of appearance had been entered this day (indicating 17 January 1998) when in fact no such entry had been made on 17 January 1998 in the appearance book. The defendants were still barred.

Eventually, the plaintiff's chamber application of 5 February 1998 for default judgment was considered and on 10 June 1998 Gillespie J, in his written judgment, ordered that default judgment be refused, that the plaintiff be directed to make a court application, on notice to the defendant, for an order striking out the irregular proceedings and claiming judgment in default of appearance, and that all the costs between the date of the application for default judgment to the date of judgment were to be borne by the plaintiff. But one wonders how the defendant could appear in that court application since r 83 explicitly prevents this and there is nothing in the directions that the learned judge gave which granted leave to appear to the defendant. It is also difficult to fathom why the plaintiff was asked to pay costs without being given any opportunity to be heard on the question of costs for merely applying for a default judgment. In his judgment, there is a homily by the learned judge on the duties of legal practitioners to conduct themselves honestly and fairly, which, with due deference to him, does not apply to the plaintiff's legal practitioners who only acted after waiting 10 days. In my view, they behaved honestly and fairly as they were required to do according to *Masendeke*'s case *supra*. They were not "snatching at a judgment". Nothing in law or in the ethical conduct of legal practitioners requires them to do more than what they had done. There is clearly no further duty, such as that a warning must be given by the plaintiff's legal practitioners to the defendants' legal practitioners that the plaintiff intended to make a court application, with notice to the defendants' legal practitioners, to strike out their irregular proceeding. Such an obligation on the plaintiff's legal practitioners would amount to an open invitation to every defendant who wanted to delay the grant of a default judgment to sit back and wait until such a court application was served on him. It is inverse logic to hold that the plaintiff's legal practitioners who are entitled to a default judgment under r 57, having conducted themselves as required by *Masendeke*'s case *supra*, to ask their clients to pay for them to make a further court

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application, with notice to the defendant, before the plaintiff can obtain its default judgment. Rather it should be for the defendants' legal practitioners, once their attention is drawn to their "defective" proceeding, to make the necessary application to rectify the defect, either by applying to uplift the bar or by seeking condonation for the late entry of appearance before the plaintiff makes application for default judgment.

There is no authority that is binding on this court that makes it an impediment for the plaintiff's legal practitioners to obtain a default judgment where the defendants' legal practitioners have filed a "request for further particulars" without entering an appearance to defend or any other "irregular" proceeding and their attention has been drawn to the fact that no entry of appearance has been entered or about such other "irregular" proceeding.

It must not be forgotten that the defendants' legal practitioners also has a duty to behave fairly and honestly towards the plaintiff's legal practitioners, particularly when they have been made aware of defects in the defendant's papers filed in the Registry. Their duty was to communicate urgently with the plaintiff's legal practitioners, since they had not sent the receipt as promised, and to have informed them that their clients had clearly misled them when they indicated that they had entered appearance to defend. They should have (after proper instructions from their clients) sought the requisite indulgences from the plaintiff's legal practitioners if it was their clients' genuine intention to defend.

In his judgment, GILLESPIE J referred to a number of cases including *Zapf* v *Provident Insurance & Trust Co* (1884) 4 EDC 17 where the plaintiff, a foreigner, sued the defendants who did not enter appearance. When the matter came up for hearing in court legal counsel for the defendants raised two objections against the plaintiff's application for default judgment. These were that the plaintiff had not provided for security for costs and that the defendant had good grounds of defence. Barry JP held that the defendants were in default and under the rules of court judgment ought to be given against them in default. The defendants could only purge that default by leave of the court upon affidavit of merits. Judgment was given for the plaintiff, but execution was stayed until the plaintiff gave security for costs and rights were reserved to the defendants, on showing sufficient cause, to have the judgment set aside. This judgment did not hold that the plaintiff had to make application, with notice to the defendants, in order to strike out any irregular proceedings, if in fact there were any. On the contrary, it granted default judgment and granted leave to the defendants, if they established sufficient cause in an affidavit, to set aside the default judgment.

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In *Gibson & Jones (Pty) Ltd* v *Smith* 1952 (4) SA 87 (T), the plaintiff's summons was for payment for goods sold and delivered. The defendant had entered an appearance to defend in the appearance book out of time. His legal counsel wrote to the plaintiff's lawyer. Clayden J (as he then was) referred to *Zapf*'s case *supra* where it was held the plaintiff was entitled to the default judgment. He said at p 88:

"But the form in which the judgment was given, for all practical purposes, amounted to a refusal of the default

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judgment ..."

This was because the court gave leave to the defendants, on sufficient cause being shown in an affidavit of merits, to apply to set aside that judgment. With great respect to CLAYDEN J, he is not correct when he said that for all practical purposes that judgment amounted to a refusal of default judgment. If that was the case, then every time a party obtains a default judgment which is subsequently set aside on sufficient cause being shown, such default judgment, for all practical purposes, amounts to a refusal of default judgment. Surely that cannot be so. CLAYDEN J also observed at p 89A:

"In the present case, having been rightly informed that the defendant has in fact entered appearance, though irregularly, and knowing that no notice of this application for judgment has been given to the defendant, because the plaintiff was not obliged to do so, it seems to me that if that case had to be followed, a similar sort of order should be made. But I think the answer to this application is that as the Registrar has in fact allowed the defendant to enter appearance, there is in fact here an entry of appearance. As the facts are before me it appears that that entry of appearance was an irregular one in that it was made when the defendant was barred from the right to enter appearance, but the fact is that there is appearance entered. Rule 37 provides that

> 'When any proceeding in a cause on the part of one of the parties is irregular or improper, the opposite party shall be entitled, before taking any further steps, to apply for leave to cancel such proceeding upon notice summoning the opposite party to show cause why such proceeding shall not be set aside.'

In the case of *Schewe* v *Schewe* 1909 TH 149, entry of appearance had been made by a party personally, but in breach of r 27. No address within the jurisdiction as required by the rule had been given ... But it seems to me that the reasoning in that case that a plaintiff's proper course, where any proceeding or cause is irregular, is not to proceed as if there has been no such proceeding at all, but *to apply to court under r 37 for a rule setting it aside* should be applied" (the emphasis is mine).

It is crystal clear that CLAYDEN J referred to two procedures - one under *Zapf*'s case *supra* and the other under r 37 - and opted for the procedure which r 37 permitted a party to adopt. If an application to strike out an irregular proceeding as part of the inherent jurisdiction of the court to regulate its own proceedings could have been adopted, as GILLESPIE J maintained, surely an eminent judge such as CLAYDEN J would have said so, rather than relying on the show cause procedure under r 37. Further, there is no authority (even of persuasive value) which has held this. In *Creux & Sons*

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(Pty) Ltd v *Groenewald* 1953 (3) SA 726 (T), the defendant had entered appearance after the *dies induciae* had expired and so was barred. When referring to *Zapf*'s case *supra*, Dowling J correctly pointed out that there had been no appearance to defend entered but there was an intention on behalf of the defendant to contest the default judgment. Dowling J most astutely observed that CLAYDEN J in *Gibson & Jones supra* took the view that the case before him was distinguishable from *Zapf*'s case because the Registrar had allowed an entry of appearance to defend after the *dies induciae* had expired and there was in fact an entry of appearance although an "irregular" one. That was not so in *Zapf*'s case. It was on that basis that CLAYDEN J, having relied on *Schewe*'s case *supra*, adopted the procedure under r 37. In *Schewe*'s case *supra* an appearance to defend had been entered but without an address being provided in

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terms of the rules. On this, DOWLING J said at 728D-F:

"I am inclined to think that had appearance been entered late in *Schewe*'s case, the learned judge might have regarded such appearance as void and granted judgment by default, leaving the defendant to his remedy of setting aside the default judgment under r 43. I am in fact asked to regard the late appearance in the present case as a nullity. Counsel for the plaintiff indicated that in a similar case which came before Neser J (*Baker & Roos* v *Winterheights* TPD 9 October 1952, not reported) the learned judge declined to follow the case of *Gibson & Jones (Pty) Ltd* v *Smith*. I have made inquiries regarding this case and it transpires that in an application before Neser J no appearance of any kind - even irregular - had been entered. All that happened was that counsel appeared for the defendant at the hearing and asked for leave to enter appearance from the Bar. To these facts, the case of *Gibson & Jones (Pty) Ltd* did not apply, and the default judgment was granted."

He then went on at 729H:

"Where, however, the defendant has in fact been allowed to enter appearance (*out of time*), he cannot, in a certain sense, be said to have been barred. That being so, it seems equitable and competent to refuse judgment by default in the present circumstances, and to make an order in terms similar to that granted by CLAYDEN J" (the inclusion and emphasis are mine).

From the foregoing, it can be seen that DOWLING J distinguished the case before him and the *Gibson & Jones* case *supra* from the *Baker & Roos* case *supra* before Neser J on the grounds that where no appearance of any kind, even irregular, had been entered (therefore a nullity), the plaintiff was entitled to his default judgment (*Zapf*'s case *supra*), leaving it to the defendant to apply to set it aside on showing sufficient cause. But where the defendant had entered an appearance in an irregular manner, Dowling J found this was not a nullity (and it would appear contrary to *Schewe*'s case) and so it was equitable and competent to refuse default judgment to the plaintiff. The situation in *Dalib*'s case *supra* was that there was no appearance of any kind (the same as before Neser J) and so a nullity which required

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GILLESPIE J to grant a default judgment if he was following DOWLING J. It seems to me that the learned judge may have misapplied the *ratio decidendi* in *Creux & Sons (Pty) Ltd* v *Grenewald supra*.

In *KDL Motorcycles (Pty) Ltd* v *Pretorius Motors* 1972 (1) SA 505 (O), also mentioned by Gillespie J, summons had been served on the defendant without appearance being entered when the *dies induciae* expired. The matter was set down for default judgment by the plaintiff when, a day before the hearing, the defendant gave notice to defend to the plaintiff. Erasmus J had to consider the Uniform Rules of Court under r 30 which provided for the setting aside of irregular proceedings and r 31 which dealt with default judgments and the case of *Bank van die Oranje-Vrystaat Bpk* v *Cronje* 1966 (4) SA 4 (O). About it he observed at 506H:

"I do not understand this passage necessarily to mean that whenever appearance to defend is entered, or notice to defend is given, belatedly and irregularly, an applicant who is entitled to come to court in terms of r 31 and ask for judgment by default is in law obliged first of all to make an application to set aside such an entry or notice before he can succeed in his application. I do not find such a general view in the present rules of court and, if that is the effect of the judgment in *Bank van die Oranje-Vrystaat Bpk supra*, then I am with great respect constrained to disagree with it."

He then referred to *Gibson & Jones supra*, *Zapf supra* and *Schewe*'s case *supra* and mentioned

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what CLAYDEN J said in a passage at p 89 in *Gibson & Jones* case *supra*. ERASMUS J continued at 507G:

"The passage does not state in so many words that a plaintiff is obliged to set aside the irregular entry of appearance before he can approach the court to ask for judgment by default."

He then also referred to DOWLING J in *Creux & Sons* case *supra* concerning the Cape and South West Africa Rules on default judgments and ended at 508-9 with these apt words:

"It seems to me an extraordinary position that a defendant who intends to defend an action but has failed to enter an appearance to defend should, notwithstanding such default which in terms of r 31(2)(a) enables the plaintiff as of right to ask for judgment by default, be privileged to place an obstacle in plaintiff's way and burden him with a new and additional application in terms of r 30 in order to remove it before he can enforce his *prima facie* right. Rule 31 does not qualify the plaintiff's right in such way and no other rule of court provides explicitly in the circumstances for such a course to be taken. Moreover, the unnecessary time wasted and the costs of multiplying applications and postponements in this way might not be conducive to the administration of justice even if the plaintiff is well-to-do. If he is not, the effect on him might be appalling and the speedy remedy of judgment by default might prove useless.

Rule 30(1), as I see it, makes it optional for a party to set aside an irregular or improper proceeding and I have difficulty in understanding why he should not be able to bring this application for judgment by default, if in terms of r 30(1) he has refused to exercise his option. The irregular entry of appearance to defend may not be ignored and the plaintiff in the instant case did not ignore it. It is simply a factor that may count

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in favour of the defendant to prove his *bona fides* when he applies for postponement or condonation, should he intend to defend the action or oppose the plaintiff's application for judgment by default. It is certain, however, that if no application is made under r 30(1) to have such irregular entry of appearance set aside, it can never have the same cogency as a regular notice of appearance to defend, for it is irregular being out of time. The court has a discretion to give judgment or not in favour of the plaintiff ..."

The outcome from the above is that there is no inherent jurisdiction in the court to compel a plaintiff to apply to set aside an irregular proceeding before he can obtain a default judgment that is his by right. Even where the rules of court have explicit provisions like r 37 of the Transvaal rules of court or r 30 of the Uniform Rules of Court, the plaintiff is given an option to follow that or to seek default judgment. There is no explicit provision like r 37 or r 30 in our rules of court. Yet GILLESPIE J has imposed an "obligation" on the plaintiff to apply to set aside an "irregular" proceeding before he can exercise his right, given to him clearly and explicitly in our rules of court, to obtain a judgment in default of appearance. Erasmus J has, it would seem to me in a most convincing manner, demolished a most generous privilege, which GILLESPIE J has given to the defendant by placing an obstacle in the plaintiff's path and to burden the plaintiff with a new and unnecessary additional court application. After this there is nothing more to be said about *Dalib*'s case *supra.*

In *Grenville* v *Randall* (1881) 2 EDC 11, summons was served upon the defendant who failed to enter an appearance to defend and so was barred. At the hearing the defendant appeared indicating that appearance had just been entered. The court granted default judgment agreeing with the plaintiff's counsel who had referred to *Luck* v *Owen* (1885) 3 Menz 456 and *Stoll* v *Crous* (1885) 3 Menz 549 that the defendant might obtain leave to defend after judgment upon

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showing sufficient cause in terms of the rules of court.

In *Luck* v *Owen supra*, the court held that when a defendant has been barred and the case had been set down for hearing as undefended, the defendant was not allowed to appear personally or by counsel. In *Stoll* v *Crous supra*, the defendant was in default and at the hearing his counsel said that he had a watching brief. The court, following *Luck's* case *supra* refused to hear him.

In *Lewis Cox & Co (Pvt) Ltd* v *Twentydales Service Station (Pvt) Ltd* 1956 R&N 338, summons was served upon the defendant who entered appearance out of time by one business day. At the hearing, the defendant applied for condonation. Beadle J (as he then was) said at 342D-F:

"There is no rule of court which specifically provides that the court cannot condone a late entry of appearance ...

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It seems to me that if the court in its inherent jurisdiction has power to lift a bar barring the defendant from entering appearance, it should similarly have power in circumstances such as these to condone a late entry of appearance."

In *Radue's Roller Mills (Pty) Ltd* v *Hagemann* 1954 (2) SA 115 (E), the period for entry of appearance had expired and the matter was set down for default judgment. A day before the hearing the defendant purported to enter appearance to defend. At the hearing, the defendant appeared by counsel after an affidavit had been filed. The question that the court had to determine was whether to grant default judgment under r 18, leaving it to the defendant to apply to have the judgment set aside, or to hold, as argued on behalf of the defendant, that an adequate explanation was given by the defendant and so there was a proper entry of appearance. Reynolds JP said at 116C:

"Rule 18 is quite clear in its terms, and entitles the plaintiff to set down the case for judgment on default of appearance. That is a right that he has got and a right given to him under the rule, and even if the court has a discretion as to whether it should grant that judgment or not, the court must remember that it would be exercising its discretion in this case against the plaintiff's rights if it holds that it should follow the course asked for on behalf of the defendant. This rule is intended to enable a plaintiff to get a form of summary judgment and that summary judgment is not final, because the rule itself allows the defendant the opportunity of contesting the matter in the manner laid down by the proviso. It seems to me I would be going very far in interfering with the right of the plaintiff to set this matter down and get judgment, when the defendant who is in default has got a method of putting his case before the court if he wishes to do so.

Moreover, it seems to me that the practice of this court is against the contention of the defendant. In the case of *Granville* v *Randall* 2 EDC 11, the procedure was to grant judgment, and to leave the defendant to his remedy under the rule. The only distinction I can see between that case and this is that here appearance was entered a day before argument and there appearance was entered before argument, and that is a distinction without a difference in principle. It seems to me, therefore, that I should follow the course adopted by the court in that case."

Both the *Lewis Cox* case *supra* and the *Radue's Roller Mills* case *supra* were cited in *Abramacos* v *Roman Gardens (Pvt) Ltd & Ors* 1960 R&N 1 (SR) where the plaintiff's summons was served but no appearance was entered by the defendants. The matter was set down in court for default judgment but was postponed for a week by consent, since circumstances seemed to indicate that the defendants were taking an interest in the matter. After hearing argument, the matter was further postponed to enable the defendants to make application in

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proper form for condonation of their failure to enter appearance timeously. Hathorn J (as he then was) said at 2:

"It cannot be doubted that if the defendants had made an application for condonation in proper form that application would have been heard and disposed of before the hearing of the application for default judgment. Indeed, the result of the former application would have been decisive of the latter.

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This being so, it seems to me that a defendant ought not to be deprived of the opportunity of having an application for condonation disposed of before default judgment is given against him where, as here, there appears to be an adequate explanation why that application is not properly before the court ...

Another point of importance arises from r 16 of Order 7, dealing with the effect of a bar. In relation to the kind of case like the present, the rule provides that a defendant who has entered appearance and has been barred for want of filing a plea may not appear or be heard on an application for default judgment except only on an application for removal of the bar. The present case is a *fortiori* the situation envisaged in that rule. And one cannot escape the conclusion that the court should adopt the same kind of attitude in a case where the defendant has failed to enter appearance.

On more than one occasion I have had before me a case on which counsel has appeared for a barred defendant on the plaintiff's application for default judgment. In those cases in which the defendant's counsel has asked for a postponement in order to enable a proper application for removal of the bar to be made, and has given a satisfactory explanation why such an application was not then before the court, I have treated the appearance as the first step in an application for removal of the bar, and granted the postponement. At least one of my colleagues has adopted the same practice.

In a general sense, the purpose of the rules is to define the means by which disputes between parties are to be resolved in the most appropriate manner. That being so, it does not seem to me that in a proper case a plaintiff ought to be enabled to obtain an unfair advantage over a defendant who has failed to observe a rule. I emphasise the use of the phrase 'in a proper case', for I am in full agreement with the view that the rules are made to be observed and not to be ignored. But in a proper case it seems to me that a plaintiff does get an unfair advantage over a defendant if he achieves a situation in which the defendant must apply for a rescission of a default judgment, instead of having to apply for condonation of late entry of appearance or removal of the bar, as the case may be."

Again, it is clear from the foregoing that Hathorn J did not refer to any sort of an inherent jurisdiction in this court to require the plaintiff to apply by court application to set aside an irregular proceeding. Hathorn J observed that the practice of this court has always been that, in a proper case, the defendant must be given an opportunity either to apply for condonation of late entry of appearance or to apply for the removal of the bar. He held in the case before him that the defendants be allowed to make an application for condonation for late entry of appearance.

In *Levine* v *Rick* 1926 CPD 242 WATERMEYER J said at 244:

"These rules of court are made in order to prevent delay or injustice being done owing to this delay, and a bar should not be uplifted as a matter of course; it should not be done merely for the asking, otherwise the rules may as well be torn up ... "

The proper course, in accordance with the long-standing practice of this court, was for GILLESPIE J to have given directions to the defendants' legal practitioners that they within 5 days either make application for condonation for failing to enter appearance timeously and

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seeking an extension of time or to make application within 5 days for the removal of the bar, failing which

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the plaintiff would be entitled to default judgment. A copy of such direction should also be sent to the plaintiff's legal practitioners.

I should indicate that a number of my colleagues agree that the procedure I have described above is the proper one that should be observed by legal practitioners.

Kantor & Immerman, plaintiff's legal practitioners

Stumbles & Rowe, defendant's legal practitioners

PONTER *v* PONTER 2000 (1) ZLR 336 (HC)

Citation	2000 (1) ZLR 336 (HC)
Case No	Judgment No. HH-54-00
Court	High Court, Harare
Judge	Smith J
Heard	December 10, 1999
Judgment	March 1, 2000
Annotations	None

Civil application

Flynote

Administration of estates - intestate succession - widow of deceased - whether entitled to maintenance from estate - extent of right to remain in former matrimonial home

Headnote

Mr Ponter died intestate in 1991. He was survived by his widow, the applicant, and three children from a former marriage. The children, all adults, live outside Zimbabwe. The widow lived in the former matrimonial home. Over 6 years after the deceased died and letters of administration had been issued, the widow applied for maintenance from the estate under the Deceased Persons Family Maintenance Act [*Chapter 6:03*]. She had already received a share

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of the money left by the deceased. In addition, valuable coin and silver collections left in her care had disappeared. The house represented the greater part of the estate. The respondent, one of the three children, wanted the house to be sold and the proceeds shared.

Held, that the court is obliged, under s 7(2)(h) of the Deceased Persons Family Maintenance Act, to have regard to the interests of the persons who would normally succeed on intestacy, not only to the interests of the former spouse of the deceased. The court is required to have regard to the provision which the applicant might reasonably be expected to have received if the marriage had ended with divorce and not by death. The applicant had already taken considerably more from the estate than she would have received had she been divorced from the deceased in 1991.

Held, further, that, in terms of s 3 of the Deceased Estates Succession Act [*Chapter 6:02*], if, as in this case, the spouses were married out of community of property and the deceased spouse leaves any descendants entitled to succeed *ab intestato*, the surviving spouse is entitled to receive the household goods and effects and a child's share, or the specified amount, of the residue. The specified amount is $200 000, fixed in 1991 and not changed since.

Held, further, that the applicant had not shown that she needed maintenance and had not come to court with clean hands. Had she been in desperate need of maintenance, she would have made an application many years earlier. She had not been open and honest with the court about the movable assets of the house, in particular, the coin and silver collections.

Held, further, that in terms of s 10(1)(a) of the Deceased Persons Family Maintenance Act, a surviving spouse has the right to occupy any immovable property which the deceased was entitled to occupy and which the deceased was ordinarily occupying immediately before his death. However, these rights end on completion of the administration of that portion of the deceased estate to which those rights relate. Consequently, the applicant's right to occupy the house had ceased.

Cases Considered

Cases cited:

Shaw v *Shaw & Anor* 1992 (2) ZLR 134 (S)

Takafuma v *Takafuma* 1994 (2) ZLR 103 (S)

Legislation considered:

Deceased Estates Succession Act [*Chapter 6:02*], s 3

Deceased Persons Family Maintenance Act [*Chapter 6:03*] ss 7 & 10

Case Information

Applicant in person

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A P de Bourbon SC, for the respondent

Judgment

Smith J: This is an application purportedly made in terms of the Deceased Person Family Maintenance Act [*Chapter 6:03*] (hereinafter referred to as "Chapter 6:03"). Mrs Michelina Ponter (hereinafter referred to as "the applicant") wrote a letter to the Master of the High Court, dated 24 February, 1998, with which she submitted an affidavit specifying her maintenance requirements. She apologised for the delay in submitting the document, saying that she had been previously assured by her legal practitioner in June 1997 that "this budget/application' had been submitted to the High Court. In her affidavit, she said that her monthly requirements amounted to $20 713.15 and, with a life expectancy of 25 more years, her total claim was $7 767 431.20. This affidavit was sent by the Master to the legal practitioners who represent the respondent, who is the eldest son of the applicant's late husband (hereinafter referred to as "Hubert") by his first wife. Their response was as follows. Hubert died on 11 April 1991. Letters of administration were granted on 17 July 1991. In her application for maintenance, the applicant did not mention that she was currently self-employed and did not reveal her earnings. They produced newspaper cuttings to prove that the applicant had opened a sculpture gallery at the former matrimonial home and also ran an interior decorating consultancy business. In her opposing affidavit filed in case No. H-8115-97, the applicant in fact said that her employment had provided for Hubert prior to his death and that she was involved in the antique business. The applicant was paid from Hubert's estate, by one of the executors and by Hubert's brother Bernard, amounts totalling $116 512.13. Cheques from the estate to the applicant ceased at the end of 1994 and, although the applicant had indicated in 1995 that she was going to apply for maintenance from the estate, no such application was made until 1998. The present application is highly inflated and unreasonable. The applicant rejected an offer by the respondent that she pay him out his share in the house.

In his report in terms of s 4 of Chapter 6:03, the Master said that the major asset in Hubert's estate is the former matrimonial home (hereinafter referred to as "the house"). At the time of his death, Hubert was married to the

applicant. There were no children of that marriage. However, Hubert has three children from an earlier marriage, all of whom have emigrated. Hubert died intestate. Two executors were appointed, one to represent the applicant's interests and the other to represent the interests of the respondent and the other two children. There are some disputes concerning assets in the estate. Certain sculptures were exported by the respondent on behalf of Hubert's estate. He claims that their value was $27 000, whereas the applicant claims that the value was $200 000. The respondent claims that Hubert had a valuable coin collection, whereas the applicant says that there was no such collection. The respondent and the executors want to sell the house and wind up the estate, whereas the applicant says that she has no other home and wants to keep the house. There is no consensus amongst the beneficiaries. Although the applicant says that she gave her legal practitioners instructions in June or July 1997 to make an application for maintenance from the estate, no such application was received. Then, on 3 February 1991, the

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applicant was put on terms by the High Court, one of them being that any application for maintenance had to be filed within 30 days. She filed her application on 24 February. The Master has now referred the application for adjudication by the court.

In his report, the Master makes the following comments. There is no consensus amongst the beneficiaries as to the winding up of the estate. The applicant does not want the house to be sold, because it is her home and she has been living there for 18 years. She is a widow and her life will never be the same. It may be true that she is self-sufficient, but nonetheless she needs a roof over her head. The other beneficiaries have not lived in this country since the early sixties. They have nothing to lose if the house is kept for the widow. Possibly, she should be allowed to buy out the other beneficiaries' shares at the 1992 valuation of the house "to avoid prejudice to the beneficiaries". The long delay in winding up the estate is prejudicing the beneficiaries.

A supplementary opposing affidavit was filed by Susan Colquhoun, representing the respondent. There were a number of affidavits, letters and other papers annexed thereto. From the papers filed, a number of facts clearly emerge. Hubert was an avid numismatist and had, over the years, accumulated an extensive and valuable collection of coins. That collection of coins has disappeared. Hubert was also a very keen collector of silverware, gems and ivory and ebony carvings. These, too, have all disappeared. The applicant alleges that the silver and other articles in fact belonged to a friend, Major "Mac" Willar, and she and Hubert were merely storing them for Willar, who had taken them away. He may have left the country. These allegations are, to my mind, highly suspect. At the time of his death. Hubert's company was

in the process of exporting some stone and wood carvings to the respondent's company in New York. The applicant claimed initially that the value of the carvings was in the region of $200 000 and later said that the value was millions of dollars. The respondent established that their value was $27 000 which he paid to the executors. The applicant admitted that she supported Hubert, purchased household furnishings and collected antique furniture, therefore she could not have been partially or totally dependent on him, as is required by s 8 of Chapter 6:03. Mr Bernard Ponter paid the applicant, by way of maintenance from the estate, amounts totalling $17 408.21 and one of the executors paid her amounts totalling $51 949.26 and also paid certain creditors on her behalf amounts totalling $99 103.92. The grand total is $116 512.13. Even though the other beneficiaries live outside the country, they cannot be disinherited in favour of the widow, their step-mother. They are Hubert's children. The house is the only remaining asset in the estate. The children did offer to let the applicant buy their shares in the house and she declined the offer. The applicant is, by law, entitled to a quarter share in the estate or $250 000, whichever is the greater.

Mrs Colquhoun concluded her affidavit by requesting, *inter alia*, that the applicant be held accountable to the estate for all assets on the property at the time of the death of Hubert, including all silverware, stone and wooden sculptures, coin collections, porcelain, ivory, gems, crystal, stamps and his personal jewellery, amongst which was an extremely valuable gold watch inscribed with the royal insignia of the King of Jordan, his gold and onyx ring, his gold pen

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and pencil set and other belongings, as well as two vehicles. She sought a draft order dismissing the applicant's claim for maintenance and ordering the sale of the house, that the applicant allow valuators into the property for the purpose of valuing it and that she account for all the movable assets in the estate.

Hubert died on 11 April 1991. No will can be found. There are three children from his first marriage, one being the respondent, and his widow, the applicant. The law of intestate succession in Zimbabwe provides that each of the four survivors is entitled to a quarter share in the estate, but the widow must receive at least $200 000. Since the house comprises the major asset in the estate, it is not possible to give one survivor the immovable property with the other three sharing the movable property or proceeds thereof. As the respondent has requested that the house be sold, the executors are legally obliged to do so. The applicant has refused to permit any valuator or estate agent to come onto the property. On 30 May 1996, the then Master directed that the house be sold by private treaty, but the applicant was given 30 days to make an offer to buy the property which was acceptable to the other beneficiaries and the executors. This order was not implemented. In 1997, the

executors filed an application, citing the applicant, the respondent and the Master as respondents - case No. H-8115-97. On 3 February 1998, Blackie J issued an order which provided as follows. The applicants in that case and their authorized agents were to be allowed access to the immovable property for the purposes of inspection and the applicant was to give them vacant possession of the property within three months of the date of the order. If she did not move off the property, the Deputy Sheriff was authorized to remove her and her possessions. However, the learned judge then specified that the order was subject to the applicant's right to bring an application for maintenance in terms of Chapter 6:03 within 30 days of the date of the order. The effect thereof would be to stay the running of time as regards the eviction of the applicant from the property. He ordered that the costs of the application be paid by the applicants.

Mr *de Bourbon* made the following submissions. The only account for the estate which is before the court shows the total worth of assets to be $756 752.69 and the liabilities total $92 667.12. Therefore, the amount available for distribution amongst the four heirs is $664 085.57, of which $580 000 represents the value of the house. The balance to be divided is $84 085.57 which means that each heir will receive $21 021.39 therefrom. Hubert and the applicant had lived together for 12 years but had been married for only 6 years. The house is registered in his name. The applicant has not applied for a usufruct over the property, although in effect she has had one for some 8 1/2 years. The Master, in his report, accepts that she is self-sufficient but "needs a roof over her head". If the applicant is to be permitted to buy out the shares of the other heirs, it must be at the present day value of the house and not the value which pertained in April 1991. In *Shaw* v *Shaw & Anor* 1992 (2) ZLR 134 (S), GUBBAY JA, as he then was, discussed the meaning of the concept of "maintenance" in Chapter 6:03 and concluded that it covered such things as food, clothes, a house and all other "necessaries and conveniences of life", having regard to the various factors specified in subs (2) and (3) of s 7 of Chapter 6:03.

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The learned Judge of Appeal went on to say that the trigger for an order was two-fold : firstly, there must be a need, and secondly, it must be just and equitable. In that case, the court *a quo* had made an order granting the former spouse of the deceased a usufruct over the former matrimonial home for 5 years. On appeal, after considering all the relevant factors relating to the means of the former spouse and the surrounding circumstances, the Supreme Court reduced the usufruct to one of 6 months' duration. In this case, regard must be had not only to the money the applicant has received since the death of Hubert (which totals at least $99 103.96) but also to the question of the missing collections. In fact, she has already had the lion's share of the estate and is now seeking to deprive Hubert's children of

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any form of inheritance from their father. The court is required, by s 7(2)(h) of Chapter 6:03, to have regard to the interests of the persons who would normally succeed on intestacy, and not only to the needs of the former spouse of the deceased. By virtue of s 7(3)(c) of Chapter 6:03, the court is required to have regard to the provision which the applicant might reasonably be expected to have received if the marriage had been terminated by divorce, and not by death. Having regard to the criteria laid down by MCNALLY JA in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S), if the parties had been divorced on 11 April 1991 she would have received considerably less than what she has already taken from the estate. After all, the house is registered in Hubert's name; he acquired it long before he married the applicant and they had been married for only 6 years. It must be noted that it has taken the applicant 7 years to bring this application and, after it was lodged, she took no steps to ensure that it was heard expeditiously. Then, when the matter was set down for hearing in October 1999, she applied for a postponement in order to enable her to obtain her file from her legal practitioners. Hence the matter was postponed to 3 December 1999. It was then postponed twice and was finally heard on 10 December 1999. If she was in desperate need of maintenance, and had clean hands, she would have made an application for maintenance many years ago.

Section 3 of the Deceased Estates Succession Act [*Chapter 6:02*] provides for the entitlement of the spouse of a person who dies intestate. If, as in this case, the spouses were married out of community of property and the deceased spouse leaves any descendants who are entitled to succeed *ab intestato*, the surviving spouse is entitled to receive, as his or her sole property, the household goods and effects and, in respect of the remaining free residue, he or she succeeds to the extent of a child's share or to so much as does not exceed the specified amount, whichever is the greater. The specified amount, for the purposes of s 3, is specified by the Minister of Justice, Legal and Parliamentary Affairs, by notice in the *Gazette* in terms of s 6 of that Act. The specified amount for the purposes of s 3(b)(ii) of that Act at present is $200 000 which was fixed in SI 156 of 1991, published on 28 June 1991. Having regard to the depreciation in the value of money since that date, I would recommend that serious consideration be given to increasing the specified amount to a reasonable amount. The amounts that were considered reasonable in 1991 bear little relationship to today's values.

Section 3 of Chapter 6:03 provides for applications for maintenance from the estate of a deceased person. In terms of subs (2) thereof, such an application must be made within three

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months of the date of the grant of letters of administration to the executor. However, the Master is empowered, on good cause shown, to grant an extension of the three-month period. There

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is no evidence on record to show that the Master did extend the period. However, BLACKIE J, in his order, did grant authority for the applicant to make such an application. There is nothing to indicate whether or not good cause was shown, and if it was, what the good cause was. Be that as it may, I do not consider that the applicant has shown that she is in need of maintenance from the estate of Hubert. Furthermore, it seems to me that she has not approached the court with clean hands. She has not been open and honest with the court about the movable assets of the estate, and in particular the coin and silver collections.

Section 10(1)(a) of Chapter 6:03 provides that when any person dies, the surviving spouse shall have the right to occupy any immovable property which the deceased had the right to occupy and which the surviving spouse was ordinarily occupying immediately before the death of the deceased. However, s 11 of Chapter 6:03 provides that the rights conferred by s 10 shall terminate upon completion of the administration of that portion of the deceased estate to which those rights relate. Consequently, with the dismissal of the applicant's claim for maintenance, the right of the applicant to remain in occupation is now terminated. Furthermore, the order granted by BLACKIE J on 3 February 1998 now becomes operative and, presumably, the executors will sell the house and finalise the estate.

The application is dismissed with costs.

Coghlan, Welsh & Guest, respondent's legal practitioners

CHIKADAYA *v* CHIKADAYA & ANOR 2000 (1) ZLR 343 (HC)

Citation	2000 (1) ZLR 343 (HC)
Case No	Judgment No. HH-50-00
Court	High Court, Harare
Judge	Smith J
Heard	February 18, 2000; February 21, 2000
Judgment	March 1, 2000
Annotations	None

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Civil application

Flynote

Practice and procedure - parties - requirement to come to court with clean hands - application to enforce contract entered into to circumvent city council's housing policy - application dismissed

Headnote

The applicant sought the transfer of a property into his own name. Several years earlier, he had contracted to buy the property but, because of the city council's policy that no person could own more than one property in that housing area, the property was registered in the respondent's name. He did this in order to circumvent the Council's policy that no person should be allocated more than two houses.

Held, that the law requires that litigants come to court with clean hands. They are not allowed to come to court seeking the court's assistance if they are guilty of lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. Although what the applicant did was not unlawful, the court could not condone the flouting and undermining of the Council's equitable and sensible policy. If the court condoned this action it would have very harmful effects. There are not enough houses for the people; hence the policy of one house per person. People who already have houses should not be able to frustrate the hopes and expectations of those who do not.

Cases Considered

Cases cited:

Barclays Bank (DC&O) v *Volkskas Bpk* 1951 (2) SA 296 (T)

Deputy Sheriff, Harare v *Mahleza & Anor* 1997 (2) ZLR 425 (H)

Khaile v *Administration Bd, Western Cape* 1983 (1) SA 473 (C)

Mulligan v *Mulligan* 1928 WLD 164

Underhay v *Underhay* 1977 (4) SA 23 (W)

Case Information

G Musariri, for the plaintiff

Judgment

Smith J: The applicant (hereinafter referred to as "Cyril") issued summons seeking an order that the first defendant (hereinafter referred to as "Zakeyo") cede his rights, title and interest in stand No. 6059, Glen View Township, Harare (hereinafter referred to as "the Property") to Lydman Chikadaya. In his declaration Cyril says that the second defendant (hereinafter referred to as "the Council") sold the Property to Kufa Oswin Danda on 26 September 1979 and he bought Danda's rights, title and interest in the Property some

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time in 1980. At that time, he had another property within the area under the jurisdiction of the Council. It was the policy of the Council not to permit the cession of, or to give, rights to any residential property to a person who already owned, or had rights in, another residential stand within the area under its jurisdiction. Therefore, Cyril agreed with Zakeyo that the Property would be registered in the latter's name in order to circumvent that policy of the Council. It was further agreed that the Property should in due course be registered in the name of one of Cyril's children. On 28 January 1982, the Council approved the cession of Danda's interests in the Property to Zakeyo. On 19 May 1998, Cyril asked Zakeyo to cede his rights in the Property to Cyril's son, Lydman, but Zakeyo refused to do so.

Zakeyo denies that there was any such agreement as alleged by Cyril to defraud the Council. He claims that Cyril told him that Banda was waiting to sell his interests in the Property and he bought the interests for himself.

As was done by BARTLETT J, in *Deputy Sheriff, Harare* v *Mahleza & Anor* 1997 (2) ZLR 425 (H), when the parties first appeared and Mr *Masiriri* applied for a postponement, I *mero motu* raised the question of whether Cyril was approaching the court with clean hands. At the resumed hearing, Mr *Masiriri* argued that the circumstances in this case were different from those in the *Mahleza* case. In that case, Mahleza had contravened the law, whereas in this case it was only a policy of the Council that Cyril was trying to circumvent. Furthermore, Cyril had not made any false representations to the Council in connection with the Property. In the *Mahleza* case *supra* at p 426B-C, BARTLETT J said:

"People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. As stated by DAVIDSON J in *Underhay* v *Underhay* 1977 (4) SA 23 (W) at 24E-F:

> 'It is fundamental to court procedures in this country and in all civilised countries that standards of truthfulness and honesty be observed by parties who seek relief.'

If this court were not to enforce that standard, it would be washing its hands of its responsibility."

The facts of that case were stated by BARTLETT J at p 427-428 as follows:

"The basis of Mary Mahleza's claim is accordingly that she dishonestly pretended that the disputed goods were being purchased by her husband (or his transport business) in order to take advantage of his sales tax number to evade paying the lawfully due sales tax at the point of sale. When she found that, as a consequence of her misrepresentation, the goods had been attached as her husband's, she then altered the invoices to reflect her name as the purchaser and sought the court's protection.

Are her hands clean? She has on her evidence dishonestly evaded paying sales tax at the

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point of sale by pretending that the purchaser was someone else. She has not apologised for that dishonesty. She has not sought to tell the court that the sales tax has now been paid nor offered to ensure that it will be paid. She seems to regard evasion of tax as part of the natural order of things. While she is probably not the only potential Zimbabwean taxpayer to hold that view, she would be well advised to remember that if everybody evaded tax the Pensions Office would have no money to pay her pension. She has, again on her evidence, altered the sales invoices in the founding papers to reflect her name, but has at least accepted and explained those alterations in a further affidavit."

In *Mulligan* v *Mulligan* 1928 WLD 164, the court refused to entertain the suit of a litigant who was a fugitive from justice. De Waal J said at 167:

"Before a person seeks to establish his rights in a court of law he must approach the court with clean hands."

Then in *Barclays Bank (DC & O)* v *Volkskas Bpk* 1951 (2) SA 296 (T) where it was contended that the applicant had come before the court with "dirty hands", Dowling J said at p 347C:

"even if the applicant were guilty of contraventions of the Act, the type of conduct which the court penalises by withholding its protection of the use of a trade name or trade mark is conduct involving moral obliquity such as fraud or other forms of dishonesty."

The learned judge went on to hold that if there were contraventions of the Banking Act, it did not appear to him that such contraventions comprised any element of fraud or dishonesty.

A case which, in my view, is analogous to the case before me is *Khaile* v *Administration Board, Western Cape* 1983 (1) SA 473 (C). The respondent in that case was responsible for the administration of dwellings in a township called Guguletu. Its superintendent allocated dwellings and issued residential permits to tenants and was empowered to cancel such permits if the permit-holder's wife ceased to live with him or was estranged from him. Khaile's wife left him, which meant that the superintendent was entitled, in terms of the regulations, to cancel his residential permit. The two were reconciled, but the superintendent decided to cancel Khaile's residence permit on the grounds that the couple were estranged. Khaile then brought the matter on review. In the meantime, however, his wife again left him, this time apparently for good. Khaile did not tell the superintendent of this new development. BERMAN AJ refused to interfere with the superintendent's decision, saying *inter alia* at p 480B-C:

> "There is also of course the fact, which should not be left out of account, that the good and sufficient reason for cancelling applicant's residential permit was unknown to respondent when it made the decision to cancel only because of applicant's deliberate action in withholding the truth from respondent and in seeking to mislead it - the litigant with dirty hands is not entitled to expect, or to receive, clean justice from the court."

The insistence by the courts on honesty on the part of a litigant is also demonstrated in *Underhay* v *Underhay* 1977 (4) SA 23 (W) where the

plaintiff, who was applying for a divorce, lied to the court, saying that she had become pregnant by way of artificial insemination. At p 24E-G, Davidson J said:

> "It is fundamental to court procedures in this country and in all civilised countries that standards of truthfulness

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> and honesty be observed by parties who seek relief. There is a factor which operates in this case, particularly, because the plaintiff who seeks relief matrimonially must come into court with clean hands, and must confess his or her adultery which would otherwise be a bar to his or her obtaining the relief. They say that confession is good for the soul; in this case, it is absolutely essential for the success of the action. The plaintiff failed to make her confession at the right stage, namely, in her pleadings and in her evidence in the court."

In this case, it is not a question of whether or not the applicant is telling lies. In fact, he is brutally frank. He says that the property was registered in Zakeyo's name in order to circumvent the policy of the Council that no person should be allocated more than two houses. Should the court permit that and become a party to the flouting and undermining of the Council's policy? I do not think so. The policy which was adopted by the Council, and is the policy of most, if not all, local authorities in Zimbabwe, is a very sensible one. There are not enough houses for the people. In every urban area, the lists of names of those wanting houses are lengthy and there is little chance of the housing needs being satisfied. Understandably, the local authorities have decreed that anyone who already owns a house cannot be allocated a second. Undoubtedly, many people try to circumvent the policy of one man or woman, one house, and no doubt many succeed. The courts cannot, however, assist those who want to subvert the policies of the local authorities.

I cannot accept the submission by Mr *Musariri* that, because Cyril has not contravened any law, his actions must be condoned. The circumvention of the Council's housing policy would have much more harmful effects than would the contravention of some by-laws. People who already have houses should not be able to frustrate the hopes and expectations of those who do not have a house and are hopefully waiting to be allocated a house. I accept that Cyril has not made any misrepresentation to the Council.

However, if one accepts his averments, he connived with Zakeyo for Zakeyo to misrepresent that it was he that had bought Danda's interest in the Property when in fact, it was Cyril.

In the circumstances, the plaintiff's claim is dismissed with costs.

Musariri & Co, plaintiff's legal practitioners

S *v* MAZANO & ANOR 2000 (1) ZLR 347 (HC)

Citation	2000 (1) ZLR 347 (HC)
Case No	Judgment No. HH-46-00
Court	High Court, Harare
Judge	Garwe J
Heard	March 1, 2000
Judgment	March 1, 2000
Annotations	None

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Criminal review

Flynote

Evidence - admissibility - statements made by accused - before being admitted, rules as to admissibility must be satisfied - statements admitted without satisfying rules must be disregarded - rules apply to all statements made by accused, including mute indications

Headnote

The same rules as to admissibility apply to all statements made by the accused, whether oral or in writing, whether constituting a confession or not, and whether inculpatory or exculpatory (or partly one or the other). A police officer may not give evidence of any such statement unless he first satisfies the rules on admissibility. If the accused makes an indication and the indication is, in effect, a mute statement about the offence with which he is charged, that aspect of the indication would not be admissible. If during the indication the accused points at certain objects or explains what he knows about the offence, this is a statement for the purposes of s 256 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. A serious irregularity is committed where statements or indications are admitted in evidence without the rules as to admissibility being satisfied. Such statements must be excluded and the matter determined without reference to that evidence.

Cases Considered

Cases cited:

S v *David* HH-204-94

R v *Mwaengahama* 1950 SR 220

S v *Nkomo* 1989 (3) ZLR 117 (S)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 256

Judgment

Garwe J: The position is now settled that a statement made by an accused person, written or oral, is not admissible against him unless the statement is shown to have been made freely and voluntarily without any undue influence being brought to bear. This has been repeatedly stressed in a number of review judgments of this court. Despite this, however, a number of magistrates still do not seem to appreciate that where there is a dispute as to whether a statement by an accused person was made freely and voluntarily a separate issue or trial within a trial must be held before such a statement can be admitted in evidence.

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GARWE J

The facts giving rise to this review judgment are as follows. The two accused in this case appeared before a magistrate at Masvingo charged with the crime of "housebreaking and theft". It was alleged during the trial that they had on 7 November 1998, unlawfully and with intent to steal, broken and entered Concord Supermarket, Chiredzi, from which premises they took an assortment of goods and cash. Entry into the supermarket had been effected after the burglar bars had been cut with a bolt cutter. The stolen property was valued at $45 727.55. Property worth $1 099.55 was recovered. Most of the property was recovered from accused 2 whilst a few items were recovered from accused 1. Although both the accused pleaded not guilty they were nevertheless found guilty as charged and each was sentenced to 30 months' imprisonment with labour, of which 6 months' imprisonment with labour was suspended for 5 years on the usual conditions of good behaviour.

During the trial, the two accused told the court that the indications they had made to the police had been made under duress. In particular, they told the court that they had been assaulted by the police after which they had then been taken to the scene where they were directed to point at the window through which entry had been effected. Photographs had then been taken by the police whilst they were so indicating. The photographs were produced at the trial.

The prosecution called a number of witnesses. The manager of the shop gave evidence on the break-in and the nature, quantity and value of property stolen. He was able to identify part of the recovered property as having been stolen from the supermarket. A number of police officers were also called. They gave evidence on the arrest of the two accused, recovery of some of the stolen property and the indications made by the accused admitting the offence. A trial within a trial was not held to determine whether the indications made by the accused had been freely and voluntarily made. The magistrate however came to the conclusion that the indications should be admitted. He remarked at p 9 of his judgment:

> "We now come to the question of indications. The complainant says the accused made indications. They appeared to be free when they made the indications and also to know their way around as no one told them or directed them what to do.
>
> We have also heard from at least three or four officers who said the accused made indications.
>
> The court is satisfied that the accused did make the indications. Accused one made the indications firstly and he made them freely and voluntarily. He had even explained that accused two had not entered the supermarket. This he also explained in the presence of the complainant ...
>
> As for accused two, I am also satisfied that he made the indications freely and voluntarily because he confirmed what his co-accused had said that he remained outside and they later were to share the loot at a tree some distance away ..."

I asked the trial magistrate to explain whether the statements made by the

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accused during the indications had been properly admitted. Whilst admitting that a trial within a trial had not been held, the trial magistrate sought to justify the conviction on the basis that the accused had been found in possession of the recovered property about a week after the break-in. He also submitted that because the complainant, who had been present during the indications, had deposed to the fact that during the indications the accused appeared to know their way around the shop "with no-one telling them what to do", this "tended" to connect the accused to the commission of the offence.

Section 256 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides:

> " (1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, during a preparatory examination or after committal and whether reduced into writing or not ..."

It is clear from the language used in the section, which is clear and allows of no ambiguity, that any statement made by an accused person, verbal or written, cannot be admitted in evidence unless it is first proved that the statement was made freely and voluntarily. This has been stressed in a number of decided cases within this jurisdiction.

In *R* v *Mwaengahama* 1950 SR 220 at p 220, TREDGOLD CJ had this to say:

> "When a question of the admissibility of any evidence is raised and such an admissibility is dependent upon an issue of fact, this *issue should be tried separately and decided before the matter proceeds*. The Crown should be permitted to call any witnesses it may wish and the defence afforded an opportunity to cross-examine such witnesses. Then the defence should be permitted to call witnesses, including the accused, if he so desires, and these may be cross-examined by the Crown. All evidence and all questions put should be strictly confined to the issue before the court. No decision should be made until all evidence on the point has been led. The most common form in which such an issue arises is when the Crown tenders a statement made by the accused to the police, or to any other person in authority over him. In such a case, a clear onus rests on the Crown to prove the statement was freely and voluntarily made. *Where there is the slightest suggestion that the statement was made under duress or pressure, this question must be fully investigated before the statement is admitted* ..." (my emphasis).

In *S* v *Nkomo* 1989 (3) ZLR 117 (S) at p 124F, MCNALLY JA remarked as follows:

> "Inevitably, when the investigating officer came to give evidence, he prattled on happily about what the appellant had told him. Nobody stopped him. Nobody seems to have thought that a trial within a trial was called for, despite the fact that it was clear from the defence outline that the appellant was alleging that everything he said was false and induced by assaults, and everything he indicated was indicated at the behest of the police to which he submitted after the assaults.

GARWE J

> Sometimes I wonder whether Police Officers and prosecutors labour under the mistaken belief that 'a statement' is only 'a statement' when it is written down. Therefore, they may think, the rules about admissibility apply only to written statements. If that is a general belief, it is necessary to say firmly that it is wrong. No statement to a person in authority by an accused person, made outside the court room, may be produced (if it is in writing) or quoted (if it was oral), unless the rules have been observed, that is to say, unless the court is satisfied that it was made freely and voluntarily and without undue influence being brought to bear. That is what s 242(1) (now s 256(1)) of the

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Criminal Procedure and Evidence Act means.

A statement is a statement, that is, it is something said by the accused. It may be recorded on paper, in which case it is called a written statement, or it may not, in which case it is an oral statement. It may be a formal statement made in an office before assembled witnesses; or it may be an informal statement, for example, chit-chat on the way to the scene of crime. A police officer may not give evidence of any such statements unless he first satisfies the rules about admissibility. See S v *Ndlovu* 1988 (2) ZLR 465 (S).

Police officers should be trained until it becomes second nature to them, never to use in court the words 'He said ...' or 'He told me ...' until the court has given them leave to do so. When referring to the accused they should say 'He then made a statement'. The witness should then pause. When referring to anyone else they should say 'He then made a report to me'. Those phrases should trigger off an automatic reaction in the minds of the prosecutor, the defence lawyer and the presiding officer, be he a judge or magistrate. The prosecutor's reaction, in relation to a statement, will be 'was he properly warned and cautioned and did he make the statement freely and voluntarily and without undue influence and while in his sound and sober senses?'. In relation to a report, he will normally say, 'Do not tell us what he said, I will be calling him later and he can tell the court himself'.

It is unfortunate that it should be necessary to spell out in such detail the elementary rules of evidence. But the fact is that here a possibly cast iron case has been shattered by procedural errors. This court has the difficult task of picking up the pieces, and sticking them together to see if they still hold water.

Because of the failure to hold a trial within a trial, it does not seem to me that we can pay any attention at all to the many things the appellant is alleged to have said to the police, both about the events of day of the murder and about the knife recovered from his house."

The Attorney-General, to whom I referred the matter for an opinion, agrees that the indications made by the accused and the accompanying statements were not properly admitted. In a most helpful response, the Attorney-General has remarked:

"Failure by a trial court to observe the principles enshrined in s 256(1) of the Criminal Procedure and Evidence Act is such a serious irregularity that in *S* v *Ndlovu supra* the Supreme Court held that all the evidence given by various police officers as to what the appellant therein had said, which did not meet the requirements of that section (then s 242(1)), had to be ignored as evidence. The extra-curial statements were inadmissible.

See S v *Bvuure* (1) 1973 (2) RLR 171 at 174

R v *Nhleko* 1960 (4) SA 712 (AD) at 720 C

S v *Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 112C-118F.

From these authorities, it is clear that in order to determine the admissibility of an accused's extra-curial statements a trial on the separate issue has to be held. It is through

a trial-within-a-trial that it can be determined whether or not an extra-curial statement was given freely and voluntarily.

It is common cause that no trial-within-a-trial was held in respect of the extra-curial statements by the accused persons in the instant case. This is despite the claims by both accused persons in their defence outlines that the statements they made to the police had not been made freely and voluntarily. They also claimed in their defence statements in court to have been severely assaulted by members of the police force.

In view of the probative value of the accused's unconfirmed extra-curial statements and indications, and the

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challenge by the accused persons to their admissibility, it is respectfully submitted that the court *a quo* was enjoined to hold an enquiry into the admissibility of the statements. Failure to do so was an irregularity of serious magnitude to the proceedings.

It is respectfully submitted that as the trial court improperly accepted the State's evidence on the extra-curial statements and indications by the accused it acted on it to the accused persons' prejudice.

If this Honourable Court is to adopt the reasoning in *S* v *Ndlovu supra*, it is respectfully submitted that as the evidence of the accused's extra-curial statements did not meet the requirements of s 256(1) of the Criminal Procedure and Evidence Act, that evidence is to be ignored."

I also had occasion in *S* v *David* HH-204-94 to make remarks to the same effect.

It is necessary to stress that any indications made by an accused person during which he explains what he knows about the offence or during which he points at certain objects is a "statement" for purposes of s 256 of the Criminal Procedure and Evidence Act. All statements made by the accused, whether constituting a confession or not and whether inculpatory or exculpatory (or partly one or the other), are subject to the same rules as to their admissibility. A police officer may not give evidence of any such statements unless he first satisfies the rules on admissibility - *Criminal Procedure in Zimbabwe* by John Reid-Rowland at p 20-2. As the learned author further points out:

"... If the indication was, in effect, a mute statement about the thing discovered, that aspect of the indication would not be admissible ..." (at p 20-14).

What happened in this case was that the police were allowed to give evidence on the statements and indications made by the accused before the admissibility of such statements and indications had been determined. This was irregular. A trial within a trial should have been conducted to determine the admissibility of the statements allegedly made by the accused. This was not done. Reliance cannot therefore be placed on such statements. The evidence given by the police in this regard must accordingly be excluded.

The only evidence implicating the accused is the property that was recovered in their possession approximately a week after the commission of the offence. In respect of the first accused, the Attorney-General has remarked:

GARWE J

"The first accused's account for his possession of the recovered property was that the property was brought to his residence by the girlfriend of one Amos Banda for safe-keeping: Amos Banda had been apprehended for an offence allegedly committed in Bindura in Mashonaland Central. The girlfriend had been evicted from Banda's lodgings upon Banda's arrest.

Amos Banda and his girlfriend did not testify in the court *a quo*. Neither the State nor the defendant called them. It is respectfully submitted that as the onus was on the prosecution to prove its allegations against the accused Benson Mazano, its failure to dislodge this assertion by him left its case against him to depend on the evidence relating to his indications and the extra-curial statements accompanying those indications.

Once it is accepted that the extra-curial statements were improperly admitted in evidence, it must follow that the State case against Benson Mazano must also fall away for want of evidence.

The Attorney-General does not support the conviction of the first accused on the current charge in view of the

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evidence led in the court *a quo*."

I agree with the above conclusion. The State did not prove beyond a reasonable doubt that the first accused had indeed broken and entered the supermarket and stolen the property in question.

In respect of accused 2, different considerations however apply. He was found in possession of almost all the recovered property about a week or so after the break-in. His claim that he was not found in possession of the stolen property was correctly rejected by the trial court. I am satisfied he was correctly convicted and accordingly confirm both the conviction and sentence.

Lastly, the trial magistrate's attention is drawn to the fact that there is no such offence as "housebreaking and theft" known to law. Charges against accused persons should be correctly drafted to obviate possible prejudice to accused persons, particularly unrepresented.

MUNGWIRA J agrees.

PHILLIPS CENTRAL CELLARS (PVT) LTD *v* DIRECTOR OF CUSTOMS AND EXCISE 2000 (1) ZLR 353 (HC)

Citation	2000 (1) ZLR 353 (HC)
Case No	Judgment No. HH-58-00
Court	High Court, Harare
Judge	Gillespie J
Heard	May 5, 1999
Judgment	March 8, 2000
Annotations	None

Civil action

Flynote

Delict - vicarious liability - wrongful act of employee - employee committing prohibited act - act a part of his official duty - customs officer producing clearance certificates having taken correct amount from importer and keeping part of the money - employer liable

Headnote

The plaintiff paid a clearing agent to clear goods through customs. It handed over the correct amounts of customs duty to the agent to pay the duty but the agent, acting in collusion with a

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corrupt customs officer, converted most of the payments to his own use. Stamped customs clearance certificates were produced which showed that the correct duty had been paid and the plaintiff cleared the goods. However, because the plaintiff was suspicious of some of the certificates, it instituted an investigation and the fraud was uncovered. The results of the investigation were reported to the customs department. Instead of being grateful at the uncovering of the fraud that had been perpetrated with the collusion of a customs officer, the reaction of the customs department was to place an embargo on the plaintiff's remaining goods in bond until it paid the full amount of duty. The plaintiff paid the amount demanded under protest. It then claimed the recovery of the excess funds, arguing that the defendant was vicariously liable for the acts of the customs officer who produced the clearance certificates.

Held, that even where an employee commits a wrong in pursuit of his, rather than the employer's, interests, the employer may still be vicariously liable, provided that the wrong is nonetheless sufficiently proximate to his duties and authority and to the employer's interests as reasonably to justify the conclusion that in committing the wrongdoing the employee was still engaged upon functions to which he was appointed. The key issue is the degree of departure from the employer's business. Since the question is a matter of degree, the further removed the misconduct is from the employer's own interest and business, the more important becomes the questions of the employee's ostensible authority, general powers and specific duties. For the employer to be held vicariously liable it is not enough that the employee merely takes advantage of an opportunity for dishonesty presented by his employment.

Held, further, that the customs officer was behaving in a way that was forbidden and was pursuing his own interests. However, in doing so he was using an authority vested in him to assess duty; to receive payment of duty; to enter data into a computer system; to produce and issue bills of entry; and to pass payment of duty on to his employer. In doing these

authorised acts, he deviated from his appointed course by falsifying computer entries; producing, issuing and filing false documents; converting part of the duties received; and accounting to his employer for only part of those duties. This was more than merely taking advantage of an opportunity for fraud afforded by his employment. It was an abuse of a power and a misuse of authority so clearly connected with his duties that the false bills of entry were on file as official records. The duties not stolen, and balancing the false bills of entry on file, had become receipts in the hands of the employer. The defendant was vicariously liable for the loss caused to the importer.

Held, further, that the plaintiff was not liable for the fraud of its agent as a principal. It would only be liable for the agent's delicts which were specifically authorised or committed in obtaining the authorised results, neither of which applied in the present case.

Held, further, that the additional duty extorted by the defendant's officers was accordingly not due and that the defendant's acts in obliging the importer to pay the duty under protest was an abuse of power.

Cases Considered

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Cases cited:

Fawcett Security Ops (Pvt) Ltd v *Omar Entprs (Pvt) Ltd* 1991 (2) ZLR 291 (S)

Feldman (Pty) Ltd v *Mall* 1945 AD 733

Min of Police v *Rabie* 1986 (1) SA 117 (A)

Mkize v *Martens* 1914 AD 382

Nott v *ZANU (PF)* 1983 (2) ZLR 208 (S)

Case Information

A P de Bourbon SC, for the plaintiff

Mrs *C Machaka*, for the defendant

Judgment

Gillespie J: The Temperance League would regard Mr David Simleit with fear and loathing. Others might see in him a gentleman of good cheer. Opinion would be divided. For he is a cellarer. He purveys all manner of fine liquor. And also - those which many might regard as indispensable adjuncts to imbibition - tobacco and coffee. It is not for me to say which of these attitudes would be correct. It is perhaps instructive to note that those of the former persuasion tend to give lectures and write papers on the perils of indulgence and the benefits of abstemiousness. Whereas the opposing camp seem more given to poetry and song in praise of the pleasures of the cup and of the faithful cup-bearer:

> "The cellarman deserves my praise,
>
> from duty never shrinking.
>
> He deftly fills the glass I raise
>
> When I'm drinking, drinking, drinking!"1(54)

One does rather prefer music and rhyme to didache and Jeremiad.

One who has earned express praise relevant to these proceedings is Mrs Dale Nicholas. She has worked for the plaintiff for some sixteen years; first as a book-keeper and presently as the operations director. The source of her

praise was the defendant. Its cause, her exemplary efficiency in administering the Phillips bonded warehouse.

Paradoxically, it is that warehouse, and the payment of duty in respect of goods entered from it, that is at the heart of this dispute.

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The facts, which are in all respects uncontested, show that Mrs Nicholas, looking to increase the celerity with which liquor in bond was entered for the purposes of sale, engaged a new clearing agent. This person, Neil Tracey, carried on business under the style Alexa Freight. He is a thief. On a number of occasions, on Mrs Nicholas's instruction, he pretended to effect clearance of consignments of alcohol. He received from her payment in advance of the duty in an amount demanded by him.

Instead of making payment in the amount of the advance, however, Tracey chose dishonesty. In collusion with a customs officer, he paid only a fraction of the amount due and converted the balance to his own use. The fraud was concealed by the customs officer who, no doubt in consideration of payment of part of the converted funds, produced false bills of entry. One copy, for delivery to Phillips, showed payment of the full amount due. Another, for customs records, showed payment of a lesser amount fraudulently calculated, and matching funds actually received and recorded by customs.

Certain discrepancies in one of the bills given to her by Tracey caused Mrs Nicholas to query it with customs officers. She was assured by them that if the bill was stamped by the department of customs, as it was, then it constituted proof of payment of the amount of duty shown on the face of the document and of due clearance of the goods recorded. The discrepancies between that bill and her records, however, caused Mrs Nicholas, a properly cautious and thorough woman, to report her disquiet to Mr Simleit. He recommended a consultation with Mr Christopher Noble. Mr Noble is a former deputy director of customs and a customs consultant. It was his investigation that revealed the fraud described above. His findings were reported to the department of customs.

While these investigations were continuing, Tracey attended to clearances for Phillips and which may be tabulated as follows:

Bill of Entry

	Registration No.	Date	Client's Copy	Customs Copy	**Difference**
(A)	C 07926	12.6.96	$263 004.56	$34 475.81	$228 528.75
(B)	C 08542	17.6.96	$ 47 010.34	$ 2 453,83	$ 44 556.51
(C)	C 09076	21.6.96	$ 41 613.92	$41 613.92	Nil
(D)	Form 21	4.7.96	$ 30 923.17	No Trace of Processing	

GILLESPIE J

(E)	C 11370	9.7.96	$ 55239.18	$ 5 523.91	$ 49 715.27

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(F)	C 11407	9.7.96	$ 30037.74	$ 5 528.97		$ 34 508.77
(G)	C 13226	20.7.96	$ 32363.05	$32 363.05		Nil
(H)	C 14754	31.7.96	$ 51676.80	$ 8 844.00		(Stopped
					(Not Paid)	Payment)
(I)	C 14756	31.7.96	$ 40812.05	$ 4 081.21		(Stopped
					(Not Paid)	Payment)
						$357 309.30

Of these, it is items (A), (B), (E) and F) which give rise to the claim. No malfeasance was involved in items (C) and (G) which were properly issued. Payment was stopped on the plaintiff's cheques in respect of items (H) and (I) after the earlier frauds were uncovered. No issues arise in respect of these items nor item (D). The amount claimed is the total of the difference in items (A), (B), (E) and (F).

The defendant was far from evincing gratitude at the uncovering of fraud and collusion within his department. Rather, he took the view that Phillips had smuggled goods. That is to say, had removed goods from a bonded warehouse without clearing them or paying duty. He sent a band of officers to embargo the bonded warehouse. And to claim payment of the difference in duty between the customs' copies of the bills of entries - on pain of forfeiture of the entire contents under bond. Phillips paid. Under protest. And instituted this action for recovery of the funds.

The declaration sets out the claim in three alternatives. In the main, it is declared that a customs officer falsely represented to the plaintiff, by means of a stamped bill of entry, that duty had been paid, thereby enabling the plaintiff's clearing agent, in association with the defendant's officer, to convert funds intended to be paid as duty. In the first alternative, this misrepresentation was averred to be negligent. In the second alternative, it was innocent. These averments are contained in three paras 8, 9 and l0, of the declaration. The payment under protest to avert duress of goods is averred, and the fact that the payment was not due follows from the averment that loss was caused by the wrongful act, in the course of his employment, of the customs officer.

The defendant's plea raises many disputes, but few issues. The disputes, by which I mean irrelevant or immaterial conflicts of fact or argument, relate to such things as whether the plaintiff was obliged to engage a clearing agent; or whether a bill of entry constitutes a receipt for duty; or whether a receipt,

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other than a bill of entry, were ever issued. As to the material averments in paras 8 and 9, the defendant simply did not answer the averment that:

(a) customs officer acted fraudulently;

(b) that the bill of entry constituted a representation;

(c) that the representation facilitated the theft;

(d) that the theft was perpetrated "in association with the officials of the defendant".

To confirm that this is a correct reading of the true intention of the plea, one has but to recall that none of the plaintiff's evidence was challenged on any of these points. The plea asserts that the apparent duress of the customs officers was lawful conduct.

None of this discloses a defence. By amendment, therefore, the defendant subsequently inserted a denial that it is vicariously liable for the conduct of the officer in question, whose actions, it is pleaded, "were done solely and entirely in pursuit of such officer's personal interests". This, then, becomes the only material issue upon which the matter was referred to trial.

Mr *de Bourbon* attempted to present his case on the basis that duty had actually been paid. By this expedient he sought to avoid any legal controversy as to whether the defendant was liable for the officer's theft from the plaintiff. If the monies were in fact paid, then the theft would have been from the defendant and no question of vicarious liability would arise.

This argument is untenable. It is contrary to the declaration, which avers that duty was not paid. It also assumes a version of the fact - that the dishonest customs officer received the full amount of duty and converted it to his own use - which is not proven. It is therefore necessary to determine the point of vicarious liability.

An employer may be liable for injury caused by his employee to a third party, even where there is no fault, causative of the injury, attributable to the employer.

> "while on the one hand considerations of public policy and social justice favour the doctrine and militate against attempts to confine its operation within too narrow a compass, on the other hand it is usually contrary to legal principle to visit liability on a party who was not himself at fault in relation to the injury suffered."2(55)

The guiding principle, balancing those competing considerations, whereby vicarious liability is imposed upon the blameless employer of a wrongdoer, is that the employer is liable for wrongs committed by the employee "in the course of his employment".3(56)

The question of difficulty arises where the employee does wrong during his

employment but while pursuing his own rather than his employer's interest. Even here, the employer may still be liable where the employee's conduct, albeit a digression from his duties, is, as a matter of degree, sufficiently proximate to his duties and authority and to the employer's

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interests as reasonably to justify the conclusion that he is, wrongdoing or not, still engaged upon the functions to which he was appointed. 4(57) The reasonableness of the conclusion is in particular to be stressed

> "In order to emphasize that the court should not ... adopt an approach to the facts which would tend towards too jealous, a restriction of the above-stated principle of the vicarious liability of a master for the conduct of his servant." 5(58)

Application of this test of degree becomes even more problematic where the employee's conduct involves behaviour that is forbidden him by the employer. Such as where the employee steals his employer's customer's property. Many considerations have been invoked by the courts in an attempt to reach a reasonable conclusion as to whether the employee's behaviour was sufficiently proximate to his appointed function. For instance, whether or not the employer had clothed the employee with powers that were abused; 6(59) or whether goods stolen by the employee were entrusted to the particular care of the dishonest employee. 7(60)

It appears to me that no such consideration is stated with the intention of laying down a rule applicable to a specific category of wrong. Rather, they are all emphasized as important factors relevant to the overall question of the degree of departure from the employer's business. Since the question is a matter of degree, the further removed the misconduct is from the employer's own interest and business, the more important become the questions of the employee's ostensible authority, general powers and specific duties (for instance towards stolen property).

As the judgment, which I regard with respect as most instructive, of the learned CHIEF JUSTICE in *Fawcett* 8(61) shows, the line beyond which there can be no liability is where the employee merely takes advantage, for his own illicit gain, of an opportunity for dishonesty presented by his employment. 9(62) That is not sufficient to justify the reasonable conclusion that the act, although forbidden, is sufficiently connected to the authorized conduct so as to visit the employer with vicarious liability.

GILLESPIE J

Considering the facts of this case, and of the competing principles underlying the issue, and bearing in mind the need to preserve a flexible approach, not limiting the doctrine of vicarious liability too jealously, I am impressed by the following factors. First, the untrustworthy customs officers was clearly behaving in a way prohibited by his employer and was pursuing his own unlawful interest. Second, and nevertheless, in doing so he was using an authority vested in him to assess duty; to receive payment of duty; to enter data into a computer system; to produce and issue bills of entry; and to pass payment of duty on to his employer. Third, in doing this authorised act, he deviated from his appointed course by falsifying computer entries; producing, issuing and filing false documents; converting part of the duties received; and accounting to his employer for only part of those duties. I regard this as more than merely taking advantage of an opportunity or access afforded by his employment. It is, of course, just that; but it does not stop there. It is an abuse of a power and a misuse of authority so clearly connected with his duties that the false bills of entry are on file as official records. The duties not stolen, and balancing the false bills of entry on file, have become receipts in the hands of the

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employer.

I therefore hold that loss caused to the plaintiff is caused by the wrong of the defendant's employee, for which loss the defendant is vicariously liable. The further duty extorted by the defendant's officers and paid under protest was accordingly not due.

Before I finish I wish briefly to touch upon a point which might suggest itself to an interested reader and which might, if not mentioned, be thought to be an omission. That point concerns the involvement in the loss of the plaintiff's own agent. It might have been thought that this involvement could constitute a wrong by the plaintiff's agent damnifying the defendant and for which the plaintiff is responsible. If so, it might be considered that this could possibly affect, even if only in part, the plaintiff's right to recover the amount claimed. I have to point out that this is not a defence raised by the defendant. I have studied carefully the pleadings; the issues prepared in draft by both parties; the issues on which the matter was referred to trial; the evidence, and the submissions by defendant's counsel. The points to which I allude have simply not been raised. There is an oblique reference, in the defendant's summary of evidence, to loss being caused by the plaintiff's agent, but that has not been pursued at all and, of course, the defendant led no evidence. I do not criticize it for not doing so, indeed the decision may well be advised - taken in the knowledge that a principal is not vicariously liable for an agent's delicts unless the agent is an employee of the principal (which is not the case here). The principal is only liable for

his agent's delicts where they are specifically authorised or committed actually in obtaining the authorised result (which most certainly does not seem to be the case here).

Finally, I have to say that the act of the defendant, or his officers, in obliging the plaintiff to pay the amount paid under protest, was an abuse of power. The Director was not seeking in good faith to recover duty unpaid on goods wrongfully entered. He had no cause whatsoever to threaten to seize the goods so entered, and far less to embargo the entire stocks under bond. All the more egregious was it to threaten to seize future imports to hold them on account of unpaid duty. This was an act of extreme oppression and misuse of authority carried out in extraordinarily bad faith. This is particularly so given the previous favourable reports concerning the conduct of the plaintiff's business and the fact that it was the plaintiff which pursued its suspicion and investigated and reported the fraud to the defendant.

I therefore enter judgment for the plaintiff in the sum of $347 309.30 together with interest on the aforesaid sum at the prescribed rate from 8 July 1997 and costs of suit.

Byron Venturas & Partners, plaintiff's legal practitioners

Civil Division of the Attorney-General's Office, defendant's legal practitioners

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GRANTULLY (PVT) LTD & ANOR *v* UDC LTD 2000 (1) ZLR 361 (SC)

Citation	2000 (1) ZLR 361 (SC)
Case No	Judgment No. S-17-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA and Sandura JA
Heard	February 28, 2000
Judgment	March 13, 2000
Annotations	None

Civil appeal

Flynote

Practice and procedure - judgment - default judgment - rescission - grounds for - error - trial judge unaware of relevant facts - court to which application for rescission made not confined to record of previous proceedings - inordinate delay in seeking rescission - court's discretion to refuse rescission irrespective of merits

Headnote

The respondent, a financial institution, granted a loan to the first appellant in July 1990. The second appellant was one of the sureties and co-principal debtors. When the first instalment, due a year later, was not paid, the respondent issued summons. The respondents did not enter appearance to defend and were barred. In February 1992, default judgment was granted in terms of the summons. Well over five years later, the appellants applied for rescission of judgment, on the grounds that the sum of interest claimed was erroneously granted. At the time he granted the default judgment, the judge was not aware of a clause in the acknowledgement of debt. A proper interpretation of this clause showed that the amount of interest claimed by the respondent was considerably higher than was actually due and payable. The judge who heard the application refused it on two grounds. The first was that on the face of both the summons and the declaration placed before the original judge, there was nothing to indicate that there had been an error. The second was that to bring an application for rescission such a long time afterwards was an abuse of process. On appeal:

Held, that the judgment had been granted because at the time of its issue the judge was unaware of a relevant fact, the provisions of the clause in the acknowledgment of debt. Had he known if the clause, he would not have granted the judgment he did. There was ample precedent for the proposition that a court to which application is made for rescission is not confined to the record of proceedings in deciding whether a judgment was erroneously granted. The wording of r 449(1)(a) of the High Court Rules made it clear that a party against whom default judgment had been granted was entitled to place before the correcting, varying or

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rescinding court facts which had not been before the court granting the default judgment.

Held, further, that it is not necessary for a party seeking relief under r 449 to show "good cause". If a court holds that the default judgment was erroneously granted, it may be corrected, rescinded or varied without further enquiry.

Held, further, that the judge *a quo* was justified, in the exercise of his discretion, in dismissing the application by reason of the inordinate lapse of time. Rule 449 was a procedural step, designed to correct expeditiously an obviously wrong judgment or order. It is in the interests of justice that there should be relative certainty and finality as soon as possible

concerning the scope and effect of court orders. It would be a proper exercise of the court's discretion to rule that, even if the applicant proved that the rule applied, it could not be heard after the lapse of a reasonable time. The length of time the appellants waited in this case, whatever the explanation, was unreasonable and the application was an abuse of the court's process.

Cases Considered

Cases cited:

Bakoven Ltd v *G J Howes (Pty) Ltd* 1992 (2) SA 466 (E)

de Sousa v *Kerr* 1978 (3) SA 635 (W)

City of Harare v *Cinamon* 1992 (1) ZLR 361 (S)

Firestone SA (Pty) Ltd v *Genticuro AG* 1977 (4) SA 298 (A)

First National Bank of Southern Africa Ltd v *van Rensburg NO & Ors*, In re *First National Bank of Southern Africa Ltd* v *Jurgens & Ors* 1994 (1) SA 677 (T)

Fraind v *Nothmann* 1991 (3) SA 837 (W)

Frenkel, Wise & Co (Africa) (Pty) Ltd v *Consol Press of SA (Pty) Ltd* 1947 (4) SA 234 (C)

Holmes Motor Co v *SWA Mineral & Exploration Co* 1949 (1) SA 155 (C)

Nyingwa v *Moolman NO* 1993 (2) SA 508 (Tk)

Promedia Drukkers & Uitgewers (Edms) Bpk v *Kaimowitz & Ors* 1996 (4) SA 411 (C)

Scotfin Ltd v *R P K Buses (Pvt) Ltd & Ors* 1998 (1) ZLR 167 (H)

Simon NO & Ors v *Mitsui & Co Ltd & Ors* 1997 (2) SA 475 (W)

Stander & Anor v *ABSA Bank* 1997 (4) SA 873 (E)

Stumbles & Rowe v *Mattinson; Mattinson* v *Stephens & Ors* 1989 (1) ZLR 172 (H)

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Theron NO v *United Deomcratic Front (Western Cape Region) & Ors* 1984 (2) SA 532 (C)

Topol & Ors v *L S Group Mgmt Svcs (Pty) Ltd* 1988 (1) SA 639 (W)

Tshabalala & Anor v *Peer* 1979 (4) SA 27 (T)

Tshivhase Royal Council & Anor v *Tshivhase & Anor; Tshivhase & Anor* v *Tshivhase & Anor* 1992 (4) SA 852 (A)

Legislation considered:

High Court Rules 1971 (RGN 1047/1971), r 449

Case Information

P Nherere, for the appellants

E W W Morris, for the respondent

Judgment

Gubbay CJ: On 9 July 1990, the respondent granted a loan to the first appellant in the sum of $370 000, repayable in five equal instalments due on 9 July of each year, commencing in 1991. Interest thereon was agreed at an annual rate of eighteen *per centum*, making the total amount payable as interest $242 647.85.

The first appellant signed an acknowledgement of debt for $612 647.85, being the aggregate amount of the loan. The second appellant and three others bound themselves as sureties and co-principal debtors. Clause 5 of the acknowledgement of debt provided, in material part, that:

> "Should the debtor fail to pay any one instalment on due date, then, at the option of udc, any interest outstanding may be added to the balance capital then due and the amount so compounded, together with any other sum under this acknowledgement, shall immediately

> become due and recoverable by udc on demand together with interest thereon at the rate appearing on the reverse hereof, or such higher rate as may then be payable in terms hereof from the date of default up to the date of receipt of payment by udc of the total amount ..."

On 25 October 1991, and consequent upon the failure of the first appellant to make payment of the instalment due on 9 July 1991, the respondent issued summons and declaration simultaneously against the two appellants and the other three debtors. It claimed against each jointly and severally, the one paying the others to be absolved, payment of: (i) $607 647.85 representing the aggregate amount in terms of the acknowledgement of debt, less amounts paid by the first appellant; (ii) $3 258.60; (iii) interest on the sum of $607 647.85 *a tempore morae* from 7 September 1991 to date of payment; (iv) the costs of suit. An appearance to defend the action was entered. Thereafter, on 24 January 1992, all the defendants were barred for default of plea.

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On 27 February 1992, in a chamber application brought before him, MTAMBANENGWE J granted default judgment in terms of the summons and declaration. A copy of the acknowledgement of debt upon which the claims were based, though mentioned in the declaration, was not annexed.

No application was made by any of the judgment debtors for rescission of the default judgment. However, well over five years later, on 8 October 1997, the two appellants applied under r 449(1)(a) of the Rules of the High Court for an order correcting the judgment of Mtambanengwe J to the extent that the sum of $607 647.85 with interest thereon from 7 September 1991:

> "was erroneously sought or erroneously granted in the absence of any party affected thereby."

The alleged error was that the judgment presupposed that the total interest payable over the five year period had become due and payable after 9 July 1991, whereas what was owing was (i) the balance of the capital in the sum of $370 000; (ii) the sum of $3 258.60; (iii) interest in the amount of $66 600, being eighteen *per centum* of the capital sum for one year.

Correction of the judgment sought was refused by the learned judge *a quo* on two grounds. First, he held that, on the face of both the summons and the declaration placed before MTAMBANENGWE J, there was nothing to indicate that there had been an error in the grant of the judgment. Put differently, MTAMBANENGWE J, being unaware of the provisions of clause 5 of the acknowledgement of debt, had not proceeded on an incorrect premise. Approval of this proposition, though not cited by the learned judge, is to be found in *Bakoven Ltd* v *G J Howes (Pty) Ltd* 1992 (2) SA 466 (E), where at 471F, ERASMUS J said of the almost identically worded r 42(1)(a) of the South African Uniform Rules that:

GUBBAY CJ

> "a court, in deciding whether a judgment was 'erroneously granted' is, like a court of appeal, con*fined to the record of proceedings*" (emphasis added).

In the second place, the learned judge expressed the view that:

> "It is an abuse of the process of the court to bring such an application some five years and eight months later. Matters must have some finality and r 449 was not designed to let defendants have a second bite at the cherry by raising a defence which should have been raised when the summons was issued."

Rule 449 is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is *functus officio* and has itself no authority to correct, alter or supplement it. The matter has passed *in rem judicatam*. See *Firestone South Africa (Pty) Ltd* v *Genticuro AG* 1977 (4) SA 298 (A) at 306F-G; *Stumbles & Rowe* v *Mattinson; Mattinson* v *Stephens & Ors* 1989 (1) ZLR 172 (H) at 174D-F; *Tshivhase Royal Council & Anor* v *Tshivhase & Anor; Tshivhase & Anor* v *Tshivhase & Anor* 1992 (4) SA 852 (A) at 862I-J.

The error it was urged MTAMBANENGWE J had committed was not a mere "clerical mistake", the correction of which does not alter the intended sense or substance of the judgment. See *City of Harare* v *Cinamon* 1992 (1) ZLR 361 (S) at 366C. This is so. It was that the judgment had been erroneously granted because at the time of its issue the learned judge was unaware

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of a relevant fact, namely, the provisions of clause 5 of the acknowledgement of debt. Appreciation of the existence of clause 5 would have induced the learned judge not to grant the judgment in the manner he did. The submission finds support in *Nyingwa* v *Moolman NO* 1993 (2) SA 508 (Tk) at 510F-G; *Promedia Drukkers & Uitgewers (Edms) Bpk* v *Kaimowitz & Ors* 1996 (4) SA 411 (C) at 417H-I; *Simon NO & Ors* v *Mitsui and Co Ltd & Ors* 1997 (2) SA 475 (W) at 517G-H. Certainly, judgments have been rescinded on the ground of a mistaken belief on the part of the court that the defendant knew of the hearing when in fact he did not (see *de Sousa* v *Kerr* 1978 (3) SA 635 (W) at 638B; *Topol & Ors* v *L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 648B-D; *Fraind* v *Nothmann* 1991 (3) SA 837 (W) at 839H; *Nyingwa* v *Moolman NO supra* at 510E-F); where counsel for the applicant in an *ex parte* application had led the court mistakenly to believe that the respondent had deliberately decided not to consult his attorney or to appear at the hearing (see *Theron NO* v *United Democratic Front (Western Cape Region) & Ors* 1984 (2) SA 532 (C) at 536C); and where the capital claimed had already been paid by the defendant (see *Frenkel, Wise & Co (Africa) (Pty) Ltd* v *Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C); *Holmes Motor Co* v *SWA Mineral & Exploration Co* 1949 (1) SA 155 (C) at 156; *Nyingwa* v *Moolman NO supra* at 510F).

A court is not therefore, so it seems to me, confined to the record of the proceedings in deciding whether a judgment was erroneously granted, as

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held by ERASMUS J in *Bakoven Ltd* v *G J Howes (Pty) Ltd supra* at 471E and as suggested by the learned judge in this matter. See *Stander & Anor* v *ABSA Bank* 1997 (4) SA 873 (E) at 882C-G.

Moreover, the specific reference in r 449(1)(a) to a judgment or order granted "in the absence of any party affected thereby" envisages such a party being able to place facts before the correcting, rescinding or varying court, which had not been before the court granting the judgment or order. I think the rule goes beyond the ambit of mere formal or technical defects in the judgment or order.

What then falls for decision is whether the pertinent provision of clause 5 of the acknowledgement of debt meant clearly and unambiguously that the respondent was only entitled to payment of interest at the rate of eighteen *per centum* for one year on the capital sum of $370 000.

The failure to pay an instalment on due date put the first appellant at risk, at the option of the respondent, to have added to the balance of the capital any interest outstanding. The interest outstanding as at 9 July 1991, the date when the initial instalment was due, was $66 600, being eighteen *per centum* of the capital sum of $370 000, and not $242 647.85, being the aggregate amount of interest for the full five year period.

I do not believe that this interpretation of the first appellant's liability is open to doubt. The contrary contention is fallacious. Indeed, in *Scotfin Ltd* v *R P K Buses (Pvt) Ltd & Ors* 1998 (1) ZLR 167 (H), counsel conceded, and the learned judge held, that it was improper to claim

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interest on outstanding instalments not yet due and payable even though the balance became due from the date on which the right to call it up was exercised; interest being claimable only on instalments which are in arrear (see at 170B).

It is my belief that if MTAMBANENGWE J had been aware of the apposite provision in clause 5 he would not have granted judgment in the amount he did. Clause 5 precluded him from doing so, even though all the defendants, and especially the first appellant, should have appreciated, on a simple reading of the summons and declaration, that the amount of interest claimed was not due and payable. Nonetheless, the existence of such lack of diligence, and the deliberate decision taken not to file a plea, while effectively barring the success of an application brought in terms of r 63 for rescission of the default judgment, was of no relevance to the application made; for there is no requirement that an applicant seeking relief under r 449 must establish "good cause". If the court holds that a judgment or order was erroneously granted in the absence of a party affected, it may be corrected, rescinded or varied without further enquiry. See *Tshabalala & Anor* v *Peer* 1979 (4) SA 27 (T) at 30D-E; *Topol & Ors* v *L S Group Mgmt Svcs (Pty) Ltd supra* at 650F-G.

Even if the learned judge was wrong in deciding that the judgment granted

GUBBAY CJ

by MTAMBANENGWE J was not erroneously sought or obtained, I consider that he was justified, in the exercise of his discretion, in dismissing the application by reason of the inordinate lapse of time. After all, r 449 is "a procedural step designed to correct expeditiously an obviously wrong judgment or order": *per* ERASMUS J in *Bakoven*'s case *supra* at 471E-F. See also *Firestone South Africa (Pty) Ltd* v *Genticuro AG supra a*t 306H.

In *First National Bank of Southern Africa Ltd* v *van Rensburg NO & Ors:* In re *First National Bank of Southern Africa Ltd* v *Jurgens & Ors* 1994 (1) SA 677 (T), Eloff JP (with whom VAN DER WALT and PREISS JJ concurred) stressed the important need to proceed rapidly in applications of this nature. He said at 681E-G:

> "It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject. The power created by r 42(1) is discretionary (see *Tshivhase Royal Council & Anor* v *Tshivhase & Anor*; *Tshivhase & Anor* v *Tshivhase & Anor* 1992 (4) SA 852 (A) at 862 *in fine*- 863A) and it would be a proper exercise of that discretion to say that, even if the appellant proved that r 42(1) applied, it should not be heard to complain after the lapse of a reasonable time. A reasonable time in this case is substantially less than the three years referred to."

I respectfully agree with these observations.

It was said by the appellants that they only became aware that the judgment had been erroneously granted when they received advice of that fact on 25 July 1997, some five years and six months later. Such length of time, whatever the reason therefor, is unreasonable. But what made the appellants wholly undeserving of the court's indulgence was that after being advised that aggregate interest had been awarded, they allowed a further ten weeks to pass before filing their application. And even when informed by the respondent's legal practitioners

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on 27 August 1997 that it was not accepted that the judgment was in any way erroneous, it was five weeks before the necessary relief was sought.

I have, therefore, no hesitation in agreeing with the learned judge that the bringing of the application amounted to an abuse of the process of the court and was not to be sanctioned.

In the result, I would dismiss the appeal with costs.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Sawyer & Mkushi, appellants' legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

CRONE *v* CRONE 2000 (1) ZLR 367 (SC)

Citation	2000 (1) ZLR 367 (SC)
Case No	Judgment No. S-93-99
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	September 20, 1999
Judgment	March 14, 2000
Annotations	None

Civil appeal

Flynote

Evidence - judicial notice - matters of which judicial notice may be taken - cost of living - data published by Government in Digest of Statistics

Family law - husband and wife - maintenance - following divorce - application for increased maintenance - whether can be ordered to run from date before date of application - increase of maintenance - increase in cost of living - effect - husband living and working outside Zimbabwe - devaluation of Zimbabwe currency - extent to which actual cost to husband can be taken into account

Headnote

The parties were divorced in 1994. At that time the wife was awarded maintenance in the sum of $4000 a month. There was provision in the divorce order for an arbitrator to determine

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whether that figure was adequate once she moved into a new house. In 1995, the arbitrator increased the maintenance to $7000 a month and at the end of 1996 to $10 000 a month. In December 1998, she applied for an order to increase the maintenance to $17 500 a month, backdated to August 1998. The High Court granted her application. The husband appealed against the order, both as to the amount and as to the date from which the order was to run.

The husband was not living in Zimbabwe. He was based in the United States, and paid in American dollars. At the time the arbitrator awarded maintenance of $10 000 a month, the cost to the husband was US$943 a month. With the sharp decline in the value of the Zimbabwean dollar since then, $17 500 was worth only US$473.

Held (*per* MCNALLY JA and EBRAHIM JA, MUCHECHETERE JA dissenting), that while a maintenance order can be made effective from the date of application, it should not be backdated to any time earlier than that.

Held, further, that an increase in the cost of living is in itself "good cause" for an increase in maintenance. The court was entitled to take judicial notice of the consumer price index published in the Government's quarterly digest of statistics, which could be accepted as a rough guide to the rate at which the cost of living for everyone is increasing. Had the husband been a resident of Zimbabwe, and affected by the increase in the cost of living, some allowance would have to be made for that. In fact, because of the exchange rate, his maintenance expenses were less than they were before. The court could regard the change in the exchange rate as a factor negativing any argument by the husband that he could not afford the "increase" in maintenance. Since no additional financial stress was placed on him to redress the wife's change in financial circumstances, it was a distraction from the

issue of maintenance to postulate that she should have had recourse to other property available to her to ameliorate the change in her financial circumstances.

Cases Considered

Cases cited:

Biti v *Min of State Security* 1999 (1) ZLR 165 (S)

Black v *Black* 1987 (1) ZLR 133 (S)

Chiomba v *Chiomba* 1992 (2) ZLR 197 (S)

Fluxman v *Fluxman* 1958 (4) SA 409 (W)

Levin v *Levin* 1984 (2) SA 298 (C)

Lindsay v *Lindsay* 1993 (1) ZLR 195 (S)

Marufu v *Moyo* 1983 (2) ZLR 386 (S)

Muzondo v *Muzondo* 1985 (2) ZLR 240 (S)

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Strime v *Strime* 1983 (4) SA 850 (C)

Woodhead v *Woodhead* 1955 SR 70

Legislation considered:

Civil Evidence Act [*Chapter 8:01*], s 24(3)

Matrimonial Causes Act [*Chapter 5:13*], s 9

Case Information

A P de Bourbon SC, for the appellant

F Girach, for the respondent

Judgment

McNally JA: The parties were divorced on 23 February 1994. In terms of the divorce order, Mrs Crone was to receive maintenance in the sum of $4 000 per month. However, there was a provision for an arbitrator to determine, once she moved into a new house, whether that figure constituted an adequate amount of maintenance.

The arbitrator awarded $7 000 per month with effect from 1 January 1995. Later she sought an increase to $10 000 a month. Mr Crone objected, and offered $8 000. They agreed to go back to the same arbitrator. He approached the matter on the basis that his earlier award was appropriate as at 1 January 1995. On this basis, he awarded $10 000 per month with effect from 1 November 1996. It was based on the cost of living as at 1 January 1997.

On 16 July 1998, her legal representative wrote to his, seeking a further increase to $17 500 per month. There was some discussion, but no agreement. Eventually, on 3 December 1998, she served on him an application for the increased maintenance to be paid to her, backdated to 1 August 1998. Presumably, this date was chosen as the first day of the month following her letter of 16 July 1998.

Despite opposition, the learned judge in the High Court granted her prayer. The appeal is against that order, both as to the amount and as to the date from which it was ordered to run.

Let me deal first with the latter point. Arrear maintenance is a contentious subject. Mr *de Bourbon* contends that a maintenance order should be

effective from the date on which it is made. At most, he says, it should be backdated to the date the application was made to court. But certainly not to any earlier date. Mr *Girach* argues for the order as made.

KORSAH JA, in *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S), accepted that there was no reason in principle why a maintenance order should not be made effective from the date of the

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application. He pointed out that if she were not in need at the time she would not have made the application. I agreed with that decision, and I agree with that view.

But to backdate an award further than that is more problematic. I discussed the problem in *Muzondo* v *Muzondo* 1985 (2) ZLR 240 (S) and concluded that the law had been properly summed up in *Woodhead* v *Woodhead* 1955 SR 70 in the words:

"in the absence of any agreement or any court order, if she has succeeded in maintaining herself without incurring debts, she has no claim to arrear maintenance from her husband."

There is also the fact that the Matrimonial Causes Act [*Chapter 5:13*] makes specific provision, by means of a 1959 amendment, for arrear maintenance in respect of children (s 11) but makes no such provision under s 9 in respect of a former wife.

I agree with Mr *de Bourbon* that *Fluxman* v *Fluxman* 1958 (4) SA 409 (W) and *Strime* v *Strime* 1983 (4) SA 850 (C) are distinguishable. In *Fluxman*, far from ordering the payment of arrears of maintenance, the court absolved the husband from paying them. And in *Strime*, the husband had failed to pay what he had been ordered to pay, which is not the position in the present case. Finally, in *Levin* v *Levin* 1984 (2) SA 298 (C) at 307E-F, relied upon by Mr *Girach*, the court in fact ordered the increase to be effective from the beginning of the month following the institution of proceedings.

I conclude, therefore, that the order for increased maintenance should not have been backdated beyond the date of the application. For convenience, I will regard that date as being 1 December 1998, even though the application was apparently lodged two days later.

I turn then to the amount of the award. Mr *de Bourbon* has first criticised the speed at which her maintenance has increased from $4 000 per month on 23 February 1994 to $7 000 per month from 1 January 1995, to $10 000 per month from 1 November 1996 and now to $17 500 per month.

The answer to that criticism is twofold. First, we live in unusual times of very high inflation. Second, the award of $10 000 per month by the arbitrator was accepted by the parties and we cannot go behind it. Our starting point is that $10 000 per month was an appropriate award with effect from 1 November 1996. It was based, as the arbitrator said in making the award, on the cost of living as at 1 January 1997.

MCNALLY JA

An increase in the cost of living is in itself "good cause" for an increase in maintenance. See *Marufu* v *Moyo* 1983 (2) ZLR 386 (S) at 387G.

Since the award was made by reference to the cost of living index, and since in the papers the parties have consistently referred to that index to support their arguments, I have no hesitation in saying that the court may take judicial notice of the fact that the Government publishes a "*Quarterly Digest of Statistics*" which contains a section entitled "Consumer Price Index" based at present on the figure for the cost of living in 1990 as being 100. Of course, it is a general figure, not necessarily related to the particular items consumed in the lifestyle of the parties. But

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it is generally accepted as a rough guide to the rate at which the cost of living for everyone is increasing. It would be foolish to ignore it. See *Biti* v *Minister of State Security* 1999 (1) ZLR 165 (S); *Black* v *Black* 1987 (1) ZLR 133 (S) at 138G; and s 24(3) of the Civil Evidence Act [*Chapter 8:01*].

Reference to that *Digest* shows the cost of living figure for January 1997 to be 438.9. For December 1998 it is 757.2. A straightforward calculation shows that the equivalent purchasing power in December 1998 to $10 000 in January 1997 was $17 252.22. The figure claimed, therefore, is in no way out of line with the rise in the cost of living. Indeed, it ignores the fact that the cost of living has continued to rise even more spectacularly since then.

One then looks to Mr Crone's income to calculate whether he can afford that amount. Were he a resident of Zimbabwe, he, too, would have been adversely affected by the rising cost of living, and some allowance might have had to be made for that fact.

But the opposite is the case. Mr Crone is based in the United States of America. He was, at the time of the hearing, working on a job in Bangladesh. But his income is in United States dollars.

Another simple calculation, based on exchange rates accepted at the hearing, produces a surprising result. In November 1996, with effect from which date she was awarded $10 000 per month, the cost to Mr Crone was US$943 per month. He had no problem with that. When the latest order was made the exchange rate had fallen to such an extent that $17 500 was costing him US$473, and $10 000 a mere US$270. One may look at it another way. Had the original order been expressed in United States dollars (I do not say it should have been), he would have been paying $943 ∞ 37 ορ Ζιμβαβωε dollars 34 891 per month by now. He is paying only half that.

I stress that the court does not rely on the change in the exchange rate as a positive reason for the increase in the amount of maintenance. But it is reasonable to regard it as a factor negativing any argument that he cannot afford the "increase". He has not suggested that he is any poorer than he was before. His maintenance expenses, in United States dollars, are half what

MCNALLY JA

they were in November 1996. He should have no problem with that. Rather the reverse.

The new figure of $17 500 per month therefore gives Mrs Crone no more in purchasing power than the $10 000 she was awarded from November 1996, and costs him less. On that basis, I find it impossible to disagree with the learned judge's conclusion in the court *a quo*.

It does not seem to me to be appropriate, in the circumstances, to haggle about the cost of newspapers, golf, or staff overtime. The overriding point is simply that, to maintain her standard of living as at 1 November 1996, she needed about $17 500 in January 1998.

The same applies to the argument that she should use the interest on her English money to augment her income here. That may be an argument, if and when he retires. But it is clear that

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that is a nest-egg, and she is justified in saying that she wants to keep it, and its modest increase, in England, even though interest rates there are very much lower than they are here. It was clearly not envisaged, in the arbitrator's award, that she should have to draw on capital or interest, unless some crisis arose. And it is equally clear that Mr Crone has expressly conceded that, barring exceptional circumstances, he does not expect his ex-wife to work.

Overall, I would echo the remarks of Korsah JA in *Lindsay supra* at 199E-F that:

"regard must have had to what would be adequate as maintenance for a wife of a man in the husband's position, considering his ability to pay and all other circumstances."

I am aware that the comment was made in regard to maintenance *pendente lite*. But it is apposite also in this case. One has to be guided by the criteria set out in s 7(4) of the Matrimonial Causes Act. Those criteria are intended:

"as far as is reasonable and practicable ... to place the spouses ... in the position they would have been in had a normal marriage relationship continued between the spouses."

As far as costs are concerned, the appellant has succeeded partially on the point of law as regards the backdating of the order. The effective date has been moved forward four months, resulting in a saving of $30 000 to the appellant. I do not see this as a significant victory, given that the respondent's stance has been essentially vindicated, and, at the date of this order, she will already be entitled to over $100 000 more than he was prepared to allow.

The appeal is dismissed with costs, save that the effective date of payment is altered from 1 August 1998 to 1 December 1998.

EBRAHIM JA: A cardinal point which must always guide courts when dealing with applications for alteration of maintenance orders is a change in the financial circumstances of the parties.

MCNALLY JA

It cannot be gainsaid that the devaluation of the local dollar effects an adverse alteration in the financial circumstances of each person, inclusive of artificial persons, in Zimbabwe. Labour appreciates the impact of devaluation, hence the demand for higher wages to cushion its effect. Employers acknowledge its devaluation on the living standards of the worker and enter into collective bargaining agreements to redress the issue. Government itself is cognisant of its effect on the financial circumstances of the individual and offers periodic increments in salary. It would be remiss of the court of justice to put the telescope to its blind eye when confronted with the effect of devaluation in a case such as this. It constitutes a change in financial circumstances: *Marufu* v *Moyo* 1983 (2) ZLR 386 (S) at 387G.

The appellant lives in the United States and is remunerated in the currency of that country. At the conclusion of their divorce proceedings in Zimbabwe on 23 February 1994 he was ordered to pay maintenance to the respondent in the sum of Z$4 000 per month. This amount was by arbitral proceedings adjusted to Z$7 000 per month commencing from 1 January 1995. The same arbitrator in further proceedings adjusted his award to Z$10 000 per month with effect from 1 November 1996 per month, based on the cost of living in Zimbabwe as at 1 January

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1997.

On 3 December 1998, failing agreement for a further increase in maintenance to Z$17 500, the respondent launched proceedings in the High Court, for a variation of the maintenance order to the amount claimed by her.

MCNALLY JA makes the telling point that the parties accepted the arbitrator's award of Z$10 000 per month with effect from 1 November 1996, without demur. The parties cannot resile from that award, and that should be our starting point.

As at 1 November 1996, the cost to the appellant of the award of Z$10 000 per month was the equivalent of US$943 per month. Now, with the devaluation of the Zimbabwe dollar, Z$17 500 is the equivalent of US$473 - a saving to the appellant of US$470. Had the maintenance awarded been expressed in United States dollars instead of Zimbabwe dollars, the respondent's financial circumstances would not have been adversely affected by the devaluation. Conversely, if the appellant had been resident in Zimbabwe and remunerated in Zimbabwe dollars while the respondent resided in the United States, his financial circumstances may have so deteriorated with the devaluation of the Zimbabwe dollar, that he could hardly be expected to pay to the respondent the equivalent of US$473 in Zimbabwe dollars.

This brings me to the second fundamental issue which has to be addressed in applications for variation of maintenance orders - the financial ability of the person ordered to provide maintenance to pay the increment sought by the applicant.

MCNALLY JA

There is no evidence on record that the financial circumstances of the appellant, who could afford to pay maintenance equivalent to US$943 per month, has so altered that he is incapable of paying to the respondent the reduced equivalent of US$473 per month. To his credit, he does not say he cannot afford to pay such an amount, only that the percentage increments of 75% *per annum* were inordinate. But this factor must be placed against the backdrop of devaluation and how much it would cost the appellant in terms of United States dollars to provide such maintenance. As we have seen, devaluation has almost halved his financial liability to the respondent and he, therefore, has no cause for complaint.

Furthermore, in my view, since no additional financial stress is placed upon the appellant to redress the respondent's change in financial circumstances occasioned by devaluation, for which the respondent is not responsible, it is a distraction from the issue of maintenance to postulate that the respondent should have recourse to any other property available to her to ameliorate her change in financial circumstances.

I agree with MCNALLY JA that the appeal, save for the backdating of the order, should be dismissed with costs.

MUCHECHETERE JA: I have read the judgment prepared by my brother McNally but respectfully disagree with it for the reason that it does not fully take into account the provisions

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of s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] ("the Act").

The application in question was made in terms of s 9 of the Act and it was therefore incumbent upon the learned judge *a quo* to apply the provisions of s 7(4) of the Act.

In the above context, I agree with Mr *de Bourbon*'s submission that an application for an increment of maintenance by an average of 75% *per annum* - his calculation on percentage increment was not disputed - t helearned judge *a quo* ought to have taken into account the two sources of income which were available to the respondent. The first one is that the respondent could work. Although it was accepted in the affidavits that the respondent did not have to work, I agree with Mr *de Bourbon*'s submission that, whilst that might well not have been a consideration in the arbitration proceedings, when the matter came to be considered by the High Court it should have been taken into account. This is because the above provisions enjoin the High Court to take the matter into account when deciding the matter. As for the issue itself, the respondent does not suggest she is not able to work. She has, however, chosen the life of luxury, that is, preferring golf to work. And it is significant that she has increased her golfing activity - she added three extra golf rounds a month to her two rounds weekly.

MCNALLY JA

The second issue is that the respondent has access to at least the interest on the £37 000 she has overseas. I do not doubt that if properly invested the amount could earn at least Z$15 000 a month, as submitted. There is indeed no explanation as to why she cannot or should not use that amount to help meet her costs.

I also agree that the list of expenses proffered by the respondent shows gross extravagance. Not content with the fact that the appellant is to pay literally for each and every expense in her life, she seeks to add to the golf expense by adding three more rounds of golf, overtime domestics, temporary domestics, extra water charges (the main charges are paid for by the appellant), and extra newspaper contributions. I also am of the view that some of the figures such as domestic uniforms ($150 per month) and dog visits (vet) per month ($300) are inflated. And there was no attempt to justify the argument, that, given what the appellant is already paying, these were reasonable expenses even bearing in mind the standard of living of the parties.

I consider that the question as to whether the appellant can or cannot afford to pay the extra amount claimed - it was claimed by the respondent and held by my brother MCNALLY that the appellant would, in United States dollars or British pounds, be paying now less than he was paying on the basic amount - can only be entertained after the respondent has satisfied the court that the extra amount she claims is necessary and reasonable. This, in my view, is the same with considerations of the consumer price index. In connection with the latter I agree with Mr *de Bourbon*'s submissions that, whilst everyone knows that it is getting more expensive to live in Zimbabwe, this does not necessarily apply to every activity. And that, in any event, everyone living in Zimbabwe has now to cut their cloth to meet their means. I fully endorse his sentiments that living in Zimbabwe cannot be a free holiday for the respondent, to be financed

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by her former husband.

Further, in matters of this nature I consider that the modern trend in awarding maintenance should be taken into consideration by the courts. In *Chiomba* v *Chiomba* 1992 (2) ZLR 197 (S) at 198 *in fine*- 199 MANYARARA JA said:

"Mr *Chatikobo* relied on a statement made in Hahlo's *South African Law of Husband and Wife* 5 ed at pp 363-4 which is to the following effect:

> 'It remains to be said that with the emergence of the "working wife" and "woman's liberation", the attitude of the courts towards the award of maintenance has been changing the world over. Cases where maintenance is awarded to the husband, while still rare, are no longer unknown. The idea that marriage ought to provide the wife with a "bread ticket for life" is on its way out. Not long ago, an "innocent" wife who obtained a divorce on the ground of her husband's misconduct could count on being awarded maintenance until death or remarriage, almost as a matter of course. Today, the courts

MCNALLY JA

> are no longer prepared to award maintenance to a young woman who has been working before marriage, and can be expected to work again after the divorce, at least if there are no young children of the marriage. At most, if she has given up her job, she will be awarded a few months' maintenance to tide her over until she finds a new one. *Middle-aged women who have for years devoted themselves full-time to the management of the household and care of the children of the marriage are awarded "rehabilitative maintenance" for a period sufficient to enable them to be trained or retrained for a job or profession. "Permanent maintenance" is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to remarry.* As MR JUSTICE MOORHOUSE remarked in the Canadian case of *Knoll* [(1969) 2 QR 580 at 584, 6 DLR (3d) 201 at 205]:
>
> > "In this day and age, the doctrine of assumed dependence of a wife is in many instances quite out of keeping with the times ... The marriage certificate is not a guarantee of maintenance."
>
> At present, these trends may be more pronounced in Europe and America than in South Africa, but with the replacement of the "guilt" with the "marriage breakdown" principle they are likely to become more marked in South Africa, too.'

Mr *Chatikobo* submitted that there is much in common between South African jurisprudence and our own and Hahlo's statement therefore applies to this case. *The submission is valid in view of the well known provisions of subpara (3) of s 7 of the Matrimonial Causes Act 1985*" (my emphasis).

In the result, I would have allowed the appeal with costs. The order of the court *a quo* would have been set aside and I would have dismissed the application with costs.

Ali Ebrahim, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S *v* MUGEBE 2000 (1) ZLR 376 (HC)

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Citation	2000 (1) ZLR 376 (HC)
Case No	Judgment No. HH-61-00
Court	High Court, Harare
Judge	Bartlett J
Heard	March 15, 1999
Judgment	March 15, 2000
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - community service - may be imposed directly - where imposed directly another punishment may not also be imposed - approach to be taken where appropriate to impose both community service and another sentence

Headnote

Section 350A(1) as read with s 350A(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] allows a criminal court to impose a direct sentence of community service and to specify the fine which will have to be paid or term of imprisonment which will have to be served should the offender fail to perform the community service imposed. Where community service is imposed directly a fine or term of imprisonment may only be imposed as an alternative punishment to community service. The court may not impose direct community service and in addition another form of punishment. It was therefore not permissible for the magistrate to impose both community service and a prison term wholly suspended on condition that the complainant paid a sum of money by way of restitution.

A magistrate who wishes to impose community service and to order restitution to the victim would have to impose the sentence in terms of s 358 of the Act. In terms of that provision he could sentence the accused to a term of imprisonment and suspend a portion of the prison term on condition that the accused serve a specified period of community service and suspend the remaining portion of imprisonment on condition that the accused makes restitution to the victim.

The provisions of s 350A(3) of the Act are not easy to understand and are likely to cause confusion. It was enacted into law contrary to the advice of the National Committee on Community Service. Prior to the enactment of this section, the position was simple and straightforward. If a magistrate wished to impose community service he ordered it as a condition (or one of the conditions) when suspending a sentence of imprisonment or a fine. Section 350A(3) should either be amended or preferably be repealed, leaving the simple, unconfused approach to community service that pertained prior to its enactment.

Cases Considered

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Cases cited:

S v *Chinzenze & Ors* 1998 (1) ZLR 470 (H)

S v *Gumbo* 1995 (1) ZLR 163 (H)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 350A(3)

Judgment

Bartlett J: Peter Mugebe stole $1 000 from his employer and squandered it drinking beer. He could hardly have had time, after what must have been a considerable bout of drinking, to regain his sobriety, before finding himself in court to answer for his conduct. He pleaded guilty and was sentenced to perform 105 hours of community service. A three month wholly suspended prison term was also imposed on condition he restitute the complainant the $1 000.

The sentence was very probably appropriate. Peter Mugebe was aged only 18, was a first offender and had pleaded guilty. But it falls foul of the sections of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act") under which it was imposed - s 350A(1) as read with s 350A(3) (which sections were introduced by the Criminal Procedure and Evidence Amendment Act 8 of 1997). These sections allow a direct sentence of a number of hours of community service as a punishment in itself. They also allow a magistrate to specify the fine or alternative period of imprisonment the offender shall pay or serve, if he fails to render the community service. But these punishments only become applicable if the offender fails to render the community service. A magistrate may not impose direct community service and, in addition, another form of punishment. The alternative or additional punishment need to be specified as only being applicable if the community service is not carried out. A reading of s 350C(3)(b)(i) and (ii) establishes this as the correct interpretation of s 350A(3).

The magistrate's desire to impose both community service and order restitution was entirely understandable. But to achieve that result he would have needed to exercise his powers under s 358 of the Act and imposed a sentence, for example, in the following terms: 6 months' imprisonment with labour of which 3 months' imprisonment with labour is suspended on condition the accused perform 105 hours of community service (and then specified the details relating to the community service) and of which a further 3 months' imprisonment with labour is suspended on condition the accused pays restitution to the complainant in the sum of $1 000 (and then specified the details of the payment of the restitution).

Section 350A(3) is, in my view, not easy to understand. Or conversely, it is easily misunderstood and likely to cause confusion. Prior to the enactment of s 350A, the position was simple. If a magistrate wished to impose community service he ordered it as a condition (or one of the conditions) to be performed when imposing a suspended prison sentence or fine. That seems to me to be an eminently sensible and easily understandable way of imposing community service. It certainly caused no problems or difficulties in practice. Section 350A(3) is, in my view, unnecessary, unwieldy and easily given to creating misunderstanding and confused

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interpretation. It was

BARTLETT J

also enacted into law directly against the advice of the National Committee on Community Service - the generally and internationally respected body which has for seven years organised and superintended the operation of community service sentencing in Zimbabwe. I would suggest that the legislature considers amending s 350A(3) with a view to making it less easy to misunderstand. Or preferably, repealing it (and the sections relating to it) and leaving the simple, unconfused approach to community service which existed before the enactment of the Criminal Procedure and Evidence Amendment Act (8 of 1997).

There are several other errors made by the magistrate in regard to the imposition of the community service sentence.

He did not apply his mind as to why he wanted to impose direct community service and give reasons as to why he favoured such an approach - in this regard see the comments of Garwe J in *S* v *Chinzenze Ors* 1998 (1) ZLR 470 (H) at 477D-E.

He also did not conduct a proper inquiry as to whether community service was an appropriate punishment for the accused - see *S* v *Chinzenze supra* at 477E-F and S v *Gumbo* 1995 (1) ZLR 163 (H) at 168C-E. He should have established that the accused would still be living in the same area and that he had a fixed place of abode - having lost his employment. He should also have established that the school at which he was to perform the community service was a reasonable walking distance from his home.

The imposition of the three months prison sentence suspended on condition of restitution was outside the magistrate's powers acting (as he was) under s 350A(3) of the Act and is set aside. I hope it has not already been served. The remainder of the proceedings are probably in broad accordance with real and substantial justice and are confirmed.

The scrutinising regional magistrate is to be commended for noticing the difficulty in the interpretation of s 350A(3) and referring the matter on review.

GARWE J agrees.

FUNGURA & ANOR *v* ZIMNAT INSURANCE CO LTD 2000 (1) ZLR 379 (HC)

Citation	2000 (1) ZLR 379 (HC)
Case No	Judgment No. HH-67-00
Court	High Court, Harare
Judge	Gillespie J

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Heard November 18, 1999
Judgment March 22, 2000
Annotations None

Civil application

Flynote

Employment - contract - termination - retrenchment - retrenchment package agreed upon according to procedures established by regulation - whether individual worker may reject package

Headnote

The respondent company had, after merging with another company, found it necessary to retrench a number of employees. After protracted negotiations, agreement was reached by the retrenchment committee on the retrenchment package for the employees. The applicants were the sole workers to object to the package, claiming that they were entitled to a better package. In their court application they argued that an agreement reached by the retrenchment committee was not binding unless it was ratified by every worker affected.

Held, that although it might appear that there is some support in the decided cases for the proposition advanced by the applicants, properly understood, these cases do not support this position.

Held, further, that an agreement reached in works council by workers' representatives about a retrenchment package is binding on the workers, provided that the formal requirements of the regulations are complied with and provided that the representatives have the authority of the workers for whom they act to give consent. Individuals amongst the body of workers who dissent from the package properly agreed by authorised representatives will nevertheless be bound by the will of the majority so represented. This applied in the present case and the application must therefore be dismissed.

Held, further, that a works council cannot represent and bind the retrenchees when the retrenchees have not been notified of their position and could not have mandated the workers' representatives on the works council in these negotiations. The position is different where the works council has been properly mandated by the workers.

Cases Considered

Cases cited:

Nyangani & Ors v *Zimbabwe Development Corp & Ors* HH-34-98

Chidziva & Ors v *ZISCO* 1997 (2) ZLR 368 (S)

Prosser v *ZISCO* HH-201-93

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Case Information

L T Biti, for the applicants

Miss *E Mushore*, for the respondent

Judgment

Gillespie J: Zimnat Insurance Company Ltd merged with Lion of Zimbabwe Insurance Company Ltd. This brought about a retrenchment of

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employees. The applicants were both employed by Zimnat, being a claims account officer and a secretary respectively. They were among the many employees who received a notice of retrenchment during March 1999. This notice, dated 1 March 1999, was a preliminary intimation and advised affected employees to liaise with their representatives who would negotiate on their behalf.

There followed a series of negotiations, and a lengthy and detailed report to affected employees informing them of the progress of negotiations. The negotiations were minuted. The minutes record meetings of l, 2, 4, 8, 9, 10, 19 and 23 March. They are exhaustive minutes, and show a very thorough debate and exchange on the subject. A package was eventually agreed and implemented. The proposed agreement to be finalised in works council was communicated to all concerned on 24 March. The workers' committee sought legal advice on the package. Of all the affected workers, the applicants alone sought thereafter to dissent. They procured separate legal advice and instructed their lawyers to write repudiating the conciliation and claiming for themselves alone a package based on 24 months' severance plus 6 months' pay for every year worked (as opposed to 3 months' severance plus 1 month's pay for every year worked accepted by the majority). No reason is advanced why they were entitled to differential treatment. The letter is dated 31 March 1998, the same day the council finally approved the package, and was received by the respondent subsequent thereto.

All aspects of the proposed retrenchments were considered and argued at length including the identify of the workers' representatives; the need for retrenchment; the persons to be retrenched and the package to be offered. There can be no doubt that negotiations were at arm's length and, save for one arguable point, followed the course, and adhered to the requirements, prescribed by regulation.

That one point is put by the applicants thus: that workers' representatives had a duty to sell the agreement to affected workers. Put better: that an agreement reached by the retrenchment committee is not binding unless ratified by every worker affected. Some support for this proposition is to be found in decided cases.

The first such judgment is that of BARTLETT J in *Prosser* v *Zimbabwe Iron & Steel Ltd*.1(63) Prosser was a managerial employee of Zisco. He, along with 35 others, were retrenched on a package negotiated by a workers council. Although the others purportedly challenged the

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retrenchment, their causes were not properly before the court, which determined Prosser's claim alone. The crucial features of the decision were that the individuals to be retrenched

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were not identified prior to the negotiation of the package; and that Prosser, as a managerial employee, had no representation from either the workers' committee (which represents only blue collars) or the management (which was his adversary in the retrenchment).

On the first point, BARTLETT J remarked:

"It was only very late in the day, almost immediately prior to the issuing of the retrenchment notices, that the people being retrenched were finally identified - there had until then been arguments as to who exactly should be retrenched and whether all employees over 55 should be retrenched or some retained.

What should have happened was that the employer, the respondent, should have simply decided who it wished to retrench and then given written notice of that intention to the Works Council. The Works Council should then have complied with s 3(2) and 3(4) of the Regulations and attempted to secure agreement between the employer and employees concerned, or their representatives, as to whether or not the employees should be retrenched and the terms and conditions of any such retrenchment."2(64)

On the second, he made the observation, much quoted, that:

"The Works Council effectively in terms of s 3(2) was supposed to act in some respects as a mediator between the employer and the employees (or their representatives) to try and decide whether there should be retrenchment and if so on what terms and conditions. It accordingly would not be possible for the managerial members of the Works Council to wear two hats - one as members of the Works Council trying to secure an agreement and the other as the representatives of the persons about to be retrenched."3(65)

It appears from the applicants' argument here that this statement has been misunderstood, or at least applied in a sense well beyond that intended by the learned judge to form his *ratio decidendi*.

The exact decision on the issue is that of the Supreme Court in *Chidziva & Ors* v *Zimbabwe Iron & Steel Co Ltd*.4(66) In this, a minority held that the retrenchments were invalid. The majority held, assuming invalidity for the purposes of argument, that the affected parties had waived their right to challenge that retrenchment, either by accepting the package or delaying unreasonably for some years so to challenge, and declined to overturn the retrenchment.

In the minority decision of MUCHECHETERE JA, it is apparent that the learned Judge of Appeal found there to be invalidity in the retrenchments in the following respects. Firstly, the identities of the persons to be retrenched was not publicised. 5(67) As in *Prosser*, therefore, there was no possibility of consultation with, or proper representation of, the affected workers. Secondly,

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mala fides was found to exist on the part of the employer in failing to set criteria for retrenchment.6(68)

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The learned Judge of Appeal also stated the following:

"Thirdly, I am of the view that the workers' representatives on the Works Council had neither the statutory authority *nor the mandate to represent the workers who were facing retrenchment*. As I have already indicated above, they were appointed on the Works Council as representatives of all the workers but once appointed they became part of the council and separate from the workers. Their duty there was to try, together with their counterparts, to work out an agreed position which they would sell to the workers and the employer. They could not wear two hats. In that capacity, they therefore had no authority to negotiate and reach any agreement on behalf of the worker let alone a special group of workers which was intended to be retrenched. *Authority had to be specifically given to them for that by the workers who were intended to be retrenched* individually if necessary. *It is also worthy of note that the alleged representatives themselves did not testify to the effect that they had such authority or mandate*. The meetings which were admittedly held, the first one to announce the commencement of the retrenchment exercise (before the persons affected were known) and the second one to announce the package offered and warn the workers to accept it, do not suffice. At neither of the meetings, attended by workers, in general, that is those who were facing retrenchment and those who were not, were the employees invited to make submissions or participate in any way. There were also no resolutions to the effect that the retrenchment and package offered were even acceptable to all the workers in general let alone those who were intended to be retrenched. The latter could in any event not have been done because the workers intended to be retrenched were not known."7(69)

This observation, like that of BARTLETT J to which it alludes, seems to have been misapprehended. The emphasis is mine and is intended to show that the learned Judge of Appeal based his decision on the factual finding that the supposed representatives had been given as mandate.

The final judgment in point is the decision of SMITH J in *Nyangani & Ors* v *Zimbabwe Development Corporation & Ors*.8(70) This application, unlike those preceding, was brought not to avoid, but to enforce, a retrenchment negotiated in works council. The package had been repudiated by the employer. The issue was referred to the retrenchment committee which eventually produced a package less favourable to the employee than that of the works council. The decision of the retrenchment committee was challenged on grounds of alleged irregularities, but this challenge was rejected. On the question of whether the employer was entitled to repudiate, the agreement reached in works council, the following was said:

"The argument that the agreement reached by the works council is binding on the ZDC is an attractive one. After all, the acting chief executive officer, together with other

representatives of management, attended the meeting and they agreed to the package. It is not surprising that the employees assumed that the acting general manager was speaking as a representative of the ZDC and had full authority to make decisions and enter into agreements on behalf of ZDC. However, an analysis of the provisions of s 3 of the Retrenchment Regulations supports the contention by the ZDC that it is not bound by the agreement entered into by the works council."9(71)

The learned judge continued with the description of the functions of the works council:

"That council, too, must first discuss and agree as to the employees who are to be retrenched and the appropriate retrenchment package and then try to get the package accepted by the employer and employees. In discussing and agreeing on the retrenchment package, the members of the works council must be guided by what they consider to be reasonable, practicable and affordable in the circumstances. They are expected to come up with a package which

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they think should be acceptable to both the employer and the employees concerned. Only after they have agreed on what they consider to be a suitable retrenchment package should they then start to think about getting the approval or consent of the employer and employees. It may well be that at that stage the members of the works council could then remove their hats as members of the works council and the one group could put on the employer's bowler and the other could don the scarf and worker's cap and the two groups could formally accept the package that had been agreed by the council. At that stage, however, they would be acting as two separate groups and not as one council."10(72)

It is this decision, rather than the previous two, which seems to provide the greater support for the applicants' contention.

I do not consider the decision of BARTLETT J in *Prosser* to be such support. The capital imagery employed by the learned judge (and adopted by the subsequent judges) is not intended by him to show that the constituents of the works council can never both agree within itself the terms of the retrenchment package and represent and bind the opposing parties. Rather, it shows that the managerial faction in that case could not represent both the company and a managerial employee being retrenched. To understand the decision of Bartlett J as laying down that an agreement reached within works council is never binding without subsequent ratification, is to misunderstand it.

Similarly, the judgment of MUCHECHETERE JA in *Chiziva* is not authority for the applicants' proposition. The passage from the judgment, echoing BARTLETT J, referring to the inability of works council members to wear more than one hat at a time, demonstrates the inability of the works council to represent, and bind, retrenchees when these retrenchees have not been notified of their position and could not have mandated the workers' representatives on the works council in these negotiations or compromises.

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The importance of a mandate, as a question of fact, appears from the passages I emphasised. This is a far cry from holding that the works council, properly mandated, cannot reach a binding agreement itself.

To return to the judgment of SMITH J, I can see no reason to apply it in my way differently from the decisions in *Prosser* and *Chidziva*. Although the learned judge described the proceedings in terms suggestive of a need to secure ratification by the interested parties of a proposal agreed in council, it is axiomatic that no ratification is required where prior authority is given. Put another way, the decision in *Nyangani* can be justified on the factual basis that the managerial contingent had no authority to agree, not on the supposed legal point that the works council members have no authority to bind. That this understanding is entirely in accordance with the learned judge's intention is clear from his extension of the headgear metaphor originally devised by BARTLETT J.

This understanding is, moreover, entirely in accordance with the intendment of the legislation.11(73) There are four formal requirements laid down and these are described by BARTLETT J in *Prosser*. 12(74) Absent the requirements, however, it seems to me that the legislation seeks to achieve a process of conciliation in the first instance, at works council. Failing that, a package may be imposed, with the minister's approval, at retrenchment

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committee. No procedures are imposed upon the works council. Its resolution, however, cannot be regarded as binding in the absence of due notice of intended retrenchment to the affected persons. It cannot be binding if the council members are not representative of the parties. It cannot be binding if the parties have not authorised it, whether by instructions to representatives during consultations and reports back in the course of negotiations, or by notification thereafter. Whether such approval and authority was given is, of course, a factual question.

The facts in this case show a conscientious and thorough set of negotiations. A deliberate decision was taken to ensure that the workers' representatives included persons affected by the retrenchment. Prior notice was given to all concerned. The council debated all aspects of the need for retrenchment; the persons to be retrenched; and the package. The progress and status of negotiations were consistently reported back to the affected workers. That instructions were given and acted upon appears from the minutes of works council meetings. The result has been accepted by all bar these two members. There is no statement of fact that the working representatives had no authority; merely the proposition of law, based on a misunderstanding of the three judgments, that subsequent ratification is in necessary.

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These leaves one final question, a legal question, to be determined. This is, whether, in a case of group retrenchments, the consent to a works council package must be unanimous or whether the assent of the majority is sufficient. To the extent that the legislation aims for conciliation at the first instance and determination only at the second stage, it might well be thought that this is an indication that a successful conciliation requires unanimity.

There is, however, considerable indication against this, showing majority rule to be sufficient. The clearest indication, to my mind, comes from the reference, in the regulations, to the need to secure the agreement of the employees or their representatives.13(75) It seems to me that this contains, first of all, a clear indication of awareness that the procedure is applicable to group retrenchments (in the use of the plural). Second, there is the express recognition that employees' representatives will be involved in negotiations and consents. Given that, and given the whole philosophy of our labour legislation, which is as far as possible to achieve conciliation between parties by negotiation and compromise conducted by representative bodies of employers and employees, it seems to me inevitable that unanimity in the retrenchment package is not required at the works council stage. There are obviously limits: thus one might not expect the consent of thirty labourers to a package to bind an accountant to that package. But that is rather a question of the representation of the affected person and the authority of the representative. The alternative would make the conciliation process either impracticable or unfair. One member could frustrate the entire process contrary to the will of its majority. Or could, hypothetically at least, as is sought here, be seen to seek preferential treatment.

I would therefore hold that an agreement reached in works council in a retrenchment package by workers representatives is binding on workers provided the formal requirements of the regulations are complied with; and provided the representatives have the authority of the works for whom they act to give that consent. Further, individuals amongst the body of workers who

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dissent to the package properly agreed by authorised representatives will nevertheless be bound by the will of the majority so represented.

I would therefore, dismiss the application with costs.

Honey & Blanckenberg, applicants' legal practitioners

Coghlan, Welsh & Guest, respondents' legal practitioners

S *v* DUBE 2000 (1) ZLR 386 (HC)

Citation	2000 (1) ZLR 386 (HC)
Case No	Judgment No. HH-60-00
Court	High Court, Harare
Judge	Devittie J
Heard	March 22, 2000
Judgment	March 22, 2000
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - common law crimes - stock theft - approach which should be taken

Criminal procedure (sentence) - general principles - factors affecting - guidelines given by superior courts - need to avoid rigid tariff approach - how sentence should be assessed where guidelines have been given

Headnote

Stock theft is generally regarded as a very serious offence, for which the superior courts have laid down guidelines in respect of sentence. Where guidelines are given as to the sort of sentence that should be imposed in respect of particular crimes, the lower courts should eschew a rigid tariff approach where the facts of the individual case play no role and the reasoning process is stunted by the numbers game. The courts should not neglect the truism that the appropriate level of sentence depends on the facts of each individual case. They should not treat the guidelines as immutable standards. The approach should be in three phases: (a) to identify the normal range of sentence for the offence; (b) having located the normal range of sentences, to place the particular offence at the appropriate level within that range; (c) to reduce the sentence by having regard to the mitigatory factors, such as youthfulness, the reasons for

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the commission of the offence, and the consequences of the conviction. A plea of guilty should also attract a discount on policy grounds quite unrelated to contrition.

Cases Considered

Cases cited:

S v *Matimbe & Ors* HH-251-92

S v *Mhike* S-27-94

S v *Munechawo* 1998 (1) ZLR 129 (S)

S v *Munyombwe* S-21-93

S v *Munzutu* HH-58-88

Judgment

Devittie J: "Rhodesia", said Beadle CJ, "is cattle country". The learned Chief Justice was stating the need for motorists to be alert to the presence of cattle on Zimbabwean roads. He was dealing with a traffic case and not with a case involving theft of cattle - but he spoke in an age when the message that cattle are the country's most precious commodity was being driven home against cattle thieves. That remains true today. To the

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communal dweller, the loss of even one beast can bring misery to an entire household. To the cattle rancher and the country's economy, cattle are of immense value. The Stock Theft Act No. 10 of 1976 prescribed a mandatory nine year penalty. The courts had no discretion in the matter.

After the repeal of the Stock Theft Act of 1976 the courts were freed from the fetters of a mandatory sentence. Nevertheless, they devised guidelines on what they considered the minimum appropriate sentences. The present Act prescribes a maximum of six years' imprisonment. SMITH J in *S* v *Matimbe & Ors* HH-251-92 makes the observation that stock theft is the only common law offence in our statute books for which a statutory penalty is provided.

I am aware, therefore, as the history of penal legislation in this country demonstrates, that theft of stock is an offence of extreme gravity. The draconian penalties with which this offence has been visited are in a large measure due to the prevalence of the offence. This is as true today as it was at the time a nine year mandatory term was in force. It is accepted that it is those at the lowest levels of our economic strata who are the main transgressors. One cannot, however, place too much weight on the economic status of the offender lest sentences are passed which would tend to trivialise an offence that is serious and prevalent. However, whenever a sentencer is obliged to have regard to guidelines set by the superior courts, it becomes important to have proper regard to the particular facts of each case. The tariff approach has the advantage that it

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provides a degree of uniformity - but an inflexible approach may lead to injustice.

I must confess that I am less than comfortable with the current approach to sentencing in stock theft cases. I think that insufficient attention is being paid to the principle that, for any offence, the level of the sentence must be appropriate to the facts of the individual case. This case presents me with an opportunity to suggest guidelines on what I consider to be the proper approach to sentence in stock theft cases. It comes before me by way of review from the Kwekwe magistrates court.

The accused is aged 28 years and resides at Simairi Village, in the Mberengwa communal lands. He was formerly in the employ of Hleki Moyo, as a herdsman, in the Zhombe area. He earned the paltry sum of $300 per month. On 11 September, he stole two head of cattle which were amongst a herd of 14 cattle grazing in a resettlement area near Zhombe. He drove the two cattle to Zhombe where he tried to find a buyer. He did not succeed in selling them. Villagers in the Zhombe area to whom he offered the cattle suspected them to have been stolen. They effected a citizen's arrest and handed the accused over to the police. The cattle were recovered and returned to the owner.

2000 (1) ZLR p388

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When arraigned before the Kwekwe magistrates court, the accused pleaded guilty. He was sentenced to four years' imprisonment of which ten months were suspended on the usual conditions. In mitigation, the accused said that he stole the cattle because he was in desperate need of some money to sustain himself and his family. He said that his employer had not paid him his monthly salary of $300 for over two months. He was owed $600 by his employer. He had no food to feed his family. To compound his problems, his wife was in hospital and about to give birth.

The trial magistrate accepted without reservation that the accused had been placed in extremely difficult circumstances. He remarked that it would have been "more understandable" if the accused had stolen the beasts of the employer, who would not pay him, than those of the complainant. The trial court also found that the theft of two beasts indicated avarice because this far exceeded his immediate needs. The accused, however, had earlier explained the great difficulty in herding one beast. It was easier, he said, to herd two - and so he stole two.

As I have indicated above, in the absence of legislation on mandatory penalties for stock theft, the high prevalence of the offence has made it necessary for our courts to set out guidelines on what they consider to be the appropriate levels of the sentence. In *S* v *Munzutu* HH-58-88, CHIDYAUSIKU J (as he then was) set aside a sentence of two and half years for theft of an ox. The accused had pleaded guilty. The ox had been slaughtered and sold by the accused. It was valued at $450. The learned judge stated:

"Sentences for theft of one beast tend to range between twelve and twenty-four months sentence with a portion suspended. He considered a sentence of two and half years to be manifestly excessive and substituted a sentence of twenty four months with six suspended."

Four years later, SMITH J in *S* v *Matimbe & Ors supra*, gave alarming figures on the increasing

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prevalence of crimes of stock theft. He stated that the increased prevalence and the increase in the value of cattle meant that the range of sentence set by CHIDYAUSIKU J was no longer appropriate:

"In cases of stock theft where one or two head are involved, I consider that unless there are special mitigating factors, a sentence of not less than three years' imprisonment should be imposed, with six or nine months being suspended for good conduct and a further period suspended on condition that the accused paid compensation to the complainant. Where the value of the cattle is high or there are two counts, as in *S* v *Nyenkwe* above, a greater sentence should be imposed."

In *S* v *Mhike* S-27-94, the appellant was convicted of theft of two oxen and sentenced to 50 months' imprisonment, of which six months were suspended on condition of good behaviour. A further six months were suspended on condition the appellant made restitution in the amount of $800. The facts of that case were that the appellant stole two head of cattle and drove them a

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considerable distance to a butchery where he sold them. The value of each beast was said to be $800. One was recovered and the other had been slaughtered by the butcher by the time the appellant was arrested. EBRAHIM JA cited with approval the approach of SMITH J in *Matimbe*'s case. The learned Judge of Appeal considered the sentence of 50 months' imprisonment to be excessive and set it aside. He substituted a sentence of thirty-six months' imprisonment, with six months suspended on the usual conditions.

The guidelines of SMITH J in cases of stock theft were also approved in *S* v *Munyombwe* S-21-93.

I have no quarrel with the guidelines given by SMITH J in *Matimbe*'s case. Magistrates should, however, in applying the guidelines in *Matimbe*'s case not be oblivious of the truism that the appropriate level of sentence depends on the facts of each individual case. This court has in the past emphasized the need for individualization of sentences. I am left with the unhappy impression, from the many reviews that have come before me involving cases of stock theft, that there is a tendency by some judicial officers to regard the three year guideline in *Matimbe*'s case as an immutable standard to be applied without regard to the facts of each case. In my view, the present matter is one where the trial magistrate has committed such an error.

I consider it necessary therefore to set out what I consider to be the proper application of the guidelines in *Matimbe*'s case. In that case, SMITH J stated that in the absence of "special mitigating factors" a sentence of not less than three years, with a portion suspended should be imposed for theft of one or two head. He stated that a further period should be suspended on condition compensation is paid.

From time to time, superior courts of this country set down guidelines suggesting levels of sentences be imposed for particular crimes. This practice has obvious advantages. It introduces a desirable level of uniformity. In cases such as stock theft, it gives effect to the deterrent policy of the courts. Sentencing officers, however, should eschew a rigid tariff approach in which the individual facts of the case play no meaningful role and the reasoning process is stunted by the numbers game. It seems to me that where a sentencing officer has regard to a "tariff" or other

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guideline suggested in past cases he should, in order to give proper effect to the individual facts of each case, approach the sentence in three phases:

(a) In the first instance, he ought to identify the normal range of sentences for the offence. In the case of stock theft, the normal range is up to three years' imprisonment for theft of one or two head of cattle. For the theft of more than three or four head of cattle the sentence would normally range from up to four years.

(b) Having located the normal range of sentences, the next stage is to place

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the offence, having regard to the particular facts, at a level within the range that is appropriate to the gravity of the particular case. Thus, a serious manifestation of the offence will be placed at the upper limit of the range. A not so serious form of the offence at the middle of the range and a relatively minor form of the offence at the bottom of the range.

(c) Having thus arrived at the sentence that is appropriate to the gravity of the particular offence, the next stage is to reduce the sentence arrived at by having regard to "mitigating factors". In this final stage, the length of a tariff sentence is reduced from the level indicated by the gravity of the offence to reflect personal mitigating factors, such as youthfulness, the reasons for the commission of the offence, and the consequences of the conviction.

The phased approach to sentence is not novel. DA Thomas *Principles of Sentencing* 1979 ed at p 35 states thus:

"Whatever motive has led the sentencer to decide to impose a tariff sentence, whether he seeks to make the gravity of the offence as a deterrent or has reached the conclusion that no alternative means of dealing with the offender is feasible, the object in determining the length of sentence is to reflect the culpability of the offender. The process consists of three stages, which may be called 'defining the range within the scale', 'fixing the ceiling' and 'allowing for mitigation'. The overriding principle is that the sentence must not be more severe than is justified by the gravity of the offence for which it is imposed, whatever other considerations might suggest a longer term."

In explaining the first stage, defining the range, the learned author states:

"Whatever terminology is used, the central idea is that within the scope of any legal definition a variety of factual situations will recur; with each of these typical situations there are associated upper and lower limits within which the sentence should normally fall, in the absence of exceptional circumstances in the offence and without regard to mitigating features peculiar to the offender himself. The difference between the upper and lower limits applicable to a particular situation constitutes the range ... or normal level for that variation of the offence."

I shall now endeavour to apply the stage approach to tariff sentences to the facts of this case. It is clear to me that a sentence of up to three years for theft of one or two head of cattle, in accordance with the guideline in *Matimbe*'s case, represents the upper limit of the range of sentences appropriate for the offence. To put it simply, an overall sentence of three years is to be imposed for the more serious forms of the crime of stock theft involving one or two head of cattle. The majority of cases that come before the courts are committed by communal dwellers. For the most part, these offenders represent the poorest of the poor in our society. Even for

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them, I would say, a sentence of three years for theft of one or two beasts is appropriate for the more serious forms of the offence. No doubt, where the facts indicate a commercial motive, as would be the case with a butcher, a

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sentence in excess of three years may be justified for theft of one or two head of cattle.

I must now, as a second stage, and having located the normal range of sentence, place this offence at a level within the range that is appropriate to the gravity of this case. There is nothing particularly sinister about the facts of this case. The accused was not part of an organised gang. He had no commercial motive. The offence does not fall into a category that may be regarded as a serious pattern of the offence. I would place the ceiling on the facts of this case at a sentence in the region of twenty-eight months.

The third stage is to consider the mitigating circumstances. Where there are special mitigating features, then, in accordance with the guidelines by Smith J, an overall sentence lower than three years ought to be imposed for theft of one or two head of cattle. The special mitigating features which to my mind, make appropriate an overall sentence of twenty-four months appropriate are:

(a) genuine remorse has been shown;

(b) all the stolen property is recovered;

(c) the accused is a relatively young first offender; and

(d) circumstances of extreme poverty seem to have induced the commission of the offence.

In addition, where there is a plea of guilty, this should attract a discount in the sentence on policy grounds quite unrelated to contrition. See *S* v *Munechawo* 1998 (1) ZLR 129 (S).

In the present case, the accused received an overall sentence of forty months. He is aged 28 and a first offender. The trial court accepted the desperate circumstances in which he was placed when his employer failed for two months to pay him the monthly salary of $300. The cattle were all recovered. In addition, the accused showed genuine contrition. I consider, therefore, that the facts of this case do not justify a sentence which according to SMITH J ought only to be imposed in the absence of special mitigating factors. I consider that such special mitigating factors are present. In cases of stock theft, offenders under the age of 21 should receive sentences considerably shorter than would be awarded to a man of mature years for the same offence. I consider that youth should be a mitigating factor for offenders in their early twenties and that even in late twenties some value should be placed on the offender's age as a mitigating factor. Again, age should be a relevant mitigating factor once an offender has passed the age of sixty.

In conclusion, therefore, I take the range of sentence for the theft of one or two head to be in the region of three years. I consider that within that range an overall sentence of 28 months to be appropriate to the facts of the present case. In other words, I do not consider that the facts of

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this case justify a

DEVITTIE J

sentence at the upper limit of the range; and, finally, the mitigating factors to which I have adverted indicate to me that an overall sentence of twenty four months would be appropriate. From this sentence, I would allow a discount of three months on account of the accused's plea of guilty (see *S* v *Munechawo supra*). Accordingly, the sentence of the trial court is set aside and is substituted with a sentence of twenty-one months' imprisonment, of which six months is suspended for five years on condition that during that period the accused does not commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

SMITH J agrees.

S *v* MUTAKWA & ANOR 2000 (1) ZLR 393 (HC)

Citation	2000 (1) ZLR 393 (HC)
Case No	Judgment No. HH-62-00
Court	High Court, Harare
Judge	Bartlett J and Devittie J
Heard	March 22, 2000
Judgment	March 22, 2000
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - general principles - factors affecting - period spent in custody awaiting trial - how should be taken into account

Headnote

Magistrates tend to pay lip service to the requirement to take into account the time a person has spent in custody awaiting trial, if they pay any heed to it at all. Sometimes it is evident that a magistrate has not even been aware of the time the accused has been in custody before sentence is passed. The way a court usually takes account of pre-trial custody is that the fact of

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pre-trial incarceration goes onto the scale along with a variety of other mitigating and aggravating factors. It is difficult to demonstrate in quantitative terms the extent to which the period spent in custody has been taken into account.

Other countries have legislation specifically allowing a sentencing court to direct that the sentence should run from the time the accused was taken into custody, but the legislation in this country is to the contrary. The only way a court can, at present, take into account the time spent in custody before trial is to impose a lesser sentence than it would otherwise have done. The court should, as a standard procedure, inquire into the time the accused has spent in custody before sentence is passed. The court should then decide what is the appropriate sentence and deduct from that the time the accused has spent in custody before trial.

Cases Considered

Cases cited:

Cooper v *Government* 1906 TS 436

S v *Aitken* 1995 (2) ZLR 395 (S)

S v *Blanchard & Ors* 1999 (2) ZLR 168 (H)

S v *Buka* 1995 (2) ZLR 130 (S)

R v *Chikoro* 1965 RLR 455 (G)

S v *Katsaura* 1997 (2) ZLR 102 (H)

R v *Manyon-Smith* 1960 R & N 335 (FS)

Legislation considered:

Powers of Criminal Courts (Sentencing) Act 2000, s 87 (England)

Prisons Act [*Chapter 7:11*], s 65

Sentencing Act 1995, s 63 (Northern Territory, Australia)

Sentencing Act 59 of 1997, s 16 (Tasmania)

Judgment

Devittie J: In *S* v *Blanchard & Ors* 1999 (2) ZLR 168 (H), three Americans were sentenced to a term of imprisonment for possession of arms of war. Concerned at the length of time they had spent in custody awaiting trial, and the conditions they had endured in pre-trial custody, the trial judge ordered the sentences to run from the date the accused were placed in custody.

In the present matter, I too am concerned at the length of time the accused have spent in pre-trial custody. They have spent a year in custody awaiting trial. The brief facts of the matter are as follows. In July 1998, the accused persons crossed the border into South Africa. Once

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there they broke into a clothing store in Sibasa and stole various items of clothing valued at Z$50 000. On 26 July, they re-entered Zimbabwe through the Beitbridge Border Post and boarded a bus to Chiredzi. On arrival in Chiredzi, they looked for persons to buy the property. The suspicions of a police officer, to whom this information came, were aroused. He found the accused persons at a bus terminus and immediately arrested them in possession of all the stolen property. Further investigations revealed that the property had been stolen in South Africa.

The accused were tried in the Masvingo regional court. They pleaded not guilty but were convicted and sentenced to four years' imprisonment of which one year was suspended on the usual conditions. The conviction was proper. It is the sentence that causes me concern. For reasons not apparent on the record, the accused spent a period of approximately twelve months in custody before they were brought to trial. The trial court took this factor into account - the factor of pre-trial incarceration - in the following way:

"In assessing an appropriate sentence, I will be mindful of the fact that you have been in custody for close to a year awaiting the finalization of this matter. I will therefore, take that into account in arriving at the quantum of punishment I will hand to you."

The approach of the trial court to the period spent in custody awaiting trial is the standard approach in this country. In the reasoning process used in this approach, the fact of pre-trial incarceration goes into the scale along with a variety of other mitigating and aggravating factors. Consequently, it would be difficult for a judicial officer let alone the offender to demonstrate in quantitative terms the extent to which the period spent in custody has been taken into account.

It is a well established principle of sentencing that weight be given to the period of pre-trial incarceration. In *S* v *Aitken* 1995 (2) ZLR 395 (S) Gubbay CJ stated:

"I am in agreement with Mr *de Bourbon* that the learned Judge President attached insufficient weight to the five month period of incarceration that the appellant was forced to endure as a D class high security prisoner."

In many English speaking jurisdictions, legislation provides that a court

may order the sentence to run from the time an accused was taken into custody.

In Australia, s 63 of the Northern Territory Sentencing Act 1995 provides as follows:

"(4) Except as expressly provided or expressly ordered, a sentence of imprisonment on conviction, takes effect from the day the court passes sentence on the offender and a sentence of imprisonment on summary conviction takes effect from the commencement of the offender's custody under the sentence.

(5) Where an offender has been in custody on account of his or her arrest for an offence and the offender is convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment shall be regarded as having commenced on the day on which the offender was arrested or on any other day between that day and the day in which the court passes sentence."

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In Tasmania, s 16 of the Sentencing Act 59 of 1997 provides as follows:

"A court that is sentencing an offender to a term of imprisonment for an offence:

(a) must take into account any period of time during which the offender was held in custody in relation to proceedings for, or arising from, that offence; and

(b) may order that the sentence is to commence on a day earlier than the day on which it is imposed."

Similar provisions exist in the relevant English statute. See s 87 of the Powers of Criminal Courts (Sentencing) Act 2000.

R v *Chikoro* 1965 RLR 455 (G) is a case where the magistrate ordered that a sentence of six months' imprisonment with hard labour would run from the date when the accused was first taken into custody. In making the order, the magistrate was concerned at the time already spent by the accused in custody. Lewis J held that the only proper manner in which account may be taken of the time already spent in custody is to impose a shorter term of imprisonment than would otherwise have been imposed. In *R* v *Manyon-Smith* 1960 R&N 335 (FS), it was held that under the Roman-Dutch common law a sentence always runs from the date of its imposition. See also *Cooper* v *Government* 1906 TS 436.

The above authorities present formidable obstacles in the path of any inclination I may have to order the accused's sentence to run from the date of their arrest. Such thoughts are laid to rest by s 65 of the Prisons Act [*Chapter 7:11*]. It provides as follows:

"Except as otherwise provided in this Act, a sentence of imprisonment imposed by any court shall take effect from the day on which that sentence is passed unless it is suspended in terms of any law or the convicted person is released on bail in terms of any law, in which case the sentence shall take effect from the day on which the accused surrenders himself or is taken into custody to undergo his sentence."

My concern is whether the sentencing process we use allows for proper effect to be given the time a prisoner will have spent in custody prior to

sentence. In less developed countries such as ours, scarce resources dictate fairly sparse living conditions in remand prisons. Administrative difficulties mean that the trend is for accused persons to spend longer periods in pre-trial custody. I would hazard a guess that, where no bail is granted, the current average period of pre-trial incarceration exceeds three months and maybe even six months. The current practice requires the sentencer in a single stage to have regard to the time spent in custody, along with other factors relevant to sentence. It does not permit the sentencer, should he be so minded, having regard to the time spent in pre-trial custody, to take that period into account in the most effective possible way. Given the prohibition placed on such an approach by present legislation, account may properly be taken of the period spent in pre-trial custody by deducting the period spent in custody, in a phased approach to the sentencing process. What this means is that after the sentencer has had regard to the level of sentence appropriate to the gravity of the case, and has arrived at an appropriate sentence having regard to all relevant factors, he may, at that stage deduct the period spent in custody from the sentence arrived at. Thus, having arrived at an appropriate

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sentence, any period spent in pre-trial custody should be deducted by an arithmetical process from the sentence arrived at. If the approach is to achieve any result, it would be obligatory on the trial court to inquire, as a standard procedure, into the time the accused has spent in custody. That is the approach I propose to adopt in this case.

I am not aware that the facts of this case fall into a recurring pattern whose gravity has been recognized as meriting a certain level of sentence. The property stolen was substantial. The operation involved a degree of planning in crossing the border and returning to Zimbabwe to sell the goods. The facts indicate, therefore, that it is a serious form of the offence of housebreaking and theft. A sentence in the region of four years would normally be appropriate. The accused are young first offenders. In addition, all the property was recovered. These considerations serve to mitigate the sentence and I would accordingly consider a sentence of three years to be appropriate to the facts of this case. I propose to deduct from that sentence the period the accused have spent in custody. I arrive therefore at a sentence of two years' imprisonment. The sentence of the trial court is set aside and each of the accused persons are sentenced as follows:

"Two years' imprisonment of which six months is suspended for five years on condition the accused does within that period commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine."

In conclusion, I should state that it remains somewhat of a mystery to me why, in a country like Zimbabwe with lesser resources to sustain a large prison population, legislation similar to that enacted in the Australian States

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DEVITTIE J

has not been introduced into the penal system, notwithstanding the favourable recommendation of the Law Development Commission.

BARTLETT J: I agree with the views and the approach suggested by my brother DEVITTIE. Taking proper account of the time an accused person has been in custody prior to sentence is a matter of fundamental importance in arriving at a fair and just sentence. But just as magistrates have tended to pay lip service to the mitigatory effect of a plea of guilty - see *S* v *Buka* 1995 (2) ZLR 130 (S) at 134G-135A and *S* v *Katsaura* 1997 (2) ZLR 102 (H) at 105E-G - so they tend to give lip service to taking proper account of the time the accused has spent in custody prior to conviction. Indeed quite often a magistrate's reasons for sentence does not even reflect that lip service. On a number of occasions, I have had to ask magistrates, by way of review minute, how long an accused had spent in custody prior to conviction and what account was taken of that period in assessing sentence. Sometimes it has been apparent - even when dealing with the most senior of magistrates - that the magistrate passed sentence without being aware of, let alone taking account of, the period the accused had been in custody. So the approach suggested by DEVITTIE J should ensure that practical effect is given to this basic and fundamental requirement in arriving at a fair sentence.

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REZA *v* NYANGANI NO 2000 (1) ZLR 398 (HC)

Citation	2000 (1) ZLR 398 (HC)
Case No	Judgment No. HH-72-00
Court	High Court, Harare
Judge	Adam J
Heard	March 6, 2000
Judgment	March 29, 2000
Annotations	None

Civil action

Flynote

Property and real rights - occupier - improvements effected by - occupier effecting improvements after becoming aware that seller's title was suspect - right of owner to insist that improvements be removed

Headnote

A piece of land was sold in execution. In spite of the sale, the original owner purported to sell the land to the plaintiff, who erected improvements on it. The plaintiff did so after being made aware, by the legal practitioners for the person who bought the property at the sale in execution, that there was question as to the ownership of the land. The plaintiff claimed compensation for the value of the improvement he had made. The evidence showed that the improvements were such that they could be separated from the existing structure without causing damage to it. The owner of the land had no interest in keeping the improvements. The measure of the enhancement of the property was less than the expenditure on the improvements.

Held, that the plaintiff should be allowed to remove the improvements, but he was not entitled to compensation for them.

Cases Considered

Cases cited:

Fletcher & Fletcher v *Bulawayo Waterworks Co Ltd* 1915 AD 636

Rubin v *Botha* 1911 AD 568

Case Information

P C Paul, for the plaintiff

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W Muchengeti, for the defendant

Judgment

Adam J: The plaintiff claims judgment with costs for the amount of $90 000 in terms of the amended declaration.

Naison Mufandirwa sold Stand No. 7632 Glen Norah C. Glen Norah to a Mr Sibanda, who paid the purchase price. Naison Mufandirwa cancelled the sale, so Mr Sibanda sued and obtained judgment for $12 000 against him for breach of contract. As a result of this, a writ of execution was issued against Naison Mufandirwa and Stand No. 7632 was in August 1992 sold at a public auction. The late Fungai Artwell Nyangani purchased the stand and became the registered owner. On 14 October 1992, Naison Mufandirwa "sold" Stand No. 7632 for $10 000 to the plaintiff who paid him a deposit of $6 500 on that date, with a balanc of $ 3 520 still to be paid. The plaintiff alleged

that he was unaware of the sale in execution and, in good faith and in that belief, purchased the property, and erected some improvements. According to the valuation report those consisted, when the property was inspected on 13 December 1997, of a concrete strip and slab foundation of 53.9m^2 and incomplete building of 43.72m^2 with two bedrooms, a large room with no fittings, a small room (intended to be a bathroom) with no fittings and another small room (intended to be a toilet) with no fittings, all of red brick with external and internal walls not plastered, concrete floors and steel door frames and without window frames. It was a single storey building under asbestos roof on timber trusses. The plaintiff averred that he only became aware of the sale in execution after the erection of the improvements, towards the end of 1992. He has been in occupation of the stand since 14 October 1992, on which date Naison Mafundirwa had a shack there. The plaintiff alleged that the improvements enhanced the value of the property by $90 000 and so the estate of the late Fungai Artwell Nyangani has been unjustly enriched to that extent.

The defendant averred that the late Fungai Artwell Nyangani did not want those improvements and so called upon the plaintiff to dismantle the improvements and give vacant possession to the defendant.

The issues to be determined by this court, as agreed by the parties, are: (a) whether as a matter of law, the defendant can require the plaintiff to remove the improvements; (b) whether the plaintiff should have attempted to recover his loss from Naison Mufandirwa; and (c) whether the plaintiff was negligent in erecting the building without taking transfer or cession of the property.

In case No. 4106/93, the plaintiff, in an affidavit sworn by him on 20 May 1993 in the proceedings in this court, averred that the cost of the building amounted to $26 434.78. Again in case No. 6994/93, in another affidavit sworn on 21 September 1993, he gave the same amount as the cost of the building. At the hearing before this court, the plaintiff produced vouchers and receipts, all dated in December 1992, for a total amount of $7 964.14 and payment of $3 600 to

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a builder. The plaintiff had not paid the full purchase price to Naison Mufandirwa.

On 15 March 1992, the late Fungai Artwell Nyangani's legal practitioners informed the plaintiff's legal practitioners that when the late Fungai Artwell Nyangani learnt that the plaintiff had bought the property from Naison Mufandirwa without checking as to title and had gone on to develop, he decided to apply to this court for an urgent order to stop the developments. All papers had been prepared to obtain that order. The plaintiff came and saw them, having been sent by his then legal practitioners, Sawyer and Mkushi. After discussion, the plaintiff asked that they not proceed to obtain the order.

ADAM J

He was prepared to pay their wasted costs of $500. They said that the plaintiff had been advised by Sawyer and Mkushi and by Atherstone & Cook (whom he also consulted) about the futility of his case. They said that the late Fungai Artwell Nyangani had viewed the developments and found that they were not not what he wanted. They said that the plaintiff's recourse was against Naison Mufandirwa.

In his affidavit of 20 May 1993, the plaintiff averred that the late Fungai Artwell Nyangani demanded that he vacate the stand. He was prepared to do so after he was paid $26 434.78. On 23 February 1998, the late Fungai Artwell Nyangani's legal practitioners demanded that the building be demolished. This came as a shock to him, since he had gone to see them and paid them $500 to act for him. On 18 May 1993, the late Fungai Artwell Nyangani came with six persons and demolished three rooms, causing damage of $6 300.

In his affidavit of 21 September 1993, the plaintiff averred that Nyangani obtained an order from this court against Naison Mufandirwa for the eviction of Naison Mufandirwa and all persons holding possession through him. He said that Nyangani was aware that he was in occupation of the property and that he was claiming a lien in respect of the improvements. On 20 September 1993, the Deputy Sheriff evicted him from stand No. 7632. He said that he held the property in his own right, having paid Naison Mufandirwa the purchase price in full. His eviction, he said, was unlawful.

In his particulars of claim, the plaintiff averred that he did not know the exact date when he became aware that Nyangani purchased the property but it was towards the end of December 1992. In his evidence in chief in this court, he stated that he thought Naison Mufandirwa was the owner when he entered into the agreement of sale on 14 October 1992. He said that he received letters from Nyangani's legal practitioners demanding that he vacate this property and advising him not to build on the property. He took those letters to Naison Mufandirwa, who told him to forget them. He nonetheless stopped building, since he was now worried. After seeing Naison Mufandirwa, he went to see Nyangani's legal practitioners, who gave him a receipt for the $500 he had paid them. They told him that the property was not his. Two persons came and demolished a whole bedroom, so he called the police who stopped them from breaking the house. He was evicted from the property after he had been to see the police. He made an urgent application in September 1993. On 29 October 1994, it was ordered that possession of the property be restored to him. He employed a builder to construct the house, which was

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unfinished, and he purchased the materials for that purpose. Various receipts were tendered by him. Under cross-examination, he said that Naison Mufandirwa showed him his cards from the City Council. Over

ADAM J

a period of 2-3 weeks, letters from Nyangani's legal practitioners were received by him. The last time he received a letter from them was before the receipt given to him by them on 11 January 1993. After he received that particular letter he continued to build. The letters received were addressed to Naison Mufandirwa, so he took them to Naison Mufandirwa. He received a letter from Nyangani's legal practitioners dated 22 February 1993, demanding the structure be demolished. As late as August 1993 he was still purchasing materials. After he got back into the property in October 1994 he put up the roof. He admitted that Nyangani did not want his structure. He said he had been told by Naison Mufandirwa that he was the owner; he relied on the rent cards in the name of Naison Mufandirwa. He admitted that he did not go and check at the City Council offices. After he found out that Naison Mufandirwa was not the owner, he did not try to get money from him. He said that he could not find him even though he had earlier stated that he had taken the letters to Naison Mufandirwa from Nyagani's legal practitioners.

The defendant in his evidence said that the property was transferred into the name of the late Fungai Artwell Nyangani in November 1992. He went in the company of Nyangani about the third week of November 1992 to stand No. 7632 where they found Naison Mufandirwa's wife, the plaintiff and his builders there. Nyangani showed the documents pertaining to the ownership of the property to the plaintiff and informed him that he was coming to build on stand No. 7632. Naison Mufandirwa had a shack on the property and there were foundation trenches only there. Nyangani was surprised to see the foundation trenches there. As a result, Nyangani approached his legal practitioners between November 1992 and January 1993. The plaintiff approached them with an alternative that he try to buy another property to replace stand No. 7632 but Nyangani was adamant that he wanted his stand. The plaintiff stopped building for some time. In July 1993, they went to stand No. 7632 and erected their own temporary shack. At that stage there were a slab, three rooms and an incomplete room. The plaintiff had stopped building in February 1993.

In *Rubin* v *Botha* 1911 AD 568, INNES J (as he then was) said at 578-9 and 580-1:

"The equitable relief given by Roman Dutch law to a person who had made improvements upon the land of another was the outcome of the modification of the maxim that whatever is affixed to the soil belongs to it, by the further maxim that no man should be allowed to enrich himself at the expense of another. And in deciding what form the relief in each particular instance should take, the law had regard, among other things, to the intention and state of mind of the parties - and more especially of the person making the improvements. Every occupier, it was considered, either knew or did not know that the ground he occupied belonged to someone else; he either meant to recognise, or not recognise, another's title. And his mental attitude in this respect had an important bearing upon his legal position.

ADAM J

If he treated the land as is own, it followed that he could have had no intention of parting with the *dominium* in the

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materials which affixed to the soil. If, on the other hand, he recognised the title of another, then he was taken to have been willing that when his occupation terminated such material should belong to the ground owner. These considerations lay at the root of the distinction drawn, in the matter of compensation for improvements, between the position of possession in the juristic sense, who held *pro domino*, and that of an occupier (such as a tenant) who laid no claim to the ownership of the soil.

...

But then it was argued that the plaintiff was a *bona fide* occupier, entitled to full compensation for *utiles impensae*, just as if he had been a *bona fide* possessor. That is not the way in which the matter presents itself to my mind. The distinction between the legal position of a possessor (whether *bona fide* or *mala fide*), and that of an occupier in whom the *animus domini* was wanting, was a distinction, the consequences of which were important in more than one branch of the Civil Law. And it is one which in my judgment should be maintained in determining the rights of a person who has with his own materials improved the land of another. Now in this case it is clear that the plaintiff was not a possessor at all; for he recognized the title of the defendant, to whom he intended that the improvements should belong."

In *Fletcher & Fletcher* v *Bulawayo Waterworks Co Ltd* 1915 AD 636, the defendant's company had leased a piece of ground from one Slot and sank a well, within what it believed to be in the leased ground but was in fact outside the leased property. INNES CJ said at 646-9:

"In sinking the well, the company thought that it was doing so in terms of a lease which would have entitled it to the benefit of the improvement for a definite number of years, at the end of which period the well would have reverted to Slot. But it was mistaken; the well was sunk upon land not covered by the lease, and the owners of the land sued for ejectment. Clearly, the company was not in law possessor of the ground upon which it trespassed; it did not hold the land or effect the improvement *pro domino*, but as a mere occupier, entitled to do what it did but laying no claim to the ownership of the soil. Under those circumstances, careful inquiry would have been necessary into the legal position of the company with regard to compensation, were it not for the decision of this court in *Rubin* v *Botha*. The plaintiff in that case had erected certain buildings upon the defendant's land, under what he believed to be a binding contract of lease ... As a fact, the so-called contract was wholly invalid and of no effect in law; and the plaintiff was ejected after he had occupied the property for three years. It was common cause that compensation was payable. The dispute was as to the amount ... It was laid down by the considered judgment of the majority of the court that the plaintiff, though not a possessor but a mere occupier, was entitled to be paid for the improvements to the extent to which they had enhanced the value of the property - less a deduction for his three years' use and occupation. In other words, the plaintiff was placed in the position of a *bona fide* possessor, save that his compensation was equitably reduced in view of the particular circumstances.

...

Now the civil law allowed a very wide discretion to a judge dealing with relief of this nature. And the courts of Holland proceeded on the same lines. The general basis, in regard to useful expenditure, was the extent to which the property had been enhanced in value thereof. But in the case of costly improvements it is obvious a rigid application of that

general test might sometimes involve very considerable hardship. And the authorities, recognising that an equitable principle should not be so applied as to produce inequitable results, indicated the lines upon which a court should proceed in order to obviate since results (see Gluck Vol 6, s 592; Voet 6.1.36). The measure of enhancement would generally be less than the expenditure actually incurred; but if in any instance it proved to be greater, then only the lesser amount was to be awarded as compensation. If the improvements could be separated from the property without damage to the latter, and if in the opinion of the judge they were such as the owner would not have effected himself, then he was allowed to remove them and permit their removal. Where from the nature of things such separation could not be effected, the improvements automatically ensured to the benefit of the owner of the property; but he ought to be released from liability to compensate, if the improvements were not useful to him and the

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expenditure excessive, regard being had to his means and position. But the owner would not escape the obligation to compensate even under the circumstances last mentioned if he intended to sell the property, and could obtain a substantially higher price by reason of the improvements.

Such were some of the principles (not always easy of application in practice) which were indicated for the guidance of courts dealing with claims for compensation; but they were not exhaustive, and much was left, as already pointed out, to the discretion of the judge.

The equitable principle on which the law awards compensation for improvements is that no man should be allowed to enrich himself at the expense of another. Both elements must concur, benefit to the claimant and detriment to the improver, and both must be borne in mind in assessing the amount."

SOLOMON JA said at 656-7:

"The doctrine upon which the right to compensation is based is an equitable one, and it must not be applied in such a way as to produce inequitable results. Probably, in the majority of cases it will be found that it is fair and equitable that the owner of the land should pay for the improvements to the extent to which the land has been enhanced in value, subject, of course, to this limitation that, inasmuch as the possessor is to be compensated for the expense to which he has been put, he can in no circumstances recover more than the amount of such expenses. At the same time, it is easy to suggest cases in which the application of the rule would be most unfair to the owner of the land. Accordingly, we find it laid down in the *Digest* (6.1.36) that 'the order made by a wise judge will vary according to the circumstances of the parties and the facts'. Celsus, in the passage referred to, gives examples to show how the order should vary in different cases. And these cases, it is clear, were not intended to be exhaustive, but merely illustrative. And the same observation applies, I think, to the cases put by Voet (6.1.36), his conclusion being thus expressed: 'so that much here has been left to the discretion of the judge, who is enjoined in the Digest to decide according to the circumstances of each person and case'."

It is clear that the plaintiff in October 1992 occupied Stand No. 7632 along with Naison Mufandirwa. The latter was aware that the property had been taken under a writ of execution. Also, the plaintiff, as far as he was concerned, was aware that ownership of Stand No. 7632 was still in Naison Mufandirwa's name, since he had not paid the purchase price in full, there being a balance of $3 500 still outstanding. As between the plaintiff and Naison Mufandirwa, the plaintiff was a *bona fide* occupier; as he was in respect of the late Fungai Artwell Nyangani, until he was made aware of the true position. I accept the

ADAM J

evidence given by the defendant that the plaintiff was told, in about the third week of November 1992, that Nyangani was the owner. He had no reason to give false testimony about this. The plaintiff, according to the vouchers and receipts, must only have carried out the construction of the rooms in December 1992, with the knowledge that Naison Mufandirwa's title to the property was suspect. In such circumstances, the plaintiff could only claim compensation for useful expenditure, to the extent the property had been enhanced in valued. But the measure of the enhancement was generally less than the actual expenditure. Also, if the improvements could be separated from the structure without causing damage to it, and if it could be shown to the satisfaction of the court that the owner of the land would not have made such improvements, then such improvements were allowed to be removed by the owner of them. In no circumstances could he recover more than the actual amount of the expenses he incurred. Further, in the case of a *bona fide* occupier, in the exercise of its discretion, the court may take

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in account the period of occupation of the property by the owner of the improvements.

It follows that the plaintiff is allowed to remove those improvements which can be removed. Since the defendant and the late Fungai Artwell Nyangani have shown no interest in retaining the structure, the issue of causing damage to it does not need to be considered by this court. Since neither Nyangani nor the defendant has in actual terms benefited from the improvements constructed on stand No. 7632, and taking into account the fact that the plaintiff occupied stand No. 7632 from 14 October 1992 until 20 September 1993 and from 29 October 1994 up to the present, it would be inequitable for the defendant to be ordered to pay for the expenditure incurred by the plaintiff in constructing the improvements. It is abundantly clear that Naison Mufandirwa had "sold" stand No. 7672 when he had no title to it and the plaintiff had ample opportunity to recover any loss suffered by him from Naison Mufandirwa. It was foolhardy of him to continue to build after November 1992 and to rebuild the rooms he alleged were destroyed in May 1993. In the light of this, the authorities referred to by me indicate that the owner of the land can insist that the plaintiff remove his improvements.

In all the circumstances, it is ordered that the plaintiff may remove the improvements effected by him on stand No. 7632. The plaintiff is to pay the defendant's costs.

Wintertons, plaintiff's legal practitioners

Manase and Manase, defendant's legal practitioners

MUSADZIKWA *v* MINISTER OF HOME AFFAIRS & ANOR 2000 (1) ZLR 405 (HC)

Citation	2000 (1) ZLR 405 (HC)
Case No	Judgment No. HH-74-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	March 9, 2000; March 10, 2000; March 15, 2000
Judgment	March 29, 2000
Annotations	None

Flynote

Delict - liability - personal injury - injury caused by police acting in defence of third party property and restoring and maintaining law and order - use of force - use of firearms - when police entitled to use firearms - nature of firearms being used - use of military weapons not justified - innocent party hit by ricocheting bullet - entitled to damages

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Police - duties - act in defence of third party property - restore and maintain law and order - use of force - use of firearms - when police entitled to use firearms - nature of firearms being used - use of military weapons not justified - innocent party hit by ricocheting bullet - entitled to damages

Practice and procedure - pleadings - extent to which parties are bound by pleadings - real dispute between parties not apparent from pleadings but thoroughly investigated during trial - court entitled to decide case on basis of real dispute

Headnote

In January 1998, demonstrations began in Harare over the rising prices of basic foods. The demonstrations degenerated into riots during which a lot of property was destroyed and goods were looted. During rioting in a high density area of Harare, the police were called in to quell the mob. The police were heavily outnumbered by the mob. In their efforts to quell the rioting, the police used FN rifles. A bullet ricocheted and hit the plaintiff, who was an innocent passerby. He had been some 400 metres from the shopping area where the rioting was taking place. He claimed damages. The evidence showed that FNs are military weapons and unsuitable for riot control because a bullet fired from an FN rifle can travel 4 or 5 kilometres and still kill someone at that distance. A more suitable weapon for riot control is a 12 bore shotgun. There were only 2 such shotguns available at the police station in question and there was insufficient ammunition for them.

In his pleadings, the plaintiff alleged that the actions of the police were negligent and reckless, in that it was grossly unreasonable to discharge a firearm in a crowded shopping area. The defendants contented themselves with a bald denial of these averments. The manner in which the case was conducted by the parties, however, went far beyond these issues: the plaintiff's case was directed towards proving that it was unreasonable to discharge firearms

at the shopping centre, or that there was no justification for doing so. The defendants sought to show that there was a need to maintain law and order and to protect property which the rioters were destroying and looting.

Held, that while the court will strive to ensure that the parties are restricted to the issues reflected in the pleadings, it will not enslave itself to the pleadings in complete disregard of its duty to decide the real dispute between the parties. As long as there is no likelihood of prejudice being occasioned to one or other of the parties, the court should not lightly disregard a point which has been thoroughly investigated.

Held, further, that the police had a bounden duty to maintain law and order. Their right to resort to the use of force to protect the property of third parties and to restore order cannot be doubted. In view of the magnitude of the violence that the police faced, the use of firearms was totally justified.

Held, further, that the question which then fell for decision was whether the police force's state of unpreparedness made it reasonable for riot control squads to resort to the use of military weapons to suppress riots. In order to determine the wrongfulness or reasonableness of any given conduct the court is enjoined to make a value judgment based on, among other things, contemporary *boni mores*, in the sense of the convictions of the community as to what is fair,

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just and equitable

Held, further, that it does not conduce to harmonious community relations for the police force to unleash its members onto an urban shopping centre located in the centre of a densely populated suburban residential area armed with FN rifles. The police force is a strong arm of the State, with considerable resources at its disposal. It should be able to secure suitable riot suppression equipment. While the police have a duty to maintain law and order, they should do so with the use of suitable equipment. Their duty must not be allowed to ride roughshod over the rights of people in the position of the plaintiff, who should be left to walk freely away from the area of a riot without fearing that they might be hit by ricocheting bullets. While they were entitled to use firearms to disperse the rioters, it was unreasonable to use FN rifles; and so they were liable to the plaintiff.

Cases Considered

Cases cited:

Compass Motor Industries (Pty) Ltd v *Callguard (Pty) Ltd* 1990 (2) SA 520 (W)

Coronation Brick (Pty) Ltd v *Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D)

Financial Mail (Pty) Ltd v *Sage Hldgs Ltd* 1993 (2) SA 451 (A)

Matambanadzo Bus Svc (Pvt) Ltd v *Magner* 1971 (1) RLR 54 (A)

Medispa (Pty) Ltd v *Knoebel Tools & Products (Pty) Ltd* 1988 (4) SA 415 (W)

Middleton v *Carr* 1949 (2) SA 374 (A)

Min of Justice Ex p, In re *S* v *van Wyk* 1967 (1) SA 488 (A)

Natal Fresh Produce Growers' Assn & Ors v *Agroserve (Pty) Ltd & Ors* 1980 (4) SA 749 (N)

Ntanjana v *Vorster & Anor* 1950 (4) SA 398 (C)

R v *Tsutso* 1962 R & N 168 (SR); 1962 (2) SA 666 (SR)

Robinson v *Randfontein Ests GM Co Ltd* 1925 AD 173

Still v *Milner* 1937 AD 101

Case Information

Miss *W T Miles*, for the plaintiff

Mrs *L Hove*, for the defendants

Judgment

Chatikobo J: The plaintiff works in a textile factory in Masasa, Harare.

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He was shot in the right shoulder on 19 January 1998 at a place near Tafara shopping centre situated in a Harare high density suburb of the same name. He says he was coming from his place of work when he was shot and injured. He claims, in these proceedings, that his assailants are members of the Zimbabwe Republic Police who were trying to quell a riotous mob at the shopping centre. This action was instituted so as to recover damages for the injury sustained by the plaintiff. The sums claimed for general and special damages are $40 000 and $6 617.62 respectively.

The circumstances under which the plaintiff was injured as testified to by him are these.

In January 1998, Harare was rocked by demonstrations which turned violent and in which a lot of property was destroyed and goods were looted by the rioting mobs. The rioters were protesting against soaring prices for basic food items, which is why the riots have become known as the "food riots".

On 19 January, the plaintiff attended at his workplace in Masasa. At about mid-morning, his employer told all workers to return home as he feared that demonstrations outside the factory might disrupt their work and cause damage to his property. The plaintiff left for home in the company of Martin Tawali and Tinashe Mutema. They boarded a commuter omnibus which dropped them off at a Shell service station in Mabvuku, from where they walked towards Tafara where they lived. The omnibus could not proceed beyond this point because the road had been barricaded with stones. The three of them took a path which passes through a park which is apparently known as Mabvuku gardens. The plaintiff, who lived beyond the shopping centre, intended to circumvent the shopping centre. As they walked through the park, which is some 500 to 600 metres from the shopping centre, they heard the sound of gunfire from the direction of the shopping centre. Between the park and the shopping centre there are houses which obstruct one's view of the shops. In front of the houses, there is an open ground. While in the park they were unable to see what was happening at the shopping centre.

As they continued walking, they saw people coming from the direction of the shops, running away from the shooting. At a point which the plaintiff estimated to be some 400 metres from the shops he fell down and lost consciousness. When he regained consciousness, he noticed that he had been surrounded by people who were helping him up and that his shirt was blood stained. He was unable to lift his right arm. He realised for the first time that he had been shot in the shoulder. Passers-by took him to the clinic where he was bandaged and placed on a drip. Shortly thereafter, Janet Jonasi, who had also been shot, was brought to the clinic and they were both taken to Parirenyatwa hospital where the plaintiff was attended to by a Dr Chimuka

who caused the bandage and the drip to be removed. A decision was made by the hospital personnel against carrying out an operation to remove the bullet which had been shown by X-ray examination to be lodged in his shoulder because the plaintiff had bled excessively and the area around the wound was by then swollen. The wound was sutured and he remained in

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hospital for one and a half days. After his discharge from the hospital he would return at intervals for reviews. The stitches were removed two weeks later.

The plaintiff said that from the time he regained consciousness at the point where he was shot, and for several days thereafter, he experienced extreme pain. He could only sleep on one side. He was unable to lift things with his right arm and he could not work for three weeks. Even when he resumed work he was not performing to full capacity.

He denied the suggestion that at the time of the shooting he was amongst the rioters who were looting and destroying property at the shopping centre. His protestation of innocence in this regard was fully supported by Martin Tawali, whose evidence was to the following effect. They left their work place together with Tinashe and the plaintiff because most firms, theirs included, had closed down due to the demonstrations. On arrival in Mabvuku, they noticed that things were relatively calm and one could walk freely. They walked home through Mabvuku gardens because the road had been barricaded with stones. From the park, they turned into Chengwezi road which in turn led them to Tafara Way. Along the way they met people who were coming from the direction of the shopping centre. Towards the end of Tafara Way, they encountered people who were fleeing from the shopping centre. He suddenly noticed someone who had been shot in the leg and he immediately turned back and fled from the scene. Although he did not see any members of the police force he could hear the sound of gunfire and he was able to observe that teargas was being thrown at the fleeing crowds. From the point where he turned back to flee he was unable to see the shopping centre as his vision was blocked by houses. He was not able to say if the plaintiff had already been injured when he fled from the scene. An hour after making good his escape he learnt that plaintiff had been injured.

Janet Jonasi is one of those who was shot. Her evidence, which dealt with the circumstances under which she came to be shot, at a different spot from where the plaintiff was when he was shot, did not advance the case of the plaintiff in any meaningful way.

The last witness to testify for the plaintiff was Superintendent Donald Charles Haley, a police officer who is in charge of the police firearms forensic laboratory. He has given expert evidence in these courts on firearms-related incidents for many years and is an acknowledge expert in his field. He

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examined X-rays (exhibits 1(a) and 1(b)) and stated that they reveal an object lodged in the shoulder region of the plaintiff's body. The object can be seen clearly even by a lay person. He stated that the object has the appearance of a bullet jacket, although he could not be absolutely sure without examining the object. It is somewhat distorted and part of it has peeled back, which is typical of a bullet jacket. From its size and shape, he was able to observe that the bullet was fired from a rifle, although he could not say what type of rifle it was. It is the remains of a full metal jacket projectile from military equipment as opposed to a jacket emanating from a civilian rifle. Although a civilian rifle may have metal jackets, it normally uses soft nosed jackets. He found the object to bear little resemblance to a projectile from a shotgun. It is possible that it may have been fired from a pistol, which also has the military type metal jacket, but it mostly

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resembles a rifle bullet jacket.

It was his evidence that police stations generally have to make do with what is available. Even though FN rifles are not suitable for riot control, the police are issued with such rifles and they sometimes have to use them. They are unsuitable because a bullet fired from an FN rifle can travel for four to five kilometres and still kill someone at that distance. If an individual is shot with an FN rifle the projectile can penetrate, exit from his body and shoot and kill someone else. If it is fired into the ground, the bullets are prone to ricochet, bouncing off in all directions and the rebound can travel for 400 metres or more and still kill someone at such distance. Superintendent Haley said a more suitable weapon for riot control is a 12 bore shotgun. However, when faced with mass anarchy, that is, when there is a breakdown of law and order with huge crowds of people demonstrating, looting, destroying property and rioting, FN rifles can be used to control the riotous mobs. He was certain that the metal jacket seen in the X-ray could only be in the shape in which it is due to a ricochet. If it was a direct hit, it would have penetrated completely and hit someone else. It would only deform to the extent shown in the X-ray and remain lodged in the body if a substantial bone was hit and shattered, and there is no evidence of a shattered bone in the X-ray.

Two witnesses gave evidence for the defendants. The first to testify was Inspector Collins Kavhu, who at the material time was the officer-in-charge at Mabvuku police station. On 19 January 1998, there was general unrest in the Mabvuku area. At about 10 o'clock in the morning of that day he learnt from passers-by that there was a large crowd of people gathered at Tafara shopping centre. He sent twelve police details to go and investigate. They were not armed. They soon returned with the report that they had been stoned and chased away by the crowds and that people were damaging property, whereon he armed them with riot guns, teargas canisters and FN rifles. They

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left for the shopping centre, but he remained behind summoning reinforcements from other stations to match the size of the crowd. Braeside and Rhodesville police stations responded promptly by sending police details to Mabvuku, twelve in all. The crowd at that stage numbered about 4000. Kavhu accompanied the twelve details to the shopping centre. They too had teargas canisters and FN rifles. They could not drive straight to the shopping centre as the road had been barricaded. On arrival at the shopping centre, they observed a large crowd of people surrounding the whole shopping centre. They were throwing stones at the police, who were firing teargas canisters at them. They would disperse, regroup and continue looting. As these running battles continued unabated, the crowds had the upper hand because the police were outnumbered. This went on until midday. The policeman ran out of teargas. Kavhu then instructed his men to fire their FN rifles into the air. When the firing started, the people ran away. The crowds were pushed back and members of the support unit, who had come to assist, left to attend to rioters elsewhere. At around 1 o'clock Kavhu withdrew from the shopping centre but he maintained radio contact with his men at the shopping centre. Before he left he had become aware of one person who had been shot. There were four people who were shot and were brought to the police station from where they were ferried to hospital. The plaintiff was not

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among the four injured people who were brought to the police station.

Kavhu described the situation at the shopping centre as fierce. A lot of goods were being stolen and property was being damaged. Before he left the shopping centre and while the police were firing into the air, the people kept advancing towards the police apparently thinking that they were firing blanks. He ordered his men to fire into the ground so that the people could see that live bullets were being fired. He stated that he allowed his men to use FN rifles because there were no other guns at the station apart from two shotguns which, though issued out on this day, had insufficient ammuni1tion. The five pistols which he had at the station were not used because, like FN rifles they are not riot equipment.

None of the police officers at the scene were shot but some received injuries from the stones which were being thrown at them. A police vehicle was burnt in the process.

The second and last witness to testify for the defendants was Assistant Inspector Masarirambi who led the first group that visited the shopping centre. After being chased away he later returned to the shopping centre with the same details, this time armed with rifles and tearsmoke. This was after they had failed to address the demonstrators to urge them to be peaceful.

They fired teargas canisters at the crowd to stop them from looting. The crowd, which initially numbered 4 000, had grown bigger and violent. The

rioters kept on throwing stones at the police, as well as at the shops. Children were sent ahead to break into shops and the adults would follow in large numbers to loot property. The police ran out of teargas, thus forcing them to fire in the air but the crowd continued to loot, setting a police vehicle ablaze in the process.

The shopping complex is about one and half times the size of a football ground. The crowds swelled to about 10 000, yet at most the police officers increased to forty. The rioting lasted for the whole day with varying degrees of intensity from time to time. The situation was fierce for about three hours.

In order to properly ventilate the dispute between the parties, there are two issues touching on liability which I must decide. The first, which arises from the pleadings, is whether the plaintiff was injured by a bullet fired from a police weapon. The second issue, which was not raised on the pleadings, but which was canvassed in evidence, is whether the injury, if it was perpetrated by the police, was justified.

I turn to the first issue. The plaintiff claims to have been shot by members of the police force who were trying to quell a riot at Tafara Shopping Centre. He estimates the distance from which he was shot to be four hundred metres from the shopping centre. The police deny responsibility. They advanced the theory that the plaintiff could have been shot by a bullet fired by business people who were trying to protect their property from looters. The weakness of this theory is readily apparent. No concrete evidence was led from which an inference can be drawn that the plaintiff could have been shot by a shopowner who was shooting in defence of his property. The

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police officers who gave evidence did no more than suggest it as a possibility. All things are possible but some possibilities are less likely than others. The fanciful nature of this possibility can be demonstrated by an examination of the positive evidence led in court, the bulk of which is either common ground or is indisputable. It is not denied that the police opened fire and that at the time when the plaintiff was shot there was gunfire emanating from the direction of the shopping centre and that the source of the gunfire was the FN rifles being fired by the police. The police admit that four people, apart from the plaintiff, were injured by bullets fired by the police. Some bullets were fired into the ground. Superintendent Haley told the court that bullets fired from an FN rifle are prone to ricochet causing the rebound to travel for more than four hundred metres and to retain enough strength to kill someone. Furthermore, the shape of the bullet jacket found lodged in the plaintiff's shoulder as well as the fact that became lodged in his body is consistent with the bullet having ricocheted. The bullet jacket was of a metal type, typical of one fired from a military type hardware, which a FN rifle is, as opposed to a soft nosed jacket which one expects from a civilian rifle. The fact that in

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between the shopping centre and the spot at which the plaintiff was shot, there is a row of houses which would have shielded the plaintiff from danger is set at nought by Haley's evidence concerning the manner of travel of a rebound from an FN rifle. It is more than likely that someone walking along the road could be hit by a rifle fired from the shopping centre. That is more so in the present matter, in which satisfactory expert evidence established that the bullet which hit the plaintiff had ricocheted.

The claim by the defendants that the plaintiff must have been among the rioting mob can be discounted with little risk of error. The plaintiff's evidence on this point is credible. It is supported fully by the evidence of his workmate, Martin, which in my view proves that the two were not part of the rioting mob. Their presence within the vicinity of the rioting mob, makes it more likely than not that he was hot by the police. I am satisfied that the plaintiff was shot by a bullet discharged from a FN rifle fired by the police who were trying to contain a rioting mob at Tafara shopping centre.

It is alleged on behalf of the plaintiff that the actions of the police were negligent and reckless in that it was grossly unreasonable in the circumstances to discharge a firearm in a (crowded) shopping area. The defendants contended themselves with a bald denial of these averments. The issues, as pleaded, fall within a narrow compass, but the manner in which the case was conducted by the parties went far beyond the narrow issues which exist on a literal reading of the pleadings. The case for the plaintiff was directed towards proving that it was unreasonable or there was no justification for discharging firearms at the shopping centre. The defendants, on the other hand, sought to show that there was a dire need to maintain law and order and to protect property which the rioters were destroying and looting. I must decide the case on the basis of the wider issues in order to ensure that the decision focuses on the real dispute between the parties. In doing so, I do not lose sight of the *dictum* of LEWIS JA in *Matambanadzo Bus Service (Pvt) Ltd* v *Magner* 1971 (1) RLR 54 (A) at 55I that:

"... it seems to me, notwithstanding that the courts tend to take a broad view of pleadings as long as the real dispute

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between the parties is properly investigated and adjudicated upon, the cardinal rules in regard to pleadings should be properly observed, even in a magistrate's court; and a trial should not be allowed to become just a 'free for all' with a complete disregard of the issues as raised in the pleadings."

This was of course an appeal from the magistrate's court, a forum in which pleadings are not analysed with a magnifying glass, but one where greater latitude is given to the litigants to traverse issues beyond the immediate confines set by the pleadings. The strictures enunciated in the above *dictum* are to be observed more strictly in the High Court than is the case in the inferior courts. This notwithstanding, this court, while it strives to ensure that

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the parties are restricted to the issues as reflected on the pleadings, will not enslave itself to the pleadings in complete disregard of its duty to decide the real dispute between the parties. As observed by Innes CJ in *Robinson* v *Randfontein Estates GM Co Ltd* 1925 AD 173 at 198:

"The object of pleading is to define the issues and parties will be kept strictly to their plea, where any departure would cause prejudice or would prevent full inquiry. But within those limits the court has a wide discretion, for pleadings are made for the court, not the court for pleadings, and where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

Ideally, the matter should have been regularised by an appropriate amendment to the plea to allege that the defendants acted with justification in defence of property and in an effort to restore order. However, the importance of pleadings should not be unduly magnified. See *Still* v *Milner* 1937 AD 101 at 105 and *Medispa (Pty) Ltd* v *Knoebel Tools & Products (Pty) Ltd* 1988 (4) SA 415 (W) 421I-J at 422A-H.

As long as there is no likelihood of prejudice being occasioned to one or other of the parties the court should not lightly disregard a point which has been thoroughly investigated. In the words of SCHREINER JA in *Middleton* v *Carr* 1949 (2) SA 374 (A) at 385-6:

"... where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court. Generally speaking, the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or of avoiding a special order as to costs, on the courts readiness at the court's readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated."

I perceive the common approach in these *dicta* to stress the need to strike a balance between underpinning the importance of keeping litigants to strictly within the four covers of their pleadings, on the one hand, and on the other, the court's duty to attain justice by permitting a fuller investigation of the wider issues which do not arise from the pleadings, where that can be done without occasioning prejudice to one or other of the litigants. Such a balance is easy to strike in a case such as the present, where both parties approach the case on the assumption that the wider issues, though not pleaded, are relevant to the determination of the real dispute

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between the parties. This is how I should regard the matter.

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So regarding the matter, it then becomes necessary to determine what duty lay upon the police, firstly, to act in defence of the property of third parties, and secondly, to restore and maintain law and order. It admits of no doubt that, depending on the circumstances, it is permissible to kill or injure another in the course of defending one's property. That position was authoritatively laid down by the former Appellate Division of South Africa in Ex p *Minister of Justice* In re *S* v *van Wyk* 1967 (1) SA 488 (A). A person has the same right to resort to the use of force in the defence of another person or a third party's property. The case of *Ntanjana* v *Vorster & Minister of Defence* 1950 (4) SA 398 (C) is opposite in this retard. Doctor Ntanjana was shot dead by Constable Vorster in the former's room at the Vineyard Hotel, in Newlands. Mrs Ntanjana sued Vorster and the Minister of Justice for damages for loss of support. The claim against Vorster rested on the allegation that he wrongfully, unlawfully and intentionally caused the death of Doctor Ntanjana. Constable Vorster, in his plea, admitted shooting the deceased but said he did so in defence of his superior officer, Sergeant Hoffman who, while lawfully arresting the deceased, was unlawfully attacked by the latter with a dangerous weapon and was as a result in danger of loosing his life. In dealing with this defence VAN WINSEN AJ stated at 405 that:

"The fact that this unlawful attack was directed against Sgt Hoffman and not against Const Vorster does not disentitle the latter to act. He has the same right to take steps to defend his superior officer as he would have had were the attack directed against him, Const Vorster, personally."

See also *R* v *Tsutso* 1962 R&N 168 (SR) at 170B; 1962 (2) SA 666 (SR) at 668E. The decision in *R* v *Puttock* 1967 RLR 186 (A), which, in my view, is correct on its own facts, is not inconsistent with the two cases just referred to the above and many others to the same effect.

In context, I am concerned with a shooting perpetrated by the members of the police force, in the course of restoring law and order in the area where mass anarchy had supplanted peace and tranquility. There was a complete breakdown of law and order; people were rioting, looting and damaging property. There can be no gainsaying the fact that, in firing shots in the vicinity of the rioting mobs, the police were discharging their bounder duty to maintain law and order. Their right to resort to the use of force to protect the property of third parties and to restore order cannot be doubted. But was it reasonable for the police officers to discharge their firearms in the manner they did? The answer to this question must be in the affirmative. They had fought running battles with the rioters for more than two hours and they were failing to quell the riots. The use of teargas canisters did not dissuade the crowds from looting and damaging property. Reinforcements were summoned to the scene of the riots, but the situation did not improve. By the

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time of the shooting the strength of the rioters had more than doubled. The police were hopelessly outnumbered and they had run out of teargas canisters. Stones were being thrown

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at the police by the rioters. Finding themselves at the end of their tether and realising that the situation would continue to deteriorate, the police decided to fire the FN rifles, the only weapons left. They fired into the air and into the ground and the plaintiff was hit by a ricocheting bullet.

I have no hesitation in holding that, faced with violence of the magnitude described by the witnesses, the use of firearms was totally justified. In this case, the firearms with which the police details had been issued with were mostly FN rifles, which are military weapons. FN rifles are wholly unsuitable for riot control. It is, therefore, necessary to decide whether the conduct of the defendants, in particular the Commissioner of Police, in issuing an urban police station with military weapons which are wholly unsuited for riot control, was wrongful or unreasonable. I have no been told in specific terms why the police force sanctions the use of military rifles to quell riots in urban centres, but I am able to infer from the evidence led by the police, including that of Superintendent Haley, that the problem is one of shortage of suitable weapons. Kavhu said he had only two twelve bore shotguns and less than fifty teargas canisters in the armoury at Mabvuku Police Station. The support details he summoned were all armed with FN rifles. Haley said that there are times when the police have to make do with what is available. It would seem, therefore, that the police, in general, and Mabvuku police station, in particular, were ill-equipped to deal with riots.

The question which falls for decision is whether this state of unpreparadness on the part of the police force as a whole makes it reasonable for riot control squads to resort to the use of military weapons to suppress riots. Do the legal convictions of the community deem it pardonable for a modern police force to use military weapons to suppress an urban uprising in the full knowledge that such weapons are dangerous and thus unsuitable for purpose of riot control?

In order to determine the wrongfulness or reasonableness of any given conduct, the court is enjoined to make a value judgment based in part upon the *boni mores* and legal convictions of the community. As Howard JP ably observed in *Natal Fresh Produce Growers' Association & Ors* v *Agroserve (Pty) Ltd & Ors* 1980 (4) SA 749 (N) at 754I-J at 754A:

"It is common cause that the plaintiffs' claim to an interdict is based on delict, specifically on the *actio legis Aquiliae*, as it has been extended and applied in our law, and that to succeed in their claim the plaintiffs must allege and prove facts to show that the conduct of the defendants which they seek to interdict is wrongful. To decide whether conduct is wrongful in the delictual sense the court applies the general criterion of reasonableness ...

which is determined according to the legal convictions of the community. The decision involves policy considerations, and the court has to evaluate and balance the conflicting interests of all concerned parties, with due regard *inter alia* to the social consequences of recognising or denying the existence of liability in a given case."

See also *Coronation Brick (Pty) Ltd* v *Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) and *Financial Mail (Pty) Ltd* v *Sage Holdings Ltd* 1993 (2) SA 451 (A) at 462. In the latter case, Corbett CJ stated:

"And in demarcating the boundary between lawfulness and unlawfulness in this field, the court must have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the court."

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The phrase, *boni mores,* in this context is used not to mean good morals but to denote the legal convictions of the community which serve as a yardstick to ascertain whether or not the community regards a given act to be wrongful in the delictual sense. It is another way of determining the reasonableness or otherwise of the conduct under consideration. A court, in coming to such a determination, makes a value judgment based upon its perception of what the community considers to be fair, just and equitable. As observed in the *Coronation Brick* case *supra* at 380:

"(I)n any given situation the question is asked whether the defendant's conduct was reasonable according to the legal convictions or feelings of the community."

In this connection, I must end by quoting the *dictum* of VAN ZYL J in *Compass Motors Industries (Pty) Ltd* v *Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 529A:

"From this, it appears that public policy, in the sense of *boni mores*, cannot be separated from concepts such as justice, equity, good faith and reasonableness, which are basic to harmonious community relations and may indeed be regarded as the purpose of applying public policy considerations."

In my considered judgment, it does not conduce to harmonious community relations for the police force to unleash its members onto an urban shopping centre located in the centre of a densely populated suburban residential area armed with FN rifles, whose bullets, when fired on to a hard surface, are prone to ricochet and kill a target within a radius of four to five kilometres. The chances of such ricocheting bullets killing or maiming innocent passers-by is all too obvious. The police force is a strong arm of the State, no doubt with considerable resources at its disposal. It should be able to procure suitable riot suppression equipment. I am by no means suggesting that the police force does not experience financial constraints from time to time. But that fact is not an excuse for exposing the urban populace to the obvious risk of being hit by stray bullets fired from weapons that should not be used for the suppression of riots. The obligation of the police to maintain law and

order must not be allowed to ride roughshod over the rights of people in the position of the plaintiff to walk freely away from the scene of riots without fearing that they may be hit by ricocheting bullets fired by the police from FN rifles in the process of quelling a riot.

It would be unjust to exempt from liability a police force which chooses to arm its men and women in urban police stations with rifles which are only suitable for battlefields at the expense of an innocent suburban dweller who is injured by such weapons while going about his business. Public policy requires that the plaintiff be compensated. Had the police armed themselves with suitable weapons, he would not have been injured. While the police have a duty to maintain law and order, they should do so with the use of suitable equipment.

In conclusion, therefore, I hold that the police, who were suppressing riots at Tafara shopping centre on 19 January 1998, were perfectly entitled to use weapons to dispense the rioters. It was, however, unreasonable for them to use FN rifles. Their conduct in using such rifles was wrongful and they are liable in damages to the plaintiff.

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The plaintiff claims the sum of $40 000 as general damages and $6 617.62 as special damages. The amount claimed for special damages has been substantiaed and no issue arises in that regard. I have not been referred to any comparable cases on general damages. However, there can be no doubt that the plaintiff experienced great pain. He lost consciousness when he was shot. When he regained consciousness, he felt great pain. At the hospital he could not be operated upon to have the bullet removed because the wound was by then swollen and he had bled excessively. The bullet remained lodged in the shoulder region of his body for nearly twenty months. At the time of the injury, he was hospitalised for one and a half days and he was off work for three weeks. He no doubted suffered further pain at the time that he was operated on in October 1999 to have the bullet removed. The surgeon who removed the bullet has expressed the opinion that there are not likely to be any significant long term *sequelae* following the removal of the bullet. Taking all these circumstances into account, I consider that the amount claimed is by no means incomparable with the gravity of the injury.

Accordingly, it is ordered that judgment be and is hereby entered in favour of the plaintiff in the sume of $46 617.62 together with interest at the prescribed rate with effect from the date of judgment to date of payment plus costs of suit.

DA Matyszak, plaintiff's legal practitioner

Civil Division of the Attorney-General's Office, defendants' legal practitioners

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CHAVUNDUKA & ANOR *v* COMMISSIONER OF POLICE & ANOR 2000 (1) ZLR 418 (SC)

Citation	2000 (1) ZLR 418 (SC)
Case No	Judgment No. S-20-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	March 20, 2000
Judgment	March 30, 2000
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(1) - right to protection of the law - embraces right to require the police to perform their public duty in respect of law enforcement

Constitutional law - Constitution of Zimbabwe 1980 - s 76 - Attorney-General - powers of - power to require

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Commissioner of Police to investigate offences - not limited to situation where Commissioner has refused to investigate

Headnote

Following the publication of an article in a weekly newspaper about an alleged coup attempt, the applicants, the editor of the newspaper and the author of the article, had been unlawfully detained by members of the military and tortured. Following their release, the applicants' legal practitioners wrote to the Attorney-General, asking him to set in motion a thorough investigation of the unlawful arrest and torture. The Attorney-General claimed that he had power to direct an investigation only when satisfied that the police were refusing to do so. In view of the Attorney-General's attitude, the lawyers wrote to the Commissioner of Police in May 1999, with a lengthy and detailed complaint. This was followed by a number of reminders, none of which elicited any response. Finally, at the end of August the lawyers intimated that they would bring legal proceedings. Only then did the Commissioner reply, saying that he had directed that an investigation take place. The investigation was, however, assigned to junior officers. There was no explanation about the previous lengthy lack of action. In October 1999, a statement was taken from the first applicant, and only in January 2000 was a statement taken from the second applicant, and then after reminders had been sent. An application was made to the Supreme Court for an order compelling the Commissioner to comply with his duty in respect of law enforcement.

Held, that the Attorney-General's power to direct the Commissioner of Police to investigate and report to him on any criminal offence is not limited to those situations where the Commissioner of Police is refusing to do so. He has the power to require the Commissioner to investigate and report to him on any matter which, in his opinion, relates to any criminal

offence or alleged or suspected criminal offence, and the Commissioner is obliged to comply with that requirement.

Held, further, that for nine months no action whatever was taken to address the charges laid by the applicants, and thereafter what was done was so minimal as to justify the inference that the investigation was not being regarded seriously. The Commissioner did not do nearly enough. He did not do all that his duty required of him.

Held, further, that in terms of s 24(1) of the Constitution the court had a wide and unfettered discretion as to the form the relief should take in order to enforce the Declaration of Rights.

Held, further, that the entitlement of every person under s 18 of the Constitution to the protection of the law embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator, and the bringing of him before a court. Where there has, as in this case, been a dereliction of duty by the police, the court will issue an order of *mandamus* to require the police to institute and complete a comprehensive and diligent investigation of the alleged offences.

Cases Considered

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Cases cited:

Catholic Commission for Justice & Peace v *A-G & Ors* 1993 (1) ZLR 242 (S)

Commissioner of Police v *Rensford & Anor* 1984 (1) ZLR 202 (S)

Hill v *Chief Constable of West Yorkshire* [1987] 1 All ER 1173 (CA)

Mlambo In re 1991 (2) ZLR 339 (S)

R v *Bristol Corporation* Ex p *Hendy* [1974] 1 All ER 1047 (CA)

R v *Chief Constable, Kent County Constabulary & Anor* Ex p *L (a minor)* [1993] 1 All ER 756 (QBD)

R v *Metropolitan Police Commissioner* Ex p *Blackburn (1) [1968]* 1 All ER 763 (CA)

R v *Metropolitan Police Commissioner* Ex p *Blackburn & Anor (3)* [1973] 1 All ER 324 (CA)

R v *Oxford* Ex p *Levey The Times* 18 December 1985

Tribac (Pvt) Ltd v *Tobacco Mktg Bd* 1996 (2) ZLR 52 (S)

Legislation considered:

Constitution of Zimbabwe 1980, ss 18(1), 24(1) & 76

Case Information

A P de Bourbon SC, for the applicants

Mrs *L Hove*, for the respondents

Judgment

Gubbay CJ: On 10 January 1999, *The Standard*, a weekly newspaper printed in Harare, published its lead article entitled "Senior Army Officers Arrested". It concerned a coup attempt in which twenty-three members of the Zimbabwe National Army were alleged to have been arrested. Mismanagement of the economy and involvement in the war in the Democratic Republic of the Congo were given as reasons for the failed uprising. The article also noted general dissatisfaction within the Army over the war, claiming morale was low, and that in defiance of orders some soldiers had refused to participate in the Congo conflict.

Two days later, the first applicant, the editor of *The Standard*, was arrested and detained by members of the military police of the Zimbabwe National Army. On 19 January 1999, the second applicant, who is the newspaper's

most senior reporter and the author of the article, surrendered himself to the police as his

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apprehension was being sought. He was formally arrested and soon thereafter released into the custody of the Army's military police. Startlingly, the reason for such illegal action, as proffered by the first respondent, the Commissioner of Police, was "because the nature of the enquiry involved highly sensitive matters of national security which could not be dealt with by my officers".

The applicants allege that during the course of their unlawful detention (the first applicant for a period of nine days, the second for two days) they were interrogated and tortured by military personnel in an effort to extract information as to the sources utilised for the article. In short, the complaint made is that their arrests and detentions were in violation of s 13(1), and the physical treatment they suffered contrary to s 15(1), of the Constitution of Zimbabwe. These provisions afford protection of the right to personal liberty and from torture or inhuman or degrading punishment or treatment.

It is unnecessary in these proceedings to determine the truth or otherwise of such allegations. It is sufficient to state that they are neither confirmed nor denied by the Commissioner of Police and so constitute *prima facie* breaches of the constitutional rights relied upon.

On 21 January 1999, the applicants were remanded on bail on a charge of contravening s 50(2)(a) of the Law and Order (Maintenance) Act [*Chapter 11:07*]. Insistent that the perpetrators of their illegal detention and torture, together with their accomplices, should be prosecuted, a letter was addressed to the second respondent, the Attorney-General, on 1 February 1999. It expressed the hope that he would set in motion, as a matter of priority, a thorough investigation into the allegations of unlawful arrest and torture.

The letter in reply was written on 22 April 1999. The Attorney-General stated that under the Constitution he had power to direct an investigation only when satisfied that the Commissioner of Police was refusing to do so. And there was no indication that this had occurred. To the contrary, he was satisfied that the matter had received, and was receiving, police attention.

With due deference, I do not consider that the Attorney-General's power is as curtailed as he believes it to be. Section 76(4a), as read with s 76(7), of the Constitution, reposes in the Attorney-General the power (the exercise of which is not subject to the direction or control of any person or authority) to require the Commissioner of Police to investigate and report to him on any matter which, in his opinion, relates to any criminal offence or alleged or suspected criminal offence; and the Commissioner of Police has no option but to comply with that requirement.

Faced with the approach adopted by the Attorney-General, on 11 May 1999 the applicants' legal practitioner submitted a lengthy written complaint

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to the Commissioner of Police. Enclosed with the letter were the comprehensive affidavits of the applicants and four medical reports pertaining to each of them. Charges of wrongful arrest and detention, aggravated assault and torture, were made against named and unnamed persons.

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The letter, which was copied to the Attorney-General, concluded with the following request:

"We ask you please to let us have your written confirmation of receipt of this letter and its annexures as soon as possible and your confirmation that an investigation into all the charges laid by this letter will be immediately instituted if this has not already commenced."

No response was forthcoming and reminders dated 16 June 1999, 14 July 1999 and 23 July 1999, copies of which were delivered to the Attorney-General, likewise remained unanswered. Clearly no investigation had been commenced; for otherwise the Commissioner of Police surely would have advised the applicants of what was being done.

Their patience worn thin, on 30 August 1999 the applicants made good the intimation in the last letter of an intention to resort to proceedings. They applied to this Court for relief under s 24(1) of the Constitution on the ground that their rights to the protection of the law, as enshrined in s 18(1), had been infringed.

In opposing the grant of the order, the Commissioner of Police deposed, on 10 September 1999, that his office had directed that an investigation be carried out into the complaints and that an inspector and a detective inspector had already made an appointment to see the second applicant and his legal practitioner at noon on 10 September 1999. A criminal register reference under Braeside Police Station CR 99/9/99 had been opened.

Implicit in these averments is an acknowledgement that no investigation had been commenced prior to service of the application. The entry in the criminal register was the ninety-ninth for the month of September and the sole action taken, probably on or about the day the affidavit was signed, was to appoint two comparatively junior police officers to investigate complaints that serious wrongs had been committed by high-ranking members of the Army and Police Force. No attempt was made to explain or justify the lengthy preceding inaction.

In early October 1999, the two police officers met with the applicants at the offices of their legal practitioner. The applicants were informed that because of the sensitive nature of their complaints, statements would be recorded from them, not at the police station, but at the offices of either the legal practitioner or *The Standard* newspaper. A statement was taken from the first applicant during that month but not from the second applicant. It was only on 31 January 2000, and as a result of letters written on 23 December 1999 and 12 January 2000, that the second applicant was asked to report to the office of the Serious Fraud Squad for the recording of a statement.

The entitlement of every person to the protection of the law, which is

proclaimed in s 18(1) of the Constitution, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator (provided the investigation so warrants) and the bringing of him or her to trial before a court of competent jurisdiction. As underscored in *Commissioner of Police* v *Rensford & Anor* 1984 (1) ZLR 202 (S) at 207H, members of the Police Force may not

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refuse to perform a duty imposed upon them by the law of the land.

It is with regret that I find that the Commissioner of Police has failed to afford the applicants the protection of the law they are entitled to expect from him. Between January and September 1999 no action whatsoever was taken to address the charges laid by the applicants. Thereafter what was done was so minimal as to justify the inference that the investigation was not being regarded seriously. As counsel for the applicants so aptly put it, mere lip service was being paid to the duty to investigate the complaints which by no stretch of the imagination could be categorised as frivolous. The Commissioner of Police did not do nearly enough. He did not do all that his duty reasonably required of him. See *R* v *Bristol Corporation*, ex p *Hendy* [1974] 1 All ER 1047 (CA) at 1049d-e.

Section 24(4) of the Constitution empowers the Supreme Court to:

"make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights."

This imparts a wide and unfettered discretion as to the form the relief should take. See In re *Mlambo* 1991 (2) ZLR 339 (S) at 355C; *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General & Ors* 1993 (1) ZLR 242 (S) at 283C.

What then is the appropriate remedy where it has been shown that the police have not done something which obviously it is their duty to do - where there has been a dereliction of duty owed to the public? The answer is that in such a clear case the court will grant an order of *mandamus*. But where the police have arrived at the decision not to take any action in good faith and on the basis of a proper appreciation of the applicable law, they will not then incur the risk of judicial intervention. The police thus retain a very considerable freedom to formulate and implement general policies and to decide what to do in a particular situation. A substantial margin of discretion must be allowed them. See *R* v *Metropolitan Police Commissioner,* ex p *Blackburn & Anor (No. 3)* [1973] 1 All ER 324 (CA) at 331j-332a and 334a-b. So in *R* v *Oxford,* ex p *Levey* (reported in *The Times* of 18 December 1985 and cited in Clayton and Tomlinson *Civil Actions against the Police* at 406), it was contended that it was *ultra vires* for the chief constable to adopt a policy whereby Toxteth was deemed on some occasions, to be a "no go area". The

application was refused because the applicant had failed to establish that the chief constable had exceeded the limits of his discretion.

The landmark case dealing with the duty of the police to take due measures for the purpose of enforcing the law is undoubtedly *R* v *Metropolitan Police Commissioner*, Ex p *Blackburn* [1968] 1 All ER 763 (CA) ("*Blackburn No. 1*"). The facts were that Mr Blackburn, a private and concerned citizen, applied for an order of *mandamus* to direct the Commissioner to reverse a policy decision not to prosecute London gaming clubs for illegal forms of gambling. The Commissioner's confidential instructions, when revealed to the court, substantially bore out the complaint, being based on the understanding of the law and the expense and manpower

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required to keep the clubs under observation. The Court of Appeal accepted that the police owe a duty to the public to enforce the law and that the courts could, if necessary, compel them to perform it. Lord Denning MR stated the position, at 769E-G, as follows:

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and the law alone."

To similar effect were the words of SALMON LJ at 771B-C:

"... the police owe the public a clear legal duty to enforce the law - a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of *mandamus* for the instruction to be withdrawn."

And the third member of the court, EDMUND DAVIES LJ, was equally emphatic. He said at 776 *in fine*- 777D:

"(Counsel) for the commissioner has addressed to the court an elaborate and learned argument in support of the bald and startling proposition that the law enforcement officers of this country owe no duty to the public to enforce the law. Carried to its logical limit, such a submission would mean that, however, brazen the failure of the police to enforce the law, the public would be wholly without a remedy and would simply have to await some practical expression of the court's displeasure. In particular, it would follow that the commissioner would be under no duty to prosecute anyone for breaches of the Gaming Acts, no matter how flagrantly and persistently they were defied. Can that be right? Is our much-vaunted legal system in truth so anaemic that, in the last resort, it would be powerless

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against those who, having been appointed to enforce it, merely cocked a snook at it? ... The applicant is right in his assertion that its effect would be to place the police above the law. I should indeed regret to have to assent to the proposition thus advanced on behalf of the commissioner, and, for the reasons already given by my lords, I do not regard it as well-founded. On the contrary, I agree with them in holding that the law enforcement officers of this country certainly owe a legal duty to the public to perform those functions which are the *raison d'être* of their existence."

No order of *mandamus* was made, however, for while the application was pending the law was clarified and the Commissioner undertook to revoke his policy decision. But for that development, the observations of their Lordships plainly indicate that they would have compelled the Commissioner to enforce the law. See also *Hill* v *Chief Constable of West Yorkshire* [1987] 1 All ER 1173 (CA) at 1184a; *R* v *Chief Constable of the Kent County Constabulary & Anor,* Ex p *L (a minor)* [1993] 1 All ER 756 (QBD) at 768a.

In this matter, I am satisfied that the requirements for a *mandamus* are satisfied. See *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at 56B-D. There is no other judicial remedy which is equally or more appropriate. But it is not for this court to instruct the Commissioner of Police as to the manner in which he is to perform his duty. It is only necessary

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to direct him to do so.

In the result, I would order as follows:

1. The first respondent is to institute forthwith and/or carry forward to completion a comprehensive and diligent investigation of the offences alleged to have been committed against them by each of the applicants as detailed in the affidavits sworn by them on 20 May 1999 and in the letter of 11 May 1999, with a view to the prosecution of all persons against whom there is a reasonable suspicion of complicity in the perpetration of such offences.

2. The costs of this application are to be paid by the first respondent.

MCNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Atherstone & Cook, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

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CHAMBE *v* RUFARO MARKETING (PVT) LTD & ANOR 2000 (1) ZLR 425 (HC)

Citation	2000 (1) ZLR 425 (HC)
Case No	Judgment No. HH-73-00
Court	High Court, Harare
Judge	Smith J
Heard	February 22, 2000
Judgment	April 5, 2000
Annotations	None

Civil application

Flynote

Employment - termination - referral of dispute to labour relations officer - prescription - date when dispute

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arose - date on which employer became aware of facts giving rise to dispute

Headnote

The applicant was the managing director of a brewery owned by a city council. The mayor appointed a task force to enquire into the operation of the brewery. The task force recommended that the applicant be suspended while the task force was carrying out its investigations. Based on this recommendation the brewery's board suspended the applicant on full pay. The task force later recommended to the mayor that the applicant be dismissed on the grounds that he was unsuitable for the job. Some months later the mayor communicated this recommendation to the board. The board then suspended the applicant without pay and applied to a labour relations officer for permission to terminate the applicant's contract of employment. The labour relations officer to whom the application was made took the view that the matter was prescribed as the matter had not been referred to him within 180 days of the employer becoming aware of the facts giving rise to the dispute as required by s 94(1) of the Labour Relations Act [*Chapter 28:01*].

Held, that the acts or omissions on the part of the managing director which formed the basis of the dispute only became known to the board of the brewery when the final findings of the task force were communicated to the board. Even if the chairman of the task force had informed the chairman of the brewery board at an earlier stage of its preliminary findings, this would have led only to suspicion and not to actual knowledge. The matter had therefore not prescribed.

Held, further, however, that the mayor should have communicated the recommendations of the task force to the brewery board far earlier. There are many instances where a statutory body or local authority has been very dilatory in instituting disciplinary proceedings against an employee and it is unfortunate that the employee may escape the consequences of his acts or omissions merely because the responsible official in the body or authority fails to act promptly when he becomes aware of wrongdoing or incompetence as the part of an employee.

Held, further, that s 94(3)(b) of the Labour Relations Act should be amended because it contains an anomaly. This anomaly arises when the party wishing to refer a dispute to a labour relations officer is the board of directors of a company. Where there has been corruption or gross mismanagement in a corporation, the question arises as to whether a newly appointed board is able to refer a matter to the labour relations officer when the old board

has turned a blind eye to the corruption or mismanagement for a period of more than six months. The question is whether the matter has prescribed. To overcome this problem, s 94(3) should be amended by the insertion of a proviso to permit a labour relations officer to deal with a dispute even after the period of 6 months has elapsed if there are special circumstances.

Cases Considered

Cases cited:

Chinyerere v *Harare City Council & Anor* HH-228-99

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Makova v *Urban Development Corporation* 1992 (1) ZLR 326 (H)

Munn Publishing (Pvt) Ltd v *ZBC* 1994 (1) ZLR 337 (S)

Myers v *SAR&H* 1924 AD 85

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 94(3)

Case Information

T Gumunya, for the applicant

E W W Morris, for the respondents

Judgment

Smith J: The applicant (hereinafter referred to as "Chambe") was employed by the first respondent (hereinafter referred to as "Rufaro") as its managing director. On 22 August 1997, Chambe was given a letter, signed by the acting chairman of Rufaro, telling him that the task force formed to investigate the operations of Rufaro had requested that he be suspended from performing his duties as managing director, on full pay and benefits, with immediate effect to enable the task force to continue its investigations. He was also told that he was not allowed to visit any premises of the company and was asked to surrender all the keys and documents of the company in his possession. He assumed that Rufaro was exercising its common law rights to suspend an employee, especially since he continued to receive full pay and benefits. However, during the currency of his suspension he came across a letter, dated l4 August 1997, from the chairman of the task force to the then Executive Mayor for the City of Harare, which stated the reasons for the recommendation that he be suspended. In that letter, the chairman of the task force set out the reasons for the recommendation but, before setting them out, he said that specific issues had already been investigated which made the task force believe that Chambe and some other employees may well be unsuitable to hold the positions they held and that it might well be that, in the final recommendations, it would be recommended that they be removed from their posts. Three specific allegations against Chambe were detailed and it was said that it was not the intention to catalogue all the allegations against Chambe.

On 19 September 1998, the chairman of the task force again wrote to the Executive Mayor, reporting the task force's findings that there had been

"glaring malperformance, negligence and gross misrepresentation" on the part of Chambe. He requested that Chambe be permanently relieved of his duties forthwith, saying that his continued suspension could no longer be justified in the face of overwhelming evidence of his unsuitability for the position and the current ongoing expense "to the already cash-strapped Rufaro". The specific allegations of malperformance were his handling of the computerisation exercise, the purchase of beer tanks through a company called Bradnick & Thompson, the

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continued expensive and unjustified reliance on a firm of chartered accountants in the recruitment of "finance executives" and his personal ignorance and/or naivety in the running of Rufaro, leading to the company being overstaffed and loss-making.

The Executive Mayor did not act on the recommendation of the chairman of the task force for some time. Eventually, by letter dated 6 May 1998 from the legal practitioners of Rufaro, Chambe was advised that it was the intention of Rufaro to dismiss him from his position as managing director and therefore he was suspended with immediate effect without pay or other benefits in terms of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1983 (SI 371 of 1985). He was also advised that Rufaro would be applying to a labour relations officer for an order terminating his contract of employment. The grounds for such application were that Chambe -

(a) was guilty of acts, conduct or omissions inconsistent with the fulfillment of the conditions of his employment;

(b) was guilty of gross incompetence or inefficiency in the performance of his work;

(c) lacked the skills which he had expressly or impliedly held out that he possessed.

These conditions were based on the fact that Rufaro recorded operating losses in the amount of $12.8 million in the financial year ending 30 June 1997. He was advised that, at the hearing, Rufaro would rely on the report of the task force, a copy of which had been given to Chambe. A number of specific areas were mentioned therein. They included the following:

1. Beer tanks, which were traditionally purchased direct from the manufacturer had been purchased through a company and it was suspected that Chambe was a friend of one of the directors of that company. A higher price was paid for the beer tanks because they were not sourced from the manufacturer and in addition, an overpayment was made to the supplier which had not been reclaimed, and also the supplier failed to deliver one of the beer tanks;

2. A company (allegedly run by a friend of Chambe's) had been engaged to build offices, a bulk store and garage at the head office of Rufaro,

despite the fact that the building section of Rufaro was under-utilised at the time;

3. The person appointed as finance manager did not have the necessary qualifications;

4. The computerisation of Rufaro, which was to take four weeks to complete, had not been completed more than a year after work thereon started. The cost of the project was to be just under $480 000. However, some 18 months later, $1.2 million had been spent and the manual system was still running parallel to the computer system. Capital expenditure in the computerisation project was close to $3 million;

5. From September 1996 to May 1997, Chambe authorised donations totalling $67 186 which

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were of a political nature and given at a time when Rufaro could ill afford them. One of the donations was for $25 000 which was given to ZANU (PF); and

6. Chambe's managerial style left a lot to be desired.

Rufaro's application for approval of the dismissal of Chambe was heard by a labour relations officer who ruled that the matter was prescribed and therefore he could not entertain it. Rufaro appealed against that ruling.

Chambe then filed this application, seeking a declaratory order to the effect that his suspension on 6 May 1998 is a nullity and therefore he is entitled to his salary and benefits with effect from that date and also declaring that the dispute between him and Rufaro is prescribed and therefore cannot be dealt with by the second respondent. The basis of Chambe's claim is as follows. Rufaro knew, if not from 14 August 1997 then from 22 August or, at the latest, 19 September 1997, that grounds for his dismissal existed. Therefore, in terms of s 94 of the Labour Relations Act [*Chapter 28:01*] (hereinafter referred to as "Chapter 28:01" prescription began to run on 22 August or 19 September 1997.

Rufaro opposes the application. Firstly, it claims that in this case there are clear disputes of fact and therefore Chambe should have instituted proceedings by way of summons. Secondly, it contends that the issue of prescription was not raised by Chambe during the proceedings before the labour relations officer. Prescription must be specially pleaded by one of the parties; the labour relations officer should not have raised the issue of prescription *mero motu*.

Mr *Gumunya* argued that this application is made in terms of s 14 of the High Court Act [*Chapter 7:06*] and the requisites for such an application, as outlined and discussed in *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) at 343 are satisfied. He then went on to argue that the task force in August 1997 was well aware of the alleged wrongdoing of Chambe and therefore, as it was an agent of Rufaro, Rufaro

must be deemed to have been aware of them also as at that date. The task force communicated its findings to Rufaro in September 1997. Section 94 of Chapter 28:01 provides that labour disputes prescribe after 180 days and therefore the suspension of Chambe on 6 May 1998 was invalid.

Mr *Morris* argued that the reports of the task force do not create or constitute a dispute; they could not trigger an inquiry by a labour relations officer; they are merely communications from the task force to Rufaro. It was only after Rufaro's legal practitioners had written to Chambe advising him of his suspension and he challenged the propriety of his dismissal that a dispute arose. When Rufaro first became suspicious as to the qualities and actions of Chambe it suspended him in order to facilitate its inquiries. That suspension was under the common law, not in terms of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985.

Section 94(1) of Chapter 28:01 provides that a labour relations officer shall not entertain any

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dispute unless it is referred to him within 180 days from the date when the dispute first arose. It is further provided in subs (3) of s 94 that a dispute is deemed to have first arisen on the date when -

(a) the acts or omissions forming the subject of the dispute first occurred; or

(b) the party wishing to refer the dispute to the labour relations officer first became aware of the acts or omissions referred to in para (a) above, if such party cannot reasonably be expected to have known of such acts or omissions at the date when they first occurred.

In this case, as Chambe was the managing director of Rufaro when the acts or omissions which were mentioned by the task force in its report first arose, he would not have disclosed them to the board of directors of Rufaro. Therefore the board of Rufaro, which is the party that wished to refer the dispute to a labour relations officer, could not be expected to have known of such acts or omissions when they first arose. One must then decide, in accordance with the provisions of para (b) of s 94 (3), when Rufaro, which would mean the board of directors of the company, first became aware of the acts or omissions. Mr *Gumunya* argued that the task force was acting as the agent of Rufaro and therefore, when "the agent has actual knowledge of certain information, which knowledge falls within the scope of his authority and such agent has a duty to communicate the information so known to him to the principal, and has an opportunity to communicate such information, then the principal is imputed to have the knowledge possessed by his agent". The submission is based on A J Kerr's *The Law of Agency* 3 ed at pp 65-173. There is, however, no evidence that the task force was an agent of Rufaro. From the papers filed, it appears that the task force was appointed by the Harare City Council or by the Executive Mayor of Harare and not by the

board of Rufaro. The letters from the chairman of the task force that were filed were addressed to the Executive Mayor and not to the chairman of Rufaro. The task force was apparently appointed to investigate the operations of Rufaro.

In the letter dated 14 August 1997, the chairman of the task force informed the Executive Mayor of the reasons why the task force had recommended the suspension of Chambe. Then, in the letter dated 19 September 1997, he made an urgent recommendation that Chambe be permanently relieved of his duties forthwith, saying that his continued suspension could no longer be justified "in the face of overwhelming evidence of his unsuitability to the position and his current ongoing expense to the already cash-strapped Rufaro Marketing".

Whilst it is clear from those letters that the then executive Mayor must have been aware of the acts or omissions of Chambe which are the subject of the dispute sometime towards the end of September 1997, there is no evidence as to when the board of Rufaro became aware thereof. In fact, in the letter dated 19 September, the chairman of the task force also criticised the board of Rufaro, saying that it "should also be labelled as a culprit through its appointment of Mr Chambe as Managing Director". The knowledge on the part of the Executive Mayor, as at September 1997, of the acts or omissions of Chambe, cannot be attributed to the board of

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Rufaro. Presumably it, or the chairman, became aware of those acts and omissions only when the report of the task force was submitted.

For the reasons set out above, I consider that the dispute referred by Rufaro to the labour relations officer was not prescribed.

In *Makova* v *Urban Development Corporation* 1992 (1) ZLR 326 (H) Gibson J pointed out that at common law the employer enjoys the power to suspend an employee but may only do so on full pay. The learned judge referred with approval to *Myers* v *S A Railways & Harbours* 1924 AD 85 where at 90 SOLOMON JA said:

"... the general principle underlying a contract of service is that the hire is to be paid in return for services rendered, so that *prima facie*, if the services have not been rendered, the servant would not be entitled to be paid for that period. And accordingly ... if an unforeseen misfortune, such as sickness, befalls the person who has left his services and renders him incapable of performing them for the whole of the period of his engagement, he can only claim wages or salary for the time during which he has actually served. If, however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid, notwithstanding that no service had been rendered by him."

See too *Chinyerere* v *Harare City Council & Anor* HH-228-99 where at pp 5-6 of the cyclostyled judgment I said:

"Under the common law, an employer cannot suspend an employee without pay unless

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provision therefor is contained in the contract of service and the employer acts in terms of the contract. The provisions of subs (4) to (7) of s 141 of Chapter 29:15 set out the circumstances in which a council may suspend an employee without pay although, in terms of para (b) of subs (7), he must be paid an allowance. That does not mean, however, that an employee who is the subject of disciplinary proceedings can insist on being allowed to enter his employer's premises in order to be able to carry on doing his work. Under the common law, unless there are special circumstances, an employee cannot demand that he be given specific duties to perform. His entitlement, under the contract of service, is to receive his wage or salary and any allowances due to him. If his employer does not require him to do any work but is prepared to continue paying him, then in law he has no cause for complaint unless there are special circumstances, such as loss of status or respect. In the private sector, of course, few employers would be prepared to accept such a situation for any length of time. It would affect their profits. In the case of statutory or public bodies, however, as it is the taxpayer or ratepayer whose money is being used and not that of the individual, no one seems to worry."

The fact that Chambe was suspended on full pay on 22 August 1997 does not mean that his suspension without pay on 6 May 1998 was invalid - see *Standard Chartered Bank Zimbabwe* v *Matsika* 1996 (1) ZLR 123 (S). Rufaro did, after the suspension without pay, apply forthwith to the labour relations officer.

By virtue of the provisions of subs (3) of s 94 of Chapter 28:01, a dispute is deemed to have first arisen when the acts or omissions forming the subject of the dispute first occurred or, if the party who wishes to refer the dispute to a labour relations officer cannot reasonably be expected to have known of such acts or omissions when they first occurred, then on the date that party first became aware of the relevant acts or omissions. If, for example, Rufaro had appointed the task force to investigate the operations of Rufaro and the chairman of the task

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force had written to the chairman of Rufaro requesting that Chambe be suspended because the specific issues which had already been investigated by the task force made them believe that Chambe may well be unsuitable to hold the position of general manager but further investigations were necessary before a final recommendation was made, it could not be said that Rufaro was aware, at that stage, of the acts or omissions on the part of Chambe that were the basis of the dispute. Even if the chairman of the task force had then told the chairman of Rufaro of the preliminary findings of the task force, it could not, in my opinion, be said that Rufaro was aware of the acts or omissions concerned. Mere suspicion is not sufficient. If, then, as had happened in this case, the chairman of the task force had written another letter on 19 September 1997 setting out the findings of the task force and recommending that Chambe be relieved forthwith of his duties and that letter had been sent to the chairman of Rufaro, instead of being sent to the Executive Mayor, then the matter would have become prescribed six months after the receipt of that letter by the chairman of Rufaro. That would have

been towards the end of March 1998. In this case, Rufaro suspended Chambe on 8 May 1998 and then referred the matter to the labour relations officer, which is almost 8 months after the letter was written to the Executive Mayor. One wonders why he took so long to react to the recommendation of the task force. As it was not his money that was being wasted, he obviously had little motivation to act expeditiously. As pointed out in *Chinyerere*'s case *supra*, many instances have come before the courts where a statutory body or local authority has been very dilatory in instituting disciplinary proceedings against an employee. It seems unfortunate that an employee of such a body may escape the consequences of his acts or omissions merely because the responsible (or should I say irresponsible) official in the statutory body or local authority fails to act promptly when he becomes aware of wrongdoing or incompetence on the part of an employee.

It seems to me that s 94(3) of Chapter 28:01 contains an anomaly that requires amendment or clarification. In para (b) thereof, reference is made to the date when the party wishing to refer the dispute to the labour relations officer first became aware of the acts or omissions forming the subject of the dispute. Judicial notice can be taken of the fact that NOCZIM is riddled with corrupt employees - both the President and the former Minister of Transport have said so. If it is assumed that the board of directors of NOCZIM was aware of the corrupt acts or omissions of the officials concerned, after the lapse of 6 months any "dispute" would become prescribed and a labour relations officer would not be able to inquire into the matter. If a new board were to be appointed tomorrow and it wished to refer the dispute to a labour relations officer, would it be able to do so? After all, it could only become aware of the corrupt acts or omissions of the officials after the new board members were appointed. That would depend on whether the reference in para (b) of s 94(3) of Chapter 28:01 to the party wishing to refer the dispute to a labour relations officer is the company itself or the board of directors. Does an alteration in the composition of the board mean that there is a different party? If the position is not affected by the appointment of a new board of directors, it means that where the board of directors of a company or parastatal either turns a blind eye to the corrupt actions of one or more employees or actively colludes with them, the position cannot be rectified by the appointment of a new

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board. I would recommend that consideration be given to the question of amending s 94(3) by the insertion of a proviso to permit the labour relations officer to deal with a dispute even after the period of 6 months has elapsed if there are special circumstances.

The legislature obviously introduced subs (3) of s 94 of Chapter 28:01 so as to ensure that labour disputes were resolved expediously. The concept is to be applauded. It is unfortunate, however, that the Executive or the Ministry

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concerned is failing to implement that policy in at least one respect. In case No. HC-16522-99, the applicant filed a letter from the Registrar of the Labour Relations Tribunal to his legal practitioners which reads as follows:

"Your 'notice of set down' filed on 24 September 1999 refers. Please be advised that we are currently setting down cases from 1995. It is therefore unlikely that this matter will be heard before the year 2001."

It seems incredible that the Government is prepared to accept the position that an employer or employee who wishes to submit a matter can be heard. What is the employee expected to do during that period if he has been suspended without? What about the employer? Must he keep the position held by the suspended employee vacant for 4 or 5 years in case he is required to reinstate the employee? Surely something can, and must be done, to remedy the current position.

The application is dismissed with costs.

Mavingo & Machaya, applicant's legal practitioners

Chikumbirike & Associates, respondent's legal practitioners

HUGHSON & ANOR *v* GREYLING 2000 (1) ZLR 434 (HC)

Citation	2000 (1) ZLR 434 (HC)
Case No	Judgment No. HH-78-00
Court	High Court, Harare
Judge	Mungwira J
Heard	February 23, 2000
Judgment	April 5, 2000
Annotations	None

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Civil application

Flynote

Family law - child - custody - following divorce - variation of - custodian parent wishing to emigrate - when status quo can be interfered with by court - whether in best interests of children to allow such emigration

Headnote

After the parties' divorce, the custody of the children had been awarded to the former wife, the first applicant. She had since remarried. The home life for the children was stable and the stepfather, the second applicant, had formed a good relationship with the children and was attending to their welfare. Due to the uncertain future facing the children in Zimbabwe, the applicants wished to emigrate to Australia. They applied for a court order authorising them to leave the country with the children. The former husband (the respondent) opposed the application on the basis that, if the children were to be moved to Australia, he would effectively be deprived of access to them. In her founding affidavit, the first applicant stated that if the court refused to allow the children to go to Australia, she would have no option but to leave them with the respondent and that such an arrangement would not be in best interests of the children.

Held, that a step parent has no legal status regarding the minor children and the step father could not be a party to the present proceedings, but given the nature of the application the court could have regard to the contents of his affidavit.

Held, further, that as the custodian parent the first applicant had the right to regulate the lives of the minor children. Unless she exercised her right in a manner that was contrary to the interests of the children, the respondent's rights were limited to access.

Held, further, that although the concern of the respondent that he should continue to have access to the children was understandable, he had placed no new facts or circumstances which would warrant interference by the court with the rights of the first applicant.

Held, further, that the court should take into consideration whether the proposed relocation of the children to Australia was in their best interests. The children had a stable home life. Relocation to Australia would entail a change of environment, whereas any order by the court which would result in the separation of the children from their mother would affect them adversely. The respondent, as an adult, was better equipped to cope with separation from his children.

Held, further, that in the present situation in Zimbabwe, the decision of the first applicant and her husband to emigrate was not unreasonable. There was no basis on which the court could find that the children's interests would suffer if they were removed from the jurisdiction. The court should not lightly interfere with a reasonable way of life selected by the custodian parent.

Held, therefore, that the order allowing the removal of the children to Australia should be

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granted.

Cases Considered

Cases cited:

Hackim v *Hackim* 1988 (2) ZLR 61 (S)

Johnson v *Johnson* 1940 (1) PH B7

(LM) (otherwise E) v *P (GE)* [1970] 3 All ER 659 (CA)

Segal v *Segal* 1971 (4) SA 317 (C)

Turkstra v *Turkstra (2)* 1949 (1) PH B7

Case Information

F Girach, for the applicants

A J Dyke, for the respondents

Judgmnet

Mungwira J: The first applicant is the former wife of the respondent. The parties were married at Harare on 12 September 1981. Two children were born during the course of the marriage, a son André Kevin (born 2 August 1985) and a daughter Mandy Estelle (born 22 October 1987). The marriage was dissolved by order of this court on 23 September 1992 (HC-4992-89). The parties agreed to and signed a consent paper which was by agreement made an order of the court. In terms of the consent paper, custody of the children was granted to the first applicant with the respondent being entitled to exercise access subject to reasonable and adequate notice to the applicant.

The applicant remarried in November 1992. This relationship was short-lived and ended in May 1995 when an order of divorce was granted by this court. In February 1996, the applicant entered into a third marriage with her present husband, who is the second applicant. She has since then been living with the second applicant together with the two minor children.

In 1998, the first and second applicants sought to emigrate to Australia and lodged the necessary application with the Australian immigration authorities and expressed in such application their intention to emigrate with the two minor children in the event of the application being successful. The Australian immigration authorities communicated to the applicants the need to obtain the consent of the respondent, he being the guardian of the minor children.

A letter was on 30 December 1998 written to the respondent by the Australian High Commission, informing him of the intention of the applicants to move to Australia with the minor children and advising him to seek a court order interdicting the removal of the minor children from this jurisdiction in the event he had objections to the minor children's travelling to or removing to Australia. Enclosed with the letter was a consent form for completion by the respondent if he did not have any objections.

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The respondent did not take steps to obtain a restraining order until June 1999 when he filed an urgent application for a provisional order

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(HC-9346-99). In this application, the respondent sought to amend the provisions of the consent paper. He wanted his right of access defined and a clause added which would have the effect of prohibiting both himself and the first applicant from removing the minor children from Zimbabwe without the prior written consent of the other party. The respondent also applied for interim relief restraining the first applicant from removing the minor children from the jurisdiction.

The respondent did not pursue this application after a letter was written to the respondent by the first applicant's legal practitioner. In this letter (Annexure F), the first applicant made an undertaking that she would not remove the minor children from Zimbabwe without the prior written consent of the respondent as long as such consent was not reasonably withheld. An indication was made in the same letter that if the respondent withheld his consent the first applicant would seek an order of the court to authorise the removal of the minor children.

The applicants are in the present application seeking an order authorising them to migrate to Australia with the two minor children and also that the respondent be compelled to sign the necessary consent form.

Before I proceed to deal with the merits of this application, it is necessary for me to determine the question of the *locus standi* of the second applicant. He, it is common cause, has been living with the children since his marriage to their mother in 1996.

There can be no doubt from the papers that he had taken an active interest in the children and has attended to their physical, moral and spiritual welfare and has to all intents and purposes behaved towards them as would a natural parent.

The cause of action in this case arises out of the right of the first applicant as the custodian parent of the minor children to regulate the life of the minor children and, more specifically in this case, the power of the custodian parent to change the child's residence. There is in our law no provision which enables a step parent, in this case the second applicant, to share those parental rights which his spouse has. It would accordingly follow that the second applicant has no legal status in regard to the minor children. He cannot therefore be a party to the present proceedings. At best, the first applicant ought to have annexed to her founding affidavit a supporting affidavit deposed to by the second applicant. Bearing in mind, however, the nature of this application and that the determination of the matter is primarily based upon a consideration of the welfare of the children and what is in their best interests, this court cannot disregard the content of the second applicant's affidavit, as it has a direct bearing on the outcome of the matter.

Turning to the merits of the application, the starting point is for this court

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to have regard to the concept of custody and its severance from guardianship. Boberg in *The Law of Persons and Family* at p 460, in defining the rights that pass to the custodian parent, distinguishes them from those that remain with the guardian as follows:

"An award of custody to a mother 'entrusts to her all that is meant by the nurture and upbringing of the minor children. In this, is included all that makes up the ordinary, daily life of the child - shelter, nourishment, and the training of the mind .... The child .... passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body ....' A custodian parent has therefore the right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive, and how his health should be cared for. The non-custodian parent has no right to interfere in these matters, though he may petition the court to do so if it appears that the custodian parent has exercised his discretion in a manner contrary to the interests of the child, or in conflict with an order of court. Otherwise he is confined to his right of access to the child."

The same author goes on, at p 463, to say that although the father may remain the natural guardian and retains his power to administer his child's property, represent or assist him in legal proceedings, authorise him to enter into legal transactions and his consent (together with that of the mother) is still required for the child's marriage, the power to change the child's residence, influence his citizenship or determine his domicile passes to the custodian parent. He does, however, qualify the foregoing by stating that these aspects of parental power which fall within the purview of custody and control do not totally extinguish the non-custodian father's rights and duties and cites circumstances wherein the father may be ordered to resume custody. The learned author relies on and cites a host of authorities in support of the foregoing.

Spiro in his work *Law of Parent and Child* 4 ed p 296 sets out the law in the following terms:

"The custodian party has the right to have the minor child with him or her and may altogether choose and establish the residence of the minor. There is no general rule that without the consent of the other spouse or the leave of the court the custodian spouse cannot remove the child out of the jurisdiction of the court nor that, on access being awarded to the other spouse, the child's removal out of the jurisdiction is not, save with such consent on leave, permitted, unless there is an explicit statement of what constitutes reasonable access in the circumstances."

The first applicant has referred the court to two authorities, *Johnson* v *Johnson* 1940 (1) PH B7 and *Turkstra* v *Turkstra (2)* 1949 (1) PH B7, and submits that these cases are testimony to the principle that a custodian spouse is entitled, as a general rule, to remove the minor child from its ordinary country of residence without the consent of the non-custodial spouse.

These cases, it is submitted, dealt with custody having been granted subject

to the specific condition that the minors were removed from the jurisdiction of the court without consent being had and obtained. It is argued that the consent paper in the present case does not define the respondent's rights of access or expressly stipulate that the custodian parent cannot remove the child from the jurisdiction of this court without the consent of the non-custodian parent or leave of the court. It is the applicant's contention that in circumstances where the non-custodian spouse alleges that the non-custodian spouse's acts amount to an

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abuse of custodial power the onus rests on the person so alleging to exhibit on the facts that there has been an abuse of such power.

Mr *Dyke* argued on behalf of the respondent that the consent paper, whilst making reference to reasonable rights of access, must be read in the light of the rest of the consent paper which is predicated on the children being in Zimbabwe and that in any event it is not the applicant's case in the founding papers that what the first applicant seeks is a declaratory order. I do not understand Mr *Dyke* in these submissions to be arguing that Mr *Girach* is incorrect in his submissions as regards the law on the rights of the non-custodial parent *vis-à-vis* the removal of a minor from the jurisdiction.

The first applicant in her founding affidavit makes it patently clear that she does not in her application seek the permission of the court to remove the minor children from this jurisdiction. What I understand her to be saying is that she is the custodian parent and, the respondent's rights of access not being prescribed in the consent paper, she is entitled to remove the children from the country. Her contention is that she has been compelled to resort to these courts as it is a requirement of the Australian immigration authorities that a consent to removal of the minor children be signed by respondent as guardian of the children and he is withholding that consent. She has, according to my reading of the founding affidavit, approached this court with a view to obtaining an order which will enable her to enforce a right with which she considers herself vested.

It is of relevance to note that the sole application before the court is that initiated by the first applicant. The respondent has not filed a counter application for custody. From a reading of the opposing papers, his sole concern is that, should the children be removed from the country, he will not be able to exercise his right of access and that it is the intention of the applicant to emigrate to Australia which has brought about the impasse. It is in the course of this that he raises the issue of it not being in the best interests of the children that they remove to another jurisdiction. The indicators are that, were the applicant to remain within this jurisdiction, the respondent would have no difficulty with the *status quo* being maintained.

The respondent in his affidavit deals in fair detail with the current

circumstances of the first applicant and her spouse. Australia is, he states, in comparison to Zimbabwe, an unknown and untested quantity. The respondent thereafter raises questions as to the stability of the first applicant's current marriage, given her temperament and marital history, and suggests that the relationship is likely to crumble from the pressures and stresses which are likely to result in consequence of the move.

He describes his own domestic circumstances and finances in a bid to prove to the court that he is capable of taking care of all the children's needs. This being in response to the first applicant's averments on the unsuitability of the respondent's environment to the upbringing of the minor children.

In her answering affidavits, the first applicant amplifies her averments on the extent of the

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homework she has undertaken before reaching the decision to emigrate.

The position in this case is that the custodian parent has made a decision to emigrate and wishes to take the minor children with her to Australia. It was held in the case of *Segal* v *Segal* 1971 (4) SA 317 (C) that:

"Even where the exercise of the right by the custodian parent to decide what is or is not in the best interests of the child is not capricious or not carried out in an improper manner, or influenced by improper motives, the court must still be satisfied that such decision is not, in fact, contrary to the interests of the child and *the court is entitled to enquire into that, where such a decision is challenged or disputed*. It is not merely a question of substituting the court's discretion for that of the custodian parent. The court must have regard objectively to all the relevant factors and then decide whether the exercise by the custodian parent of his right of control is in fact contrary to the interest of the child. If it is, then the court will, and should, interfere" (my emphasis).

In the present case, the decision of the applicant is challenged. It is therefore incumbent upon this court to examine what is in the best interests of the children.

In the case of *Hackim* v *Hackim* 1988 (2) ZLR 61 (S) at 67, DUMBUTSHENA CJ stated that:

"The mere fact that a non-custodian parent does not like the fact that the custodian parent wants to emigrate with the child may not, standing by itself, be sufficient to warrant a variation of the order (of custody). In saying this, I am mindful of what was said by Trengove JA in *Bailey* v *Bailey* 1979 (3) SA 128 (A) at 135H-136C. The learned Judge of Appeal stated:

> 'In approaching a problem of this nature the court is, of course, primarily concerned with the welfare of the children, that is the paramount consideration. Just as in custody cases, so also disputes arising out of custody orders, the welfare of the children is the predominant consideration which should weigh with the court (*Shawzin* v *Laufer* 1968 (4) SA 657 (A) at 662G-H). In *du Preez* v *du Preez* 1969 (3) SA 529 (D), Miller J referred to the effect of the burden upon the applicant to show "good cause" for a variation of a custody order, and at 532C-G of the report, he made the following observations with which I respectfully agree; namely:

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> "But when the paramountcy of the child's welfare in such a conflict between the parents is borne in mind, it is obvious that the burden upon the applicant (who is this instance happened to be the non-custodian parent) dare not be magnified. She may be held to have shown good cause for variation of the order, even if no new facts or circumstances have arisen in the interim, provided it appears clearly to the court that the child's interests would be better served by varying the order than by maintaining the *status quo*. If this should appear the case the court ought not to hesitate to vary its order, however inadequate her explanation might be for consenting to the order in the first place, or however adamantly the respondent may insist that the limitation is one which he, as custodian, parent, deems to be undesirable. This is not to say that the opinion and desires of the custodian parent are to be ignored or pushed aside: indeed, the court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is in the best interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions and impulses which have contributed to it'"."

The learned Chief Justice went on to remark that the proper approach to the variation of custody orders should be one that is a little afraid of depriving the custodian parent of the child when it is clear that there is little justification for doing so. He further states that a custodian parent who is not at fault should not be deprived of the child solely because he or she wants to remove the child from the jurisdiction and that in order to vary the order there must be something more than

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the mere fact of removal from the jurisdiction.

It is not a disputed fact that from the time the parties separated in 1989, and at which time the minor children were aged about 4 and 2 years respectively, the first applicant has had undisturbed custody of the children. She retained custody of the children during her failed second marriage. It is again not disputed that the applicant's current husband has, since his marriage to the applicant, forged a good relationship with and has acted as and been appreciated as a father to the children by all concerned including the respondent. Judging from the papers, he has and continues to assume a more active role in the upbringing of the children than their mother. The first applicant and her present husband have - and respondent does not dispute this - adequately and satisfactorily provided for the children's material, moral, spiritual and emotional needs. It appears that the respondent's own role in that period has been more or less limited to the periods when he has access.

According to the first applicant, she and her husband have been driven to make the decision to emigrate, in part, out of concern for the future welfare of the children. She highlights the inherent difficulties that confront the children in obtaining work permits in this country, they being, by birth, South African citizens. The first applicant expresses concern at the difficulties the children may encounter in obtaining placements at tertiary education

institutions, the prohibitive cost of sending the children out of the country to external universities and their bleak employment prospects should they remain in this country.

The respondent seeks to make capital of the first applicant's averment that in the event of the minor children not being able to emigrate to Australia there would be no option but to leave the minor children with the respondent. He reads into that statement that the applicant intends to emigrate, no matter what the court decides, and the children's interests are secondary to her own.

This is, in my view, an incorrect interpretation and is taken out of context. That statement of the first applicant must be read in conjunction with the succeeding paragraphs of her founding affidavit, wherein she explains the unsuitability of an arrangement whereby the children are left with the respondent. She bolsters the foregoing by expressing the difficulties experienced in obtaining an increase in the children's maintenance. Her efforts, she explains, have come to naught as the respondent has at each maintenance hearing professed to be earning no more than $1 000 per month and in addition a small bonus. She questions the respondent's ability to maintain the children if these are indeed his true circumstances.

The first applicant attributes to the economic climate in this country the decision to emigrate. The first applicant in her papers speaks of the research she has conducted into conditions in Australia and makes specific reference to educational and employment opportunities and to availability of suitable accommodation. The prospects, she states, were explored in an earlier visit to Australia. She submits that she is unable to state at this stage that she and her husband have secured employment in Australia, the obtaining of employment being subject to the grant

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of the necessary visas.

In her answering affidavit, she denies attempts on her part to exclude the respondent from the children's lives. She explains the reasons for the breakdown of her failed marriages and extols the merits of her current husband who, she says, had been able to provide what was lacking in the other marriages. The respondent does not challenge or comment on the foregoing.

The applicant emphasises, in relation to the respondent's assertion that the children will have difficulty in adjusting to the new country, that these children are in fact of an age where they are still malleable and best able to adjust to a new environment. The respondent, it is suggested, can save the monies he currently utilises to pay school fees and maintenance for the children for visits to or from them during school holidays. The respondent, on the other hand, argues that the children are coping well in their present circumstances. The applicant, he states, is in her papers attempting to paint too bright a picture of the benefits to be gained in emigrating to Australia. He states that he is well placed to adequately accommodate and maintain the

children. His financial status has, according to him, improved. He also claims to be able to cater for the children's spiritual needs. He queries the applicant's behavioral pattern, in that she has, according to him, been in and out of a number of marriages. He expresses doubt on her present marriage's potential for survival once subjected to strains of life in a foreign land. He speaks of problems that may arise should the present marriage break down as the first applicant is proceeding to Australia on the strength of her husband's qualifications and skills. He further voices his concern at the manner in which the children are currently treated and that this is having an adverse effect on their temperaments.

It is of note that, despite his having observed these shortcomings on the part of the first applicant, the respondent has not taken action previously to lodge his objections and if need be to seek that he be awarded custody. He has it seems only been nudged into registering his complaint by his knowledge of the applicant's intended emigration. As submitted by the applicant, one must question his failure to apply previously for custody if he seriously harbours these concerns. This court notes that even now he is not applying for custody.

It is only when he became aware of the intended emigration that he sought to have his rights of access defined and even then he was not applying for custody of the children. The respondent has not denied that the children feel at home and secure with the first applicant and her husband.

The decision of the first applicant to emigrate does not to me appear to have been taken lightly. It has, in my view, been carefully considered. The children are, it is accepted, without question an integral part of their mother's household and have not been sidelined in her marriage. They in fact appear to maintain centre stage and in the family unit.

In the case of *(LM) (otherwise E)* v *P* (GE) [1970] 3 All ER 659 (CA) at 622L, SACHS LJ opines:

"When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the

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joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as WINN LJ has pointed out, produce considerable strains which would be unfair, not only to the parent whose way of life is interfered with, but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of these things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

SACHS LJ describes the type of situation as has arisen in this case as involving a difficult and sad decision, as does DUMBUTSHENA CJ in the

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MUNGWIRA J

Hackim case *supra*, in that it is difficult to deal with matters of this nature "because they touch the tenderness of human emotion, family relationships", that parting with a child is difficult to bear.

Understandably, the primary concern of the respondent is that he have access to his children. The fact, however, remains that the respondent has placed no new facts or circumstances before this court which warrant interference with the *status quo*. The applicant has arrived at her decision after taking into account and weighing what she considers are the uncertain prospects of remaining in Zimbabwe as against the opportunities which would avail themselves to the family should the intended immigration be successful. That cannot, given the present climate, be said to be unreasonable. There is no basis upon which this court can make a finding that the interests of the children will suffer if they are removed from this jurisdiction. The respondent has himself not suggested or proffered any reasons of substance to counter the reasons given by the first applicant.

It is common cause that the children are now in settled and comfortable circumstances. Emigration to Australia entails a change of environment, whereas any order made by this court which would have the result of separating the children from their mother would affect a much deeper and more fundamental bond. The respondent, as an adult, is better equipped to cope with separation from his children than are the children, who are now at a vulnerable and impressionable age, were the court to order that they be separated from their mother who has been the custodian parent from infancy.

This court is convinced that it would not be in the best interests of the children to deny the applicant the order she seeks. In matter of fact, no justification exists for so doing.

The application is in light of the foregoing, in my view, entitled to the relief that she seeks.

The application of the second applicant is dismissed for lack of *locus standi*. I believe, however, that this court in its capacity as the upper guardian of minors and in its quest to determine what was in the best interests of the children had of necessity to have regard to all the relevant information before it and for that reason took into account the content of the affidavit of the second applicant, which should have been more properly placed before this court as a supporting document to the first applicant's founding papers. I am, in the circumstances, of the

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view that as against the second applicant it would be proper to make no order as to costs.

It is accordingly ordered that:

1. The first applicant is entitled to remove the minor children, namely André Kevin Greyling (born 2 August 1985) and Mandy Estelle Greyling (born 22 October 1987) from the jurisdiction of this court.

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2. The respondent sign the necessary consent papers to enable the minor children André Kevin Greyling (date of birth 2 August 1985) and Mandy Estelle Greyling (date of birth 22 October 1987) to emigrate to Australia with the first applicant within seven days of the service of this order upon him, failing which the Master of the High Court be and is hereby authorised to sign such consent.

3. The respondent is to bear the first applicant's costs.

4. The second applicant's application be and hereby dismissed with no order as to costs.

5. A copy of this order is to be served on the Master of the High Court.

Stumbles & Rowe, first and second applicants' legal practitioners.

Lofty & Fraser, respondent's legal practitioners

CONFORCE (PVT) LTD *v* CITY OF HARARE 2000 (1) ZLR 445 (HC)

Citation	2000 (1) ZLR 445 (HC)
Case No	Judgment No. HH-71-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	March 1, 2000
Judgment	March 5, 2000
Annotations	None

Civil application

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Flynote

Arbitration - award - rectification of by court - court's powers to interfere with award - award ordering interest to run from particular date - application of in duplum rule to arbitral awards - application to make award an order of court - grounds for refusal of application - whether award contrary to public policy - whether interest runs afresh from litis contestatio - relevance to arbitration proceedings

Interest - date from which runs - in duplum rule - whether interest begins to run again from date of issue of summons

Headnote

A court should not interfere with an arbitrator's award so as to alter it to what the court thinks the arbitrator decided. However, it can interpret ambiguities. In this case, the arbitrator ordered interest to run from a date before the arbitration proceedings. The ambiguity was whether he intended the *in duplum* rule to apply. In normal litigation the *in duplum* rule applies as a matter of law. An arbitral award may be set aside on, among other grounds, the ground that it would be contrary to public policy. The non-applicability of the *in duplum* rule would be contrary to public policy, being a violation of a fundamental principle of our law. The arbitrator's award was consistent with an interpretation favourable to the applicability of the *in duplum* rule.

Although there are cases which state that interest begins to run again when *litis contestatio* takes place, there are others to the opposite effect. The public interest served by the *in duplum* rule is not to be identified with sympathy for the debtor, so as to say that the rule is designed to protect him. "Public interest" encompasses a wider spectrum of interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of the justification for charging interest in the first place, that is to compensate the creditor for the deprivation of use of the money due until payment. The danger in holding that interest runs again from the date of *litis* contestatio is that an unscrupulous creditor could defeat the *in duplum* rule by instituting proceedings. It would not be against the public interest if the *in duplum* rule were to operate so that interest stops running when the double is reached, regardless of whether proceedings have or have not been instituted. This would apply particularly to arbitration proceedings, which are based on contract.

Decision in *Ehlers* v *Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H) not followed.

Cases Considered

Cases cited:

CBZ Ltd v *M M Builders & Suppliers (Pvt) Ltd & Anor* 1996 (2) ZLR 420 (H)

Ehlers v *Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H)

Keen v *Durban City Council* 1951 (2) SA 548 (N)

Mawere v *Mukuna* 1997 (2) ZLR 360 (H)

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Standard Bank of SA Ltd v *Oneanate Invstms (Pty) Ltd* 1998 (1) SA 811 (A)

Walenn Hldgs (Pvt) Ltd v *Lloyd & Anor* 1996 (2) ZLR 383 (H)

ZESA v *Maposa* 1999 (2) ZLR 452 (S)

Case Information

F Girach, for the applicant

L T Biti, for the respondent

Judgment

Chinhengo J: The parties in this application entered into four separate agreements for the construction of water reservoirs. This was in 1984 and 1985. The agreements were governed in certain respects by the terms embodied in the General Conditions of Contract, a standard set of terms applicable to works in civil engineering construction. In terms of clause 69(3) of the General Conditions of Contract, any dispute between the parties would be settled by arbitration if attempts at mediation failed. Disputes indeed arose in respect of all the agreements. The disputes were about claims for delays and damages and they were of a similar nature. Mediation must have failed. The disputes were referred to arbitration by Mr James Henry Purnel Back ("the arbitrator") on or about 25 October 1990. The arbitration proceedings were in terms of the Arbitration Act [*Chapter 7:15*]. The arbitrator made an award in favour of the applicant. The award reads:

"Claimant (applicant herein) is awarded:

1. The sum of $769 701.42 together with interest on that sum at the prevailing minimum commercial bank rate for overdrafts as set out in Exhibit AA, plus 2% *per annum* compounded monthly.

2. Costs of suit on the High Court scale, such costs to include:

   (a) Engineer Cochrane's costs in the sum of $169 466.90;

   (b) the Arbitrator's fees;

   (c) the costs of a stenographer in the sum of $500 per day together with the costs of cassettes in the sum of $419.94;

   (d) the cost of hiring the venue for the arbitration in the sum of $4 226.

   The respondent's counterclaim is dismissed with costs."

It will be apparent that in this award the arbitrator did not specify the date from which interest was to accrue. In his judgment, the arbitrator had, however, specified such date. His omission, therefore, did not lie in failing to consider the question of the date from which interest was to be calculated but in failing to insert that date in his final award. By letter dated 21 July 1999, the arbitrator indicated that interest was to run from 1 February 1989. This letter was written after the applicant's legal practitioner had made an inquiry to the arbitrator in that regard. The letter reads:

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CHINHENGO J

"Arbitration : Conforce P/L and City of Harare

Thank you for your letter of 16 th July 1999. I apologise for the oversight and confirm that as indicated on p. 35 of the award, interest is to run on the sum of $769 701.42 from the lst February, 1989."

In this application, the applicant seeks, in terms of article 35(1) of the First Schedule to the Arbitration Act ("the Model Law"), an order that the arbitration award be made an order of this court. Article 35(1) of the Model Law provides as follows:

"(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."

The provisions of article 36 are not all relevant to the dispute between the parties except, as I shall show later, article 36(1)(b)((ii), which provides that the recognition or enforcement of an arbitral award may be refused only if the court finds that its recognition or enforcement would be contrary to the public policy of Zimbabwe. If an application in terms of article 35(1) is granted, the award becomes a judgment of this court and becomes enforceable in the same manner as any judgment or order of this court.

The respondent opposed the application on two grounds. Its heads of argument were filed out of time but condonation was granted by consent. The first ground was that the omission in the order of the date from which interest was to run could not be rectified by the arbitrator because from the minute that the arbitrator handed down the award on 24 June 1999, he became *functus officio* and could not amend his order. And because the award as handed down on 24 June did not specify the date from which interest was to be calculated, interest could only run from the date of the award. As such, if the award were made an order of the court, it had to be made with the clarification that interest was to run from the date of the award and not from an earlier date.

The respondent did not persist with this ground of opposition. It conceded that such rectification could be effected. The concession was proper. Article 33 of the Model Law allows any of the parties to ask for a correction of "any errors in computation, any clerical or typographical errors or any errors of a similar nature". Article 33(2) permits the arbitrator to correct a similar error or similar errors. In either case, time limits are prescribed for effecting such corrections. Under the common law an arbitrator may not correct an error in his award even if he admits the mistake, but, as I have shown, the Model Law permits the making of such corrections. The arbitrator had, in the body of his award at p 35 granted interest from 1 February 1989. That he intended to make such an award of interest is quite obvious. The omission to insert in his final order the date from which the interest was to run was just a slight omission, a matter of mere inadvertence on his part. It was an error of the

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nature contemplated by article 33 of the Model Law. I am satisfied that the correction was

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properly made and that the respondent properly conceded on this point.

The respondent's second ground of opposition was that even if the arbitrator could correct or amend his order, which it is now accepted he was entitled to do, the order as amended did not entitle the applicant to be paid an amount of interest which exceeded the amount of the award. The respondent's contention was that the *in duplum* rule applies to the calculation of the interest.

There are two distinct averments made by the parties in their affidavits which encapsulate the essence of the dispute between them. On the side of the applicant, these are paras 7-10 of the founding affidavit. In these paragraphs, the applicant states that the arbitrator's award was $769 701.42, together with interest on that sum at the prevailing commercial bank rate plus two percent *per annum* compounded monthly, such interest to be calculated from 1 February 1989. In order to determine the amount payable by the respondent, the applicant instructed Ernst & Young, Chartered Accountants, to calculate the interest on the judgment debt. The applicant attaches a schedule of calculations by Ernst & Young showing that as at 31 July 1999 the interest was $17 838 774.44 and the total of capital and interest as at the same date was $18 608 480.86. These are the amounts which the applicant says it is entitled to be paid in terms of the arbitrator's award.

On the side of the respondent, the relevant paragraphs are paras 2(b) and 3 of the opposing affidavit. The respondent's contention in these paragraphs is that the applicant is not entitled to be paid as interest an amount which exceeds the capital amount. This is to say that the *in duplum* rule applies. Although the respondent also makes reference to the contention that the applicant was not entitled to any interest at all except from the date of the award, I have already stated that it did not persist with his contention for good reasons. Broadly stated, the respondent's contention now is that the applicant is entitled to interest which is equal to the capital award and to further interest which should not exceed the amount of the judgment debt and which should be calculated from the date of the award.

Buried in the parties' respective contentions are certain important questions which are, in fact, the essence of this application. Some of these questions, except the first hereunder, were dealt with in the heads of argument. They are the following:

1. Is this court empowered to interfere with an award made by an arbitrator in such a way as to clarify the meaning and effect of the award in so far as the interest claimable is concerned? This question can be couched in different terms: is this court empowered, despite the apparently clear

wording of the award that interest will run from 1 February 1989, to declare that such interest is to be calculated subject to the *in duplum* rule?

2. If the *in duplum* rule applies:

   (a) does the running of interest cease at the commencement of the arbitration

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proceedings?

(b) does the running of interest cease at any stage, before the award is made, assuming it continues to run despite the commencement of arbitration proceedings?

(c) does interest run afresh from the time that the award is made?

(d) does it only run from the time that the award is made an order of court?

The submission made in the heads of argument filed on applicant's behalf was that interest was to run from 1 February 1989 until it reached an amount equal to the capital award. It would stop running and then commence to run afresh only from the time that the award was issued (see para 14). In terms of this submission the maximum amount of capital and interest payable by the respondent would be about $3 078 805.68. Mr *Girach,* who appeared for the applicant, departed from this submission and contended that interest continued to run beyond the double until the award was issued and to run afresh on the judgment debt after the award. Thus instead of $3 078 805.68, being the maximum amount payable by the respondent, it was to be a sum, as I have shown, in excess of $18 000 000.

Before examining the questions which I have identified as arising in this application, it is necessary that I make certain preliminary comments.

It is apparent that the respondent did not question the essential validity of the arbitrator's award. The respondent did not counter-apply for the setting aside of the award. It accepted that the award was valid following upon arbitration proceedings which were regular in all respects. The respondent was concerned only with the correct interpretation of the award - whether the *in duplum* rule applies or not. It was concerned with the effect of the award in respect of the amount of interest payable by it. I am, therefore, not called upon to consider the merits of the award in any respect whatsoever, but only to interpret it so that the parties can know how to approach the question of the calculation of interest. The applicant, on its part, also did not question the validity of the award. All it sought was that the award be enforced by making it an order of court upon which it (the applicant) may execute.

It seems to me, therefore, that I must first be satisfied as to whether this court is entitled to interpret the arbitrator's award so as to clarify its effect in respect of the calculation of interest. This point has, I must say, exercised my mind considerably, although it was not squarely raised by the parties either in their affidavits or in their written submissions to the court. It is a question

which necessarily arises because of the nature of the application before me. I must deal with it.

It is generally acknowledged in our law that a court should not interfere with an arbitrator's award even where there has been a mistake. Jacobs *Law of Arbitration in South Africa* at pp 128-129 says the following:

"It has been held that a court should be very chary about interfering with an award on the ground that the arbitrators made a mistake. Such interference would be justified only where the arbitrators made a mistake in reducing to writing

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what they had actually decided, and it should not take place where the mistake was as to the consequences of what they decided. It is submitted that this decision (in *Schoeman & Schoeman* v *Schoeman* 1928 CPD 564) to the effect that a court can interpret an award to determine what the arbitrators decided, is wrong and that a court has no jurisdiction to alter an award so as to accord with what the court thinks the arbitration tribunal actually decided, except in a limited sense, that is, to interpret the meaning of a word in an award where such word is not clear, by admitting evidence to determine the application of the word concerned to the facts of the arbitration."

The learned author relied on the decision in *Keen* v *Durban City Council* 1951 (2) SA 548 (N) for this comment.

I agree that a court should not interfere with an arbitrator's award so as to alter it to accord with what the court thinks the arbitrator actually decided. The difficulty, as I see it, is not with this position at law. It is with determining whether what the court is being called upon to do is to interfere with an arbitrator's award in the manner stated. It seems to me that Jacobs *op cit* has too narrowly interpreted the decision in *Keen*'s case *supra.*

In *Keen*'s case *supra,* the court was asked to interpret what the word "salary" encompassed. The facts were these. An arbitrator was appointed to determine a dispute between a trade union and the Durban City Council as to the remuneration payable by the Council to the plaintiffs, members of the trade union. The arbitrator made an award which contained a schedule setting out the salaries to be received by various classes of plaintiffs. An action was brought by the plaintiffs for the court to determine whether the words "salary" included a special service increment to which an employee became entitled after he had been on top of his grade for a specified period and had complied with certain conditions.

The court accepted that this was an action to construe an award and, specifically, to interpret the word "salary" where it appeared in the schedule. DE WET J at 551G-H found as follows:

"I am satisfied beyond any doubt that the arbitrator, when using the word 'salary' in his award included the special service increment where the particular employee had qualified for such an increment."

It is to be noted that the court in fact interpreted the word "salary" so as to give it a meaning which the court thought was the meaning intended by the arbitrators. The court did not concern itself with the question whether it had

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the jurisdiction to interfere with the award or whether it was in fact interfering with it. There was an ambiguity in the award which needed to be clarified and the court, without much ado, proceeded to give the necessary clarification.

In the present application, it cannot be said that the arbitrator made a mistake. If he had made a mistake, whether of law or of fact, and, even if he had admitted that mistake, this court would ordinarily have no jurisdiction to interfere. See *Walenn Holdings (Pvt) Ltd* v *Lloyd & Anor* 1996 (2) ZLR 383 (H) at 359-397 and the authorities quoted therein. The arbitrator made an award which states in clear terms that the respondent was liable "in the sum of $769 701.42, together with interest on that sum...with effect from 1 February 1989 ..." It must, therefore, be apparent that I am not here concerned with any mistake or with the consequences of what the arbitrator

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decided. I am called upon to deal with an ambiguity in the words I have quoted - whether the award is to be understood in its literal sense or in the sense which any judgment or order of court must be understood. On the one hand, the award can be understood to mean what it says - that the applicant is entitled to interest beyond the double calculated from 1 February 1989 to the date of payment, which, according the applicant, is a sum exceeding $17 000 000. On the other hand, the award can also be understood in the same way that any judgment or order of a court in ordinary litigation would be understood to mean - that the award of interest is subject to the application of the *in duplum* rule. There is therefore an ambiguity, perhaps in appearance only, which this court must clarify. *Keen*'s case *supra* can be relied upon as authority for the approach that a court can indeed interpret the meaning of an award. It did so in that case, and I too can do so in the present case. I do not agree with Jacobs *op cit* that the *ratio* in *Keen's* case is that the court can only interpret a word in an award. Whilst in *Keen*'s case, it can be said that the court only interpreted the word "salary", a closer reading of that case reveals that in substance, it did much more than that. It interpreted the award as a whole so as to clear up an ambiguity. I do not agree that an ambiguity which arises from the award, read as a whole, can be distinguished from an ambiguity arising from a word in an award so as to say that the court is only entitled to interfere with an arbitrator's award "in a limited sense, that is, to interpret a word in an award where such word is unclear ..." I think that where there is an ambiguity in an award, as in this case, the court is entitled to interpret the award or any of its constitutive words or phrases, not for the purpose of determining what the arbitrator decided, but for the purpose of clarifying what he ordered to be done. This application is similar to the application in *Keen*'s case so far as the task before the court is concerned - i.e. to interpret the arbitrator's award. I find that this court is entitled to do so.

In the present case, there is a more compelling reason to clarify the

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arbitrator's award. As I have stated above, there is no allegation that the arbitrator made a mistake. There is no challenge to the award. Both parties are satisfied that the award was properly made. They differ only in their interpretation of it - its meaning in so far as the calculation of interest is concerned.

The orders which are routinely made by this court do not specify that the interest payable on the capital amount shall be subject to the *in duplum* rule. The assumption is that the *in duplum* rule is applicable in all appropriate cases. There is never a need to state that it shall apply. It applies, where it must, as a matter of law. Thus, for instance, the court may in January 2000 enter judgment for the plaintiff "in the sum of $10 000 together with interest at the rate of 40% *per annum* from 1 January 1996 to the date of payment in full". A calculation of the interest in this example will show that the amount payable as interest will have equated to the amount of the capital some time before judgment is entered for the plaintiff. But the court does not state the obvious that the plaintiff shall only be entitled to interest which does not exceed the capital sum until the judgment is given. Nor does it specify that interest on the judgment debt shall be subject to the application of the *in duplum* rule. In one sense, therefore, it can be said that there is no need at all to interpret the arbitrator's award in the present case. His award should be read

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and understood the same way as any similar order of court. On this basis, I find myself justified in providing the clarification necessary in order that the award may be enforced for the correct amount payable on its terms. The interpretation only consists in declaring what the law is, for the guidance of the parties. It does not have the effect of altering the decision of the arbitrator or of replacing it with what the court thinks the arbitrator decided.

The other reason why I think that I must interpret the award is that there is no other approach to resolve the issue between the parties or another way in which the clarification they seek can be obtained. It is not possible for me to remit the matter to the arbitrator for him to clear up the ambiguity. Remittal arises if there is an application to set aside the award. No such application is before me. Article 34 of the Model Law does not permit the court *meru motu* to remit a matter to the arbitrator. There has to be before the court an application to set aside the award before the court can exercise its discretion to remit. It is also in the interest of bringing this matter to finality that I must interpret the award.

The last point I must be satisfied about is that the respondent's opposition to the award being made an order of the court is permitted under the Model Law. If no basis has been laid by reference to the provisions of the Model Law for this court to refuse to recognise and enforce the award, then I would have no power to refused to enforce it.

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The grounds upon which a court may refuse to make an award an order of court are spelt out in the Model Law in Article 36. The provision is couched in exhaustive terms. The court may refuse to recognise or enforce an arbitral award only if the party against whom the award is invoked furnishes proof that:

(a) a party to the arbitration agreement was under some incapacity or the agreement itself was not valid under the law to which the parties have subjected it or under the law of the country where the award was made; or

(b) it was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case; or

(c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission;

(d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties or it has been set aside or suspended by a court of the country in which or under the law of which the award was made; or

(f) the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe or that the recognition or enforcement of the award

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would be contrary to the public policy of Zimbabwe.

Quite evidently, all except one of these grounds are not relevant to this application. The only relevant ground is that concerning the public policy of Zimbabwe.

Recently, in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S), the Chief Justice had occasion to state what public policy entails. He said at 464C-D that:

"Public policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions. See generally *Sasfin (Pty) Ltd* v *Beukes* 1989 (1) SA 1 (A) at 7I-9G for a useful survey of the authorities dealing with the problem. In order to ascertain the meaning of this elusive concept, in the context of the Model Law, regard is to be had to the structure of articles 34(5) and 36(3) which deal with two aspects."

The two aspects which the Chief Justice examined are the circumstances connected with the making of the award and the substantive matter of the award. In respect of the latter he said at 465B-D:

"The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after a consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe ... In my opinion, the approach to be adopted is to construe the public policy

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defence as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated."

Continuing with this theme and in direct relation to the case before him, the Chief Justice said at 466C-G:

"*In casu*, the effect of an enforcement of the arbitral award will be to allow Maposa to take advantage of a position that he deliberately engineered. Counsel for ZESA submitted that this 'turns justice on its head'; the error of the arbitrator being so fundamental as to make a refusal to set aside the award, or, to permit the enforcement of it, a violation of Zimbabwe's elementary notions of justice ... Under article 34 and 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."

This statement shows that the only recognised ground on which I may decline to enforce the arbitral award *in casu* is that of public policy. The non-applicability of the *in duplum* rule in the present case would, in my view, result in the violation of a fundamental principle of our law. It is on this basis that the respondent's opposition to the application would be justified. The public policy defence applies. So if the award was clearly one that was inconsistent with an interpretation that the *in duplum* rule applies, I would refuse to make the award an order of the court. But the position is different as I have shown above. The arbitrator's award is consistent with an interpretation favourable to the applicability of the *in duplum* rule.

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It is not in dispute that interest was ordered to run and therefore did run from 1 February 1989. It is not clear exactly when the arbitration proceedings were commenced. It must have been on or before 16 May 1991. If the proceedings began on or before 16 May 1991, then according to Ernst & Young's schedule of interest, the interest on the amount of the award had not equated to that amount by the time the proceedings were begun. The question before me is therefore - did the commencement of the arbitration proceeding suspend the in duplum rule?

Arbitration is founded on contract. The parties agree to submit their dispute to arbitration - see *Walenn Holdings (Pvt) Ltd* v *Lloyd & Anor supra* at 401E. This contractual basis is what the Chief Justice refers to in *Maposa*'s case *supra* as "party autonomy ... a paramount feature under the arbitration regime in this country". The parties agreed that interest would accrue on the amount owing by the respondent to the applicant. The applicant was therefore entitled to claim it from before the award was made. They did not

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specify whether interest would run afresh at the commencement of the arbitration or that it would cease to run at that point. They had the freedom to agree on what was to happen. They did not reach any agreement. How then is the matter of interest to be approached? The answer is to be found in the decided cases on the *in duplum* rule. That the *in duplum* rule applies to an award of interest in arbitration proceedings seems to be trite. Butler and Finsen *Arbitration in South Africa: Law and Practice* deal with the question under a subheading "Interest on the award" at pp 275-276 and state in context that:

"It is a rule of the common law that the amount of interest accumulated cannot exceed the capital sum, but where the rule applies, interest starts to run again from the date of judgment."

The context in which this statement is made shows that the accumulation of interest is the same in arbitration as it is with other debts. In *CBZ Ltd* v *M M Builders & Supplies (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H), Gillespie J dealt with the question whether interest that has already reached the double starts to run afresh at the stage of *litis contestatio*. At 437D-E the learned judge, after an examination of the authorities, said:

"... I think that ... there is even less cause in the present day than there was in Huber's time to regard interest as commencing afresh from the time of *litis contestatio* despite the fact that interest equating to the double had already accrued. The view that interest commences anew from the time of judgment is to be preferred."

He is more explicit in this view at 437F-438C. GILLESPIE J dealt only with the question whether interest which has already reached the double commences to run again at *litis contestatio*. His conclusion was an emphatic no. The learned judge did not, however, deal with the question whether interest which has not reached the double before *litis contestatio* continues to run despite this stage having been reached. In para 10 of the applicant's heads in *casu,* the question which was not dealt with by GILLESPIE J in *M M Builder*'s case *supra*, and the law applicable is put thus:

"whether or not the *in duplum* rule is suspended once proceedings have been commenced was not decided in the leading case in this country, *Commercial Bank of Zimbabwe* v *M M Builders* 1996 (2) ZLR 420. However, the South African Supreme Court of Appeal has now held that public policy does not require the rule to run once proceedings

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have been instituted and therefore the *in duplum* rule is suspended from the institution of proceedings until judgment. See *Standard Bank* v *Oneanate* 1998 (1) SA 811 at 834 H."

A view contrary to the decision in *M M Builders'* was expressed by Malaba J in *Ehlers* v *Standard Chartered Bank Zimbabwe Ltd*

HB-4-2000.*(76) In that case, the respondent issued summons on 3 October 1995

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claiming from the applicant the payment of $2 052 346.42 with interest thereon at the rate of 41% *per annum* as from 1 September 1995. Default judgment was entered against the applicant on 7 November 1996. In terms of the judgment, the applicant was ordered to pay the amount claimed plus interest calculated from 1 September 1995. At the time of the issue of the summons, unpaid interest on two of the applicant's loan accounts giving rise to the respondent's claim had become equal to the unpaid capital. The double had been reached. The applicant paid the judgment debt but applied for an order that the interest charged and recovered pursuant to the default judgment for the period 1 September 1995 to 7 November 1996 be refunded to him. The applicant contended that as the unpaid interest had reached the double as of 1 September 1995 in respect of the two loans, the respondent had no right to charge interest for the period 1 September 1995 to 7 November 1996 and that accordingly the default judgment had unlawfully required him to pay interest accruing on the debt during that period. He argued that the judgment by default should have required him to pay interest only from the date of judgment, that is to say, as from 7 November 1996. He claimed as overpaid interest the sum of $602 271.03 and prayed for the partial rescission of the judgment in order that he could defend the claim for interest in respect of the period 1 September 1995 to 7 November 1996. His Lordship dismissed the application and stated at p 5*(77) of the cyclostyled judgment that:

"It is clear therefore, that the defence based entirely on the proposition that interest starts to run afresh only after the date of judgment where the *in duplum* rule applies and that the court which ordered the applicant to pay interest from a date earlier than 8 November 1996 was wrong, has no prospects of success on the merits."

In reaching this conclusion, MALABA J clearly differed from the decision in *M M Builders* case *supra*. He stated at p 3-4**(78) of his judgment as follows:

"The defence the applicant intends to raise to the claim of interest from 1 September 1995 to 7 November 1996 derives support from the decision of Gillespie J in *Commercial Bank of Zimbabwe Ltd* case *supra* at pp 436C-439C. The learned judge with the concurrence of Smith and Blackie JJ rejected a view of the *in duplum* rule which regarded interest as commencing to run afresh from the date of *litis contestatio* despite the fact that it would have become equal to the unpaid capital. This view of the law is expressed in Joubert *Law of South Africa* Vol 15 p 199 and 297 where the writer states that:

> 'Interest runs only until the sum of the interest unpaid is equal to the sum of the capital, with the result that the lender can never claim interest in an amount exceeding the sum of the loan. *After* litis contestatio *interest will commence to run again so that the court may award interest from that time in addition to the permitted interest*' (emphasis is mine).

The learned judge preferred the view that interest only commences to run anew as from the date of judgment. I must,

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with respect, express my dissent from the decision in

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Commercial Bank of Zimbabwe's case *supra*, on the date from which interest commences to run afresh in a case where the *in duplum* rule applies. This view of the law does not give effect to the policy behind the *in duplum* rule nor does it recognise the discretion enjoyed by the court in the matter."

MALABA J found support for differing from the decision in *M M Builder's* case *supra* in the judgment of Zulman JA in *Standard Bank of South Africa Ltd* v *Oneanate Investments (Pvt) Ltd* 1998 (1) SA 811 (A), a decision of the full bench of the Appellate Division of the Supreme Court of South Africa. Decisions of the South African Courts which, like our courts, operate in a Roman Dutch system of law, and particularly decisions of the Supreme Court of South Africa and its full bench have the highest possible persuasive value for the courts in Zimbabwe. But of course our courts are not bound to follow them. It is correct that in *Oneanate*'s case *supra* the Supreme Court of South Africa on this point differed from the decision in *M M Builder*'s case - see the judgment at 834B-H. It seems to me that the decision on this point was not entirely based on the law as expounded by the old authorities of Roman-Dutch law. There are authorities on both sides of the question, as pointed out by ZULMAN JA at 832-833. The decision seems to me to have been based more directly on the learned Judge of Appeal's understanding of what public interest in the modern setting requires. He said at 834B-D:

"It might at this stage be helpful to repeat the justification for the *in duplum* rule ... It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation of lenders who permit interest to accumulate. If that is so, I fail to see how a creditor who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in the legal proceedings, keeps the creditor out of his money. No principle of public policy 'is involved in providing the debtor with protection *pendente lite* against interest in excess of the double. *Since the rule as formulated by Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it.* A creditor can control the institution of litigation and can by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor however has no control over delays caused by the litigation process'" (emphasis is mine).

After indicating how long the proceedings had taken from service of the summons to the final disposition of the matter, ZULMAN JA further supported the conclusion he had reached at 834F:

"If one accepts that interest and indeed compound interest is 'the life blood of finance' in modern times I am of the opinion that one *should not apply all of the 'old Roman Dutch Law to modern conditions where finance plays an entirely different role...*'" (emphasis is mine).

The rationale for the *in duplum* rule and its origins are fully examined by GILLESPIE J in *M M Builders*' case *supra*. I am much persuaded by his Lordship's reasoning and understanding of the rationale and origins of the rule. I do not need to traverse the same ground. If I understand the reasoning

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of GILLESPIE J correctly, then I venture to say that the public interest served by the *in duplum* rule is not to be identified with sympathy for the debtor, so as to say that the rule is design to

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protect him. I view the public interest involved as encompassing a wider spectrum of interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of justification for charging interest in the first place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere* v *Mukuna* 1997 (2) ZLR 360 (H) at 364G) and to the interests of commerce generally and to perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce. But even if it were to be so restricted, I cannot see anything incompatible with the rule serving those interests if it were to be applied in the manner advocated for in *M M Builders*' case. The creditor's claim for interest would be limited to an amount that does not exceed the capital. In my view, the danger in adopting the approach in *Oneanate* and *Ehlers* cases *supra* is that an unscrupulous creditor only has to institute action to defeat the *in duplum* rule. He may so act as to ensure that the institution of proceedings and the attainment of the double coincide with the result that the rule is rendered inoperative. I do not see anything that is against the public interest, or the interest of modern finance, if the *in duplum* rule operates in the manner outlined by GILLESPIE J and the old Roman Dutch authorities which espouse the view that once the double has been reached, interest must stop to run regardless of the institution of proceedings, or that the stage of *litis contestatio* has been reached. Where in particular the double has not been reached, I find no relevance at all of the event of institution of proceedings. Interest must continue to run until it equates to the capital amount and then cease to run. It may thus equate to the capital amount soon after or long after the institution of proceedings, but that is immaterial. I am therefore unpersuaded by the conclusion reached on this point in *Oneanate* and *Ehlers* cases. I must respectfully express my dissent from those judgments. I appreciate that the law must be certain and that it is most undesirable for judges to differ on fundamental principles of law. There would appear to be a need for the difference of opinion on this point to be placed before the Supreme Court as soon as possible, either by way of an appeal or in a suitable case, as a reference of a point of law. Consistency in the law is paramount in the administration of justice.

If I am wrong in the conclusion I have come to on the question of whether, if during the course of litigation the amount of interest equates to the capital amount, interest stops running and only commences to run once judgment is pronounced, proceeding, as I have done, on a consideration of the legal position with respect to ordinary litigation, I am comforted by the fact that

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I am, in this application, concerned with arbitration proceedings. I have already stated that arbitration is based in contract. The parties have a much greater control of the proceedings. The argument that the debtor should not be protected from the consequences of the delays interest in legal proceedings as contended in the passage I have cited from *Oneanate supra* would seem to me to find no application in arbitration proceedings. The parties are in the position, and are able, to determine and demand on their reference when the arbitration proceedings should be concluded. Arbitration proceedings are renowned for the speed with which they are conducted, although this was not the case with the proceedings which have resulted in the present application. They were begun in the first half of 1991 and the award was

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only issued in 1999. The comment by EDWARD DAVIES J as quoted by Butler & Finsen *op cit* at p 19 is most apposite in relation to these proceedings:

"Many years ago, a top-hatted old gentleman used to parade outside these Law Courts carrying a placard which bore the stirring injunction 'Arbitrate - don't litigate'. I wonder whether the ardour of that old gentleman would not have been dampened somewhat had he survived long enough to learn something about the present case."

The point is that if parties to arbitration proceedings are aware that they cannot waive the operation of the *in duplum* rule in any way whatsoever and in particular if the creditor who is kept out of his money is aware of the requirements of the *in duplum* rule the parties, or the creditor, should insist that the arbitrator determines the dispute within the shortest possible time. If they do not do so and allow arbitration proceedings to continue almost interminably they have themselves to blame if they are hit by the rule, as they surely will be. Any prejudice which they may suffer will be entirely to their own account. I am aware that the law of arbitration follows closely and in most respects upon the law of ordinary litigation, but differences exist. And I have no hesitation at all in stating that even if the law on the *in duplum* rule in relation to its suspension at the commencement or institution of proceedings is as stated in *Oneanate* and *Ehlers,* it should not be the same in respect of arbitration proceedings.

To summarise: the conclusion I have reached is that interest was ordered to run from 1 February 1989. The amount of interest should have equated to the sum of $759 701.42, long before the award was issued. According to the schedule by Ernst & Young, this would have been about the end of June or beginning of July 1992. In my judgment, the interest stopped running at that point. It had reached the double. The *in duplum* rule was operative. It was not suspended by the institution or commencement of the arbitration proceedings. On an application of the *in duplum* rule, as I have found in this judgment, the award should have been worded more precisely to the effect that, as at the date of the award, the applicant was entitled to be paid the sum of $1 539 402.84.

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The ambiguity which was created by the wording of the award was the reason that the applicant contended that the *in duplum* rule was suspended by the commencement of the arbitration proceedings and that as a consequence it was entitled to be paid as interest the sum of $17 838 779.44. This case, if anything, is a typical example to show that the approach adopted in *Oneanate* and *Ehlers* can be unconscionable if the "old Roman Dutch law" on the application of the *in duplum* rule were not binding on us.

The parties to this application did not make an issue of it whether interest begins to run afresh from the time that the award is made. They both appeared to accept that interest begins to run again from the time that the award is made. They must have relied on *M M Builders* and *Oneaneate supra*. The question is not before me for decision but I may in passing refer to the passage in *M M Builders* case *supra* which may have escaped the attention of the parties' legal practitioners. At 435A GILLESPIE J says:

"The principle of interest commencing to accrue afresh upon judgment was approved in *Administrasie van Transvaal* v *Oosthuizen en 'n Ander* 1990 (3) SA 387 (W) but held not to apply to the award 'of an arbitrator'."

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That this is the position is also stated by Butler & Finsen *op cit* at p 276 where reference is made to the decision in *Oosthuizen*'s case *supra*. I find myself hamstrung to further address an issue which was not of concern to the parties. The applicant will therefore be entitled to recover further interest from the date of the award and such interest is to be calculated on the amount of the award, being $1 537 402.84, from 25 June 1999 to the date of payment in full, provided, for the avoidance of doubt, that the amount of such interest shall not exceed the amount of the award. The award issued by the arbitrator, in my view, did not have to be interpreted at all if the parties had understood the correct application of the *in duplum* rule to the calculation of interest in this case. But for the need to clarify the position the award could very well have been recognised and enforced as it was framed by the arbitrator. The applicant has succeeded in its main relief, which was to have the award made an order of this court. It did not succeed in its argument on the interpretation of the award. The respondent succeeded in the latter connection. I think in the circumstances it is only fair that I do not award costs against any of the parties.

In the result the full order is -

IT IS ORDERED THAT:

1. The arbitral award issued on the 24 June 1999 in favour of the applicant against the respondent be and is hereby recognised and enforced.

2. The respondent shall pay to the applicant.

   (a) the sum of $1 539 402.84 (being $769 701.42 capital award and $769 701.43 interest on the capital award) together with interest thereon with effect from 25 June 1999 at the prevailing minimum

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commercial rate for overdrafts, as set out in Exhibit "AA" plus 2% *per annum* compounded monthly provided that the amount of interest so payable shall not exceed the sum of $1 539 402.84.

(b) Costs of suit on the High Court scale, such costs to include:

   (i) Engineer Cochrane's costs in the sum of $169 466.90;

   (ii) the arbitrator's fees;

   (iii) the costs of a stenographer in the sum of $500 per day together with the costs of cassettes in the sum of $419.94;

   (iv) The cost of hiring the venue for the arbitration in the sum of $4 226.

3. The respondent's counterclaim is dismissed with costs.

4. There will be no order of costs in respect of this application.

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Byron Venturas & Partners, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

AKINO *v* MUDEDE NO & ORS 2000 (1) ZLR 462 (HC)

Citation	2000 (1) ZLR 462 (HC)
Case No	Judgment No. HH-79-00
Court	High Court, Harare
Judge	Smith J
Heard	March 22, 2000
Judgment	April 5, 2000
Annotations	None

Election petition

Flynote

Elections - vote - equality of - requirement for returning officer to "draw lots" - meaning - does not include spinning a coin

Elections - voter - denial of right to vote - voter told she must produce identity card - not a requirement of the law - result affected - election set aside

Headnote

The applicant was a candidate in a municipal election. When she went to the polling station to record her vote, she presented her voter registration card and her national identification papers. Although she was known to the official at the polling station, she was refused the right to vote on the grounds that her national identity papers were so faded as to be illegible. When the votes were subsequently counted, both the applicant and her opponent received an equal number of votes. The returning officer decided to spin a coin to determine the result of the poll. Both candidates had drawn lots to determine who should have "heads" and who should have "tails". After the coin was spun, the applicant's opponent was declared the winner.

The applicant sought an order setting aside the election. It was argued on her behalf that nothing in the Electoral Act [*Chapter 2:01*] requires a voter to produce an identity card before voting. The polling officer's decision to deny the applicant her right to vote was irrational and unlawful and affected the result of the election. The method of determining the result after the votes had been counted did not comply with the requirements of the Act and was a nullity. The

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first respondent, the Registrar-General, contended that the polling officer had a discretion as to whether to allow the applicant to vote. The applicant should have obtained a legible identity document.

Held, that there is no requirement to produce an identity card. The only requirement of the Act is that the presiding officer may put to an applicant for a ballot paper such questions as he considers necessary to ascertain whether or not the applicant is registered on the voters roll. The presiding officer must exercise his discretion but is expected to act reasonably and intelligently. He should act on the principle that persons eligible and entitled to vote should be able to do so with as little formality as possible. An applicant for a ballot paper should not be denied a vote merely because he or she is not, for example, unable to produce a passport, national registration or drivers licence, if he or she can produce a voters registration card.

Held, further, that where a there is an equality of votes and the returning officer is required to draw lots, he must not decide the outcome on the toss of a coin. Drawing lots means drawing

one thing from a number whose marks are concealed from the drawer. The returning officer should not use any other procedure.

Cases Considered

Cases referred to:

Gerdener v *Returning Officer & Anor* 1976 (2) SA 663 (N)

Dongo v *Mwashita & Ors* 1995 (2) ZLR 228 (H)

Mtoba & Ors v *Sebe* 1975 (4) SA 413 (E)

Morgan & Ors v *Simpson & Anor* [1974] 3 All ER 722 (CA)

Pio v *Smith* 1986 (2) ZLR 120 (S)

Putter v *Tighy* 1949 (2) SA 400 (A)

Legislation considered:

Electoral Act [*Chapter 2:01*], ss 56 and 103(1)

Case Information

L T Biti, for the applicant

Mrs *Y Dondo*, for the first respondent

G E Mandizha, for the second respondent

Judgment

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Smith J: This is an election petition.

On 30 and 31 August 1999, the first respondent (hereinafter referred to as "the Registrar-General") conducted elections for councillors for Mutare City Council. The applicant (hereinafter referred to as "Akino") was a candidate for ward 4 and the second respondent (hereinafter referred to as "Tsopo") was her opponent. Akino had been elected as a councillor in August 1995 and so was the sitting councillor for ward 4. The Registrar-General had called for nominations for the election on 26 August 1999. Akino submitted nomination papers which were duly accepted and she was registered as a candidate. On 31 August 1999, she went to a polling station to record her vote. She was accompanied by her polling manager and her polling agent. She presented her national identity papers and her voters registration card to an official who checked her name on the voters roll and satisfied himself as to her identity and that she had not already voted and then she went on to the next official, Mr Nhliziyo.

Nhliziyo said that she could not vote because the writing on her national identity document was so faded that he could not read what had been recorded. She then produced her voter registration card. Although he knew that she was one of the candidates, he refused to allow her to cast her vote.

On 2 September, the ballot boxes were opened and the votes were counted. Akino and Tsopo both polled 486 votes. In terms of s 103 (1) of the Electoral Act [*Chapter 2:01*], as inserted by the Local Authorities Election Law Amendment Act, 1997 (No. 21 of 97) (hereinafter referred to as "Chapter 2:01"), where there is an equality of votes the Registrar-General shall draw lots to determine the winning candidate. In this case, however, the

returning officer decided to spin a coin to determine the result of the poll, although the candidates first drew lots to determine who should take the "head" and who should take the "tail" of the coin. After the spinning of the coin, Tsopo was declared the successful candidate. Akino contends that, in determining the result of the election by spinning a coin instead of drawing lots, the provisions of s 103 (1) of Chapter 2:01 were not complied with and therefore the election was void.

Akino seeks an order setting aside the election and calling for a fresh election.

The Registrar-General opposes the application. His contentions are as follows. The presiding officer at the nomination court used her discretion in accepting the papers submitted by Akino. Likewise, the presiding officer at the polling booth, Nhliziyo, exercised his discretion and came to a different conclusion. That is to be expected when different officials are required to exercise their discretion. Akino could easily have gone to the District Registry in Mutare to have her identity document updated. She was aware "that she was required to apply for a legible duplicate identity document as advised by the Nomination Court Presiding Officer". She had ample time to do so between nomination day (10 June) and the first polling day (30 June). The Registrar-General went on to claim that the form of drawing of lots adopted by the ward registrar was not inconsistent with s 103(1) of Chapter 2:01. The tossing of a coin was agreed upon by

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the parties. The authority of the Registrar-General to conduct the drawing of lots had been delegated to the ward registrar in terms of s 15 of Chapter 2:01.

Supporting affidavits from Nhliziyo, the presiding officer at the polling station, Mrs Kupe, the nomination court presiding officer, and Mr Tsuro, the ward registrar, were filed in support of the affidavit by the Registrar-General. Nhliziyo said that Akino's national registration waiting pass was so faded as to be illegible and that she could not produce "any other acceptable form of identification in the form of a passport or driver's licence". Akino said she also produced her voter registration card. Nhliziyo does not dispute that. Presumably, he had been told that that card was not acceptable and so her refused to accept it. Nhliziyo denied that he greeted Akino by name when she came to exercise her vote but does not dispute that he knew her and knew that she was one of the candidates. One would have expected him to have known that, in order to qualify as a candidate for election as a councillor of a local authority, the individual must be a citizen who has attained the age of 21 years and is enrolled on the voters roll for the council area - s 103G of Chapter 2:01.

Mrs Kupe said that Akino had produced a faded national registration document with illegible names. However, she had also produced "her green

voters card" and had answered questions she had put to her and so she had decided to accept her nomination paper. Mr Tsuro said that when the counting of votes resulted in a tie between Akino and Tsopo, both having received 486 votes, he had read the provisions of s 103 (1) of Chapter 2:01 to the candidates and they had agreed to the drawing of lots. He says that the two candidates were told that a coin was to be used to determine the successful candidate. Both candidates called "heads" and so lots were drawn to determine which was to be allocated the "head" and which the "tail". However, Mr Tsuro does not say why he decided to spin a coin, instead of drawing lots to determine which candidate should be declared the winner. Mr Tsuro merely concluded his affidavit by declaring, pontifically, "The Returning Officer acted lawfully in that he drew the lots in accordance with the Electoral Act s 15 and 16 and s 103(1)."

Tsopo filed an opposing affidavit in which he said that he did not oppose the relief claimed by Akino, save for the order of costs against him. The decision to deny Akino her right to vote was taken by the representative of the Registrar-General and not by him.

Heads of argument were filed by Mr *Biti,* in which the following submissions were made. When Akino's nomination paper was accepted, that meant that it was accepted that she was enrolled on the voters roll for the Mutare City Council area. As her name was enrolled on the voters roll she had a constitutional right to vote. There is nothing in Chapter 2:01 which requires a voter to produce an identity card before being permitted to cast a vote. The decision by Nhliziyo to deny Akino her right to vote was irrational and unlawful. That mistake did affect the result of the election, which distinguishes this case from *Pio* v *Smith* 1986 (2) ZLR 120 (S), *Gerdener* v *Returning Officer & Anor* 1976 (2) SA 663 (N) and *Putter* v *Tighy* 1949 (2) SA 400 (A). The non-compliance with the provisions of the Act must result in the election being set aside. See *Morgan & Ors* v *Simpson & Anor* [1974] 3 All ER 722 (CA), *Mtoba & Ors* v *Sebe* 1975 (4) SA

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413 (E) and *Dongo* v *Mwashita & Ors* 1995 (2) ZLR 228 (H). Furthermore, s 103 (1) requires that the returning officer draw lots to determine the outcome of the election. According to the *Shorter Oxford English Dictionary of Historical Principles* 1933 ed, the word "lot" is defined as meaning:

"An object (usually a piece of wood) used in an ancient method of selection or discussion by choice; a number of these being placed in a receptacle and shaken or drawn."

As the returning officer did not comply with s 103 (1) of Chapter 2:01, the method he chose to determine the outcome of the election was a nullity.

At the hearing of this application, Mrs *Dondo* advised that the opposition to Akino's claim was being withdrawn and therefore the order sought could be granted by consent. That concession was very properly made. There is no

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possible basis on which the decision by Nhliziyo to deny Akino the right to cast her vote could be supported. The attempt by the Registrar-General in his opposing affidavit to support and uphold Nhliziyo's actions is inexplicable. Akino would undoubtedly have voted for herself and therefore would have obtained an additional vote which would have made her the successful candidate. She must now face a fresh election. That will also entail the incurring of additional expenditure which would have been avoided had Nhliziyo acted reasonably and intelligently. Akino's application was filed on 30 September 1999. Instead of consenting to the granting of the order sought at that stage, notice of opposition was entered and opposing affidavits filed. It was only some six months later that the opposition was withdrawn. That resulted in the incurring of additional expenses and a delay of six months during which Tsupo took office and acted as a city councillor when he was not entitled to do so.

In all fairness, the State should bear the costs of the fresh elections, rather than the ratepayers of Mutare, because it is due to the action of the State officials concerned that a fresh election has become necessary.

Although the order was granted by consent, I wish to comment on two aspects. Section 103 (1) of Chapter 2:01 provides that provisions of that Act relating to the election of members of Parliament shall apply, *mutatis mutandis*, to local authority elections in terms of Part XIXA of Chapter 2:01. Therefore, s 56 of Chapter 2:01, which deals with the identification of voters, was applicable to the elections for the councillors for the Mutare City Council. Subsection (1) thereof provides that every voter registered on the voters roll shall be entitled to vote. In terms of subs (2) thereof, the presiding officer may put to an applicant for a ballot paper such questions as he considers necessary to ascertain whether or not the applicant is registered on the voters roll. Therefore the presiding officer must exercise his discretion, but he is expected to act reasonably and intelligently. Subsection (3) of s 56 provides that, unless otherwise directed by the Registrar-General, the presiding officer shall require an applicant for a ballot paper to produce his or her voters registration card and, if that card shows that the applicant is registered as a voter on the voters roll, he shall mark the card and hand the applicant a ballot paper. There is nothing in the papers to indicate that the Registrar-General had "otherwise directed". He does

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not allege in his opposing affidavit that he did so. In her founding affidavit, Akino said that she produced her voter registration card and showed it to Nhliziyo. Nhliziyo does not deny that. In his supporting affidavit, he said that certain information on Akino's national registration pass had faded and was not legible and she "could not produce any other acceptable form of identification in the form of a passport or driver's licence". As mentioned above, subs (2) of s 56 provides that the

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presiding officer can put to an applicant for a ballot paper such questions as he considers necessary. The presiding officer should act on the principle that persons eligible and entitled to vote should be able to do so with as little formality as possible. An applicant for a ballot paper should not be denied a vote merely because he or she was not, for example, able to produce a passport, national registration card or drivers licence, if he or she can produce a voters registration card.

With regard to the procedure adopted by Mr Tsuro, the returning officer, to determine the outcome of the poll, he does not say why he decided to spin a coin rather than draw lots. All I can say is that that procedure is not what the Act requires. Section 103(1) of Chapter 2:01 clearly and succinctly states that the winning candidate must be determined by the drawing of lots. In Nuttall's *Standard Dictionary of the English Language,* the phrase "draw lots" is defined as follows:

"to determine an event by drawing one thing from a number whose marks are concealed from the drawer."

That is what is required and that is what must be done. The returning officer cannot decide to spin a coin or use a deck of cards or adopt any other procedure. He must comply with the requirements of s 103(1) of Chapter 2:03.

By consent, it is ordered that -

1. The election of the second respondent as councillor for the Mutare City Council be and is hereby set aside.

2. Consistent with the Electoral Act [*Chapter 2:03*], the first respondent be and is hereby directed to call for a by-election for ward 4 of the Mutare City Council.

3. The costs of this application be borne by the first and second respondents jointly and severally, the one paying, the other to be absolved.

Honey & Blanckenberg, applicant's legal practitioners

Civl Division of the Attorney-General's Office, first respondent's legal practitioners

Mahizhe & Associates, second respondent's legal practitioners

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HONDA SALES (PVT) LTD *v* COMMISSIONER OF TAXES 2000 (1) ZLR 468 (HC)

Citation	2000 (1) ZLR 468 (HC)
Case No	Judgment No. HH-77-00
Court	High Court, Harare
Judge	Blackie J
Heard	April 5, 2000
Judgment	April 5, 2000
Annotations	None

Civil application

Flynote

Interpretation of statutes - retrospectivity - procedural provisions taken to be retrospectively operative unless wording of legislation indicates that legislature intended that the provision is not to apply retrospectively - legislative provision providing for a period of prescription is procedural provision

Revenue and public finance - overpaid tax - refund of - time within which application for refund must be made - original period of three years extended to six years - whether six year period applied retrospectively to claims brought before period extended to six years

Headnote

The applicant company mistakenly paid more tax than it owed. It then applied for a refund of the overpayments. At the time that the claim was brought, s 7(4) of the Income Tax Act [*Chapter 23:06*] provided that a claim for a tax refund had to be brought within a period of three years. The applicant failed to bring his claim within the three year period but after the expiry of the three year period s 7(4) was amended to extend the period of prescription for such claims to six years. The question which arose was whether the extended period of six years applied only to claims brought after the amendment came into effect or whether it applied also to claims brought before it came into effect.

Held, that legislative provisions dealing with procedural matters are taken to have retrospective effect. A law dealing with prescription is a procedural law. The amendment to s 7(4) of the Income Tax Act was a procedural law and it operated retrospectively.

Held, further, that even if this basis of interpreting the provision is not correct, retrospectivity should be dealt with on the same general lines as interference with existing rights, and an interpretation which produces less harsh results should be favoured. There is every reason in justice why the section should be interpreted as having retrospective effect. Unless it is interpreted in this way, the applicant would lose something to which it was entitled and the

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Commissioner would gain something to which he was not entitled.

Cases Considered

Cases cited:

Curtis v *Johannesburg Municipality* 1906 TS 308

Gardner v *Lucas* (1878) 3 App Cas 582 (HL)

Henks Construction (Pvt) Ltd v *Zimbabwe Defence (Pvt) Ltd* 1998 (1) ZLR 49 (S)

Shewan Tomes & Co Ltd v *Commissioner of C & E* (1955) 20 SATC 307 (A)

Case Information

Miss *E Mushore*, for the applicant

Mrs *J Zindi*, for the respondent

Judgment

Blackie J: Section 7 of the Fifteenth Schedule to the Income Tax Act [*Chapter 23:06*] ("the Act") obliges the respondent (the Commissioner) to refund any proved overpayment of residents shareholders tax, provided the claim for that refund is made within the period prescribed in the section. As at December 1993, s 7(4) required a claim for such refund to be made within three years of the date of payment of the tax. Section 23 of the Finance Act No. 17 of 1997 (the Finance Act), amended s 7(4), with effect from 28 November 1997, to increase the period within which a claim for a refund could be made from three years to six years.

In December 1993, the applicant mistakenly paid to the Commissioner $15 597.40 in resident shareholders tax that was not due. In March 1997, the applicant applied to the Commissioner for a refund of that amount. The Commissioner refused to refund the payment because the claim had not been made within the then prescribed period of three years. In March 1998, and after s 7(4) had been amended by the Finance Act, the applicant reapplied for the refund. The Commissioner again refused to pay. He maintained that claims for refunds "relating to the period before the 28 November 1997 (are) subject to the three year prescriptive period and claims after 28 November 1997 will now be subject to the six year prescriptive period". The applicant disputes the Commissioner's decision. He has brought the decision to this court on review. The Commissioner opposes the application.

The Commissioner failed to file his papers in opposition to this review on time. In terms of the rules of this court he was automatically barred from proceeding with his opposition. He applied for the bar to be uplifted. The applicant did not oppose that application. The matter has proceeded to the merits by consent.

The question to be determined is whether the amendment to s 7(4) by s 23 of the Finance Act, which increased the prescriptive period from three to six years, applies only to overpayments

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made since the amendment came into effect.

The principles governing the nature of s 7(4) and the plain wording of that section do not permit the interpretation that the Commissioner seeks to put on it. There is a general rule that legislation does not have retrospective effect. Nevertheless:

"There is an exception to this rule where (the) legislation deals with procedural matters, which are taken to be retrospectively operative. For instance, where a statute effects

procedural changes in actions brought before the court, such changes would apply *prima facie* to court actions pending and to future ones unless the context of the statute clearly provides otherwise":

Kellaway *The Principles of Legal Interpretation* p 324.

In *Curtis* v *Johannesburg Municipality* 1906 TS 308 at 312, Innes CJ described a law of prescription or limitation as a law relating to procedure and held that:

"[Every] law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure of every suit which comes to trial after the date of its promulgation ... Whether the expression is an accurate one is open to doubt, but it is a convenient way of stating the fact that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose."

Our Supreme Court has accepted in principle both that a law governing prescription is a law of procedure and that a law of procedure operates retrospectively. In particular, in *Henks Construction (Pvt) Ltd* v *Zimbabwe Defence (Pvt) Ltd* 1998 (1) ZLR 49 (S), the court cited, with approval, the statement by Lord Blackburn in *Gardner* v *Lucas* (1878) 3 App Cas 582 at 603, that:

"Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be ..."

The provisions of s 7(4) prescribe the time within which a claim for a refund of resident's shareholders tax may be claimed. The subsection therefore falls within the description of a law relating to procedure. Prior to amendment, s 7(4) read that:

"(T)he Commissioner shall not authorise any refund in terms of this paragraph unless the claim therefore has been made within three years of the date of payment of the tax".

The plain wording of the subsection was to permit, prior to the amendment, a claim for the refund for up to three years from the date on which the tax was paid. Section 23 of the Finance Act amended the subsection "... by the deletion... of 'three years' and the substitution of six years'." There is nothing in the wording of the amendment, or in the section as amended, to suggest that the legislature intended by that amendment to make an exception to the general rule concerning the retrospective effectiveness of a law of procedure or to restrict the extended prescriptive period to claims for repayment which arose after the amendment had come into effect. The amendment has not altered the subsection, except to extend the time within which a refund may be claimed from three years to six years from the date that the tax was paid. The

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fact that the applicant did not make a claim for repayment of the money mistakenly paid by it until after the three year limitation had expired does not affect the position. The expiry of the period

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of limitation does not extinguish the applicant's claim. It merely renders it unenforceable. If the legislature then extends the period of limitation, the claim becomes enforceable within the extended period.

Even if I am wrong in holding that the intention and wording of s 7(4) are clear and simple and incapable of doubt, and the matter can be said to be open to doubt, the position is not altered. In that case, retrospectivity is -

"to be dealt with on the same general lines as interference with existing rights, and where there is real room for doubt as to the meaning of a provision, the interpretation producing the less harsh results should be favoured":

Shewan Tomes & Co Ltd v *Commissioner of Customs and Excise* (1955) 20 SATC 307 (A) at 316.

The Commissioner has not pointed to any good reason or claim of inconvenience or injustice to him why retrospectivity should not apply in this case. By contrast, there is every reason in justice why the section should interpreted retrospectively. Without that retrospectivity, the applicant will suffer a loss through an error: the Commissioner will received a benefit to which he would not otherwise be entitled.

In the result, the Commissioner is directed to refund forthwith to the applicant the sum of $15 579.40, being the amount of shareholders tax paid to him by the applicant on 7 December 1993, together with interest thereon at the prescribed rate from 1 April 1998 to date of payment. The Commissioner is to pay the costs of this application.

Atherstone & Cook, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners

COLLECTIVE SELF FINANCE SCHEME *v* ASHARIA 2000 (1) ZLR 472 (SC)

Citation	2000 (1) ZLR 472 (SC)
Case No	Judgment No. S-22-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Muchechetere JA
Heard	March 9, 2000

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Judgment April 11, 2000

Annotations None

Civil appeal

Flynote

Appeal - peremption - party's earlier acquiescence in judgment appealed from - judge of appeal court subsequently granting leave to appeal - appeal not perempted

Contract - breach - damages - amount - sale of property repudiated after deposit paid - property subsequently sold to another at a lower price - when special damages may be claimed

Headnote

The appellant organisation contracted to buy a property from the respondent and paid a deposit. It later repudiated the contract and claimed the return of the deposit. The respondent accepted the cancellation, sold the property for a lower price, and claimed damages for breach of contract. Included in the amounts claimed were claims for extra bond finance charges, loss of investment income and loss of interest on the original sale price from the time of the original sale until the property was subsequently sold.

At the appeal hearing, it was argued by the respondent that the appeal was perempted, as the appellant had acquiesced in the judgment appealed from.

Held, that as a judge of the appeal court had, with knowledge of the actions of the appellant, granted leave to appeal, the appeal was not perempted.

Held, further that what was being claimed was the normal contractual damage, namely, that the respondent be put in the position in which she would have been had the contract been carried out. The various heads of damage should be examined on that basis.

Held, further, that the first two items were claims for special damages. It had to be alleged and established that these amounts were within the contemplation of the parties. No such allegation was made, nor did the evidence support such an allegation. The respondent was, however, entitled to claim interest on the agreed sale price.

Cases Considered

Cases cited:

Baker v *Probert* 1985 (3) SA 429 (A)

Masters v *Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W)

Trotman v *Edwick* 1951 (1) SA 443 (A)

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Tweedie & Anor v *Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W)

United Air Charters v *Jarman* 1994 (2) ZLR 341 (S)

Case Information

P Nherere, for the appellant

R M Fitches, for the respondent

Judgment

McNally JA: This is an unfortunate case because the person who contracted to buy the property in Harare on behalf of the appellant (the Scheme) was probably rash in his choice of words, and thus committed himself and his principal to a purchase before he had the money to pay for it. As it turned out, the money did not materialise. The Scheme was sued for damages for breach of contract and was ordered to pay $250 150 damages. It now appeals.

Mr *Fitches,* for the seller, took the point *in limine* that the appeal had been perempted by the buyer's earlier unequivocal acquiescence in the judgment. See *Cohen* v *Cohen* 1980 ZLR 286 (S). While there is much to be said for this contention, the fact is that a judge of this court granted an application for reinstatement of the appeal at a time when he was aware of the actions of the buyer/appellant upon which the claim of peremption is based. That order, it seems clear to me, overtakes and overrides the earlier events. Those events were set out in the affidavit opposing the application for reinstatement. Although the word "peremption" was not used, the matter is effectively *res judicata*. Accordingly the point *in limine* must fail.

The main issues are two fold: was there an unconditional contract of sale in respect of the property; and if there was, and since it was clearly breached by the buyer, what is the measure of damages?

As to the contract, the evidence is straightforward. The Scheme was looking for office premises. The Scheme's general manager, Mr Timba, approached Mr Asharia, whose wife owned the property in question. He acted as her agent. Mr Timba wrote to him on 21 January 1992, under the heading "Re: Purchase of property (2nd St and Cork)". He referred to a discussion earlier that day and continued:

"Mr organisation, Collective Self Finance Scheme, is offering to buy the property. Cash at the agreed price of $2 400 000 as soon as possible. I hope our offer will receive your favourable consideration."

On the same day, he wrote again:

"Please find enclosed a cheque of $240 000 being the deposit for the purchase of the above property by CSFA."

The next day the Scheme's legal practitioner wrote to Mr Asharia recommending his client's "relentless honesty" and requesting him "to favourably accept my client's offer".

Mr Asharia's evidence was that he accepted the offer on condition that a bank certified cheque for 10% of the amount was paid to him. The cheque arrived the next day, along with the letter

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from the lawyer. They even brought by Mr Timba. They shook hands on the deal. Mr Timba wanted an urgent transfer, so Mr Asharia instructed his lawyers to draw up the transfer documents with all speed. Payment of the purchase price was promised by 5 February 1992.

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Then suddenly, on 6 February 1992, the Scheme's lawyer wrote to say that the "proposed sale" could not go ahead because:

(a) the donors had declined to advance the funds;

(b) the building was zoned in a residential area and could not therefore be used for office purposes.

The learned trial judge ruled that an unconditional contract of sale had been concluded. I will not repeat what was said in his judgment, HH-71-95 of 28 June 1995.*(79) It seems to me to be incontestably correct. The only doubt was over the issue of zoning, and it is of significance that when the property was re-sold on 15 December 1992, the purchaser was able to have the zoning changed to office use. It is, no doubt, a point which Mr Timba should have checked before he made his offer, but he did not do so. The real reason for the collapse of the contract was that he was over-confident that his donors would support the purchase.

The matter came to court by way of a claim by the Scheme for the refund of its $240 000 deposit, and a counter-claim by Mrs Asharia for damages for breach of contract. She opted to accept the cancellation, and resold the property on 15 December 1992 for $2 200 000.

The main argument on appeal was in relation to the method of calculation of damages. The counter claim had calculated them as follows:

1. $200 000, being the loss on the sale price;

2. $4 650, being wasted legal costs;

3. $250 000, being extra bond finance charges over the ten months up to the re-sale of the property;

4. $280 000, being investment income lost on the sum of $1 200 000, which would have been left over after the bond on the property had been paid off;

5. Interest and costs.

The learned trial judge awarded, on the first four claims above, the sums of $200 000, $4 650, $177 500 and $1 089 000. He subtracted from this the amount of the deposit ($240 000), thus coming to an award of $250 150 plus interest on that sum from 5 February 1992 to date of payment. That date, 5 February, is the date on which Mr Timba had promised payment.

Mr *Nherere*, representing the Scheme, argued first, and correctly, that a party cannot be entitled both to her positive and to her negative *interesse*. In simpler language, she cannot claim both to

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be put in the position in which she would have been had the contract been fulfilled, *and* to be put in the position in which she would have been had the contract never happened. This latter

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is usually the basis for delictual claims - see *Trotman* v *Edwick* 1951 (1) SA 443 (A) at 449B-C.

The last word had yet to be spoken on the matter of positive and negative *interesse.* Since the decisions referred to by Mr *Nherere* there have been several others - some conflicting. See *Baker* v *Probert* 1985 (3) SA 429 (A); *Tweedie & Anor* v *Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 804-808B; and *Masters* v *Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W). See also Christie *Law of Contract* 3 ed p 599.

I think it is clear in this case that what is being claimed is the normal contractual damage, namely, that Mrs Asharia be put in the position in which she would have been had the contract been carried out. This is positive *interesse*. I will proceed on that basis to examine the various heads of damage.

1. *The claim for $200 000*

   This is a straightforward claim. The evidence showed that the property was re-advertised for sale, and the best offer was $200 000 less (and approximately 10 months later) than the price to be paid by the Scheme. But one must also note that these damages were, as it were, prepaid. The deposit of $240 000 was never refunded. The Scheme is $40 000 in credit.

2. *The claim for $4 650 wasted legal costs*

   Mr *Nherere* argued that this was part of the negative *interesse*. Had the sale gone through, the costs would have been incurred anyway. But my major difficulty with this claim is that it was not proved. In the claim-in-reconvention the amount was simply described as "wasted legal costs arising out of plaintiff's breach of contract". The claim was denied by the plaintiff. No evidence whatever was led to substantiate the claim. I would guess that it represents the cost of drawing the abortive agreement of sale. But nobody said so. I would disallow this claim on the basis that it was not proved. The learned judge simply said the figure was not challenged. That is not so. In the pleadings, the claimant-in-reconvention was put to the proof of it, and she did not prove it. The claim fails.

3. *The claim for $250 000, being extra bond finance charges*

   This is a claim for special damages, a term commonly used in law and explained in this court in *United Air Charters* v *Jarman* 1994 (2) ZLR 341 at 344E. One of the requirements for a claim for special damages to be proved is that it must be alleged and established that the loss was within the contemplation of the parties. No such allegation was made in defendant's claim-in-reconvention. Nor does the evidence suggest that Mr Timba had any idea of the bond situation in respect of the property.

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MCNALLY JA

In the circumstances, the claim should not have been allowed, in whole or in part.

4. *The claim for $280 000, being investment income lost*

Exactly the same considerations apply to this calim. It is a claim for special damages. Although it was specially pleaded, there was no averment that it was within the contemplation of the parties that if the contract were breached, the seller would suffer this loss. Nor was there any evidence to suggest that Mr Timba was aware of this possibility. This claim also should not have been allowed, either in the whole or in part.

5. *Interest*

In the absence of these two claims for special damages, the seller's loss, apart from the capital sum of $200 000 already dealt with, is the interest (at the prescribed rate) on the sale figure of $2.4 million, less the deposit, from 5 February 1992 to 15 February 1992. That is what she is entitled to.

6. *The Scheme's claim*

Finally, one has to deal with the Scheme's claim for a refund of the deposit of $240 000. Clearly, $200 000 of that is to be set off against the seller's claim for the $200 000 loss on the sale price. The balance of $40 000 became repayable to the Scheme on 16 December 1992. Interest on that sum of $40 000 at the prescribed rate is due to the Scheme from 16 December 1992 to date of payment.

Thus, in the final reckoning, the judgment of the court *a quo* must extensively modified. The Scheme is entitled to judgment in the sum of $40 000 together with interest on that sum at the prescribed rate from 16 December 1992 to the date of payment. The counter-claiming seller is entitled to retain $200 000 of the deposit, and in addition, to an award of interest, at the prescribed rate, on the sum of $2 160 000, from 5 February 1992 to 15 December 1992. In 1992, the prescribed rate of interest was 12.5% *per annum* in terms of SI 251 of 1991.

7. *Costs*

While I do not propose to make precise calculations, it is clear that in the High Court, the defendant (counter-claimant) was the net winner, and was entitled to her costs. In this court, however, the original award in the High Court has been substantially reduced and the appellant is therefore entitled to the costs of appeal.

8. *The Order*

(a) The appeal is allowed in part.

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(b) The order of the High Court is set aside and in its place the following order is made:

(i) judgment for the plaintiff in the sum of $40 000 with interest at the prescribed rates on that sum from 16 December 1992 to date of payment;

(ii) judgment for the defendant in respect of interest, at the prescribed rate, on the sum of $2 160 000 from 5 February to 15 December 1992;

(iii) the defendant is awarded the costs of suit;

(c) The appellant is awarded the costs of the appeal.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Wintertons, appellant's legal practitioners

Lofty & Fraser, respondent's legal practitioners

MASHAVE & ORS *v* ZUPCO & ANOR 2000 (1) ZLR 478 (SC)

Citation	2000 (1) ZLR 478 (SC)
Case No	Judgment No. S-24-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Sandura JA
Heard	March 13, 2000
Judgment	April 11, 2000
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - retrenchment - retrenchment package arrived at according to procedures established by regulations - when court can interfere with such package

Practice and procedure - parties - representative action - one party purportedly representing numerous others - when may do so

Headnote

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A large number of employees of ZUPCO were retrenched. The retrenchment was carried out in compliance with the regulations governing retrenchment, namely SI 404 of 1990. The need for retrenchment was accepted by the workers' representatives when the matter was dealt with by the retrenchment committee and the sole dispute before the committee was about the amount of the retrenchment packages. The Minister then approved the retrenchment on the basis of the recommendations of the retrenchment committee. The appellant and a large number of other retrenched workers appealed to the Labour Relations Tribunal against the amount of their retrenchment packages. (They did not ask for the retrenchment to be set aside.) After a considerable period of time the retrenchees took the Minister's decision on review. They argued that there were grounds for impugning the Minister's decision. These were that the Minister should not have approved the decision of the committee, as it had failed to consider whether the retrenchment was justified and there were certain other alleged procedural irregularities. Alternatively, it sought an order awarding the employees a better retrenchment package. The High Court decided that the proper procedures for bringing the action in the names of a large number of parties under r 89 of the High Court Rules had not been followed, and only the one party should be allowed to bring the action. It further dismissed the application on the grounds that there had been undue delay in bringing the action. On appeal:

Held, that the guidelines to be followed where one person brings an action on behalf of a number of others have been set out in a number of cases. If these guidelines are not followed, the result will be that there will only be one person bringing the action. This applied in the present case.

Held, further, that the trial court was correct in dismissing the action because of undue delay in bringing it. This was not a proper case for condoning the delay. There was no adequate explanation for the delay; the possible prejudice to the first respondent was considerable; and the prospects for success in the action were negligible.

Held, further, in relation to the prospects of success, that the grounds for impugning the

Minister's decision were not convincing. As regards the alternate ground that the court should award a better retrenchment package, where retrenchment takes place, it is not the function of the court to decide what the appropriate level of compensation is. So long as the machinery for making the decision functions correctly, and comes to a conclusion which is not wildly unreasonable, the courts cannot interfere.

Cases Considered

Cases cited:

Continental Fashions (Pvt) Ltd v *Mupfuriri* 1997 (2) ZLR 405 (S)

Gudza v *University of Zimbabwe* HH-85-95

Kadir & Sons (Pvt) Ltd v *Panganai & Anor* 1996 (1) ZLR 598 (S)

Mashave v *ZUPCO* 1998 (1) ZLR 567 (H)

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Prosser & Ors v *ZISCO* HH-201-93

Vrystaat Ests (Pvt) Ltd v *President, Administrative Ct & Ors* 1991 (1) ZLR 323 (S)

Case Information

Miss *W T Miles*, for the appellants

P Nherere, for the first respondent

Miss *Y Dondo*, for the second respondent

Judgment

McNally JA: The first question raised in this appeal is as to who exactly are the appellants. A large number of employees of the first respondent (ZUPCO) were retrenched with effect from 31 December 1995. Mr Mashave appears on behalf of a large percentage of them. But it is far from clear how many of them are with him in the appeal.

One can sympathise with the problem faced by the appellants' legal representatives. Inevitably, when people are retrenched, many of them go back to their villages; some of them, as time goes by, find new jobs. It is almost impossible to keep a group of this nature together.

It may be that when the Class Actions Act [*Chapter 8:17*] (Act 10 of 1999) comes into effect, it will be easier for persons in this position to proceed as a group or class. In the meanwhile, we have to deal with the problem as best we can under r 89 of the High Court Rules, using the guidelines set out in the High Court in *Gudza* v *University of Zimbabwe* HH-85-95 and *Prosser & Ors* v *Zimbabwe Iron & Steel Co Ltd* HH-201-93.

In the court *a quo*, the learned judge held, after applying the guidelines, that none of the appellants, other than Mr Mashave, was properly before him. What he had before him were two long lists of names, one of which has 409 names and the other 324. Many of the names in the first list have signatures next to them, which purport to indicate that those persons support the averments put forward by Mr Mashave. But quite a large number of the signatures are not there. None of the signatures is authenticated; some are first names only, some are signed "pp." the person concerned. And there are other problems, which the learned judge specified.

Despite the painstaking and praiseworthy efforts of those who compiled

the lists, I find it difficult to fault the learned judge's decision. And in any event, it does not seem to me to make a great deal of difference in this particular case. The only prejudice may be to Mr Mashave himself, because if he loses, any order of costs is operative only against himself. He is, however, protected by the fact that many of his colleagues have signed an agreement which makes them liable to indemnify him *pro rata* for the costs. The position is no different, in practice, from what it would have been if they were all parties, and the costs order were against

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them "jointly and severally, the one paying the others to be absolved".

The other relevant consideration is that the relief sought is such that if Mr Mashave succeeds, they will all succeed. He seeks an order invalidating the retrenchment, and if that is true for him it is true for all retrenchees.

I do not propose, therefore, to interfere with the ruling that Mr Mashave is the only applicant/appellant.

Now to the merits. Mr Mashave and hundreds of his fellow employees at ZUPCO were retrenched, as I noted earlier, with effect from 31 December 1995. The retrenchment was carried out in compliance with (or, as Mr Mashave says, in purported compliance with) SI 404 of 1990 (the Retrenchment Regulations.)

Mr Mashave and others appealed to the Labour Relations Tribunal. But, and this is the first important point, it is clear that they did not appeal against their retrenchment as such, but against the compensation or "retrenchment package" they were awarded. The prayer in the notice of appeal was:

"that the Minister's decision be amended as follows ..."

They did not ask for it to be set aside, so that they might be reinstated. They wanted better packages.

The Tribunal gave a judgment dated 22 October 1996, though it appears to have been handed down on 19 November 1996. It noted specifically, and correctly, that there was no appeal against retrenchment as such, but only against the package. It decided that the package was appropriate. It ruled, however, that the Minister could not back-date his order. The order was made on 16 February 1996, and should not have been made effective on 31 December 1995. Subject to that amendment the retrenchment package was confirmed. See *Kadir & Sons (Pvt) Ltd* v *Panganai & Anor* 1996 (1) ZLR 598 (S), where this court held that the Minister could not make an order with retrospective effect.

It was only for the first time in the notice of appeal to this court from the Tribunal, filed on 28 November 1996, that the retrenchment itself was challenged. There was then a cross-appeal by ZUPCO. It contended that the appeal should be struck off the roll because there was no such person as

MCNALLY JA

"Zupco Retrenchees". Therefore, the appeal should not have been heard. Alternatively, it argued that the Tribunal had erred as to the date of the Minister's decision. It was taken on 16 January 1996, not 16 February 1996. The decision should be amended accordingly.

When the appeal came before this court on 13 May 1997 the matter was disposed of by consent. It was accepted by the parties that "Zupco Retrenchees" was not a proper *persona*. The judgment of the Tribunal was altered to read:

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"The appeal is struck off with costs."

I pause to observe, however, that both sides had accepted the fact that the Minister's order should have been made effective as from 16 January 1996.

The retrenchees then decided that they should have taken the Minister's decision on review to the High Court. The application for review was dated 30 June 1997. It was presumably lodged soon after that. I cannot read the registrar's date stamp.

This application was dismissed by the learned judge on 24 June 1998.*(80) He dismissed it on the grounds of delay, failure of explanation, and prejudice.

It is against this order of dismissal with costs that Mr Mashave now appeals.

The application for review was made in terms of High Court Order 33, r 256. Rule 259 requires such as application to be brought:

"within eight weeks of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred."

The irregularity complained of was in relation to the Minister's order dated 16 January 1996. The application for review was dated 30 June 1997. The delay is over eighteen months. It is trite that in a proper case delay can be condoned. But there must be an acceptable explanation, and there must be a consideration of the possible prejudice to the other side. See *Vrystaat Estates (Pvt) Ltd* v *President, Administrative Court & Ors* 1991 (1) ZLR 323 (S), and the *Kadir & Sons* case *supra*.

It is totally clear, that from a very early stage, the workers' committee and the works council accepted that retrenchment was simply inevitable. The number of buses being run by the company had decreased from 1400 to 1130; competition from commuter omnibuses had reduced its market share. This situation was recognised and accepted by the works council. All the negotiations were concentrated on the size of the retrenchment package.

MCNALLY JA

Understandably, there was no agreement. So the issue of the size of the package was referred to the retrenchment committee. The issue of retrenchment itself was not referred, because there was no issue.

It was, I suspect, the judgment of the Labour Relations Tribunal on 19 November 1996 which alerted the retrenched employees, or their legal advisers, to the fact that they had not raised the issue of their retrenchment. They sought to do so first in their notice of appeal to this court filed on 28 November 1996. It was quite inappropriate to do so, given that it had not been raised by them as an issue before the Tribunal.

Presumably, realising this, they then withdrew the appeal and approached the High Court. In this application, they questioned, for the first time, the procedure of the Minister's decision.

I do not think it can properly be argued that the delay is explicable on the basis that they had

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been actively pursuing a different remedy in the meanwhile. The fact is that they had been pursing a different cause of action. They did not say, for eighteen months, that there was anything procedurally wrong with the Minister's decision. The learned judge was justified in saying that that delay was too long, was unexplained, and would cause prejudice to the other side.

He also, quite properly, considered the prospects of success of the application. Obviously, condonation will more readily be granted if prospects of success are good.

The two grounds raised in Mr Mashave's affidavit for impugning the Minister's decision are:

1. The decision was made *ultra vires* the provisions of SI 404 of 1990.

2. The Minister acted with gross negligence in failing to apply his mind to the matter.

I do not consider either of these grounds to be convincing. The argument on the first point is that the retrenchment committee should have considered whether retrenchment was justified. The short answer to this is that that question was not put in issue before the committee. They were asked to resolve the dispute over the retrenchment package. They did so. They made a recommendation to the Minister. It is not for this court to decide whether that recommendation was a bad one or a good one. Nor whether the works council should or should not have accepted that retrenchment was inevitable. The fact is, they did, and the committee and the Minister properly proceeded on that basis.

The second issue arose out of the fact that the letter communicating the Minister's decision was not signed by him, but by the Secretary of the Ministry. The letter is in a standard form "It is hereby notified that the

Minister ... has ... approved the proposed retrenchment, subject to the terms and conditions which are listed in Annexure 2."

The fact that the Secretary failed to delete the alternative "has refused to approve the proposed retrenchment" is an indication of bureaucratic slovenliness, but does not invalidate the document since it is clear what was meant. The same may be said about the fact that the wrong Minister signed the first affidavit. Eventually, the person who was the relevant Minister at the relevant time swore an affidavit confirming that:

(a) he had himself made the decision, and then authorised the Secretary to communicate that decision to the interested parties;

(b) he had considered the recommendations, and had exercised his discretion in compliance with the regulations.

Accordingly, the grounds of review seeking a setting aside of the retrenchment has no prospect of success. The alternative order, seeking a better package, must be similarly fated. The retrenchment committee had both parties' proposals before it. It conducted itself in accordance

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with the requirements of s 5 of the regulations. If it was to be alleged that the committee did not consider the matters set out in s 7 of the regulations, the committee members should have been cited, and invited to comment on the allegations. As it is, there is no basis for a suggestion that they did not consider them. The allegation is wholly speculative.

I have commented on a previous occasion - *Continental Fashions (Pvt) Ltd* v *Mupfuriri & Ors* 1997 (2) ZLR 405 (S) - that the legislation on retrenchment is not very helpful to those required to apply it. Retrenchment is a tragic fate in times like the present when alternative jobs are hard to come by. But it is not the function of this court to decide what the appropriate level of compensation is. The machinery for so deciding has been established. So long as it functions correctly, and comes to a conclusion which is not wildly unreasonable, the courts cannot interfere.

I conclude therefore, that the learned trial judge was right. The delay in seeking the review was too long; the explanation for that delay was inadequate; the possible prejudice to the first respondent was too great; and the prospects of success were negligible.

Mr *Nherere* was not authorised to make any concession on the question of costs. It is not for this court to exercise mercy at the expense of ZUPCO. That is the prerogative of ZUPCO. But the State is in a slightly different situation. The matter was one which is of general public interest. I do not propose to order the appellant to pay the State's costs.

Accordingly, while we record that the date of retrenchment is to be altered

MCNALLY JA

to 16 January 1996, the appeal is dismissed, the appellant to pay the first respondent's costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Legal Aid & Advice Scheme, appellants' legal practitioners

Gill Godlonton & Gerrans, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, second respondent's legal practitioners

EDWARDS *v* CHIEF IMMIGRATION OFFICER 2000 (1) ZLR 485 (SC)

Citation	2000 (1) ZLR 485 (SC)
Case No	Judgment No. S-26-00
Court	Supreme Court, Bulawayo

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Judge	Gubbay CJ, Muchechetere JA and Sandura JA
Heard	March 27, 2000
Judgment	April 11, 2000
Annotations	None

Civil appeal

Flynote

Immigration - prohibited person - who is - person entering or remaining in Zimbabwe in contravention of Immigration Act - Minister not empowered to revoke status - effect of subsequent marriage to citizen - marriage of convenience - what is - onus on immigration authorities - need to show both that marriage entered into to evade immigration laws and that there was no intention on part of parties to live together

Headnote

The appellant had been convicted in 1994 of remaining in Zimbabwe without a permit to do so. She thereby became a "prohibited person" in terms of s 14 of the Immigration Act [*Chapter 4:02*]. After attempts to remove her had been made by the immigration authorities, she married a Zimbabwean citizen. She then sought an order declaring that she was entitled to remain in Zimbabwe. By virtue of her marriage, she was issued a certificate of registration as a citizen. The judge *a quo* ruled against her and also held the marriage to be one of convenience. On appeal, it was argued on her behalf that, as the wife of a citizen, she could not be classified as a prohibited person and so could not be removed from Zimbabwe.

Held, that her status as a prohibited person remained. She had, before her marriage, remained in Zimbabwe in contravention of the Act, and thereby became a prohibited person. Her status as such could not be removed by the Minister, and she did not cease to be a prohibited person by virtue of her marriage to a citizen. Her marriage did not entitled her, as of right, to remain in the country, although her husband could have sought an order to that effect.

Held, further, that there was no onus on the appellant to show that the marriage was not one of convenience; the onus was on the immigration authorities, who had to show both that the marriage was entered into with the intention of evading the immigration laws and that the parties had no intention of living together as husband and wife. The evidence with regard to the latter aspect was to the contrary. The judge *a quo* had erred in finding that the marriage was one of convenience.

Cases Considered

Cases cited:

Hambly v *Chief Immigration Officer (3)* 1998 (2) ZLR 285 (S)

Kohlhaas v *Chief Immigration Officer & Anor* 1997 (2) ZLR 441 (S)

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Principal Immigration Officer & Anor v *O'Hara & Anor* 1993 (1) ZLR 69 (S)

Rattigan & Ors v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S)

Salem v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S)

Wood & Anor In re 1994 (2) ZLR 155 (S)

Legislation considered:

Immigration Act [*Chapter 4:02*], ss 8(2), 14(1), 15(2) and 17(a)

Case Information

A Morris-Davies, for the appellant

P Ncube, for the respondent

Judgmnet

Gubbay CJ: This appeal and, of course, the unsuccessful application before the High Court that led to it, is but a continuation of the saga which started with the case of In re *Wood & Anor* 1994 (2) ZLR 155 (S). For the appellant was formerly Sarah Jane Isabella Wood and her mother, June McCallum, the first applicant in the proceedings before the learned judge, was June Hansard. She died on 31 December 1998, after the noting of this appeal. It is therefore solely in relation to the appellant, a British national, that this court is now required to determine the legal consequences flowing from her marriage to Brian Victor Edwards, a citizen of Zimbabwe.

The early scenario concerning the dispute between the appellant and the respondent, the Chief Immigration Officer, is set forth in adequate detail in In re *Wood & Anor supra* at 157D-158E and need not be repeated. It is sufficient to indicate that, following upon the constitutional questions referred in that matter having been decided adversely to the appellant and her mother, both were convicted, on 7 December 1994, of contravening s 29(1)(a), as read with s 36(1)(h), of the Immigration Act [*Chapter 4:02*] ("the Act"); that is, of the offence of unlawfully remaining in Zimbabwe, from 16 April 1993, without a permit permitting them to do so.

The appellant candidly admitted that she and Edwards resolved to marry as soon as possible once this court had ruled that she had no constitutional right to reside in Zimbabwe. See In re *Wood & Anor supra* at 160A-B. Edwards took immediate steps to obtain a divorce from his wife and married the appellant on 6 September 1994, shortly after the decree was granted. Being advised that her marriage entitled her to remain living in Zimbabwe, the appellant did not bother to inform the immigration authorities of the change in her marital status from that of divorcee.

On 11 January 1996, the appellant was served with a notice in terms of s 29(1) of the Immigration Regulations 1979 (GN No. 373 of 1979) ("the Regulations", now replaced by SI 195 of 1998) which informed her that the temporary permit given her as a prohibited person on 14 January 1994 was cancelled with immediate effect. Also served upon her was a "notice to

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visitor" issued in accordance with s 10 of the Regulations. It required her to report to an immigration officer at Harare Airport on 13 January 1996.

The appellant refused to comply with the instruction that she depart from the country. She approached a judge in chambers, upon a certificate of urgency, and obtained a provisional order restraining the Chief Immigration

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Officer, pending confirmation thereof, from arresting and deporting her from Zimbabwe (case No. HB-107-96). The basis of the application was that the appellant was entitled to reside in this country on account of her marriage to a citizen. She believed that she had secured for herself an absolute right to reside here and, though an alien, did not require a permit enabling her to do so. A declaration to that effect was the substantive relief claimed.

Inconceivably, it was not Edwards who, as the citizen, complained that by virtue of his right to freedom of movement protected under s 22(1) of the Constitution of Zimbabwe, he was entitled to reside permanently *with his alien wife* in any part of Zimbabwe. See *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S); In re *Wood & Anor supra* at 160G; *Salem* v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S); *Kohlhaas* v *Chief Immigration Officer & Anor* 1997 (2) ZLR 441 (S); *Hambly* v *Chief Immigration Officer* (3) 1998 (2) ZLR 285 (S) at 286B.

On 27 February 1997, immigration officials, acting on wrong advice, arrested and detained the appellant with the intention of removing her from the country. In the event, the appellant was compelled to obtain another provisional order (case No. HB-579-97) prohibiting her arrest and removal pending the determination of the prior application.

The *declaratur* sought by the appellant in case No. HB-107-96 was opposed. On 8 August 1997, it was dismissed by the learned judge and the interim interdict discharged with costs. The apposite rationale is well captured in the following passage of the judgment:

"Since the right of an alien to reside in Zimbabwe is a statutory right, it was up to Parliament to pass a law, to the effect that an alien woman, married to a citizen of Zimbabwe and not domiciled in the country, is entitled, by virtue of the marriage, to remain in the country without a residence or alien's permit. There is no provision to that effect in our statutes. In the absence of authority to the contrary, I find that marriage, *per se*, does not entitle an alien wife of a Zimbabwe citizen to reside in the country without the relevant permit issued in terms of the provisions of the Immigration Act and Regulations."

Although not strictly necessary to do so, the learned judge proceeded to decide a further contention addressed by the Chief Immigration Officer. This was that the marriage between the appellant and Edwards was one of pure convenience, entered into solely for the purpose of evading the immigration laws or to persuade the immigration authorities to allow the alien appellant to remain living unimpeded in the country of her husband. After an examination of various features, the learned judge expressed the opinion that the marriage was indeed so tainted.

Before this court, the argument advanced on behalf of the appellant focused entirely upon ss

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15(2)(d) and 8(2) of the Act. Simply put, it was that, not being a person as described in paras (a), (d), (e), (f) or (g) to s 14(1), the

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appellant, being "the wife" (as defined) of a Zimbabwe citizen, is not classified as a prohibited person in s 15(2)(d). And that being so, an immigration officer may not remove her, or cause her to be removed, from Zimbabwe under s 8(2) of the Act. Counsel for the appellant readily acknowledged that his contention was in conflict with the decision of this court in *Principal Immigration Officer & Anor* v *O'Hara & Anor* 1993 (1) ZLR 69 (S), where at 74E it was said:

"Now, s 14 of the Immigration Act declares certain classes of persons to be 'prohibited persons'. 'Prohibited persons' are by s 17 not allowed to enter or remain in Zimbabwe. Section 15 of the Act does no more than specify, for the avoidance of doubt, persons who are not prohibited from entering Zimbabwe. It does not confer on such persons any special rights when they are allowed to enter Zimbabwe."

And later at 77C-D:

"To construe the word 'may', in s 38(1) (of the Regulations), as meaning 'shall', would be to impose an unnecessary shackle which would unduly blunt the wide discretion reposed in the officers appointed to administer the Act. We do not perceive that it was the intention of the legislature to fetter the wide discretion vested in the Minister, as the voice of the supreme power in the State, to determine the conditions upon which former residents of Zimbabwe, who have lost their domicile in Zimbabwe, may resume residence in Zimbabwe."

I interpose to mention that by Immigration (Amendment) Regulations, 1993 (No. 12), SI 96C of 1993 dated 23 February 1993, s 38 of the Regulations was amended to read:

"(1) An immigration officer may in his discretion endorse the passport relating to an alien who -

(a) enters or has entered Zimbabwe and is not domiciled therein; and

(b) is proved to the satisfaction of an immigration officer or, in the event of an appeal to a magistrates court, to the satisfaction of the magistrate, to be the wife or child of a citizen of Zimbabwe.

(2) An alien's permit in terms of subsection (1) shall authorise the person concerned, subject to the provisions of the Act and these regulations, to enter and remain or to remain, as the case may be, in Zimbabwe.

(3) The Chief Immigration Officer may, for any reason which he considers sufficient, including the breach of any condition of the permit, cancel an alien's permit issued in terms of subsection (1).

(4) The Chief Immigration Officer shall not be obliged to give reasons for the cancellation of a permit in terms of subsection (3).

(5) Where an alien's permit is cancelled in terms of subsection (3) -

(a) the Chief Immigration Officer shall cause written notice of the cancellation to be served on the holder of the permit and shall state in the notice the date from which the cancellation shall take effect;

(b) the holder of the permit shall, unless authorised in terms of the Act or these regulations to remain in Zimbabwe, leave Zimbabwe on or before the date referred to in paragraph (a) or on such later date as the Chief Immigration Officer may fix by notice in writing to the person concerned."

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Subsequently, and on the very day the lower court delivered its judgment, subs (1) was amended by the insertion after "endorse" of "or refuse to endorse". See the present s 37 of SI 195 of 1998.

Counsel sought to derive support from the criticisms levelled at the *O'Hara* judgment in (1993) 5 *Legal Forum* No. 4 at p 25, which preferred the reasoning of the lower court in that case.

It is unnecessary in this appeal to consider the validity of the attack made by the writer of that article. (The judgment in *O'Hara* was given effect to in the Constitution of Zimbabwe Amendment (No. 14) Act 1996, under which para (d) to s 22(3) was repealed and substituted. See the remarks in *Kohlhaas* v *Chief Immigration Officer & Anor supra* at 444G-H). This is because I am satisfied that the argument is flawed by reason of the fact that, prior to her marriage, the appellant had remained in Zimbabwe in contravention of the Act, without a permit to do so. She became, therefore, a "prohibited person" in terms of s 14(1)(i) of the Act, as being:

"any person who has entered or remained in Zimbabwe in contravention of this Act or a repealed Act, whether or not he has been prosecuted for such contravention."

The appellant was, of course, prosecuted and convicted. It matters not that the verdict was given after she had married. Upon becoming a prohibited person, s 17(a) of the Act disentitled the appellant from remaining in Zimbabwe. The stigma acquired is not one the Minister is empowered to revoke in terms of s 14(7) of the Act.

Furthermore, it is implicit that s 15(2) classifies persons or classes of persons who are *not* regarded as prohibited persons under s 14. Thus the actuality of being a prohibited person at the date of her marriage to a citizen of Zimbabwe effectively disqualified the appellant from becoming a non-prohibited person under para (d) to s 15(2) of the Act. A contrary interpretation would give rise to the ability of a prohibited person to evade the restriction against entry or removal from Zimbabwe by marriage to a Zimbabwean citizen. It would defeat the predominant purpose behind immigration laws, which is to protect the State in the interests of its citizens by the control and supervision of aliens who seek to enter and remain within the country. The point is underscored by the following illustrations. Suppose a foreign prostitute, who under para (f) to s 14(1) of the Act is a prohibited person, were to enter the country illegally and marry a citizen of Zimbabwe. It would be absurd to suggest that by such marriage she would receive the protection of s 15(2)(d) against removal from the country. Or take the situation of an alien who enters Zimbabwe lawfully but thereafter commits theft - an offence specified in Part I of the Schedule to the Act. While serving a sentence of imprisonment and so before being removed as a prohibited person, she marries a Zimbabwean citizen. Obviously the provisions of

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s 15(2) would be inapplicable and thus not result in the eradication of her classification.

Accordingly, I share the view of the learned judge that the appellant's marriage did not enable her as of right, and without the grant of the relevant permit, to remain living in this country.

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During the course of the hearing, the court was informed that on account of her marriage to Edwards, the appellant had been issued with a certificate of registration as a citizen (the application having been made in terms of s 7(2)(c) of the Constitution). This occurred before the court *a quo* had ruled that the marriage was one of convenience and, in all probability, in ignorance of the fact that the nature of the marriage was then under judicial scrutiny. The appellant has now been warned that should this court uphold the finding that her marriage was one of convenience, measures will be taken to deprive her of citizenship pursuant to s 11 of the Citizenship of Zimbabwe Act [*Chapter 4:01*]. It is thus in the appellant's interests that I should indicate that this court does not consider that the learned judge was correct in his condemnation of the nature of the marriage.

At the date of his determination the learned judge did not have the benefit of the pronouncements of this court in *Kohlhaas* v *Chief Immigration Officer & Anor supra* at 445E-G, and *Hambly* v *Chief Immigration Officer (3) supra* at 287D-F. These cases hold that where immigration authorities allege that a marriage to a Zimbabwe citizen is one of convenience, the onus rests on them to show: (1) that the marriage was entered into for the primary purpose of evading the immigration laws; and (2) that there was an absence of intention to live together permanently as husband and wife. Each ingredient is of equal importance. Proof of the first alone will not suffice. But the ability to persuade the court of a lack of intention to establish a genuine marriage relationship will be enough.

It was with regard to the test to be applied that the learned judge fell into error. He appears to have placed the burden on the appellant to prove that her marriage was not one of convenience; and then found that because, on her own admission, the timing of the marriage was influenced by the decision in In re *Wood & Anor supra*, and was designed to prevent her removal, its occurrence did not entitle the appellant to reside in the country of her so-called husband. This approach overlooked the second ingredient of the test, which must co-exist with the first, before a court of law may declare the marriage one of convenience.

No investigation was undertaken by the immigration authorities to prove that the appellant and Edwards had from the inception no intention of creating a common home and consortium between husband and wife, for better or for worse. In fact, the evidence of the appellant, which was not

disputed, was to the contrary. Indeed, at the date when the application was heard, she and Edwards had been living together for a period in excess of thirty months. And there is no reason to suspect that at the present time the situation has changed.

That said, the appeal is to be dismissed with costs, save that in accordance with the agreement of the parties the order for costs relating to case No. HB-579-97 is set aside.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

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Webb, Low & Barry, appellant's legal practitioners

Coghlan & Welsh, respondent's legal practitioners

MATIBIRI *v* KUMIRE 2000 (1) ZLR 492 (HC)

Citation	2000 (1) ZLR 492 (HC)
Case No	Judgment No. HH-80-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	March 1, 2000
Judgment	April 12, 2000
Annotations	None

Civil trial

Flynote

Customary law - application - no agreement between parties that it should apply - application of customary law "unless the justice of the case otherwise requires" - meaning - history and application of provision

Headnote

The parties were married under customary law. After some 11 years, the union was dissolved according to customary law. The plaintiff moved out of the matrimonial home with the children. She claimed a share in the house, the basis of her claim being her direct and indirect contributions to the matrimonial home. It was argued that a tacit universal partnership had come into being.

Held, that in any civil case between Africans, "unless the justice of the case so requires", customary law applies where the parties have expressly agreed that it should apply or where, regard being had to the nature of the case and the surrounding circumstances, it appears either that the parties have agreed that customary law should apply or that it appears just and proper that it should apply. There was no evidence from which the inference could be drawn that the parties had agreed that customary law should apply.

Held, further, that the claim was one that was not cognisable at customary law and the plaintiff would have no remedy under customary law.

Held, further, that if the application of customary law does not conduce to the attainment of

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justice, the common law should apply. This has been the situation from 1891 up to the present time. It must be shown that customary law applies to the dispute, and that it must be just and proper that customary law should apply. Where customary law is found to be inapplicable to the just decision of any matter in controversy, the general law must apply.

Held, further, that the requisites of a tacit universal partnership are well-known. On the evidence, there was no partnership in this case. As that was the only basis on which the plaintiff made her claim, the claim would have to be dismissed.

Cases Considered

Cases cited:

Chapendama v *Chapendama* 1998 (2) RLR 18 (H)

Chapeyama v *Matende & Anor* 1999 (1) ZLR 534 (H)

Chikosi v *Chikosi (1)* 1973 (1) RLR 161 (G); 1973 (3) SA 142 (R)

Chikosi v *Chikosi (2)* 1973 (1) RLR 199 (G); 1973 (3) SA 145 (R)

Jena v *Nechipota* 1986 (1) ZLR 29 (S)

Jengwa v *Jengwa* 1999 (2) ZLR 121 (H)

Mashingaidze v *Mashingaidze* 1995 (1) ZLR 219 (H)

Muhlmann v *Muhlmann* 1981 (4) SA 632 (W)

Santam Insurance Co Ltd v *Taylor* 1985 (1) SA 514 (A)

Legislation considered:

African Law and Tribal Courts Act [*Chapter 237 of 1974*]

Customary Law and Local Courts Act [*Chapter 7:05*], s 3

High Commissioner's Order in Council, 1891, s 9

Native Law and Courts Act 1937, s 3(1)

Case Information

Mrs *C Mzavazi*, for the plaintiff

N Bvekwa, for the defendant

Judgment

Chatikobo J: The plaintiff and the defendant met in 1985. At the time the defendant was working and the plaintiff was a form 2 pupil at Nhowe Mission School. It seems that the plaintiff

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was being looked after by her sister who was married to the defendant's cousin. Shortly thereafter, the defendant assumed responsibility for the educational requirements of the plaintiff in terms of an arrangement whereby he undertook to pay for her tuition, boarding fees and other expenses, it being agreed, it seems, between the defendant and the plaintiff's sister that a marriage would in turn be arranged between the plaintiff and the defendant once the plaintiff finished school. I do not know if the plaintiff and the defendant were in love nor do I know how old the defendant was then or whether she was a willing participant in this arrangement which appears, on the face of it, to be less than proper. I will henceforth say no more about it, because it hardly has any bearing on the issues before me. Suffice it to say that the defendant did, while operating under the same arrangement, pay for the plaintiff's secretarial course.

In 1988, the two parties contracted a customary law union which was subsequently blessed with two children. The marriage was not solemnised. After the marriage, the parties moved into a house in Houghton Park, which was owned by the defendant, having been bought by him with his own resources. This house was later sold and, with the net residue realised from the sale, the defendant purchased a vacant stand in Letombo Park in Harare and commenced the construction of a dwelling house on the stand. The money he realised from the sale of the house in Houghton Park was not enough to complete the construction of the Letombo Park house, so he borrowed money from Founders Building Society to finance the costs of construction. This, too, was not sufficient so he also borrowed from a pension fund to complete the construction. They however moved into the house before the relationship between the parties broke up and were living there with their children and other relatives.

The union was dissolved in accordance with customary law in March 1999 and the plaintiff moved out of the Letombo Park house and returned to her people in customary fashion. She took with her property worth $20 000 to $25 000. The children went with her and, currently, she is claiming for a

contribution towards their maintenance from the defendant in the maintenance court. Their custody and maintenance is therefore not before me. What is before me is a claim by the plaintiff for a share in the Letombo Park house. The basis of her claim, as it appears in the pleadings (which, as is increasingly becoming the norm, are inelegant and vague) is that she contributed towards the construction of the house by purchasing groceries and household furniture so as to enable the defendant to channel his resources towards the construction of the house. She claims that this was done by agreement between her and the defendant. In addition, so she claims, she contributed indirectly as a housewife by performing the usual household chores.

In evidence, she stated that, if she had not assisted, the defendant would not have afforded to buy groceries for the family. To lessen the burden on the defendant she sometimes paid school fees for the children, water and electricity bills as well as levies paid in respect of security and maintenance of the Letombo Park complex, it being a sectional titles complex. In addition, she also bought items of furniture worth about $20 000. At some point she advanced the sum of

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$800 to the defendant to enable him to purchase electrical fittings for the house.

In 1995, the plaintiff started operating a flea market where she bought and sold goods which earned her a monthly profit of $16 000. In 1998, she commenced formal employment from which she earned a net salary of $2 500. Part of this income was utilised to procure household necessities for the family.

Part of the evidence led before me by the defendant was intended to show that the lifestyle of the parties, both before and after the customary union, was more connected to customary law than the general law. Such evidence was obviously meant to foreshadow or lay a foundation for the argument which was subsequently advanced during closing submissions that the case before me must be determined according to customary law. If that be the case, then the question of a universal partnership or a redistribution of assets in a matrimonial estate does not arise. I will deal with this argument later on in this judgment.

I propose to make findings of fact on the evidence led concerning the acquisition of the assets for which the parties are now fighting.

The plaintiff was, in a sense, brought up by the defendant. He it is who educated her and trained her for a job. When they got married the defendant already owned the Houghton Park house. When that house was sold a substantial portion of the proceeds from the sale went towards the construction of the Letombo Park house. After the marriage the plaintiff remained unemployed until 1995 when she commenced business at the flea market, a period of some seven years during which the defendant shouldered the

responsibility of caring for the family single handedly. Any monetary contribution which the plaintiff might have made was made during the last three years of the marriage.

The evidence of the plaintiff concerning the income she derived from the flea market was clearly exaggerated. The plaintiff herself did not appear confident about the figure of $16 000 per month which she gave as her net income. On further probing she found herself shifting ground. In any case, when she took up formal employment her net income was only $2 500. It is unlikely that she would have abandoned a highly lucrative business at the flea market to take up a job for which she was paid less than a fifth of what she was earning at the flea market.

I am also inclined to believe what the defendant said about the $800 which he got from the defendant, namely, that it was a refund of his money which he had used to pay for the release of the plaintiff's merchandise which had been confiscated by customs officials. Similarly, I consider it likely that the furniture which the plaintiff purchased was bought with money from the defendant or at least part of it. I accept, however, that during the time that the plaintiff was in receipt of an income, she contributed financially towards the purchase of household necessities. Naturally, she also contributed indirectly as a mother. The extent of her contribution is however not easy to quantify in monetary terms. What is clear is that her contribution did not go beyond what is expected of any wife in similar circumstances.

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The starting point in the determination of the dispute between the parties in this case is to identify the choice of law rule which applies to the case. If the case is one which is cognisable at customary law, the question which will follow as a matter of logic is whether the concept of a tacit universal partnership, which I have been urged to apply, can properly fit into the resolution of the dispute. If it does, then I will have to decide if, on the facts and the law as applied to the facts, a universal partnership has been proved.

CHOICE OF LAW RULE

The application of customary law in any given case is governed by s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*], which provides that "unless the justice of the case otherwise requires", customary law shall apply in any civil case where the parties have expressly agreed that it shall apply or where, regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that customary law should apply or where, after taking into account the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. In all other cases the general law shall apply. *In casu,* there is no express

CHATIKOBO J

agreement between the parties that customary law should apply. On the contrary, there is denial by the defendant that it should apply. Having regard to the nature of the claim and the surrounding circumstances, I am not convinced that the inference can be drawn that the parties have agreed to have the matter determined according to customary law. The claim is, in essence, based on the fact of the plaintiff having been married to the defendant customarily. What she claims is, in effect, a share in the matrimonial assets acquired by the parties, whether jointly or separately, during the subsistence of the customary law union. It is a claim which is not cognisable at customary law because, upon dissolution of an unregistered customary law union, the property acquired by the parties during the union becomes the property of the husband unless it can be classified as *umai* or *mavoko* property. See *Jena* v *Nechipota* 1986 (1) ZLR 29 (S). At customary law, therefore, the plaintiff has no remedy for a redistribution order, whether it be premised on a universal partnership or the Matrimonial Causes Act [*Chapter 5:13*] which does not apply to an unregistered customary law union. If she is without a remedy at customary law, is there a basis upon which she can obtain relief in terms of the common law as claimed by her?

The application of customary law in this country has had a chequered history. It was first recognised in s 9 of the High Commissioner's Order in Council of 10 June 1891 which provided that:

"decisions shall follow the laws and customs of the natives concerned, in so far as they are applicable, provided that if such laws and customs conflict or are not clearly proved or if such laws or customs should be found to be incompatible with peace, order and good government, the court may decide in accordance with the law which would regulate the decisions if the matter in dispute concerned persons of European birth or descent."

The High Commissioner's Order in Council was replaced by the Matabeleland Order in Council of 1894 which also recognised customary law in similar fashion. The next landmark

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development in this regard was the enactment of the Native Law and Courts Act 1937. It provided in s 3(1) thereof that:

"In the determination of any civil case between natives by any court of law, decisions shall be in accordance with native law and custom, but if native law and custom is inapplicable to the cause or matter before the court -

(a) any court of law other than a native court shall determine the case in accordance with the law of the Colony;

(b) a native court shall state all proceedings in the case to the Native Commissioner of the district for decision or transfer to a court of competent jurisdiction."

It can thus far be seen that while between 1891 and 1937 the courts had been directed by legislation to be guided by customary law, the Native Law and Courts Act made the application of customary law mandatory. But, more importantly for present purposes, the common law was made applicable in

all those cases where no remedy was available at customary law. Did that position ever change?

The Native Law and Courts Act was repealed in 1969 after nearly eighty years of application of customary law, during which common law remedies were applied to those cases where no remedy was available at customary law. It was replaced by the African Law and Tribal Courts Act [*Chapter 237 of 1974*]. It provided in s 3(1) that:

"(1) Subject to the provisions of this section and of any other enactment, in the determination by any court of law of any civil case between Africans or between an African and a person who is not an African the decision may be given in accordance with customary law.

(1a) Save as otherwise provided in this section, *unless the justice of the case otherwise requires* -

(a) customary law shall be applicable in any case which is between Africans and which relates to -

(i) seduction or adultery; or

(ii) the customary or guardianship of children; or

(iii) the devolution otherwise than by will of movable property on the death of an African ...; or

(iv) rights in land which is not held under individual registered title; or

(v) marriage consideration; or

(vi) a marriage between Africans contracted under customary law, whether or not it has been solemnised under the African Marriages Act [*Chapter 238*].

(b) the law of Rhodesia shall be applicable in any other case.

(4) In cases where no express rule is applicable to any matter in controversy, the court shall apply the principles of justice, equity and good conscience" (my own emphasis)

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Although there is no specific mention of the need to apply the general law to those cases where customary law was inapplicable, the section provides that customary law shall apply to the specific areas mentioned "unless the justice of the case otherwise requires". In my view, the only logical construction to place on the phrase "unless the justice of the case otherwise requires" is that if the application of customary law does not conduce to the attainment of justice then the common law should apply. This was precisely the case in *Chikosi* v *Chikosi (1)* 1973 (1) RLR 161 (G); 1973 (3) SA 142 (R) and *Chikosi* v *Chikosi (2)* 1973 (1) RLR 199 (G); 1973 (3) SA 145 (R) where it was held, in essence, that where the justice of the case requires, common law principles shall apply. If I am right in this regard, then it must follow that the provision in the Native Law and Courts Act, which empowered courts to apply common law principles where customary law was inapplicable, was re-enacted by the African Law and Tribal Courts Act. This Act remained in force until it was replaced by the Customary Law and Primary Courts Act 1981. Like its precursor, this Act also stipulates the circumstances in which customary law will apply unless the justice of the case otherwise requires.

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The phrase, "unless the justice of the case otherwise requires" has remained in all Acts passed by Parliament, including the current one, namely the Customary Law and Local Courts Act [*Chapter 7:05*] which, as already seen, provides for the circumstances in which customary "law applies unless the justice of the case otherwise requires". What emerges is that for the one hundred years during which customary law has co-existed with Roman-Dutch law, it has always been provided through legislation that where the customary choice of law rules were found to be inapplicable to the just decision of any matter in controversy, then, in that event, resort should be had to common law principles.

The historical approach to the interpretation of the phrase "unless the justice of the case otherwise requires" is one that is supported by respectable authority. In *Santam Insurance Co Ltd* v *Taylor* 1985 (1) SA 514 (A) at 524C, BOTHA JA said:

"Searching for the intention of the legislature on the question at issue merely by studying the words used in the section is to my mind an unrewarding, unedifying and finally abortive exercise. This is so because the section as a whole is so convoluted and the syntax so clumsy that the setting in which the exclusionary phrase of para (bb) appears renders it impossible to ascertain with any degree of certainty to what part of the preceding provisions the exclusionary phrase was intended to be related. One is left with the impression that when the draftsman came to write the exclusionary phrase he had lost his way in the maze of verbiage, with the result that a scrutiny of the language he used fails to reveal his intention."

And at 527B:

"Indeed, in a case such as the present, where the uncertainty of the legislature's intention relates to a recent amendment of an enactment which has been on the statute book for many years and which has been amended on a number of previous occasions, the historical perspective can be of great assistance in resolving problems of interpretation. And that is certainly the position in the present instance: while the wording of s 22(1)(bb) leaves the intention of the legislature shrouded in obscurity, an examination of the historical background of the section leaves no doubt as to what was intended."

When the African Law and Tribal Courts Act was repealed and the various succeeding Acts were passed, the legislature was no doubt aware of the judicial interpretation placed on the

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phrase "unless the justice of the case otherwise requires" in *Chikosi* v *Chikosi supra*. Had it been the intention of the legislature to depart from that interpretation, it would have said so in unmistakable terms. The continued use of the same language is consistent with an intention to maintain the same meaning.

The problem of women who, after contributing to the acquisition of property during the currency of an unregistered customary law union, find themselves unable to share in the estate on the dissolution of the union, has arisen on numerous occasions in this court. Different judges have, perhaps sadly, approached the problem in different ways. The approach

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I have adopted has not been adopted before. I have thus accentuated the discord.

In *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H), Robinson J sounded a warning to legal practitioners who sought to apply a general law concept, namely, the concept of a tacit universal partnership, to an unregistered customary law union without seeking to lay a foundation for applying the general law to a customary law situation. I do not read his judgment as laying down as a rule that common law principles cannot be invoked where customary law is found to be inapplicable.

Chapendama v *Chapendama* 1998 (2) ZLR 18 (H) was a case where the purported solemnisation of a customary marriage was found to be a nullity on account of the absence of one of the parties at the solemnisation ceremony. The claim to a share in the parties' "matrimonial" property was therefore dealt with on the basis that the parties were in an unregistered customary law union to which the provisions of the Matrimonial Causes Act [*Chapter 5:07*] did not apply. Chinhengo J, after applying the choice of law rules set out in s 3 and s 6 of the Customary Law (Application) Act [*Chapter 8:05*], found that customary law was not applicable and proceeded to determine the case by applying common law principles. Although the learned judge's reasoning does not dovetail with the reasoning I have adopted in this judgment, I respectfully agree with him. In particular, while he does not say, as I do, that it has always been permissible to apply common law principles whenever customary law is found to be inapplicable, he nevertheless determined the dispute before him on that basis. However, in *Chapeyama* v *Matende & Anor* 1999 (1) ZLR 534 (H), CHINHENGO J, contrary to the approach he took in *Chapendama*, proceeded on the basis that there was no remedy open to the litigants and that there was a need for the courts to adopt a reformative approach to the application of customary law. At p 536E-F the learned judge said:

"The recognition and exhortation that the law must adapt and be deliberately adapted to changing social and economic conditions is indeed a fundamental premise on which our jurisprudence in the area of customary law will develop as well as being a basis on which justice will be done and be seen to be done. The correct balance must, however, be struck between judicial law making and legislation. Where the law requires to be revolutionised, the function is largely that of Parliament to change it. But where, within the framework and spirit of the existing law, it is possible for the courts to interpret it in a purposive manner and render it more useful in changed circumstances, the courts will by such purposive and progressive interpretation achieve the same goal. The purpose of the law is to serve the people and meet their expectations."

Had these remarks been directed towards the interpretation of the Customary Law (Application)

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Act, which was then in force but which has since been replaced by the Customary Law and Local Courts Act [*Chapter 7:05*], I

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would have had no difficulty with their validity. It seems though - if I understand the context in which they were uttered - that they were primarily intended to set the stage for the finding which was ultimately made, namely, that a redistribution order under the Matrimonial Causes Act was not competent - which is true - and that customary law is not applicable - which is also true - and consequently that as there is no remedy available to the customary law wife. Faced with such an unsatisfactory situation, and bearing in mind the injustice which would flow from the failure to provide a remedy, the court must do its best to adapt the unsatisfactory and undeveloped concepts of customary law to the changed social and economic circumstances of an African woman who finds herself in a customary law union which disentitles her to a share in the "matrimonial property", even though for all intents and purposes she was a wife in every respect except the non-solemnisation of the union. The remedy could only be found by adopting a reforming exercise in which the court embarks on a rule-creating function so as to provide a remedy where none previously existed. I have held that it has always been permissible, in terms of the legislation dealt with above, to apply common law principles where customary law was inapplicable.

In *Mashingaidze* v *Mugombe* HH-3-99, GWAUNZA J lamented the fact that an unregistered customary law union is not treated as a normal marriage for the purposes of redistributing property on the dissolution of the union. Hers was a call for change with which I fully agree. It, however, is not inconsistent with the conclusion to which I have come, except to the extent to which, like Chinhengo J, she proceeded on the assumption that only a reformatory approach would provide a remedy where none exists.

In *Jengwa* v *Jengwa* 1999 (2) ZLR 121 (H) at 128D, GILLESPIE J made the following observations:

"The choice of law is governed by the Customary Law and Local Courts Act. If in terms of this choice it is shown that customary law applies, then it is not possible to extend any relief to the woman beyond her traditional entitlements and her personally held property."

I would say not only must it be shown that customary law applies to the dispute; it must be just and proper that customary law applies, otherwise the general law must apply. I however, acknowledge the pertinent observations made by GILLESPIE J concerning the pitfalls faced by litigants who try to allege the existence of a tacit universal partnership, but I consider that that is a problem which the litigants and their advisers must address before selecting a cause of action. The existence of such a problem does not render it impermissible to employ common law principles where it would not be just to determine the matter in accordance with customary law.

As far as the present matter is concerned, it was contended on behalf of the plaintiff that there was, prior to the dissolution of the customary union, a tacit

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universal partnership and consequently that upon the dissolution of the partnership, the parties became entitled to share in the property of the partnership.

The requisites of a partnership are well known. They are, firstly, that each of the partners brings something into the partnership or binds himself to bring something into it, whether it be money, or his labour or skill. The second requirement is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit and the fourth, which is common to all contracts, is that the contract between the parties should be a legitimate contract. See *Muhlmann* v *Muhlmann* 1981 (4) SA 632 (W).

At p 634G-H of the judgment, MCCREATH J stated:

"In the situation where one has to do with a relationship between spouses and there is no express agreement between the parties, the court must be careful to ensure that there is indeed an *animus contrahendi* and that conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation.

Thus in Hahlo *South African Law of Husband and Wife* 4 ed at p 290 the learned author states the following:

> 'However, there must be something to indicate that the parties intended to operate as a partnership. The mere fact that the wife worked in her husband's business without pay is not sufficient. Unless it can be shown that she made a substantial financial contribution or regularly rendered services going beyond those ordinarily expected of a wife in her situation, the courts will not be readily persuaded to imply a partnership agreement'."

Here we are not dealing with the proceeds of a business. We are concerned with a claim for a share in an incomplete house built with money borrowed by the defendant from a building society and a pension fund to which he is a member. The defendant is solely responsible for the repayment of the loans. The plaintiff's contention, which is disputed, is that whenever the defendant ran out of money due to the ongoing construction of the house, she would step in and buy household necessities or pay school fees and levies. She at times bought items of furniture. Even if I were to accept her *ipse dixit* in this regard, I would still be unable to go a step further and hold that her contribution exceeds that of a wife in her situation. If anything, her contribution was insignificant. She married the defendant at a time when she was unemployed. At that time, the defendant already owned the Houghton Park home. She remained unemployed until 1995, four years before the dissolution of the marriage, when she started operating a flea market. The income which she derived from this source has not been properly proved. She does not say the flea market was part of the partnership, only that some of the money derived therefrom went towards the purchase of household essentials. There can be no clearer indication of the absence of an agreement to pool resources

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together for the benefit of both parties. I cannot, on the evidence before me, conclude that there was a partnership.

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It may well be that if the plaintiff had identified a suitable cause of action, she could have obtained some relief. She nailed her colours to the mast of the concept of a universal partnership, the existence of which has not been established.

In the premises, the plaintiff's claim is dismissed with costs.

Makarau & Gowora, plaintiff's legal practitioners

Vasco Shamu & Associates, defendant's legal practitioners

COMMISSIONER OF POLICE *v* COMMERCIAL FARMERS' UNION 2000 (1) ZLR 503 (HC)

Citation	2000 (1) ZLR 503 (HC)
Case No	Judgment No. HH-84-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	April 10, 2000
Judgment	April 13, 2000
Annotations	None

Civil application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(1) - protection of law - duty of police to afford such protection - separation of powers - relationship to rule of law - relevance to failure of police to take action where normally action would be taken

Police - duties - duty to enforce law and protect constitutional right to protection of the law - duty to disregard ministerial or other orders to the contrary

Practice and procedure - order - by consent - must be complied with - timeous application in which explanation offered for non-compliance - effect of

Headnote

Following the invasion and occupation of numerous white-owned commercial farms by groups calling themselves "war veterans", the respondent obtained a court order, issued by consent, which, among other things, declared the invasions to be unlawful and required the police, within seventy two hours of the issue of the order, to inform the invaders that the invasions were unlawful and to remove them if they did not leave the farms. The order also required the police

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to disregard any executive instructions to the contrary. Six days after the order was issued, the applicant applied to the court to delete the paragraphs of the court order requiring the police to disregard contrary instructions from the executive and requiring the police to evict the invaders. The application did not address the other parts of the order directed at the police, requiring the police to inform the invaders that the invasion was unlawful. These other parts of the order were not complied with. Although the application was not made on an urgent basis, the respondent applied for the matter to be treated as urgent.

The main ground for the application was that, after the order was issued, the police realised that they has insufficient resources to effect the evictions. The applicant cited the size of the police force, the number of the invaders, the ongoing fuel shortage in the country, and transport and budgetary constraints. It was also argued for the police that to intervene in a situation that was charged with political and racial overtones would be ill advised and would ignite a powder keg. The land distribution and ownership pattern in Zimbabwe was iniquitous and should be rectified in the shortest possible time. The applicant applied, at the hearing, for the deletion of the order to instruct the invaders that the invasion was

unlawful. The applicant argued, with regard to the concept of the rule of law, that enforcement of an unjust and inequitable ethnically based ownership structure, through the application of brutal state power, such as demanded by the respondent, would not promote the rule of law.

It was argued for the respondent that the applicant should not be heard because, having failed to carry out the court's orders within seventy-two hours, he was in contempt. The application to delete the order to inform the invaders of the illegality of the invasion was opposed. The respondent argued that, in any case, the principle of finality of litigation meant that the application could not be entertained. The respondent also asked that the applicant be ordered to pay the costs personally.

Held, that a court order must be obeyed until it is set aside. The wilful refusal to obey a court order amounts to contempt of court. It cannot be said, however, that there is wilful disobedience to a court order where the person against whom it is made timeously goes back to court to explain why he considers that he is unable to comply with the order. In the present case, it could not be said the police had not wilfully disobeyed the order to evict the farm invaders as they had returned to court timeously to explain why they felt unable to comply with the order. As Saturdays and Sundays do not form part of the period within which a court order must be carried out, the application had been made timeously. It was different, however, in respect of the order against the police that they must inform the invaders of the illegality of their actions. This order remained in force and had to be complied with.

Held, further, that the application was concerned with the enforcement of the court's order, not with the question of land distribution.

Held, further, that although the police might be stretched, the fact was that they had not even attempted to enforce the court order. If some attempt has been made to enforce the order, the

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court's attitude might have been different.

Held, further, that police intervention was unlikely to ignite an already explosive situation. Where the executive had acted on the previous farm invasions, the invasions had ended.

Held, further, that the protection of the law and the police's duty in the that regard provided under s 18(1) of the Constitution extended to protection in respect of a person's civil rights. In the present case the civil rights of members of the respondent were violated. An order was issued by the court to the applicant to protect the civil rights of the petitioners. The consent order could be equated to and was in effect an order of *mandamus,* for it required the applicant to act to prevent the violation of the civil rights of respondent's members. The police have a duty to enforce the law and investigate crime and to disregard ministerial orders to the contrary. The applicant clearly had the public duty to enforce the consent order and to afford the members of the respondent the protection of the law enshrined in s 18(1) of the Constitution. If the court were to accede to a variation, amendment or other detraction from the order, it would not be upholding its sworn duty - to uphold the law of Zimbabwe. The applicant could not be allowed to adopt stratagems to obviate the absolute necessity of implementing an order of the court, more so where such order has been issued with his informed consent.

Held, further, that where a written constitution, amenable to amendment by the people is in existence, and statute laws, old and new exist, and which the people's representatives can amend or repeal, an argument such as the one advanced by the applicant with regard to the rule of law was spurious. The rule of law meant that everyone must be subject to a shared set of rules that are applied universally and which deal on an even-handed basis with people and which treat like cases alike. It meant that those who are affected by official inaction should be able to bring actions on the basis of official rules - i.e. the law - to protect their interests.

Held, further, that the applicant had not only failed to lay the basis for the relief he sought under

the common law but has also failed to satisfy the court that this would be an appropriate case to grant such relief. Under r 449 of the High Court Rules, the applicant had to give a reasonable explanation of the circumstances in which the consent order was entered and there must be a *bona fide* defence on the merits of the case which *prima facie* carries some prospect of success. As the applicant's legal representatives were involved in the formulation of the consent order and in amending it to suit the applicant's position, there was no basis on which the court could revisit the order.

Held, further, that in view of the lack of support for the applicant from the executive, he should not be penalised personally with regard to costs.

Cases Considered

Cases cited:

Bheka v *Disablement Benefits Bd* 1994 (1) ZLR 353 (S)

Binza v *Acting Dir of Works & Anor* 1998 (2) ZLR 364 (H)

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Chavhunduka & Anor v *Commissioner of Police & Anor* 2000 (1) ZLR 418 (S)

Culverwell v *Beira* 1992 (4) SA 490 (W)

Deweras Farm (Pvt) Ltd & Ors v *Zimbank* 1997 (2) ZLR 47 (H)

Firestone SA (Pty) Ltd v *Genticuro AG* 1977 (4) SA 298 (A)

Forum Party of Zimbabwe & Ors v *Min of Local Govt & Ors* 1996 (1) ZLR 461 (H)

Georgias & Anor v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S)

Kandy Farm (Pvt) Ltd & Anor v *Eastwood* 1996 (2) ZLR 729 (S)

Kassim v *Kassim* 1989 (3) ZLR 234 (H)

Ndebele v *Ncube* 1992 (1) ZLR 288 (S)

R v *Metropolitan Police Commissioner*, ex p *Blackburn* [1968] 1 All ER 763 (CA)

RAG (Pvt) Ltd v *Huizenga NO* 1986 (2) ZLR 203 (S)

Stumbles & Rowe v *Mattinson* 1989 (1) ZLR 172 (H)

Case Information

P A Chinamasa, Attorney-General, for the applicant

A P de Bourbon SC, for the respondent

Judgment

Chinhengo J: On 16 February 2000, Zimbabwe's Liberation War Veterans embarked on a campaign to occupy commercial farms and ranches owned or occupied by white people in Zimbabwe. The War Veterans were joined in this campaign by other land hungry black Zimbabweans or by other Zimbabweans who were aggrieved by the pattern of land distribution and ownership in Zimbabwe. This campaign commenced in Masvingo Province and it soon spread to other parts of the country. The campaign has now earned itself the epithet "farm invasion". I shall for convenience use this epithet also. When many more farms and ranches throughout Zimbabwe were thus invaded, the respondent applied to this court in Case No. HC-3544-2000 for an order that would, but for subsequent events, have brought about a cessation of the campaign. The order was sought against Border Gezi, the Governor for Mashonaland West, Dr Chenjerai Hunzvi, the Zimbabwe National Liberation War Veterans Association and the Commissioner of Police as first, second, third and fourth respondents respectively. In that application, an order was granted by consent by my brother Garwe J on 17 March 2000 ("the Consent Order").

CHINHENGO J

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The order reads:

"It is ordered that -

1. Every occupation of any property listed in the Schedule hereto or any other commercial farm or ranch in Zimbabwe that has been occupied since 16 February 2000 in pursuit of any claim to a right to occupy that property as part of the demonstrations instigated, promoted or encouraged by any person, is hereby declared unlawful.

2. All persons who have taken up occupation of any commercial farm or ranch in Zimbabwe since 16 February 2000 in pursuit of any claim to a right to occupy that property as part of the recent demonstrations instigated, promoted or encouraged by any person shall vacate such land within 24 hours of the making of this Order.

3. The first three respondents be and are hereby ordered not to encourage allow or otherwise participate in any demonstration in protest against the holding of commercial farming or ranching land in Zimbabwe according to the race of the present owners or occupiers thereof in so far as such demonstration:

    3.1 comprises the entry upon any farm or ranch by five or more persons; and/or

    3.2 persists for more than two hours; and/or

    3.3 extends at any time to the presence of any of those persons at a point closer than 100 metres from any point of any residence on the property or into the area included in any security fence; or

    3.4 purports in any way to be designed to acquire control of the farm, ranch or any part thereof otherwise than in accordance with the laws of Zimbabwe;

    3.5 This order shall not prevent the 2nd Respondent from addressing any such occupants in order to achieve the peaceful removal or ejectment of such occupants.

4. The applicant shall forthwith announce:

    4.1 on radio and television over periods of not less than 20 seconds each, four times a day in each of Shona, Ndebele and English for three successive days; and

    4.2 through the medium of two major newspapers circulating within Zimbabwe where the announcements shall appear in respect of advertisements covering not less than two columns by 15cm on three successive days.

    The precise terms of the first four paragraphs of this Order and those media reports shall be deemed to be adequate notice for purposes of r 37, Order 5 of the High Court Rules 1971, to persons subject to the Order set out in para 2 hereof of their obligation to vacate those farms.

5. The fourth respondent is ordered to direct all officers and members of the Zimbabwe Republic Police that:

    5.1 the uninvited presence on any ranch or farm of any persons for more than two hours can constitute the offence of contravening paragraph (b) or para (c) of subs (1) of s 5 of the Miscellaneous Offences Act [*Chapter 19:05*];

    5.2 any report of any such presence shall be investigated immediately and unless the persons present have good and sufficient reason to remain on the farm, they shall be removed from the farm;

    5.3 any claim that the persons' presence on the farm is justified by virtue of a desire to occupy the land because of a wish to protest against racial distribution of commercial farming land in Zimbabwe or the State's obligation to provide him or herself or others with land on which to settle is not a good enough and sufficient reason;

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5.4 all persons who have taken part in the recent demonstrations instigated, promoted or encouraged by any person shall be ordered to vacate the land that they occupy forthwith and all those who remain in occupation 24 hours after the making of this Order or who resume occupation or re-enter the land are to be arrested and charged with such offences as they may have committed.

6. The fourth respondent is ordered to disregard any executive instruction that he may receive, from any person holding Executive Power in Zimbabwe, to the effect that the Zimbabwe Republic Police or any member thereof is not to assist any Deputy Sheriff or Messenger of Court in the service and enforcement of any order of eviction made by the civil courts of Zimbabwe and he is ordered to direct all members of the Zimbabwe Republic Police to disregard any such instruction.

7. The fourth Respondent is also ordered to disregard any such executive instruction to disregard any offence other than a First Schedule Offence, as defined in the Criminal Procedure and Evidence Act [*Chapter 9:07*] that may be committed in the course of demonstrations in favour of the redistribution of land in Zimbabwe and he is ordered to direct all members of the Zimbabwe Republic Police to disregard any such instruction.

8. In so far as any person who gained occupation of any property listed in the Schedule on or after 16 February 2000 in association with the aforementioned demonstrations may remain on the land more than 72 hours after the making of this Order, the fourth respondent is ordered forthwith to deploy such manpower, having regard to available resources, as is reasonably necessary to evict all such persons from any land with their families and their belongings and to this end the Fourth Respondent shall:

   8.1 ensure that all persons so evicted are correctly identified and that their names and addresses are recorded; and

   8.2 ensure that all offences that are reported to have occurred on each such farm are fully and properly investigated.

9. The costs of this application shall be reserved for determination at a future date."

The order by consent was granted by Garwe J after the parties, all represented by their legal practitioners, had haggled over the wording of the order for some time outside the judge's chambers. It is evident that certain amendments were made to the respondent's original draft order as a result of the haggling that took place. For instance:

(a) the reference by name to "Cde Border Gezi the first respondent, Dr Chenjerai Hunzvi the second respondent, or the Zimbabwe National Liberation War Veterans Association, the third respondent or by any one or more of them" as being the persons who had instigated, promoted or encouraged the farm invasions was deleted from para 1 of the order and the phrase "any person" substituted;

(b) a similar reference in para 2 was also deleted;

(c) in para 3 the words "interdicted from encouraging allowing or otherwise participating", which was the substance of the relief sought against the first three respondents, were deleted and substituted with the words "ordered not to encourage, allow or otherwise participate";

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(d) a new subpara 3.5 was inserted and reads as it appears in the consent order;

(e) para 8 was amended by the insertion of the words "having regard to available resources" to qualify the requirement that applicant was to deploy manpower necessary to effect the evictions. Subparagraph 8.1 was also amended in respect of the identification by name and address of the farm invaders by inserting the phrase "as far as is possible";

(f) a whole paragraph was deleted from subpara 8.2 which read:

> "and the fourth respondent is ordered to report to the registrar of this Honourable Court what the police have done in this regard (in respect of full and proper investigation of offences reported to have occurred on each farm) in every Province by 31 March 2000, such report to be filed by 7 April 2000. A copy of such report shall also be served on Messrs Coghlan Welsh and Guest the legal practitioners for the applicant";

(g) Paragraph 9 was amended from requiring that the costs of the application be paid by the first three respondents jointly and severally to that the costs "*be reserved for determination at a future date*".

Paragraphs 6 and 7 of the original draft order were not amended at all. The evidence placed before me is that the amendment to para 8 was insisted upon by the applicant's legal practitioners, who wished to make it clear that the applicant was to be required to deploy such manpower as was reasonably required to effect the evictions having regard to the available resources.

It is necessary for me to analyse the import of the order by consent in order to provide the background necessary for a better appreciation of the arguments advanced in this application.

The salient features of the order by consent were the following:

(a) the invasion of the farms were declared to be unlawful (para 1);

(b) all the farm invaders were to vacate the land within 24 hours of the making of the Order (para 2);

(c) the first three respondents in that application were ordered not to encourage, allow or otherwise participate in the farm invasions. "*Farm invasion*" was defined by reference to number of person involved, the duration of their sojourn on the farm, proximity to residential premises on the farm, and the purpose of the invasion (para 3);

(d) the second respondent in that application was allowed to address the farm invaders to achieve their peaceful removal from the farms (para 3.5);

(f) the respondent was required to place advertisements through the electronic and print media for a period of three days as notice to the farm invaders of the obligation to vacate the farms (para 4);

(g) the applicant was ordered to advise members of the police force that the farm invasions constituted a criminal offence under the Miscellaneous

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Offences Act; that the police force was going to investigate the presence of uninvited occupants on the farms and that such uninvited occupants would be removed from the farms; that any claim that the occupation of the farms by the invaders was justified as a protest against racial distribution of land in Zimbabwe was not a good and sufficient reason to remain in occupation of the farms and that the farm invaders were required to vacate the farms within 24 hours of the making of the Order and those who remained in occupation, or re-entered the land would be arrested and charged with any offences which they may have committed (para 5);

(h) the fourth respondent was ordered to disregard any instruction from the executive arm of Government, or any member thereof, which may have required the police not to assist any deputy sheriff or messenger of court in carrying out the evictions or any instruction to disregard any offence committed during the farm invasions (paras 6 and 7);

(i) the fourth respondent was ordered to deploy such manpower "having regard to available resources" as was reasonably necessary to evict the farm invaders (para 8).

It must be noted that the applicant did not file any opposing papers to the respondent's application. The applicant had four days within which to file any such opposing papers if he had wished to do so. He was content to negotiate with the other parties and, in particular, the respondent for an order by consent to be issued by the court. From the papers before me, it is clear that the applicant through his legal representatives actively participated in drawing up the order by consent. They must have, over a period of four days, actively considered the ramifications of the order which the applicant in that matter was seeking.

After the order by consent was issued and after the 72 hours had expired from which moment the applicant was required to carry out the evictions, the applicant, instead of enforcing the court order, filed, on 23 March 2000 an application in which he sought an order to delete paragraph 6, 7 and 8 of the Consent Order. This application was made as an ordinary court application which in the nature of things, would have been heard after at least two months from the date of filing it. The application was not made on an urgent basis which would have meant that the matter could be heard as a matter of priority. The effect of this application was to render the enforcement of certain parts of the order by consent *sub judice* with the result that the applicant was not to act in terms of paragraphs 6, 7 and 8 of the consent order. If this was the effect of the application, the remaining portions of the consent order would be given effect to. This meant that in terms of para 1 of the consent order, the farm invasions would remain

illegal; in terms of para 2 the farm invaders were to vacate the farms within 24 hours; in terms of para 3 the words "farm invasion" were to be understood as defined and Dr Chenjerai Hunzvi could address the invaders with a view to have them move off the farms; in terms of para 4 the respondent would advertise the order as notice to the farm invaders to vacate the farms and in terms of para 5 the applicant would inform members of the police force about the criminal

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nature of the farm invasions, the requirement that the invaders should move off the farms or be moved by the police, that their reasons for remaining on the farms were not good and sufficient reasons to do so, and that if they remained on the farms they would be charged with offences that they would have committed in addition to being forcibly evicted.

The respondent filed its opposition to the application for the order to delete paragraphs 6, 7, and 8 of the Consent Order. The respondent warned that it would also apply to court for the application to be heard on an urgent basis. The respondent then filed an interlocutory application in which it sought an order that the applicant was, if it so wished, to file its answering affidavit in the main application by 1.00 p.m. on Wednesday 5 April 2000 and that the main application should be set down for hearing on Thursday 6 April 2000 at 10.00 a.m. Another order by consent was issued by Garwe J on 6 April 2000. The main application was set down for argument for 10.00 a.m. on 10 April 2000. The applicant was to file his answering affidavit and heads of argument by 2.00 p.m. of Friday 7 April 2000, and the respondent was to file its heads of argument by not later than 8.30 a.m. on Monday 10 April 2000. The application was to be heard in open court.

As a result of this, the second consent order, the matter was set down before me on 10 April 2000 as directed by Garwe J. The applicant's heads were filed out of time on Monday, just before the hearing commenced. A satisfactory explanation was proffered by the Attorney-General for this non-compliance with the terms of the second consent order. Argument was heard over a period of some three hours from about 10.00 a.m. to about 1.00 p.m.

The applicant's case was that soon after the order by consent of 17 March 2000 was issued by Garwe J, it became apparent to the applicant that the order was not possible of enforcement by the applicant. The applicant averred that it did not have adequate resources to enforce the order and that even if the resources were available the enforcement of the order was ill advised as it would worsen the security situation in the country. I will examine these grounds in detail.

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LACK OF RESOURCES

The applicant acknowledges that the farm invasions constitute a contravention of the Miscellaneous Offences Act. The intensity and pattern of the offences has, in the applicant's words, "turned the problem into a monumental one". He says that as, at the date of the hearing, over 1 000 farms had been invaded by more than 58 000 people. The applicant avers that the "scatteredness" of the farm invasions pits the task of enforcement against the meagre resources available to the police force. He explained that the police operate through police stations dotted all over the country with a majority of these stations concentrated in the urban areas because of higher population concentrations. An average rural police station has a complement of sixty officers and covers a radius of 100 km or more. The police establishment is about 20 000 men and women. The force had, as at the time that the affidavit was filed, 2 100 serviceable vehicles, including 894 vehicles acquired from the British Government in terms of a bilateral agreement which prohibited the use of the vehicles in riotous situations. The farm

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invasions would be viewed as a riotous situation in terms of the agreement, he said.

In respect of other resources, the applicant avers there is an acute fuel shortage in the country that has hampered the work of the police force. The force has not been spared from the fuel shortages. The police force has already exhausted its budget for rations and so it would not be able to feed its members on active duty on the farms and ranches. The operation itself requires additional resources in the form of troop carriers, ammunition and tear smoke which the force does not presently have. It would require an additional allocation of funds. Some parts of Zimbabwe have become inaccessible because of the havoc wreaked by the recent cyclone, Eline, and if deployments were made to these areas it would be extremely difficult to provide back-up service and reinforcements. The Zimbabwe National Army caused a public outcry when it was involved in the food riots in Harare in 1998 and it is reluctant to get involved this time around.

The respondent submits that the averment that the police force has no resources to handle the farm invasions does not hold water. It is grossly exaggerated, unfounded and contrived. The suggestion that the police establishment of 20 000 would not be able to contend with about 58 000 is untrue. The pattern of the farm invasions has been that the numbers of farm invaders constantly fluctuates. There are desertions. Individual groups move from farm to farm, or ranches, over a couple of days. The pattern has been to create "hot spots of terror" in various districts which are designed to constitute threats and examples for other farms which were or are invaded on a less offensive, but nonetheless illegal, basis in the areas surrounding each

"hot spot". The numbers of invaders is therefore much less than that given by the police.

The respondent avers that the greater number of farm invaders are not war veterans. The majority of them are unemployed youths from urban and rural township areas and some of them have been paid to participate in the campaign. The respondent estimated that the number of war veterans involved was below 1 000. The respondent relied on situation reports submitted to it from farmers throughout the country whose farms have been invaded. Such farmers, in my view, would have no interest in minimizing the scale of the invasions so far as the numbers of the invaders were concerned. On the contrary, they would be expected to inflate the numbers of the invaders so as to create a greater image of crisis. Although I cannot, on the evidence, make a definitive finding on the numbers of farm invaders, I think that they are large enough to cause concern on the part of the invaded, which is common cause, and large enough to stretch to the limit the resources available to the police in handling the evictions.

The respondent does not accept the claim that the police force does not have enough manpower to handle the situation. The respondent say that the police force has a well trained and equipped Support Unit set up to deal with situations such as the situation prevailing in the country at the moment. In the respondent's view there is no need to deal with all situations simultaneously because the level of aggression on different farms varies and it is relatively limited on each day. The respondent believes that the real reason for failing to commit manpower to the termination of farm invasions is to be found in applicant's own views of the

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farm invasions which views are sympathetic, and not antagonistic, to the farm invasions.

I incline towards the views expressed by the respondent in respect of the adequacy of manpower resources without at all minimizing the assessment of the applicant. The police force is the most visible and deterrent expression of State power in the daily lives of the citizenry. Its mere presence and involvement is a sufficient deterrence on its own against disobedience of the law. It represents an organisation that has the ability to overwhelm any person with physical force if that person resists its demands. It can call on that force any time to enforce the decisions of the courts. It can ask political leaders to deploy more resources, manpower and material, if that is necessary to resist a challenge to its authority. Its potential power is enormous, for in the last resort it can call upon all the organised force of the State. It is an immensely powerful organisation.

The respondent further avers that the police force could, in its effort to suppress the invasion, have enough vehicles available to it. Vehicles could be taken from other Ministries or borrowed from the Zimbabwe National

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Army. The farming community itself is more than willing to make vehicles available to the police. The fuel situation, though extant, is not an insurmountable obstacle and therefore it is not acceptable as a reason for the police not to act. The State regulates the distribution of fuel and it can prioritise fuel supplies to the police force for the exercise. The respondent notes that in any case the fuel supply situation has much improved to about 80% of normal supplies.

The excuse that the police does not have the money to provide rations to its members is for the same reasons also unacceptable. Equally, so the excuse that it has still to acquire and stock up additional resources such as troop carries, ammunition and tear smoke. The financial year began in January 2000 and it is hardly possible that the police force would have exhausted its budget for rations. The effect of Cyclone Eline has no real impact on the exercise as very few properties fall within the areas affected by the cyclone and in any case the national army would be able to assist.

The applicant denies in its answering affidavit that the numbers of people involved in the farm invasions is exaggerated. He avers that the police establishment of 20 000 includes non-operational staff such as nurses, doctors, technicians and administrators. The number of farms invaded continues to grow and the numbers of people involved to swell as more and more people are joining in. The police is not aware of fluctuations in number and of desertions. In its answering affidavit the applicant does not sufficiently dispute the allegation that persons other than war veterans constitute the larger majority of farm invaders. It states that it is not aware of the exact composition of persons involved nor the diversity of their reasons for their involvement. The support unit comprises some 1 645 members as a part of the whole force strength of 20 000 members. That unit is over-stretched because of other national commitments and as such it is inadequate to deal with the situation. The police stations country-wide are equally over-stretched even to deal with ordinary issues of policing and for this reason it is intended to increase the police strength by about 6 000 members. The applicant avers further

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that the shortage of resources is a real predicament that the police force finds itself in. In respect of motor vehicles, the applicant states that it is general knowledge in the country and therefore common cause that police stations do not have adequate vehicles for the normal policing duties. He further states that it is beyond his authority to take vehicles from other ministries or State agencies. So far as the money for rations and additional resources is concerned, the applicant avers that the police did not budget for a situation of the magnitude such as is concerned in this application.

One must express some sympathy for the applicant in respect of the availability of resources. Certain averments he makes tell of what is generally

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known by many in this country. The police do not have enough vehicles for their normal policing work. They would therefore be severely constrained in the present situation. Fuel supplies have, over the past few months, been insufficient to meet the ordinary requirements of the motoring public. Even if priority was given to the police the shortage of fuel would still be a factor to reckon with. That the police has no money to ration its members, whilst possible, is an assertion which is subject to some doubt. No figures were placed before the court to prove the absence of funds for rations. It is hardly four months into the financial year and one would think that funds for this purpose are still available. It would be assumed that in its planning and financial estimates the police force would provide for contingencies.

Greater sympathy must, I think, be expressed for the applicant in respect of receiving additional resources from the executive arm of Government in the form of either obtaining vehicles from other Government ministries or agencies or in the form of directing the national army to render any assistance. It is true that resource or additional resources can only be made available by the Executive. The Executive is not a party to this application, so it has not put its position across and should therefore not be condemned without a hearing. What, however, is clear from the papers before me and what has not been strongly challenged is that the Executive appears sympathetic to the cause of the present campaign by the war veterans. That that sympathy exists founds or is the basis of the formulation of paras 6 and 7 of the consent order. And that being the case, the Executive would not be willing to provide further assistance to the police force. I do not intend to make a finding on the attitude of the Executive but suffice it to state that the applicant may not, as he urges the court to accept, be able to access additional resources without the Executive providing such additional resources.

The sympathy which I have expressed for the applicant should not blind anyone from seeing the more fundamental aspects of this case in their proper context. The factor of resources is what the parties recognised when they agreed to the formulation of para 8 of the consent order. The underlying perception must have been that the police force would, to the best of its ability and with the resources available to it, act to terminate the farm invasions. It must have been naturally hoped that the Executive would provide whatever additional resources, within its means, as were required by the police force. What is, however, glaringly apparent is that the applicant has not acted at all. His explanation is that after the order was issued a fresh assessment of the situation revealed that the police could simply not embark on such a

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mammoth task on the resources available to it. And for that reason it did not act. It must be apparent that I do not find this reason to be convincing enough. I shall revert to this explanation for the omission to act later in the judgment.

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THE IGNITION OF THE POWDER KEG ARGUMENT

It was urged upon the court by the *Attorney-General* that the lack of resources should not be viewed in isolation from another and perhaps more important consideration. If the consent order was enforced, a powder keg would be ignited, he said, basing his submissions on the applicant's averments. The situation was charged with political and racial overtones, and any intervention by the police would be ill-advised. The farm invasions had not only been politicised and racialised but internationalised as well. The British Government had jumped into the fray. South African white opposition parties had jumped into the fray. The land question in Zimbabwe had been portrayed as a black on white confrontation. Those who had jumped into the fray did so on the side of the white commercial farmers against the aspirations of the black people of this country. Land redistribution on its own is always an emotional issue but when it is coloured by factors of race, colonial history and international interference it becomes a more intractable problem. The farm invaders had threatened to resist any police action to evict them and the police were not taking this threat lightly. Some of the invaders may in fact be armed. In his own words, the applicant described his assessment in these words:

"9. Those people who have invaded the farms have threatened resistance and as Police we cannot take this lightly. However, of greater concern to the police is the fact that even taking a single intervention on a specified farm, such intervention cannot and should not be taken naively as a once off intervention. In the event of resistance, and in this regard police should anticipate that resistance can take many forms from the peaceful to the not-so-peaceful and to violence. Police may be required to provide back-up services such as reinforcements. Worse if resistance is violent and takes the form of armed resistance. More back-up services become an imperative in the planning and implementation process.

10. Also to be anticipated is what the reaction might be countrywide when news of Police intervention in one place reaches the other invaded farms not enjoying Police protection. In their assessment, Police intervention in one place will apocalyptically provide the match stick that will ignite this beautiful country of ours into a bloody conflagration. In their painstaking consideration of the question of enforcement of the order the police have looked over the edge of the cliff, over the brink and they see nothing but an abyss if police intervene. Police feel enforcement of the order will render the law and order situation worse than it is at the present moment and this probably ranks the understatement of the century. The purpose of this application is to bring, figuratively speaking, this Honourable Court to the edge of the cliff and invite your Lordship to peep over the edge and be persuaded to agree that an enforcement of the order is tantamount to falling over the cliff, not for the court of course, but for the entire country. Committing hara-kiri for the people of this country is a decision that should not be taken lightly. It is strongly contended that from a security point of view given that the country is racially and polically polarised and is sitting on a powder keg, police enforcement

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of the Order will provide the match stick to light up the powder keg. This Honourable Court should weigh heavily and decide whether by ordering enforcement of the order it is not going down in history as providing the match

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stick to torch the country. Such eventuality is calamitous for the country.

11. ... Police contention is that the land question is a complex, involved, divisive problem which is better resolved in the political arena. The countrywide trespasses are but a tip of the land question iceberg. A spirited police attack against a single farm invasion will not solve the problem but instead serve to trigger violent reactions which in its view might risk some of the members of the respondent being killed. It will not take on its shoulders that awesome responsibility. Equally the courts are not the forum where the land problem can be solved. It required an armed struggle to begin to attempt a solution to the problem. Even in circumstances characterised by goodwill and co-operation, which unhappily are non-existent in our present situation, land reform and distribution problems take years to resolve. This Honourable Court should be mindful of that."

These are lofty words indeed.

The applicant filed a supplementary affidavit in further support of the powder keg submission. In that supplementary affidavit, he drew the court's attention to an incident that took place in Marondera on 4 April 2000 in which a farm owner, a Mr Ian Kay was assaulted and a policeman was shot and killed. In my view, that incident is as much supportive of the respondent's argument as it is of the applicant's argument.

The applicant gives a historical and current conspectus of the land question. He says that the land question in Zimbabwe seems to have evaded a solution over the years. The landless have hungered for land without much palliation. The armed liberation struggle was waged principally over the question of land ownership as between whites and blacks. He laments that twenty years after independence about 4 000 white commercial farmers continue to own about 13.3 million hectares of the best land in the country whilst the majority of the black people of this country remain divorced from such land and the numbers of them who have no role to play in the agricultural economy of the country except one of dependency continues to grow. He describes the land distribution and ownership pattern in Zimbabwe as iniquitous and opines that it should be rectified in the shortest possible time. Unfortunately, for the applicant, this application is not, as I shall show later, essentially concerned with the question of land ownership and distribution in Zimbabwe. It is singularly concerned with the question of the enforcement of an order of this Honourable Court. I shall, therefore, not be sidetracked from the essential issues before me in this application.

The respondent does not subscribe to this "powder keg" submission and submits that in any event there are dozens of smaller powder kegs that are being created by the failure of the police to take action. The situation that moved the respondent to seek the relief in the Consent Order is

graphically described in the papers before the court and in particular in the founding affidavit in Case No. HC-3544-2000. That description appears in paras 24-31 of the affidavit. It is to the following effect.

Some invasions are relatively peaceful and the invaders merely get onto the land and make themselves shelters. They cut down trees and mark their claims for land. There are other instances where farmers are told to vacate their farms, farm occupants are abused and called

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derogatory names, drum beating to the accompaniment of songs outside the occupants' residence goes on for long periods or several days and nights. Senior farm workers are singled out for abuse. Farm occupiers' schedules and working practices are flouted or interfered with and attempts are made to provoke a reaction. The more aggressive invasions are characterised by persons carrying large sticks, old spears and assorted makeshift weapons. Farm tractors and equipment are commandeered. Farm buildings are broken into and tools looted. Electricity supplies are cut off. Farm houses and workers residences are invaded. Tobacco reaping and curing is interrupted. In general, the civil rights of farmers and their workers are invaded.

Against this background the respondent submits that intervention by the police will not be the cause for igniting the explosive situation and further, that even if it was, it would not be the sole cause for such an eventuality. The intensity of the "hot spot demonstration" that continue to be used as intimidatory displays poses a constant danger. Excesses are increasing arising from perceived political differences between the farm invaders and some farm workers. The failure of the police to act provides encouragement to the farm invaders, with the result that they take more liberties. The respondent argues that the longer the police stand by, the bolder and less restrained will the farm invaders be and the more likely are there to be really serious incidents. The respondent contends that the flash point could also just as easily come from amongst the invaded because of persistent provocation, disruption of their farming activities, losses in production, the threat of escalation of violence and the total inactivity of the police force. They may start some form of open resistance which could also spread throughout the country.

It is evident that the respondent views the situation quite differently to the applicant. It argues that the nature and extent of the invasions are not as subject to a national explosion as the applicant would have the court believe. The respondent argues that the land invasion has the backing of the Executive and if only the Executive wished to do so it could, as it were, "turn off the tap" and bring an end to the invasions. The respondent refers to statements made to the electronic and print media by some members of the Executive in apparent support of the invasions as *indicia* that, if they made similar

statements against the farm invasions, the invasions would come to an end. The respondent does not therefore share the applicant's view as to the extremely explosive nature of the situation and its apparent irreversibility.

From the evidence placed before me, I an inclined to agree with the respondent's view that police intervention is not likely to ignite an already explosive situation. Farm invasions are not a new phenomenon in Zimbabwe. They have occurred in the past and when the police, with the support of the Executive have acted, the invasions have been brought to an end. It is accepted, though, that previous invasions were not spearheaded by war veterans who, it must be accepted, have a more credible ability and disposition to resist force and even to resist force with force, but their numbers are not perhaps as significant as they were, for instance, during the armed liberation struggle and their resolve not as strong. It must be held to their credit that they now must be entertaining the hope, and not a forlorn one at that, that the Executive will address the land question once and for all, thereby dampening their ardour somewhat. This is a

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factor in my view which would seem to render the conflagration assessment untenable.

THE ESSENCE OF THE PRESENT APPLICATION

The present application is not essentially concerned with whether the land distribution and ownership in Zimbabwe is fair. That may have been a line of defence possible to be taken up by the applicant in the application that resulted in the consent order.

It is acknowledged by all and sundry that the land ownership and distribution pattern is not fair. In para 5.1 of its opposing affidavit, the respondent states:

"The Union accepts that the imbalance in the distribution of land between the black people and the white people of the country does present a source of friction between the community that must be eliminated."

It speaks of its efforts at redressing the land question and lays the blame for lack of progress on the Government. I do not think, however, that the blame can be laid squarely on the Government alone. Both the white commercial farmers and the Government must bear the blame, if blame should be allocated. But this is not the point to deal with in this application, nor should my own views be regarded as the truth. The point in this application is whether the failure of the respondent to enforce the consent order at all or in part is excusable on the grounds proffered and whether paras 6, 7 and 8 should be deleted as incapable of enforcement. The application raises issues relating to how consent orders should be dealt with, the role of the applicant in the face of a court order directing him to take certain action, the rule of law and perhaps obliquely, the question of disobedience. I will deal with all these

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issues, having in mind the need to hand down this judgment within the shortest possible time. I undertook to do so within at most three days from the date of the hearing. I shall not examine or consider all these issues in any great detail because of time constraints.

Mr *de Bourbon* raised two points *in limine*. The first was that the applicant should not be given audience by the court because he was in contempt of court in failing to obey the consent order. The second was that the applicant had not laid a basis for this court to exercise its jurisdiction in this matter. He submitted that there were only two grounds on which the court's jurisdiction could be exercised - the first under r 449 of the High Court Rules and the second under the common law. I will deal with these points at once.

CONTEMPT OF COURT

The consent order was issued on Friday 17 March 2000. At the expiration of the period of 72 hours from the making of the consent order, the police were required to deploy its members and evict all land invaders from the farms. The 72 hours expired at the latest by end of day on Wednesday 22 March 2000. Rule 4A of the Rules of this court provides that:

"Unless a contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

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The police would therefore have been expected to commence to evict the land invaders on the morning of Thursday 23 March 2000. Instead of doing so, the applicant filed, on the same date, the present application in which he is seeking the variation of the consent order. It must be observed that the applicant did not by his application challenge the validity of the consent order. He came to court, so to speak, to anticipate the charges of contempt and explain why, in his opinion, part of the order could not be enforced.

It is indeed true that "all orders of this court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside" (*Culverwell* v *Beira* 1992 (4) SA 490 (W) at 494), but the same cannot be said where the person affected by an order of court goes back to that court, timeously in the circumstances, to explain himself and his perceived inability to comply with the order issued against him. He is in a sense purging his contempt, as it were. This I find to be the situation *in casu* in respect of the applicant's conduct relative to paras 6, 7 and 8 of the consent order. The application filed by the applicant cannot in my view be construed as a wilful intention to disregard the order of the court. I would not find that the applicant is in contempt of the consent order in respect to his inaction relative to paras 6, 7 and 8 of the order.

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I cannot, however, say the same thing in relation to para 5 of the consent order. This paragraph ordered the applicant to advise all members of the Zimbabwe Republic Police that the uninvited presence of persons for more than two hours on any of the farms constituted an offence under the Miscellaneous Offences Act; that members of the Zimbabwe Republic Police should investigate their presence immediately with a view to removing such persons from the farms; that any claim to remain on the farms as a protest against the racial distribution and ownership of land in Zimbabwe was not a sufficient reason to remain thereat; and that all persons who invaded the farms were being required to vacate the land, with those who remained there for more than 24 hours after the making of the order having to be arrested and charged with such offences as they may have committed.

There was not placed before me any evidence that the applicant had complied with this paragraph. During the hearing, Mr *Chinamasa* said that the applicant had complied with this paragraph. Later, in his response to the respondent's submissions and after being asked by the court what the applicant's explanation was on his apparent non-compliance with para 5, Mr *Chinamasa* made an oral application to include para 5 among those paragraphs which should be deleted. Needless to mention that Mr *de Bourbon* opposed this last minute amendment. The opposition was merited. The applicant had not sought, on his affidavits or in his earlier submissions to court, to have para 5 deleted along with paras 6, 7 and 8. The respondent had, in its papers, taken up the issue of applicant's non-compliance with para 5, but the applicant had not chosen to contest that point or to amend its papers so as to seek the deletion of that paragraph. Quite obviously, the respondent's opposition to Mr *Chinamasa*'s very belated application was justified. The respondent would have been severely prejudiced by such amendment.

If Mr *Chinamasa*'s approach was that the inclusion of para 5 as one of the paragraphs to be deleted was to cure any failure by the applicant to comply with that paragraph and to avoid any

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allegation of contempt of court which may arise therefrom, that approach should be, justifiably, sneered at. If Mr *Chinamasa*'s application were to be granted then it would buttress the argument that the applicant deliberately refrained from giving effect to the consent order as a whole, including giving effect to paras 6, 7 and 8. I am not called upon to determine the question whether the applicant was in contempt of the court in respect of para 5. That is a separate question which I do not have to answer in this judgment. The absence of any evidence to show compliance with para 5, which would seem to be the reason for Mr *Chinamasa*'s application to have that paragraph deleted, would suggest however, that the applicant may have committed a contempt. This fact is relevant to my decision whether I should grant the application to include

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para 5 for deletion along with paras 6, 7 and 8. For the reasons I have given that application cannot be granted. Regardless of the decision I will come to on paras 6, 7 and 8, para 5 remains a part of the order which the applicant is required to comply with. And for the reasons I have given I cannot find that the applicant was in contempt of court in respect of paras 6, 7 and 8 so as not to hear him. In any case, there is some concession that these paragraphs require to be explained by the court for their better understanding by everyone concerned.

THE JURISDICTIONAL ISSUE

Mr *de Bourbon* submitted that the only bases upon which the applicant could approach this court for a "variation" or alteration of its order are the provisions of r 449 of the Rules of this court and the common law. He submitted, further, that even if such bases existed the court should have regard to the principle of finality of litigation. He referred to *Firestone South Africa (Pty) Ltd* v *Genticuro AG* 1977 (4) SA 298 (A) at 306 where the judge said:

"The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased."

He referred me to numerous other cases in this jurisdiction where this principle was accepted as correct, among them *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1997 (2) ZLR 47 (H) at 61-62; *Kandy Farm (Pvt) Ltd & Anor* v *Eastwood* 1996 (2) ZLR 729 (S) at 734; *Stumbles & Rowe* v *Mattinson; Mattinson* v *Stephenes & Ors* 1989 (1) ZLR 172 (H) at 174; *Kassim* v *Kassim* 1989 (3) ZLR 234 (H) at 242; *Bheka* v *Disablement Benefits Board* 1994 (1) ZLR 353 (S) at 357G and *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290C-E.

I agree that the principle of finality of litigation must be upheld in every case where no other factor permissible at law exist to warrant a departure from that principle. If this were not to be so, these courts would be flooded with repeat litigation and the administration of justice would come to a halt. Litigants would themselves become disenchanted by the litigation process and the existence of the courts and their purpose would be justifiably open to question. In this regard, I have had the benefit of the decision by MALABA J in *City of Mutare* v *Mawoyo* 1995 (1) ZLR 258 (H) where he deals almost exhaustively with the jurisdictional basis of alterations to

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judgments. Under common law, the position with regard to judgments by consent is even

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more circumscribed with respect to whether such judgments can be revoked or withdrawn. The applicant has not only failed to lay the basis for the relief he seeks under the common law, but has also failed to satisfy me that this would be an appropriate case to grant such relief.

It was submitted on the applicant's behalf that this application was concerned with the manner in which the eviction is to be carried out and that that manner is a procedural matter. Consequently, the court can alter the manner in which the eviction is to be carried out if sufficient cause is shown. Reliance was placed on *Stumbles & Rowe* v *Mattinson* 1989 (1) ZLR 172 (H). I must respectfully disagree with this submission. I hope I have shown quite clearly elsewhere in this judgment that this application is not in my view concerned with the manner of carrying out the evictions. It is, on the contrary, concerned with whether the applicant will carry out the evictions at all. I therefore would reject this submission. Although the applicant refers to the relief he seeks as a variation of the consent order, it is in effect not such relief at all. It is, as I have already stated, an application to have a part of the consent order rescinded because the applicant thinks that it cannot be enforced. He wishes to be absolved from his obligations under the order for the reasons which he has given.

Under r 449, it is my finding that not only is the application not for the variation of the consent order, but also that, even if it was, it does not satisfy the requirements of the rule, in particular the requirement that a reasonable explanation must be given on the circumstances in which the consent order was entered and that there must be a *bona fide* defence on the merits of the case which *prima facie* carries some prospect of success (see *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 493). The circumstances in which the consent judgment was entered can be gleaned from the papers. I have already shown how the applicant's legal representative was involved in the formulation of the consent order and in amending it to suit his position. I would, for those reasons and more which appear in this judgment, find that the applicant has not laid the basis on which this court can revisit its order of 17 March 2000. Finality of litigation is paramount and it must be upheld in this case. Rescission under the common law or under r 449 is not merited at all. The application could therefore be dismissed on this basis alone.

I must however do justice to the spirited submissions made by the parties' legal practitioners which exercise, as I shall show, leads me to no different a conclusion.

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THE ESSENCE OF APPLICANT'S ARGUMENT

The applicant concedes that the farm invasions are unlawful and in fact they constitute offences at criminal law. This is recognised in paras 1 and 5 of the consent order. He would concede, as did the Attorney-General, that the remedy lies both under the criminal law (prosecution for

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contravening the Miscellaneous Offences Act) and under the civil law (eviction pursuant to an order such as the consent order). The applicant has, however, stated that he cannot enforce the order because he has no resources with which to do so and he fears that the situation may further deteriorate.

The applicant did not allude to a complete lack of resources when he agreed that the consent order should be issued. No new facts which were unknown to him on 17 March when the order was issued had emerged by 23 March when he filed the present application. As it is argued on the papers, he had the historical experience that farm invasions have the potential to grow in terms of intensity and spatial occurrence. He accepted that he would act with the resources available to him. I do not find merit at all in his submissions on the lack of resources. If any attempt had been made at evicting the farm invaders, I would probably have viewed the submission differently. I have already dealt with the "powder keg" submission and concluded that in my view it does not hold water.

There are the other fundamental questions which arise from this application which I should address at this point. I do so because submissions were made in regard to them.

THE ROLE OF THE POLICE COMMISSIONER AND RIGHT OF EVERYONE TO PROTECTION UNDER THE LAW

In a very recent judgment of the Supreme Court in *Chavunduka & Anor* v *Commissioner of Police & Anor* 2000 (1) ZLR 418 (S), the full bench of the Supreme Court stated at p 421 *in fine*- 422B that:

"The entitlement of every person to the protection of the law, which is proclaimed in s 18(1) of the Constitution, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator provided the investigation so warrants and the bringing him or her for trial before a court of competent jurisdiction. As underscored in *Commissioner of Police* v *Rensford & Anor* 1984 (1) ZLR 202 (S) at 202H, members of the police force may not refuse to perform a duty imposed on them by the law of the land."

The Chief Justice then expressed regret that the Police Commissioner in that case had failed to afford the applicants the protection of the law which they are entitled to expect from him. At p 422F he said:

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"What then is the appropriate remedy where it has been shown that the police have not done something which obviously it is their duty to do so - where there has been a dereliction of duty owed to the public? The answer is that in such a clear case the court will grant an order of *mandamus*."

The protection of the law and the police's duty in that regard provided under s 18(1) of the Constitution extends to protection in respect of a person's civil rights. In the present case the civil rights of members of the respondent were violated. An order was issued by this court to the applicant to protect the civil rights of the petitioners. The consent order can be equated to, and in my view, it was in effect an order of *mandamus,* for it required the applicant to act to prevent the violation of the civil rights of respondent's members. The duty of the applicant in respect of the criminal aspect of the farm invasions is no different to that which was advised to him by the

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Supreme Court in *Chavunduka*'s case *supra*. Perhaps for purposes of emphasis I must also refer to the words of Lord Denning MR in *R* v *Metropolitan Police Commissioner,* Ex p *Blackburn* (1968) 1 All ER 763 (CA) ("Blackburn No. 1") which were quoted with approval in *Chavunduka*'s case *supra* at p 423:

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and if need be, bring the prosecution or see that it is brought; but in all these things he is not a servant of anyone, save the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation at his place or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and the law alone."

The words of SALMON LJ are also quoted with approval:

"... the police owe the public a clear duty to enforce the law - a duty which I have no doubt they recognise and which they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn."

The farm invasions are illegal and of a riotous nature. The applicant clearly has the public duty to enforce the consent order and to afford the members of the respondent the protection of the law enshrined in s 18(1) of the Constitution. If this court were to accede to a variation, amendment or other detraction from the order issued by Garwe J it would not be upholding its sworn duty - to uphold the law of Zimbabwe. In independent Zimbabwe, the law should no longer be viewed as being made for us; rather it must be

viewed as our law. We have the sovereign right to enact new laws and repeal old laws which we find to be incompatible with the national interest. The applicant cannot be allowed to adopt stratagems to obviate the absolute necessity of implementing an order of this court more so where such order has been issued with his informed consent.

THE RULE OF LAW

In his answering affidavit the applicant stated in paragraph 4 as follows:

"These are not disputed but suffice to point out that the Rule of Law which is divorced from justice and just laws becomes a hollow concept. Enforcement of unjust and an iniquitous ethnically (*sic*) land ownership structure, through the application of brutal state power, such as demanded by the respondent, is not promotive of the Rule of Law."

These same sentiments were expressed by the *Attorney-General* in his oral submissions to the court. I would shudder to think that this perception of the rule of law could have been one of the reasons why the respondent thought that he may not enforce the order. It is unlikely and unthinkable that it could be so. I acknowledge that at the philosophical level there are different schools of thought as to what the rule of law encompasses. At the practical level, however, where a written constitution, amenable to amendment by the people is in existence, and statute

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laws, old and new exist, and which the people's representatives can amend or repeal, an argument such as the one advanced by the applicant in the passage I have just quoted is but spurious. There is, in my opinion, a middle view of the rule of law between the two extremes - that the law or the rule of law is partisan on the one hand and that it is neutral on the other hand. That middle view is that the rule of law represents a norm, a standard which ensures that any person may bring up a claim and have it determined within the framework of a body of principles which are applied to all persons equally. Viewed from this perspective, the role of the State is to maintain law and order and mitigate conflict within the community and the instrumentality for the maintenance of law and order is the police. The rule of law must, in my opinion, be viewed as a national or societal ideal. Talking of a society where the rule of law is viewed as a societal ideal, Jeremy Waldon in *The Law: Theory and Practice in British Politics* says:

"What is this image? It is the image of a land where everyone is subject to the same rules, where they are applied scrupulously and impartially by the officials who take that as their vocation and where people can look one another in the eye and know that they are co-operating openly in a framework on terms that apply to them all."

The rule of law to me means that everyone must be subject to a shared set of rules that are applied universally and which deal even handedly with

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people and which treat like cases alike. It means that those who are affected by official inaction should be able to bring actions, as did the respondent *in casu*, on the basis of the official rules - i.e. the law, to protect their interests.

THE SEPARATION OF POWERS

Under a constitutional democracy such as Zimbabwe there is a recognition that society's power is dangerous to its members if it is exercised by one group of individuals. It is recognised therefore that there must be a separation of powers to perform the three jobs which have to be done - that of making the law (by Parliament) that of applying the law to particular cases (by the judiciary) and that of enforcing the laws and decisions of the courts (by the Executive).

These pillars of the State act together. They are not isolated from each. They however act as brakes on each other. It is in performing its function of applying the law to particular cases that the consent order was issued. In the face of an admitted illegality, this court is duty bound to pronounce itself in favour of the application of the law, our law, and to uphold the rule of law.

On the basis that the applicant has a public duty to afford protection of the law to everyone in Zimbabwe; that the rule of law must be upheld and that this court has and is conscientiously performing its constitutional function of applying the law to particular facts of cases that are brought before it and on the finding that the applicant has failed to show good cause for this court to alter its order entered by consent, there does not appear to me to be any basis for granting the order sought by the applicant.

Paragraphs 6, 7 and 8 of the consent order are capable of enforcement by the applicant "having

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regard to available resources". The applicant must accordingly act in terms of the consent order. These paragraphs as formulated in the consent order are clear and should not lead to any confusion. They in fact recognise a positive duty, couched in the negative, of the Executive to facilitate the enforcement of the consent order. These paragraphs were so framed because of the refusal of the police at Masvingo to assist the messenger of court evict persons ordered by the court to be evicted and because of press reports to the effect that certain members of the Executive were urging that the evictions should not be carried out. The same applies to para 7 in respect of the investigation and prosecution of offences committed during the farm invasions. Any other reading or construction of paras 6 and 7 of the consent order can only be mischievous and calculated to mislead the reader about the true import of those paragraphs and the *bona fides* underlying their formulation.

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COSTS

Mr *de Bourbon* urged it upon this court that it should order Mr Augustine Chihuri, the Police Commissioner, to pay the costs of this matter personally. He argued that if he is guilty of dereliction of his public duty to enforce the orders of this court then taxpayers should not have to pay the costs. He cited authority for his submissions - *Forum Party of Zimbabwe & Ors* v *Minister of Local Government & Ors* 1996 (1) ZLR 461 (H), *Binza* v *Acting Director of Works & Anor* 1998 (2) ZLR 364 (H) and *RAG (Pvt) Ltd* v *Huizenga NO* 1986 (2) ZLR 203 (S).

I do not agree that the costs in this matter should be paid by Mr Chihuri personally. Even though I have rejected his contentions in support of the application to delete paras 6, 7 and 8 from the consent paper, there is enough indication on the papers filed of record in this matter that the Executive has been unwilling to assist him in the task before him. I would like to urge to the Executive to recognise that the permanent interest of Zimbabwe and the rule of law are served by ensuring that the land invasions are brought to an immediate end. I would urge the Executive to provide the applicant with all the additional resources that the police force may require to carry out its functions under the law. This will avoid the impression that the applicant is a lonely figure in the midst of the present crisis. In a sense, his application can be viewed sympathetically as a cry for the courts to recognise the predicament that he is in. On one side, the courts have issued an order which he should enforce and, on the other, the Executive is giving conflicting signals as to what he must do, if it is not showing outrightly that it condones the farm invasions. It is no wonder that Mr *Chinamasa*, in appreciation of the applicant's predicament described him as the "hapless Commissioner". He will no doubt find comfort in the rule of law as I have articulated it and in the fact that he has a public duty which he must perform for the common good. Although this application would, gauged against a different set of circumstances, come quite close to an abuse of the court process, I think that considering the totality of the circumstances in which it was made and having regard to my finding on the question of contempt of court, an order of costs against Mr Chihuri personally would not be appropriate or justified or fair.

In the result, the application is dismissed with costs.

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Civil Division of the Attorney-General's Office, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

FOUNDERS BUILDING SOCIETY *v* MAZUKA 2000 (1) ZLR 528 (HC)

Citation	2000 (1) ZLR 528 (HC)
Case No	Judgment No. HH-85-00
Court	High Court, Harare
Judge	Mungwira J
Heard	September 21, 1999
Judgment	April 27, 2000
Annotations	None

Opposed application

Flynote

Appeal - noting of - effect - stay of execution pending appeal - applicability to appeals to Labour Relations Tribunal against determination made under registered code of conduct

Employment - Labour Relations Tribunal - appeal to - against determination made under registered code of conduct - noting of appeal - effect - no stay of execution pending appeal

Headnote

The respondent was dismissed from his position as a branch manager with the applicant, following a disciplinary hearing held under the applicant's registered code of conduct. He appealed unsuccessfully to the applicant's general manager, then noted an appeal to the Labour Relations Tribunal. The applicant sought the eviction of the respondent from the house he was entitled to occupy as manager, and surrender of the company vehicle allocated to him. The applicant argued that the noting of the appeal suspended the operation of the dismissal and that he was still manager.

Held, that the rule that the noting of an appeal suspends the operation of the decision appealed against applies only to the superior courts. It does not apply to other tribunals unless the relevant statute so provides. There are other remedies open to an aggrieved person. It would, for example, be open to the aggrieved person to approach the court - as a matter of urgency, if so required - in order to move the appropriate interdict. The Labour Relations Tribunal itself is empowered to make such interim determination as it thinks fit, pending the determination of the

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appeal. This interim determination could have, as one of its aim, the restoration of the *status quo ante*.

Held, further, that in this case, the *status quo* had not been maintained. Another person had been appointed as manager. The respondent's employment had been terminated and the applicant was entitled to the order sought.

Cases Considered

Cases cited:

Chatizembwa v *Circle Cement* HH-121-94

Marinpine Tpt (Pty) Ltd v *Local Rd Transportation Bd, Pietermaritzburg & Ors* 1984 (1) SA 230 (N)

Mushaishi v *Lifeline Synd* 1990 (1) ZLR 284 (H)

PTC v *Mahachi* 1997 (2) ZLR 71 (H)

PTC v *Mahachi* HH-183-97

South Cape Corp (Pty) Ltd v *Engineering Mgmt Svcs* 1977 (3) SA 534 (A)

Vengesai & Ors v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H)

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 97

Case Information

L T Biti, for the applicant

C Makoni, for the respondent

Judgment

Mungwira J: The respondent in this matter was employed by the applicant as manager of its Mutare branch. Following a disciplinary hearing held on 21 August 1998, which hearing was held in terms of the applicant's registered code of conduct, the respondent's contract of employment with applicant was terminated.

The respondent, in accordance with the provisions of the code of conduct, appealed to the applicant's general manager. This appeal was dismissed on 25 August 1998. The respondent thereafter proceeded to note an appeal to the Labour Relations Tribunal.

The applicant in the present application seeks the eviction of the respondent from the company house he was occupying during the course of his employment and the surrender of the

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company motor vehicle allocated to him.

The respondent opposes the order sought on the grounds that, as he has noted an appeal to the Labour Relations Tribunal, it cannot be argued that he no longer holds the position of manager. In short, his argument is that his appeal to the Labour Relations Tribunal suspends the decision of the disciplinary hearing held in terms of the applicant's registered code of conduct.

In their submissions, both parties are agreed that it is trite that at common law the noting of an appeal from a decision of one court to a superior court has the effect of suspending the determination appealed against: *South Cape Corporation* v *Engineering Management Services* 1977 (3) SA 534 A.

Mr *Biti,* for the applicant, submits that statutory bodies, being creatures of statute, may exercise only such powers as are conferred upon them by or under the statute and as such do not have inherent powers as do our courts of law. The courts, he argues, have the inherent jurisdiction to control the operation of their own judgments, a jurisdiction not enjoyed by statutory bodies. He submits that in the circumstances the common law position can only apply to superior courts and not domestic tribunals.

In making these submissions, he relies on the judgment of Smith J in the case of *Posts and Telecommunications Corporation* v *Mahachi* HH-183-95. In that case Smith J states at p 1 of the cyclostyled judgment:

"On 27 September 1996, the PTC issued summons praying for an order evicting Mahachi from stand No. 6, Beatrice. After Mahachi had filed his plea in opposition, the PTC applied for summary judgment. Chatikobo J rejected the application - HH-114-97. He

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held that the noting of the appeal to the Supreme Court suspended the decision of the Labour Relations Tribunal and therefore is still an employee of the PTC ... As CHATIKOBO J expressed it, the court has inherent jurisdiction to control the operation of its own judgments. He therefore held that ... the common law rule that the noting of an appeal suspends the operation of a judgment applies to administrative decisions unless the enabling statute provides otherwise. Similar views were expressed by GREENLAND J in *Mushashi* v *Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H). CHATIKOBO J distinguished the case of *S* v *Chatizembwa* HH-121-94 where I held that a decision of an employer made in terms of a registered code of conduct was not suspended when the employee noted an appeal to the Labour Relations Tribunal ...

In *Mushashi* case *supra*, GREENLAND J said it would be anomalous if an administrative decision of a quasi-judicial nature were to be put on a different footing from court judgments and orders. However, it seems to me that the learned judge overlooked a very important difference between courts of law and administrative or quasi-judicial bodies established by statute. Statutory bodies, being creatures of statute, may exercise only such powers as are conferred on them by or under statute. They do not have inherent powers as do courts of law. The

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common law principle, enunciated in the *South Cape Corporation* case *supra*, has two elements, namely, that the execution of the judgment is suspended and that the court has authority to direct that the judgment be executed. As Chatikobo J said, the court has inherent jurisdiction to control the operation of its own judgment. A statutory body has no such inherent jurisdiction. It may only exercise such controls as are conferred on it by statute. Thereafter, if it cannot order, in appropriate circumstances, that its judgment be executed, is it right to say that the judgment is automatically suspended?"

Mr *Biti* goes further and argues that even if the common law principle does apply to domestic tribunals, the specific provisions of the Labour Relations Act are such that they do not render the common law principle applicable. He states that, while s 97(3) of the Labour Relations Act states that an appeal against the determination of a senior labour relations officer shall have the effect of suspending the determination or decision appealed against, s 101(7) of the same Act, which deals with appeals from a determination made under a code of conduct, is silent. If the legislature had intended that the decision of the body concerned under the code of conduct should be suspended pending an appeal, it would have done so under s 97(3) of the Act.

This line of reasoning is consistent with the decision of Smith J in the case of *Chatizembwa* v *Circle Cement* HH-121-94.

The respondent argues to the contrary, in that he submits that an appeal to the Labour Relations Tribunal suspends the decision of a disciplinary hearing held in terms of a registered code of conduct. This court is therefore urged not to follow the *Chatizembwa* case. The respondent places reliance on the South African case of *Marinpine Transport (Pty) Ltd* v *Local Road Transportation Board, Pietermaritzburg, & Ors* 1984 (1) SA 230 (N) and the case of *Mushaishi* v *Lifeline Syndicate* 1990 (1) ZLR 284 (H) at 287D. It is my respectful observation that in *Marinpine* the application before the court was one in which the applicant therein was seeking an order for interim relief.

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It is submitted by the respondent that the decision in the *Chatizembwa* case *supra* is wrong for the following reasons:

"That the common law position applies unless changed by legislation. Silence by the legislature should not be taken to mean that the legislature intends to alter the common law position. If legislation is silent then the common law position must apply. There is, it is argued, a presumption that Parliament does not intend to change the common law. See *Phiri & Ors* v *Industrial Steel Pipe (Pvt) Ltd* 1996 (1) ZLR 45 and *PTC* v *Mahachi* 1997 (2) ZLR 71."

It is submitted that there is nothing objectionable in the determining authority established in terms of a code of conduct determining an application as to whether there should be execution pending appeal. It is the respondent's contention that there is nothing inherently different between a labour relations officer and a disciplining authority set up in terms of a registered code of conduct, with the result that it is wrong to suggest that such authority can only exercise powers equivalent to the powers of a labour relations officer if the statute specifically says so. It is on that basis that I am urged to determine that it cannot have been the intention of the legislature to place persons who appeal against the decision of a senior labour relations officer

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at a greater advantage than those who appeal against a decision made in terms of a registered code of conduct.

The respondent concludes by submitting that, the respondent having taken his matter on appeal, it cannot be argued that he no longer holds the position of a manager and he can therefore not be deprived of the trappings which go with his position.

I find that I cannot express my view on the matter better than by making reference to the following remarks of Gillespie J in the case of *Vengesai & Ors* v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 598T:

"In stating the common law, Corbett JA referred to the automatic stay of execution upon the noting of an appeal, as a rule of practice. That is, not a firm rule of law, but a long established practice regarded as generally binding, subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Moreover, the authorities cited by Corbett JA are authorities relevant to appeals from superior courts.

The reference to this rule as a rule of practice shows the acceptance by the learned Judge of Appeal of the analysis by JANSEN J. This analysis leads inexorably to the conclusion that the grant or withholding of a stay of execution is, at common law, a matter of discretion reserved to a court in which such a discretion is imposed. It follows that, in the absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conformed by the statute. It cannot order the suspension of its own judgment notwithstanding an appeal. The only basis upon which its judgment or order can be supposed to be stayed is where its enabling statute provides for the situation.

MUNGWIRA J

This, in my view, is persuasive support for the view expressed by Smith J in *Mahachi*'s case, namely, that the grant, whether automatic or not, of a stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal or any temporary stay. It follows that the question of enforcement pending appeal of judgment from an inferior court or authority cannot possibly be regulated according to a rule of practice, derived from common law, and applicable in superior courts of inherent jurisdiction."

The learned judge, in the same case, went on to state that this did not mean that a person aggrieved by a decision judicial or administrative which is not covered by any enactment providing for its suspension pending appeal and who wished to appeal and whose prospects of success were sufficient was without a remedy. In such circumstances, it was open to the aggrieved person to approach this court, as a matter of urgency if required, in order to move the appropriate stay or interdict.

It is of note that the Labour Relations Act empowers the Labour Relations Tribunal to make such interim determination as it thinks fit pending the determination of an appeal. Such interim determination, in the case of an aggrieved employee, would in my view have as one of its aims the restoration of the *status quo ante.*

In *PTC* v *Mahachi* 1997 (2) ZLR 71 (H), the issue under consideration was that pertaining to the noting of an appeal from the Labour Relations Tribunal to the Supreme Court. Chatikobo J in that case specifically refers to the decision of Smith J in the *Chatizembwa* case as one that

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must be regarded as one "peculiar to its own facts, especially in view of the fact that the decision appealed against in *Chatizembwa* was not one made by a statutory functionary or a quasi-judicial body". The learned judge in the same judgment proceeds to comment upon the provisions of ss 97(1) and 97(2) of the Labour Relations Act and concludes, after stating his reasons therefor, that this was not intended as a restatement of the common law position.

The case of *Chatizembwa supra*, as does the present case, dealt with an appeal from the decision of a body authority duly constituted in terms of an employment code of conduct and is clearly distinguishable from the *PTC* v *Mahachi* case *supra*.

To assist me in arriving at a decision in this matter, I have further had regard to the question of the immediate consequences of the disputed termination upon the employment relationship, which involves a separate enquiry from that which addresses the issue of whether the termination complies with or violates the rules.

Benedictus and Bercusson *Labour Law Cases and Materials* state the following at p 391:

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"A disputed termination can have a number of alternative effects on the employment relationship:

(i) the *status quo* is maintained. The purported termination is not effective if challenged. The worker remains employed while the dispute is resolved;

(ii) the purported termination is effective at least until the dispute is resolved, and perhaps even afterwards;

iii) a compromise of (i) and (ii): some attributes of the employment relationship are terminated (eg attendance at work) while others (eg payment of wages) continue until the dispute is resolved."

It is evident from the papers that the *status quo* has not been maintained. The applicant has appointed another person to the managerial post previously held by the respondent. Nowhere in his papers does the respondent make reference to the incorporation in the code of conduct or in his contract of employment of a *status quo* clause. The respondent does not mention that he is still on the applicant's payroll.

The effect of the foregoing is, in my view, that the purported termination was effective, at least until the dispute is resolved.

The respondent's employment having been terminated and the accommodation and vehicle, the subject matter of this application, being an incident of his employment, the respondent has lost his entitlement to the accommodation and motor vehicle.

It is my respectful view that there is no basis upon which this court can deny the respondent the relief sought.

It is accordingly ordered that:

(i) The respondent and all those claiming through him be and are hereby ordered to give to applicant vacant possession of the property known as stand No. 2231 Umtali Township of

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Umtali Township Lands situate at No. 2 Keats Avenue, Fairbridge Park, Mutare.

(ii) surrender to applicant a Hyundai motor vehicle registration number 606-779R, within seven days of service upon him of this order, failing which the Deputy Sheriff be and is hereby authorised to -

(a) remove him and his possessions from the property;

(b) attach and surrender to the applicant the Hyundai motor vehicle registration No. 606-779R.

Honey & Blanckenberg, applicant's legal practitioners

Makarawu & Gowora, respondent's legal practitioners

MUTARE RURAL DISTRICT COUNCIL *v* CHIKWENA 2000 (1) ZLR 534 (SC)

Citation	2000 (1) ZLR 534 (SC)
Case No	Judgment No. S-32-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Muchechetere JA
Heard	May 2, 1999
Judgment	May 11, 2000
Annotations	None

Civil appeal

Flynote

Employment - contract - parties - alienation of undertaking in which person is employed - effect - party to whom undertaking transferred - all rights and obligations between seller and employee transferred to purchaser of undertaking

Headnote

The respondent was employed by the appellant council at one of its factories. While he was on study leave, the council formed a company which acquired all the assets of the factory; over the next two years the shares in the company were sold to other persons. After the company was formed, the respondent's salary was paid by the company for a period of two years. The company ceased operations because of financial indebtedness. The respondent sought an order declaring that he was employed by the council and that he should be reinstated with effect

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from the last salary payment from the company. He relied also on the fact that when he went on study leave he entered into bonding agreements, whereby he undertook to work for the council for a minimum period. A second bonding agreement was informally reached with the council. This agreement was reduced to writing after the company had been formed. The High Court granted the order and the council appealed.

Held, that in terms of s 16(1) of the Labour Relations Act [*Chapter 28:01*], when an "undertaking" in which any persons are employed is alienated or transferred in any way whatsoever, the employment of those persons is deemed to be transferred to the transferee. The word "undertaking" meant a business or enterprise. What the council transferred was a separate and viable business, which was an "undertaking" as contemplated and sanctioned by the section. The council's employees became employees of the company. Their consent to the transfer was not required.

Held, further, that the date of the bonding agreement was irrelevant. In any event, the agreement was for the benefit of the appellant, not for that of the respondent; it did not protect the tenure of the respondent's employment. It gave the appellant the right to insist that the respondent remain in its employ; but the appellant was always at liberty to forego that benefit and to release the respondent from his obligation.

Cases Considered

Cases cited:

Manning v *Metro Nissan* (1998) 19 ILJ 1181 (LC)

Nokes v *Doncaster Amal Collieries Ltd* [1940] 3 All ER 549 (HL)

Schutte & Ors v *Powerplus Performance (Pty) Ltd & Anor* (1999) 20 ILJ 655 (LC)

Top of the Cross (Pty) Ltd v *Federal Commissioner of Taxation* (1980) 50 FLR 19

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 16

Case Information

P Nherere, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Gubbay CJ: This is an appeal against the judgment of the High Court in terms of which: (1) the respondent was declared to be in the employ of the appellant; (2) the appellant was ordered to reinstate the respondent to the position of executive officer without loss of salary or benefits with effect from 1 October 1995 (it should have read 1 November 1995), and to pay upon all amounts due to the respondent, interest at the annual rate of twenty-five *per centum* calculated

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from the date of judgment (18 June 1998) to date of payment; (3) the costs of the application were awarded to the respondent.

The material facts which formed the background to the dispute between the parties and led to the application before the High Court, were straight-forward and uncontentious. They may be outlined chronologically as follows:

1. On 1 August 1984, the respondent commenced employment with the appellant, a body corporate constituted under the Rural District Council Act [*Chapter 29:13*], as assistant executive officer - licensing. He was subsequently appointed executive officer - projects with the responsibility of running the appellant's furniture making factory, known as Mutare Furniture and Hardware.

2. On 2 January 1990, the respondent was promoted to the position of executive officer - administration and then, during March 1990, was transferred to the projects department again as production manager of the Mutare Furniture and Hardware factory.

3. During early December 1992, the respondent, still the appellant's factory manager, applied for and was granted one year's leave of absence, from January to December 1993, for the purpose of furthering his studies in administration at the Mutare Technical College. The conditions attached to such approval were that the respondent was to be bonded to the appellant for a period of one year upon completion of his studies, and was obliged to work at the factory during such period as the college was closed for the holidays.

4. On 26 July 1993, the appellant agreed to an extension of the one year period to a second year consequent upon a letter received from the Mutare Technical College. At that time a bonding agreement was not reduced to writing and signed by the parties.

5. In or about October 1993, the appellant formed a limited liability company known as Council Income Generator (Pvt) Ltd ("CIG"). It

acquired the assets, liabilities and total operation of the Mutare Furniture and Hardware factory. The appellant held all the shares in CIG.

6. In a letter to the executive director of CIG dated 10 May 1994, the respondent, who was experiencing a shortage of moneys to meet school fees and other necessaries, sought to encash thirty days' vacation leave due to him. And on 2 June 1995 he applied to CIG to take ten days' vacation leave.

7. On 10 June 1994, a formal bonding agreement was concluded. It provided that in return for the financial assistance given him by the appellant while pursuing his studies from 1 January 1993 to 31 December 1994, the respondent undertook to serve the appellant for a minimum period of four years from 1 January 1993 to 31 December 1996. The agreement also set out the salary and bonuses payable to the respondent for the years 1993 to 1996.

8. At about the same time the appellant sold forty *per centum* of its shares in CIG to an

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independent party. And after CIG had traded for another year the appellant disposed of the remainder of its shareholding.

9. Notwithstanding the terms of the bonding agreement, from October 1993 to October 1995, the respondent's salary was paid by CIG and not by the appellant.

10. On 19 December 1995, the appellant paid the respondent a gratuity of $2 718 for ten years' service up to 31 October 1993. The respondent accepted the gratuity due to economic duress, but immediately complained in writing that the appellant had not paid his salary for November and December 1995. He disputed that as from October 1993 he had been employed by CIG, pointing out that he had never been asked to resign from the appellant's employment. He regarded himself as having been "assigned" by the appellant to work for CIG.

11. In a letter dated 5 March 1996 the respondent was informed that he had been retired from the United Councils Pension Fund with effect from 1 July 1994 and that a pension of $391.76 payable monthly in arrear, for a guaranteed period of ten years, was to commence on 1 August 1994. In fact, the respondent had been in employment for nine years and three months.

12. It appears that CIG became unable to pay a substantial indebtedness and ceased to operate.

Citing s 16(1) of the Labour Relations Act [*Chapter 28:01*] ("the Act"), counsel for the appellant advanced the argument that from the operative date in October 1993 when the appellant transferred to CIG the business of its Mutare Furniture and Hardware factory, the respondent became an employee of CIG and no longer of the appellant.

GUBBAY CJ

Subsection (1) of s 16 reads:

"(1) Subject to this section, whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted."

And subsection (2)(c) thereof stipulates:

"(2) Nothing in subsection (1) shall be deemed -

(c) to affect the rights of the employees concerned which they could have enforced against the person who employed them immediately before the transfer, and such rights may be enforced against either the employer or the person to whom the undertaking has been transferred or against both such persons at any time prior to, on or after the transfer."

The word "undertaking" is of variable meaning. Basically, the idea it conveys is that of a business or enterprise. In the Australian case of *Top of the Cross (Pty) Ltd* v *Federal*

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Commissioner of Taxation (1980) 50 FLR 19, Woodward J said at 36:

"Frequently, the word 'undertaking' is used in circumstances where it could be interchanged with either the word business or enterprise and with varying shades of meaning. Sometimes it is used alone, sometimes by way of distinction from the assets of the owner and sometimes as a synonym for business. Sometimes it is used to embrace the property which is used in connexion with the undertaking as well as the debts and liabilities which have arisen in relation thereto."

In this matter, it is indisputable that what was transferred to CIG was the appellant's viable and separate business, the Mutare Furniture and Hardware factory. It had its own set of employees under the control and supervision of production and factory managers. It was an "undertaking" as contemplated and sanctioned by s 16(1). Indeed, I did not understand the respondent to dispute that this is what had occurred in October 1993.

A somewhat similar provision to s 16(1) is to be found in s 197 of the South African Labour Relations Act 1995. The phrase there used is "business, trade or undertaking" which must be transferred as a "going concern", that is to say, what is taken over must be an active and operating business, trade or undertaking.

The effect of s 197 has been considered by the South African Labour Court in two recent decisions. Both contain dicta apposite to s 16(1). In *Manning* v *Metro Nissan* (1998) 19 ILJ 1181 (LC), the court stated at 1189:

"What these subsections provide for is that wherever a business, trade or undertaking is sold as a going concern, the purchaser for all intents and purposes, *vis-à-vis* the employees of the business, trade or undertaking purchased, puts himself in the place of the seller. Consequently, all the rights and obligations that existed between the seller and its employees are transferred by operation of this section to the purchaser."

GUBBAY CJ

And continued:

"... when a purchaser purchases a business 'as a going concern' he is in fact taking over the business, trade or undertaking that is 'active and operating' so that the operation may continue if he so desires. This would mean that on the effective date of the sale insofar as the individual employees are concerned the purchaser takes the place of the previous employer and all their rights and obligations that were enforceable against the previous employer automatically are enforceable as against the new employer."

In the second case, that of *Schutte & Ors* v *Powerplus Performance (Pty) Ltd & Anor* (1999) 20 ILJ 655 (LC) it was pointed out by the court at 664 that:

"The primary purpose of s 197 is to protect the rights of employees during certain processes of business restructuring. Their continuity of employment is ensured if there is a change of employer. This is an area of legal regulation where the tension between commercial interest and social policy for employees is at its highest ...

The provisions of s 197 are part of the Act's mechanisms designed to provide security of employment in times of change."

Similarly, the dual purpose behind s 16(1) is to replace the common law, according to which the consent of both the individual employees and the transferee (the new employer) would have been necessary (see, for example, *Nokes* v *Doncaster Amalgamated Collieries Ltd* [1940] 3 All

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ER 549 (HL) at 551E-G); and secondly, to protect the rights of the employees by requiring that their employment be continued on conditions no less favourable than those they were enjoying immediately before the transfer.

Of course s 16(1) permits all or some of the employees to be excluded by agreement from the alienation or the transfer of the undertaking to the new employer. The phrase "deemed to be transferred" makes this clear. There is no suggestion, however, of the existence of an agreement between the appellant and CIG which either expressly or by implication retained the services of the respondent for the appellant.

Absent any such agreement, s 16(1) provides a statutory exception to the fundamental common law principle that a person is entitled to choose the employer whom he promises to serve so that the right to his services cannot be transferred from one employer to another without his consent. Thus at the date of transfer of the undertaking all those persons who were employed in the furniture and hardware factory became the employees of CIG. The fact that the respondent happened to be on study leave and not physically working in the factory, did not make him any the less an employee of the appellant's undertaking. His position was no different from that of the other employees.

The respondent sought to resist the consequence of the legislation by seeking to rely on the terms of the bonding agreement. This was signed, however, after the undertaking had been transferred to CIG. Since at the date of signing, on 10 June 1994, the respondent was already an employee of CIG, that situation could not be reversed. It was one which, in any event, the

GUBBAY CJ

respondent, on the probabilities, appears to have accepted. As from October 1993 his salary was paid by CIG and received without protest until November 1995, when CIG could no longer meet its liabilities. And on 10 May 1994, before the conclusion of the bonding agreement, and while still on study leave, the respondent wrote to CIG requesting that he be paid salary in lieu of leave. Thereafter, on 2 June 1995, he applied to CIG to take ten days' leave.

In my view, the date when the bonding agreement was signed was of no relevance whatsoever. From 1 January to 30 September 1993, the respondent, while on study leave, was an employee of the appellant. On 26 July 1993, it was the appellant who agreed to extend the period for a further year. Obviously, this meant a bonding for an extra year. The signing of the agreement subsequent to the transfer merely formalised what previously had been agreed between the appellant and the respondent.

But most significantly, the bonding agreement was for the benefit of the appellant and not for that of the respondent. It did not give the respondent the right to serve the appellant as its employee for the prescribed period. It did not protect the tenure of the respondent's employment. On the contrary, it gave the appellant the lawful right to insist that the respondent remain in its employ until the end of 1996. Yet it was always at liberty to forego such benefit and release the respondent from his obligation. That is what occurred.

For these reasons, I would allow the appeal with costs and alter the order of the High Court to

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read:

"The application is dismissed with costs."

MCNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Henning Locke Donagher and Winter, appellant's legal practitioners

Bere Brothers, respondent's legal practitioners

S *v* HUNZVI 2000 (1) ZLR 540 (SC)

Citation	2000 (1) ZLR 540 (SC)
Case No	Judgment No. S-33-00
Court	Supreme Court, Harare
Judge	Gubbay CJ
Heard	May 11, 2000
Judgment	May 11, 2000
Annotations	None

Chamber application

Flynote

Appeal - criminal matter - right of appeal - refusal to discharge at end of prosecution case - accused has no right of appeal against refusal to discharge until after conviction

Headnote

The applicant was being tried in the High Court on four counts of fraud. At the close of the case for the prosecution defence counsel applied for discharge on all counts. The application was dismissed. Dissatisfied with the ruling, defence counsel applied to the trial judge for leave to appeal. The application was refused on the ground that no appeal lies against the decision of the court refusing to discharge an accused at the close of the case for the prosecution. The applicant then sought leave from a judge of the Supreme Court against what was claimed to be the interlocutory judgment of the High Court.

Held, that the accused has no right of appeal against the refusal of a trial judge to discharge at the end of the prosecution case because at that stage the final determination of the trial has not

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been reached and the proceedings are still on-going. After conviction, however, the accused has the absolute right, under s 44(2)(a) of the High Court Act [*Chapter 7:06*], to appeal to the Supreme Court on any ground involving a question of law. A refusal to discharge is a question of law and so may be relied upon as a ground of appeal. The ground of refusal to discharge would only succeed if on appeal it were found that at the close of the prosecution case there was no evidence justifying a conviction and that the defence case furnished no proof of guilt.

Held, further, that on the other hand, the Attorney-General may, in terms of s 198(4)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], with leave, appeal against the discharge of the accused at the end of the prosecution case. The specific and sole mention of the Attorney-General in this section warrants the conclusion that the legislature intended to exclude a right of the accused to appeal against refusal to discharge. The maxim *expressio unius est exclusio alterius* applied. The application of this maxim did not lead to inconsistency or injustice.

Cases Considered

Case cited:

S v *Kachipare* 1998 (2) ZLR 271 (S)

Legislation referred to:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 198(3)

Case Information

Z F Joubert SC, with him *E T Matinenga*, for the applicant

N Sibanda, with him *M Zimba*, for the respondent

Judgment

Gubbay CJ: The applicant was indicted for trial to the High Court on four counts of fraud arising from allegations that on diverse occasions he had forged medical reports, thereby causing prejudice to the War Victims Compensation Fund in an amount of $517 537.72. A plea of not guilty was entered in respect of each charge.

At the close of the case for the prosecution defence counsel applied for the discharge of the applicant on all counts. The contention advanced was that the evidence of one of the State's witnesses, Mr R Blackmore, a questioned document examiner, had been so discredited that no reasonable court could safely convict on it. The application, which was strongly opposed, was dismissed by the learned trial judge. He held that, apart from the testimony of Mr Blackmore, there was other evidence relied on by the prosecution, including that of a circumstantial nature, upon which a reasonable court, acting carefully, might properly convict. Consequently, the defence was invited to present its case.

Dissatisfied with the ruling, defence counsel applied to the learned judge for leave to appeal, presumably in terms of s 44(5)(a) of the High Court Act [*Chapter 7:06*]. The grant of leave was

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refused on the ground that no right of appeal lies against the decision of a court refusing to discharge an accused at the close of the case for the prosecution.

The applicant now seeks leave from a judge of the Supreme Court to appeal to the Supreme Court against what is claimed to be the interlocutory judgment of the High Court.

If the learned judge was correct in the view expressed that his decision refusing to discharge the applicant is not appealable, the application now before me is misconceived. Obviously, the absence of a right to appeal against such a judgment makes it impermissible for both a trial judge, and a judge of this court, to grant leave to appeal.

Thus, only if the learned judge was wrong on the issue of appealability will it become necessary to decide: (a) whether his judgment was interlocutory in form; and, if so; (b) whether in a situation in which, in the exercise of the discretion vested by s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the learned judge was of the opinion that there was sufficient evidence to place the applicant on his defence, it is appropriate for a judge of this court to grant leave to appeal against that judgment.

In *S* v *Kachipare* 1998 (2) ZLR 271 (S), I said at 279C-D:

"It is to be noted that subs (3) of s 198 gives the accused person no right of appeal against a refusal to discharge. Only the Attorney-General under subs (4) may, with the leave of a judge of the Supreme Court, exercise the right of appeal, if dissatisfied with a decision given in terms of subs (3). However, the express grant to an accused may have been considered unnecessary by the legislature as s 44(2)(a) of the High Court Act [*Chapter 7:06*] permits a person convicted in a criminal trial, held by the High Court, to

appeal as of right to the Supreme Court against such conviction on any ground of appeal which involves a question of law alone."

What was being pointed out was that, in terms of s 198(4)(a) of the Criminal Procedure and Evidence Act, the Attorney-General, with leave of a judge of the Supreme Court, may appeal against a verdict of not guilty returned at the close of the case for the prosecution; for the trial has then come to an end. But an accused, on the other hand, is not given a right to appeal against a refusal to discharge him because at that stage the final determination of the trial has not been reached. The proceedings are still on-going.

The specific and sole mention of the Attorney-General in s 198(4)(a) warrants the conclusion that the legislature was minded to exclude the accused. Having regard to the fact that for the Attorney-General a discharge of the accused means an acquittal and a termination of the trial, the maxim *expressio unius est exclusio alterius* is apposite. Its application does not lead to inconsistency or injustice. In the event of *conviction*, the accused has the absolute right, under s 44(2)(a) of the High Court Act, to appeal to the Supreme Court on any ground involving a question of law. A refusal to discharge is a question of law and so may be relied upon as a ground of appeal.

In sum, after but *not before*, the final determination of the trial the Attorney-General, with leave, and the accused as of right, may appeal against the decision of the trial court which had either

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discharged or refused to discharge, the accused at the close of the case for the prosecution. But insofar as the accused is concerned, the appeal on that ground will only succeed if it is found that at the close of the prosecution's case evidence justifying a conviction was absent and the defence case furnished no proof of guilt.

It is only necessary to add that the passage quoted from the judgment in *Kachipare*'s case *supra* was concurred in by Sandura JA. Although McNally JA came to a different conclusion with regard to the interpretation of s 198(3) of the Criminal Procedure and Evidence Act, I do not understand anything said by him to signify disagreement with the *obiter dictum* that an accused is given no right of appeal against a refusal to discharge.

It follows that s 44(5)(a) of the High Court Act is of no application since there was no right to appeal against the judgment of the court *a quo.*

The application is accordingly dismissed.

Musunga & Associates, applicant's legal practitioners

MANNATT *v* M M DE KOCK & SONS LTD 2000 (1) ZLR 543 (SC)

Citation	2000 (1) ZLR 543 (SC)
Case No	Judgment No. S-143-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 16, 1999
Judgment	May 11, 2000
Annotations	None

Civil appeal

Flynote

Company - judicial management - application - when application will be granted - requirement that company should actually be unable to pay its debts

Headnote

The appellant had unsuccessfully applied for an order of provisional liquidation of the respondent, a farming company. In terms of s 300(a) of the Companies Act [*Chapter 24:03*] a provisional order for judicial management may not be made unless the company concerned is

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actually unable to pay its debts or probably unable to pay its debts. The trial judge held that it could not be found that the company was unable or probably unable to pay its debts. On appeal:

Held, that the criteria for placing a company under judicial management and those for placing it in liquidation are not the same. For a company to be placed under judicial management it must be shown that the company is in fact unable to pay its debts or it is likely that in fact it will be unable to pay them.

Held, further, that in deciding whether the company should be placed under judicial management because it is unable to pay its debts, a distinction must be made between a company which can realise assets and still carry on business and a company which by realising its assets would either cease to exist or be so crippled that it could not reasonably carry on that business. The respondent farm fell into the first category.

Held, further, that it is standard practice for farms to obtain large loans in order to operate. The fact that the respondent farm had two large debts did not show that the company could not pay the debts if called upon to do so.

Held, therefore, that the appeal should be dismissed.

Cases Considered

Cases cited:

Irvine & Johnson Ltd v *Oelofse Fisheries Ltd* 1954 (1) SA 231 (S)

RAG (Pvt) Ltd v *Huizenga NO* 1986 (2) ZLR 203 (S)

Legislation considered:

Companies Act [*Chapter 24:03*], s 300(a)

Case Information

A P de Bourbon SC, for the appellant

A Chinake, for the respondent

Judgment

Ebrahim JA: The sole point in this appeal is whether the learned judge *a*

EBRAHIM JA

quo was correct in holding that it could not be said that the respondent company was "unable to pay its debts or ... probably unable to pay its debts", and as such he was precluded from making a provisional judicial management order. Section 300(a) of the Companies Act [*Chapter 24:03*] sets out three criteria, all of which must be satisfied before a court may make such an

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order. The learned judge found that the criteria set out in subparas (ii) and (iii) had been satisfied, but that the requirements of subpara (i) - that the company "is unable to pay its debts or ... probably unable to pay its debts" - had not been fulfilled.

There are only two specific debts which are outstanding. The first is one due to udc Ltd ("udc"). Two-thirds of a loan to udc had been paid off but the remaining third, some $600 000, was to be carried over to the next season. Presumably, this would have been by arrangement with udc, though the papers do not make this clear. It is unlikely that it would have been a unilateral decision by the respondent. The second debt is an overdraft with Zimbank. Although Zimbank has granted the respondent overdraft facilities of up to $3 900 000, the respondent's actual overdraft is somewhat lower, standing at $2 168 745. Zimbank itself appears to have no qualms about this debt and seems confident that it will be paid.

Mr *de Bourbon* argued that the respondent is "commercially insolvent", since it had to sell some of its stock to pay its debts. He cited *R A G (Pvt) Ltd* v *Huizenga NO* 1986 (2) ZLR 203 (S) at 206B, where McNally JA said:

"A farming company is clearly commercially insolvent if it has to sell its stock and implements to pay its debts."

The respondent admitted to selling off cattle "to improve the cash flow and to protect the grazing".

It is clear that the company is in financial difficulties, some at least of which are of its own making. But is it "unable to pay its debts"? Does its "commercial insolvency", in the sense mentioned, have any bearing on the matter? It would seem that the criteria for placing a company under judicial management and those for placing it in liquidation are not the same.

Henochsberg on the Companies Act 5 ed Vol. 1 pp 925-6 says of the corresponding South African provision:

"The company must be unable in fact to pay its debts or it must be likely that it will be unable in fact to pay them. It is submitted that the provisions of s 345 (the equivalent of s 205 of the Zimbabwean Act) have no application in this context. If the company can pay its debts, however, judicial management can also ensue where it is likely that the company will be unable to perform obligations other than ones to pay creditors, eg to manufacture and supply something, to construct a building."

A distinction must be made between a company which can realise assets and still carry on its business and a company which, by the realisation of its

EBRAHIM JA

assets, would either cease to exist or be so crippled that it could not reasonably carry on that business: *per* Reynolds J in *Irvin & Johnson Ltd* v *Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 239.

I do not think that a farm falls into this situation. It may well happen that the farm itself, or part of its stock and assets, must be sold to pay off the loan. It is generally not a business that has any specific obligations to third parties, such as a manufacturer might. Crops are produced in the expectation that they will be sold for adequate prices. No-one (apart from the farmer and his

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employees) is harmed if those expectations are not fulfilled.

It is standard in the agricultural sector for farms to obtain large loans, whether in the form of bank overdrafts or actual loans from such organisations as the Agricultural Finance Corporation or finance houses - in order to enable them to obtain the necessary seed, fertiliser and so on to plant for the next season. The loans are taken out on the assumption that the returns on the crop will be enough to enable the loan to be repaid and for the farming operation to continue. There is, of course, always something of a gamble in this process: the crop might fail, due to drought; it might be destroyed by hail; the selling prices might be low. But the lender has the security of the farm itself. As Mr *Chinake* submitted, if the fact that the bank had not called up the overdraft were to be given little weight, then logically all farming companies with overdrafts or which have taken out loans would be candidates for judicial management. This surely cannot be so.

As *Henochsberg op cit* states, it must be shown that the company is *in fact* unable to pay its debts or it must be likely that it is *in fact* unable to pay them. The evidence shows that the company has two large debts (which are probably not large as farm debts go), but it does not show, in my view, that the company could not pay the debts if called upon to do so.

Accordingly, the appeal is dismissed with costs.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

BWANYA *v* MATANDA 2000 (1) ZLR 546 (HC)

Citation	2000 (1) ZLR 546 (HC)
Case No	Judgment No. HH-100-00
Court	High Court, Harare
Judge	Smith J and Chinhengo J
Heard	May 11, 2000
Judgment	May 17, 2000
Annotations	None

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Civil appeal

Flynote

Delict - animals - injury by - cattle grazing on crops of another - liability for - actio de pastu - still exists as part of our law - defences available

Headnote

The *actio de pastu* remains part of our law and has not fallen into disuse. If one person's animals stray onto another person's land and cause damage by grazing or trampling crops, the *actio de pastu* is available to the owner of land against the owner of the animals for the damage caused by them. Where there was fault on the part of the injured party, there would be a complete or partial defence, as where the injured party had failed to maintain a fence or had let the animals in. It is also a defence that the straying was brought about by a deliberate act on the part of a third party as, for instance, where the third party deliberately cuts the fence, thereby allowing the animals to stray onto someone else's land. *Vis major* would be a defence only in limited circumstances, as where the animal is directly motivated by the *vis major* and did not act of its own volition. *Vis major* would not be a defence where, for instance, lightning struck a fence knocking it down and the animal discovered the gap in the fence and, of its own volition, moved onto the adjoining property and caused harm. In such a case the owner of the animal would remain liable.

Cases Considered

Cases cited:

Heron v *Skinner* 1970 (2) RLR 105 (A); 1971 (1) SA 399 (RA)

Pieters v *Botha* 1989 (3) SA 607 (T)

Potgieter v *Smit* 1985 (2) SA 490 (D)

van Zyl v *Kotze* 1961 (4) SA 214 (T)

van Zyl v *van Biljon* 1987 (2) SA 372 (O)

Case Information

E Chivinge, for the appellant

Respondent in default

Judgment

Smith J: This is an appeal from a decision by the provincial magistrate dismissing the appellant's claim. The facts of the case are as follows. The appellant (hereinafter referred to as "Bwanya") lives in a village in the Murewa district. He cultivates an area of two acres on which he was growing maize, tomatoes, sweet potatoes and vegetables. He claims that one Monday morning he was told that there were cattle in his garden. He went there and recognised the

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cattle as being those of the respondent (hereinafter referred

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to as "Matanda"). They had destroyed maize, sweet potatoes and tomatoes. He called the kraal head and other villagers to come and witness what had happened. The man who was employed by Matanda to look after her cattle and homestead, who is about 30 years of age, was also there. Bwanya claims that he suffered damages amounting to $5 000. The magistrate who heard the case dismissed Bwanya's claim on the grounds that he had sued the wrong party; he should have sued the employee who was supposed to look after the cattle.

In his notice of appeal, Bwanya says that on the first day of the hearing of his case Matanda alleged that the wrong person had been sued because the cattle did not belong to her; they belonged to her son Bornwell. The hearing was then postponed and he went and checked at the local veterinary department office. By looking at the cards he was satisfied that the cattle belonged to Matanda. He then went to the local dip-tank and checked the record book which also showed that the cattle belonged to Matanda. At the resumed hearing, a different magistrate presided. That magistrate then postponed the case because he wanted to give further consideration to the matter. He later ruled that Bwanya should have sued the cow-herd, Farai, and not the employer Matanda and therefore dismissed the claim.

Mr *Chivinge* argued that the court *a quo* had misdirected itself. Matanda was liable under the *actio de pastu* and therefore Bwanya was entitled to judgment in the sum of $5 000. He submitted that Matanda owed Mwanya a duty of care and, as owner of the cattle, she was liable because of her negligence. This argument shows a lack of appreciation of the principles of the *actio de pastu* which were set out in *van Zyl* v *Kotze* 1961 (4) SA 214 (T) by DE WET JP at 216A-E:

"The nature of the action relied upon by plaintiff is explained in Voet 9.1, ss 1 and 3. (I cite only the relevant passages from *Gane*'s translation Vol. 2 pp 534, 535 and 537).

> 'An animal does harm either in accord with or against the nature of its kind. It does so in accord with its nature when it grazes on another's ground. For that various actions are provided to suit varying circumstances.
>
> ... if one man's animal grazes on another man's ground without anyone letting him in, then there is room under the law of the Twelve Tables for a civil action on the grazing of cattle. The action is available to the owner of the land against the owner of the animal grazing. It lies for the making good of the damage caused ...
>
> But by our customs it has been held [that] it is permitted to an owner of land or a tenant-farmer whose fruits have been harmed by grazing to impound another's cattle caught on his own ground in a public or imperial stable until the value of the damage caused by the grazing has been paid or the animal given up as *noxa*.
>
> Clearly, to shut up in a private stable or to keep back cattle privately on account of grazing in any other way that has been stated is not allowed to-day. And even to-day the provisions of the Roman law as to grazing has been in other respects retained.'

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In *Le Roux & Ors* v *Fick* 1879 Buch 29, Smith J reviews the Roman law in relation to damage caused by animals and at p 37 he says:

> 'In the case of damage caused by ordinary animals *mansuetae naturae* according to their natural disposition, as for example by cattle depasturing on another man's herbage, the owner was liable to the *actio de pastu pecorum* under the law of the Twelve Tables.'

And at p 41 he comes to the conclusion that, except in some respects not material to the present case, there was no material difference between the Roman and Roman-Dutch law and it is implicit in the judgment that this law was still in force at the time when he wrote."

In that case the appellant, who had been ordered to pay R13 as damages for the replacement of her roses which had been eaten by four calves belonging to the respondent, had submitted that the *actio de pastu* had fallen into disuse. It was held that the action had not fallen into desuetude.

MACDONALD JP, in *Heron* v *Skinner* 1970 (2) RLR 105 (A); 1971 (1) SA 399 (RA) assumed, without deciding, that the *actio de pastu* still forms part of our law in this country. He also assumed that the *actio* is available to the lessee of any property, and not only to the owner. He concluded, after referring to Voet's statement of the law, 9.1.1, that while liability is based upon ownership of the cattle, such liability is not absolute. At p 400F he said:

"The limitation that no liability attaches to the owner of the cattle under the *actio de pastu* if the cattle are 'let in' by a stranger or by the owner of the pasture is a most sensible limitation, and a *prima facie* case is not made out if, at the end of the plaintiff's case, there is direct or circumstantial evidence that, as a matter of probability, the cattle were let into the pasture in respect of which damages are claimed by a stranger or by the owner of the pasture or his agent.

The facts of the present case were that the respondent was the lessee of part of the farm owned by the appellant. On part of the land leased by him, the respondent had planted a maize crop. The crop occupied part of a paddock, and the paddock was enclosed by a fence. In the fence was a gate - described as a concertina gate, and consisting of strands of wire strengthened by uprights - which led to another farm paddock. This adjoining paddock had not been leased to the respondent and, at the time of the alleged delict, was being used by the appellant to graze his cattle. The evidence established that these cattle entered the paddock in which the respondent's maize crop was situated through his gateway in the dividing fence. When the cattle entered through the gateway, the concertina gate was not wide open; it had become unlatched and was on the ground between the gate posts."

In that case, Skinner had leased a portion of Heron's farm. Cattle belonging to Heron, which were grazing in a paddock adjoining the leased ground, on which Skinner had planted a maize crop, entered the leased area and caused damage to the maize. The learned Judge President found that the probabilities supported the inference that the cattle entered the leased area because someone opened the concertina gate and left it open; there was no evidence that the person responsible was either Heron or an agent or employee of his. It could have been a stranger or an employee of Heron or Skinner. However, the learned Judge President said that there was no doubt that someone had left

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the gate open, either deliberately or negligently. He said that the court *a quo* should have ordered that Heron be absolved from the instance on Skinner's claim in reconvention for damages caused to his maize crop because it was possible that the cattle had been "let in" by a stranger.

In *Potgieter* v *Smit* 1985 (2) SA 490 (D), FRIEDMAN J also concluded that the *actio de pastu* is an action which forms part of the law in South Africa and is one which places upon the owner of cattle an absolute liability where damage is caused by those cattle grazing on the grass, crops or shrubs of another - see p 695I. In that case, Potgieter, whose farm adjoined that of Smit, claimed damages in respect of the loss of a cotton crop which he alleged had been destroyed by cattle belonging to Smit which had strayed onto his fields. The learned judge found that Smit's cattle strayed onto Potgieter's farm through that portion of the fence between the two farms which Potgieter was supposed to maintain but did not. After referring to a number of authorities, he concluded at p 697A:

"The fact that Voet appears to recognise as an exception to the rule the fact that someone may have 'let the cattle in', seems to me to fortify the view that, where fault on the part of the injured party has contributed to the loss, the *actio de pastu* will not lie."

The learned judge determined that where, in an action based upon the *actio de pastu*, the injured party was at fault in relation to the damage, that fault could be raised as a complete defence to the action; further, that Potgieter's failure to maintain the fence which he was obliged to maintain at least contributed towards the loss and, accordingly, no claim lay under the *actio de pastu*. In that case, however, Potigieter had also claimed in delict, based on Smit's negligence in permitting or allowing his cattle to stray onto Potgieter's fields. Friedman J found that Smit, as a reasonable farmer, owed Potgieter a duty of care to take steps to ensure that his cattle would not trespass upon his neighbouring property and it was unreasonable of him simply to remain inactive, knowing as he did of the damage which his cattle were causing to Potgieter's crop. He also found that Potgieter had not taken reasonable steps to guard against the loss when, by the exercise of reasonable care, he could have done so. He therefore apportioned the fault and ordered that Smit pay half of Potgieter's proven damages.

The court, in *van Zyl* v *van Biljon* 1987 (2) SA 372 (O) had to decide whether *vis major* was a valid defence against the *actio de pastu*. The cattle belonging to van Biljon had gained access to the maize field of van Zyl because the boundary fence between the maize field and the cattle paddock had been struck down by lightning. Steyn J held that the principle of causality was still part of the *actio de pastu* and was the basis of the strict liability that adhered to the owner of the animals - in other

words, the action is applicable where an animal gains access to the another person's pastures or crops without the intentional involvement of its owner or of anybody else and it therefore acts from its own volition. *Vis major* could constitute a defence in suitable, relatively strictly circumscribed circumstances, *viz*, where the animal is directly motivated by the *vis major* and that the reason therefor was to be found in the decisive effect of the principle of causality: if the animals concerned were forced onto the land in question, not from their own volition but due to

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the operation of *vis major*, and were then forced to trample the pasture or crops, they would then not have caused the resultant damage from their own volition and the principle of causality would not operate against them and their owner, but would have a bearing on the force or happening which had forced them thereto. In that case, as the lightning had done no more than strike down the boundary fence and the cattle had discovered the access through the gap in the fence, they had been motivated to act by their own will and not by *vis major*. Therefore, the *vis major* did not constitute a defence.

In *Pieters* v *Botha* 1989 (3) SA 607 (T), Kirk-Cohen J said that fault on the part of the injured party may validly be raised as a defence to the *actio de pastu*. That does not, however, affect the principle that the basis of the liability of the cattle owner is his ownership of the cattle which caused the damage. The learned judge found that where the plaintiff claimed damages from the defendant as a result of losses suffered when the defendant's cattle trespassed on his sunflower fields, that there was contributory negligence on the plaintiff's part. That fault, on the facts of the matter, constituted a sufficient defence to the *actio de pastu* and therefore the plaintiff could succeed only partly with his alternative claim under the *actio legis Aquiliae*.

After hearing counsel, we upheld the appeal and said that we would give our reasons later. They are set out above. Bwanya sought an order granting judgment in the sum of $5 000. As explained to counsel, the court cannot grant such an order because there is no evidence as to the quantum of the damages suffered by Bwanya. Accordingly, the order of the court *a quo* is set aside and the matter is remitted to that court for it to determine the quantum of the damages suffered and also whether there is any defence available to Matanda based on any negligence on the part of Bwanya or the possibility that someone, either deliberately or negligently, opened a gate or broke a fence in order to let the cattle gain access to the gardens of Bwanya. In assessing damages, the court *a quo* must bear in mind that not only are damages assessed in respect of plants which are grazed but also loss caused by trampling and breaking of

branches and even the consumption of harvested crops; the measure of damages is the replacement value of the plants or the value of the prospective harvest which has been lost. The court must also have regard to the costs that Bwanya would have incurred in harvesting the crops and delivering them to market.

The appeal is allowed.

CHINHENGO J: I agree.

Manase & Manase, applicant's legal practitioners

Respondent in person

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CHAVUNDUKA & ANOR *v* MINISTER OF HOME AFFAIRS & ANOR 2000 (1) ZLR 552 (SC)

Citation	2000 (1) ZLR 552 (SC)
Case No	Judgment No. S-36-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	March 20, 2000
Judgment	May 22, 2000
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20(1) - right to freedom of expression - benevolent and purposive interpretation to be given to - Law and Order (Maintenance) Act [Chapter 11:07] - s 50(2) - prohibition against making false statements likely to cause fear, alarm and despondency - need to consider actual circumstances - vagueness of provision - whether a provision enacted in the interests of public safety or public order - not justifiable in a democratic society - primary purpose not directed at one of legitimate exceptions provided - scope of provision out of proportion to evil aimed at

Constitution of Zimbabwe 1980 - Declaration of Rights - s 24(1) - application to Supreme Court - pending criminal matter - whether Court should decide constitutional question before trial is held - matter of great public importance - desirability of deciding issue before waiting for trial to be held

Human rights - freedom of expression - law prohibiting the making of false statement likely to cause fear, alarm and despondency - whether law one unduly restricting freedom of expression

Headnote

The appellants were the editor and senior reporter of a weekly newspaper which published an article about an attempted *coup d'etat* which was said to have taken place. They were arrested on charges of contravening s 50(2)(a) of the Law and Order (Maintenance) Act [*Chapter 11:07*], which makes it an offence to publish a false statement likely to cause fear, alarm and despondency among the public. They applied for an order declaring the section to be unconstitutional, as breaching the rights of freedom of expression and to a fair trial. The court first considered whether it should hear the application before it had been established whether the State had proved that the falsity of the statements and the likelihood of alarm and despondency.

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Held, that the constitutionality of the provision was a matter of great public importance. It was

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therefore not appropriate for the court to decline to exercise its powers until after the trial for the offence being challenged on constitutional grounds had been held and the defences available to the applicants had been adjudicated on.

Held, further, that the court will give a benevolent and purposive interpretation to the provisions of the Constitution guaranteeing freedom of expression. Encompassed in the idea of freedom of expression are statements and opinions regarded by the majority as false. Before the protection of the law could be denied, the court would have to be certain that there could be no justification for offering protection. The purpose of s 50(2) was to restrict expressive activity.

Held, further, that statutory vagueness cannot be allowed where freedom of expression is at issue; the law must be precise enough to enable a person to regulate his conduct. The provision was far too wide and vague. It forbade statements "likely" to cause fear, alarm and despondency, as opposed to actually causing it. The word "false" was also very wide, embracing the merely inaccurate as well as actual lies. The provision could not be said to meet the requirement of being "under the authority of any law".

Held, further, that for a provision to be saved by being one of the six legitimate aims or exceptions listed in s 20(2) of the Constitution, it must be primarily directed at that aim. The primary object of the provision was to ensure that public safety and order were not jeopardised by false news spread by irresponsible journalists and rumour-mongers.

Held, further, although in a democratic society freedom of expression could be subjected to reasonable restrictions, the provision in question was not one that could be said to be reasonably justifiable in a democratic society. This was the first such prosecution since Independence. There was no longer a primary aim behind the legislation justifying the restriction on freedom of expression. Even though the provision was capable of serving a legitimate aim, no objective of pressing and substantial concern had been identified in support of its survival. The anticipated danger was remote and conjectural. There are other provisions of the Act and the common law which restrict freedom of expression. Many other democratic countries do not have false news provisions, or have provisions that are very limited in scope. The purpose behind s 50(2) fails for want of proportionality between its potential reach and the "evil" to which it is claimed to be directed. The provision goes further than is necessary to achieve its aim.

Held, further, that it was not the court's function to re-draft a legislative provision so as to make it constitutionally acceptable. That is the function of Parliament.

Held, therefore, that the provision contravened s 20(1) of the Constitution.

Cases Considered

Cases cited:

Barthold v *Germany* (1985) 7 EHRR 383

Castells v *Spain* (1992) 14 EHRR 445

Cline v *Frank Dairy Co* 274 US 445 (1927)

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Connolly v *General Construction Co* 269 US 385 (1925)

Die Spoorbond & Anor v *SA Rlys* 1946 AD 999

Handyside v *UK* (1979-80) 1 EHRR 737

Hector v *A-G, Antigua and Barbuda & Ors* [1990] 2 All ER 103 (PC)

Kauesa v *Min of Home Affairs & Ors* 1995 (11) BCLR 1540 (NmS)

Letter Carriers v *Austin* 418 US 264 (1974)

Libman v *Quebec (A-G)* (1997) 46 CRR (2d) 234 (Can SC)

Munhumeso & Ors In re 1994 (1) ZLR 49 (S); 1995 (2) BCLR 125 (ZS)

Mlambo In re 1991 (2) ZLR 339 (S); 1992 (4) SA 144 (ZS)

Martin v *A-G & Anor* 1993 (1) ZLR 153 (S)

Nyambirai v *NSSA* 1995 (2) ZLR 1 (S); 1995 (9) BCLR 1221 (ZS)

Ontario Film & Video Appreciation Soc v *Ontario Bd of Censors* (1983) 31 OR (2d) 583

Papachristou v *City of Jacksonville* 405 US 156 (1972)

Perera v *A-G & Ors* [1992] 1 Sri LR 199

Public Prosecutor v *Pung Chew Choon* [1994] 2 LRC (Const) 236

R v *Big M Drug Mart* (1985) 13 CRR 64 (Can SC)

R v *Brind* 1966 RLR 565 (A); 1967 (1) SA 616 (RA)

R v *Butler* (1992) 8 CRR (2d) 1 (Can SC)

R v *Keegstra* (1991) 3 CRR (2d) 193 (Can SC)

R v *Lucas* (1998) 50 CRR (2d) 69 (Can SC)

S v *Modus Publications (Pvt) Ltd & Anor* 1996 (2) ZLR 553 (S)

R v *Nova Scotia Pharmaceutical Soc* (1992) 10 CRR (2d) 34 (Can SC)

R v *Zundel* (1992) 10 CRR (2d) 193 (Can SC)

Rangarajan v *Jagjivan Ram & Ors* [1990] LRC (Const) 412 (Ind SC)

Retrofit (Pvt) Ltd v *PTC & Anor* 1995 (2) ZLR 199 (S)

Reynolds v *Times Newspapers Ltd & Anor* (2000) 7 BHRC 289 (HL)

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Richards v *A-G & Anor* [1991] LRC (Const) 311

Smith v *California* 361 US 147 (1959)

Sunday Times v *UK* (1979-80) 2 EHRR 245

Thappar v *State of Madras* [1950] SCR 594 (SC)

Thomson Newspapers Co v *Canada* (1998) 51 CRR (2d) 189 (Can SC)

United Parties v *Min of Justice & Ors* 1997 (2) ZLR 254 (S); 1998 (2) BCLR 224 (ZS)

US v *Schwimmer* 279 US 644 (1929)

Legislation considered:

Constitution of Zimbabwe 1980, s 18(1), 18(2), 20(1) and 24(4)

Law and Order (Maintenance) Act [*Chapter 11:07*], s 50(2)(a)

Case Information

A P de Bourbon SC, for the applicants

B Patel, with him *F Chakutuka*, for the respondents

Judgment

Gubbay CJ:

I. INTRODUCTION

On 10 January 1999, *The Standard*, a weekly newspaper printed in Harare, published its lead article entitled "Senior Army Officers Arrested". It concerned a coup attempt in which twenty-three members of the Zimbabwe National Army were alleged to have been arrested. Mismanagement of the economy and involvement in the war in the Democratic Republic of Congo were given as reasons for the failed uprising. The article also noted general dissatisfaction within the Army over the war, claiming morale was low, and that in defiance of orders some soldiers had refused to participate in the Congo conflict.

Two days later, the first applicant, the editor of *The Standard*, was arrested.

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On 19 January 1999, the second applicant, the newspaper's most senior reporter and the author of the article, surrendered himself to the police as his apprehension was being sought.

The two applicants were duly remanded in the magistrate's court on a charge of contravening s 50(2)(a) of the Law and Order (Maintenance) Act [*Chapter 11:07*] ("the Act"), it being alleged that in the issue of the newspaper in question they had published a false statement likely to

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cause fear, alarm or despondency among the public or a section of the public. Presently, the applicants remain on bail pending trial.

On 2 July 1999, the applicants applied to this court in terms of s 24(1) of the Constitution of Zimbabwe for an order declaring s 50(2)(a) of the Act to be in contravention of ss 20(1) and 18(2) of the Constitution - which guarantee freedom of expression and the right to a fair trial - and, therefore, of no force and effect. The first respondent was cited as the Minister responsible for the administration of the Act and the second respondent, who is the Attorney-General, as required by s 24(6) of the Constitution.

At the inception of these proceedings, the court entertained some doubt as to whether it was proper for the applicants to seek this particular form of redress before it had been determined at their criminal trial whether -

(i) the State had proved (a), the falsity of the article in question, and (b), the likelihood of the publication causing fear, alarm or despondency among the public or a section thereof;

(ii) the applicants had failed to satisfy the trial court that before publishing the article they had taken reasonable measures to verify its accuracy.

Having been referred by counsel to the decisions in In re *Mlambo* 1991 (2) ZLR 339 (S); 1992 (4) SA 144 (ZS); *Martin* v *Attorney-General & Anor* 1993 (1) ZLR 153 (S); and In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S), 1995 (2) BCLR 125 (S), the court was persuaded that the application before it was indeed proper.

In any event, as the constitutionality of s 50(2)(a) is a matter of great public importance, with significant implications for the freedom of the press and the freedom of expression generally, it was clearly not appropriate for the court to have recourse to the proviso to s 24(4) of the Constitution and decline to exercise its powers on the ground that the defences available under s 50(2) should first be exhausted and adjudicated upon. In the clear words of Dickson CJ in *R* v *Big M Drug Mart* (1985) 13 CRR 64 (Can SC) at 79-80;

"Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such 'public interest litigation' it would have

had to fulfil the status requirements laid down by this court ..., but that was not the reason for its appearance in court.

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid."

II. THE RELEVANT ENACTMENTS

Section 50 of the Act provides:

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"(1) In this section -

'statement' includes any writing, printing, picture, painting, drawing or other similar representation.

(2) Any person who makes, publishes or reproduces any false statement, rumour or report which -

(a) is likely to cause fear, alarm or despondency among the public or any section of the public; or

(b) is likely to disturb the public peace;

shall be guilty of an offence and liable to imprisonment for a period not exceeding seven years, unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report he took reasonable measures to verify the accuracy thereof.

(3) ..."

Section 20(1) of the Constitution protects the freedom of expression in the following terms:

" (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

Subsections 18 (1) and (2) of the Constitution stipulate that:

" (1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law.

(2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

III. THE ORIGIN, HISTORY AND SCOPE OF SECTION 50(2)(A) OF THE ACT

The type of offence created by s 50(2)(a) is generally known as the false news offence and its provisions are referred to as false news provisions.

In 1275, the Statute of Westminster introduced the offence *De Scandalis Magnatum or Scandalum Magnatum*. It recited "that from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm". The offence was enforced by the King's

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Council, and later by the court of Star Chamber. In the seventeenth century, the common law courts took over its enforcement. The prevention of false statements, which in a society dominated by extremely powerful landowners could threaten the security of the state, was its primary objective. Yet it proved to be an ineffective measure and at the time of its repeal in 1887 had long been obsolete. Nor did it survive in the United States of America. See the historical survey in *R* v *Keegstra* (1991) 3 CRR (2d) 193 (Can SC) at 209-210.

The precursor of s 50(2) in this country was s 10 of the Public Order Act 31 of 1955. It read:

"Any person who publishes or reproduces any statement, rumour or report which is calculated to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that such statement, rumour or

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report is false, shall be guilty of an offence and liable to imprisonment for a period not exceeding one year."

In the Legislative Assembly of Southern Rhodesia, s 10 of the Bill was subject to fierce criticism as being an objectionable fetter upon the freedom of expression, and especially of the press. It was, however, justified by the Government of the day on the basis that it would provide a safeguard against the attempts of irresponsible journalists and rumour-mongers "to create chaos out of order"; no instance of any such occurrence was cited - only a rumour circulating in the then Northern Rhodesia that cigarettes had been poisoned.

On 12 January 1961, the Public Order Act was repealed and replaced by the present Act. The scope of s 43, which was the counterpart to the old s 10, was extended. It substituted the word "likely" for "calculated" and placed a burden on the accused person to establish that reasonable measures had been taken to verify the accuracy of the false statement.

The extant s 50 is little different from s 43, except that it separates the provision into subsections. The substantive elements of the offence have not changed. Insofar as subs (2)(a) is concerned, the onus is on the State to prove:

(i) the falsity of the statement, rumour or report in question;

(ii) its publication to one or more persons;

(iii) the likelihood of the publication causing fear, alarm or despondency.

In assessing the likely consequences of the publication, what is to be considered are the actual circumstances and the actual persons concerned, rather than the hypothetical reasonable man. It must be shown that the publication was not merely theoretically but in practical effect likely to cause fear, alarm or despondency among the public. The accused person may raise as a defence that the circumstances giving rise to the likelihood were unknown to him and could not reasonably have been anticipated. See *R* v

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Brind 1966 RLR 565 (A) at 577D-E, 578A-B and 579E-G, 1967 (1) SA 616 (RA) at 625D, 625 *in fine*- 626A, and 627B-C.

IV. IS A PUBLICATION SUCH AS THAT AT ISSUE EXPRESSION PROTECTED BY SECTION 20(1) OF THE CONSTITUTION? IF SO, IS THE PURPOSE OR EFFECT OF SECTION 50(2)(A) OF THE ACT TO RESTRICT SUCH EXPRESSION?

I did not understand counsel for the respondents to dispute that the answer to each question should be in the affirmative.

This court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy - one of the most recent judgments being that of *United Parties* v *Minister of Justice & Ors* 1997 (2) ZLR 254 (S) at 268C-F; 1998 (2) BCLR 224 (ZS) at 235I-J. Furthermore, what has been emphasised is that freedom of expression has four broad special

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objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See, to the same effect, *Thomson Newspapers Co* v *Canada* (1998) 51 CRR (2d) 189 (Can SC) at 237.

Plainly, embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered Holmes J so wisely observed in *United States* v *Schwimmer* 279 US 644 (1929) at 654, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought - not free thought for those who agree with us but freedom for the thought of that we hate". Mere content, no matter how offensive, cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression. See *R* v *Keegstra supra* at 286.

Sixty years later, in *R* v *Zundel* (1992) 10 CRR (2d) 193 (Can SC) MADAM JUSTICE MCLACHLIN (now Chief Justice) expressed much the same sentiment as HOLMES J. The matter under consideration involved the publication by the appellant, a Holocaust denier, of a booklet entitled "Did six million really die?", which previously had been published by others in the United States and England. The booklet reviewed certain publications in a

critical fashion and suggested, *inter alia*, that it had not been established that six million Jews were killed before and during World War II; and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy.

At the time, it was an offence under s 181 of the Canadian Criminal Code for a person to wilfully publish a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest. The learned judge, writing for the majority, in a valuable and forward-looking judgment, stated at 206:

"(The) guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or 'false' view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression."

And continued at 209:

"Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criteria of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom of expression guaranteed by s 2(b) hitherto adhered to by this court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech."

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See also the earlier remarks of Dickson CJ in *R* v *Keegstra supra* at 241-242 and 286; *Hector* v *Attorney General of Antigua and Barbuda & Ors* [1990] 2 All ER 103 (PC) at 106c-e and g; *Rangarajan* v *Jagjivan Ram & Ors* [1990] LRC (Const) 412 (Ind. SC) at 426a-b; *Kauesa* v *Minister of Home Affairs & Ors* 1995 (11) BLCR 1540 (NmS) at 1553I-1554D; *Reynolds* v *Times Newspapers Ltd & Anor* (2000) 7 BHRC 289 (HL) at 294f-g.

In the majority judgment of the European Court of Human Rights in *Handyside* v *The United Kingdom* (1979-80) 1 EHRR 737 at 754 (para 49) it was said that freedom of expression constitutes one of the essential foundations of a democratic society and it is applicable:

"not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness, without which there is no democratic society."

See also, S D Smith "Skepticism, Tolerance and Truth in the Theory of Free Expression" (1987) 60 *So Cal L Rev* 649 at 712, where the author argues that even patently false statements communicate particular truths and have

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a place in the marketplace of ideas because they help the marketplace to reject false ideas by revealing them for what they are.

Convinced as I am that the publication in this matter is protected by s 20(1) of the Constitution, I turn to consider whether the purpose or effect of s 50(2)(a) of the Act is to restrict this form of expression.

It is not open to doubt that both the State's purpose in, and the effect of, s 50(2)(a) is to restrict expressive activity. Both the facial purpose of the legislative technique and the particular consequence of the proscribed activity offend. The reality of being liable to criminal conviction and imprisonment for a period not exceeding seven years results very definitely in a curtailment of free expression. All this was accepted to be so by counsel for the respondents.

V. IS THE LIMITATION WHICH S 50(2)(A) OF THE ACT IMPOSES ON THE RIGHT OF FREE EXPRESSION SAVED BY S 20(2)(A) OF THE CONSTITUTION?

Section 20(2)(a), in relevant part, reads:

"Nothing contained in or done *under the authority of any law* shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

(a) *in the interests of ... public safety, public order* ...

except so far as that provision ... is shown not to be *reasonably justifiable in a democratic society*" (emphasis added).

(a) *Is the limitiation authorised by law?*

The phrase "under the authority of any law" is worded differently from such equivalent phrases as "provided by law", "prescribed by law" or "in terms of law", used in other constitutional and human rights instruments. See, for instance, article 19(3) of the International Covenant on Civil

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and Political Rights, article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, s 36(1) of the Constitution of the Republic of South Africa and s 1 of the Canadian Charter of Rights and Freedoms. Yet the meaning of these phrases is substantially the same.

In *The Sunday Times* v *The United Kingdom* (1979-80) 2 EHRR 245, the European Court of Human Rights was required to consider what was meant by the expression "prescribed by law" in article 10(2) of the Convention on Human Rights. The majority of the court held at 271 (para 49):

"In the court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is

formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."

It is crucial, therefore, that the law must be accessible and formulated with sufficient precision to enable a person to regulate his conduct. He or she must know, with reasonable certainty, what the law is and what actions are in danger of breaching the law. See *Barthold* v *Germany* (1985) 7 EHRR 383 at 399 (para 47). It is the guidance of conduct, and not the absolute direction of conduct, which is the appropriate objective of legislation. A provision will be too vague if it fails to provide a foundation for legal debate and discussion. An inadequate demarcation of an area of risk affords neither notice to a person of conduct which is potentially criminal, nor an appropriate limitation upon the discretion of the authorities seeking to enforce the provision. It offers no basis for the court to define limits of conduct. See *R* v *Butler* (1992) 8 CRR (2d) 1 (Can SC) at 28-29; *R* v *Nova Scotia Pharmaceutical Society* (1992) 10 CRR (2d) 34 (Can SC) at 58-59.

Expectedly, it was the submission of counsel for the applicants that when dealing with the permissible limitation upon constitutionally protected rights, a court must ensure that if human conduct is to be subjected to the authority of any criminal law, the terms of such law must not be vague; for otherwise there will be a denial of due process. In this context, useful reference may be made to three opinions of the United States Supreme Court.

In *Connolly* v *General Construction Co* 269 US 385 (1925) at 391 it was pointed out that:

"... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily *guess at its meaning and differ* as to its application, violates the first essential of due process of law" (emphasis added).

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Then, in *Cline* v *Frank Dairy Co* 274 US 445 (1927) at 465, the first essential of due process of law was identified as being that:

"... it will not do to hold an average man to the peril of an indictment for the unwise exercise of his ... knowledge involving so many factors of varying effect that neither the person to decide in advance, nor the jury to try him after the fact, can safely and certainly judge the result."

Finally, in *Papachristou* v *City of Jacksonville* 405 US 156 (1972) at 162 it was said:

"This Ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute' ... and because it encourages arbitrary and erratic arrests and convictions ... . Living under

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a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed of what the State commands or forbids'. *Langetta* v *New Jersey* 306 US 451 at 453."

See, generally, Tribe *American Constitutional Law* 2 ed at 1033-1035.

Does s 50(2)(a) of the Act overcome this threshold test? It is obvious that the provision does not just criminalise false statements; nor false statements which *actually cause* fear, alarm or despondency. It criminalises false statements which are *likely to cause* fear, alarm or despondency. There is no requirement of proof of any consequences - of damage to the State or impact upon the public. What the lawmaker has provided for is a speculative offence. An offence has been created out of a conjectural likelihood of fear, alarm or despondency which may arise out of the publication of any statement, rumour or report, even to a *single person*. It matters not that no fear, alarm or despondency actually eventuates.

Because s 50(2)(a) is concerned with likelihood rather than reality and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide an interpretation. It places persons in doubt as to what can lawfully be done and what cannot. As a result, it exerts an unacceptable "chilling effect" on freedom of expression, since people will tend to steer clear of the potential zone of application to avoid censure, and liability to serve a maximum period of seven years' imprisonment.

The expression "fear, alarm or despondency" is over-broad. Almost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or in a single person, one or other of these subjective emotions. A report of a bus accident which mistakenly informs that fifty instead of forty-nine passengers were killed, might be considered to fall foul of s 50(2)(a).

The use of the word "false" is wide enough to embrace a statement, rumour or report which is *merely* incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability; negligence is criminalised. Failure by the person accused to show, on a balance of probabilities, that any or reasonable measures to verify the accuracy of the publication were taken, suffices to incur liability even if the statement, rumour or report that was published was simply inaccurate.

What is overlooked in the criminalisation of false statements is that language is used in a variety

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of complex and subtle ways. It is simply not possible to divide statements clearly into categories of fact and opinion. Rhetorical devices, figures of speech, comedy, metaphor and sarcasm are all examples of superficially false statements which either may be substantially

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correct or be expressions of opinion. As was so graphically put in *Letter Carriers* v *Austin* 418 US 264 (1974) at 284:

"... to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies - like 'unfair' or 'fascist' - is not to falsify facts ... . Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expressions of such an opinion, even in the most perjorative terms, is protected under federal labour law. Here, too, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas."

Often, the line between fact and opinion is blurred. There is a danger that the accepted view becomes confused with the right or correct view.

In *R* v *Zundel supra*, this was said at 209:

"A second problem arises in determining whether the particular meaning assigned to the statement is true or false. This may be easy in many cases; it may even be easy in this case. But in others, particularly where complex social and historical facts are involved, it may prove exceedingly difficult.

... But the difficulties posed by this demand (to determine the truth of a statement) are arguably much less daunting in defamation than under s 181 of the *Criminal Code*. At issue in defamation is a statement made about a specific living individual. Direct evidence is usually available as to its truth or falsity. Complex social and historical facts are not at stake. And most important, the consequences of failure to prove truth are civil damages, not the rigorous sanction of criminal conviction and imprisonment."

Counsel for the applicants put his concluding submission on this aspect of the case thus:

"Several key elements of a s 50 offence are unacceptably vague; cumulatively this is highly problematical. Section 50 is potentially applicable to a very wide range of published work and effectively allocates a wide discretion to authorities in deciding when and where to prosecute. It is also difficult for citizens to know with any degree of certainty whether they are conforming to its requirements. Were this provision to be actively applied, it would exert a significant chilling effect on freedom of expression."

I think these remarks represent a fair and realistic summation of the harsh impact of s 50(2)(a). I regard the provision as one uncertain in the generality of the discretion conferred upon the Attorney-General as to whether to prosecute or not (see s 63(1) of the Act and the statement of the Ontario High Court in Re *Ontario Film and Video Appreciation Society* v *Ontario Board of Censors* (1983) 31 OR (2d) 583 at 592); and in its use of language, insufficiently precise to demonstrate the area of risk and provide guidance of conduct to persons of average intelligence. On both scores, taken cumulatively, it fails to meet the requirement of being "under the authority of any law".

This conclusion effectively disposes of the application against the respondents. Nonetheless, in the event that it may be considered that s 50(2)(a) satisfies the test referred to, and that a

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contrary view is erroneous,

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I shall proceed to an examination of the remaining questions which arise under s 20(2) of the Constitution.

(b) *Does section 50(2)(a) of the act make provision in the interests of public safety or public order?*

It is clear that limitations on freedom of expression which do *not* serve one of the legitimate six aims or exceptions listed in s 20(2) of the Constitution are not valid. See *The Sunday Times* case *supra* at 269 (para 45). *In casu,* only public safety and public order might be posited as legitimate aims of false news provisions. However, it is not sufficient that the limitation on freedom of expression effects merely incidentally one of the specified legitimate aims. It must be primarily directed at that aim - an overriding objective, to use the language of *R* v *Oakes* (1986) 19 CRR 308 (Can SC). The Supreme Court of India similarly pronounced in *Thappar* v *State of Madras* [1950] SCR 594 (SC) at 603 that:

"So long as the possibility (of a limitation) being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void."

The primary objective of the legislature in enacting s 10 of the Public Order Act 1955 and in continuing its existence, first in s 43 and then in s 50(2)(a) of the current Act, was to ensure that public safety and, especially, public order were not jeopardised by false news wilfully or negligently spread by irresponsible journalists and rumour-mongers.

In *Hector* v *Attorney General of Antigua and Barbuda supra*, an editor of a newspaper had been charged under s 33B of the Public Order Act 1972, which prohibited the printing or distribution of any false statement "likely to cause fear or alarm in or to the public, or to disturb the public peace or to undermine public confidence in the conduct of public affairs". The Privy Council, through Lord Bridge of Harwich, was of the opinion that if a false statement likely to undermine public confidence in the conduct of public affairs (which was the allegation particularised in the charge) is also of such a character that *it is likely* to disturb public order, an offence under s 33B could be charged on the ground that it was likely to cause fear or alarm in or to the public or that it was likely to disturb public peace (see at 107e).

This *dictum*, though *obiter*, is worthy of weight. It is supportive of the view I hold that the purveyance of false news which is likely to cause fear, alarm or despondency among the public, may be of such a character that its prohibition is necessary in the interest of public safety or public order. Section 50(2)(a) therefore provides an appropriate instrument with the

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legitimate aim of securing public safety or public order. A charge may therefore be laid in terms

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of it.

(c) *Is the limitation upon freedom of expression, mandated under s 50(2)(a) of the Act, reasonably justifiable in a democratic society?*

In *Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S) at 13C-F, 1995 (9) BCLR 1221 (S) at 1231H-J; and *Retrofit (Pvt) Ltd* v *PTC & Anor* 1995 (2) ZLR 199 (S) at 220A-C, 1995 (9) BCLR 1262 (S) at 1277G-I, this court, following Canadian jurisprudence, set out the three criteria to be looked to in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. To be answered are whether:

(i) the legislative objective which the limitation is designed to promote is sufficiently important to warrant overriding a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations;

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

In *R* v *Zundel supra*, having found that s 181 violated the right of free expression guaranteed by s 2(b) of the Charter, the court proceeded to consider whether the violation was saved as a reasonable limit under s 1 as being "demonstrably justified in a free and democratic society". Section 181 provided:

"Every one who unlawfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

The majority held that the infringement of such right was not saved. MCLACHLIN J summarised the reasons for so holding at 222-223:

"Section 181 catches not only deliberate falsehoods which promote hatred, but sanctions all false assertions which the prosecutor believes 'likely to cause injury or mischief to a public interest', regardless of whether they promote the values underlying s 2(b). At the same time, s 181's objective, insofar as an objective can be ascribed to the section, ranks much lower in importance than the legislative goal at stake in Keegstra. When the objective of s 181 is balanced against its invasive reach, there can in my opinion be only one conclusion: the limitation of freedom of expression is disproportionate to the objective envisaged."

I pass then to the application of the three criteria. First, what is the State's objective in prohibiting false news?

In determining the objective of a legislative measure, the court must have regard to the intention of Parliament when the provision was enacted or amended. See *R* v *Zundel supra* at 211. Clearly, at both stages, in 1955 and

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in 1961, the primary objective was to preempt and counteract threats to the internal security of the country by the publication of statements, rumours or reports considered by the government

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of the day to be false and capable of instilling in the people, or some of them, feelings of fear, alarm or despondency as to the political, economic or social conditions in the country.

Since the advent of independence the need for recourse to s 50(2)(a) of the Act has not been felt. There has been no prosecution. If the trial of the applicants is to proceed it will be the first in twenty years. This, in itself, would seem to establish that there is no longer a primary objective, directed to a "substantial concern which justifies restricting the otherwise full exercise of the freedom of expression": *per* SOPINKA J in *R* v *Butler supra* at 33.

Nor is the retention of s 50(2)(a) necessary to fulfil any international obligation undertaken by the State.

In such circumstances, can it be said that the applicants have not discharged the burden of establishing that the objective of this piece of legislation is *not* of "pressing and substantial" in a democratic society; and is of insufficient importance to justify overriding the constitutional guarantee of freedom of expression? I think not.

Even though s 50(2)(a) is capable of serving a legitimate aim - equally with s 181 of the Canadian Criminal Code - no objective of primary and substantial concern has been identified in support of its survival. Other provisions of the Law and Order (Maintenance) Act remain in force which restrict free expression for reasons of public safety or public order. The Act allows the President to prohibit publications relating to a variety of forms (s 18). Statements threatening or encouraging violence (s 30), inciting strikes in essential services (s 32), undermining the authority of police officers (s 39), exciting disaffection against the President in person or the Government or the Constitution (s 44), and undermining the authority of the President whether in person or in respect of his office (s 46) are condemned as offences. In addition, under common law and statute, treason, acts of terrorism and incitement to crime, are prohibited. There is, as well, the common law offence of criminal defamation which has been charged in this country, albeit somewhat rarely. See *S* v *Modus Publications (Pvt) Ltd & Anor* 1996 (2) ZLR 553 (S).

All this apart, as the European Court of Human Rights was at pains to indicate in *Castells* v *Spain* (1992) 14 EHRR 445 at (para 46):

"(The) dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to unjustified attacks and criticisms."

Political action is the other means available - the refutation of the false

allegation by the provision of appropriate evidence to the contrary - and not litigation. See *Die Spoorbond & Anor* v *South African Railways* 1946 AD 999 at 1012-1013.

With regard to the second inquiry, the fact, before mentioned, that the provisions of s 50(2)(a) have not been employed by the State since this country attained majority rule in 1980, strongly suggests that it is not rationally connected to, and essential for, the intended objective of avoiding public fear, alarm or despondency and so to the securement of public safety or public

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order. There are other ways of achieving this legitimate aim far less arbitrary, unfair and invasive to free expression.

It is of much significance that many other democratic countries either do not have, or do not apply, false news provisions. In *R* v *Zundel supra* at 215, the observation was made, albeit not entirely accurately, that:

"the Crown could point to no other free and democratic country which finds it necessary to have a law such as s 181 on its criminal laws."

False news provisions are indeed non-existent in many jurisdictions, including Australia, France, the Netherlands, the United Kingdom, the United States and, now, Canada. They have been upheld, however, in Malaysia. See *Public Prosecutor* v *Pung Chew Choon* [1994] 2 LRC 236 - but the constitutional test did not include a requirement of reasonable justification and in St. Vincent and the Grenadines. See *Richards* v *Attorney General & Anor* [1991] LRC (Const) 311).

In other jurisdictions, they are very limited in scope. Section 171G of the Indian Penal Code, for example, makes it an offence to knowingly publish false news in relation to the character or conduct of a candidate with the intent of affecting the result of an election. Section 226(b) of the Danish Criminal Code prohibits false rumours, but only where these incite to racial hatred, as a species of hate speech. In Germany, there are no false news provisions relating directly to public order. Section 109d of the Criminal Code prohibits the wilful spreading of false statements of fact likely to disturb the functioning of the army; while s 100a prohibits spreading false facts that endanger relations with other states or the security of the country. The ambit of each is narrow. In addition, any such prohibitions are subject to the constitutional guarantee of freedom of opinion and the specific principles flowing therefrom. Article 656 of the Italian Criminal Code prohibits the publication of false news which disturbs public order. This provision has been upheld on three occasions by the Constitutional Court. However, the extent of its application - far more finely tuned to a legitimate aim than is s 50(2) - has been progressively reduced. The last successful prosecution appears to have been in 1968. The Supreme Criminal Court held in 1955 that it is not applicable to cases of mistake and, in 1974, that the threshold for establishing a threat

to public order is high. See the detailed survey of legislative responses in other jurisdiction in *R* v *Zundel supra* at 246-248.

Unlike the situation in *R* v *Butler supra,* where the court relied on the fact that pornography legislation may be found in most free and democratic societies to justify, as proportionate, the restriction it imposes on freedom of expression, the opposite is true with s 50(2)(a). Just as with s 181 of the Canadian Criminal Code, the purpose behind s 50(2)(a) - which has the effect of overriding the most precious of all the protected freedoms, resting as it does at the very core of a democratic society - fails for want of proportionality between its potential reach on the one hand and the "evil" to which it is claimed to be directed on the other.

Even if a rational link is assumed, one then must ask whether the breadth of the provision goes

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further than necessary to achieve that aim. In my view, it does.

Section 50(2)(a) captures not only the publication or reproduction of any statement, rumour or report made with actual knowledge of its falsity which causes fear, alarm or despondency. It sanctions the prosecution of all false publications or reproductions made negligently which the Attorney-General regards as not having caused, but only likely to cause, fear, alarm or despondency among the public or even in a single member of the public.

The breadth of the expression "fear, alarm or despondency" in s 50(2)(a) is more far-reaching than that of "injury or mischief to a public interest" in the condemned s 181. Accordingly, the remarks of McLachlin J in *R* v *Zundel supra* at 219 strike me as particularly relevant to the situation that pertains under s 50(2)(a):

"Section 181 can be used to inhibit statements which society considers should be inhibited, like those which denigrate vulnerable groups. Its danger, however, lies in the fact that by its broad reach it criminalises a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms. The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups or individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. Should an activist be prevented from saying 'the rainforest of British Columbia is being destroyed' because she fears criminal prosecution for spreading 'false news' in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry? Should a concerned citizen fear prosecution for stating in the course of political debate that a nuclear power plant in her neighbourhood 'is destroying the health of the children living nearby' for fear that scientific studies will later show that the injury was minimal? Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that this statement is a deliberate assertion of a false fact? Should a

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member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight?"

Two other passages in Her Ladyship's judgment, at 220 and 221, are also apposite to an analysis of s 50(2)(a), and commend repetition:

"Not only is s 181 broad in contextual reach; it is particularly invasive because it chooses the most draconian of sanctions to effect its ends - prosecution for an indictable offence under the criminal law. Our law is premised on the view that only serious misconduct deserves criminal sanction. Lesser wrongs are left to summary conviction and the civil law. Lies, for the most part, have historically been left to the civil law of libel and slander; it has been the law of tort or delict that has assumed the main task of preserving harmony and justice between individuals and groups where words are concerned. This is not to say that words cannot properly be constrained by the force of the criminal law. But the harm addressed must be clear and pressing and the crime sufficiently circumscribed so as not to inhibit unduly expression which does not require that the ultimate sanction of the criminal law be brought to bear ..."

And later:

"(The) broad range of expression caught by s 181 - extending to virtually all controversial statements of apparent fact which might be argued to be false and likely to do some mischief to some public interest - combined with the serious consequences of criminality and imprisonment, makes it impossible to say that s 181 is appropriately measured and restrained having regard to the evil addressed - that it effects a minimal impairment ..."

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I respectfully adopt the compelling force of this reasoning.

It only suffices to state, in sum, that the expansive over-breadth of s 50(2)(a) gives rise to the inevitable consequence of failing to confine and impair the exercise by the applicants of their right to freedom of expression as little as possible.

VI. CONCLUSION AND DISPOSITION

It necessarily follows that, in my judgment, s 50(2)(a) of the Act infringes the right of freedom of expression protected and guaranteed by subs (1) of s 20 of the Constitution and that such infringement is not saved by subs (2) thereof. I do not therefore find it necessary to deal with the argument under s 18(2) of the Constitution.

In the result, I would order as follows:

1. It is declared that s 50(2)(a) of the Law and Order (Maintenance) Act [*Chapter 11:07*] is in contravention of s 20(1) of the Constitution.

2. The costs of the application are to be paid by the first respondent.

MCNALLY JA: I agree with the learned Chief Justice, but would add some brief observations. The wealth of learning which supports the conclusion reached by His Lordship contains a relatively simple message, which is this:

The section is too widely expressed, too unclear as to its limitations, and too intimidating (because no-one can be sure whether what he says or writes will or will not attract prosecution and imprisonment). That is why it cannot stand.

We are not saying that freedom of expression is limitless. We are not saying that people may publish anything they wish, however pornographic, however untruthfully subversive, however race-hatred inspiring.

It is not the court's function to re-draft legislation. That is the function of Parliament and the State's draftsmen and women. All we are saying is that the section is unacceptable as it stands.

These remarks are necessary because, after our judgment in In re *Munhumeso & Ors* 1994 (1) ZLR 49, about the control of demonstrations and street processions in terms of the same Act, it was said, by persons who do not seem to understand these things, that the Supreme Court had made the work of the police impossible, because we had tied their hands.

That is simply untrue. We struck down a section which was too wide and thus too oppressive. It was for the Government to rewrite the section in a more acceptable form. We said so explicitly. We went so far as to suggest that s 12 of the English Public Order Act 1986 might provide a useful starting point. But nothing has been done. It was simple to say "the courts have tied our hands. If there are disturbances, blame the courts, not us".

It is the urgent duty of the relevant Ministry to re-write the Act in proper form and to steer it

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through the necessary constitutional processes.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Atherstone & Cook, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

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NYAGUSE *v* MKWASINE ESTATES (PVT) LTD 2000 (1) ZLR 571 (SC)

Citation	2000 (1) ZLR 571 (SC)
Case No	Judgment No. S-34-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	May 8, 2000
Judgment	May 22, 2000
Annotations	None

Civil appeal

Flynote

Employment - dismissal - wrongful - award of back pay - reduction based on probable earnings during period - whether may be made - calculation of - onus on employer

Headnote

The appellant was dismissed from his employment with the respondent company. The Labour Relations Tribunal found that he had been wrongfully dismissed and ordered that he be reinstated without loss of salary; alternatively, the company could choose to pay damages. As the parties could not agree on a figure, the matter was set down before the Tribunal for assessment. The Tribunal held that he was entitled to various sums, but from the total there had to be deducted a sum which the Chairman of the Tribunal estimated as being the appellant's earning from other sources during the time between his dismissal and the date the Tribunal decided that he had been wrongfully dismissed.

Held, that where an employee has been wrongfully dismissed, and damages (including back

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pay) are awarded as an alternative to reinstatement, the employee is required to mitigate his loss. The court is entitled to set off against the award of damages any income earned by the accused during the time he was not employed, but the onus is on the employer to show that the employee has, or should have, earned an income from another source. If an estimate must be made of the amount, the court must use the information to hand, and not simply pluck a figure from nowhere.

Cases Considered

Cases cited:

Ambali v *Bata Shoe Co* 1999 (1) ZLR 417 (S)

Chegutu Municipality v *Manyora* 1996 (1) ZLR 262 (S)

Gauntlet Security Svcs (Pvt) Ltd v *Leonard* 1997 (1) ZLR 583 (S)

Leopard Rock Hotel v *van Beek* 2000 (1) ZLR 251 (S)

Myers v *Abramson* 1952 (3) SA 121 (C)

Reserve Bank of Zimbabwe v *Siwawa's Est's Exor* 1999 (1) ZLR 185 (S)

Toerien v *Stellenbosch University* 1996 (1) SA 197 (C)

Case Information

P Nherere, for the appellant

A J Dyke, for the respondent

Judgment

McNally JA: I will refer to the parties as Mr Nyaguse and Mkwasine respectively. Mr Nyaguse was employed by Mkwasine in 1982, and in 1994 had risen to the position of Manpower Resources Manager. He was then

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dismissed. On 20 September 1996, the Labour Relations Tribunal found that he had been wrongfully dismissed. It ordered that he be reinstated without loss of salary and other financial benefits. But, as required by the proviso to s 96(1)(c) of the Labour Relations Act ("the Act"), it also ordered that, as an alternative to reinstatement, Mkwasine could choose to pay damages. The parties were invited to agree to a figure for damages, failing which the matter should be set down for the Tribunal to make an assessment.

There was no agreement. The matter was set down. The hearing took place apparently on 10 and 11 June 1997 and 23 and 24 October 1997. Judgment was handed down on 27 May 1999, though it is date-stamped the day before.

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The Chairman of the Tribunal came to the following conclusions:

1. Mr Nyaguse had been paid up to and including 11 August 1994;

2. The order for reinstatement was on 20 September 1996;

3. Therefore damages were to be calculated in two parts, namely, past or actual damages from 12 August 1994 to 20 September 1996, and future or prospective damages thereafter;

4. In regard to both heads of damages, the rule of mitigation of damages should apply, that is to say, any income he earned in alternative employment (including self-employment) or that he could reasonably have been expected to earn, should be deducted from his claim. In the case of his claim for the period 12 August 1994 to 20 September 1996, that amount would be deductible from his claim for salary and benefits. In the case of his claim for the period after 20 September 1996, the calculation of his prospective loss would take into account his prospects of alternative employment.

5. Applying these criteria, the Chairman found:

   (a) In respect of the first period, he was entitled to:

      (i) back pay from 12 August 1994 to 20 September 1996 with interest from the date of suspension to the date of judgment;

      (ii) his bonuses or "13th cheques";

      (iii) $48 607 by way of leave pay;

      (iv) education allowance and school travel allowance in principle, but the amount was not established, so he granted absolution from the instance;

      (v) pension difference - but again the amount was not proved and absolution was granted;

      (vi) medical aid contributions, if not paid by Mkwasine to CIMAS, should be paid to him in respect of the period;

      (vii) his claim for motor vehicle allowance was not understood, and absolution was granted;

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      (viii) electricity and water charges - I confess I have difficulty in understanding the ruling on this issue.

   (b) From that total must be deducted the sum of $300 000 which the Chairman estimated as his probable actual earnings from other sources during that period.

   (c) By way of future or prospective damages Mr Nyaguse was entitled to two years' net

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salary (including any relevant salary increases).

Mr Nyaguse now appeals against part of this judgment, as follows:

1. As a matter of law, his back pay should not be diminished by the sum of $300 000 or at all;

2. The figure of $300 000 is a figure which no reasonable Tribunal could have come to;

3. (A ground sought to be added at the hearing as to which we reserved judgment, but which we now, without strenuous objection by Mr *Dyke*, allow.) The Tribunal erred in using an interest rate of 18%, and should have used the prescribed rate - 25% at the relevant time. Moreover, interest should have been ordered to run from the date each payment fell due until date of payment;

4. The Tribunal should have awarded Mr Nyaguse his costs.

I will deal with each in turn.

1. MITIGATION OF BACK PAY

Mr *Nherere* has put up a logically powerful argument for the contention that back pay is not, as a matter of law, subject to mitigation. It goes like this:

(a) Back pay is provided for in subs (a) of s 96(1) of the Act.

(b) Reinstatement or damages are provided for in subs (c) of s 96(1) of the Act.

(c) Therefore damages are an alternative to reinstatement, not an alternative to back pay.

(d) Reinstatement, as we have held in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262, carries no necessary implication of retrospectivity.

(e) Therefore, there is a clear distinction between the situation before the date of reinstatement, and the situation thereafter. Up to the date of the order of reinstatement, Mr Nyaguse was entitled contractually to his salary and allowances. No question of mitigation arises - *Toerien* v *Stellenbosch University* 1996 (1) SA 197 (C). After the date of reinstatement we are concerned with prospective damages. The question of mitigation now becomes relevant.

The difficulty with the conclusion reached in para (c) above is that this court has, on at least three occasions, rejected it. In *Gauntlet Security Services*

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(Pvt) Ltd v *Leonard* 1997 (1) ZLR 583 (S) at 586, the Chief Justice, relying on *Myers* v *Abrahamson* 1952 (3) SA 121 (C) at 127C-E, said "but the employee must mitigate his loss".

In *Ambali* v *Bata Shoe Co* 1999 (1) ZLR 417, I specifically distinguished *Toerien supra* on the ground that, as was said in *Myers supra*, and more recently by the Chief Justice in *Reserve*

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Bank of Zimbabwe v *Siwawa's Estate's Executor* 1999 (1) ZLR 185, we are not concerned with surrogate damages.

Finally, in *Leopard Rock Hotel* v *van Beck* S-6-2000*(81) we rejected a virtually identical argument put forward on behalf of the employee.

The point must be made that the Act is intended as a practical solution to labour problems. True, it is intended to favour workers, but not to the extent that they should be paid twice for the same period of work. I do not, with respect, agree with Traverso J in *Toerien supra* where he says (at 201I):

"Why should the respondent, who is in breach of its obligations in terms of the contract of employment, benefit from that very breach?"

My answer to that is that the employer does not benefit. It is excused from paying an employee who has not worked for it. And the reason is that the employee has been able to earn at least as much by working elsewhere. If the employee had remained jobless, then that would have been different. Equitably, if someone has to lose, it must be the employer, who was in the wrong. But if the employee manages to find other work which pays just as well, why punish the employer and over-compensate the employee? We are not dealing with punitive damages.

We have interpreted s 96 of the Act rather (though not exactly) in the way that the law approaches a claim in a matrimonial dispute for arrear maintenance. There is a discretion inherent in s 96, as appears from the word "may" in the phrase "a determination made ... may provide for ..."

I do not accept the contention of Mr *Nherere* in this regard. The common law logic of his argument is not applicable in a statute law situation which this court has interpreted in an equitable way which is fair to both sides.

2. THE BASIS FOR THE DEDUCTION OF $300 000

Since this court does not deal with appeals on fact from the Tribunal, Mr *Nherere* has put his submissions on the basis that no reasonable tribunal could have come to the figure of $300 000 as the amount by which the award of salary and allowances for the period 12 August 1994 to 20 September 1996 should be reduced.

MCNALLY JA

The figure was arrived at by the Chairman as a result of a process of reasoning which I understand to be as follows:

1. Mr Nyaguse certainly earned some income during the period;
2. He was untruthful and unforthcoming in his evidence and seemed to be doing his best to conceal the extent of his earnings;
3. He was involved in gold-mining and probably in other income generating occupations as

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well;

4. He admitted, under cross-examination, earning $82 981 from the sale of gold;

5. Taking into account this and the other activities he was probably involved in, it would not be unreasonable to estimate his income over the two years to be $300 000.

It is undeniable that the figure of $300 000 is a "guesstimate". There may be situations in which some kind of estimate must be made, particularly where the person concerned has been less than frank about his income. But at the same time, it must be borne in mind that the onus is on the employer to show that the employee has, or should have, earned an income from some other source. If the Tribunal is forced to make an estimate, it must use the information to hand, and not simply pluck a figure from nowhere.

There is an indication suggesting that the figure of $300 000 is not an unreasonable one. As Mr *Dyke* pointed out, his bank statement (Exhibit 8, p 338) shows that between 20 July and 20 August 1995 he banked $34 670.17 from Fidelity Printers, the firm to which he sold his gold. At that rate of earning, his income over twenty-four months would have been over $800 000. But there is no reason to assume that gold mining income is regular. The indication in this case is that it was not. And anyway, this calculation ignores the cost of producing the gold.

I am not convinced by Mr *Dyke's argu*ment that the documents show that he earned $136 199.09 over the period instead of the $82 981 he admitted. I cannot confirm Mr *Dyke's* calculation from the papers. In particular, I cannot find the $39 000 allegedly earned from gold sales. It is not reflected on p 336, which show smaller credits totalling $28 496.35 excluding unpaid items. Moreover, the sums of $12 637.97 and $10 383.33, claimed by Mr *Dyke* to have been earned within the relevant period, were in fact earned on 12 and 18 December 1996. That is outside the period.

More convincing, however, is the evidence of the "Statements of Bullion Purchased" obtained from Fidelity Printers. These add up as follows, and I have put them back into date order:

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Date	Amount
3 March 1995	$ 7 220.47
4 May 1995	$ 5 891.46
18 May 1995	$ 8 728.74
31 May 1995	$ 13 776.15
4 July 1995	$ 12 209.14
2 August 1995	$ 1 868.38

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16 August 1995	$ 6 674.49
22 August 1995	$ 3 362.49
6 September 1995	$ 4 309.01
22 February 1996	$ 4 716.42
7 May 1996	$ 4 996.31
12 June 1996	$ 4 126.28
	$77 879.55

If one compares this list with the amounts banked in his account, there are discrepancies. Large deposits, amounting to $25 496 made in April and on 3 May 1995, are not recorded on this list; nor the $26 127.09 deposited in July 1995 and recorded as coming from Fidelity Printers. One would be justified in concluding that the list of "Statements of Bullion Purchased" supplied by Mr Nyaguse is incomplete. On the other hand, there is no evidence that I can find which shows that amounts earned by the sale of gold were hidden elsewhere and not paid into his current account. So the evidence would support the conclusion that the list understates his gold sales by some $51 623.

Against this, the gold earnings are gross earnings, not net figures. Obviously, there is expense involved in producing gold. No evidence at all was led on that aspect of the calculation.

Finally, it seems to me that there was no real evidence at all that Mr Nyaguse had other sources of income. He admitted being involved in some cross-border trading in 1992-93, a period long before the relevant period. He denied any involvement in running emergency taxis. Nothing was proved.

None of these considerations were taken into account by the Chairman in coming to his "guesstimate" of $300 000. I think he should have done so, and that it was wrong in principle, and thus unreasonable, not to do so.

The facts suggest to me that:

1. Mr Nyaguse earned $129 500 from gold mining in the relevant period;

2. That was gross income. We simply do not know the net profit;

3. There is no rational basis for supposing that he earned money from other sources.

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Strictly perhaps, the matter should be sent back to the Tribunal for re-quantification. But the situation cries out for an early resolution, and I do not propose to remit the matter. I will assume

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that he made about a 50% net profit on gross earnings. I rule therefore that $64 500 instated of $300 000 is to be deducted from his actual damages.

3. THE WRONG INTEREST RATE WAS APPLIED, AND THE INTEREST WAS CALCULATED OVER THE WRONG PERIOD

This ground of appeal is incontestable. Neither counsel could suggest a reason for the use of 18% as a rate of interest. The prescribed rate at the time was 25%. That rate should be applied.

The interest on the salary and benefits and bonuses due to Mr Nyaguse must run from the date on which each salary cheque and each bonus was due, and from that date to the date on which the final payment, less $64 500, is made.

4. COSTS

Mr Nyaguse sought costs below, and his claim appears to have been overlooked. The basic rule must apply. In the absence of any tender, he had to come to court to win any award, and he is entitled to his costs. He has achieved enough success on appeal to merit the award of costs of appeal as well.

The appeal therefore succeeds to the following extent -

1. The deduction to be made from the award of actual damages (described in the Tribunal as back pay) is to be reduced from $300 000 to $64 500;
2. The interest on arrear salary, benefits and bonuses is to be 25% *per annum* and not 18% *per annum*;
3. The said interest is to run from the date each payment fell due until date of payment of the full amount less $64 500;
4. The appellant is awarded the costs of the hearing before the Tribunal and the costs of appeal.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Wintertons, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

THEBE *v* MBEWE t/a CHECKPOINT LABORATORY SERVICES 2000 (1) ZLR 578 (SC)

Citation 2000 (1) ZLR 578 (SC)
Case No Judgment No. S-38-00

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Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	May 9, 2000
Judgment	May 22, 2000
Annotations	None

Civil appeal

Flynote

Delict - negligence - liability - medical - blood test - erroneous finding that person infected with AIDS - subsequent tests showing person not infected - error in collecting and labelling of sample tested - not a procedure involving an inherent risk - error due to failure to exercise due skill and care

Headnote

The plaintiff had a routine blood test for insurance purposes. The test, carried out in the defendant's laboratory, showed positive for AIDS. The plaintiff immediately went for further tests, both with her own doctor and at the instance of the insurer. The results of both were negative. She claimed $150 000 damages for the shock and suffering caused to her by the defendant's alleged negligence. The court *a quo* found the respondent liable, on the grounds that before sending the results of the test to the plaintiff's insurer, he should, because she was a low risk person, have asked for another blood sample and carried out another test. There was also evidence that there had been an error in the collection and labelling, not in the actual test carried out. The court awarded damages of $2 000 only, with costs on the magistrates court scale. The appellant appealed against the *quantum* of damages and the order of costs, while the respondent cross-appealed against the finding of liability.

Held, that the defendant should not have been found to have been negligent on the basis of sending the results to the insurer before conducting a second test. However, the probabilities were that there was an error in the collecting and labelling of the blood and he should have been found negligent on that ground. The respondent's laboratory erred in the most fundamental aspect of blood testing - collecting and labelling the blood sample. A professional technician is expected to comply with that. He could not escape liability on the ground that he, as a professional person, had exercised reasonable skill or care. Such negligence was not an "inherent risk" of the kind that is attendant on surgical procedures, nor was it an error of judgment of the kind that a professional person might make.

Held, further, that the trauma suffered by the plaintiff was transitory; there was no evidence that she needed counselling or psychiatric care. No more than a small sum could be justified as damages; the original claim was exorbitant.

Held, further, that the costs should have been awarded on the High Court scale. This subject, which involved a high profile issue, was virgin territory, and it was right that the High Court

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should be the first to pronounce upon it.

Cases Considered

Cases cited:

Hatchen v *Black*, *The Times* 2 July 1954

Hancke v *Cooper* (1835) 7 C & P 81

Case Information

L Mazonde, for the appellant

J Dondo, for the respondent

Judgment

Muchechetere JA: The appellant ("Thebe") issued summons in the High Court against the respondent ("Mbewe") for damages in the sum of $150 000 together with costs of suit. This was in relation to an HIV/AIDS test carried out at Mbewe's laboratory (Checkpoint Laboratory Services). The court *a quo f*ound Mbewe liable and awarded Thebe damages in the sum of $2 000 and costs on the magistrate's court scale. Thebe appeals against the *quantum* of damages awarded and the order of costs. It was submitted on her behalf that she should have at least been awarded damages in the region of $30 000 and that the costs should have been on the High Court scale.

It was, on the other hand, submitted on behalf of Mbewe that the court *a quo*'s award and order of costs was proper in the circumstances. Mbewe also counter-appealed against the court's finding of liability on the matter. He submitted that the court erred in finding that there was negligence on his part.

The counter-appeal is also opposed by Thebe.

The facts in the matter are that Thebe was sent to Mbewe's laboratory for the purposes of an HIV/AIDS test to be carried out upon her by her insurance company (First Mutual Life Assurance Company, "the insurance company") because her insurance policy for over $100 000 had lapsed. On 22 October 1997, a blood sample was taken by an employee of Mbewe, one Steve Chibukwe ("Chibukwe"). The insurance company was given the results on 27 October 1997 which were to the result that Thebe was positive.

The results were communicated to Thebe by the insurance company on 28 October 1997. She went to her own doctor about the matter on the same day and he referred her to Clinical Laboratories for a further blood test to be carried out upon her. This was done and on 29 October 1997 the blood test report she was given indicated:

"BLOOD

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TEST FOR HIV:

WELLCOZYNE (MUREX)	:	Non-reactive
ROCHE	:	Non-reactive."

Subsequently, that same blood sample was used to carry out what is known as a western blot test and the result, which was communicated to Thebe on

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17 November 1997, was that there were no bands seen. All the above indicated that the results for the blood test were negative.

On 27 November 1997, Thebe was once again asked by the insurance company to undergo a further HIV/AIDS test. This time she was sent to CIMAS Medical Laboratories. A test was carried out on the same day and the report released on the same day. The Elisa test which was carried out indicated:

"ELISA TEST FOR HIV

GENELAVIA MIXT	:	NEGATIVE
BIOTEST	:	NEGATIVE."

This therefore indicated that the blood test was also negative. This information was communicated to the insurance company in December 1997.

Thebe alleged that Mbewe was negligent in that he did not attach to the results of his tests a letter to the insurance company to the effect that Thebe should undergo a further test. In her view, this omission had the effect of leaving his result as conclusive. She further alleged that Mbewe conducted his test negligently or, alternatively that he, an experienced doctor, left the conducting of the tests to his inexperienced assistant who did not perform the tests properly. She also alleged that, as a result of the negligence, she suffered damages in the form of mental trauma and *contumelia* which resulted in her seeking counselling. She quantified her damages as being in the sum of $150 000.

Mbewe denied the allegation of negligence. In his plea, he stated that the person who carried out the tests was a qualified technician, Chibukwe. He himself never had any contact with Thebe. He also stated that his technician performed two different Elisa tests on the blood sample he got on the day in question and that they came out with a positive result. He further stated that, after receiving the letter of demand, he carried out a western blot test on the blood sample which remained from the first test and that this also came out positive. He also stated that he did not know how Thebe received the results but that the results were sent to a Dr

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Shabudin of the insurance company marked confidential and not to be disclosed to the client (Thebe).

Mbewe denied that Thebe suffered damages as alleged and challenged her to prove her damages.

Thebe's evidence was to the effect that she initially went for an HIV/AIDS test at the request of Dr Shabudin of the insurance company on 23 January 1997. This was carried out by CIMAS Medical Laboratories and the result on the same date was negative. The result read:

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"ELISA TEST FOR HIV

GENELAVIA MIXT	:	NEGATIVE
BIOTEST	:	NEGATIVE."

However, when her insurance policy lapsed she was, as stated above, sent for another test by Dr Shabudin, this time to Mbewe's laboratory. After the test she telephoned Mbewe's laboratory to find out the results of the test and was told that they had been sent to the insurance company. She then contacted Dr Shabudin and when she later saw him he told her that the results indicated that she was HIV positive. He was apologetic about it but stated that she should not take the results seriously.

Thebe goes on to state that as soon as she was told the said information she felt dizzy and was speechless. According to her, it came to her as if someone had given her a death sentence. She became suicidal. When she later tried to explain the situation to her friends they distanced themselves from her. Some two days later she went to see her doctor, Dr Browne, who sent her to Clinical Laboratories. As indicated above, they came out with the negative results. And, as also indicated above, a further HIV/AIDS test was carried out by Cimas Medical Laboratories at the request of Dr Shabudin on 27 November 1997 and it again came out negative.

Thebe's evidence was not shaken under cross-examination. It, however, became clear that the test, a western blot test, in Mbewe's laboratory were carried out by an employee of Mbewe whose name she did not know (Chibukwe) and not Mbewe.

Professor Peter Robert Marson ("Professor Marson") gave evidence on behalf of Thebe. He is a professor at the University of Zimbabwe involved in laboratory testing. His evidence was to the effect that he has since the middle of the 1980s been involved in HIV research which entailed dealing with three large tests, monitoring some 15 000 to 16 000 people. He was aware of the tests carried out on Thebe. According to him, the test by Mbewe's laboratory merely disclosed the result of the test but did not indicate what the tests conducted were. In this it differed from the three tests carried out on 23 January 1997, 28 October 1997 and 27 November 1997. It was

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put to him that Mbewe's evidence would be to the effect that an Elisa test was carried out in Mbewe's laboratory and that at a later date a western blot test was carried out on the same sample of blood and that both tests produced a positive result. His comment on that was that it was not possible that the blood status of a person could change or alter in the manner reflected between Mbewe's test and the two subsequent tests. In his view, there could be no change in the status from HIV positive to negative even with the use of modern medicine.

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On what possible explanation there could be for the different results, Prof Marson's response was that there could be errors in the initial collection, labelling and interpretation by the reader. Prof Marson thereafter explained to the court how the HIV/AIDS tests were carried out and that they all had to be done in accordance with the guidelines issued by the World Health Organisation as well as the National Aids Co-ordinating Project ("the guidelines"). He also stated that on all blood samples for HIV/AIDS tests two samples must be tested. It was also Prof Marson's evidence that the western blot test was an exceptional test because it was very expensive and would probably be done with a fresh sample of blood. On his opinion about the test carried out at Mbewe's laboratory and the two subsequent ones, his reply was that Mbewe's test was not consistent with the other two tests and that this indicated to him that there was an error in labelling in Mbewe's laboratory's tests.

Under cross-examination, Prof Marson admitted that even with diligence in the conduct of the above tests errors do occur but indicated that this could, however, be avoided. He also indicated that he did not carry out HIV/AIDS tests for insurance companies. He also stated that normally if an HIV/AIDS test's result in a laboratory is positive, the laboratory, in the case of a low risk person, should ask for another blood sample from which another test could be carried out again. He stated that that was also in line with the guidelines. When it was put to him that Mbewe would say that the guidelines were not to that effect, Prof Marson insisted that they were. Prof Marson was reluctant to state that Mbewe's laboratory was incompetent in this matter because of the evidence that a later test by the same laboratory on the same blood sample again produced a positive result. In his view, this indicated that there was an error in the collection and labelling and not in the actual test carried out.

Prof Marson's evidence was also not really shaken under cross-examination.

Mbewe gave evidence for the defence. He testified that Thebe's blood sample was taken and labelled by Chibukwe. He is a qualified laboratory technician with two or three years' experience. Chibukwe thereafter carried out the Elisa tests. These tests gave a positive result. He then informed the insurance company of the results. Thebe later telephoned for the results but was told that the insurance company would get the results.

On what procedure was used when the person to be tested was a low risk person, his reply was that his understanding of the guidelines was to the effect that the person who tested positive would be sent to the doctor or technician concerned, that is, the person who sent her for the tests, and if

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the person sending was not satisfied the person tested would then be sent back for another blood test. He could not recall when he last read the guidelines.

Mbewe also stated that, after receiving a letter of demand, he carried out another test from the remainder of Thebe's blood sample and that that again tested positive. On the difference between his results and those two subsequent tests carried out by two laboratories, his reply was that he was suspicious as to how blood was extracted in connection with the subsequent tests. He denied that there was negligence in the manner the test was carried out in his laboratory.

Under cross-examination, Mbewe confirmed that he did not extract the blood sample from Thebe. He, however, agreed that he owed a duty of care to make sure that things were done properly in the testing of Thebe's blood samples. He stated that he would be calling Chibukwe, who carried out the test, to give evidence in the matter. Mbewe also indicated that he disagreed with Prof Marson's evidence on the guidelines and on the question as to whether there was an error in the manner the test was carried out - the collection and labelling of the blood.

Mbewe denied that Thebe suffered the trauma she alleged on receiving the test results from Dr Shabudin. This, according to Mbewe, is because Thebe went for further blood tests and that she could have also come to him for further blood tests.

Mbewe was evasive on whether he would call evidence to indicate that collection of blood samples done in his laboratory was better than that which was done in the other two tests. In the end, he did not call any other evidence on the matter.

The learned trial judge preferred the evidence of Prof Marson on the testing of blood samples to that of Mbewe. In particular he accepted that there must have been an error in labelling at Mbewe's laboratory. He also was of the view, and also in agreement with Prof Marson, that a reasonable professional technician in the position of Mbewe or Chibukwe, when dealing with a low risk person such as Thebe, should, as indicated in the guidelines, have asked Thebe to provide another blood sample so that another test could be carried out once the first test proved positive.

In the result, the learned trial judge found Mbewe negligent on the ground that before sending out the results of Thebe's test to the insurance company he should have first asked her for another blood sample and carried out another test. This, according to the learned trial judge, was because Thebe was a low risk person.

On quantum, the learned trial judge was of the view that the amount being sought by Thebe was exorbitant. His view was that the trauma Thebe

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suffered could not be other than transitory. This was because, firstly, she was, at the time the positive result was communicated to her, aware that in January 1997 a similar test resulted in a negative result. Under the circumstances, this should have caused her to doubt the result of Mbewe's laboratory's test. Secondly, some two days later another test resulted in a negative result.

I will deal firstly with the issue of liability. In this connection Mr *Dondo*, for Mbewe, firstly submitted that the learned trial judge erred in finding that Mbewe was negligent in that he failed to treat Thebe as a low risk person, in which case he should not have sent her results to the insurance company before conducting another test with a fresh sample of blood from her in accordance with the guidelines. Mr *Dondo* argued, firstly, that the guidelines - which were not produced in either court - did not apply to the situation he was in. Thebe was not his client or patient. She was the insurance company's client. His client was the insurance company and he owed a duty of care to it. His instructions from his client were simply to carry out the test on Thebe and send the results to it. There were no instructions to carry out a second test in the event the results were positive. This is evidenced by the insurance company's form which requested the test. The situation might have been different if Thebe had been his client or patient. I agree with Mr *Dondo*'s argument on this. He had no instructions to carry out another test in the event the result was positive. In my view, the obligation to have the second test carried out is on the insurance company who eventually did just that.

Mr *Dondo*'s second argument was that, even if it could be said that there was an obligation to carry out a second test in accordance with the guidelines, this would only come into play on knowledge that Thebe was a low risk person. He argued that in this case there was no way he would have known that, because Thebe was a person simply sent to him by the insurance company. He carried out tests on all persons who were referred to him by insurance companies and other persons. There was no way he could judge as to whether they were high or low risk persons. He would not know their social or medical histories. I again agree with Mr *Dondo*'s argument and disagree with Mr *Mazonde*'s counter-argument that Mbewe ought to have been aware that Thebe was a low risk person because she had been sent to him by an insurance company and because the insurance policy she wanted renewed was over $100 000. It does not follow that persons in that category are low risk.

As a result, I agree that Mbewe should not have been found negligent because of sending the results to the insurance company before conducting a second test on Thebe.

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However, the second ground of negligence generally found by the court *a quo* or eventually adopted in this court by Mr *Mazonde*, which was to the effect that Mbewe was negligent in the collecting and labelling of Thebe's blood sample, was, in my view, proper. In this connection, the learned trial judge relied on the evidence of Prof Marson and the two subsequent tests.

Mbewe's insistence in his assertion that his tests were correct, as evidenced by the second test he later carried out on the remainder of the same blood sample, reinforces, when account is taken of the two subsequent results, the probability that there must have been an error in the

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collection and labelling of the blood. Mbewe's account was also dented by his failure to call Chibukwe to give evidence. He would have told the court the circumstances surrounding the collection and labelling of Thebe's blood sample, the testing of the sample and the reading of the result. An allegation by Mbewe that the collection of blood samples in the two subsequent tests must have been suspicious or faulty was never persisted in and no evidence was proffered to substantiate it. Further, the two laboratories who carried out the tests independently of each other had good reputations and appear to be used by many medical institutions in the country. In any event, the probabilities favour the finding that there must have been an error in Mbewe's laboratory and that in the circumstances there was liability.

Mr *Dondo* submitted that an error of the nature alleged in this case does not amount to negligence to be visited with damages because it had not been proved that Mbewe's laboratory's actions or inaction fell below the standard expected of a professional in the same position. He cited Jackson and Powell's *Professional Negligence* 2 ed at p 291 para 6.11 where the learned authors say:

"Whether he is sued in contract or tort, the medical practitioner is not obliged to achieve success in every case that he treats. His duty, like that of other professional men, is to exercise reasonable skill and care ..."

And in *Hancke* v *Hooper* (1835) 7 C & P 81 Tindall CJ said:

"A surgeon does not become an actual insurer; he is only bound to display sufficient skill and knowledge in his profession. *If from some accident, or some variation in the frame* of a particular individual, an injury happens, it is not a fault of the medical man" (my emphasis).

And further, DENNING LJ said, directing the jury in *Hatchen* v *Black*, *The Times*, 2 July 1954, as part of the summing up (including the passage quoted), (and it is also set out by LORD DENNING in *The Discipline of Law* (Butterworths 1979) p 242-244) reads as follows:

"You must not, therefore, find him negligent simply because something happens to go wrong; if, for instance, *one of the risks inherent in an operation* actually takes place *or*

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some complication ensues which lessens or takes away the benefits that were hoped for, or if in a matter of *opinion he makes an error of judgment.* You should only find him guilty of negligence when he falls short of a standard of a reasonably skilled medical man, in short, when he is deserving of censure - for negligence in a medical man is deserving of censure" (my emphasis).

In the first instance, Chibukwe was not called to give evidence and it is therefore not known what diligence he applied in extracting and labelling Thebe's blood sample and the testing itself. Secondly, the error alleged is, in my view, a very basic procedure which a professional technician is expected to follow, and cannot be said to be an "inherent risk" in an exercise of this nature. It also cannot be said to have consisted of "an error of judgment" or of some "accident or variation in the frame of a particular individual" or that some complication ensued in the exercise. In my view, the cases cited by Mr *Dondo* do not apply in the present situation. Here, the allegation is that Mbewe's laboratory erred in the most fundamental aspect of blood testing - collecting and labelling the blood sample. A professional technician, in my view, is expected to comply with that. In failing to do that he failed to exercise the due skill and care

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required of him and he deserves censure.

I therefore, consider that the finding that Mbewe was negligent in the matter was proper.

On quantum, I am again of the view that the learned trial judge's finding is unassailable. In the first place, I agree with Mr *Dondo*'s submission that the assessment of damages is left to the discretion of the trial judge and that an appeal court will be reluctant to interfere unless there is a misdirection found. There is no misdirection alleged here. Secondly, I agree that the cases cited by both counsel in the matter are not of much assistance. This is virgin territory. Thirdly, I agree with the view that the trauma Thebe must have suffered was transitory, as reasoned by the learned trial judge. Further, no evidence was adduced to indicate that Thebe went for counselling or that she sought medical or psychiatric attention for her condition. There was also no evidence to substantiate the allegation that her family and friends shunned her after she informed them of the results of the first test. Surely she would have also informed them of the results of the much earlier case to the contrary and the fact that she was undergoing further tests to check the correctness of Mbewe's laboratory's finding.

In the circumstances, I am not inclined to interfere with the award by the learned trial judge.

On the question of costs in the court *a quo,* I am, however, of the view that the learned trial judge should have awarded Thebe costs on the High Court scale. This is because, in my view, this is virgin territory. Matters concerning

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HIV/AIDS are high profile issues which are presently of the highest concern to the country and indeed the world. It was therefore incumbent upon a superior court, such as the High Court, to make the first pronouncement on the matter. Thebe should not therefore have been punished for bringing the matter in the High Court even though I agree that her claim for $150 000 was exorbitant.

In the result, both the appeal and cross-appeal are dismissed with costs. The order of the court *a quo* is, however, amended by the deletion of the words "at the magistrates court scale".

MCNALLY JA: I agree.

EBRAHIM JA: I agree.

Manase & Manase, appellant's legal practitioners

Chinamasa, Muchimu & Chinogwenya, respondent's legal practitioners

CHADOKA & ORS *v* MINISTER OF LOCAL GOVERNMENT & ORS 2000 (1) ZLR 588 (HC)

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Citation 2000 (1) ZLR 588 (HC)
Case No Judgment No. HH-104-00
Court High Court, Harare
Judge Adam J
Heard May 4, 2000
Judgment May 24, 2000
Annotations None

Opposed application

Flynote

Local authority - urban council - councillor - dismissal by Minister of Local Government after investigation into affairs of council - need for Minister to advise each councillor of his intention to dismiss and give them opportunity to present their cases

Headnote

The respondent Minister set up an investigation into the running of the Harare City Council. Acting on the investigators' findings, and without giving the councillors an opportunity to present their case, he dismissed them in terms of s 114 of the Urban Councils Act [*Chapter 29:15*]. They applied for an order declaring the section to be unconstitutional, alternatively that the dismissal be set aside as breaching the *audi alteram partem* principle.

Held, that the decision of the Minister to summarily dismiss the councillors affected their civil rights and obligations. It adversely affected their reputations and might also affect their prospects to hold further public offices in the future. The dismissals would therefore be set aside.

Held, further, that the Minister ought to have advised the councillors that he intended to invoke his powers under the Act and to have given each of them an opportunity to explain his or her conduct before their dismissal or granted them an opportunity to proffer their resignation in writing.

Held, further, that the course would still be open to the Minister to reconsider the matter, allowing the councillors to be heard before making his final decision.

Cases Considered

Cases cited:

Bagg's Case (1615) 11 Co Rep 936

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Bishi v *Sec for Education* 1989 (2) ZLR 240 (H)

Chrmn, PSC v *Marumahoko* 1992 (1) ZLR 304 (S)

Cooper v *Wandsworth Bd of Works* (1863) 14 CBNS 180

Fisher v *Keane* (1878) 11 ChD 353

Health Professions Council v *McGown* 1994 (2) ZLR 329 (S)

Holland & Ors v *Min of the Public Svc* 1997 (1) ZLR 186 (S)

Kanda v *Govt of Malaysia* [1962] AC 322 (PC)

Marumahoko v *Chrmn, PSC & Ors* 1991 (1) ZLR 27 (H)

Matida v *Chrmn, PSC & Anor* 1998 (1) ZLR 507 (H)

R v *University of Cambridge (Dr. Bentley's Case)* (1723) 92 ER 818; 8 Mod Rep 148

Ridge v *Baldwin & Ors* [1963] 2 All ER 66 (HL)

SA Defence & Aid Fund v *Min of Justice* 1967 (1) SA 263 (A)

Spackman v *Plumstead Bd of Works* (1885) 10 App Cas 229

Legislation considered:

Urban Councils Act [*Chapter 29:15*], ss 114 & 311

Case Information

A P de Bourbon SC, for the applicants

Mrs *L Mathanda-Moyo*, for the first respondent

Judgment

Adam J: The applicants, all 26 of them, were elected councillors of the second respondent who received an identical letter dated 9 June 1999 from the first respondent as follows:

"RE DISMISSAL FROM HARARE CITY COUNCIL

You will recall that I appointed a Team of Investigators to carry out an investigation into the management of the affairs of the Harare City Council in terms of s 311 of the Urban Councils Act [*Chapter 29:15*].

The Investigating Team has submitted its report and arising from its findings, I am satisfied that there has been gross mismanagement of the funds, property and affairs of the Council for which you are held responsible both collectively and individually.

I am therefore proceeding to invoke s 114 subsection 4 of the said Act and hereby dismiss you as Councillors in the City of Harare with immediate effect."

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Copies of each letter were sent to the Town Clerk and Chairman of the Commission - City of Harare.

It is common cause that all the councillors had been suspended by the first respondent some time prior to his letter of 9 June 1999.

The founding affidavit sworn by Maxwell Chadoka on 4 August 1999, filed in this court on 6 August 1999, was adopted and confirmed by 25 other councillors in their individual affidavits. He averred that in terms of s 114(1)(d) of the Urban Councils Act [*Chapter 29:15*], the councillor must himself be responsible for the gross mismanagement of the funds, property or affairs of the Council, whether or not others were also responsible; that the first respondent erred in seeking to hold all the Councillors responsible; that it is not clear on what basis the first respondent acted in respect of each and every councillor because no individual allegations were put to each councillor and all of them were denied the opportunity to hear the allegations against them and to respond to them; and that in their view the rules of natural justice were breached by the first respondent, as he denied them the right to be heard. He also questioned how the first respondent could dismiss them on the basis of the report, whose contents the first respondent did not even bother to put to them, so that they could individually respond to it. He avers that the first respondent's decision suffers from procedural irregularity and as such it is reviewable by the High Court; hence this application for review. He further averred that s 114(4) of the Act offends against s 18(9) of the Constitution of Zimbabwe, because it deprives the councillors of the right to be heard; that s 114(4) empowers the first respondent to dismiss the councillors without

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affording them an opportunity to be heard and so s 114(4) is *ultra vires* and contrary to s 18(9) of the Constitution of Zimbabwe. The applicants sought an order in terms of the draft order declaring s 114(4) of the Act unconstitutional and that the dismissal of the councillors be set aside and that the first respondent reinstate the applicants as councillors without loss of any benefits. Alternatively, the dismissal of the applicants without giving them an opportunity to be heard be set aside and that the first respondent reinstates the applicants as councillors without loss of any benefits and that the second respondent pay the applicants their allowances from the date of suspension to the date of reinstatement and that the first respondent pay the costs of this application.

On 17 September 1999, the first respondent filed his opposing affidavit. The matter was set down on the unopposed roll on 22 September 1999, when Ziyambi J refused to deal with it by removing it from the roll on the grounds that the application for review was late by one day. As a result, the applicants filed an application for condonation for the late filing of a review on 24 February 2000. The first respondent having opposed this application, ZIYAMBI J on 31 March 2000 ordered that such application be granted and that the costs of it be borne by the applicants.

In the first respondent's opposing affidavit before me, he averred that he dismissed the applicants in terms of s 114(4) of the Act as it was clear that they had been responsible for the

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gross mismanagement of funds, property and affairs of the second respondent; that they were collectively and individually responsible for the mismanagement of the affairs of the second respondent; and that it had been established that in some instances the applicants made resolutions collectively which resulted in the mismanagement of the second respondent. He denied that the applicants were not given an opportunity to respond to allegations as allegations were put to them by the Investigating Team investigating the affairs of the second respondent and they were given an opportunity to respond to such allegations. Therefore he acted on the findings of that Investigating Team in dismissing them. It is therefore not true that he did not afford them the right to be heard. He averred also that the principles of natural justice were adhered to, as the applicants were given an opportunity to respond to allegations against them by the Investigating Team whom he had authorised to investigate the affairs of the second respondent. It was therefore not necessary to make the report available to the applicants. He denied that there was any procedural irregularity in the dismissal of the applicants. He further averred that he was advised by his legal practitioners that s 114(4) of the Act was not *ultra vires* s 18(9) of the Constitution of Zimbabwe and that the report was as a result of due process of investigations in which the applicants were afforded the opportunity

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to respond to allegations made against them, individually and collectively. He averred that the relief sought by applicants in the draft order is unenforceable as the applicants' term of office expired on 31 August 1999.

In the draft order filed, the applicants sought s 114(4) of the Act to be declared unconstitutional, that their dismissals be set aside and the first respondent be ordered to reinstate them as councilors of the second respondent without loss of any benefits within 10 days from the date of the order. Alternatively, the dismissals of the applicants without affording them an opportunity to be heard be set aside and the first respondent be ordered to reinstate them as councillors of the second respondent without loss of any benefits within 10 days from the date of the order.

Now r 260 of the High Court Rules indicates that where the proceedings concern those of an inferior court, the clerk of that court, and for other proceedings, the tribunal, board or officer, must within 12 days of the date of the service of the court application lodge with the Registrar of this court the original record together with two typed copies, which copies must be certified to be true and correct copies.

Mrs *Mathanda-Moyo* has conceded that the first respondent has not filed the original record together with two typed copies that were certified to be true and correct copies. Without a "record" or any explanation concerning about it review proceedings before this court would not be possible: *Matida* v *Chairman, Public Service Commission & Anor* 1998 (1) ZLR 507 (H).

However, Mr *de Bourbon* suggested that this court deal with the application for a declaration. He further submitted that it is common cause that the first respondent not only relied on the report of the Investigating Team by merely endorsing any findings against the applicants individually or collectively without affording the applicants individually the opportunity to be heard before doing so, but also did not give the applicants the opportunity to be heard before dismissing them as

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councillors of the second respondent. In other words, the first respondent himself did not give the applicants the opportunity to be heard on the issue of any misconduct by them and also on the penalty of dismissal as councillors. Mrs *Mathanda-Moyo* did not dispute this.

At the hearing Mr *de Bourbon* indicated that the applicants were now seeking an order that s 114(4) of the Act be declared unconstitutional and the dismissals of the applicants be set aside. Alternatively, that the decision of the first respondent to dismiss the applicants without affording them an opportunity to be heard be set aside.

In the applicants' heads of argument, Mr *de Bourbon* submitted that what the first respondent did, at best, was to have regard to a report prepared by the

Investigating Team, and based on it purported to dismiss them. The first respondent alleges that the principles of natural justice were adhered to because the applicants had the opportunity of responding to allegations against them to the Investigating Team. For example, nowhere does the first respondent state that he put the allegations to the applicants and put to them that he was contemplating invoking his powers in terms of s 114(4) of the Act and giving them an opportunity to be heard. The basic tenets of the rules of natural justice require that an opportunity be given to deal with the specific allegations that are raised, or to deal with the proposed administrative action itself: *Health Professions Council* v *McGown* 1994 (2) ZLR 329 (S). Accordingly, the complete failure by the first respondent to give any form of notification to the applicants of the charges they were facing, of his intended action or the chance to make representations to him is fatally defective to the decision to dismiss the applicants and such decision must be set aside. He also submitted that the power of the first respondent under s 114(4) of the Act is precisely similar to the power that was considered by the Supreme Court under s 21(1) of the Private Voluntary Organisations Act [*Chapter 17:05*] in *Holland & Ors* v *Minister of the Public Service* 1997 (1) ZLR 186 (S). He therefore submitted that it is clear from this provision that the first respondent is given power to deal with a dismissal without any obligation to afford a hearing to the affected applicants. He submitted that such is a breach of s 18(9) of the Constitution of Zimbabwe and falls to be determined in precisely the same manner as the legislation in *Holland*'s case *supra*. Far from the position that the first respondent is entitled to rely on the report of the Investigating Team to satisfy the *audi alteram partem* rule, the existence of the report is a precondition to him exercising his powers. It is in that context that the report is relevant, not in the context of fulfilling his constitutional and common law duty to give a fair hearing before dismissing any councillors. The legislation has no provision which would require the first respondent to hear representations from the elected officials before they are deprived of their office. The first respondent did not give any opportunity to the applicants to make representations. This is a clear manifestation of the unconstitutionally wide powers given by s 114(1) of the Act. In the circumstances, this court should declare s 114(1) of the Act to be in conflict with s 8(9) of the Constitution of Zimbabwe and accordingly of no effect.

In the first respondent's heads of argument, it is submitted that in suspending the applicants the first respondent made it clear to them that the Investigating Tem was to investigate the mismanagement of the affairs of the second respondent, so the issue of the applicants being

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unaware of the first respondent's intention to dismiss them is out of the question. All the applicants appeared before the Investigating Team and allegations against

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them were either individually or collectively put to them. Because of this, for the first respondent to hear the applicants again would be unduly onerous and this would be a duplication of the whole process. In any case, the legislature could not have intended that the first respondent should personally afford a hearing to those applicants he intended to dismiss. Section 114(1) does not indicate that a councillor should be given an opportunity to be heard before such dismissal. This should be viewed as an exception to the general rule of the *audi alteram partem* as being excluded by necessary implication and deliberately so because of the process embarked upon by the Investigating Team. If the legislature intended a hearing to take place specific provisions providing for this would have been enacted. The *audi alteram partem* is not fixed and as long as fundamental fairness has been achieved then the rule is satisfactory. The first respondent dismissed the applicants after consideration of the Investigating Team's extensive report on the management of the affairs of the second respondent. On the face of it, s 114(4) of the Act gives the first respondent the right to dismiss councillors without affording them a chance to be heard; but if this section is read with s 311(2) of the Act it becomes clear that, only after investigations and if he is satisfied that the grounds for suspicion have been established as facts, can the first respondent dismiss councillors. It is thus clear that, although the right to be heard is excluded by necessary implication, it is catered for by the investigations which invariably afford the councillors the right to be heard. The applicants appearance before the Investigating Team met the three fundamental requirements of natural justice as set out in the case of *Holland & Ors* v *Minister of Public Service supra*. The first respondent would have to take due regard of the report before making a decision, as he had to be satisfied from that report the grounds for suspension have been substantiated. In the circumstances, s 18(9) of the Constitution of Zimbabwe has therefore not been breached by s 114(4) of the Act. The order of reinstatement by the applicants is unenforceable because their terms of office expired on 31 August 1999 and the court does not have power to extend their terms of office.

At the hearing, Mr *de Bourbon* submitted that it was clear from the first respondent's heads of argument that s 114(4) of the Act does give him the right to dismiss the applicants without affording them an opportunity to be heard and that reliance by him on s 311(2) of the Act does not suffice to satisfy s 18(9) of the Constitution of Zimbabwe. He also submitted that the basic tenets of the rules of natural justice required that the first respondent give the applicants an opportunity to address him before he is satisfied that the grounds for suspicion have been established as facts. Thereafter, the first respondent must also give the applicants an opportunity to plead in mitigation

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and/or offer to resign in light of the harsh consequences of s 114(5). Mrs *Mathanda-Moyo* conceded that the first respondent did not afford the applicants an opportunity to plead in

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mitigation.

Section 114 provides as follows:

"114. **Suspension and dismissals of Councillors**

(1) Subject to this section, if the Minister has reasonable grounds for suspecting that a councillor -

(a) has contravened any provision of the Prevention of Corruption Act [*Chapter 9:16*]; or

(b) has contravened section *one hundred and seven*, section *one hundred and eight* or section *one hundred and nine*; or

(c) has committed any offence involving dishonesty in connection with the funds or property of the council; or

(c) has been responsible -

(i) through serious negligence, for loss of any funds or property of the council; or

(ii) for gross mismanagement of the funds, property or affairs of the council, whether or not the councillor's responsibility is shared with other councillors or with any employees of the council; or

(e) has not relinquished office after his seat became vacant in terms of this Act;

the Minister may, by written notice to the councillor and the council concerned, suspend the councillor from exercising all or any of his functions as a councillor in terms of this Act or any other enactment.

(2) Any allowance that is payable to councillors in terms of this Act shall continue to be paid to a councillor who has been suspended in terms of subsection (1) for so long as he remains a councillor, unless the Minister, by notice is writing to the council concerned, directs otherwise.

(3) As soon as is practicable after he has suspended a councillor in terms of subsection (1), and in any event within forty-five days, the Minister shall cause a thorough investigation to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of any act, omission or conduct referred to in that subsection.

(4) If, following investigation, the Minister is satisfied that the grounds of suspicion on the basis of which he suspended a councillor in terms of subsection (1) have been established as fact, he may, by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat shall thereupon become vacant.

(5) A person who has been dismissed in terms of subsection (3) shall be disqualified from nomination or election as a councillor for a period of five years."

What is clear from s 114 of the Act is that, because the first respondent has reasonable grounds of suspicion that the applicants may be guilty of any act, omission or conduct referred to in s 114(1) of the Act, he has a discretion to suspend them. He must then cause a thorough investigation to be conducted in order to determine if is the case. It is only after such an investigation and if the first respondent himself is satisfied that his grounds of suspicion has been establishes as a fact that he has a discretion to dismiss the councillors. Also, a dismissal by the first respondent under s 114(4) disqualifies

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councillors from nomination or election as a councillor for 5 years and so the consequences of a

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dismissal under s 114(4) are indeed most harsh.

Section 311 provides as follows:

" 311. **Inquiries by the Minister and appointment of investigators**

...

(2) The Minister may, if he considers it necessary or desirable in the public interest, appoint one or more persons as investigators, together with such assistance and advisors as he may consider necessary, to inquire into any matter which -

(a) relate to the good government of a council area or local government area or arises out of the government of a council area or local government area; or

(b) relate to the failure of a council to undertake any function or provide any facilities for which it has the necessary power it has failed to exercise; or

(c) relates to or arises out of the affairs of -

(i) a council; or

(ii) a local authority concerning any matter referred to in Part XVI,

and to report to him thereon.

...

(4) For purposes of an inquiry in terms of subsection (2), it shall be lawful for the investigator, if the Minister so directs -

(a) to hear and received evidence upon oath, which oath he is hereby empowered to administer; and

(b) by summons under his hand, to require such persons as he may think fit to appear personally before him at a time and place to be stated in such summons and to produce all such books and papers as may be necessary for the inquiry.

(5) If it is intended that the investigator shall take evidence from members of the public, notice of the time and place at which evidence will be heard shall be given at the office of the authority and in two issues of a newspaper.

(6) A statement given by any person to an investigator under this section shall not be admissible in evidence in any court of law, except with the consent of all persons affected thereby or for the purposes of a prosecution under subsection (11), (12) or (13).

...

(11) Any member or employee of an authority who -

(a) refuses or fails to answer to the best of his ability any lawful question put to him by, or willfully makes any false statement to, an investigator in the exercise of his functions under this section; or

(b) refuses or fails to comply to the best of his ability with any lawful requirement made by an investigator in the exercise of his functions under this section;

shall be guilty of an offence.

(12) Any person who -

(a) threatens, resists, hinders or obstructs or uses foul, abusive or insulting language towards, or at, an investigator or

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any person referred to in subsection (2) while that investigator or other person is exercising his functions under this section; or

(b) falsely holds himself out to be an investigator; or

(c) without lawful excuse, having been summoned under subsection (4) -

(i) refuses or fails to attend in obedience to such summons; or

(ii) having so attended refuses to be examined upon oath or take the oath; or

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(iii) having taken the oath, refuses to answer such questions as are lawfully put to him; or

(iv) refuses or fails to produce any books or papers he has been required to produce;

shall be guilty of an offence.

(13) Any person who, having taken an oath under subsection (4), makes any false statement knowing it to be false or not reasonably believing it to be true, shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(14) A conviction for an offence in terms of this section shall not exempt the person convicted from liability to do or perform the act, matter or thing required to be done or performed by him.

(15) The Minister may, on receipt of a report arising from an inquiry instituted by him in terms of section (2), take such steps as in his opinion are necessary or desirable to rectify any defect or omission revealed by the report."

What is significant about s 311 is that it is only once the first respondent has considered it necessary or desirable in the public interest that he may appoint investigators. The fact that such investigators (the inquiry body) have no statutory power to make decisions did not mean that its proceedings are not to be conducted in a fair manner. It is true that s 311 does not contain express provisions to such effect, nevertheless, investigators are enjoined to act fairly in the exercise of their functions. The provisions of s 311 such as those that allow them to issue summons and to hear and receive evidence under oath must surely contemplate some sort of fair procedures. It is not a necessary implication that in s 311 the rules of natural justice have been excluded.

In *Health Professions Council* v *McGown supra*, the respondent's renewed practising certificate had imposed upon it by the Practice Control Committee of the appellant, a condition in terms of s 39D(2) of the Medical, Dental and Allied Professions Act that restricted the respondent from performing any form of spinal anesthesia. This had been done without affording him the opportunity to make representations. Section 39D(2) did not have express provisions relating to the making of any representations. Gubbay CJ held that where the restrictive condition is highly prejudicial and damaging to his standing as a professional, the respondent'a ambit of the right to be heard under s 39D(2) extended no more than he be advised of the Practice Control Committee's proposed restriction, stating its reasons for this and affording him a reasonable opportunity to make such representations about this as he may wish to make in writing or, at the discretion of the Practice Control Committee in some other way. In so doing, the learned Chief Justice referred to the explicit provisions of s 39D(5) which permitted such representations to be

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made. He accepted the argument on behalf of the respondent that sections in that Act in which the right to make representations were spelt out did not imply the converse that there is no obligation to do so under s 39D(2)

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notwithstanding the action proposed by the appellant is inherently prejudicial. He was thus satisfied that it is not a necessary implication of s 39D(2) that the right to be heard is excluded.

In *Holland & Ors* v *Minister of the Public Service supra*, the applicants were elected members of the executive committee of the Association of Women's Club (AWC), a non-profit making registered private voluntary organisation. The respondent, acting in terms of s 21 of the Private Voluntary Organisations Act [*Chapter 17:05*], suspended the applicants from exercising all their functions in running the affairs of AWC and as their suspension was not revoked within 30 days the positions of applicants in terms of s 21(2) of the Act became vacant and they were disqualified from being on the executive committee until the respondent removed their disqualification. The applicants challenged the validity of s 21 as being unconstitutional in that it violated s 18(9) of the Constitution of Zimbabwe. GUBBAY CJ, in determining the scope of s 18(d) held that the term "civil rights" is of wide import and confirmed that "civil rights and obligations" include not only the prejudicial effect on property and liberty but the reasonable and legitimate expectations of the aggrieved person: *Marumahoko* v *Chairman, Public Service Commission & Ors* 1991 (1) ZLR 27 (H) at 44G. He found that procedural fairness is an ambiguous concept which varied according to context. At the very least the three fundamental requirements of it were: firstly, the right to have notice of the charge or complaint; secondly, the opportunity to adequately present his case in answer to the charge or complaint; and thirdly, the right to an impartial hearing. He reiterated that where a statutory provision empowered an authority to make a decision that will prejudicially affect a person's liberty, property or existing rights, such a person has a right to a fair hearing unless the statute expressly or by necessary implication indicates the contrary. His conclusion about s 21 of the Act was expressed in those words at 193A-H and 194A and D:

"... that subsection (1) excludes by necessary implication the principle to be heard. The following features are supportive of this conclusion:

First, the Minister is entitled to act on the basis of information supplied to him, regardless of the source of that information. It may be hearsay in nature or difficult to substantiate; or it may emanate from unreliable or vindictive persons. The Minister's discretion 'does not hinge upon an inquiry into or consideration of facts or circumstances in respect to which there may be a conflict; or upon any particular finding of fact': *per* HOEXTER JA in *Moodley & Ors* v *Minister of Education & Culture, House of Delegates & Anor* 1989 (3) SA 221 (A) at 235D.

Second, the Minister has an untrammeled discretion. He is not obliged to disclose the reasons for his decision.

Third, the power given to the Minister to suspend all the members of the executive committee by publication of a single notice in the *Gazette*, where it appears to him on

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information supplied that any of the matters specified in paras (a) to (d) have occurred - which by their nature may necessitate the taking of urgent action - points strongly in the direction of excluding the grant of hearings to what could well be a large number of affected members.

Fourth, the Minister's power under para (i), as read with subs (2), to revoke the suspensions of all or any members within thirty days, gives rise to the clear inference that it was the objective of the law maker to enable the Minister to suspend without attracting the delay resultant upon affording each affected member a hearing; and then, during the intervening period of suspension, to take the opportunity of assessing the veracity of the information supplied to him.

Fifth, s 20 of the Act empowers the Minister to appoint an inspecting officer to inspect any aspect of the affairs of any private voluntary association to examine all documents, books and accounts relating to its financial affairs and to report to the registrar of private voluntary organisations. It is an offence to fail to produce, without lawful excuse, any book or statement required by the inspecting officer; or to willfully to hinder or obstruct him in the exercise of his functions. Section 21(2), construed in conjunction with s 20, suggests to me that in the event of information relating to any of the matters detailed in paras (a) to (d) thereof being supplied by the registrar to the Minister, it would be permissible for the Minister to invoke the power of suspension forthwith.

...

A review court is concerned to set aright procedural improprieties committed by the decision-maker. It cannot order a hearing where, under the particular legislation, the public official or body is not required to hold one."

In this case, under the relevant provisions of Urban Council Act, it would seem the two functions of inquiry into the facts and of making the eventual decision were divided between two bodies. This has been described as a "hybrid" procedure - *South Africa Defence & Aid Fund* v *Minister of Justice* 1967 (1) SA 263 (A) at 281S. In that case, Williamson JA observed at 279F-H and 280:

"There seems nothing improbable or improper or inconvenient in the fact that, in a statute authorising a Minister, or other officer of State, for instance, to liquidate an organisation or to impose severe penalties on an individual, provision is made for a procedure whereby any necessary preliminary inquiry into the circumstances is to be made by some person or body on behalf of the Minister, or other officer of State. Pressure of work or inconvenience or impropriety may, on the other hand, even render it undesirable that such a Minister or officer should himself undertake the work of sifting and weighing the relevant facts or of entertaining representations or arguments or submissions. If the possible end result of such a composite procedure is that the rights or liberties of a person or body can be taken away, it would generally be surprising if no provision were expressly or impliedly incorporated whereby the affected person or body is given an opportunity at some stage during such proceedings of learning what was suggested as being a fitting penalty to be imposed and of submitting why such a penalty should not be imposed. Cases undoubtedly can and do arise where it is impolitic or against the interests or safety of the State to be given a forewarning of any intended protective measure; or there may exist other paramount considerations necessitating a denial of the right of a prior opportunity to meet the proposed steps. The terms of the statute itself may lead to a necessary inference that

for some such reason that position exists. But the mere fact by itself that the procedure for making of any such decision is divided up or depart materialised does not give rise, in my view, to any necessary implication that a denial of such right was intended by the legislature."

In *Kanda* v *Government of Malaysia* [1962] AC 322 (PC) at 337 Lord Denning observed:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have

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been made effecting him: and then he must be given a fair opportunity to correct or contradict them."

In *Ridge* v *Baldwin & Ors* [1963] 2 All ER 66 (HL), the appellant chief constable was charged with two others on two indictments for criminal conspiracy to pervert the course of justice and for corruption. He had been suspended. At the end of the trial on the first indictment, the appellant was acquitted whilst the other two officers were convicted by the jury. At this trial in February 1958, he gave evidence but called no witnesses. In passing sentence on the two police officers, the trial judge intimated as extenuating circumstances for them that in his view the appellant did not have the professional or moral qualities requisite for a person holding the office of chief constable. At the trial on the second indictment on 6 March 1958, no evidence being led by the prosecution, on the direction of the trial judge the jury acquitted him. Once again, the trial judge made certain observations about a cloud hanging over that police force until they were given a leader who would be a new influence and set a different example that which had been given lately to them and it was clear that the trial judge intended that what he said about the appellant should be brought to the attention of the watch committee (disciplinary authority) to act on as they thought fit. On 7 March 1958, the watch committee met when, after considering matters relating to the appellant, they summarily dismissed him unanimously as chief constable under s 191(4) of the Municipal Corporations Act 1882. That s 191(4) indicated that the watch committee may at any time suspend, and it may at any time dismiss any constable whom they thought negligent in the discharge of his duties or otherwise unfit for the same. The appellant was told in the latter of 7 March 1958 of the resolution passed by the watch committee (also given to the press) to the effect that, after carefully considering the criminal trial of the appellant and the two police officers, the statements of the trial judge, the evidence given by the appellant at that trial and certain statements made on that day, members of the watch committee and the town clerk decided that he was in their opinion negligent in the discharge of his duties and unfit for the same and accordingly they dismissed him as chief constable. He had not been charged or given notice of the proposal to dismiss

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him (although he was no doubt aware that his conduct in the Leach and Page matter had been called seriously into question at his trial) or the particular grounds on which it was based or an opportunity to put his case. On that date, the transcripts of the criminal proceedings were not available to the watch committee but they had the transcript of the statements made by the trial judge. On 12 March 1998, the appellant lodged an appeal to the Home Secretary under the Police (Appeals) Act 1927 against the dismissal, stating that it was without prejudice to the appellant's right to challenge the validity of the watch committee's decision and reserving the right to contend that it was not in accordance with the appropriate statutes and regulations. In the meantime, correspondence was exchanged between his solicitor and the town clerk that led to his solicitor on 18 March 1958 addressing the watch committee at a special committee meeting where he requested them to reconsider their decision since the appellant was not seeking restatement but would be happy to retire with his pension. The watch committee listened to him in silence, even when his solicitor complained that he had difficulty since he did not know anything about specific charges against the appellant. The watch committee (with three of them in favour of allowing the re-opening of the matter) adhered to their decision. On 18

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April 1958, the watch committee submitted their counter statement to the Home Secretary, which set out the facts and contentions which it relied in opposing the appeal. In it were included the allegations that the appellant gave false evidence at the criminal trial, that following up a report of attempted bribery of a police officer he went to the home of Leach to interview him and that he also interviewed Page, who had a criminal record, in his private room and discussed police policy with him. The Home Secretary had before him a long statement prepared by the appellant's solicitor and the counter-statement from the watch committee. On 5 July 1958, without holding a hearing, the Home Secretary, in dismissing the appeal, found that there was sufficient material before the watch committee to justify the appellant's dismissal, intimating also that he had disregarded the allegation about false evidence because there was no evidence to support it. The appellant brought an action against the watch committee claiming a declaration that his dismissal was illegal, *ultra vires* and void and alternatively, a declaration that he was entitled to his pension. The Queen's Bench Division (STREATFEILD J) held: (1) that when exercising the power of dismissal under s 191(4) the watch committee must observe the principles of natural justice and exercise the power *bona fide* and fairly; but in dismissing him the watch committee had acted, in the present circumstances and having regard to his evidence at the criminal trial, in accordance with the principles of natural justice although they had not heard him before dismissing him; (2) that in appealing to the Home Secretary he waived his right to bring his action. His

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appeal was dismissed by the Court of Appeal which held: (1) that in exercising their power of dismissal the watch committee was acting in an executive or administrative capacity, so it was not bound to apply the principles of natural justice; and (2) that in appealing to the Home Secretary he had waived his right to bring his action. His appeal to the House of Lords was allowed. It held: (1) that the decision of the watch committee of 7 March 1958 was null and void since, in exercising the power of dismissal under s 191(4), the watch committee must observe the principles of natural justice and, as dismissal was on the grounds of neglect of duty, negligence had to be proved. In this case, the appellant had not been charged nor informed of the grounds on which the watch committee proposed to proceed and had not been given a proper opportunity to present his defence. Further, the appearance on 18 March 1958 by his solicitor before the watch committee was not a full re-hearing and so did not cure the failure to observe the principles of natural justice on 7 March 1958 and so the consequence of the failure to observe the principles of natural justice made the decision of 7 March 1958 void; (2) that since the dismissal of 7 March 1958 was a nullity, the decision of the Home Secretary could not make valid that which was a nullity. Lord Reid, indicating that the essential elements of waiver had not been established, said at 81F:

"Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in *Wood* v *Woad* (1874) LR 9 Exch 190. I see no reason to doubt those authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case."

LORD HODSON observed at 111I-112A and 114D-E:

"I should add that STREATFEILD J, although holding that the principles of natural justice should *prima facie* have

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been applied, held that in this case the appellant had at the Old Bailey, for purposes of his trial for all the world as well as the watch committee to hear, convicted himself of unfitness to hold the office of chief constable. The judge concluded that on the evidence which the appellant had himself given at the Old Bailey there was no need for the watch committee to do other than they in fact did, whatever also they might have done to be on the safe side. It would be unrealistic to suppose that the watch committee had not a good idea of what took place at the criminal trial, although they were not provided with a transcript of the evidence until after they had reached their conclusion, but in my opinion, it will not do to say that the case was so plain there was no need for the appellant to be heard and that, therefore, the claims of natural justice satisfied.

...

One of the difficulties felt in applying principles of natural justice is that there is a certain vagueness in the term and as TUCKER LJ said in *Russell* v *Duke of York* ([1940] 1 All ER 109 at 118):

> 'There are ... no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirement of natural justice must depend on the

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> circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'

If it be said that this makes natural justice so vague as to be inapplicable, I would not agree. No one, I think, disputes that three features of natural justice stand out : (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges. The first does not arise in the case before your Lordships, but the two last most certainly do and the proceedings before the watch committee therefore, in my opinion, cannot be allowed to stand."

LORD REID and LORD MORRIS in that case referred to a number of cases including *Bagg's case* (1615) 11 Co Rep 93b; *R* v *University of Cambridge* (*Dr Bentley's Case*) (1723)1 Stra 557; *Cooper* v *Wandsworth Board of Works* (1863) 14 CBNS 180; *Fisher* v *Keane* (1878) 11 ChD 353 and *Spackman* v *Plumstead Board of Works* (1885) 10 App Cas 229.

In *Bagg's case supra* a freeman or chief burgess or magistrate of the borough of Plymouth had threatened and scandalised the mayor and so was disfranchised without good cause. The court said at 99a:

"... if a citizen or freeman, be attainted of forgery or perjury or conspiracy ... or any crime whereby he is become infamous, upon such attainder they may remove him ... these and the like are good causes to remove him. And although they have lawful authority either by charter or prescription to remove any one from the freedom and that they have just cause to remove him; yet it appears by return that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void and shall not bind the party ... and such removal is against justice and right."

In *R* v *University of Cambridge supra*, Dr Bentley was first suspended and then deprived without notice to come and defend himself, of his degrees for insulting the Vice-Chancellor's court. FORTESCUE J said at 567:

"Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence."

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In *Cooper* v *Wandsworth Board of Works supra,* in the Metropolis Management Act 1855 it was provided that no person could put up a building without giving 7 days' notice to the district board and if this was done without notice being given, the district board might have the building demolished. The Wandsworth Board of Works demolished a building without informing the plaintiff's builder. ERLE CJ said at 189:

"I think the board ought to have given notice to the plaintiff and to have allowed him to be heard. The default in sending notice to the board of the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually confirmed ... though by accident his notice may have miscarried ... I cannot conceive of any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as demolition of his house; but I can conceive a great many advantages which might

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arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss. I fully agree that the legislature intended to give the district board very large powers indeed but the qualification I speak of is one which has been recognised to the full extent. It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard is limited to a judicial proceeding and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point; but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board ordering a house to be pulled down."

WILLES J said at 190:

"I apprehend that a tribunal which is by law invested with the power to affect the property of the one of Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds : and that that rule is of universal application and founded upon the plainest principles of justice."

BYLES J said at 195:

"It seems to me that the board are wrong whether they acted judicially or magisterially ... a long course of decisions, beginning with *Dr Bentley*'s case, and ending with some very recent cases, establish that although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

In *Spackman* v *Plumstead Board of Works supra*, the issue of authority of the superintending architect was raised, Earl of Selborne LC observed at 240:

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice. But it appears to me to be perfectly consistent with reason, that the statute may have intentionally omitted to provide for form...but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are bound such considerations as in their judgment ought to be brought before him."

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In *Fisher* v *Keane supra*, the plaintiff, a member of the Army and Navy Club, was expelled for misbehaviour without due notice being given to him from that Club. LORD JESSELL MR said at 362-3:

"Be that as it may, in my opinion, a committee acting under such a rule as this, are bound to act, as LORD HATHERLEY in *Dean* v *Bennett* (1870) 6 Ch App 489 said, according to the ordinary principles of justice, and are not to convict a man of a grave offence which shall warrant his expulsion from the club, without fair, adequate, and sufficient notice, and an opportunity of meeting the accusations brought against him.

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They ought not, as I understand it, according to the ordinary rules by which justice should be administered by committees of clubs, or by an other body of persons who decide upon the conduct of others, to blast a man's reputation for ever - perhaps to ruin his prospects for life, without giving him an opportunity of either defending himself or palliating his conduct."

In *Chairman, Public Service Commission* v *Marumahoko* 1992 (1) ZLR 304 (S) when referring to the lack of the right to make representations in mitigation, MCNALLY JA said at 311A and F:

"... The amendment of s 19(3) of the Regulations by s 5 of SI 111 of 1988 has made it difficult for the Commission to be fair to an officer found guilty of misconduct ... The difficulty created is this. The Commission may correctly decide the guilt of the officer is clearly established without the need of an inquiry. In many cases ..., the extent of that guilt may be impossible to determine without further evidence or inquiry. Therefore, it will be improbable to determine what penalty is appropriate without further information ... it runs the risk of imposing an irrational penalty."

See, also, *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H) at 247F.

Now, s 114 of the Urban Councils Act gives the first respondent a discretion initially to suspend and subsequently to dismiss councillors only if he is himself satisfied that his grounds of suspicion have been established as a fact. Both Mr *de Bourbon* and Mrs *Mathanda-Moyo* assert that under s 114(4) the first respondent himself is not obliged to apply the principles of natural justice. Mr *de Bourbon* submits that by necessary implication s 114(4) is in violation of s 18(9) of the Constitution of Zimbabwe. Mrs *Mathanda-Moyo*, on the other hand, maintains that since the applicants appeared before the Investigating Team the first respondent had satisfied the requirements of natural justice by himself not affording them an opportunity to be heard. She has clearly conceded that the first respondent should have provided the applicants with an opportunity to address him in mitigation before their dismissal.

The staring point for ascertaining whether s 18 of the Constitution of Zimbabwe has been breached is to consider whether the first respondent by dismissing the applicants has determined the existence or extent of their civil rights and obligations. It is not disputed that the applicants held important elected positions in the second respondent which concerned their civil rights and obligations. Their dismissal undoubtedly curtailed such rights and obligations.

There is a presumption that statutory enactments are not in contravention of the Constitution. In *Holland & Ors* v *Minister of the Public Service supra*, it is clear that Gubbay CJ, in reaching his conclusion that s 21 of the Private Voluntary Organisations Act excluded the right to be heard, relied on five supportive features. In the matter before this court, those features do not necessarily apply to s 114 of the Act and so that case can be distinguished.

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The first respondent under s 114 is required to cause a thorough investigation to be carried so as to determine whether or not councillors are guilty of any act, omission or conduct mentioned in s 114(1). The thorough investigation was entrusted to an Investigating Team set up under s 311 of the Act. This feature is not important and relevant. As already indicated that Investigating Team, in my view, is enjoined to observe the rules of natural justice. The applicants have not cited the Investigating Team in these proceedings and the manner in which they carried out their investigations has not been challenged before this court. It cannot seriously be maintained that the first respondent is endowed with an untramelled discretion. It follows that, in the absence of the required features listed by Gubbay CJ, it cannot be asserted that s 114 has excluded the right to be heard. Suffice to say the applicants hold the position that the first respondent is obliged to observe the rules of natural justice before he can himself be satisfied that his grounds of suspicion have been established as fact, that is, that it must be for the first respondent himself to determine, after affording them an opportunity to be heard, that the applicants have been responsible for gross mismanagement of the funds, property or affairs of the second respondent, whether or not each applicant's responsibility is shared with other applicants or with any employees of the second respondent. In addition, the applicants argue that, even after being satisfied that his grounds of suspicion have been established as fact, the first respondent is obliged to afford them an opportunity to address him on mitigation before he exercises his discretion to dismiss them.

The issue for this court to determine in this matter is what constitutes a "fair hearing" for purposes of s 114 of the Act since the first respondent, I am convinced, must himself observe the rules of natural justice. It is accepted that the applicants are entitled, firstly, to the right to have adequate notice of the complaints or charges made against them; secondly, the right to be given the opportunity to adequately state their case in answer to those complaints or charges; and, thirdly, the right to an impartial hearing. Since s 114(4) empowers only the first respondent to dismiss the applicants, in the context of this case, he was, in my view, at least required to give them written notice forewarning them that he intended to proceed in terms of that section and providing each of them with the specific findings including particulars (that he relied upon) of the Investigating Team as it related to them and giving each of them an opportunity either to make such written representations as each may wish to make or, at the discretion of the first respondent, in some other way. I cannot see any harm that would have befallen the first respondent by giving each of the applicants such an opportunity, but I can conceive a great many advantages which might arise in the way of doing substantial justice to them and in the fulfilling the purposes of s 114 of the Act.

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Furthermore, the first respondent ought not, according to the rules by which justice should be administered by him, to blast their reputations for ever - perhaps ruining their prospects for further public office - without giving them an opportunity of palliating their conduct. As Mr *de Bourbon* submitted, the applicants should have been given an opportunity to proffer their

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resignations with a written explanations for this should any of them desire to do so. It would then have given the first respondent an option that he would have been free to adopt rather than summarily dismissing them.

In the result, I feel that the first respondent ought not to have dismissed each of the applicants in the manner he did and therefore the applicants are entitled to their declaration.

The remedy that I propose to give leaves it open to the first respondent, if he is so minded, to reconsider the matter once more by allowing the applications to be heard before applying s 114(4) of the Act. Accordingly, it is ordered that the dismissal of the applicants as councillors of the City of Harare be and is hereby set aside, with the first respondent to pay the costs of this application.

Kandandara & Co, applicants' legal practitioners

Civil Division of the Attorney-General's Office, first respondent's legal practitioners

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S *v* BANANA 2000 (1) ZLR 607 (SC)

Citation	2000 (1) ZLR 607 (SC)
Case No	Judgment No. S-41-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	March 6, 2000; March 7, 2000
Judgment	May 29, 2000
Annotations	None

Criminal appeal

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 23 - prohibition of discrimination on grounds of gender - consensual sodomy between adults - criminalisation of - whether criminalisation of consensual sodomy between male adults violates the anti-discrimination provision

Criminal law - common law crimes - sodomy - consensual sodomy between adults - criminalisation of - not contrary to anti-discrimination provisions of Constitution

Criminal procedure (sentence) - common law crimes - sodomy - both parties consenting adults and act committed in private - imprisonment not proper

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Criminal procedure (sentence) - general principles - suspended sentence - conditions - compensation for damage or pecuniary loss - court's discretion - portion of sentence suspended on condition of payment to complainant of sum of money as compensation for sexual assaults perpetrated on him

Evidence - sexual cases - cautionary rule - no longer warranted in Zimbabwean law - need for evidential basis to suggest witness unreliable

Evidence - sexual cases - complaint - evidential value of - when admissible

Evidence - similar fact evidence - when admissible - striking similarity test - not an indispensable element of admissibility - test to be applied

Evidence - single witness - caution to be taken - whether corroboration is essential

2000 (1) ZLR p608

Headnote

The appellant was convicted of two counts of sodomy and several others involving sexual offences between himself and other men. The offences were committed at a time that the appellant was the President of Zimbabwe. He was sentenced to an effective sentence of one year's imprisonment with labour, with a period of four years' imprisonment suspended on certain conditions and a further four years suspended on condition that he pay a lump sum as compensation to one of the complainants. He appealed against conviction and sentence. On appeal, the full court sat as various important issues were raised by the appeal, including the constitutionality of the crime of sodomy in relation to consenting adults. The decisions on all the issues, except the constitutional issue, were unanimous. On the constitutional issue, there was a split decision, with the majority of the court deciding that the criminalisation of sodomy between consenting adults was not unconstitutional.

Constitutionality of the crime of sodomy

Held (*per* MCNALLY JA, MUCHECHETERE JA and SANDURA JA), that that the criminalisation of consensual sodomy between adult males is not unconstitutional.

*Held, f*urther, that the right to privacy under the unaltered s 11 of the Constitution related to protection from arbitrary search and entry and is not relevant to the constitutionality of consensual sodomy.

Held, further, that the Constitution is to be given a generous and purposive interpretation to take account of the values of society. Zimbabwe is a conservative society in matter of sexual behaviour. The social norms and values of Zimbabwe are not pushing for a decriminalisation of sodomy. The provisions of the Constitution that outlaw discrimination on the basis of gender do not prevent consensual sodomy from being an offence. The prohibition of consensual adult sodomy is only technically gender discrimination; the real discrimination in this situation is not between men and women, which is forbidden by the Constitution, but between homosexual men and heterosexual men. The fact that anal penetration of women by men is not criminalised is an insignificant side issue, an issue more of practicality than principle. The complaint by homosexual men is that they are not allowed to give expression to their sexual desires, whereas heterosexual men are. Discrimination on the grounds of sexual orientation is not forbidden by our Constitution. Additionally, it cannot be said that a law against sodomy is not reasonably

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justifiable in a democratic society. Many democratic societies have such laws. While the prohibition is gender specific, it is so in the same way that the crime of rape is gender specific.

Held (*per* GUBBAY CJ and EBRAHIM JA, dissenting), that the criminalisation of sodomy between consenting adult males is unconstitutional. Numerous sexual acts which are unlawful if committed by a male person with another male person are not unlawful if committed by a male with a female person. Consensual sexual acts between women no longer constitute an offence. Only male-male sexual acts are the subject of criminal prohibition. The only distinction which makes such acts criminal is the participant's gender. It is irrational to criminalise homosexual anal intercourse and not heterosexual anal intercourse. Such criminalisation is arbitrary and unfair. The prejudicial impact of criminalisation on homosexual men is not outweighed by any acceptable rational objective. It is not reasonably justifiable in a democratic society to make an activity criminal merely because a segment, maybe a majority, consider it to be unacceptable. Such an objective is not, on its own, sufficiently important to override the prohibition on gender discrimination. The criminalisation of consensual male sodomy is thus *ultra vires* s 23 of the Constitution.

GUBBAY CJ

Issues of evidence

Held, that the cautionary rule in sexual cases is based on an irrational and outdated perception, and has outlived its usefulness. It is no longer warranted to rely on the cautionary rule of practice in sexual cases. Despite the abandonment of the cautionary rule, however, the courts must still consider carefully the nature and circumstances of alleged sexual offences.

Held, further, that the evidence of a single witness must be approached with caution and its merits weighed against any factors that militate against its credibility. A common sense approach must be adopted. Where the evidence of a single witness is corroborated in any way that tends to indicate that the whole story was not concocted, the caution may be overcome, as it may be by any other feature that increases the confidence of the court in the reliability of the single witness. Corroboration is not, however, essential.

Held, further, that evidence of a complaint in a sexual case is admissible to show the consistency of the complainant's evidence and the absence of consent. The requirements for admissibility are that (a) the complaint must have been made voluntarily, not as the result of questions of a leading and inducing or intimidating nature; and (b) must have been made without undue delay, at what is in the circumstances the earliest opportunity, to the first person to whom the complainant could reasonably be expected to have made it.

Held, further, that the test for the admissibility of similar fact evidence used to be whether the similar facts were of such a striking similarity that it would be an affront to common sense to assume that the similarity was explicable on the basis of coincidence. However, the courts have moved away from this test. Striking similarity is not a pre-requisite to admissibility. What has to be assessed is the probative force of the evidence in question; there is no single manner in which this can be achieved. Like corroboration, this is a matter of logic and common sense.

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Sentence

Held, that in this modern day imprisonment is not a proper sentence for sodomy where both parties are consenting adults and the act was committed in private. The appropriate sentence is a fine.

Held, further, the discretion reposed in a trial court in relation to the conditions on which a sentence may be suspended are very wide-ranging and a matter for the court's discretion. Where the court's discretion has been used imaginatively and creatively, an appeal court would be loath to interfere. The suspension of portion of sentence, on condition of payment to the complainant of a lump sum as compensation for sexual assaults perpetrated on him, was within the parameters of s 358(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Cases Considered

Cases cited:

Boardman v *DPP* [1974] 3 All ER 887 (HL)

Bowers, A-G of Georgia v *Hardwick* 478 US 186 (1986)

Dudgeon v *UK* (1982) 4 EHRR 149

Modinos v *Cyprus* (1993) 16 EHRR 485

National Coalition for Gay and Lesbian Equality & Anor v *Min of Justice & Ors* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC)

Norris v *A-G* [1984] IR 36

Norris v *Ireland* (1989) 13 EHRR 186

Nyambirai v *NSSA & Anor* 1995 (2) ZLR 1 (S)

GUBBAY CJ

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R v *Abdoorham* 1954 (3) SA 163 (N)

S v *Banana* 1998 (2) ZLR 533 (H)

S v *Banana* 1999 (1) ZLR 50 (H)

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S v *Chiwoko & Anor* 1989 (2) ZLR 364 (H)

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S v *Gombarume* 1975 (1) RLR 300 (G)

R v *Gough & Narroway* 1926 CPD 159

R v *H* 1962 (1) SA 278 (SR)

S v *H* 1995 (1) SA 120 (C)

R v *H* [1995] 2 All ER 865 (HL)

S v *K* 1997 (9) BCLR 1283 (C)

S v *K* 2000 (4) BCLR 405 (NmS)

R v *K & F* 1932 EDL 71

S v *Katevera* 1979 RLR 196 (G)

S v *M* 1977 (2) SA 327 (Tk)

R v *M* (1995) 30 CRR (2d) 122

S v *M* 1999 (2) SACR 548 (SCA)

S v *M & Ors* 1995 (1) SACR 667 (BA)

S v *Magaya* 1997 (2) ZLR 138 (H)

R v *Makanjuola, R* v *Easton* [1995] 3 All ER 730 (A)

S v *Makanyanga* 1996 (2) ZLR 231 (H)

R v *Masuku* 1968 (2) RLR 332 (G); 1969 (1) SA 328 (A)

S v *Meager* 1977 (2) RLR 327 (A)

R v *Mokoena* 1932 OPD 79

R v *Mokoena* 1956 (3) SA 81 (A)

S v *Mupah* 1989 (1) ZLR 279 (S)

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S v *Mupfudza* 1982 (1) ZLR 271 (S)

S v *Mutsinziri* 1997 (1) ZLR 6 (H)

R v *N* 1961 (3) SA 147 (T)

S v *Nathoo Supermarket (Pvt) Ltd* 1987 (2) ZLR 136 (S)

S v *Ngara* 1987 (1) ZLR 91 (S)

S v *Nyati* 1977 (2) RLR 315 (A)

R v *P* [1991] 3 All ER 337 (HL)

S v *Penias & Anor* 1967 RLR 104 (G)

R v *Petros* 1967 RLR 35 (G)

S v *Roffey* 1991 (2) ZLR 47 (H)

S v *Sauls & Ors* 1981 (3) SA 172 (A)

S v *Smith* 1997 (1) ZLR 274 (S)

R v *Taylor* 1927 CPD 16

S v *V* 1967 (2) SA 17 (E)

S v *Zaranyika* 1997 (1) ZLR 539 (H)

Smyth v *Ushewokunze & Anor* 1997 (2) ZLR 544 (S); 1998 (2) BCLR 170 (ZS)

Toonen v *Australia* (Communication No 488/1992)

Vriend v *Alberta* (1998) 50 CRR (2d) 1 (Can SC)

Zimbabwe Township Developers (Pvt) Ltd v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S)

Legislation considered:

Constitution of Zimbabwe 1980, s 23

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 358(3)

Case Information

J C Andersen SC, for the appellant

P Muziri, with him *A Nhemadire*, for the respondent

Judgment

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Gubbay CJ:

I. INTRODUCTION

With the advent of independence on 18 April 1980, the appellant was appointed the country's non-executive President. He remained in that office until the end of 1987. He is an acclaimed academic, author and former minister of the Methodist Church, and was an honorary professor and lecturer in religious studies, classics and philosophy at the University of Zimbabwe. In 1989, the appellant served as a member of the United Nations' Commission of eminent churchmen mandated to investigate multinational activities in South Africa. And in 1996, he was named as the Organisation of African Unity's special envoy to mediate an end to the civil wars raging in Liberia and Sierra Leone.

On 24 February 1997, Jefta Dube, a former police inspector who had served as the appellant's aide-de-camp, was convicted by the High Court of having murdered a police constable. After a finding of extenuating circumstances was made, Dube was sentenced to undergo ten years' imprisonment with labour. The court held that it could not reject as false the uncontroverted claim that Dube had been traumatised as a consequence of being the victim of repeated homosexual abuse by the appellant, at State House, during the years 1983 to 1986.

The next day, the Commissioner of Police publicly announced that the allegations of sodomy were to be the subject of an extensive investigation. In the event, on 7 July 1997, the appellant was indicted for trial to the High Court on two counts of sodomy, three counts of attempted sodomy and six counts of indecent assault. The offences were alleged to have been committed during the period extending from January 1984 to December 1996.

The appellant pleaded not guilty to all the charges. At the conclusion of the trial, which lasted several weeks and at which the appellant was defended with consummate skill and tenacity, he was convicted on two

counts of sodomy (counts 1 and 2), seven counts of indecent assault (counts 4 to 8, 10 and 11), one count of common assault (count 9) and one count of committing an unnatural offence (count 3). He was sentenced to an effective one year's imprisonment with labour, with a period of four years' imprisonment with labour conditionally suspended for three years; and a further four years' imprisonment with labour suspended on condition that, on or before 30 June 1999, he paid the Registrar of the High Court the sum of $500 000, to be transmitted in equal shares to Jefta Dube and to the deceased estate of Jefta Dube's victim. The judgment on conviction is reported, in part, in 1988 (2) ZLR 533 (H); and, on sentence, in 1999 (1) ZLR 50 (H).

II. THE APPELLANT'S CONTENTIONS WITH RESPECT TO CONVICTION

As a matter of generality and as applicable to all or some of the counts, the contentions advanced on the appellant's behalf were these:

" (a) The court *a quo* should not have convicted the appellant on any of the counts unless it was satisfied in the first instance that the evidence of the complainant was satisfactory. If not it should have acquitted. If it

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was, it should have been satisfied that it was corroborated. It should also have considered whether it was able to reject the evidence of the appellant and his witnesses as false beyond a reasonable possibility.

(b) The court erred in convicting on the counts where it found that the evidence of the complainants was not satisfactory in material respects.

(c) The court erred in failing to find that the evidence of the remaining complainants was not satisfactory in material respects.

(d) The court erred in finding that the evidence of the complainants was corroborated and, more particularly, by similar fact evidence.

(e) To the extent that there were similar facts the court erred in finding that they were of a striking and unusual nature, or that they were consistent on all counts, or that there was no risk that they were the product of collusion, rumour or media publicity.

(f) The court misdirected itself in failing to take into account the lack of an immediate and spontaneous complaint on each count, of cogent evidence as to the precise terms of the complaint and the inconsistencies between the initial complaints and reports, subsequent statements to the police and the evidence given.

(g) The court failed to make a proper assessment of the evidence of the appellant and his witnesses on its merits and erred in rejecting it as false beyond a reasonable possibility."

III. THE PRINCIPLES OF LAW TO BE APPLIED

Arising from the contentions raised, it is convenient at the outset to consider

the apposite principles of law, and then to apply them to those counts to which they are relevant.

(a) The approach to complainants in sexual cases

There is a well-established rule in Roman-Dutch jurisdictions that judicial officers are required to warn themselves of the danger of convicting on the uncorroborated evidence of certain categories of witnesses who are potentially suspect. One such category concerns complainants in sexual cases.

In a long line of cases in this country, of which *S* v *Mupfudza* 1982 (1) ZLR 271 (S) is the landmark, the so-called two-stage test has been applied. The first question to be asked by the court is: "Is the complainant credible?" If the answer is in the affirmative, the next question is: "Is there corroboration of or support for the evidence of the complainant?" In other words, the court must not only believe the complainant, it must in addition be satisfied, by an application of the cautionary rule, whether it might still not have been deceived by a plausible witness. It therefore must seek corroboration or evidence tending to exclude the danger of false incrimination. See also *S* v *Chitiyo* 1989 (2) ZLR 144 (S) at 145E-F; *S* v *Chigova* 1992 (2) ZLR 206 (S) at 219D-F and 220C-E; *S* v *Makanyanga* 1996 (2) ZLR 231 (H) at 241A-C; *S* v *Zaranyika* 1997 (1) ZLR 539 (H) at 555B-C.

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However, in *S* v *D & Anor* 1992 (1) SA 513 (Nm) FRANK J (with whom STRYDOM JP agreed), in the Namibia High Court, took the opportunity to re-examine the need for the rule in *sexual cases*. He came to the conclusion that the cautionary rule in such cases has no rational basis for its existence. He held that while a trial court must consider the nature and circumstances of the particular offence, "in the end only one test applies, namely, was the accused's guilt proved beyond reasonable doubt, and the test must be the same whether the crime is theft or rape" (see at 517A-B).

This decision received the imprimatur of the South African Supreme Court of Appeal in *S* v *Jackson* 1998 (1) SACR 470 (SCA). In the course of a well reasoned judgment, OLIVIER JA, with the concurrence of Mahomed CJ and three other Judges of Appeal) said at 476e-f:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

He commended as particularly important the eighth guideline formulated by LORD TAYLOR CJ in *R* v *Makanjuola*; *R* v *Easton* [1995] 3 All ER 730 (A) at 733c-d, which reads:

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"In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. *There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel*."

Prior to the decision in the *Jackson* case *supra*, it had long been accepted that criminal cases of a sexual nature fell into a special category. It was said that there was an "inherent danger" in relying on the unconfirmed testimony of a complainant in such a case. This belief resulted in the courts adopting a fixed cautionary rule of practice.

In *S* v *M* 1999 (2) SACR 548 (SCA), the Supreme Court of Appeal reiterated that the application of the cautionary rule to sexual cases was based on irrational and outdated perceptions. It again pointed out that although the evidence in such cases might call for a cautionary approach, this was not a general rule. The State was simply obliged to prove the accused's guilt beyond a reasonable doubt. And this approach applied to all cases in which an act of a sexual nature was an element (see at 555a-b).

Recently, in *S* v *K* 2000 (4) BCLR 405 (NmS), the Supreme Court of Namibia followed the decision in *S* v *Jackson supra*. It held that the cautionary rule had outlived its usefulness. There were no convincing reasons for its continued application. It exemplified a rule of practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved (see at 418H-419D).

It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in

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South Africa. In so holding, I have not overlooked the well-researched judgment of GILLESPIE J in *S* v *Magaya* 1997 (2) ZLR 138 (H). But having regard to the abrogation of the *obligatory* nature of the rule in such countries as Canada, the United Kingdom, New Zealand and Australia, as well as by the State of California (see Chaskalson*, et al*, *Constitutional Law of South Africa* at 14-62; Hatchard, 1993 *Journal of African Law* 97 at 98; (1983) 4 *Canadian Journal of Family Law* 173), I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully.

(b) The single witness situation

It is, of course, permissible in terms of s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for a court to convict a person on the single

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evidence of a competent and credible witness. The test formulated by DE VILLIERS JP in *R* v *Mokoena* 1932 OPD 79 at 80 was that the evidence of such a single witness must be found to be "clear and satisfactory in every material respect".

In *The South African Law of Evidence* 4 ed at 573 the celebrated authors, Hoffmann and Zeffertt, rightly point out that *Mokoena*'s case concerned the situation of a single witness claiming to have identified the accused by the light of a pocket torch as he ran past in the dark. Accordingly, they contend that the remarks of DE VILLIERS JP should be related to the context in which they were made.

Certainly, in purporting to lay down a general rule the dictum of the learned Judge President has been criticised as unhelpful and tending to obscure the ultimate purpose of the court's inquiry, which is whether the guilt of the accused has been proved beyond a reasonable doubt. See *R* v *Abdoorham* 1954 (3) SA 163 (N) at 165; *R* v *Mokoena* 1956 (3) SA 81 (A) at 85. In *S* v *Sauls & Ors* 1981 (3) SA 172 (A) at 180E-G, DIEMONT JA said:

"There is no rule of thumb or formula to apply when it comes to a consideration of the credibility of the single witness.

The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told ... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

In Zimbabwe, much the same approach has been adopted. In *S* v *Nyati* 1977 (2) RLR 315 (A) at 318E-G, Lewis JP warned that the test in *R* v *Mokoena supra* is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence, a commonsense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. See also *S* v *Nathoo Supermarket (Pvt) Ltd* 1987

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(2) ZLR 136 (S) at 138D-F.

Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.

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(c) Complaints made in sexual cases

Evidence that a complainant in an alleged sexual offence made a complaint soon after its occurrence, and the terms of that complaint, are admissible to show the consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegation.

The requirements for admissibility of a complaint are:

1. It must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R* v *Petros* 1967 RLR 35 (G) at 39G-H.

2. It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make it. See *R* v *C* 1955 (4) SA 40 (N) at 40G-H; *S* v *Makanyanga supra* at 242G-243C.

(d) Similar fact evidence

The learned trial judge dealt with the general rule applicable to the admission of similar fact evidence in some detail at 537B-539F of the reported judgment. It is clear that in this jurisdiction the test that has always been applied, as in this case, is that formulated in *Boardman* v *Director of Public Prosecutions* [1974] 3 All ER 857 (HL) at 897g-h, namely, that the similar facts must be of *such an unusual nature or striking similarity* that it would be an affront to commonsense to assume that the similarity to the offence charged was explicable on the basis of coincidence. See *S* v *Meager* 1977 (2) RLR 327 (A) at 332F-G; *S* v *Ngara* 1987 (1) ZLR 91 (S) at 100D; *S* v *Mupah* 1989 (1) ZLR 279 (S) at 284B; *S* v *Mutsinziri* 1997 (1) ZLR 6 (H) at 23F-G.

The former Appellate Division of South Africa in *S* v *D* 1991 (2) SACR 543 (A) at 546G-H applied the guide of striking similarity in evaluating the admission of similar fact evidence. It accepted that the basic principle must be that the admission of similar fact evidence is exceptional and requires a strong degree of probative force. See also *S* v *M & Ors* 1995 (1) SACR 667 (BH) at 692f-g.

However, in a recent treatment of the subject in *R* v *P* [1991] 3 All ER 337 (HL) LORD MACKAY OF CLASHFERN LC explained that the law did not require "striking similarity" as an *indispensable element of admissibility* and that it was unwarranted to restrict the admissibility principle in a manner which gives decisive effect to one particular way of describing probative significance. Thus the test in every case must be not whether the events sought to be proved by

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the prosecution are strikingly similar to the offence

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charged, but whether their probative contribution is such as to outweigh the prejudice to the accused. The learned Lord Chancellor stated the principle at 346d-j:

"As this matter has been left in *Boardman* v *DPP*, I am of opinion that it is not appropriate to single out 'striking similarity' as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. Obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required and the discussion which follows in Lord Salmon's speech in the passage which I have quoted indicates that he had that type of case in mind.

From all that was said by the House in *Boardman* v *DPP*, I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed and the authorities provide illustrations of that, of which *R* v *Straffen* [1952] 2 All ER 657, [1952] QB 911 and *R* v *Smith* (1915) 84 LJ KB 2153, [1914-15] All ER Rep 262 provide notable examples. But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle. Hume in his work *Commentaries on the Law of Scotland Respecting Crimes* 4 ed, 1844 Vol 2, p 384, said long ago:

> '... the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts.'

Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree."

And continued at 348a-b:

"... the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it, notwithstanding the prejudicial effect of admitting the evidence."

The significance of this re-statement of the principle is that it focuses attention on the concept that admissibility turns on probative weight which, like the question of corroboration, is a matter of logic and commonsense, and not of legal doctrine. Whether, of course, the evidence has sufficient probative value to outweigh its prejudicial effect depends on the facts of each case and is necessarily a matter of degree and value judgment.

By emphasising that "striking similarity" was not to be regarded as a

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prerequisite to the admissibility of similar fact evidence, the House of Lords appears to have eased the task of the prosecution in cases where the accused's alleged behaviour on the different occasions in question bears significant points of relationship, yet does not possess the virtually identical features which the rule in the *Boardman* case required. See also *R* v *H* [1995] 2 All ER 865 (HL) at 869e-870e; *R* v *Christov* [1996] 2 All ER 927 (HL) at 931f-932g.

The time has now come for this court to follow the lead taken by that august body, the House of Lords. That is the course I propose to adopt in this appeal.

IV. THE CONVICTIONS

In determining whether the State succeeded in proving each individual offence regard will be paid to the principles of law referred to where such happen to be applicable.

(a) *Count 1 - Edward Ngwenya*:

The charge alleged that during the period extending from 11 August 1995 to 31 December 1996, the appellant had sexual intercourse *per anum* with a male person, Edward Ngwenya, and thus committed the crime of sodomy.

[*The learned Chief Justice then considered the evidence and continued:*]

In the result, the factual finding of the trial court cannot be disturbed.

Now to be decided is whether the criminalisation of consensual sexual intercourse *per anum* is in conformity with the protections to which persons are entitled to be afforded under the Constitution of Zimbabwe.

Section 23 of the Constitution, in relevant part, reads:

" (1) Subject to the provisions of this section -

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) ...

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory ... if, as a result of that law ... persons of a particular description by race ... colour ... or *gender* are prejudiced -

(a) by being subjected to a condition, restriction or disability to *which other persons of another such description are not made subject*; or

(b) ...

(3) ...

(4) ...

(5) Nothing contained in ... any law that discriminates between persons on the ground of their gender shall be held to be in contravention of subsection (1)(a) to the extent that the law in question -

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(a) ...

(b) takes due account of *physiological differences between persons of different gender*; or

(c) ...

except so far as that law ... is shown not to be *reasonably justifiable in a democratic society*" (my own emphasis).

The questions that arise are whether the common law which criminalises sexual intercourse *per anum* between consenting male adults discriminates against persons of the male gender by imposing upon them a restriction to which persons of the female gender are not subject. And if so, whether the derogation in subs (5)(b) of s 23, which permits such law to take account of physiological differences between persons of different gender, has been shown not to be reasonably justifiable in a democratic society.

The common law crime of sodomy is defined as "unlawful intentional sexual relations *per anum* between two human males". See Hunt's *South African Criminal Law and Procedure* Vol III, 3 ed at 248; Snyman *Criminal Law* 3 ed at 340-341. A helpful historical analysis is to be found in *S* v *K* 1997 (9) BCLR 1283 (C) at 1287D-1289D (paras 11-21).

The definition of sodomy clearly criminalises such sexual conduct between males whether committed with or without consent and in public or in private. *In casu*, it is only necessary to determine whether the constitutional protection afforded against discrimination on the ground of gender has decriminalised the offence to the extent that it takes place in private between consenting male adults. That is the narrow issue. But see the remarks of Ackermann J in *National Coalition for Gay and Lesbian Equality & Anor* v *Minister of Justice & Ors* 1998 (12) BCLR 1517 (CC) at 1548 E-H (para 66); Hunt *op cit* at 250 (6); and Snyman *op cit* at 341.

I do not believe that it is any longer open to doubt that various forms of sexual conduct which have been held to constitute an offence, if committed by a male person with another male person, are not regarded as criminal if committed by a male person with a female person. It is not an unnatural offence where a female masturbates a male; or allows him to obtain sexual gratification by friction between her legs (as in the *metsha* custom) or performs oral sex with a man, see *R* v *K & F* 1932 EDL 71 at 73-74; or, even more significantly, permits penetration into her anus, see *R* v *N* 1961 (3) SA 147 (T) at 148, *R* v *H* 1962 (1) SA 278 (SR) at 279E-G, *R* v *Masuku* 1968 (2) RLR 332 (G); 1969 (1) SA 328 (R) at 330F-G, Strydom *op cit* at 341.

Yet the position is different if such acts are performed by a male person upon another male person. See *R* v *Gough and Narroway* 1926 CPD 159 at 163; *R* v *Curtis* 1926 CPD 385 at 386; *R* v *Taylor* 1927 CPD 16 at 19; *S* v *V* 1967 (2) SA 17 (E) at 18B-C; *S* v *M* 1977 (2) SA 327 (Tk) at 357G-H.

Furthermore, consensual sexual acts between women do not constitute an

offence. See *S* v *H* 1995 (1) SA 120 (C) at 127D-E; *S* v *K supra* at 1289C-D (para 21); the *Gay*

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and Lesbian Equality case *supra* at 1530D-E (para 14). Women may thus do what men may not do, for today only male-male sexual acts are the subject of criminal inhibition. Clearly, the only distinction that makes such acts criminal is the participants' gender or sex. See generally, Cameron *Sexual Orientation and the Constitution: A Test Case for Human Rights* (1993) *SALJ* 450 at 453 *in fine*- 454.

In his comprehensive and forceful judgment in the *Gay and Lesbian Equality* case *supra*, ACKERMANN J neatly summed up the extent of the discrimination at 1528G-H (para 11):

"Before the new constitutional order came into operation in our country, the common law offence of sodomy differentiated between gays and heterosexuals and between gays and lesbians. It criminally proscribed sodomy between men and men, even in private between consenting adults, but not between men and women; not did it proscribe intimate sexual acts in private between consenting adult women."

Article 26 of the International Covenant on Civil and Political Rights, which has been ratified by this country and is the most widely accepted agreement on human rights apart from the Universal Declaration of Human Rights, provides, *inter alia*, that the law shall guarantee to all persons protection against discrimination on any ground including race, colour and *sex*. In *Toonen* v *Australia* (Communication No. 488/1992), the majority of the Human Rights Committee found that Tasmania's law criminalising homosexual activity violates article 17 of the *Covenant* (unlawful interference with privacy); and that it was unnecessary to consider whether in addition there had been a violation of article 26. One of the members, however, a Mr Wennergren, in an individual opinion, preferred to base his reasoning on the latter article. He wrote:

"Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalise other sexual contacts between consenting men without at the same time criminalising such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasised that it is the criminalisation as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time. The designated behaviour nonetheless remains a criminal offence."

These observations, with which I respectfully agree, pertinently demarcate the reach and effect of the common law offence of sodomy in relation to s 23 of the Constitution.

R v *M* (1995) 30 CRR (2d) 112 is a judgment of the Ontario Court of Appeal. In that case, the accused was charged with contravening s 159 of the Canadian Criminal Code which prohibited anal intercourse unless engaged

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in in private "between husband and wife or any two persons each of whom is eighteen years of age or more, both of whom consent to the act". It was alleged that the accused had engaged in acts of anal intercourse with his fiancèe's niece who was under eighteen years at the time - the age of consent for other sexual activity in Canada, including vaginal intercourse, being fourteen years. Abella JA held that s 159 was a discriminatory provision which infringed the guarantee of equality contained in s 15 of the Canadian Charter of Rights and Freedoms. The two other members of the court held that s 159 infringed s 15 of the Charter because it imposed a burden

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based on age.

The judgment of ABELLA JA is significant because the learned judge addressed the issue on the basis of the right to equality (the antithesis of discrimination) and not on the right to privacy. It therefore affords some support for the view that a law which subjects acts of anal intercourse occurring between consenting male adults to criminal sanction should be held to be unconstitutional on the ground that it discriminates against gender.

In the court below, the learned Judge President, while seemingly recognising the argument that criminalising sexual intimacy between consenting male adults constitutes discrimination, nonetheless came to the conclusion that s 23 did not afford protection. At 543A-D of the reported judgment, he reasoned as follows:

"Does the Constitution seek through its provision to protect such a right? I am not aware of any provision in the Constitution that creates such a right or seeks to protect an already existing right of a homosexual to penetrate another *per anum*. I am not here addressing myself to the desirability or otherwise of creating such a right. I will probably address that issue when I come to the question of an appropriate sentence.

The framers of the Constitution were aware that in terms of common law consensual sodomy between males was an offence. If it were their intention to alter that position one would have expected them to use more explicit language, as indeed is the case in the South African Constitution. Section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 provides as follows:

> 'No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture or language' (emphasis is mine).

It is quite clear from that the South African provision against discrimination is intended to strike down any law that outlaws homosexual activity. The Zimbabwean Constitution, s 23 in particular, contains no similar wording on that point."

Although not cited, the learned Judge President relied on the approach of the United States Supreme Court in *Bowers, Attorney-General of Georgia* v *Hardwick et al* 478 US 186 (1986) at 196-197, in which a majority of five to four (see Justice Blackmun's stinging dissent at 199-214) was unpersuaded that the sodomy laws of some twenty-four States and the

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District of Columbia should be invalidated. But that case is distinguishable. The unconstitutionality of Georgia's sodomy laws was based upon the right to privacy, which is not specifically mentioned in the Constitution of the United States. A gender discrimination argument could not be advanced because the Georgia statute was gender neutral; anal sex was prohibited for homosexuals as well as heterosexuals.

In any event, the judgment has been the subject of trenchant and sustained criticism. See Tribe *American Constitutional Law* 2 ed at 1424 *et seq*; Grey, (1997) *University of Colorado Law Review* at 373; (1986-1987) Vol 100 *Harvard Law Review* 210 at 213-220. Recently, and somewhat surprisingly, in *Romer* v *Evans* 517 US 620 (1996) the same court struck down an amendment to the Colorado State Constitution which prohibited public measures designed to

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protect persons based on their sexual orientation.

Accordingly, I hold firmly to the view that the common law offence of sodomy, committed in private between consenting adult males, discriminates in itself between such persons on the ground of gender.

Since the law of sodomy takes due account of physiological differences between the male and female genders, the consequential question is whether that law has been shown not to be reasonably justifiable in a democratic society. If it has been it will be in contravention of s 23(1)(a) of the Constitution.

From a procedural aspect, the burden of proof is on the challenger to establish that the impugned enactment goes further than is reasonably justified in a democratic society, and not upon the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine*- 383A, 1984 (2) SA 778 (ZS) at 783H. In effect, the court will consider three criteria in determining whether or not the limitation upon the protection is permissible in the sense of not being shown to be arbitrary or excessive. These criteria were identified in *Nyambirai* v *National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) at 13D-F; 1995 (9) BCLR 1221 (ZS) at 123H-J, and are whether:

1. the legislative objective which the limitation is designed to promote is sufficiently important to justify overriding the fundamental right concerned;

2. the measures designed or framed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations;

3. the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

I shall deal with each in turn.

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As to whether the legislative objective insofar as it criminalises consensual sodomy between adult males is sufficiently important to justify overriding the fundamental right to be protected against gender discrimination.

The first step is to identify the objective of the criminal law. This is not difficult. It must be to discourage conduct regarded as tending to promote sexual licence - conduct considered to be immoral, shameful and reprehensible and against the order of nature.

Undoubtedly, there are some acts which are so repugnant to and in conflict with human dignity as to amount to a perversion of the natural order. Bestiality is an obvious example. But can it be said that to criminalise consensual anal intercourse between consenting males, in private, is so important an objective as to outweigh the protection against gender discrimination?

In seeking to find the answer, it is helpful to take account of the legal position in other countries. In this connection, I can do no better than to refer to the careful survey of the jurisprudence of

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other open and democratic societies undertaken by Ackermann J in the *Gay and Lesbian Equality* case *supra* at 1540F-1544F (paras 40-51), the result of which the learned judge summed up at 1544G-H (para 52) in these words:

"(It) shows that in 1967 a process of change commenced in Western democracies in legal attitudes towards sexual orientation. This process has culminated, in many jurisdictions, in the decriminalisation of sodomy in private between consenting adults. By 1996, sodomy in private between consenting adults had been decriminalised in the United Kingdom and Ireland, throughout most of Western Europe, Australia (with the exception of Tasmania), New Zealand and Canada."

See also the similar historical examination in both *S* v *M* 1990 (2) SACR 509 (E) at 514c-f, and *S* v *K supra* 1291I-1294A (at paras 32-40).

I would merely add, for the sake of emphasis, that the European Court of Human Rights in *Dudgeon* v *United Kingdom* (1981) 4 EHRR 149 at 167 (para 60) strongly underscored the change in judicial and social attitudes:

"As compared with the era when (the) legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the court cannot overlook the marked changes which have occurred in this regard in the domestic laws of the member States."

See also *Norris* v *Ireland* (1989) 13 EHRR 186; and *Modinos* v *Cyprus* (1993) 16 EHRR 485 which also considered the existence of penal provisions in the law of the country in question insofar as they related to sexual acts committed in private by consenting adults.

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In South Africa, the new constitutional dispensation was preceded by a softening of attitudes towards deviations from the heterosexual norm which was reflected both in academic writing and in the judgments of the courts.

It may well be that the majority of the people, who have normal heterosexual relationships, find acts of sodomy morally unacceptable. This does not mean, however, that today in our pluralistic society that moral values alone can justify making an activity criminal. If it could one immediately has to ask: "By whose moral values is the State guided?".

As Professor R Dworken, in his work *Taking Rights Seriously* at 258, emphatically proclaimed:

"Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures because they are effeminate), rationalisation (based on assumptions of fact so unsupported that they challenge the community's own standards of rationality), and personal aversion (representing no conviction but merely blind hate rising from unacknowledged self-suspicion). It remains possible that the ordinary man could produce no reasons for his views, but would simply parrot his neighbour who in turn parrots him, or that he would produce a reason which presupposes a general moral position he could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of a consensus, for the belief that prejudices, personal aversions and rationalisations do not justify restricting another's freedom, itself occupies a critical

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and fundamental position in our popular morality."

I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable.

The courts cannot be dictated to by public opinion. It cannot replace in them the duty to interpret the Constitution and to enforce its mandates. Otherwise there would be no need for constitutional adjudication. Those who are entitled to claim the protection of rights include social activists and the marginalised members of society.

As to whether the measures designed to meet the legislative objective are rationally connected to it.

In considering whether or not the criminal sanction attaching to consensual anal intercourse in private between male persons is rationally connected to the objective which it is allegedly designed to achieve, the conclusion I reach is that it is not.

It is irrational in my view to criminalise anal sexual intercourse between consenting male adults yet to recognise that it is not an offence for a woman to permit a man to engage with her in anal sexual intercourse. It is not rational to criminalise the one sexual activity but not the other. If both forms of sexual

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deviation are to be regarded as immoral and against the order of nature, by what logic is the discrimination against the male gender justified? Why should the female gender alone be given the protection of the Constitution?

Likewise, consensual unnatural sexual acts between women are not the subject of criminal sanction. Yet men may not do what women are permitted to do. Unnatural sexual acts engaged in by them are criminalised. Where is there a rational connection between the objective of discriminating on the basis of gender, anal sexual intercourse or unnatural sexual acts committed by men but not such activity committed between women and men or women and women? In short, the law of consensual sodomy is arbitrary and unfair and is based on irrational considerations.

As to whether the means used to impair the right or freedom are more than is necessary to accomplish the objective.

The impact of discriminatory criminal sanctions on homosexuals is undoubtedly very severe. It tends to increase the already existing societal prejudices on their lives.

As observed by Cameron *op cit* at 455:

"Even when these provisions are not enforced, they reduce gay men ... to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation."

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Much the same sentiment was expressed by Cory J in *Vriend* v *Alberta* (1998) 50 CRR (2d) 1 (Can. SC) at 42-43:

"Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious. This was recognised in the following statement from *Egan* (at pp 139-40 CRR, pp 594-95 SCR):

> 'The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatises them ... Such legislation would clearly infringe s 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.'

This reasoning applies *a fortiori* in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination."

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See also *Norris* v *Republic of Ireland supra* at 192 (para 21).

In the *Gay and Lesbian Equality* case *supra* at 1535F-H (para 26), ACKERMANN J summed up the impact which the common law offence of sodomy has on gay men as follows:

" (a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, person-hood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.

(b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.

(c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity."

I would quote two further passages from this landmark judgment at 1539E-H (paras 36-37). They read:

"The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.

Against this must be considered whether the limitation has any purpose and, if so, its importance. No valid purpose

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has been suggested. The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore, seem that there is no justification for the limitation."

With much respect I endorse all these observations. See also the remarks of the same learned judge in the second *Gay and Lesbian Equality* case 2000 (1) BCLR 39 (CC) at 62H-64E (paras 41-42).

In my view, the criminalisation of anal sexual intercourse between consenting adult males in private, if indeed it has any discernable objective other than the enforcement of private moral opinions of a section of the community (which I do not regard as valid), is far outweighed by the harmful and prejudicial impact it has on gay men. Moreover, depriving such persons of the right to choose for themselves how to conduct their intimate relationships poses a greater threat to the fabric of society as a whole than tolerance and understanding of non-conformity could ever do.

I conclude therefore, that the retention of the crime of consensual sodomy in our law is not reasonably justifiable in a democratic society. Accordingly I would allow the appeal on count 1 and set aside the conviction of sodomy.

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[*His Lordship went on to consider the evidence on the remaining counts, and concluded:*]

V. DISPOSITION OF THE APPEAL AGAINST THE

CONVICTIONS

In the result, I would uphold the appeal against the conviction on count 1 and set aside the conviction and sentence. I also would alter the conviction on count 2 from guilty of committing sodomy on various occasions to guilty of committing unnatural sexual offences; and on count 3, solely to guilty of committing an indecent assault on or about 16 December 1983. Insofar as Count 8 is concerned, I would uphold the appeal to the extent of substituting the offence of assault with intent to commit an indecent act for guilty of indecent assault. For the rest, I would confirm the convictions.

VI. THE APPEAL AGAINST THE SENTENCES IMPOSED

The alterations of the conviction on count 2 to guilty of the commission of unnatural sexual offences, on count 3 to guilty of one act of indecent assault, and on count 8 to guilty of assault with intent to commit an indecent act, have the effect of leaving this court at large in the matter of sentence, unfettered by the discretion of the learned Judge President.

Notwithstanding that the convictions have been reduced on count 2 from sodomy and an unnatural offence, to the commission of numerous unnatural offences, the criminal actions of the appellant were of a serious nature.

The fact remains that Dube was sexually abused by the appellant on very many occasions over

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a period of two-and-a-half years. His is a horrifying tale. He was a young man, eager to progress in his career. His appointment as aide-de-camp to the President of his country was an exciting honour. The appellant used his immense superiority of status to beat down all resistance from the young and inexperienced complainant. Nobody could or would intervene to save him. He wept as he confessed the events to his aunt. What could she do? He complained to other very senior officers. Nothing was done. He even went so far as to complain to the Acting Prime Minister. Eventually, he was transferred from State House duties.

The effect of all this on Dube's personality and reputation was traumatising and devastating. Although I have found that anal penetration was not proved, the offences were disturbing and serious. I consider that a sentence of five years' imprisonment with labour is deserved.

The trial court proceeded, generously, to allow the appellant to escape seven of the eight years' imprisonment imposed on count 2 by making

payments totalling $500 000. The eighth year was to run concurrently with the sentences on the other counts.

The payments of $250 000 to be transmitted equally to Dube and to the deceased estate of his victim were not compensation orders made in terms of Part XIX of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"). They were conditions upon which four years of the sentence of imprisonment were suspended. As to the distinction, see *S* v *Gombarume* 1975 (1) RLR 300 (G) at 301A-B; *S* v *Chiwoko & Anor* 1989 (2) ZLR 364 (H) at 365D-F.

The statutory provision governing the conditions on which a sentence may be suspended are set out in s 358(3) of the Act. It reads as follows:

" (3) Conditions specified in terms of para (a) or (b) of subsection (1) may relate to one or more of the following matters -

(a) good conduct;

(b) compensation for damage or pecuniary loss caused by the offence;

Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX;

(c) the rendering of some specified benefit or service to any person injured or aggrieved by the offence;

Provided that no such condition shall be specified unless the person injured or aggrieved by the offence has consented thereto.

(d) the rendering of service for the benefit of the community or a section thereof;

(e) submission to instruction or treatment;

(f) submission to the supervision or control of a probation officer appointed in terms of the Children's Protection and Adoption Act [*Chapter 5:06*] or regulations made under section *three hundred and eighty-nine*, or submission and control of any other suitable person;

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(g) compulsory attendance or residence at some specified centre for a specified purpose;

(h) any other matter which the court considers it necessary or desirable to specify having regard to the interests of the offender or of any other person or of the public generally."

These provisions are very wide-ranging and, as is clear from the final paragraph of the subsection, are a matter for the court's discretion. Although that discretion must be judicially exercised, this court is loath to interfere in a situation in which it has been used imaginatively and creatively.

Subsection (b) of s 358(3) specifically allows the imposition of a condition that there be "compensation for damage or pecuniary loss caused by the offence". The proviso is not relevant. Reading subs (b) with subs (h), it seems to me, certainly, that the first condition imposed is within the parameters of the section.

The second condition is more questionable. The link between the criminal conduct to which Dube was subjected and whatever pecuniary loss was

caused to the estate of the deceased victim by his murder at the hands of Dube, is remote and conjectural. Dube's reaction in fatally shooting the deceased was out of all proportion to the taunt the deceased had issued, that he was Banana's wife. I do not consider therefore that any loss sustained through the death of Dube's victim can properly and fairly be regarded as the responsibility of the appellant. For this reason, I would set aside the second condition of the compensatory suspension. It did not accord with the spirit of the section.

It may be said that insofar as the amount awarded is compensatory, there should have been an effort to calculate an appropriate figure - compare *S* v *Smith* 1997 (1) ZLR 274 (S) at 276. The answer to this, in my view, is that a condition of suspension under s 358 of the Act is not subject to the restraints of a compensation order under Part XIX of the Act. The compensation here is of a symbolic nature.

It may also be said that no attempt was made to ascertain how much compensation the appellant could afford to pay, see *R* v *Penias & Anor* 1967 RLR 104 (G) at 105C-D; or whether he could raise the amount while serving a prison sentence, see *S* v *Katevera* 1979 RLR 196 (G) at 198A-B. The appellant, however, is a person of substance and there was no reason to suppose that he would not be able to raise even as much as $500 000.

Thus, it is necessary to assess the amount of compensation the appellant should be ordered to pay as a condition for the suspension of two years of the five years' imprisonment with labour to be imposed on this count. Taking into consideration the alteration of the conviction to the lesser commission of numerous unnatural sexual offences, I do not think that the amount to be paid to Dube should be any less than that fixed by the learned Judge President.

Finally, since the majority of the court are of the opinion that consensual sodomy has not been outlawed by the Constitution and remains a crime in this country, the question of sentence on

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count 1 falls to be determined.

We are convinced that in this modern day imprisonment is not a proper sentence where both parties are willing adults and the act was committed in private. See *S* v *Roffey* 1991 (2) ZLR 47 (H) at 53B-D. After careful consideration, and bearing in mind that the appellant is a first offender and that Ngwenya who was equally guilty is not being punished, it is our view that the appellant is deserving of no more than a fairly moderate fine, the whole of which is to be suspended.

In the result, I would set aside the sentences imposed by the learned Judge President and substitute the following:

" (1) Count 1, a fine of $500 or, in default of payment, one month's imprisonment with

labour suspended for three years on condition that the accused is not convicted of sodomy committed during that period for which he is sentenced to a period of imprisonment without the option of a fine.

(2) Counts, 3, 4, 5, 6, 7, 10 and 11 (the indecent assault convictions) to be taken together for the purposes of sentence, two years' imprisonment with labour of which one year is suspended for three years on condition that during that period the accused is not convicted of an offence of which indecent assault is an element for which he is sentenced to a term of imprisonment without the option of a fine.

(3) Count 2 (the commission of numerous unnatural sexual offences committed upon Dube), five years' imprisonment with labour of which period two years is suspended for three years on the same conditions as in para (1) above. A further two years' imprisonment with labour is suspended on condition that on or before 31 August 2000 the accused pays the sum of $250 000 to the Registrar of the High Court for transmission to Jefta Dube.

(4) Counts 8 and 9 (the assault convictions) to be taken together for the purposes of sentence, one month's imprisonment with labour.

It is ordered further that the effective sentence of one year's imprisonment with labour on count 2 and the effective sentence of one month's imprisonment with labour on counts 8 and 9 (taken together) are to run concurrently with the effective sentence of one year's imprisonment with labour on counts 3 to 7, 10 and 11 (taken together)."

MCNALLY JA: I agree with a great deal of what has been said by the Chief Justice, and the area of my dissent is on the question of whether the Constitution of Zimbabwe compels the court to rule that consensual sodomy is no longer a crime.

In particular, I would like to associate myself fully with the findings set out in Part II of the judgment of the Chief Justice which deals with -

(a) The cautionary rule in sexual cases;

(b) The single witness situation;

(c) Admissibility of evidence of complaint;

(d) Similar fact evidence.

I agree also with the findings of fact in relation to the various counts, and the alterations to the

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convictions which flow from those findings of fact.

My main dissenting view relates to count 1. I agree with the factual findings made by the court below and endorsed by the Chief Justice. I do not agree that the provisions of the Constitution of Zimbabwe have the effect of decriminalising consensual sexual intercourse *per anum* between adult males in private. For the sake of brevity, I will use the phrase "consensual sodomy" in this sense.

Let me begin by making certain general observations.

There seem to be three ways in which consensual sodomy has moved away from being regarded as criminal. In some countries, such as England and Wales, there was a gradual development of a more tolerant and understanding

popular attitude towards such conduct. After widespread national debate, legislation was passed for the precise purpose of decriminalising the conduct. This was the Sexual Offences Act of 1967.

In other countries, such as South Africa, a new Constitution made provision specifically outlawing discrimination on the grounds of sexual orientation. That Constitution was widely and publicly debated and accepted. The legislation and common law provisions criminalising consensual sodomy clearly fall away in the face of such explicit provision.

The third situation arose in jurisdictions such as Ireland and Northern Ireland, where the majority of the people, and the courts, were disinclined to decriminalise the offence, but were overruled by a supra-national judicial authority - in their cases the European Court of Human Rights. Thus, for example, the Irish Supreme Court (by a majority) held in *Norris* v *The Attorney-General* 1984 IR 36 that the laws against consensual sodomy were not inconsistent with the Irish Constitution, and in particular were not invidiously discriminatory nor an invasion of privacy. Then the European Court overturned that decision. And in *Dudgeon* v *United Kingdom* (1982) 4 EHRR 149 it is apparent that such acts were regarded in Northern Ireland as criminal (though not in recent times prosecuted) until the European Court intervened.

In the United States of America the position of the individual states is not uniform. In *Bowers, Attorney General of Georgia* v *Hardwick* 478 US 186, 106 S Ct 2841, the Federal Supreme Court, by a 5-4 majority, declined to invalidate the State of Georgia's sodomy statute on the ground, among others, that "the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy". It appears from the judgment that in 1986 there were twenty-five states in which consensual sodomy was a crime.

I am aware that the judgment has been criticised. I appreciate the intellectual force of that criticism. It does not follow that the judgment is wrong. There are always two points of view upon such basic issues. The fact remains that the present stand of perhaps the most senior court in the western world is that it is not unconstitutional to criminalise consensual sodomy. That stance remains in force, despite the ruling in *Romer* v *Evans* 517 US 620 (1996), which did

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not overrule the earlier decision.

Historically, consensual sodomy, along with a number of other sexual activities which were regarded as immoral, were dealt with by the Ecclesiastical Courts. Such immoral activities included adultery and fornication, i.e. sex outside marriage. In 1533, the offences of sodomy and bestiality (collectively called buggery) were brought within the jurisdiction of the secular courts by King Henry VIII. Since then, and in very general terms, there has been a tendency in the western world to reverse that process. Adultery and fornication

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became sins rather than crimes. For those who drifted away from the churches, the concept of sinfulness became less and less meaningful. Consensual sodomy has, in many but not all parts of the western world, joined that drift from crime to sin to acceptable conduct.

It is of some interest to note, courtesy of Milton's *SA Criminal Law and Procedure* Vol 2, 3 ed, p 250-1 that in pre-Christian Rome (and I would add, Greece) such conduct carried no social or moral opprobrium, whereas Hebraic and Germanic laws were strongly disapproving. See also footnote 6 to JUSTICE BLACKMUN's dissenting judgment in *Bowers* v *Hardwick supra*.

What then of Zimbabwe?

I would remark first that this case has not, from its very beginning, been treated as a constitutional test case. No evidence was led in the court *a quo* from psychiatrists, psychologists or other experts. No evidence was led to suggest that the customary laws of Zimbabwe are more akin to those of the Romans and Athenians than to the Germanic or Hebraic customs. I cannot therefore speak with authority on the customary law in this respect. I note, however, that Goldin and Gelfand's well known book on *Customary Law* says, at p 264, the following:

"*Kurara nemumwe murume* (homosexuality) is called *huroyi*. This is considered extremely wicked but is rare."

It seems to me that this is a relevant consideration, from two points of view. From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete. Mr *Andersen* expressly disavowed any such argument. The Chief Justice does not dispute this. His view, if I may presume to paraphrase it, is that the provisions of the Constitution, properly interpreted, compel one to the conclusion that the criminalisation of consensual sodomy is actually contrary to those provisions.

From the point of view of constitutional interpretation, I think we must also be guided by Zimbabwe's conservatism in sexual matters. I have always agreed with the Chief Justice's view of constitutional interpretation, expressed for example in *Smyth* v *Ushewokunze & Anor* 1997 (2) ZLR 544 (S) at 553 that:

"... what is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be

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to be move away from formalism and make human rights provisions a practical reality for the people."

In the particular circumstances of this case, I do not believe that the "social norms and values" of Zimbabwe are pushing us to decriminalise consensual

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sodomy. Zimbabwe is, broadly speaking, a conservative society in matter of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal.

I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual freedom. Put differently, I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative.

Against that background, I turn to consider those provisions of the Declaration of Rights, namely ss 11 and 23, which might be thought to make it necessary for the court to decriminalise consensual sodomy.

(a) *Section 11 of the Constitution: The Right to Privacy*

This section was quite significantly altered by the provisions of Act 14 of 1996, which came into effect on 6 December 1996. The section became in effect a preamble, and now says nothing at all about privacy.

Prior to 6 December 1996 the section did contain a passing reference to the fundamental right of every person in Zimbabwe to:

"protection for the privacy of his home."

But, in the context, this provision is clearly a reference to the right, elaborated later in s 17, to protection from arbitrary search or entry. It has nothing whatever to do with whether or not consensual sodomy is a crime.

Count 1, which is the only count relating to consensual sodomy, relates to activities between 11 August 1995 and 31 December 1996. It extends over the currency of both versions of s 11. Neither version is relevant. I note that the privacy question was only faintly argued by Mr *Andersen*. Nor did the Chief Justice rely on s 11 in coming to his conclusion. I will not therefore dwell further upon it.

(b) *Section 23 of the Constitution: Protection from Discrimination*

This is the section upon which the Chief Justice relied in coming to the conclusion that the criminalisation of consensual sodomy was:

(a) discriminatory on the ground of gender;

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(b) not reasonably justifiable in a democratic society.

I will not set out s 23 in full because it appears in the judgment of the Chief Justice.

I make first the obvious point, which was made by the judge *a quo*, that the

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framers of the South African Constitution found it necessary to include "sexual orientation" as well as "gender" in the list of grounds on the basis of which discrimination is not permitted. Had our Constitution contained those words, there would have been no argument. But it does not.

Discrimination on the basis of gender means simply that women and men must be treated in such a way that neither is prejudiced on the grounds of his or her gender by being subjected to a condition, restriction or disability to which persons of the other gender are not made subject.

It is important to bear in mind that what is forbidden by s 23 is discrimination between men and women. Not between heterosexual men and homosexual men. That latter discrimination is prohibited only by a Constitution which proscribes discrimination on the grounds of sexual orientation, as does the South African Constitution.

The importance of this point is that the *real* complaint by homosexual men is that they are not allowed to give expression to their sexual desires, whereas heterosexual men are. Insofar as that is discrimination - and, of course it is - it is not the sort of discrimination which is struck down by s 23.

The Constitution goes on, in s 23(5)(b), to make the obvious qualification that a law may be discriminatory:

"to the extent that it takes due account of physiological differences between persons of different gender."

Otherwise, we might have the ridiculous situation that a rapist could argue "the law against rape is unconstitutional because only men can be rapists". Or a woman could argue "the law against infanticide ([*Chapter 9:12*]) is discriminatory on the ground of gender because only women who have just given birth can be punished under that Act". (I ignore the fact that a woman may technically be found guilty of rape as an accomplice, or a man of infanticide on the same basis).

"Ah" say the proponents of the other view triumphantly, "but we do not penalise men who perform this act with women. Nor do we penalise the women involved as passive partners. That is where the discrimination lies".

I confess that I regard this argument as a kind of "chop-logic", entirely lacking in commonsense and real substance. Of course, it is technically correct. But realistically, and without going into sordid detail, how often does it happen that men penetrate women *per anum*? How often, if it does happen, is it the result of a drunken mistake? Or an excess of sexual experimentation in an otherwise acceptable relationship? And, most importantly, how can it be proved? I refrain from further analysis. In my view, the law has properly decided that it is unrealistic to try to penalise such conduct between a man and a woman. I do not accept that that fact should lead

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us to the conclusion that

MCNALLY JA

it is discriminating to penalise it when it is between two men. The real discrimination, as I have said earlier, is against homosexual men in favour of heterosexual men - and that is not discrimination on the ground of gender.

That being so, the penalising of consensual sodomy is not "discrimination" as that word is defined in the Constitution, because it is not discrimination on the grounds of "race, tribe, place of origin, political opinions, colour, creed or gender". This kind of discrimination is not dealt with in the Constitution. It is thus not outlawed by the Constitution.

But let me assume that I am wrong in this. I must then turn to the question of whether the law penalising consensual sodomy "is not shown to be reasonably justifiable in a democratic society". One may not personally approve of such a law, but does that mean it is not reasonably justifiable in a democratic society? I do not believe so.

Are we to say that twenty-five American states are not democratic societies? And, in any event, democratic states are in various stages of development. Some might say, in various stages of decadence. (I do not propose to become involved in that argument).

I do not believe that it is the function or right of this court, undemocratically appointed as it is, to seek to modernise the social mores of the State or of society at large. As JUSTICE WHITE said in *Bowers* v *Hardwick supra*:

"The court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognisable roots in the language or design of the Constitution."

To sum up, as far as discrimination is concerned, I would assert:

1. That the real discrimination of which homosexual men complain is the discrimination between them and heterosexual men, which does not fall within the definition of discrimination on the grounds of gender;

2. That the fact that anal penetration of women by men is not criminalised is an insignificant side-issue, an issue more of practicality than of principle;

3. That Zimbabwe is a conservative society on questions of sexual morality and the court should not strain to interpret provisions in the Constitution which were not designed to put Zimbabwe among the front-runners of liberal democracy in sexual matters.

In my view, the conviction on count 1 should stand.

EBRAHIM JA: I too associate myself fully with the findings set out in Part II of the judgment of the Chief Justice which deals with -

(a) The cautionary rule in sexual cases;

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(b) The approach relating to single witnesses;

MCNALLY JA

(c) Admissibility of evidence of complaint;

(d) Similar fact evidence.

I am in agreement with the findings of fact made in relation to the various counts and the resulting alterations to the convictions.

I support the conclusion reached by the Chief Justice on the constitutional issue raised by the appellant's counsel.

I do not believe that in determining this matter one should have regard to one's own moral and religious outlook. To my mind, the crucial question to be determined is: What is the law? It is with this question in the forefront of my deliberations that I have carefully considered the views expressed by the Chief Justice on the one hand and MCNALLY JA on the other, and have come to the conclusion I have, in support of the view expressed so eloquently by the Chief Justice.

MUCHECHETERE JA: I too associate myself fully with the findings set out in Part II of the judgment of the Chief Justice which deals with -

(a) The cautionary rule in sexual cases;

(b) The single witness situation;

(c) Admissibility of evidence of complaint;

(d) Similar fact evidence.

I also agree with the findings of fact in relation to the various counts, and the alterations to the convictions which flow from those findings of fact.

However, like my brother MCNALLY, I do not agree that the provisions of the Constitution of Zimbabwe have the effect of decriminalising consensual sexual intercourse *per anum* between adult males in private. In this connection, I am in entire agreement with the views also eloquently expressed by my brother MCNALLY in his judgment.

SANDURA JA: I agree.

Kantor & Immerman, appellant's legal practitioners

BITUMAT LTD *v* MULTICOM LTD 2000 (1) ZLR 637 (HC)

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Citation	2000 (1) ZLR 637 (HC)
Case No	Judgment No. HH-114-00
Court	High Court, Harare
Judge	Smith J
Heard	May 24, 2000
Judgment	May 31, 2000
Annotations	None

Civil action

Flynote

Arbitration - contract - arbitration clause - effect - clause widely cast - court should not try to reduce effect of clause - when arbitration clause may be taken to have been abandoned

Headnote

The arbitration clause in the contract between the parties provided that any dispute touching the rights or obligations of the parties should be referred to an arbitrator. A dispute arose about how much money one party owed to the other. The plaintiff sought to have the matter decided in court, arguing that the dispute was not one contemplated by the arbitration clause.

Held, that where there is an arbitration clause in a contract, and the clause is widely cast, the court should not be astute in trying to reduce the ambit of the clause. The court must give effect to the clause unless there is clear and specific evidence that the parties had decided to abandon it. Where the arbitration clause is contained in a written agreement, the decision to abandon the clause must also be in writing or else so clearly evidenced by the conduct of the parties that there is no room for doubt.

Cases Considered

Cases cited:

AFC v *Pocock* 1986 (2) ZLR 229 (S)

Independence Mining (Pvt) Ltd v *Fawcett Security Ops (Pvt) Ltd* 1991 (1) ZLR 268 (H)

ZBC v *Flame Lily Broadcasting (Pvt) Ltd* 1999 (2) ZLR 448 (H)

Case Information

J B Colegrave, for the plaintiff

D M Foroma, for the defendant

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Judment

Smith J: In January 1999, the plaintiff (hereinafter referred to as "Bitumat") issued summons claiming from the defendant (hereinafter referred to as "Multicom") payment in the sum of US$121 127.62 in respect of the sale and delivery of goods and the hire of a slurry machine. Multicom entered appearance to defend on 14 June 1999 and requested further particulars on the following day. The further particulars were not filed until 17 December 1999. Multicom then filed a special plea on 24 January 2000 denying that this court had jurisdiction in the matter. It claimed that the parties had entered into a distributorship agreement (hereinafter referred to as "the Agreement"), one of the provisions of which was to the effect that any dispute between the

SMITH J

parties was to be referred to arbitration and another was that the agreement was to be governed by the laws of Malawi. I upheld the special plea and dismissed the plaintiff's claim with costs, saying that my reasons for so doing would be filed shortly. They are as follows.

Bitumat's case is as follows. Between 25 November 1997 and 25 June 1998, it sold and delivered to Multicom certain bitumen products amounting in value to US$316 084. Multicom also hired from Bitumat during that period a slurry machine, the reasonable cost of hire of which amounted to US$52 965. Multicom now owes it US$123 827.62 plus interest. In its special plea Multicom. as mentioned earlier, claimed that the disputes between the parties were required, by virtue of the arbitration clause in the agreement, to be referred to arbitration in Malawi and was not susceptible to determination in this court. Bitumat filed a replication to the special plea, in which correspondence between the parties was produced. Mr *Colegrave* argued that the letters indicate, beyond doubt, a settled decision on the part of Multicom to allow the matter to proceed before this court. Neither in the letter of 23 July nor in the letter of 23 September 1998 did the legal practitioners representing Multicom indicate that they wished the matter to proceed by way of arbitration, so he argued. Multicom implicitly accepted the idea of a High Court trial as mooted in the letter dated 16 July 1998 from Bitumat, thereby waiving the right under the arbitration clause, which it could lawfully do. See *Agricultural Finance Corporation* v *Pocock* 1986 (2) ZLR 229 (S).

Clause 8 of the distributorship agreement reads as follows:

"*Arbitration*

8. In case any dispute or difference shall at any time hereafter whether during the continuance in effect of this Agreement or upon or after its discharge or determination arise between the parties hereto touching or concerning the provisions of this Agreement and rights or obligations of the parties hereunder then the same shall be referred to a single arbitrator to be agreed upon by the parties hereto or in default of such agreement and unless otherwise agreed in writing by each of the parties hereto the arbitrator to be appointed by the Chairman for the time being of the Society of Accountants in Malawi. Such arbitrator's appointment and all arbitration proceedings shall be in accordance with the Arbitration Act [*Chapter 6:03*] of the Laws of Malawi."

Clause 10 provides as follows:

"Proper Law and Jurisdiction

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10. This Agreement shall be governed by and construed in all respects in accordance with the laws of Malawi."

Mr *Foroma* argued that in its special plea Bitumat raised five areas of dispute which are all issues of substance and within the scope of matters contemplated by the arbitration clause. Therefore, clearly, the disputes must

be referred to arbitration - the court must give full effect to the agreement between the parties by declining to adjudicate on the matter. See *Independence Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 (H). Mr *Colegrave*, on the other hand, argued that the dispute between the parties is essentially a question of how much money is owed by Multicom to Bitumat. It is, therefore, not a dispute such as is contemplated by clause 8 of the distributorship agreement. The arbitration clause concerns matters "touching or concerning the *provisions*" of the agreement and rights or obligations of the parties thereunder. Thus, had the dispute related to the manner in which one or other of the parties had carried out, or failed to carry out, its obligations under the agreement, then clearly it would have had to be referred to arbitration. Where the dispute is substantially a mathematical question of how much is due and owing by one of the parties to the other, which is the case in this dispute, then the party concerned can apply to this court for the enforcement of its right to receive payment.

The arbitration clause in the distributorship agreement is very widely cast. It starts by referring to any dispute or difference which might arise, whether during the period the agreement is in force or upon or after its discharge or determination. It then goes on to describe the category of disputes or differences as being those which touch or concern the provisions of the agreement and rights or obligations of the parties. Therefore, if any dispute or difference "touches" upon the rights or obligations of one of the parties by virtue of any provision of the agreement, and it cannot be settled amicably by the parties, then it must be submitted to arbitration in terms of the arbitration clause. In the special plea, Multicom said that it had raised certain queries with Bitumat which remain unresolved. The queries were that certain goods which had been invoiced had not been delivered; there was overcharging on certain goods that had been invoiced; some of the goods that had been invoiced were of poor quality; Bitumat had unfairly and unlawfully sought to charge interest on certain amounts prematurely; Bitumat was indebted to Multicom in the sum of US$97 785.95. There is nothing in the papers to indicate why the slurry machine was leased to Multicom or what it was used for, but as it was so leased during the period that the distributorship agreement was in force by way of an oral lease which clearly did not specify the hire charges. I think it can safely be assumed that it "touched" on Multicom's right or obligations under the distributorship agreement.

In my opinion, where parties have entered into an agreement which contains an arbitration clause that is clearly intended to be widely cast, the court should not be astute in trying to reduce the ambit of the arbitration clause. Where an arbitration clause exists in any such agreement, the court is required to give effect thereto - see Article 8(1) of the UNCITRAL Model

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SMITH J

Law which was adopted as part of our law by the Arbitration Act 6 of 1996 and *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H). It may well be that at some stage after a dispute has arisen, because of changed circumstances, the parties concerned agree that the matter should be determined by a court of law, rather than by arbitration in terms of the agreement in question. In these circumstances, the decision of the parties to abandon the arbitration clause in their agreement must be specific and clearly evidenced. It cannot be implied by the conduct of, or correspondence between the parties - it must be explicit. After all, if the arbitration clause is contained in a written agreement, then the decision to change the agreement must either be in writing or else so clearly evidenced by the conduct of the parties that there is no room for doubt.

In this case, despite the submissions made by Mr *Colegrave*, I was satisfied that there were disputes or differences between the parties which touched on, or concerned, their rights and obligations under the distributorship agreement. In my view, the correspondence between the parties in July, August and September 1998 was not sufficiently explicit to show an agreement between the parties that the arbitration clause be terminated and substituted by the proposal that the matter be referred to this court.

Wickwar & Chitiyo, plaintiff's legal practitioners

Sawyer & Mkushi, defendant's legal practitioners

MUTARE BOARD AND PAPER MILLS (PVT) LTD *v* KODZANAI 2000 (1) ZLR 641 (SC)

Citation	2000 (1) ZLR 641 (SC)
Case No	Judgment No. S-48-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA and Muchechetere JA
Heard	May 18, 2000
Judgment	June 1, 2000
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - retrenchment - employees being placed in early retirement by employer - stated reason being need to reduce strength of workforce - effective retrenchment of employees - need for

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employer to follow procedures laid down in respect of rentrenchment

Headnote

The management of the appellant company decided that it had to reduce its work force. This decision was considered to be necessary as a cost-cutting measure that was essential to maintain the financial viability of the company. It decided that it would reduce the workforce by retiring all its male employees who were 55 years of age, or over. The respondent, along with several other employees of the appellant, was compulsorily retired after reaching the age of 55 years. The rules of the pension fund provided that normal retirement was at the age of 65, but an employee could elect to retire early or be retired at the employer's instance. The respondent argued that what was being effected was retrenchment and the procedures applicable to retrenchment should have been followed.

Held, that even though an employer might have the right under the pension fund regulations to terminate employment, if the object and effect of termination is to retrench, then the regulations governing retrenchment must be complied with. An employer who wants to retrench employees cannot defeat the essential purpose of the retrenchment regulations by purporting to terminate the contracts of workers by requiring them to take early retirement under the pension fund rules.

Held, further, that it was clear that retrenchment was the object in the present case. This was shown by the fact that the employer suddenly and simultaneously required large numbers of employees of the same class by age to proceed on early retirement, and the fact that the reason given for this step was the need to reduce the strength of the workforce.

Cases Considered

Cases cited:

Badenhorst v *G C Baars (Pty) Ltd* (1995) 14 ILJ 1596 (IC)

Commissioner of C & E v *Randles Brothers & Hudson Ltd* 1941 AD 369

Metal & Allied Workers Union of SA & Ors v *Screenex Wire Weaving Mfrs (Pty) Ltd* (1985) ILJ 75 (IC)

Sehume v *Atteridgeville City Council & Anor* 1992 (1) SA 41 (A)

van Eck & van Rensburg NNO v *Etna Stores* 1947 (2) SA 984 (A)

Case Information

P Nherere, for the appellant

V M Mazengero, for the respondent

Judgment

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Gubbay CJ: At a works council meeting, held on 14 November 1997, a management representative of the appellant announced that as a cost-cutting measure, alleged to be essential for the business of the appellant to remain financially viable, the decision had been taken to reduce the number of the workforce by retiring all those male employees who were fifty-five years of age, or over. No less than thirty-eighty employees, including the respondent, were affected. Five days later, the employees so identified received official notifications that the operative retirement date was 1 January 1998. Their objections were to no avail, and on 21 December 1997 the appellant issued a directive prohibiting them from reporting for duty and from setting foot upon its premises.

In proceedings brought before the High Court, the respondent protested that, in retiring him and the other employees, the appellant had failed to comply with the requirements and procedures of the Labour Relations (Retrenchment) Regulations 1990, SI 404 of 1990. These Regulations, he claimed, were applicable because "early retirement" under the appellant's Pension Fund Rules ("the Rules") - admittedly part of the conditions of service of the employees - was to all intents and purposes a retrenchment. He further contended that "early retirement" could only be effected with the consent of the employee concerned; and none of the thirty-eight had consented. In the event, the respondent sought an order: (i) declaring the termination of his employment to be invalid; (ii) reinstating him in employment; and (iii) that he be paid salary and other benefits to which he was entitled, until such time as he was retrenched in terms of the applicable Regulations.

Clause 5:1 of the Rules contains the following provisions:

"An annual pension shall become payable to a member on:

(i) retirement at the normal retirement date.

(ii) retirement before the normal retirement date (early retirement).

A member who has attained age 55 (or 50 in respect of a female member participating hereunder immediately prior to 1 July 1976) and has completed five years of continuous service with the employer (unless the employer waives this requirement) may, with the employer's consent or at the instance of the employer, retire or be retired from the service of the employer on the first day of any month prior to his normal retirement date."

The rules were framed in compliance with the Pension and Provident Fund Regulations 1991, SI 323 of 1991, s 15 of which reads in relevant part:

" (1) The rules of a pension fund or provident fund shall specify the normal retiring age for all its members, which shall not be less than fifty-five years or more than seventy years:

GUBBAY CJ

Provided that -

(i) if in a particular trade or occupation it is customary that the normal retiring age is less than the fifty-five years, a lower age may, with the approval of the Registrar, be provided;

(ii) the rules may provide that if the normal retiring age is the age on an anniversary of the date of entry or the date of the end of a policy year, the earliest normal retiring age shall be that date which is

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nearest to the fifty-fifth anniversary of the birthday;

(iii) ...

(2) The rules of a pension fund or provident fund may provide for the early retirement or late retirement of a member:

Provided that subject to the proviso to subsection (1), they shall not permit a member to retire before his fifty-fifth birthday or after his seventieth birthday."

It is clear that these Regulations require a pension or provident fund to specify a normal retiring age of between fifty-five years and seventy years for all its members. What is optional is that the fund may also make provision for the early or late retirement of its members, save that retirement before the age of fifty-five years or after the age of seventy years is not permissible.

The appellant's argument was that the respondent's contract of employment was one the duration of which had been fixed by mutual agreement at his attaining the age of fifty-five years. For that was the earliest age at which the appellant could either grant consent to a male employee retiring from its service, or exercise the right to require him to do so. Thus, between the ages of fifty-five and the normal retirement date (specified as the attainment of age sixty-five) the male employee was accorded no enforceable right to retire on annual pension. He had to obtain the appellant's consent; on the other hand, he could be required to retire prior to the normal retirement date even if desirous of continuing in the service of the appellant. Only upon reaching the normal retirement date, that is at age sixty-five, did the employee acquire an absolute right to retire.

In her rejection of the argument, the learned judge reasoned as follows:

"It is for the purpose of the present case important to make a clear distinction between normal retiring age which is 65 and early retirement age which is 55 to 64 years. The normal retiring age is the only clear life of the employment contract and is, in my view, the contractual retiring age. The normal retirement age is not synonymous with the pensionable age. I have not been able to trace any statutory provision which excludes the right to a retrenchment package for workers in the position of the applicant and would consider the correct position to be that an employee is excluded from being considered for a retrenchment package only if he or she has reached the normal retiring age. For the employer to enforce an early retirement, reasons must be given to support the decision to terminate employment, otherwise an unfair labour practice will have been committed. The employee must be incapable of performing his duties to the required standards for whatever reason for the employer to invoke this. On the other hand, the employee can elect to go on early retirement.

GUBBAY CJ

If one were to accept ... that because there is no statutory provision that the reasons for early retirement to be investigated ... are irrelevant to early retirement, the effect would be contrary to the intention and spirit of the labour laws. The result would be that the employer would be entitled to hold employees at his beck and call for ten years, ie between the ages of 55-65 years old, and could literally 'dismiss' them at will whether or not they are good employees. To allow this would be to discriminate against this group of employees, denying them job security and the normal protection of the law.

It would appear that the spirit of the law is best served if early retirement is by mutual consent between the employer and the employee. In my view, the effect of an early retirement initiated by the employee is that it is a resignation with early retirement benefits accruing because of age. If initiated by the employer the effect is that of a dismissal and

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reasons must be given."

Consequently, Her Ladyship held that the action taken by the appellant was simply an attempt to retrench the thirty-eight employees. And, since it did not comply with the Labour Relations (Retrenchment) Regulations, it was invalid as amounting to an unfair labour practice.

At the outset, the fundamental question to be decided is the proper meaning to be given to clause 5:1(ii) of the Rules, which was binding upon the thirty-eight employees.

I do not think that a rational distinction can be drawn between agreeing a "normal retiring age" (which under the Pension and Provident Fund Regulations may be set at an age between fifty-five and seventy years), and agreeing a range in ages between which the right to opt for, or to be placed on, retirement applies. Both situations fix the duration of the contract of service. Recognising the one, yet not the other, is not supportable. In each instance, the occurrence of the event brings about the termination of the contract by effluxion of time and does not constitute a retrenchment or unfair labour practice. See *Metal & Allied Workers Union of South Africa & Ors* v *Screenex Wire Weaving Manufacturers (Pty) Ltd* (1985) 6 ILJ 75 (IC) at 88E-G; *Badenhorst* v *G C Baars (Pty) Ltd* (1995) 14 ILJ 1596 (IC) at 1601A-E.

The provisions of clause 5:1(ii) are thus to be seen as creating a contract of fixed term, commencing with the date of employment and terminating with the date of normal or early retirement. So if sixty-five is the specified normal retiring age, the contract of employment is terminated by effluxion of time when the employee attains that age. But where it has been agreed that between the ages of fifty-five and sixty-five the employer may place the employee on early retirement, the contract remains one of fixed duration, even though the termination point for individual employees may vary within the age parameters of fifty-five to sixty-five, or whatever age less than seventy has been specified as the normal retiring age.

In terms of s 17 of the Labour Relations Act [*Chapter 28:01*] the Minister

GUBBAY CJ

is empowered to make regulations dealing with *both* retirement and retrenchment. The two concepts are separate and distinct, albeit each results in a termination of the contract of employment.

This does not mean, however, that where an employer has decided to effect a needed retrenchment of a body of employees, but is not desirous of following the procedures laid down and be subject to the scrutiny and delays inevitably to be incurred, he may proceed to terminate their service contracts by requiring them to take early retirement pursuant to the applicable pension or provident fund rules. For to adopt such a device would be to defeat the essential purpose of the Retrenchment Regulations. Although it is legitimate conduct to avoid the provisions of a statute by deliberately keeping outside its reach (see *Commissioner of Customs and Excise* v *Randles Brothers & Hudson Ltd* 1941 AD 369 at 395), the position is different where the resultant effect is the achievement of that prohibited or curtailed by law.

It is thus my view that, even though an employer may have the right to resort to termination,

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founded on the authority of the Pension and Provident Fund Regulations, if the object and effect of such action is to retrench, then the applicable Regulations must be complied with. See *van Eck and van Rensburg NNO* v *Etna Stores* 1947 (2) SA 984 (A) at 997 and 998; *Sehume* v *Atteridgeville City Council & Anor* 1992 (1) SA 41 (A) at 57J-58A. Put differently, the right to require early retirement remains exercisable, but is curtailed by the requirement that whenever exercised it must not amount to, or be used to effect, a retrenchment.

How then would one be able to distinguish, in a given case, if an employer was legitimately and genuinely exercising a right to retire some employees, or was in fact retrenching them? The particular circumstances would surely reveal the true purpose. If large numbers of employees of the same class by age or type of occupation were suddenly and simultaneously required to proceed on early retirement then, in the absence of a convincing explanation, their retrenchment would be inferred.

That is precisely the situation in this matter, if not even clearer, because the thirty-eight employees were advised that the reason for requiring them to take early retirement was the need to reduce the strength of the workforce. In the result the exercise by the appellant of the right under the Rules to place the thirty-eight employees on early retirement was curtailed by the Labour Relations (Retrenchment) Regulations.

While respectfully differing from the approach of the learned judge, I am satisfied, nonetheless, that the order granted was correct and must be confirmed. It follows that the remaining thirty-seven employees, albeit

GUBBAY CJ

not parties to the proceedings, should obtain the same relief as the respondent.

The appeal is accordingly dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Dube, Manikai & Hwacha, appellant's legal practitioners

Muvingi & Mugadza, respondent's legal practitioners

SAMURIWO *v* ZIMBABWE UNITED PASSENGER CO LTD 2000 (1) ZLR 647 (SC)

Citation 2000 (1) ZLR 647 (SC)
Case No Judgment No. S-47-00

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Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA and Muchechetere JA
Heard	May 18, 2000
Judgment	June 1, 2000
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - on notice - when may be made - employment code of conduct in existence - termination without Minister's consent permissible where code applicable to employee - code not applicable to managing director - need for Minister's consent to be obtained

Headnote

The appellant, the managing director of the respondent, was given six months' notice of termination of his contract, this being the period of notice provided in the contract. He brought an application to have the termination set aside on the basis that Ministerial approval had not been given as required by the labour laws. The company argued that as it had a registered code of conduct, which applied to all employees, regardless of rank, Ministerial approval was not required. The appellant argued that the code did not apply to him for two reasons: (1) that the code only applied to termination for misconduct, not to termination for other reasons; (2) that the code made no provision for a situation where the managing director himself was the subject of a disciplinary enquiry. The High Court rejected the application. On appeal:

Held, that a managing director, though normally the primary organ of a company, could be an employee as well. This would depend on the terms of the contract between the company and himself. The terms of the letter of appointment showed that the appellant was required to combine the function of director with that of employee. This did not necessarily mean that the code of conduct applied to him. An examination of the code showed that it was not intended to deal with disciplinary proceedings against the managing director, as the managing director played important role in the disciplinary process. The code could thus not be held to apply to him an and so his employment could not be terminated under the code.

Decision of GARWE J in *Samuriwo* v *ZUPCO* 1999 (1) ZLR 385 (H) reversed.

Cases Considered

Cases cited:

Boulting & Anor v *Assn of Cinematograph Television & Allied Technicians* [1963] 1 All ER 716 (CA)

Chivenge v *Mushayakarara & Anor* 1998 (2) ZLR 500 (S)

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Moresby-White v *Rangeland Ltd* 1952 SR 200

Oak Industries (SA) (Pty) Ltd v *John NO & Anor* 1987 (4) SA 702 (N)

Case Information

J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Gubbay CJ: In February 1982 the appellant was engaged by the respondent, a company in which Government holds a controlling interest, as its senior accountant. He retained that post until 1 November 1991 when appointed managing director. Under clause 6 of the letter of appointment, signed on 19 March 1992, each party was entitled to terminate the employment on the giving of six months' notice.

With the passing of the years the relationship between the appellant and the other members of the respondent's board of directors became strained. In 1995 an investigation into the appellant's activities in his capacity as managing director was undertaken by the Criminal Investigation Department. This did not result in any criminal charges being laid. On 12 March 1997, the appellant was placed on paid leave. He complied with a request to answer in writing a report prepared by a firm of auditors concerning the financial affairs of the respondent. Nonetheless, the forced leave was extended from time to time. An invitation to resign was declined by the appellant.

On 21 July 1997, the chairman of the board of directors wrote to the Minister of the Public Service, Labour and Social Welfare, seeking approval in terms of s 2(1)(a) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, SI 371 of 1985 ("the Regulations"), to terminate the appellant's contract of employment. The reply, eventually received on 3 March 1998, advised that the Minister had no jurisdiction to deal with the matter under s 2(1)(a) of the Regulations. It went on to explain:

"Mr Samuriwo is a managerial employee and as such is covered by ZUPCO's registered code of conduct. This means [the] employer cannot use s 2(1)(a) of SI 371 of 1985 in terms of SI 377 of 1990 which makes the following provisions: 'sections 2 and 3 of SI 371 of 1985 shall not apply to employees to whom provisions of an employment code of conduct registered in terms of the (Labour Relations Employment code of conduct Regulations 1990) apply'.

The matter is hereby referred back to you in order for the Company (ZUPCO) to apply (the) procedures of their registered code of conduct."

In the event, on 27 May 1998, the respondent gave the appellant six months' notice of its intention to terminate his employment with effect from after duty on 30 November 1998. The professed reason was that the directors had lost confidence in the appellant's ability to perform his duties efficiently. The appellant's response was that no absolute right existed to terminate his employment on notice; the respondent being obliged either to obtain the prior written approval of the Minister, or to have the issue resolved under its registered code of conduct and

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grievance procedure ("the code of conduct").

GUBBAY CJ

The respondent expressed disagreement. It informed the appellant that it would not be paying salary and benefits beyond 30 November 1998 and that he was to return the company motor vehicle in his possession.

The impasse led the appellant to bring an application before the High Court for an order declaring that the respondent was not entitled to terminate his employment on six months' notice, without first obtaining the sanction of the Minister of the Public Service, Labour and Social Welfare.

In his judgment reported at 1999 (1) ZLR 385 (H), Garwe J dismissed the application with costs. He held at 389B-D that the code of conduct applied to the appellant and, that being so:

"in the light of the very clear language of s 1A of the 1990 Regulations (SI 377 of 1990 which, by amendment, provides that ss 2 and 3 of the Regulations shall not apply to employees to whom the provisions of an employment code of conduct applies) the Minister's authority is not necessary before ZUPCO can terminate the applicant's employment. As a corollary therefore, the applicant's employment can be terminated in other ways. The parties to this matter have agreed that either party can give six months' notice of termination of employment to the other. The respondent has given such notice ... The protection to which the applicant would have been entitled to under s 2 of the 1985 Regulations was done with once ZUPCO registered a code of conduct."

In support of the appeal, Mr *Andersen* addressed two main submissions. The first was that the learned judge had erred in holding (to the extent he had) that the code of conduct applied to the appellant in his position as managing director; accordingly, the prior written permission of the Minister was necessary to terminate his contract of employment. The second was that, even if the appellant was to be regarded as an "employee" for the purpose of the code of conduct, its application was limited to the determination of misconduct and procedures for settling grievances, and not with termination of employment on notice; in the premises, the learned judge ought to have found that s 1A of the Regulations did not relieve the respondent from the obligation to obtain the prior written approval of the Minister for the termination of the appellant's employment.

Per contra, the respondent's contention was that the code of conduct applied to the appellant in his capacity as managing director and, that being so, termination on notice was permissible without the Minister's prior written approval. Reliance was placed on what was said in *Chivenge* v *Mushayakarara & Anor* 1998 (2) ZLR 500 (S) at 504D-H.

It does not seem to me to be open to doubt that, although a managing director normally is the primary organ of the company, he may be an employee as well. Much, of course, depends on the effect of the terms of the contract between the company and himself. See *Moresby-White* v *Rangeland Ltd* 1952 SR 200 at 201; *Henochsberg on The Companies Act* 4 ed vol 2 at 817. But an abundance of authority reveals that a managing

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director may hold two distinct positions, the office of director as well as manager; and as manager, the managing director may be employed by the company. See *Boulting & Anor* v *Association of Cinematograph Television and Allied Technicians* [1963] 1 All ER 716 (CA) at 728C-D; *Oak Industries (SA) (Pty) Ltd* v *John NO & Anor* 1987 (4) SA 702 (N) at 704.

In casu, the terms of the letter of appointment indicate clearly that the appellant was required to combine the function of director with that of employee.

Yet it does not necessarily follow that though an "employee" of the respondent, the code of conduct *applied* to the appellant. He was, after all, a special type of employee, superior in rank to all others and in overall control of the day-to-day affairs of the respondent and tasked with the administration of its business. Thus a close examination of the provisions of the code of conduct is called for in order to decide whether it can be said that the appellant fell within its reach.

The code of conduct is divided into two sections, with the first dealing with disciplinary matters and the second with grievance procedures. Clause 1 of s I stipulates that its provisions shall apply to all employees regardless of rank. Given as one of its major objectives is:

"to encourage both *management* and *ordinary employees* to participate in solving disputes thereby ensuring that there is industrial democracy in the work place" (emphasis added).

The distinction is significant because what is recognised are two categories of personnel in the employ of the respondent; on the one side, managerial employees; on the other those who do not play a part in management. Clause 2(a) stresses that it is the responsibility of management to ensure that satisfactory standards of discipline are maintained and that the administration of such discipline is conducted in a fair and equitable manner.

Clauses 5 and 6 are the most important in the determination of the present question. They are concerned with the administration of discipline and the constitutions of the various hearing committees. The first disciplinary authority is the line manager. Depending on the seriousness of the offence the employee is alleged to have committed, the next authority is the disciplinary hearing committee, comprising a chairman (being a personnel department official), a departmental manager (or his/her representative) and three members of the workers' committee. An appeal lies from this body to the appeals committee. It is composed of a general manager (as chairman), a personnel manager (as secretary), a department head (alternate) and three members of the workers' committee in the works council or their deputies. The decision of the general manager is final and an appeal therefrom lies directly to the Labour Relations Tribunal.

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Clauses 6(C) and (D) are concerned with superior or managerial employees at the initial and appeal levels. They provide as follows:

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"(C) At Head Office the Disciplinary Committee will be comprised as follows:

1. Human Resources Manager	-	(Chairman)
2. Department Head	-	(Alternate)
3. Any two members of the workers committee.		

(D) The Head Office appeals committee will be comprised as follows:

1. Managing Director	-	(Chairman)
2. Human Resources Manager	-	(Secretary)
3. Department Head	-	(Alternate)
4. Any two members of the workers' committee.	-	

The Managing Director's decision will be final and any appeals may be made to the Tribunal.

All disciplinary cases involving Heads of Departments and above e.g. Chief Engineer, Personnel Manager, etc. will be held in consultation with the Human Resources Manager."

In my view, it is highly pertinent that, although previously mentioned, the managing director is not one of the senior members of staff listed in the last sentence of sub-clause (D). The omission must be taken as deliberate, and no mere oversight, as his decision is final and an appeal therefrom is to the Labour Relations Tribunal. Even if it could be envisaged that the disciplinary committee, chaired by a human resources manager, was competent to hear and determine an allegation of misconduct brought against the managing director - which would be an invidious practice necessitating an inferior official to discipline a senior - no provision is in place as to who would chair the appeals committee or who would act as alternate to the managing director; and who would make the final decision before an appeal could be lodged with the Labour Relations Tribunal.

In short, while the code of conduct makes specific provision for all the other employees, both ordinary and managerial, it says nothing about what disciplinary procedure is to be applied to the managing director. I do not think it is an answer, as counsel for the respondent suggested, that as:

"no code of conduct can be so comprehensive as to cover all possible instances of indiscipline."

the respondent has to make the best it can of the situation and adapt the code of conduct in the most appropriate manner where the discipline of the managing director is in issue. I must repeat that it seems to me highly improbable that the drafters of the code of conduct would have forgotten, were it ever so intended, to include the managing director in the hierarchy of employees to be subjected to disciplinary procedures. After all, the managing director is the most important employee, and as a director stands on at least equal footing with the other individual directors. It is to the board of directors that the managing director bears ultimate

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responsibility; it is the board that

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has authority over him.

The learned judge considered that the omission in the code of conduct to make provision for the managing director to be the subject of disciplinary proceedings was irrelevant as the termination was not sought on the basis of the code of conduct, but in terms of the contract of employment (see judgment at 388E). I do not, with respect, agree. It was crucial to determine whether in terms of s 1A of the Regulations the appellant was an employee to whom the provisions of the respondent's code of conduct *applied.* For if such provisions did not apply, then ss 2 and 3 were not exempted by s 1A.

I therefore uphold the argument that the code of conduct was not framed to take into account disciplinary proceedings against the appellant as the respondent's managing director. Consequently, as the appellant did not fall within s 1A of the Regulations his employment could not be terminated by the respondent other than in accordance with s 2 or 3 of the Regulations.

This conclusion makes it unnecessary to consider the validity of the alternate submission advanced on behalf of the appellant.

Accordingly, the appeal must be allowed with costs, and the order of the court *a quo* altered to read:

"An order will issue in terms of the draft, being annexure G to the application."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Wintertons, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

NYAKUDYA *v* WASHAYA 2000 (1) ZLR 653 (HC)

Citation	2000 (1) ZLR 653 (HC)
Case No	Judgment No. HH-118-00
Court	High Court, Harare
Judge	Smith J
Heard	May 17, 2000

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Judgment June 7, 2000
Annotations None

Civil action

Flynote

Damages - delictual - adultery - assessment - principles

Headnote

The factors to be considered in determining the amount of damages to be awarded against a third party for adultery with the plaintiff's spouse are: (a) the character of the woman (or man) involved; (b) the social and economic status of the plaintiff (and the defendant); (c) whether the defendant has shown contrition and has apologised; (d) the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and (e) the level of awards in similar cases. In addition to the above, the court should also take into account whether the plaintiff has suffered lack of *consortium* as well as *contumelia*, or just the latter, and the decrease in the value of money.

Cases Considered

Cases cited:

Chinamasa v *Jongwe P & P Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H)

Kasirowore v *Muzenda* HH-127-00

Katsumbe v *Buyanga* 1991 (2) ZLR 256 (H)

Khumalo v *Mandishona* 1996 (1) ZLR 434 (H)

Misho v *Sithole* 1992 (1) ZLR 291 (S)

Muller v *Vink* 1972 (1) PH B2 (T)

Mtungwazi v *Sibanda* HB-67-90

Ncube v *Mgoni* HB-77-90

Reith v *Antao* 1991 (2) ZLR 317 (S)

Takadini v *Maimba* 1996 (2) ZLR 737 (S)

Viviers v *Kilian* 1927 AD 449

Case Information

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A Debwe, for the plaintiff

defendant in person

Judgment

Smith J: The plaintiff (hereinafter referred to as "Nyakudya") issued summons claiming from the defendant (hereinafter referred to as "Washaya") damages in the sum of $50 000 for adultery, being made up of $20 000 for *contumelia* and $30 000 for loss of comfort, society and services. When the summons was issued on 12 May 1999 Nyakudya's wife (hereinafter referred to as "Anymore") had deserted him but the marriage still subsisted; subsequently the parties have divorced and Anymore is now married to Washaya. Washaya denies that he and

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Anymore committed adultery. As his legal practitioners had renounced agency he appeared as a self-actor.

[*His Lordship considered the evidence and continued:*]

There can be no possible doubt that Washaya and Anymore committed adultery on several occasions as alleged by Nyakudya. Clearly, therefore, Nyakudya is entitled to be paid damages for *contumelia* and for loss of comfort, society and services. The only question for determination is whether the amount claimed, being $20 000 for the former and $30 000 for the latter, is reasonable. As is natural, Washaya submits that the amount claimed is excessive.

ROBINSON J, in *Katsumbe* v *Buyanga* 1991 (2) ZLR 256 (H), considered the various factors relevant to the assessment of damages for the delict of adultery. In that case, the plaintiff's claim was confined to one based on *contumelia*, that is to say for the injury, hurt, insult and indignity inflicted upon the plaintiff by the defendant as the result of the latter's adultery with the plaintiff's wife. Damages were not claimed for the loss of consortium, that is to say, for "the loss of the comfort, society and services of his wife" (see *Viviers* v *Kilian* 1927 AD 449 at 456) as the plaintiff had condoned his wife's act of adultery and remained married to her. At p 258-259, the learned judge said:

"Before addressing myself to the quantum of damages to be awarded to the plaintiff, I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of the duty of marital fidelity which each spouse owes the other by committing adultery with the one spouse, the courts, in the absence of mitigating circumstances, should be seen, in their award of damages, to come down hard on the adulterer or adulteress as opposed to treating him or her with kid gloves for a variety of expedient reasons. The courts should ensure, as far as is reasonably possible, that an aggrieved spouse who approaches them is not made to feel, after their award of damages, that the adulterer or adulteress has been the winner and that it would have been better for the aggrieved spouse to have taken the law into his or her own hands. Hopefully, we have not reached the stage where we have to be told that adultery is not something to be eschewed and condemned.

Accordingly, unless they are prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the courts will only be party to society's further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against pre-marital and extra-marital sex and which has landed the world in the sexual morass over which the monster, AIDS, now presides in all its frightening aspects."

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After finding that the plaintiff had indeed suffered "grave and humiliating indignity", particularly within the circle of his business friends, ROBINSON J concluded that a high award of damages was clearly called for in the

circumstances of the case - "an award which will recognise the serious *injuria* inflicted upon the plaintiff". He went on at p 260 to say:

"In *Smith* v *Arthur* 1976 (3) SA 378 (A) at 387B-C, Miller AJA, when dealing with an award of damages for adultery, said that in 'assessing an adequate award to compensate the appellant, who was undoubtedly humiliated and deprived by the wrong done to him, it is necessary to bear in mind, when looking at awards made in the past, the decreased value of money'.

Because, in my view, the courts have tended to pay only lip service to their condemnation of adultery, their awards of damages for adultery have been relatively low, even where damages have been awarded for both *contumelia* and loss of consortium. However, even if one looks at a past award such as that made in *Doyle* v *Salgo supra* one finds that the court awarded the plaintiff the sum of £50 sterling as damages for *contumelia* arising out of the defendant's adultery with the plaintiff's husband, in circumstances which lacked the aggravating features found in the present case. In my view, had this case been before the Federal Supreme Court then, that court would have awarded the plaintiff a much higher amount which, translated into today's monetary terms, would certainly have exceeded the sum of $3 000 which the plaintiff is claiming."

The Supreme Court, in *Reith* v *Antao* 1991 (2) ZLR 317 (S), decided that the court *a quo*, in awarding $10 000 by way of damages for adultery, had not given sufficient weight to the fact that, at the time the adultery took place, the marriage had irretrievably broken down and the defendant had not enticed the plaintiff's wife. At p 319, McNallY JA said:

"What is to my mind absolutely clear is that the courts have always in the last thirty years drawn a very sharp distinction between adultery which breaks up a happy and stable marriage on the one hand, and adultery which ensues after an unhappy and unstable marriage has broken down in all but name, on the other."

The learned Judge of Appeal said that clearly the marriage was highly unstable and deeply unhappy. He referred to a number of High Court cases in relation to the question of quantum, including *Kasirowore* v *Muzenda* HH-127-90 ($3 000 awarded for adultery), *Mtungwazi* v *Sibanda* HB-67-90 ($5 000 awarded for adultery) and *Ncube* v *Mgoni* HB-77-90 ($3 000 awarded for adultery) and then went on to say at p 320:

"I am not prepared to say that an award of $10 000 could never be made in today's circumstances. But I am satisfied that the learned trial judge misdirected himself in awarding the full amount claimed when the major element on which the claim was based, namely, enticement, was specifically dismissed, and loss of consortium on the evidence was a negligible factor."

The $10 000 damages awarded by the court *a quo* was reduced to $700.

KORSAH JA, in *Misho* v *Sithole* 1992 (1) ZLR 291 (S), pointed out that loss of consortium is the main element in the estimation of damages. The loss will be less where the plaintiff has condoned the adultery and the marriage still subsists. He said that the trial court had misdirected itself in its assessment of damages by overlooking the all-important fact that the

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SMITH J

marriage still subsists, and that the defendant's intrusion was not an unusual and disturbing element to the stability of the union between the plaintiff and her husband. The latter finding was based on the unrebutted evidence that the plaintiff's husband was in the habit of indulging himself with various women before and around the same time that his adulterous association with the defendant was in progress. The court went on to reduce the award of damages for adultery from the $3 000 granted by the trial court to $1 500.

As MALABA J said in *Khumalo* v *Mandishona* 1996 (1) ZLR 434 (H), it is a daunting task for a court to try to place a monetary value on the pain and suffering inflicted on a spouse by the adulterous acts of another. He referred, *inter alia*, to *Muller* v *Vink* 1972 (1) PH B2 where COLMAN J said:

"These losses and humiliation cannot be truly measured in money; and the practice of our courts has been to make rough and ready assessments whose amounts vary according to the circumstances of particular cases. In no sense can the award, in any case, be regarded even approximately as an assessment of the value of a happy marriage which has been broken up or the value of the faithless wife."

The headnote to the *Khumalo* case set out the factors to be considered in determining the amount of damages to be awarded as being -

(a) the character of the woman (or man) involved;

(b) the social and economic status of the plaintiff (and the defendant);

(c) whether the defendant has shown contrition and has apologised;

(d) the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and

(e) the level of awards in similar cases.

In addition to the above, the court should also take into account whether the plaintiff has suffered lack of consortium as well as *contumelia*, or just the latter, and the decrease in the value of money. In assessing the various factors, MALABA J said at p 448-449:

"I now turn to assess damages for the loss of consortium. The most important factor under this head is that there should be proof of actual loss of consortium. In other words, the wife should be shown to have left the matrimonial home as a result of the adultery.

Damages for loss of consortium are aggravated where the adultery has led to the break up of the marriage. The plaintiff should not only show loss of consortium. He should also show that the loss was as a result of the adultery the defendant committed with his wife and that he suffered damages as a result of the loss of consortium.

Where the defendant is not shown to have enticed the errant spouse to abandon his or her duties of providing the plaintiff with comfort, society and services the damages reduce. The damages will also be low where the marriage is shown to have broken down in all but name at the time the adultery was committed: *Reith* v *Antao* 1991 (2) ZLR 317 (S) at 319A.

This is because the damages awarded constitute an estimated value of the comfort, society and service the guilty

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spouse would have continued to give to the plaintiff but for the adultery with the defendant. The award of damages seeks to put the plaintiff in

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monetary recompense as near as is reasonably practicable to the position he would have been had his wife not left him as a result of the defendant's adultery with her."

After considering all the factors and the circumstances of the case, the learned judge awarded $5 000 as damages for adultery, being made up of $4 000 for *contumelia* and $1 000 for loss of consortium. With regard to the latter element, he said at p 452-458:

"In *Muller* v *Vink supra*, it was stated that damages for loss of consortium are tending to the lower side in modern times because courts frown at the idea of placing too much monetary value on the loss of a woman as if she were a chattel. Colman J said:

> 'The tendency with the passage of time and with the recognition of women as free agents rather than as chattels has been for the courts to award lower amounts than were formerly thought appropriate and it is my duty, while giving proper regard to the circumstances of the case before me, to fix an amount which is within proper limits in accordance with prevailing trends'.

See also *Reith* v *Antao supra* at 318H where MCNALLY JA quoted with approval the remark by Boberg *The Law of Persons and the Family* at p 184 note 15 that 'contemporary awards tend to be relatively small'."

In *Takadini* v *Maimba* 1996 (2) ZLR 737 (S), the Supreme Court dealt with one of the "growing number of appeals in civil actions in which wives are suing 'the other woman' for damages for adultery". In dealing with the question of quantum, MCNALLY JA at p 738-739 said:

"Evidence of adultery is therefore only the beginning of the enquiry. The quantum of damages is really dependent on the factual situation in relation to the two grounds mentioned. In particular, on the first ground, has there been injury or *contumelia* inflicted on the aggrieved spouse, and to what extent was it self-inflicted? *Doyle* v *Salgo* 1957 R&N 840 (FS).

And on the second ground, to what extent had that companionship, love, affection, comfort and service already disappeared before the adultery took place?

In addition, on both grounds, it is necessary to consider, as an aggravating feature where appropriate, the element of enticement in the *contumelia* or loss of consortium. Enticement is in itself a separate action, but clearly where a spouse has been deliberately enticed away from a stable marriage by the active and deliberate intervention of the adulterer, that feature will aggravate the damages in respect of the adultery, where damages for enticement are not separately claimed. Where, on the other hand, a spouse in a desperately unhappy marriage finds sympathy and solace elsewhere and adultery ensues, the court will have to consider whether there was any real quality in the consortium lost, or any real *contumelia* suffered."

In considering the facts of that case, MCNALLY JA concluded that the marriage between the parties was virtually still-born because the husband had married the plaintiff in the same month in which he had started the liaison with the defendant. Therefore, there was virtually no consortium to be lost. Accordingly, he set aside the $10 000 awarded by the trial magistrate as damages and substituted an award of $1 000 as being adequate damages for *contumelia*.

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SMITH J

In the case before me, Nyakudya said that his marriage to Anymore was happy and stable. They had a good relationship. His evidence was not rebutted. In her declaration in the summons which instituted the divorce action, Anymore claimed that the marriage had irretrievably broken down because the parties had lost all love and affection for each other; they were incompatible; there was no meaningful communication between them; during the subsistence of the marriage Nyakudya had been indecisive on matters of family and finance; during the subsistence of the marriage Nyakudya had treated her with such mental cruelty as was incompatible with the continuation of a normal marriage relationship. Nyakudya denied the allegations. It seems to me that they are very vague and generalised and lacking in specific detail. Anymore is now married to Washaya and could have been called to establish that her marriage to Nyakudya was not a happy one. She was not called as a witness. I must, therefore, proceed on the basis that there was a stable, happy marital relationship between Nyakudya and Anymore, which had subsisted for 9 years when Washaya enticed her away. He assisted her to lease a house in which she and her son lived for four months before Nyakudya found them. During that four months, Washaya took her to Kariba and they spent four days and nights together at the hotel. Nyakudya must have suffered "grave and humiliating indignity" when his family and friends found out how Anymore had been conducting herself. In addition, he lost the consortium that he had been enjoying for 9 years. When Anymore left him, he lost not only the comforts and pleasures of living with her but also the joy, pleasure and pride of living with his son, watching him grow up and trying to ensure that he has a happy childhood. All these were lost because of Washaya.

Both Nyakudya and Washaya are emergent businessmen. Having regard to the evidence before the court as to their assets and way of life, they both appear to be successful in their businesses.

The court cannot disregard the horrendous decline in the value and purchasing power of the Zimbabwe dollar over the last two years. As Bartlett J pointed out in *Chinamasa* v *Jongwe Printing & Publishing Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 170F-G:

"... the fall in the value of money is a fact which should be taken into account in terms of purchasing power, but not with such an adherence to mathematics which may lead to an unreasonable result. I also take note of the comment at 8E-F that awards should reflect the state of economic development and general economic conditions of the country and tend towards conservatism. I am aware that *Jackson* v *Minister of Defence* does not relate to defamation but to personal injuries. I am, however, of the view that those comments which I have quoted from Gubbay JA (as he then was) are relevant in deciding the approach to damages in defamation matters as well."

His remarks apply equally in relation to damages in actions for adultery.

SMITH J

Having regard to all the circumstances of this case, I consider that it would be appropriate to award Nyakudya as damages for the adultery -

(a) $ 7 000 in respect of the *contumelia*; and

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(b) $13 000 in respect of the loss of consortium.

It is ordered that the defendant pay the plaintiff -

(a) $20 000 damages with interest thereon at 25% *per annum* from 18 May 1999 to date of payment; and

(b) costs of suit.

Mapfumo, Debwe & Partners, plaintiff's legal practitioners

MADAWO *v* INTERFRESH LTD 2000 (1) ZLR 660 (HC)

Citation	2000 (1) ZLR 660 (HC)
Case No	Judgment No. HH-115-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	May 18, 2000
Judgment	June 7, 2000
Annotations	None

Civil application

Flynote

Employment - contract - termination - on notice - employee on probation - employer's right to terminate contract on notice

Headnote

An employee on probation is like an employee on a fixed term contract. If the employer finds him to be unsatisfactory, he may be dismissed on notice without the employer having to proceed under the labour legislation or an employment code of conduct.

In regard to termination of the contract of a probationary employee, a distinction is to be drawn between an employee who is in a professional class, such as a university lecturer, and an employee whose position is akin to that of a clerk or person similarly situated. In respect of the former, it may be that on a proper construction of the contract the probationary appointment cannot be summarily terminated but could only be prematurely terminated on good cause shown and in accordance with the prescribed procedures. In respect of the latter, a probationary

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appointment can be summarily terminated.

If an employer recognises that it has adopted an incorrect or inappropriate procedure in effecting a dismissal, there is nothing to prevent him from adopting the correct procedure to effect the dismissal.

Cases Considered

Cases cited:

Min of Labour & Ors v *P E N Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S)

Muzondo v *UZ* 1981 ZLR 333 (G)

Ndamase v *Fyfe-King NO* 1939 EDL 259

Case Information

L Mazonde, for the applicant

E Matinenga, for the respondent

Judgment

Chinhengo J: The applicant was employed by the respondent as its finance manager on 1 July 1998. In terms of his letter of appointment, the applicant was required to serve a period of probation of three months after which he could be confirmed as a permanent employee if the respondent was satisfied with his performance.

On 18 August 1999, before the end of the period of probation, the applicant was suspended from employment without pay and other benefits in terms of the respondent's conditions of service. The reason for his suspension was that he had been implicated in some irregularity and that contrary to respondent's

policy with regard to the handling of money, he had failed or neglected to bank some cash which he had collected from the respondent's sports club on 13 and 18 August 1999.

The letter of suspension is dated 18 August 1999. It refers to the irregularities I have mentioned and to the applicant's failure to bank the cash contrary to company practice. It states that the applicant's conduct was viewed as a serious misconduct by the respondent and that applicant was being suspended without pay for a period of seven days from 18 to 25 August 1999 in terms of Clause 5.1 of the respondent's registered code of conduct. The letter required the applicant to remain at his residence on the respondent's estate to facilitate investigations.

The applicant responded to the letter of suspension through his legal practitioners and denied the allegations levelled at him. The letter is dated 20 August 1999. A further letter from applicant's legal practitioner to the respondent dated 25 August 1999, demanded that the

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applicant be reinstated as the seven day period of suspension had lapsed without any charges being formally preferred against him. The letter reads:

"We refer to your letter of 19th August, 1999 as read with your code of conduct in particular s 5.1(b)(ii). You have not preferred any charges against our client and the 7 days period of investigations have expired. In terms of the law, our client is deemed reinstated. In the premises, our client will present himself to work tomorrow as usual."

On the same day, i.e. 25 August 1999, the respondent terminated the applicant's contract of employment in terms of the letter of appointment. In it, the respondent recalled that the applicant was still serving his period of probation. It gave to the respondent one week's notice of termination of the contract of employment from 26 August to 3 September 1999 and advised that he was not required to serve that period of notice as the company was paying cash in lieu of the notice. The letter detailed the amounts due by the respondent to the applicant and the amounts due by the applicant to the respondent. The amounts were respectively $36 901.98 and $294 715.22, the latter being in respect of a car loan ($273 465.22) and the unexpired portion of the settling in allowance ($21 250). The respondent further advised the applicant to vacate the company accommodation which he occupied.

The applicant has, in this application, approached this court for a review of the respondent's decision. His contention is that the respondent's decision to terminate his contract of employment is irrational. He say that no reasons are given for that decision and no reasonable person exercising his mind would have arrived at that decision. In this regard, the applicant relies on the letter terminating his contract, which on the face of it does not give any reason for terminating his employment, except that it refers to the termination in terms

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of the letter of appointment. In the alternative, the applicant's contention is that the respondent did not comply with the procedures outlined in its code of conduct which provides a procedure in terms of which an employee's contract may be terminated. This contention in substance is that, rather than the respondent acting on the basis that the applicant was on probation and his contract could be terminated on a week's notice if the respondent was not satisfied with his performance, it should have followed the procedure in its code of conduct, thereby treating him as any other permanent employee.

The respondent accepts that initially the applicant was suspended in terms of the code of conduct. The respondent had hoped that the suspension would have prompted the applicant to resign, he having had regard to the gravity of the offence he had committed. But to its surprise the applicant had contested his suspension and had indicated that he was going to challenge it. The respondent then reverted to the agreement between the parties as expressed in the letter of appointment to the effect that, as the applicant was still on probation, his contract of employment could be terminated upon giving him seven days notice. The respondent then gave the requisite notice and terminated the applicant's employment. It paid to the applicant his entitlements in respect of the unexpired portion of his probationary period. It is the respondent's argument that by paying the applicant for the unexpired portion of his probationary period, the applicant's contract of employment was not terminated but it expired. It argues that it effectively reinstated the applicant on 26 August 1999 and gave him the requisite notice, thereby ensuring

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that the applicant's contract terminated by effluxion of time or that it expired at the end of the probationary period.

The respondent filed a counter-claim, seeking the eviction of the applicant from the company accommodation No. 184 Folywise, Mazowe Citrus Estate which the applicant occupied. The applicant's opposition to this counter-application was based on the fact that if he was successful in his application for reinstatement the counter-application would fall away.

It seems to me that two issues arise for decision - firstly, should the respondent have acted in terms of its code of conduct and, if it should have, did it comply with the procedures set out in its code of conduct; and, secondly, was it proper for the respondent to terminate the applicant's employment at the end of the period of probation in terms of the agreement contained in the letter of appointment?

The question as to what probation means arose in *Ndamase* v *Fyfe-King NO* 1939 EDL 259 where at 262 GANE J said:

"'Probation' is defined in the *New English Dictionary* as 'The action or process of testing or putting to the proof ... the testing or trial of a person's conduct, character or moral qualification; a proceeding designed to ascertain these ... for some position or office'. I

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think these words very well describe the process of probation as commonly undergone by accepted candidates .... Ordinarily, no doubt, the question of the possession of the requisite qualification for the post is determined by prior examination or inquiry. Qualification is then taken for granted; what it is desired to test is the fixity of purpose, diligence and personal discipline of the candidate. The probationary period is not regarded as a period allowed for acquiring the necessary qualification."

There is no dispute in the present case that the applicant was on probation. The definition of "probation" above, which I accept, fits the arrangement between the applicant and the respondent. As to the rights of an employee on probation, *Ndamase*'s case *supra* equates them to those of an employee on a fixed term employment contract, which can be terminated during its currency either summarily or on notice. At 262-263, the learned judge says:

"Can an employee on probation in the sense described, whose every action is admittedly a proper subject of scrutiny and judgment, claim to be in a better position than if he had not been on probation? Can he in effect argue: 'Even if my conduct at an early stage of my probation shows entire unfitness for my contemplated position, and even though it is clear from my conduct that I shall never fit myself for that position, nevertheless, I claim the right to hold the position until the last moment of my probationary period?' So to state the position is to answer the question. Such a position cannot be maintained. The very use of the word 'probation' alone seems to lead to the same conclusion. If at any time it becomes clear that the purpose of the probation has been already frustrated, then there is no objection at least to a dismissal on reasonable notice."

In my view, this passage highlights the fact that an employee on probation may have his contract of employment terminated on giving the requisite notice if the purpose of the probation has been frustrated. This is in keeping with the general idea of probation. "Probation" does not guarantee for the employee employment for the full period of the probation as initially agreed between the parties. Accepting this as being the position, the facts in this case are distinguishable in that the respondent did not terminate the applicant's contract before the end

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of the period of probation. It gave the requisite notice and allowed the contract to terminate at the end of the period of probation, even though this was achieved by a payment in respect of the unexpired portion of the period of probation.

Ndamase's case *supra* was approved but distinguished in *Muzondo* v *University of Zimbabwe* 1981 ZLR 333 where at 339 Beck J quoted the passage I have also quoted from *Ndamase*'s case *supra* and said:

"As far as I am aware the correctness of this passage and of the decision reached in *Ndamase*'s case has never been doubled. It must be observed, however, that, firstly the total unfitness of the plaintiff, Ndamase, for the contemplated post was not in dispute; and secondly the post in question was one that was akin, to use the words of LORD BUCKMASTER in *Clayton*'s case *supra*, to that 'of a clerk or other person similarly situated' and, was not akin to the position of a portrait painter or a professional actor, or a university lecturer entitled to use the facilities offered by his employed to engage in original research to the possible enhancement of his professional reputation and status."

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The facts in *Muzondo*'s case were largely similar to those of the applicant in the present case. Muzondo had been recruited from Canada to serve as a lecturer at the defendant university. His conditions of service were set out in the letter of appointment and one such condition was that his appointment was subject to a probationary period of two years, or at the discretion of the university three years, from the date of his appointment, until such time as it should be either confirmed or terminated. One of the Ordinances made under the University's Charter set out the procedural steps which had to be followed for dismissing a number of staff. Among the rights and benefits of a lecturer at the university were the right to accommodation at a concessional rental and a right and duty to work on research projects. The university purported to dismiss him six months before the end of the probationary period without following the prescribed procedures. The court held that Muzondo enjoyed important rights other than the right to his salary including prospects for promotion and professional reputation which could materially be influenced by his research work undertaken by him and that he was not in the position of a clerk or other person similarly situated; and as such the university could only terminate his appointment prematurely by way of dismissal for good cause and in accordance with the prescribed procedures, but not unilaterally. It held that on a proper construction of the contract of employment the probationary appointment was not one that could be summarily be terminated.

There are some similarities between Muzondo's appointment and that of the applicant in this case. The applicant, like Muzondo, was required to serve a period of probation (shorter in duration). Paragraph 5 of the letter of appointment (Annexure H) reads:

"You will be required to serve a 3 months probationary period after which your permanent employment will be confirmed subject to your performance being satisfactory."

The applicant was provided with accommodation at concessionary rates (para 4), he was entitled (and he took advantage of it) to a motor vehicle loan of upto $350 000 repayable over 60 months attracting interest at the rate of 14%. Paragraph 16 provided that:

"As an employee of this company, you will be required to abide by the provisions of the Group's code of conduct

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currently in force and to any common law and any statutory provisions currently in force and those which may be promulgated from time to time."

There were other benefits to which he became entitled and other conditions of employment which he was required to comply with. But those other benefits and conditions have not been relied upon in seeking the relief that applicant prays for in this application.

The similarities I have pointed out do not, however, place this case on all fours with *Muzondo*'s case. The applicant is not, in my view, the professional in the class of a university lecturer whose prospects of promotion and

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professional reputation is materially influenced by research work. He is not in the class of a portrait painter or a professional actor. He indeed has a reputation like any other professional, but in my view his position is akin to that "of a clerk or other person similarly situated". The attributes of a portrait painter or a professional actor or a university professor as in *Muzondo*'s case, which would make it appropriate to terminate his probationary employment summarily, do not attach to him. The present case is therefore distinguishable from *Muzondo*'s case and is almost on all fours with *Ndamase*'s case.

In *Minister of Labour & Ors* v *Pen Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S), the respondent company had dismissed an employee on the grounds that he had failed to perform his duties satisfactorily. It claimed that the employee was serving a three month probationary period. The employee challenged the dismissal claiming that he was not serving such a period. On reference of the matter to a labour relations officer, it was determined that the employee's contract was not for a fixed period and so it had been unlawfully terminated. The matter was brought on review to the High Court, instead of appealing to a regional hearing officer. On appeal, the Supreme Court held that this was not a proper matter to be brought on review. However, in an *obiter dictum* GUBBAY JA (as he then was) stated at 298B-E as follows:

"Even if it be assumed in the employer's favour that the contract of employment was for a fixed period of three months, regard ought to have been had to the significance attaching to the undisputed fact that the employee's services had been terminated weeks before the expiry of that period on 28 February 1987.

In order to utilise the right to terminate under s 2(1)(c) of the Regulations [Labour Relations (General Conditions of Service) (Termination of Employment) Regulations 1985], the employer was obliged to ensure that the fixed period had effectively expired. It would have been proper to have informed the employee in advance that on 28 February 1997 his services were to be terminated and either have required him to work until that day or, if not, have paid his salary in full for the month. But notwithstanding any contractually agreed period of notice it was not permissible to terminate, in reliance thereon, before the end of the fixed period.

If during the currency of the fixed period the employer had good cause to believe that the employee was guilty of misconduct, its remedy lay in s 3(1) of the Regulations - to suspend him without pay and apply forthwith to a labour relations officer for an order terminating the contract of employment. This remedy the employer did not avail himself of."

I do not read the above passage as laying the principle that an employee on probationary terms of a fixed duration has a fixed period of employment. If that were so, it would be a departure from *Ndamase*'s and *Muzondo*'s cases *supra*, and would not be in accordance with the

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generally acceptable notion of probationary employment. The learned Judge of Appeal seems to me, in this passage, to have merely accepted that in the particular situation of the case before him, the employer had conceded that the contract was one of a

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fixed duration and not that his Lordship was stating a general principle that every probationary engagement is a fixed term contract of employment terminable at the end of the period unless it is terminated sooner by following the procedures in the Regulations. It remains the position that a probationary engagement is not necessarily a fixed term contract and that it can be terminated sooner once the purposes of the probation period have been frustrated. I agree, though, that if the purposes of the probation have not been frustrated, the employee on probation can be dismissed only in terms of the applicable regulations (i.e. the 1985 Regulations) or in terms of the code of conduct as in the present case.

The applicant *in casu* was on probation. The respondent found his performance to be unsatisfactory. It terminated his contract of employment in terms of the agreement between them i.e. the letter of appointment by paying to the applicant cash in lieu of the agreed period of notice. That I find to be perfectly proper.

What, then, should be made of the respondent's attempt to dismiss the applicant in terms of the code of conduct, which procedure it later abandoned? I think that that is not relevant any more to my decision. If an employer recognises that it has adopted an incorrect or inappropriate procedure in effecting a dismissal, there is nothing that should prevent him to adopt the correct procedure to effect the dismissal. As the applicant was still serving a period of probation, there was nothing wrong with the respondent revising his approach to dismissing the applicant by abandoning the procedure under its code of conduct and adopting one which fully complied with the agreement between it and the applicant. Even if it can be said that the respondent was wrong in proceeding against the applicant under the terms of the letter of appointment and that it should have proceeded in terms of its code of conduct, the result would have been the same. I would have inevitably reached the conclusion that the applicant's dismissal was unlawful and that he would have been entitled either to reinstatement or to an award of damages. In the latter connection, I would inevitably have reached the conclusion that reinstatement would not be appropriate on the basis that the relationship between the applicant and the respondent had been badly damaged such that the parties could not be forced to remain in that relationship. I would then have ordered that the applicant be paid some damages. Those damages would have been assessed with regard to the expiry of the applicant's period of probation and they would not have exceeded the amount which was paid to him as terminal benefits. Either way, the application would not have resulted in effectual success on the part of the applicant.

The applicant's opposition to the respondent's counter-application depended entirely on the decision on his application. That application

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having failed, the applicant also fails in the counter-application. In the result, I order as follows:

1. The application is dismissed with costs;

2. The counter-application succeeds with costs and judgment is entered for the respondent in terms of the draft order attached to the counter-application - to wit - the applicant in case No. HC-13455-99 and all persons claiming title through him be and are hereby evicted from applicant's premises being cottage number 1884 Folywise, Mazowe Citrus Estate, Mazowe.

Manase & Manase, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

ZIMBABWE UNION OF DEMOCRATS *v* REGISTRAR-GENERAL & ANOR 2000 (1) ZLR 668 (HC)

Citation	2000 (1) ZLR 668 (HC)
Case No	Judgment No. HH-121-00
Court	High Court, Harare
Judge	Omerjee J
Heard	June 7, 2000
Judgment	June 8, 2000
Annotations	None

Civil application

Flynote

Elections - when election begins - nomination day is start of election - delimitation of constituencies - provided delimitation published before nomination day, election must be held in accordance with delimitation

Headnote

A general election begins on the nomination day specified in terms of a proclamation in terms of s 38 of the Electoral Act [*Chapter 2:01*], not when Parliament is dissolved or when the date of the election is promulgated. Accordingly, where there has been a delimitation of constituencies, that delimitation will apply to the forthcoming election as long as it has been published before the nomination day.

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Legislation considered:

Electoral Act [*Chapter 2:01*], s 116(1)

Case Information

A P de Bourbon SC, for the applicant

Mrs *L Hove*, for the respondets

Judgment

Omerjee J: The applicant in this matter is a political party engaged in contesting the forthcoming general elections. The applicant seeks an order as amended as follows:

1. The current general election be conducted under the names and boundaries of the constituencies used in the last general election;

2. Subject to any statutory instrument made by the President in terms of s 158 of the Electoral Act [*Chapter 2:01*] no polling in the current general election is to take place before 25 June 2000;

3. The first respondent shall bear the costs of this application or each party shall bear its own costs of this application.

The application was referred for my consideration on Monday 5 June 2000. Upon a perusal of the papers, it was apparent that the application had been lodged on Friday 2 June 2000, citing the Registrar-General of Elections as the sole respondent. Further papers were then filed by the applicant's legal practitioners on the morning of 5 June seeking the following:

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1. The joinder of the President of the Republic of Zimbabwe as the second respondent;

2. An amendment of the Draft Order.

In Limine:

1. Rule 18 of the High Court Rules provides as follows:

"No summons or other civil process of the court may be sued out against the President ... without the leave of the court granted on court application being made for that purpose."

At the hearing of this matter, the counsel for the respondents did not oppose the citing of the President of the Republic of Zimbabwe in his official capacity, and consequently his joinder as second respondent. The second respondent accordingly became a party to this application.

2. The submission of the contended draft order was similarly not opposed. Accordingly, the amended draft order was incorporated as part of the papers.

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THE ISSUES

Immediately prior to the hearing of the application, there were two issues that arose for determination. At the hearing of the application, one of the issues - namely, the validity of polling taking place on 24 June - was not pursued. In terms of SI 161B of 2000. the Electoral Act (Modification) Notice 2000 published on 7 June, made in terms of s 58 of the Electoral Act [*Chapter 2:01*], the period between nomination day and polling day was reduced from 21 to 20 days, thus allowing for polling to take place on Saturday 24 June 2000.

The gist of the remaining point taken on behalf of the applicant was that the general election commenced when the President issued Proclamation 7 of 2000 on 15 May 2000 in terms of s 38 of the Electoral Act, and that the subsequent issuing of Proclamation 8 of 2000 by the second respondent on 24 May 2000 was not intended to govern the June elections, but the "next and any subsequent general election", reference being had to the provisions of s 60(8) of the Constitution of Zimbabwe.

It is pertinent to mention that the last general election was held in l995 and the next general election is scheduled for June 2000. For the purposes of the 1995 general election, there was a Delimitation Constitution that defined the constituencies for the purposes of that general election. Section 59(4) of the Constitution of Zimbabwe provides as follows:

"Following the first delimitation for the purposes of this Constitution, a Delimitation Commission shall be convened by the President at five-yearly intervals:

Provided that a Delimitation Commission may be convened before the expiration of any five year period if it appears to the President necessary to do so."

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The present Delimitation Committee was appointed by the President on 28 March 2000 in order to define the constituencies (numbering 120) for the purposes of the general election following the report of the Delimitation Commission.

In terms of Proclamation 6 of 2000, published on 12 April 2000, the President dissolved Parliament. It is not in dispute that as at the date of the promulgation of Proclamation 7 of 2000 the report of the Delimitation Commission had not yet been published. Proclamation 8 of 2000 was promulgated by the President pursuant to the provisions of s 60(8) of the Constitution on the 24 May 2000. Proclamation 9 of 2000 was then published on 26 May, altering Proclamation 7 with regard to the date of the sitting of the nomination court from 29 May to 3 June.

In the view of this court, the general election itself commences on nomination day. Section 58(1) of the Constitution provides that a general election must take place within four months of the dissolution of Parliament. Proclamation 7, issued in terms of s 38 of the Electoral Act, signifies the start of the general election as at the first day designated in the Proclamation as nomination day. Mr *de Bourbon* placed reliance on s 116 of the Electoral Act in support of his contention as to the date of commencement of a general election. The relevant part of that section reads as follows:

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" 116 (1) For the purposes of this section, an election shall be deemed to commence -

(a) in the case of a general election, upon the publication in the *Gazette* of a proclamation in terms of s 58 of the Constitution fixing the date of the general election; ..."

In my view, the provision quoted is relevant with reference only to matters dealt with *by that section*, namely, the publication of election bills and placards. It cannot be construed to be of general application to the Act as a whole in determining the date of commencement of a general election. Proclamation 7 fixes the start of the election as being the date designated as nomination day. It is, to my mind, significant that subs (1) of s 116 states that, for the purposes of that section, an election shall be deemed to commence upon the publication of the proclamation. That shows that the legislature accepted that the date of publication was not the actual date of commencement of the election.

It must follow, therefore, that reference in s 60(8) of the Constitution to the "next" general election must perforce be reference to the June election. There is the further point that if the elections were to proceed on the basis of the 1995 delimitation, given the mobility of voters and the numbers of people who will have registered to vote in the June 2000 elections, there exists potential for significant distortion in the number of registered voters in the various constituencies, or indeed as between some and other constituencies.

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In the result, I am satisfied that the validity of the constituencies as defined in Proclamation 8 of 2000 and relied upon for the purposes of the nomination court that sat on 3 June 2000 is beyond reproach.

Accordingly, the application is dismissed. Each party shall bear its own costs.

Kantor & Immerman, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

ZIMBABWE BANKING CORPORATION LTD & ANOR *v* CONSOLIDATED PIPE FITTINGS (PVT) LTD & ANOR 2000 (1) ZLR 672 (HC)

Citation	2000 (1) ZLR 672 (HC)
Case No	Judgment No. HH-119-00
Court	High Court, Harare
Judge	Smith J
Heard	March 21, 2000
Judgment	June 14, 2000

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Annotations None

Civil application

Flynote

Practice and procedure - parties - substitution - cession of claim by plaintiff after litis contestatio - application for substitution made more than 3 years after summons issued - whether claim becomes prescribed - substitution in discretion of court - substitution granted

Headnote

After the applicant bank had commenced proceedings against the respondents for the recovery of debts, it ceded the debts to an investment company. The bank and the investment company then applied for an order substituting the investment company as the plaintiff in the case instead of the bank. The respondents opposed, this arguing that they would be prejudiced by this substitution because the claim by the investment company had prescribed as the investment company had failed to effect substitution within three years of the cession of the debts to it. Granting the application for substitution:

Held, that the court can order the substitution of one plaintiff for another where there has been a change in the *persona* of the plaintiff, provided that such substitution does not cause any prejudice to the defendant.

Held, that a cedent is not divested of its right of action against the defendant and the cessionary is not invested with that right until the court grants an order substituting the cessionary as the plaintiff. In the present case, as there had been no such court order, whilst the investment company has *personal* rights by virtue of the cession, it presently had no right of action against the respondents which could prescribe.

Held, further, that the plaintiff who has ceded his claim after he has instituted action but before *litis contestatio* is in the same position as the plaintiff who has ceded his claim after *litis contestatio.* He may continue to prosecute the action in his own name, as he has ceded only the *spes,* or he may apply to court to have the cessionary substituted as plaintiff. If he does continue to prosecute the action, he is doing so in his own right and not on behalf of the cessionary as his undisclosed principal.

Held, further, that allowing the substitution would not prejudice the respondents as they could still raise the defence of prescription.

Cases Considered

Cases cited

Brummer v *Gorfil Bros Invstms (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA)

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Clarke v *van Rensburg & Anor* 1964 (4) SA 153 (O)

Coronel v *Gordon Estate GM Co* 1902 TS 95

Curtis-Setchell & McKie v *Kloppers* 1948 (3) SA 1017 (W)

Friedman v *Woolfson* 1970 (3) SA 521 (N)

Govt of the Republic of SA v *Ngubane* 1972 (2) SA 601 (A)

Hall v *Howe* 1929 TPD 591

Kader v *Frank & Warshaw & Anor* 1926 AD 344

Kotsopoulos v *Bilardi* 1970 (2) SA 391 (C)

Kourie & Anor v *Sasseen* 1965 (1) SA 490 (T)

Sentrakoop Handelaars Bpk v *Lourens & Anor* 1991 (3) SA 540 (W)

Standard General Ins Co Ltd v *Eli Lilly (SA) (Pty) Ltd* 1996 (1) SA 382 (W)

Syfrets Merchant Bank v *Jardine & Ors* 1999 (1) ZLR 124 (H)

Waikiwi Shipping Co v *Thos Barlow & Sons (Natal) Ltd* 1978 (1) SA 671 (A)

Case Information

A P de Bourbon SC, for the applicants

G M Mabuye, for the respondents

Judgment

Smith J: The first applicant (hereafter referred to as "Zimbank") commenced proceedings for the recovery of debts against the respondents on 6 June 1996 (case No. HC-4713-96) which they are opposing. On 30 September 1996, Zimbank executed a deed of cession in which it ceded to the second applicant (hereinafter referred to as "Climax") a number of book debts, including those of the respondents. The applicants now seek an order substituting Climax in place of Zimbank as the plaintiff in case No. HC-4713-96. The respondents oppose the application. They claim that, apart from denying that they owe Zimbank the debt ceded, Climax is non-suited in that its claim against the respondents is prescribed.

Mr *de Bourbon* submitted that the court is entitled, on application being made, to order the substitution of one plaintiff for another where there has been a change in the *persona* of the plaintiff, provided that no prejudice is caused to the defendant by such substitution. He further argued that the respondents would suffer no prejudice if Climax were substituted as plaintiff because its claim has not prescribed. The basis of his argument is that where a cession has been effected by the plaintiff after the issue of summons, the cedent is not divested of its right of action against the defendant, and the cessionary is not invested with that right, until such time

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as the court grants a substitution of the cessionary for the cedent as plaintiff in the action. He submitted that the practical effect of the cession effected between Zimbank and Climax on 30 September 1996 was not to divest Zimbank of its right to prosecute the claim but only to divest it of its *spes* or interest in the result of the litigation. Zimbank therefore retains its *locus standi* to prosecute its claim against the respondents and the action is not left without a *dominus litis*. Climax has acquire the *spes* that was ceded but not the right to prosecute the claim. As an *actio litigiosa* cannot be transferred without the consent of the court, the transfer of the right of action as against the respondents will only

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become valid if the present application is granted by the court. He relied on *Waikiki Shipping Co* v *Thos Barlow & Sons (Natal) Ltd & Anor* 1978 (1) SA 671 (A) and *Brummer* v *Gorfil Bros Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) as supporting his arguments. He conceded that in *Syfrets Merchant Bank* v *Jardine & Ors* 1999 (1) ZLR 124 (H), the court held that the principle that a cedent is divested of all his rights, title and interest on a ceded action applies whether the cession is effected before or after service of the summons. He submitted, however, that the learned judge had erred in that he had reached his conclusions by placing reliance on a line of wrongly decided South African cases.

Mr *Mabuye* argued that the claim by Climax had prescribed and therefore the application should be dismissed. Cession was effected on 30 September 1996 and, as Climax failed to effect substitution within 3 years thereof, its action has prescribed.

There can be no doubt that the court is entitled, on application being made, to order the substitution of one plaintiff for another where there has been a change in the *persona* of the plaintiff, provided that such substitution does not cause any prejudice to the defendant - see *Kader* v *Frank & Warshaw* 1926 AD 344, *Curtis-Setchell & McKie* v *Kloppers* 1948 (3) SA 1017 (W) and *Friedman* v *Woolfson* 1970 (3) SA 521 (N). The basis of the opposition by the respondents is that any claim Climax may have against them arose on the date of cession, which was 30 September 1996; since it was not substituted as plaintiff within 3 years of the cession, its cause of action is now prescribed. Does that constitute a valid opposition to the application for substitution? Mr *de Bourbon* argued that it does not. I agree with him.

Where a cession has been effected after issue of the summons, the cedent is not divested of its right of action against the defendant and the cessionary is not invested with that right until such time as the court grants an order substituting the cessionary as plaintiff in place of the cedent. In the present case, therefore, whilst Climax, as cessionary, has *persona*l rights, by virtue of the cession, *vis-à-vis* Climax, it presently has no right of action against the respondents which could prescribe. Therefore, there can be no prejudice to the respondents if Climax is substituted as plaintiff - see *Government of the Republic of South Africa* v *Ngubane* 1972 (2) SA 601 (A) and the *Waikiwi* case *supra*.

In *Hall* v *Howe* 1929 TPD 591, the court held that the cession of a claim made in the summons was valid, even though it was made before judgment. Barry J, at p 594, said that under Roman Law, it would seem that an *actio litigiosa* could not be validly ceded and some of the earlier

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Roman-Dutch authorities, including Sande, followed that view. However, the "later and weightier authorities" were of a different view. After referring to the writings

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of van der Keessel, Voet, Grotius and Groenewegen, he concluded that the weight of Roman-Dutch authority was in favour of a *res litigiosa* being transferable, and he further pointed out that the courts had followed that view in the case of *Coronel* v *Gordon Estate GM Co* 1902 TS 95. The present position was summed up by Holmes JA in the *Ngubane* case *supra* at p 608 as follows:

"I pause here to observe that in the present case we are not called upon to decide whether the claim in question would be capable of cession after *litis contestatio*. Nevertheless it might be helpful to dispel some of the mystique surrounding that expression. According to Roman procedure, the effect of *litis contestatio* included the creation of a new obligation; and the matter became *litigiosa*; and any actions which had reached such stage was transmissible on death; see Buckland on *Roman Law* 2 ed pp 695 and 700. And Melius de Villiers on the *Law of Injuries* states at p 236:

> 'Through the litiscontestation an action acquired somewhat of the nature of a contract; a relation was created resembling an agreement between the parties to submit their differences to judicial investigation ...'

Hence, it seems to me that, in regard to a cession after *litis contestatio*, you are not ceding your interest in the claim but in the result of the litigation.

At what stage, however, does this alchemy of *litis contestatio* occur? In *Executors of Meyer* v *Gericke* 1880 Foord 14, de Villiers CJ said a p 16:

> 'Broadly stated, the answer must be that it takes effect as soon as the case is ripe for hearing ... Allowing for differences in the system of pleading, this answer will apply equally to the Roman law, the Dutch law, and the law of this Colony.'

In modern practice, *litis contestatio* is taken as being synonymous with close of pleadings, when the issue is crystallised and joined; see *Milne NO* v *Shield Insurance Co Ltd* 1969 (3) 352 (A) at p 358C. And in modern terminology, the effect of *litis contestatio* is to 'freeze the plaintiff's rights as at that moment'."

The conclusion reached by Holmes JA was that claims for damages for *personal* injury are incapable of cession before the stage of *litis contestatio* has been reached. After *litis contestatio*, such a claim may be ceded, because the party is then ceding not his interest in the claim but his interest in the result of the litigation. This distinction was considered in the *Waikiwi* case *supra*, at p 677G-H where JANSEN JA, after reviewing various Roman Law and Roman-Dutch Law authorities, said:

"Against this background the *dictum* in *Ngubane*'s case may be considered in greater detail. The 'interest in the claim' and the 'interest in the result of the litigation' are contrasted. However, there may be three factors involved: (i) the original founding right; (ii) the right arising from *litis contestatio* to proceed with the action to its conclusion; (iii) the *spes* in respect of the benefits that will flow from the successful conclusion of the proceedings. (As to this last, it may be pointed out that a *spes* may also be 'ceded'.)"

At p 678-679 the learned Judge of Appeal continued:

"That after *litis contestatio* a plaintiff should not be entitled by mere agreement between himself and a third party to transfer his right to prosecute the action, appears to be not only

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in conformity with the basic principles of our law but also in conformity with our present day practice. If the Roman prohibition against alienation of *actiones litigiosae* still obtains - *cadit quaestio*. If the relaxation of the prohibition, which clearly occurred in Holland in respect of *res litigiosa*e, is also related, by way of analogy, to the alienation of *actiones*, it follows that such purported alienation cannot be complete - it is only effective *salvo jure* the defendant. In practice, any purported transfer after *litis contestatio* could only become effective if the court allowed the cessionary to be substituted as the plaintiff. This is a matter apparently within the discretion of the court and the court will refuse the substitution if there is any prejudice to the other side (*Friedman* v *Woolfson supra* at p 525H). The transfer is, therefore, only perfected when the court gives its seal of approval by granting the substitution. It is unnecessary for present purposes to decide whether this is, in effect, a delegation of a contingent obligation to pay costs, requiring in all cases the consent of the defendant.

To the extent that the *dictum* in *Ngubane*'s case assumes that a right to prosecute a claim is not freely cedable, it, with respect, appears to be correct. It is, therefore, understandable that it could be said that a cession after *litis contestatio* should be construed as a cession of the *spes,* thus giving some immediate legal effect to the agreement. This, however, can only be the general rule. The agreement may in terms envisage a transfer of the right to prosecute the action, but in such a case it will only in law divest the plaintiff of his right if and when the court grants substitution of the plaintiff."

In that case, the appellant Waikiwi had ceded its rights to a third party after *litis contestatio* and Thomas Barlow (the respondent) had raised a special plea that Waikiwi was no longer entitled in law to pursue its counterclaim because it had ceded its rights. The court held that Waikiwi was not, in law, divested of its right to prosecute the action against Barlow - at most it was divested of the *spes* in respect of the result of the action. Whatever Waikiwi and the cessionary might have thought, done or agreed *inter se*, the fact remained that *vis-à-vis* Barlow, Waikiwi was the plaintiff in reconvention, prosecuting the claim under its own name. Its right to do so could not vest in the cessionary until the court ordered its substitution as plaintiff. Any agreement to continue the prosecution "on behalf of" the cessionary could, in law, amount to no more than an undertaking to do so for the cessionary's benefit. The court therefore concluded that the "cession" did not divest Waikiwi of its right to prosecute the counterclaim against Barlow and that Waikiwi therefore continued to have *locus standi* to proceed with the prosecution of its counterclaim.

In the *Brummer* case *supra*, the highest court of appeal in South Africa upheld the proposition that the Roman law prohibition against the cession of an *actio litigiosa* no longer applied. Streicher JA said that in principle there was no reason to permit a cession of right before *litis contestatio*, but not the cession of the right, title and interest of the claimant in the action, subject to the rights of the defendant, after *litis contestatio*.

From the above, it is clear that a cession concluded after *litis contestatio* is of limited effect. A plaintiff cannot transfer outright its right to prosecute the

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action - it can only cede the *spes,* namely, the benefits that will flow from the conclusion of the proceedings. The cession has legal force between the cedent and the cessionary but the

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cedent will not be divested of its right to prosecute the action until the court grants approval of the substitution of the cessionary as plaintiff.

The above cases refer to cessions after *litis contestatio*. In my view, there is no practical procedural difference where a cession is effected *pendente lite* as opposed to after *litis contestatio*. In both instances, the subject of the action becomes *res litigiosa* and may not be alienated without the consent of the other party or the leave of court. A thing becomes *litigiosa* from the time that the citation is issued and notice given to the defendants, not from the time of *litis contestatio* - see Sande *Restraints upon Alienation* Chapter IX 1.6. In *Halls*' case *supra*, at p 594-595, Barry J said:

"It is true that in that case cession was given after judgment, but the authorities to which I have referred do not indicate that there is any difference in the procedure when the cession is effected *pendente lite*, and when made after judgment. In either case, the same remedy is applicable. Whether notice of cession had been given or not during the suit does not, to my mind, affect the position."

In my view, the practical effect of the cession effected between the applicants on 30 September, 1996, after the institution of the action in case No. HC-4713-96, was not to divest Zimbank of its right to prosecute the claim; it divested Zimbank of its *spes* or interest in the result of the litigation. Accordingly, Zimbank retained its *locus standi* to prosecute the claim and the action was not left without a *dominus litis*. As far as Climax is concerned, it acquired the *spes* but not the right to prosecute the action which Zimbank had already instituted. The transfer of the right of action will only become effective, in law, if the present application to substitute the cessionary for the cedent is granted.

In the *Syfrets* case *supra*, it was held that where a claim is ceded before *litis contestatio*, whether the cession is effected before or after issue of summons, the cedent is thereby deprived of all his rights and has no *locus standi*. I cannot agree with that conclusion. At p 126, the learned judge said that where cession takes place prior to the issue of summons, an action instituted in the name of the cedent as the plaintiff gives it no *locus standi*. I respectfully agree with that. However, I cannot agree with him when he goes on to say that, in his view, there can be no difference in principle where the cession is effected after the issue of summons, but before *litis contestatio*. In my view, there is a difference. I consider that the effect of a cession after issue of summons is more analogous to, and has the same consequences as, a cession after *litis contestatio* than a cession before summons is issued. To hold otherwise would lead to anomalous results. Once summons is issued, there can be no

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change of plaintiff without the approval of the court. If a party institutes an action and then cedes its rights to a third party, according to the decision in *Syfrets*' case *supra*, the cedent should make an application to substitute the cessionary. What would be the case, however, if such an application were refused? The case would be left hanging in mid-air without a plaintiff.

As pointed out in *Syfrets* case *supra*, HOFMEYER J held, in *Clark* v *van Rensburg & Anor* 1964 (4) SA 153 (O), that a plaintiff who had ceded his claim after action had been instituted was, in terms of the agreement with the cessionaries, entitled to prosecute the action in his own name

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on behalf of the cessionaries as his undisclosed principals. A similar conclusion was reached in *Kourie & Anor* v *Sasseen* 1965 (1) SA 490 (T). The reasoning in *Clark*'s case *supra* was seemingly approved by Corbett J (as he then was) in *Kotsopoulos* v *Bilardi* 1970 (2) SA 391 (C) at p 398, where the learned judge said that in certain circumstances a cedent may, after cession, institute action in his own name as agent for the cessionary. However, the reasoning in *Clark*'s case was disapproved in *Sentrakoop Handelaars Bpk* v *Lourens & Anor* 1991 (3) SA 540 (W). JANSEN JA, in the *Waikiwi* case *supra, also* expressed reservations as to the reasonings of HOFMEYER J in *Clark*'s case. For the reasons set out earlier, however, I consider that a plaintiff who has ceded his claim after he had instituted action but before *litis contestatio* is in the same position as the plaintiff who has ceded his claim after *litis contestatio*. He may continue to prosecute the action in his own name, as he has ceded only the *spes*, or he may apply to court to have the cessionary substituted as plaintiff. If he does continue to prosecute the action, he is doing so in his own right and not on behalf of the cessionary as his undisclosed principal as was held in *Clark*'s case.

The respondents have argued that if Climax were substituted as plaintiff, they would be prejudiced because Climax's claim is prescribed. That argument is untenable. If the substitution is permitted, the respondents can still raise the defence of prescription if so advised.

The applicants have applied for costs in the event of the application being opposed. Since the respondents' position was fortified by the decision in *Syfrets*' case *supra*, I consider that costs should be ordered to be costs in the cause.

For the reasons set out above, the application is granted. It is ordered that:

1. Climax Investments (Pvt) Ltd be substituted as the plaintiff in place of Zimbabwe Banking Corporation Ltd in case No. HC-4713-96;

2. the costs of this application be costs in the cause.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Mabuye & Co, respondent's legal practitioners

MANDAVA *v* CHIGUDU & ORS 2000 (1) ZLR 679 (HC)

Citation	2000 (1) ZLR 679 (HC)
Case No	Judgment No. HH-117-00
Court	High Court, Harare
Judge	Devittie J
Heard	June 14, 2000
Judgment	June 14, 2000

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Annotations None

Election petition

Flynote

Elections - election petition - procedure to be followed - need for trial procedure - effect of delay in bringing petition

Elections - voters roll - whether must be printed before election - Registrar-General's discretion as to whether to print roll - limits to discretion - compilation of roll - Registrar-General's duties - right of voters to point out errors

Headnote

The applicant was a candidate in an urban council election. The result of the poll was that she lost to the first respondent. She challenged the results, seeking an order setting the election aside and that fresh elections be held.

The first ground she relied on was the claim that the Registrar-General did not make available to her a copy of the voters roll in sufficient time to enable her to inspect the roll well before the election date. When she requested a copy of the roll from the constituency registrar in Masvingo, she was told that she would have to get it from Harare. She was, however, allowed to inspect a copy in Masvingo. She obtained a copy of the roll 7 days before the election.

The second ground concerned the printed voters roll. She alleged that several persons listed on the roll did not live within the ward concerned. The Registrar-General said that the voters were registered there because they said that they resided there. In any event, he said, the applicant should have brought her complaints about the voters roll in the period before the election, so that remedial action could be taken.

The third ground alleged that the applicant's supporters were intimidated in the run up to the poll and on polling day and that bribes had been offered to an election official to rig the votes in favour of the first respondent. Her allegations were made in affidavits from her witnesses. The allegations were disputed by the respondents; no opportunity was given to the persons accused of intimidation or bribery to controvert the allegations.

Held, that there was no substance in the applicant's claim that she was hindered in any way from carrying out a timeous inspection of the roll.

Held further, that in seeking, as she did, to exercise her rights to inspect the roll well in advance of polling day, the applicant adopted a practice that should be observed by all candidates in an election. The right to inspect the roll implies a concomitant duty on the Registrar-General to have available a copy of the printed voters roll. The availability of a printed roll for each constituency is central to the efficacy of the constituency system. Even if the Registrar-General has a discretion as to whether or not a roll should be printed, that

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discretion is not unfettered. A decision not to print the roll would be subject to review.

Held, further, that the Registrar-General's task of maintaining a voters roll that complies with the requirements of the Electoral Act requires a commensurate level of administrative capacity and skill. The task is not a simple one, even in societies with adequate information on births, deaths and so on, but even there the voter is not expected to remain an impassive and uninterested observer. Voters and candidates play an important role in detecting anomalies and should do so before the election.

Held, further, that where an election petition is brought on the grounds of corrupt practices, notice must be given to the persons accused of such practices. Because of the possible consequences to those persons, in the form of criminal sanctions and civil disabilities, the matter must be dealt with by trial procedure, not by ordinary application procedure. This is so even where there is no factual dispute and the respondent does not oppose the nullification of the result. The court is required, in an election petition, to assume an inquisitorial function for the purpose of determining the extent to which corrupt and illegal practices have prevailed at the disputed election. The trial of the election petition triggers off the prosecution afterwards all of persons in respect of whom the petition discloses the commission of a criminal offence. The Director of Public Prosecutions ought to be present during the trial of an election petition.

Held, further, that in this case the allegations made in support of the third ground for setting aside the election were not capable of resolution on the papers. The allegations should be dismissed on the ground that the wrong procedure had been adopted. In addition, the petition should have been brought timeously. It should have been brought within 30 days after notification of the result.

Semble: that a form of pre-trial conference would be desirable, to enable resolution of such matters as further particulars, directions by the judge, notices to witnesses, length of trial, and the requirement for an interpreter.

Cases Considered

Cases cited:

Bganya v *Chitumba & Ors* 1998 (2) ZLR 171 (H)

Dongo v *Mwashita & Ors* 1995 (2) ZLR 228 (H)

Kutama v *Town Clerk, Kwekwe* 1993 (2) ZLR 137 (S)

Makamure v *Mutongwiza* 1998 (2) ZLR 154 (H)

Mhashu v *Chiroodza* HH-43-97

Morgan v *Simpson* [1974] 3 All ER 722 (CA)

Mundura v *Mudehwe & Anor* HH-176-98

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Legislation considered:

Electoral Act [*Chapter 2:01*], ss 18(3), 26, 109, 124, 132(2), 136 & 137

Electoral (Applications, Appeals, Petitions) Rules 1995 (SI 74A of 1995), rr 15, 21, 23, 25, 29, 138 & 139

Case Information

D Mwonzora, for the applicant

B Mugabe, for the respondent

Judgment

Devittie J: On 30 and 31 August 1999, elections for the position of councillor in Ward 2, Masvingo, were held. The first respondent was declared the winner with 359 votes. The applicant polled 314 votes. She challenges these results and seeks an order that they be set aside and fresh

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elections ordered. The issues that arise in this case concern the Electoral Act [*Chapter 2:01*] "the Act", whose provisions, in terms of s 2, apply to municipal elections.

The first ground the applicant relies on is the claim that the Registrar-General did not make available to her a copy of the voters roll in sufficient time to enable her to inspect the roll well before the election date. She says that on 10 August 1999 she requested a copy of the roll from the constituency registrar in Masvingo. She wanted a copy in order to carry out a thorough inspection. She was advised that copies were unavailable in Masvingo. She was told to go to Harare. She says that she only managed to obtain a copy of the roll seven days before the election and that this did not give her sufficient time to inspect it as well as to take action to redress her complaints before the election. In my view, the complaint raised is one that ought to have been brought in the pre-election period, and I am not prepared to entertain it at this stage. The applicant could have sought appropriate relief from this court prior to the election to compel the Registrar-General to make available a copy of the roll within a reasonable time before the election day. Ordinarily, complaints regarding access to the voters roll ought to be brought in the pre-election period and the court should be slow to entertain such complaints unless good reasons are shown why proceedings could not have been brought in the pre-election period. In any event, I am not satisfied that there is merit in the applicant's complaint. The Registrar-General deposes in his affidavit to the fact that he caused a notice to be published in *The Herald* on 26 June 1999 and 9 July 1999 inviting members of the public to inspect the roll at designated centres. He also states that a copy of the voters roll was made available on request. The applicant does not dispute that she managed to purchase a copy of the roll in Harare - her complaint seems to be that a copy should have been available for purchase in Masvingo. She accepts, though, that she was given the opportunity to inspect the roll in Masvingo. I find no substance in the claim that she was hindered in any way from carrying out a

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timeous inspection of the roll.

I make the observation that in seeking, as she did, to exercise her right to inspect the voter's roll well in advance of the polling day, the applicant adopted a practice that should be observed by all candidates in an election. The right to inspect the roll implies a concomitant duty on the Registrar-General to have available for inspection a copy of a printed voters roll. I digress briefly to consider whether the Registrar-General is under any such duty.

In *Dongo* v *Mwashita* 1995 (2) ZLR 228 (H), SMITH J ruled that the Act does not require the voters rolls to be printed at election time. At p 239, the learned judge stated that:

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"Although the Act does not require that only printed rolls be used for identifying voters at an election, I would strongly recommend that this procedure be adopted. It appears from the evidence placed before the court that the system of issuing voters registration cards to voters has not been efficiently maintained. It is also clear that it is virtually impossible for a voter who does not have a voters registration card to prove in which constituency he is registered. As I have pointed out, proof of residence at the date of the election is not sufficient. An applicant for a ballot paper must prove that he was resident in the constituency at the time he was registered as a voter and that he was in fact registered for that constituency.

The absence of a proper, printed voters roll could make it very difficult for a candidate to ensure that his nomination is in order. Furthermore, for candidates at an election to canvass support, the existence of an accurate printed voters roll would obviously be essential."

It is of significance that the learned judge considered it desirable that voters rolls be printed at election time. Section 18(3) of the Act provides that:

"A constituency registrar may, *whenever he considers it to be desirable*, have the voters roll for his constituency printed, and every person may obtain from the Controller of Printing and Stationery, upon payment of such charges and subject to such conditions as may be presented, copies of any voters roll so printed."

The key words are "whenever he considers it to be desirable".

I concur with SMITH J that it is desirable that printed voters rolls be used at every election. Indeed, a cursory examination of the statutory duties of the Registrar-General in relation to the compilation of the roll shows that the task of complying with the Act would be nightmarish, even with unlimited resources, without a printed roll. Moreover, the lack of a printed roll at election time would negate the right of the voter to inspect the roll. All this points to the fact that the availability of a printed roll for each constituency is central to the efficacy of the constituency electoral system.

I am not minded to debate the merits of the ruling by SMITH J in *Dongo*'s case *supra*. I make the passing observation, however, that even if the Registrar-General has a discretion to decide whether or not in terms of s 18(3) he considers it desirable that a voters roll be printed, it is not unfettered. The section confers a structured discretion on the Registrar-General. In other words, the Registrar may not, for arbitrary reasons, take the decision that it is not "desirable" to have the voters roll printed. It is an established principle of our law that an administrative authority must exercise his powers to promote the objects of the Act. In my view, a decision by a constituency registrar not to print the roll at election time is subject to review and the court can

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order him to do so if the desirability of printing the roll with reference to that election is proved.

The second ground upon which the applicant relies concerns the printed voters roll. She alleges that several persons listed on the roll as residing in Ward 2 do not in fact reside in that ward. She further claims that several

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addresses listed on the roll are either false or fall outside the physical boundaries of Ward 2. The Act provides in s 103C that a person resident within a council area is entitled to be registered on the voters roll for that council area. The Registrar-General states, in respect of those persons listed as residing in Ward 2 and who may not in fact reside there, that they were registered in that ward because they gave addresses in Ward 2. I would have thought it was the duty of the Registrar-General to ensure that the applicants for registration provide authentic proof of residence in Ward 2. In regard to false and non-existent addresses appearing on the roll, he states that he had no reason to believe that the addresses were false. He seems to concede that some addresses are false. He goes on to say:

"The clearing of the voters roll is dependent to some extent on the electorate and any member of the public coming forward with any objection during inspection exercises pending any election. It is unfortunate that the applicant did not submit this list of names during the prescribed inspection period which would have facilitated the removal of or rectification of the roll."

The Registrar-General in effect is saying that the compilation of an accurate voters roll is to some degree dependent on the diligent exercise by the voters of the right to inspect the roll because this enables steps to be taken thereafter to rectify anomalies that come to light. In our local and parliamentary elections, the complaint that the Registrar-General has not compiled the voters roll in accordance with the law is one that in recent times is being made with alarming frequency.

In *Dongo* v *Mwashita supra* at 239, Smith J stated thus:

"It appears from the evidence that the voters' rolls have not been properly kept and that no effort has been made for very many years to update the rolls. Obviously no competent person scrutinised the rolls before they were printed. From the objections raised by the applicant, it is apparent that voters were improperly registered, in that details of their places of residence were either not set down in their claim forms or were not properly recorded. How could people be registered for a constituency if the only address given was a post office box number?"

In *Makamure* v *Mutongwizo* 1998 (2) ZLR 154 (H), the allegation at p 158 (which was not proved) was that the Registrar-General had manipulated the voters rolls. I stated at p 158:

"In support of the allegation that the voters roll was manipulated, the applicant has produced an affidavit by Mrs Margaret Dongo, Independent MP. She states that in an attempt to check the accuracy of the roll she sent 8 000 envelopes with a return address to addressees and names on the voters roll. Of these, 5 500 were returned marked 'not known' and 'address does not exist' ..."

In *Bganya* v *Chitumba* 1998 (2) ZLR 171 at 175-176 (H), Smith J summarised some of the allegations concerning the voters roll:

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"[The] voters roll for ward 12 was inadequately prepared, in that some voters' names

appeared twice on the poll. That double representation, so he says, entitled the voter to cast two votes, especially since there was no indelible ink provided to mark the thumb of persons who had voted. He also claims that the names of some voters appeared on the voters roll for both ward 16 and ward 12."

See also *Mhashu* v *Chiroodza* HH-43-97.

It does seem, therefore, that allegations concerning irregularities in the compilation of the voters roll have hung like an albatross over the Registrar-General for a good part of his sojourn on earth. It is proper, therefore, to give consideration to his contention that complaints regarding the voters roll should be brought in the period before the election in order that remedial action be taken.

One of the most important functions of the office of the Registrar is the compilation and maintenance of an accurate voters roll. The Act requires there to be a constituency registrar for each constituency, one of whose principal functions is to maintain the voters roll for his constituency. The office of the Registrar-General is responsible for the registration of voters who meet the criteria prescribed in the Act. One such criterion is that a person must reside in the constituency in which he registers. In maintaining an accurate roll, the office of the Registrar-General must, in terms of Part III of the Act, ensure from time to time *inter alia* that:

(a) no person is registered more than once on the voters roll;

(b) no person is registered on the voters rolls for more than one constituency;

(c) deceased persons are removed from the roll;

(d) persons who have been absent from their constituencies for more than twelve months or who have left Zimbabwe are removed from the roll;

(e) any obvious mistakes or omissions are corrected.

It will be readily apparent that in a country with even as few as three million registered voters spread throughout, say, one hundred and twenty constituencies, the task of maintaining a voters roll that complies with these requirements requires a commensurate level of administrative capacity and skill. The compilation of a voters roll that fully complies with the requirements of the Act may be a relatively simple task in societies where the collation of information on deaths, employment, residential addresses (and other personal data) with the voters register surpasses even the super information highway that George Orwell foretold in his book "*1984*" - but even in those societies, the electoral laws do not contemplate an electoral process where the voter remains a passive and uninterested observer in the administrative process of compiling the voters roll. This is clear from the provisions of our Electoral Act, which follows closely the wording of its English equivalent. See *Makamure* v *Mutongwizo supra.* The provisions in our Electoral Act that deal with the rights of the voter to inspect the roll and to raise objections thereto

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persuade me that it is envisaged that voters and candidates play an important role in exposing anomalies in the voters roll in the pre-election period. It seems to me, therefore, that there is substance in what the Registrar-General says - that the applicant ought to have raised her complaints when the roll was lying for inspection, so that he would have been afforded an opportunity to rectify the roll. There will, of course, always be cases where an applicant can, with justification, claim entitlement to bring before the court complaints regarding anomalies on the roll in the post-election period on the grounds that they could not, with the exercise of reasonable diligence, have been brought in the pre-election period. This, however, is not such a case. Indeed, this court has had frequent occasion in the past to comment adversely on the failure of candidates to adopt proper pre-election procedures regarding alleged irregularities on the voters roll. In *Bganya* v *Chitumba & Ors supra* the complaints Bganya raised in regard to the voters roll were matters of real concern to any candidate - namely, the duplication of names on the voters roll and the registration of voters in more than one ward. It needs no great stretch of the imagination to appreciate that if the errors complained of by Bganya occur in abundance, the potential for a free and fair election is seriously undermined and the risk of someone so minded to subvert the electoral process would loom large. In the final result, the just perception of the losing candidates would be that the election was not free and fair. Smith J dismissed the application on account of the delay in instituting proceedings - but the learned judge remarked that Bganya could have brought an interdict in the pre-election period.

In *Mvundura* v *Mudehwe & Anor* HH-176-98, SMITH J reiterated the necessity of bringing complaints regarding the voters roll before the election is held:

"The defective rolls were open for inspection and public notice thereof was given in a local newspaper. One wonders why Mvundura did not object to the rolls at that time. That would have been the proper time for him to have lodged his objection - before the poll was held."

The Act makes ample provision for inspection of the roll and the raising of objections thereto in both municipal and parliamentary elections. In terms of s 26 of the Act, a registered voter may object to the retention of any name on the voters roll of the constituency in which he is registered. This means that an objection may be made on the grounds that a person is registered more than once on the roll, or that persons who do not reside in the constituency are on the roll. The section sets out the procedures for lodging an objection and provides for a hearing before a designated magistrate. If the magistrate is in doubt as to any question before him, provision is made for a stated case to be placed before a judge in chambers. Section 26 does not provide that an objection may be raised on the grounds that the name of a voter who has

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registered is not on the roll, but there can be no lawful impediment to proceedings being brought on such a ground. Many post-election challenges which, if successful, would necessitate the expense of calling a fresh election, would be avoided if the applicants took advantage of the

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provisions of the Act by properly inspecting the roll and raising objections prior to the election.

I uphold, therefore, the contention of the Registrar-General. The applicant ought to have brought the complaint she now raises before the election. The proper course to have adopted was to first raise the irregularities with the Registrar-General. If her complaint was not addressed with promptness or to her satisfaction, she had recourse to the courts. It is not in dispute that the factual allegations concerning the voters roll on which she relies were known to her prior to the election. I am satisfied that compelling reasons have not been shown why a complaint regarding alleged irregularities on the voters roll should be entertained in the post-election period.

The third ground for setting aside the election result is the allegation that the applicant's supporters were intimidated in the run up to the poll and on polling day. She mentions a police officer named Dzoro as having intimidated her voters by threatening to arrest them if they dared question irregularities that were taking place in registration exercises. The applicant's election agent says in an affidavit that she was warned that any complaints about the eligibility of voters who were being registered would attract a fine of $3 500 or three years in jail, or both such fine and imprisonment. The allegation is also made that two businessmen, Hosea Matapura and Edmund Mhende, offered financial inducements to Takura Mazaro for him to rig votes in favour of the first respondent. These allegations involve a breach of one or more of the provisions of Part XX of the Act which deals with corrupt practices and accordingly I am required to find beyond reasonable doubt that the corrupt practices alleged did occur, if the applicant is to have some prospect of success. The allegations made are disputed by the respondent. The persons accused of intimidation and bribery have not been given an opportunity to controvert the allegations against them, even on affidavit, let alone with oral testimony. The practice in cases concerning disputed election results that have come before this court since 1980 is that they have been heard as opposed applications. Evidence concerning, *inter alia*, allegations of violence and intimidation have been deposed to on affidavit and advanced as a basis for setting aside the election. Invariably, this evidence has been disputed. No regard has been paid to the need to give notice of the petition to persons named in the petition as being guilty of corrupt or illegal practices.

In *Kutama* v *Town Clerk, Municipality of Kwekwe* 1993 (2) ZLR 137 (S), serious allegations of intimidation were made by the petitioner. Certain persons were named in the petition as being responsible. Korsah JA

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dismissed the application on account of the delay in bringing the petition. The learned Judge of Appeal further emphasised that, quite apart from the delay, the persons accused in the petition of intimidation ought to have been given notice of the petition.

The learned Judge of Appeal stated thus at 143G-145:

"To accentuate the appellant's claim that the election abounded with irregularities, in a supporting affidavit to the appellant's petition deposed to by Edson Gazimbi, the deponent averred that those people suspected by members of the said Women's League of being the appellant's supporters were openly abused and intimidated; that even at the

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polling desk, the ZANU (PF) election agents, notably Mrs Ivy Hama and Mrs Wachemuka, literally took over the duties of the polling officer and explained all the procedures to the voters.

Edson Gazimbi also deposed that earlier in the morning of 7 August 1991 he had been ordered to produce a ZANU (PF) membership card by some party youths who were stationed about thirty metres away from the polling station. When he told them that he did not possess a party card, he was warned 'to stay in the sky since it was ZANU (PF) all over'; and at that time Mr Josiah Chinyati, Ms Eugenia Mazambani, Mr Reginald Gwisai and Mrs Maggie Musimbi approached him and Mr Last Matanhire and demanded to see their identity and party membership cards.

While not discounting the very serious nature of these allegations which, if true, constitute irregularities of grave proportions, the law demands that the person or persons accused of wrongdoing must be given an opportunity to face their accusers, and have a right to answer the charge or charges levelled against them. The question is: is failure to give such notice fatal to the petition?"

See also *Mhashu* v *Chiroodza supra,*where I called for the creation of election courts to deal with disputed facts in election petitions, and *Makamure* v *Mutongwizo supra*.

The factual disputes that this petition raises in relation to the allegations of intimidation and bribery cannot, in my judgment, be resolved on the papers. In *Makamure* v *Mutongwiza supra*, I traced the history of the Act, in particular, those provisions relating to election petitions. It is abundantly clear that these provisions were enacted to put in place a system where in *all* election petitions the trial procedure was adopted. Notwithstanding the express provisions of our Act relating to the holding of election trials upon a petition being presented, an unfortunate practice has developed in this country where electoral disputes are brought as opposed matters. That is the procedure adopted on this case. This procedure is contrary to the express provisions of the Act. In more ways than one, it undermines the objectives which the Act seeks to achieve. One of the main purposes of the Act is to ensure that election results reflect the uninhibited democratic expression of the electorate. It seeks to achieve this purpose in three ways.

Firstly, it provides for criminal sanctions and civil disabilities to be imposed upon any person for violation of the electoral code of conduct. In terms of s 109 of the Act, persons who are found guilty of illegal or corrupt

practices are liable to criminal sanction, and, in addition, are liable to prohibition from registering as a voter and from holding public office for a period of five years. A person who holds public office at the time of his conviction shall vacate such office upon conviction. Corrupt practices include treating, violence and intimidation, bribery, and the transportation of voters to vote unlawfully in another constituency. Illegal practices include the obstruction of voters and the commission of prohibited acts within one hundred metres from a polling station.

Secondly, as regards the election candidate and his agents, s 124 of the Act prescribes, in addition to criminal sanctions, the direst of penalties for breaches of the code of morality - nullification of the election result. If it is proved at an election trial that any corrupt or illegal practice has been committed:

"by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the

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knowledge and consent or approval of any of his agents, the election of that candidate shall be void, and a fresh election shall thereupon be held."

In addition, the candidate or his agent may be disqualified from voting for or filling public office for five years. The significance of this latter provision is that candidates are disqualified from holding public office in local or parliamentary election (including a fresh election ordered by the court) for a period of five years from the date of the finding.

Thirdly, in an election petition the trial court is required, in the public interest, to assume an inquisitorial function for the purpose of determining the extent to which corrupt and illegal practices have prevailed at the election which is the subject of the petition. I glean this function from the following provisions of the Act:

Section 136(4) and (5)

" (4) Where a charge is made in an election petition of a corrupt practice or illegal practice having been committed at the election to which the petition refers, the High Court shall, in addition to the certificate in terms of subsection (3), at the same time report in writing to the Speaker whether any corrupt practice or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of a candidate at that election or by or with the knowledge and consent of any of his agents, and the nature of such corrupt practice or illegal practice; and

(a) the names of all persons who have been proved at the trial to have been guilty of any corrupt practice or illegal practice; and

(b) whether corrupt practices or illegal practices have, or whether there is reason to believe corrupt practices or illegal practices have, extensively prevailed at the said election.

(5) The High Court may, in addition to the certificate required in terms of subsection (3), at the same time make a special report to the Speaker as to any matter arising in the course of the trial, including the commission or possible commission of any corrupt

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practice or illegal practice, where the High Court considers that an account of such matter ought to be submitted to Parliament."

The significance of the above provisions is twofold. Firstly, it means at that the trial of the election petition a public inquiry is, in effect, conducted on corrupt and illegal practices that have prevailed during the election. Secondly, the trial of the election petition triggers off the prosecution, in separate criminal proceedings and after the election trial is complete, of all persons in respect of whom the evidence at the election petition discloses the commission of a criminal offence. Thus, s 137 of the Act is to the following effect:

"**Procedures where High Court reports cases of corrupt practices or illegal practices**

If the High Court states in the report on the trial of an election petition that any person has or may have been guilty of a corrupt practice or illegal practice or that there is reason to believe that corrupt practices or illegal practices have extensively prevailed at the election to which the petition refers -

(a) that statement, with the evidence taken at the trial, shall be transmitted by the registrar of the High Court to the Attorney-General with a view to the institution of any prosecution proper to be instituted in the circumstances; and

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(b) the report shall, so far as it concerns any such person, be transmitted by the registrar of the High Court to the Registrar-General."

It seems to follow, therefore, that even where there is no factual dispute and the respondent does not oppose the nullification of the result, the court is nonetheless obliged to conduct a trial for the purposes of carrying out the statutory inquiry envisaged in the above sections. The statutory inquiry in turn paves the way for the prosecution of offenders in subsequent criminal trials. It seems desirable, therefore, that, the Director of Public Prosecutions be present during the trial of an election petition. A similar view is expressed in Halsbury's *Laws of England* vol 15 para 901 4 ed:

"**Duty of parties and court**. There is no obligation on the petitioner's counsel to pursue charges, even though there may be good foundation for them, if by the establishment or admission of other charges he has already attained the avoidance of the election.

When the issue between the parties has been decided, there is no duty cast on either of them to continue the inquiry in the public interest for the purposes of ascertaining to what, if any, extent corrupt or illegal practices have prevailed. The object of the petition being gained, there is an end of the inquiry so far as the parties are concerned. Nevertheless there is a duty on the election court to investigate any allegation of corrupt or illegal practices brought to its notice. If there are any indications of improper conduct in the election, it is impossible to shorten the case by concessions between the parties. The court must sit as long as there is anything which can be brought before it by the parties or the Director of Public Prosecutions relating to these allegations. When, however, the whole case has been heard and when an admission is made which shows that the judgment must be that the election is void, it is no longer necessary for the court to go into all the other grounds on which the election might have been avoided. The court will only require such further evidence to be called as is necessary to enable it to report whether corrupt or illegal practices have extensively prevailed or not and also to see whether, in respect of offences with which particular individuals have been charged, it ought to report those individuals."

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It is self-evident that the above provisions, which are central to the purposes of the Act, cannot be invoked if an election trial is not held. From an evidential point of view, the above provisions envisage four separate evidential inquiries to be carried out: firstly, whether intimidation, bribery or other corrupt or illegal practice has taken place at the election which is the subject of the petition. This requires evidence to be heard from the accusers and from persons named in the petition as being guilty of such practices. Upon a finding that a corrupt practice has been proved the court is then required in the second stage of the inquiry, and based upon the evidence, to make a finding as to whether such acts were done "with the knowledge and consent or approval of the candidate or any of his agents". In terms of s 125, no penalty is attracted if the candidate and his election agents took all reasonable precautions for preventing the commission of corrupt practices and illegal practices at that election;

If the court finds against the candidate or his agent, then the election is void by operation of law, unless - and this involves the third stage of the inquiry - it is proved:

(a) in terms of s 126(l)(a), that:

"in the case of an illegal practice *only*, that it was done in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature"; (my emphasis) or

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(b) in terms of s 126(1)(b), that:

"by reason of the circumstances it would be just that the candidate or his election agent or other agent or person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission."

Fourthly, the court is required, for the purposes of compliance with ss 136(4) and (5) and s 137 of the Act, to inquire, in the public interest, whether corrupt and illegal practices have prevailed extensively at the election which is the subject of the petition. It must now be apparent that there is merit in the view that the failure to hold a trial where allegations of corrupt and illegal practices are made undermines the objects of the Act.

I return to a consideration of the third ground relied on for the setting aside of the election. I find that the allegations made are not capable of resolution on the papers. Moreover, the persons accused by the applicant of corrupt practices have not been afforded the opportunity to defend themselves. I have no difficulty, therefore, in dismissing the allegations of intimidation and bribery on the ground that the wrong procedure has been adopted. If I had been seized with this application at an earlier date, I would have been minded to refer the matter to trial for resolution of the facts in dispute. I would then have given directions for the persons accused of intimidation and bribery to testify in open court. Regrettably, this course is not open to me because this

application was heard six months after the election was held. If I were to refer the disputed facts to trial at this stage it would mean that, taking into account the prospect of an appeal, this matter would remain unresolved more than a year after the election. The court application was filed on 16 September 1999. It was not served on the respondents until 12 October 1999. The opposing affidavits were filed on 5 November 1999 (even at that stage a trial date should have been sought) - but an answering affidavit was filed on 2 February 2000 and the matter set down on 22 February 2000. The applicant dealt with this matter as though it were an ordinary opposed application and took no steps to have the matter heard expeditiously. This brings me to the delay principle that governs election petitions.

In *Makamure* v *Mutongwizo & Ors supra,* the losing candidate for the Harare mayoral election contested the election result on several grounds including deficiencies on the voters roll. I dismissed the application because of the delay in instituting proceedings. At p 158G-159I, I stated the following:

"The second respondent's counsel, Mr *Andersen*, submitted that the delay in setting the application down was such that this court should not entertain the merits of the application. The elections were held on 14 and 15 September 1996. The applicant instituted the present proceedings on 29 October 1996, approximately six weeks after the election. No explanation is offered as to why the applicant could not have been brought more expeditiously. On 20 November 1996 and 28 February 1997, the respondents filed their opposing affidavits. On 5 May 1997, the applicant filed his answering affidavit. The applicant filed his heads of argument on 27 November 1997. It is clear from the above chronology that the applicant was extremely dilatory. No explanation has been given for the delay."

In *Kutama* v *Town Clerk, Municipality of Kwekwe supra,* KORSAH JA stated:

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"Having the results of an election declared void is of such paramount urgency that delay in making applications to set aside such results cannot be brooked. The appellant has delayed the finalisation of this matter beyond the point where the remedy he seeks can be justified on any ground."

In *Mvundura* v *Mudehwe & Anor supra*, SMITH J dealt with an electoral dispute concerning the mayoral election for Mutare. The irregularities complained of were these:

(a) the statutory requirements for the registration of voters had not been complied with and consequently the voters rolls were in a shambles.

(b) voters were turned away at the polls on the grounds that they had already voted.

(c) some persons voted twice.

(d) The election was not free and fair.

SMITH J declined the application on account of the delay in bringing proceedings. The learned judge at pp 5-6 of the unreported judgment chronicled the sequence which led him to conclude that the delay in

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having the matter heard was so inordinate that the relief sought had to be denied:

"In this case, the poll for executive mayor was held on 28 and 29 October 1995 and Mvundura filed his application on 22 December. Notice of opposition was filed 18 January 1996, which was reasonably expeditious considering that the Christmas holidays intervened. Mvundura's answering affidavit was not filed until 19 June 1996. Thereafter, there was still no sense of urgency in having the matter set down. His heads of argument were not filed until 4 October. Initially, the case was set down for 7 November but that date was not agreed by the parties and the matter was then set for 5 December when it was removed from the roll. It was eventually set down on 12 December, almost 14 months after the poll. Mvundura did not give any explanation why his application was filed almost 7 weeks after the poll. That delay was not as long as the delay in *Kutama*'s case *supra*, where it was just over 3 months. However, in *Kutama*'s case, it was emphasised that not only must the application be filed expeditiously but also any appeal must be pursued as a matter of urgency. In this case, a delay of 7 weeks in filing the application might have been acceptable if a reasonable explanation for the delay had been proffered. No explanation was given. Then Mvundura, instead of pursuing his application with vigour and expedition, took five months to compile and file his answering affidavit. His legal practitioner appreciated that many new matters were introduced in the replying affidavit which would require a response from the respondents. Accordingly, the legal practitioner filed an affidavit in which he said, *inter alia*, that if the respondents wished to file a further affidavit in response, there would be no objection from the applicant when leave was sought for the further affidavit to be filed. After the replying affidavit was filed, Mvundura obviously had to wait to see if the respondents would accept his invitation to file a further affidavit. Even then, however, there was no sense of urgency in having the matter set down. In my view, by his failure to pursue his case with expedition and any sense of urgency, Mvundura has delayed the finalisation of the matter far beyond the point where the remedy he seeks can be justified on any ground."

In the result, therefore, I have not found cause to consider the merits of this case, because, in respect of each of the grounds relied upon, the application fails for want of compliance with procedure. Accordingly, the application is dismissed with costs. I wish, however, to make some brief comments on the merits of the grounds relied upon. In regard to the irregularities on the voters' roll, these were not strenuously disputed. Proof that a sufficiently high number of persons who voted in the election were not entitled to do so because they did not meet the

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residence qualification would establish non-compliance with the provisions of the Act.

Section 149 of the Act provides that:

"an election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that -

(a) the election was not conducted in accordance with the principles laid down in this Act; and

(b) such mistake or non-compliance did affect the result of the election."

In my view, the extent of the irregularities alleged in respect of the voters

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roll for Ward 2, if proved, would have affected the result and, upon a proper application of the provisions of s 149, would have justified the setting aside of the election result. This is assuming, of course, that the applicant would have satisfied the requirement of entitlement to have her complaints regarding the voters roll heard in the post-election period. As I read s 149, the court must set aside an election if one of two situations arises: firstly, where there is a mistake or non-compliance with the Act, even to a slight degree, the election must be set aside if the result was affected. It follows from this, that even where there is substantial compliance, an election will be set aside, so long as the degree of non-compliance affected the result. Secondly, where there is a fundamental breach of the principles of the Act or where the degree of non-compliance is gross, the court must set aside the election regardless of whether the election result was affected. In such instances, therefore, it will not be necessary to inquire into whether the result was affected. Thus, in *Mvundura* v *Mudehwe supra,* SMITH J stated thus:

"With regard to the merits of the case, there can be no doubt there was at least one major irregularity in the election in question. The voters rolls were not prepared in accordance with the statutory requirements. There is no evidence, however, that the irregularity prejudiced Mvundura to a greater extent than Mudehwe was prejudiced."

It may sometimes be difficult to establish with any degree of precision whether an administrative irregularity prejudiced one candidate more than the other. No doubt, if the learned judge had come to the conclusion that the degree of non-compliance was gross, the question of prejudice, and particularly, an inquiry as to whether the one candidate was prejudiced more than the other would not have arisen:

"If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected, or not":

per LORD DENNING in *Morgan* v *Simpson* [1974] 3 All ER 722 at 729.

Section 149, however, has no application where allegations of bribery and intimidation or other corrupt or illegal practices have been found to exist. The section is concerned with the conduct of the elections by the Registrar-General in relation to compliance with the technical requirements of the Act. It has no application where the election result is challenged on the ground of allegations of intimidation, bribery and other corrupt or illegal practices. The applicable provision is s 124, which provides as follows:

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"If upon the trial of an election petition the High Court certifies to the Minister that any corrupt or illegal practice has been committed with reference to the election the subject of the petition, by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the knowledge and consent or approval of any of his agents, the election of that candidate shall be void, and a fresh election shall thereupon be held."

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It is clear that the court is not required, in the case of an election challenge based upon the allegation that corrupt or illegal practices have occurred, to consider whether prejudice has occurred in the sense of the result being affected. Mere proof, at the trial, that the requirements of the section have been met has the consequence that the election is void, subject, of course, to the exemptions provided in ss 125 and 126 to which I have earlier made reference. The allegations of intimidation and bribery made in this case are serious - if proved (and the respondent failed to establish entitlement to be exempted from the penalty provisions) the court would have had to nullify the election result, regardless of whether the result was affected. The principle enshrined in the Act, that an election must be declared void where corrupt or illegal practices are proved to have occurred at an election, is meant as a deterrent penalty and would be negated if a winning candidate was able to retain his victory on the grounds that the result was not affected notwithstanding his involvement in corrupt or illegal practices. The intention of Parliament is to root out from the body politic those who are minded to fetter the free exercise of the will in a democratic society. Hence, upon a finding that a candidate or his agents committed corrupt or illegal practices, the guilty persons are prohibited from holding public office for a period of five years.

This petition has turned on matters of procedure. It would be remiss of me, therefore, not to deal, albeit briefly, with the procedures that our law prescribes in regard to election petitions. I attempted to do so in *Makamure*'s case *supra* - but if the present application is anything to go by it seems that little heed has been paid to the observations I made in that judgment. I outline below some of the procedural requirements to which attention should be paid.

In terms of s 132(2) of the Act, an election petition must be presented within thirty days after notification of the result in terms of the Act. However, as I stated in *Makamure*'s case *supra* at p 169:

"Where an election campaign is so marred by violence, intimidation or serious irregularities that a free and fair election cannot take place, I think that any interested party may petition the court for relief. He need not wait until the electoral process is complete."

The form and content of the petition is as set out in s 21 of the Electoral (Applications, Appeals, Petitions) Rules SI 74A of 1995 ("the rules"). This provides that an election petition shall be generally in the form of a court application and shall state *inter alia*:

(a) the grounds relied on to sustain the petition;

(b) where the petitioner relies on a corrupt or illegal practice, the full name and address, if known, of every person whom the petitioner alleges was guilty of such practice; and

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(c) the exact relief sought by the petitioner.

Security in an amount fixed by the Registrar of the High Court for the payment of costs and expenses that may become payable by the petitioner to the respondent or any persons summoned as a witness on his behalf must, in terms of s 133(3) of the Act, be given by the petitioner not later than seven days after the petition is filed. In terms of s 134 of the Act, notice of the petition must be served on the respondent within ten days after it is filed with the Registrar of the High Court. If no objection is taken by the respondent to the sureties provided by the petitioner as security, the respondent must file a notice of opposition within 22 days from the date of service of the petition on him. See rr 23 and 25. There is no requirement for the petitioner to file an answering affidavit as is the case with ordinary court applications. Why should an answering affidavit be filed touching on matters of evidence that are to be resolved at the trial?

Where the petitioner relies on a corrupt or illegal practice, the rules require that notice of the trial be served on persons liable to be found guilty of a corrupt or illegal practice. Rule 29 reads thus:

" (1) Subject to subrule (2), unless the High Court otherwise orders, a notice under section 170 of the Act shall be served on the person liable to be found guilty of a corrupt or illegal practice not later than five days before the hearing of the election petition concerned.

(2) The High Court may direct a notice referred to in subrule (2) to be issued at any time after the election petition concerned has been presented, either of its own motion or upon the application of a party to the election petition or any other interested person, and may designate the person by whom the notice is to be served."

The urgency with which the trial of an election petition must be set down is underlined by the fact that all the parties to the petition and the Registrar are required to ensure that the matter is heard without delay. Rule 15 reads as follows:

"*Urgency of electoral matters*

The Registrar and all parties to any stated case, petition, appeal or application referred to in these rules shall take all steps necessary to ensure that the matter is dealt with as quickly as possible."

Although no mention is made in the rules for a pre-trial conference, it would seem desirable that a form of pre-trial conference be held along the lines of an ordinary trial action. This will enable resolution of such matters as further particulars either party may request, directions the trial judge may wish to give, notices to witnesses, length of trial and the requirement for an interpreter.

As to the conduct of the trial, this takes the form of civil proceedings, save for two significant variations: firstly, in terms of r 138 of the rules, the High Court may, on its own motion, call and examine any witness or any person

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in court, even though such witness or person is not called or examined by a party to the petition.

Secondly, a witness may not, in terms of r 139, refuse to answer any question relating to any corrupt or illegal practice on the grounds of privilege or on the ground that the answer may incriminate him. If he does answer all questions he is required to answer and those which may tend to incriminate him to the satisfaction of the court, then he is discharged from liability for any offence committed under the Act. These provisions give teeth to the inquisitorial function of the court.

To a degree, this judgment calls upon the legal profession to commit its skills in the emerging field of electoral law and practice. It is true to say that, prior to 1980, the provisions of the Act were largely ignored because the majority did not have the right to vote. It was through the efforts of the present generation of leaders that the universal adult franchise was introduced with the advent of democracy in 1980. Consequently, concepts of the rule of law and free and fair elections assumed prominence in the national psyche only after independence. Herbert Chitepo was one who (together with the present leaders in government), in embracing the instruments of war, was simultaneously able to capture the vision that, in advancing the economic and social well-being of the people of Africa, its governments must tread the path of democracy - a path where concepts such as the rule of law and free and fair elections hold sway. In 1987, in an article in the *Prosecutors Bulletin* Vol 1 No. 2, I cited the following extract from an address by Herbert Chitepo at the Lagos Conference on the rule of law in 1960:

"Africa has known ages of freedom from government regulation or dictatorship, though many parts have known the reverse. But, it is fair to say that the African masses of the age of Africa, while they know imperial regulations were wrong, may not be so ready to see the threat to their liberties in the pursuit by the new government of speedy wealth, education and social development. All this tends to suggest that the lawyer in the age of Africa may have to play a more vital part in the protection and defence of the rule of law than in the past. In this age of special skills, he will have to develop great skill and understanding in order to perform the task."

Zimbabwe is in the "age of special skills". In the arena of electoral law, the lawyer "will have to develop great skill and understanding" in order to perform the tasks that the times present.

Mwonzora & Associates, applicant's legal practitioners

Mugabe & Partners, first respondent's legal practitioners

KENDERJIAN *v* CHIEF IMMIGRATION OFFICER 2000 (1) ZLR 697 (SC)

Citation	2000 (1) ZLR 697 (SC)
Case No	Judgment No. S-54-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Muchechetere JA

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Heard June 8, 2000
Judgment June 20, 2000
Annotations None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 22 - right to reside in Zimbabwe - right of citizen to have alien spouse reside in Zimbabwe with her - when such right may be interfered with - public order or public safety - removal of prohibited persons - alien spouse having been convicted of murder in another country - State's right to deport prohibited persons - when may be interfered with

Immigration - prohibited persons - removal of - person prohibited on account of conviction for murder elsewhere - person having married Zimbabwean citizen - whether citizen's right to have alien spouse reside with her can override State's right to deport prohibited person

Headnote

The applicant was a citizen of Zimbabwe. She had married a Lebanese man. Before coming to Zimbabwe, he had been convicted of murder in Lebanon and served a term of imprisonment before being released under an amnesty. He failed to declare this conviction on arrival in Zimbabwe. After his arrival he met and married the applicant. The immigration authorities, on discovering his conviction, declared him a prohibited person and sought to have him removed. The applicant brought a constitutional application, arguing that her constitutional rights to freedom of movement and residence would be impaired.

Held, that the interference with the applicant's constitutional rights could be justified only on the grounds of public safety or public order. The removal of the applicant's husband was manifestly aimed at ensuring the interests of public safety and public order in Zimbabwe. The interference was in line with the legitimate aims authorised by the Constitution.

Held, further, that in deciding whether the applicant had shown that such interference was not reasonably justifiable in a democratic society, the court had to weigh up the public interest in the removal of a person was, because of his past criminal record, was justifiably seen as a threat to the safety of persons and property against the certain disruption to the life of the applicant, who had to choose between going to a foreign country or remaining here without her husband. The balance was not tilted in favour of the applicant: her husband had committed a most abhorrent murder - one which, if committed in Zimbabwe, would have attracted the death penalty - and had lied about it when he entered the country. The State was within its rights to remove prohibited persons and that right could only be restricted in well-defined cases. This was not such a case.

Cases Considered

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Cases cited:

Edwards v *Chief Immigration Officer* 2000 (1) ZLR 485 (S)

Kohlhaas v *Chief Immigration Officer & Anor* 1997 (2) ZLR 441 (S)

Rattigan & Ors v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S)

Retrofit (Pvt) Ltd v *PTC & Anor* 1995 (2) ZLR 199 (S)

S v *Sibanda* 1992 (2) ZLR 438 (S)

Salem v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S)

Zimbabwe Township Developers (Pvt) Ltd v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S)

Case Information

L T Biti, for the applicant

L Matanda-Moyo, for the respondent

Judgment

Gubbay CJ: In *Edwards* v *Chief Immigration Officer* S-26-2000 (not yet reported)*(82) this court held, in an application by an alien woman who had been declared a prohibited person, that a subsequent marriage to a citizen of Zimbabwe did not secure for her a constitutional right to remain living unimpeded in the country of her husband.

The present application concerns the converse situation. It is brought not by the prohibited person but by Mrs Elizabeth Kenderjian, who is a citizen of Zimbabwe. She protests that by virtue of her right of freedom of movement enshrined and protected under s 22(1) of the Constitution of Zimbabwe, she is entitled to reside permanently in this country with her alien husband, Sarkis Hrant Kenderjian, notwithstanding that he is a prohibited person. For that proposition reliance is placed on the decisions in *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S); *Salem* v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S); and *Kohlhaas* v *Chief Immigration Officer & Anor* 1997 (2) ZLR 441 (S). Those cases are, however, markedly distinguishable from the facts in this one.

The applicant's husband ("Kenderjian") was born in Lebanon on 15 September 1959 and is a citizen of that country. On 11 November 1987, he was arrested for a murder alleged to have been committed two days before in the city of Borg-Hamoud. The victim, a woman, had been strangled. The motive for the crime was robbery. After some delay Kenderjian, who was being held in custody, was brought to trial. On 28 March 1991, he was found guilty of murder and sentenced to undergo fifteen years' imprisonment with hard labour, the period being deemed to commence from the date of arrest. In addition, he was ordered to pay the sum of five million Lebanese pounds as personal compensation to the family of the victim. Upon serving only half the term of incarceration, he was released from prison on 11 May 1995, in accordance with an amnesty law.

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GUBBAY CJ

On 3 October 1997, Kenderjian entered Zimbabwe on a visitor entry certificate which permitted him to remain in the country for a prescribed length of time. In completing the required immigration declaration form, he stated that he had not been convicted of any crime in any country. Later, he was granted a temporary residence permit.

The applicant met Kenderjian in May 1998. In the months that followed, they fell in love, and were married in this country on 24 December 1998. A home was established in Harare where, on 17 July 1999, the applicant gave birth to a baby girl. It has not been suggested, and correctly so, that the marriage was other than genuinely entered into with the shared intention of making their matrimonial abode in Zimbabwe.

On 8 September 1999, and as a result of inquiries made by the Department of Immigration with regard to Kenderjian's application for a permanent residence permit, information was received that he had been convicted of murder in Lebanon. In the event on 13 September 1999, a senior immigration officer summoned Kenderjian to his office where, after an initial denial, the commission of the crime was admitted. Kenderjian was immediately served with a written notice declaring him to be a prohibited person in terms of s 14(1)(e) of the Immigration Act [*Chapter 4:02*] ("the Act") and requiring him to leave Zimbabwe by 20 September 1999. An appeal against the notice is still pending determination.

By reason of having been convicted of murder in Lebanon - an offence specified in Part I of the Schedule to the Act - and not having received a free pardon, Kenderjian is classified as a prohibited person in terms of s 14(1)(e)(i) of the Act. Clearly, he entered Zimbabwe by deception in contravention of s 17(a), as read with s 36(1)(a)(i), of the Act. In so doing, a further offence was committed.

I did not understand counsel for the respondent to dispute that effecting the removal of Kenderjian under the authority of s 17(a) of the Act, will interfere with the applicant's entitlement, guaranteed by s 22(1) of the Constitution, to reside permanently with him, as her husband, in any part of Zimbabwe. It will place her in the dilemma of having to decide whether to accompany Kenderjian to Lebanon and live there with their child as a family unit, or to exercise her afforded right to continue residing in Zimbabwe without his physical comfort and support. See *Rattigan & Ors* v *Chief Immigration Officer & Anor supra* at 60D-F; *Kohlhaas* v *Chief Immigration Officer & Anor supra* at 442E-F.

On the other hand, I do not think it can be gainsaid that limitations on the freedom of movement, which serve one or more of the legitimate five aims or exceptions listed in s 22(3)(a) of the Constitution, are invalid. *In casu only* public safety and public order may be posited as legitimate aims for the

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enactment of s 14(1)(e)(i) of the Act. Undoubtedly, the removal of Kenderjian from this country,

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looked at in the light of the aggravating circumstances surrounding the very serious crime he committed, is manifestly aimed at ensuring the interests of public safety and public order in Zimbabwe. The interference at issue is, therefore, in line with the legitimate aims authorised by the Constitution.

It follows that the crucial question to be decided is whether the applicant has been able to show that such interference, under the authority of s 17(a) of the Act, is not reasonably justifiable in a democratic society. See *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine*- 383A; *Retrofit (Pvt) Ltd* v *PTC & Anor* 1995 (2) ZLR 199 (S) at 219F-G.

The immediate obstacle that faces the applicant is to establish that the interference with the rights secured under s 22(1) of the Constitution is disproportionate to the threat to public safety and public order which Kenderjian's presence on Zimbabwean soil poses; for that, as I have said, is the legitimate aim pursued by the State.

In the one pan of the scales is to be placed the public interest in the removal of an individual who, by reason of his past criminal record, is justifiably seen by the authorities as a threat to the safety of persons and property. In the other pan is the certain disruption to the life of the applicant, were she to decide either to accompany her husband to a foreign land where the language and customs are not known to her, or to remain in Zimbabwe, with the child, living apart from him.

I am not persuaded, however, that the balance is tilted in favour of the applicant.

Every country remains the master of its own criminal policy, just as it retains the right to define the severity of sentences. In many, deportation of an alien offender is regarded as a measure of protection for other potential victims, especially where the rate of serious crime is on the increase. Zimbabwe is such a country.

Particular importance attaches in this matter to the fact that when of full age Kenderjian committed the most abhorrent of crimes. In order to rob his defenceless and terrified victim, who was a member of the weaker sex, he brutally strangled her to death. Such an act committed in Zimbabwe almost invariably attracts the death penalty. This is because, as repeated in *S* v *Sibanda* 1992 (2) ZLR 438 (S) at 443G-H:

"... it is the duty of the courts to protect members of the public against this type of offence which has become disturbingly prevalent. People must feel that it is possible for them to enjoy the sanctity of their homes, to attend at their business premises, or to go abroad, without being subjected to unlawful interference and attacks."

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Two years after his release from prison, Kenderjian gained access to this country by false representation. Obviously, he was aware that to declare his conviction would have led to a denial of entry. Since that time he has remained in Zimbabwe in the certain appreciation of being a prohibited person. Subsequently, when asked by the senior immigration officer if he had ever been convicted of any offence, he chose to lie and only acknowledged the crime when

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irrefutable documentary evidence was presented to him.

It is not asserted by the applicant that at the date of the marriage Kenderjian's criminal past was unknown to her. It is fair to assume, therefore, that she was aware of it. Furthermore, at the very least, she must have suspected that he had not disclosed to the immigration authorities his conviction for murder in Lebanon. To that extent, the applicant entered into the marriage conscious of the risk that at some future time Kenderjian's deception could be discovered and action taken to remove him.

I do not doubt that to be uprooted from this country where she has lived for the entirety of her young life, and follow Kenderjian to Lebanon, will cause the applicant difficulty in adapting. She will miss the affection and society of all those close to her. But the marriage is of short duration and certainly Kenderjian's family ties in Lebanon will not have been severed. He and his relations will have to assist the applicant in settling down in a land where living conditions are different and where she will be a stranger to its culture and inhabitants.

The removal of prohibited persons - which one can understand as being considered necessary in a situation as serious as this one - is a prerogative of the State. It is my belief that the restriction upon the use of such prerogative by the rights safeguarded under s 22 of the Constitution, should only be sanctioned in well defined cases. This is not one of them. A contrary decision by this court would set a dangerous precedent in which the existence of a genuine marriage to a citizen of Zimbabwe could be relied upon to place an alien guilty of committing the most serious of crimes beyond the reach of the immigration authorities.

It follows, for the reasons given, that the application must be dismissed with costs.

MCNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners

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RAFTOPOULOS NO *v* MINISTER OF JUSTICE & ANOR 2000 (1) ZLR 702 (HC)

Citation	2000 (1) ZLR 702 (HC)
Case No	Judgment No. HH-128-00
Court	High Court, Harare
Judge	Chidyausiku JP
Heard	June 16, 2000
Judgment	June 20, 2000
Annotations	None

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Civil application

Flynote

Constitutional law - elections - Electoral Supervisory Commission - role of supervising elections - power given to Election Directorate to accredit election observers - role of observers - functions of Commission not usurped by allowing Directorate to accredit observers

Headnote

The applicant, as acting chairwoman of the Electoral Supervisory Commission, brought an action to have ss 15B(2) and 16(4) and (5) of the Election (Amendment) Regulations 2000 declared to be *ultra vires* s 61 of the Constitution. In terms of s 15B(2), the Election Directorate was given the power to accredit foreign observers to the election Under s 16(4) and (5), the Registrar-General and the Election Directorate were given authority over election agents, polling agents, monitors and observers. It was contended that s 15B(2) usurped the Commission's constitutional function under s 61(3) of supervising the conduct of elections and that s 16(4) and (5) allowed the Registrar-General, in effect, to give directions to the Commission, contrary to s 61(6) of the Constitution, which provides that the Commission is subject to the direction or control of no person or authority.

Held, that the role of election observers from outside the country is a passive one and they have no formal role in the election process. It is thus not a usurpation of the constitutional role of the Electoral Supervisory Commission to give the Election Directorate the power to accredit foreign observers.

Held, further, that since observers are not a part of the Commission or an extension of the Commission, s 61(6) has no application to them. The Registrar-General has the function of conducting elections. The challenged provisions were necessary for the election to be conducted in an orderly fashion. They did not impinge on the Commission's right to appoint monitors.

Legislation considered:

Constitution of Zimbabwe 1980, s 61

Election (Amendment) Regulations 2000 (SI 161A of 2000), ss 15B(2), 16(4) & 16(5)

Case Information

A P de Bourbon SC, for the applicant

P Chinamasa, Attorney-General, for the respondents

Judgment

Chidyausiku JP: The applicant in this case is the Electoral Supervisory Commission

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(hereinafter referred to as "the Commission") a creature of s 61 of the Constitution of Zimbabwe. Section 61(1) provides that there should be

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an Electoral Supervisory Commission and sets out the composition of the Commission, which shall not exceed five members, including the chairman. The function of the Commission is set out in s 61 and in particular subs (3) of the Constitution which provides as follows:

"The functions of the Electoral Supervisory Commission shall be -

(a) to supervise the registration of voters and the conduct of elections to Parliament and the office of the President."

The critical words for the purpose of this case, as Mr *de Bourbon* correctly submitted, are "to *supervise* ... *the conduct* of elections to Parliament". The Commission is not, in the exercise of its functions in terms of subsections 3 and 5, to be subject to the direction or control of any person or authority. See s 61(6).

On 7 June, the first respondent caused to be promulgated and published SI 161A of 2000. I shall refer to these as "the Regulations". The regulations extensively amend the principal regulations SI 58 of 1992. It is the applicant's case that certain sections of the regulations are *ultra vires* s 61 of the Zimbabwe Constitution. In particular, the applicant contends that ss 15B(2) and 16(4) and (5) of the regulations are *ultra vires* the Constitution and should be struck out. The offending sections, it is argued, usurp the functions of the Commission to supervise the conduct of the elections. The offending sections, it is averred, make it impossible for the Commission to carry out its constitutional function. In para 13 of the applicant's chairperson's affidavit she avers that the above provisions render the work of the Commission impossible. It reads as follows:

" 13. In conclusion, I simply wish to state that it is and will be *impossible for the Electoral Supervisory Commission to carry out its constitutionally-given responsibilities and obligations if the Regulations are to be left standing as published*, and it would be a breach of trust on my part not to seek relief from this Honourable Court in terms of the Draft Order annexed hereto. I pray for the Order accordingly" (my emphasis).

The offending provisions appear in ss 15B and 16 of the Regulations which provide as follows:

"*Election monitors and observers*

15B.(1) The Electoral Supervisory Commission established in terms of section 61 of the Constitution may appoint persons called 'monitors' to monitor the conduct of polling and the verification of statements of presiding officers and the counting of votes;

Provided that no person shall be appointed in terms of this paragraph who is -

(a) an office or member of any political party contesting the poll being monitored; or

(b) not a citizen of Zimbabwe.

(2) *The Election Directorate may, on the recommendation of the Ministry of Foreign Affairs, accredit in terms of section 16 persons called 'observers' from a foreign country or representing an international organisation*

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to observe the conduct of

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polling and in terms of section 72 of the Act, be present at the counting of votes.

(3) The Electoral Supervisory Commission and the Election Directorate shall forthwith inform the Registrar-General in writing of the names of the monitors appointed in terms of this section or observers accredited in terms of section 16.

Section 16 of the Principal regulations is repealed and the following is substituted -

'*Provided classes of persons for purposes of sections 55 (1))(b) and 71 (2)(a) of Act*

16.(1) The following persons are, subject to this section, prescribed for the purposes of paragraph (b) of subsection (1) of section 55 of the Act and paragraph (a) of subsection (2) of section 72 of the Act as persons who may not be excluded from any polling station and who are entitled to be present at the verification of statements of presiding officers and the counting of votes -

(a) members of the Electoral Supervisory Commission established in terms of section 61 of the Constitution; and

(b) members of the Election Directorate; and

(c) polling agents of each candidate in the election concerned; and

(d) election agents of each candidate, in the case of an election to the office of President; and

(e) monitors.

(2) Observers are, subject to this section, prescribed for the purposes of paragraph (b) of subsection (1) of section 55 of the Act and paragraph (a) of subsection (2) of section 72 of the Act as persons who may not be excluded from any polling station and who are entitled to be present at the counting of votes.

(3) Every election agent, polling agent, monitor and observer shall be bound by the code of conduct prescribed in the Fourth Schedule.

(4) *No election agent, polling agent, monitor or observer shall be permitted to enter any polling station or be present at the verification of statements of presiding officers or at the counting of votes, as the case may be, unless:*

(a) in the case of an election agent, polling agent or monitor, such election agent, polling agent or monitor is accredited before the commencement of the poll by the Registrar-General as an election agent, polling agent or monitor, for which purpose he shall-

  (i) present himself before the Registrar-General or any officer on the Registrar-General's behalf at the time and place notified by the Registrar-General; and

  (ii) satisfy the Registrar-General or any officer on the Registrar-General's behalf that he is aware of the contents of the code of conduct prescribed in the Fourth Schedule; and

  (iii) if so required by the Registrar-General, attend a course on electoral law and procedure, approved or provided by the Registrar-General;

(b) in the case of an observer, such observer is accredited before the commencement of the poll by the Election Directorate as an observer, for which purpose he shall -

  (i) present himself before the Election Directorate at the time and place notified by the Election Directorate

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and

(ii) *be furnished with a copy of, or be made aware of the contents of the code of conduct prescribed in the Fourth Schedule; and*

(iii) *pay an accreditation fee of one hundred United States dollars.*

(5) *Upon satisfaction of the requirements of subsection (4) the Registrar-General or the Election Directorate, as the case may be, shall issue the election agent, polling agent, monitor or observer concerned with an accreditation certificate confirming that the*

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applicable requirements have been satisfied by that election agent, polling agent, monitor or observer.

(6) Every person referred to in subsection (5) shall exhibit his accreditation certificate to any electoral officer who demands to see it" (the italics are mine and represents the objected provisions of the above sections of the regulations.)

As already stated, the applicant objects in particular to ss 15B(2) and 16(4) and (5). Section 15B(2) in effect provides for the appointment of observers from international organizations or foreign countries by the Election Directorate. Section 16(4) provides for certain requirements of monitors and observers among others by the second respondent. The applicant contends that these requirements in as far as they relate to monitors and observers amount to directions to the applicant from the second respondent. Section 16(5) provides for accreditation of certain persons including monitors and observers. The applicant contends that it is its constitutional function to accredit monitors and observers and that function cannot be lawfully assigned to anyone else. Their accreditation by the second respondent is a usurpation of the Commission's function. Thus the issues for determination that emerge on the papers are as follows:

(a) Does s 61 of the Constitution of Zimbabwe confer on the applicant the exclusive right to appoint observers? Put differently, are the regulations' provisions for the appointment and/or accreditation of foreign observers by a body other than the Commission *ultra vires* the provisions of s 61 of the Constitution?

(b) Do the requirements demanded of the monitors and observers by the Registrar-General, as set out in s 16(4) of the regulations, amount to giving directions to the Commission contrary to the provisions of s 61(6) of the Constitution which stipulates that the Commission is not subject to any authority in the exercise of its functions?

(c) Do the Registrar-General and the Election Directorate have legal authority to accredit monitors and observers?"

Is the appointment of foreign observers by Election Directorate prohibited by s 61 of the Constitution?

The function of the Commission is to supervise the registration of voters and the conduct of elections to Parliament. See s 61(3)(a) of the Constitution. The Commission consists, at most, of five people who are entitled to appoint other people to assist it in fulfilling its tasks. In terms of the regulations, they appoint monitors; consequently, monitors are an extension of the

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applicant. This, as I understand the submissions of both counsel, is common cause.

The applicant further argues that observers are also there to assist in the supervision of the conduct of election and must, therefore, be dealt with by

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the applicant. Section 15B(2), it was argued for the applicant, gives a role in the supervision of the conduct of elections to the Election Directorate by conferring on that body the power to accredit observers. The applicant contends that that is not permissible under the Constitution of Zimbabwe. I am not persuaded by this argument for a number of reasons. In my view, the Constitution of Zimbabwe empowers the applicant to superintend or supervise the conduct of those who run the election, such as the Registrar-General and his staff. In my view, the function of the Election Supervisory Commission consists of observing what is happening and, where necessary, correcting or issuing instructions. There is also an element of accountability of those conducting the election to the applicant who has the constitutional function to supervise them. The observer, on the other hand, as the *Attorney-General* correctly submitted, merely watches or observes how the election is being conducted without in anyway being involved. It is a passive role. He does not supervise. He has no authority to issue directions to those conducting the election. He is there to passively watch what is happening during an election for the purpose of making a report to his principal - a foreign government, or an international organisation. An observer is essentially a political creature of a bilateral agreement between the Zimbabwe Government and a foreign government, or an international organization. The applicant is not privy to that agreement. The function of the applicant is legal and is founded on a provision of the Constitution. The function of the observer has no *nexus* with the Constitution. In my view, the function of an observer has nothing to do with the legality or otherwise of the electoral process, but has everything to do with the legitimacy and acceptability of the electoral outcome, primarily by the international community. In my view, the observer, as part of his function, observes how the applicant carries out its function of supervising the election, which is part and parcel of the electoral process the observer is observing. The *Attorney-General* also made the further point that observers are introduced into our legal system by the provisions of a statutory instrument, while the applicant is a creature of the Constitution which makes the applicant part of the country's electoral system. Observers are not part of the electoral system; they are invitees to observe the electoral process of which the applicant is a part. I find nothing in the language of s 61 of the Constitution to suggest that what the observers are doing is what is envisaged under that section and can only be carried out under the auspices of the applicant. I also do not find anything in the language of s 61 of the Constitution which suggests exclusive authority to observe or exclusive authority to control such observation of the conduct of an election by the applicant.

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For the above reason, I have come to the conclusion that the provisions of s 15B(2) are not *ultra*

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vires s 61 of the Constitution of Zimbabwe.

Is the Registrar-General by virtue of s 16(4) of the Regulations giving directions to the Commission contrary to the provisions of s 61(6)?

I turn now to deal with the contention that s 16(4) is *ultra vires*. I have in effect already concluded that observers are not part of the applicant or an extension of the applicant, consequently s 61(6) has no application to them. On this basis, the objection to s 16(4)(b) cannot be sustained.

Section 16(4)(a) provides that a monitor should present himself to the Registrar-General at a time and place notified, satisfy the Registrar-General that he is familiar with the requirements of the code of conduct and, if so required by the Registrar-General, attend a course on electoral law and procedure approved by the Registrar-General.

It is common cause that the responsibility of conducting an election is that of the Registrar-General. It is also common cause that, in pursuance of that, regulations such as those presently under examination are necessary for the election to be conducted in an orderly fashion. Indeed, the applicant accepts the code of conduct. It does not challenge it. In terms of the code of conduct, a monitor shall obey a lawful instruction of an electoral officer, e.g. he can be ordered not to wear apparel indicating any affiliation with a candidate or political party. In my view, this goes to show that a monitor is subject to some control in order to ensure orderly conduct of the election. It logically follows that the prohibition in s 61(5) of the Constitution of Zimbabwe is not absolute. It permits the issuance of directions of an administrative nature to the applicant and its monitors.

In my view, before a person can function as a monitor he needs to present himself to the authority conducting the election - s 16(4)(a)(I). If this is not done, how else will the conductor of elections know who is a monitor? In my view, such a direction is permissible under the Constitution of Zimbabwe.

The applicant accepts the code of conduct. In the light of that, there appears little substance in the objections that the conductor of elections be satisfied that the monitor is familiar with the code of conduct which his principal accepts. This provision appears to me directed at ensuring the smooth running of an election by ensuring everybody knows or is aware of what is permissible and what is not. This requirement does not impinge on the Commission's right to appoint a monitor. The requirement set out in s 16(a)(ii) is, therefore, purely administrative and permissible under the Constitution of Zimbabwe.

The requirement in s 16(a)(iii) is closely linked to the previous requirements.

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Where the Registrar-General is satisfied that the monitor who has presented himself to him in terms of the above requirement is ignorant of the provisions of the electoral law or the code of conduct, this provision authorises the Registrar-General to require the monitor to attend - not to *pass* - a course in electoral law and procedure. If this were directed at commissioners, the

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cause for offence would be immediately apparent. The requirement is in respect of monitors. The court has no idea of the criteria used in the selection and appointment of monitors. In my view, this provision is an administrative measure intended at ensuring that monitors have the requisite knowledge to properly discharge their obligation.

In the result, I am satisfied that s 16(4) is not *ultra vires* the Constitution.

Who should accredit monitors and observers?

Finally, the applicant seeks to have s 16(5) struck out because it gives the Registrar-General the power to accredit monitors and observers. As I have already said, it is common cause that the Registrar-General is vested with the authority to conduct the election. In terms of these regulations, monitors are appointed by the applicant. In the light of that, an accreditation process would simply involve the issuance of identification papers. In my view, the authority to conduct elections includes authority to issue identification papers to monitors.

In the result, my conclusion is that s 15B(2) and s 16(4) and (5) of the Electoral (Amendment) Regulations 2000 are not *ultra vires* s 61 of the Constitution. Paragraph 1 of the draft order is merely asking the court to restate the provisions of s 61 of the Constitution. One does not need a court order for that. All that is needed is for one to read the relevant provision. Paragraph 1 was never disputed by the respondent. An order in terms of para 1 of the draft order on its own does not make sense to me. What is at issue is the relief sought in para 2. The applicant has been unsuccessful in that regard.

There is the final issue of costs. The applicant sought no costs in this matter, on the basis that this case involved one department of Government suing another department of Government. The *Attorney-General,* on the other hand has argued that this is not a straightforward case of one arm of Government suing another arm of Government. It was, he argued, a case of one arm of Government being financed by donors and a named foreign Government to sue another arm of Government. In the light of that, the applicant was fair game for an award of costs against it in the event of the application being unsuccessful. I find this argument cogent, yet the courts should not be seen to be discouraging litigants from coming forward in

matters with an element of national interest. In spite of the *Attorney-General*'s powerful submission on costs, I am inclined to make no order as to costs, because of the nature of the litigation.

In the result, the application is dismissed, but there will be no order as to costs.

Kantor & Immerman, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners

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MTUDA *v* NDUDZO 2000 (1) ZLR 710 (HC)

Citation	2000 (1) ZLR 710 (HC)
Case No	Judgment No. HH-103-00
Court	High Court, Harare
Judge	Garwe J
Heard	December 13, 1999; December 14, 1999; February 21, 2000
Judgment	June 23, 2000
Annotations	None

Civil trial

Flynote

Customary law - application - husband and wife - unregistered customary law marriage - wife's entitlement to division of estate - no such entitlement under customary law - whether customary law should apply - justice of the case demanding that general law should apply

Family law - husband and wife - divorce - division of property following divorce - unregistered customary law marriage - basis on which wife can claim more than customary law entitlement

Partnership - tacit universal partnership - what must be shown to establish such a partnership - marriage - whether tacit universal partnership established thereby

Headnote

The plaintiff was married to the defendant according to customary law. They lived as man and wife for 15 years. Three children were born of the union. The union was dissolved according customary law practice. The plaintiff claimed a half share of the matrimonial home, the movables and the family car, on the basis of a tacit universal partnership having arisen from the fact that they shared a common household as man and wife and shared their assets, income and labour for their joint benefit and that of their children.

Held, that the requisites of a tacit universal partnership are: (1) each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill; (2) the business to be carried out should be for the joint benefit of the parties; (3) the object of the business should be to make a profit; and (4) the agreement should be a legitimate one. In addition, the intention of the parties to operate a partnership is also an important consideration. An ordinary marriage does not in itself found a tacit universal partnership. This does not mean that a wife seeking a division of property after divorce is not entitled to make a claim, provided she bases her claim on a suitable cause of action. Where a cause of action is established, the court is entitled to assess the extent of the wife's contribution and make an order accordingly.

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Held, further, that customary law applies in civil cases where, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. It does not apply if the justice of the case otherwise requires. Where the application of customary law would bring injustice, the general law will apply. In this case, the parties

had been married under an unregistered customary law union. They had lived together for 15 years. Under customary law, the plaintiff would have been entitled only to her *mawoko* property. In the circumstances, this would have been unjust. The court had a discretion to apply the general law, under which she was entitled to make a claim based on her contributions to the marriage on the basis of unjust enrichment.

Cases Considered

Cases cited:

Chiromo v *Katsidzira* 1981 ZLR 418 (A)

Collen v *Rietfontein Eng Works* 1948 (1) SA 413 (A)

Jengwa v *Jengwa* 1999 (2) ZLR 121 (H)

Mashingaidze v *Mashingaidz* 1995 (1) ZLR 219 (H)

Mashingaidze v *Mugomba* HH-3-99

Matibiri v *Kumire* 2000 (1) ZLR 492 (H)

Middleton v *Carr* 1949 (2) SA 374 (A)

Muhlmann v *Muhlmann* 1981 (4) SA 632 (W)

Pasipanodya v *Muchoriwa* 1997 (2) ZLR 182 (S)

Vos v *Cronje & Duminy* 1947 (4) SA 873 (C)

Zimnat Ins Co v *Chawanda* 1990 (2) ZLR 143 (S)

Legislation considered:

Customary Law & Local Courts Act [*Chapter 7:05*], s 3

Case Information

J B Colegrave, for the plaintiff

G Chikumbirike, for the defendant

Judgment

Garwe J: In this action, the plaintiff seeks the following order that:

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(a) the Deputy Sheriff be ordered to sell the immovable property, being stand No. 3083 Mabelreign Township, also known as 11 Trafalgar Avenue, Sentosa, Harare to best advantage within six months of the date of judgment and thereafter to divide the nett proceeds from the sale equally between the parties;

(b) the movables set out in the schedule to the declaration be sold to best advantage within one month of the date of judgment and the proceeds therefrom divided equally between the parties, alternatively, that the defendant retain the movables and pays the plaintiff the sum of $40 000 together with interest thereon at the prescribed rate from 1 May 1995 to the date of payment;

(c) the defendant render a full account of the sale of the 1987 Nissan sedan motor vehicle sold in 1997, debate thereof and payment to the plaintiff of half the sum upon debatement of the account;

(d) the defendant render a full account of all rentals received by him in respect of the said immovable property since January 1993, debate thereof and payment to the plaintiff of half the sum upon debatement of the account; and

(e) the defendant pays the costs of suit.

GARWE J

The facts of the case are these. The two parties started seeing each other in 1979. In 1980, they started living together as husband and wife after the defendant had paid *lobola* to the plaintiff's parents. The marriage was, however, never solemnised. Three children were born of the marriage. The parties initially stayed in Marondera but in 1980 moved to a house in Chitungwiza. That property was subsequently sold and the proceeds used to purchase the property known as 11 Trafalgar Avenue, Sentosa, Harare. Various movable assets were acquired by the parties during the subsistence of their union which finally terminated in May 1995 when the defendant gave the plaintiff a rejection token or *gupuro*.

The plaintiff's claim is that the property purchased at Sentosa, though registered in the defendant's name, was purchased by both parties as a consequence of which they became joint owners in equal shares. Alternatively, the plaintiff claims that the parties were equal partners in a tacit universal partnership and that part of the partnership property consisted of the immovable property in question. The plaintiff says the universal partnership arose from the fact that the parties shared a common household as man and wife and further shared their assets, income, and labour for their joint benefit and that of their children.

The defendant denies that the parties entered into a tacit universal partnership or that the Sentosa property was purchased by the parties jointly.

[*His Lordship then considered the evidence given by the parties, and continued:*]

On the facts, there can be no doubt that the parties were married according to customary law. They lived as man and wife and three children were born of the union. The parties intended to

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raise a family and to live as a family. They in fact lived as such. There can be no doubt that they must have shared assets. The defendant's claim that the plaintiff did nothing for the duration of the union cannot be believed. She was employed in various capacities during the subsistence of the union. She must have used her income to buy food for the family, clothes for the children, utensils and the like. There is evidence she had a carpet fitted in the Sentosa property. It is common cause her salary was paid into the defendant's account for some time. There is evidence the union went through turbulent periods but the parties would end up reconciling.

On the acquisition of the Sentosa property, it is clear the deposit came from the proceeds of the sale of the Chitungwiza property. The Chitungwiza property belonged to the defendant. Although at one stage the plaintiff gave the impression she contributed to the acquisition of the Chitungwiza

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property, it is clear the property was acquired by the defendant on his own and before the two met. The balance of the purchase price on the Sentosa property was provided by the defendant's employer. The loan repayments were effected by stop order on his salary. He also met the rates and other supplementary charges. There can be no doubt from these facts that the Sentosa property was, in the main, acquired through the contribution of the defendant.

It is common cause that the plaintiff herself bought a council property in 1994 on a lease to buy basis. The purchase price was $149 065. However, because the debt has not been serviced for some time, arrears of $219 736.87 have accumulated and the total amount due to council is almost $368 000 as of November 1999. The Kuwadzana property was purchased during the subsistence of the union but shortly before the termination of the union. It is common cause the defendant was not involved in the purchase of that property, nor did he contribute to its upkeep.

The plaintiff's claim in this case is that the Sentosa property and movable assets were jointly purchased and that therefore the parties are joint owners in equal shares. The plaintiff admits in para 4 of her closing submissions that it was the defendant who paid the deposit and met the monthly repayments. In her closing address, she says she does not rely on direct contribution towards the purchase of the house but on indirect contribution. It is common cause, it was she who had a carpet fitted, although the defendant claims, without producing documentary evidence, that he eventually paid the balance of the purchase price.

The issue that arises at this stage is which law to apply, given the provisions of s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] which provides, *inter alia*, that customary law shall apply in civil cases where, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. In terms of that section, customary law shall apply "unless the justice of the case otherwise requires". In general terms, therefore, I must accept that the law to apply in the distribution of property in an unregistered customary union would be customary law. Indeed, there is authority for the proposition that where parties are married in terms of customary law, their rights and obligations are governed by customary law as modified by statute from time to time. See *Pasipanodya* v *Muchoriwa* 1997 ZLR (2) 182 at 184. The plaintiff's claim in this case is based on the fact of the

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two parties having been married according to customary law. What she is claiming, in fact, is a share in the matrimonial assets acquired by both her and the defendant during the subsistence of the union. She is not simply claiming *mawoko* property in the traditional sense. She wants a fair share of the property acquired by both. In

this regard, I would agree with Chatikobo J's remarks in *Matibiri* v *Kumire* HH-80-2000*(83) that such a claim:

"is not cognisable at customary law because upon dissolution of an unregistered customary law union, the property acquired by the parties during the union becomes the property of the husband unless it can be classified as *umai* or *mawoko* property ..."

See also the comments by Gillespie J in *Jengwa* v *Jengwa* 1999 (2) ZLR 121 (H) at 128D.

The plaintiff's cause of action is premised on two main bases. The first is that she jointly purchased the immovable and movable property with the defendant, whereupon she became a joint owner in equal shares and she now seeks termination of such joint ownership. The second is that at all relevant times the parties were equal partners in a tacit universal partnership. There is what appears to be a third, namely, that it is just and equitable, on the basis of the parties' joint ownership of the movable and immovable property and their universal partnership, that such ownership or partnership be terminated and the property sold so that she gets half of the net proceeds from the sale of the property. Indeed, one of the issues identified by the defendant and accepted during the pre-trial conference was the extent to which the parties contributed towards the financial upkeep of the family, including the purchase of the immovable and movable property.

As already noted, the issue that arises is whether the plaintiff has any cause of action given the provisions of s 3 of the Customary Law & Local Courts Act.

There can be no doubt that the concept of joint ownership of immovable property is a concept unknown to customary law. Tacit universal partnership is a general law concept which is unknown to customary law. So too is the equitable distribution of property acquired during an unregistered customary union.

There has been legislative - even judicial - hesitance to clarify the legal status of claims arising out of such unions. Decisions emanating from this court and the Supreme Court have not made the situation any clearer. As Chatikobo J noted in *Matibiri* v *Kumire supra* different judges have, sadly, approached the matter in different ways. My approach in this case will no doubt add to the confusion. What is clear, however, is that most judges in this jurisdiction are agreed that justice needs to be achieved in these cases and that, in the absence of clear legislative provisions, this might be achieved by judicial innovation. Dealing with the interpretation of s 3 of the Customary Law and Local Courts Act, Chatikobo J remarked in *Matibiri* v *Kumire supra* at p 9**(84) -

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" ... the section provides that customary law shall apply to the specific areas 'unless the justice of the case otherwise requires'. In my view, the truly logical construction to place on the phrase 'unless the justice of the case otherwise requires' is that if the application of customary law does not conduce to the attainment of justice then the common law should apply."

CHATIKOBO J came to the conclusion that it has always been permissible in terms of the law, to apply common law principles where customary law was inapplicable. At p 13 of the cyclostyled judgment he further remarked:

"Faced with such an unsatisfactory situation and bearing in mind the injustice which would flow from the failure to provide a remedy, the court must do its best to adapt the unsatisfactory and undeveloped concepts of customary law to the changed social and economic circumstances of an African woman who finds herself in a customary law union which disentitles her to a share in the 'matrimonial property' even though for all intents and purposes she was a wife in every respect except the non-solemnization of the union. The remedy could only be found by adopting a reforming exercise in which the court embarks on a rule creating function so as to provide a remedy where none previously existed ..." *(85)

The need for the law to be dynamic and to accommodate change has been stressed in *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 153E-154F. The position is now settled that courts have the latitude in appropriate cases to make law.

Given the overall circumstances of this case, I am satisfied that the general law should apply, as it is clear that customary law does not apply to the dispute between the two parties. In terms of s 3 of the Act, if customary law were to apply, then it would not be possible to extend any relief to a woman in the plaintiff's position beyond her traditional entitlements. The justice of this case requires that the matter be dealt with otherwise than in accordance with customary law.

The main basis of the plaintiff's claim is that the property was jointly purchased and that the parties became joint owners in equal shares. In the light of the evidence led during the trial, I reach the conclusion that the plaintiff has not established that she is a joint owner of the property claimed and in particular the immovable property. On her own admission, she relies on indirect contributions made during the subsistence of the union. The evidence clearly established that the Chitungwiza property belonged to the defendant. Although he says it was inherited property, no corroborative evidence to that effect was led. That property was sold and the proceeds used to pay the deposit for the Sentosa property. The balance of the purchase price of $18 000 was provided by the defendant's employers by way of a loan which was recovered by stop order on the defendant's salary. The rates for

the property were met by the defendant. Save for a carpet which was fitted at the Sentosa property and for which the plaintiff paid $7 286.88 in March 1990, all the other expenses directly related to the purchase and maintenance of the house were borne by the defendant. The union terminated in 1995 and since then the plaintiff has continued to meet the expenses. He has produced receipts which show that screens were fitted to the property on 27 May 1999 for $15 000. In these circumstances, the plaintiff's claim that she purchased the Sentosa property jointly with the defendant cannot be accepted. She certainly contributed but she did not

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jointly purchase the property. That being the position, she cannot be said to have been a joint owner in equal shares of the immovable property. It becomes unnecessary to consider whether her claim in this regard should more properly have been one for a declarator as suggested by counsel for the defendant. See *Chiromo* v *Katsidzira* 1981 ZLR 418 at 420F-G. The plaintiff's claim on this basis must therefore fail.

The second basis of the plaintiff's claim was that a tacit universal partnership had come into existence and that the "matrimonial property" formed part of that partnership. I must say that, whilst the law on universal partnerships is clear, its application by the courts in this country in cases such as this one has been far from being uniform or satisfactory. In *Mashingaidze* v *Mugomba* HH-3-99, GWAUNZA J held that the facts of the case, which are somewhat analogous to those in the present case, justified a conclusion that a tacit universal partnership existed. No doubt the learned judge reached this decision because she felt that that was the only legal régime available in order to do justice to the parties. Whilst such judicial activism must be commended, I do not, with respect, agree that in these circumstances a universal partnership is established.

What amounts to a tacit universal partnership has been considered in several decisions of the courts in this country and in South Africa. The four requisites for a partnership may be summarised as follows:

(a) each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill;

(b) the business to be carried out should be for the joint benefit of the parties;

(c) the object of the business should be to make a profit; and

(d) the agreement should be a legitimate one.

In addition, the intention of the parties to operate a partnership is also an important consideration. See *Muhlmann* v *Muhlmann* 1981 (4) SA 632 at 634; *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219.

What is clear from the facts of this case is that this was an ordinary marriage relationship. The parties were not involved in a commercial activity for purposes of profit. Even if the plaintiff's claims were accepted in full, the

services rendered by her did not go beyond those ordinarily expected of a wife in her situation. In this situation, there can be no question of a tacit universal partnership. As remarked by Gillespie J in *Jengwa* v *Jengwa supra*, if a fair result can be reached by judicial innovation, this should be done without distorting existing legal concepts. It would not be a sufficient basis for such a finding that it is the only régime available in order to do justice to a wife in these circumstances. The plaintiff's claim, based as it is in the alternative on a tacit universal partnership, must also fail.

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In her declaration, the plaintiff seeks relief on the basis that it would be fair and equitable, taking into account the joint ownership and universal partnership that she gets half of the value of the property. What she is, in fact, saying is that she has contributed to the property and she seeks an equitable distribution of that property so that she gets what is rightfully hers.

I agree with the defendant's submissions that s 7 of the Matrimonial Causes Act [*Chapter 5:03*] does not apply in unregistered marriages and that to use the criteria laid down in the Act in distributing property in a case such as this one would be wrong. Notwithstanding the fact that s 7 of the Matrimonial Causes Act applies only in cases where the marriage has been solemnised, various decisions of this court have recognised the need for the woman to be afforded protection at the time of dissolution of a customary union. A woman who is married according to customary law is now entitled to inherit from a deceased husband's estate. Yet the same woman faces an uphill struggle to get a share of the matrimonial property in the event that her customary marriage is terminated. I certainly agree with the remarks by Gwaunza J in *Mashingaidze* v *Mugomba supra* that an unregistered customary law union:

"should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during its subsistence" (at p 21).

The cumulative effect of the various judgments emanating from this court is that a wife in an unregistered customary union who is disentitled to a share in the matrimonial property on dissolution should be afforded protection, taking into account relevant considerations such as her level of contribution, duration of the union, etc. To do otherwise, would be to promote an injustice that has been occasioned by traditionally accepted notions of the gender roles of a husband and wife.

What flows from all this is that, for a court to come to the assistance of a plaintiff who finds herself in these circumstances, she must base her claim on a suitable cause of action. There are various causes of action at the disposal of a plaintiff. The claim could be for a declarator that she has joint ownership. It could be on the basis that the parties were partners in a tacit universal partnership. It could also be on the basis of unjust enrichment. In *Jengwa* v *Jengwa supra*, GILLESPIE J found that an action founded on unjust enrichment

would be sustainable if the facts of the case established such enrichment. He approached the matter this way. If a wife has contributed, either through financial contributions or by suppressing her income-earning capacity in favour of home-making and relieving her husband to accumulate capital, she incurs personal impoverishment in favour of communal enrichment. She risks future impoverishment in the event of divorce. Therefore, where she has made a contribution that impoverishes her and will leave the husband enriched at her expense, an action for unjust enrichment should be extended to her. I agree that in a proper case a wife in a customary law union can base her cause of action on unjust enrichment. As in all other cases, however, the plaintiff must properly establish her cause of action. The plaintiff in this case has raised the issue of the extent of her contribution and whether it is just and equitable that she get a half share in the property. Indeed, during the course of the trial both parties gave evidence on

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the extent of the contribution made by each. This issue was identified at the pre-trial conference as one of the issues for determination at the trial. Indeed, the defendant, in his closing address, understood the plaintiff's claim in part to be based on equity.

The facts found proved have already been commented upon. There can be no doubt that the plaintiff has been impoverished and the defendant enriched at the expense of the plaintiff. The parties were married for fifteen years. The defendant provided the deposit for the house and met the repayments. He also paid the rates. Both he and the plaintiff were gainfully employed during that period. The plaintiff played the usual role of wife. She looked after the household and the family. Until 1991, the children were on her medical aid. She bought food for the family. She purchased items of cutlery and other household items. The defendant, on the other hand, met the school fees, using an employment benefit at his disposal. Although there is evidence the plaintiff did have difficulties in servicing some of her liabilities, it is clear most of the liabilities were not for herself personally but for the family. Evidence was given that she undertook trips to South Africa to buy items for resale in order to augment their income. These ventures were, however, not always successful. Although the parties would separate for a few months at a time there is no doubt their union subsisted for fifteen years. Whilst it is true that the plaintiff herself eventually acquired rights in an immovable property in Kuwadzana, it is clear this was a year before the parties finally broke up. No deposit was paid for that property and from the documentary evidence available the plaintiff has not been meeting her obligations to the city council. At present, she owes approximately $369 000 to the council. It must be accepted that for fifteen years she made a contribution to the union. She had the house fully carpeted. She used her income to meet the living expenses of the family. Her income was not used for her personal gain or to acquire

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property in which she solely had an interest. Clearly, she has contributed during the subsistence of the union.

Although there is no specific claim in the plaintiff's declaration for payment of the sum representing her contribution during the subsistence of the union, this was identified during the pre-trial conference as one of the issues for determination at the trial. The extent to which the plaintiff, and the defendant for that matter, contributed was fully canvassed during the trial. In these circumstances, it is permissible for a court to determine such an issue. In *Vos* v *Cronje & Duminy* 1947 (4) SA 873 (C) at 879, Newton-Thompson J remarked:

"That the court is not bound by the strict pleadings when the parties themselves have enlarged the issues is beyond argument. (*Stills* v *Milner* 1937 AD at p 105).

In *Robinson* v *Randfontein Estates GM Co Ltd* 1925 AD at p 198) it was said:

> 'The object of pleadings is to define the issues; and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within these limits the court has wide discretion.'

It seems to me in this case there was a full inquiry, with the result that the court was placed in possession of all the facts which would have enabled it to make an award of damages if such had been asked for ..."

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These sentiments have been approved in various other decision since then. Even where no amendments have been applied for, both trial courts and courts of appeal have, in appropriate cases, adjudicated on issues not raised on the pleadings but fully canvassed at the trial. In *Collen* v *Rietfontein Engineering Works* 1948 (1) SA 413 (A) CENTLIVRES JA remarked:

"This court, therefore, has before it all the materials on which it is able to form an opinion and, this being the position, it would be idle for it not to determine the real issue which emerged during the course of the trial."

In *Middleton* v *Carr* 1949 (2) SA 374 (A), Schreiner JA made the same remarks. He stated:

"Where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court. Generally speaking, the issues in civil cases should be raised on the pleadings and if an issue which does not appear from the pleadings in their original form an appropriate amendment should be sought" (at pp 385-6).

There can be no doubt, therefore, that in this case this court can determine the extent of the plaintiff's contribution during the subsistence of the union. In other words, judgment can be given in an amount which represents the extent of the contribution by the plaintiff during the subsistence of the union.

The assessment of the contribution made by plaintiff involves the making of a value judgment. The defendant has suggested 15% of the value of the

house (i.e. $800 000) to enable plaintiff to get accommodation for herself and the children, which would translate to $120 000. I am satisfied that her contribution was more than $120 000. It is true that the defendant contributed more on the house than did the plaintiff. Taking into account the roles played by each, and taking into account the declining value of money, I am of the view that her contribution in terms of money and labour cannot be less than $200 000. I say this because, not only did the plaintiff carpet the house, but she also at some stage had her money paid into the defendant's account for use by the family. She bought groceries and clothes for the family. The children were on her medical aid. She looked after the children and the defendant himself. Up until 1995, she applied her earnings for the benefit of the family and not herself personally.

On the movables, the plaintiff in her heads has suggested that this be left to the parties. I agree that this is perhaps the most appropriate way of resolving the matter. There is a dispute as to who acquired what. The identity of the property still in existence is in dispute. Some was reportedly stolen in a burglary. All the property is second hand and placing any realistic value on it is well nigh impossible. In any event the plaintiff's claim in respect of the movables is prescribed as the claim was only made in April 1999. The same also applies to the motor vehicle. The plaintiff bought and sold motor vehicles during the existence of the union. She has not been asked to account for the proceeds. The defendant bought a vehicle using a loan scheme made available by his employer. I see no basis upon which defendant could be asked to pay a portion of the proceeds of the sale of the Nissan to the plaintiff. In any event, the

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evidence before me is that the defendant made a negligible profit of $357 on the vehicle.

On the claim for a half share of the rentals, the plaintiff, not being a joint owner of the Sentosa property, is not entitled to such an order. The claim is in any event prescribed.

On costs, it is noted that the plaintiff instituted this action *in forma pauperis*. There is, of course, no principle that prevents costs being awarded to a defendant by an unsuccessful pauper plaintiff. There are authorities for the proposition that a pauper is not liable unless the court so orders. The refusal by courts to make an order of costs against a pauper plaintiff is, however, merely a rule of practice and not of right. See Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed p 1172. In this case, the defendant has submitted that the late filing of the amended declaration by the plaintiff necessitated a postponement to enable a plea to be filed and that for this reason some costs should be awarded against the plaintiff.

The summons in this case was filed in November 1995. The pleadings were

subsequently closed and the matter was set down for a pre-trial conference, but this did not materialise. The plaintiff then filed an amended declaration on 1 April 1999. On 17 June 1999, the defendant filed a notice of intention to oppose the amendment. When the matter eventually came up for a pre-trial conference on 14 July 1999, the issue of the amendment was not determined. Instead, the presiding judge directed that the issue be determined at the trial. The application for amendment was then heard by me on 18 November 1999. Both parties were asked to address the court but Mr *Chikumbirike* was in default on the date and time agreed upon. In the result, I granted the application to amend. The defendant's plea was then filed in November 1999 and the plaintiff replicated on 3 December 1999. To some extent, the history of this matter explains why the issues as identified during the pre-trial conference do not completely reflect the issues arising out of the amended pleadings - an issue highlighted by the defendant in the first paragraph of his closing address.

The amended declaration was filed at the eleventh hour. The decision made at the conclusion of the pre-trial conference that the application for amendment be determined on the trial date created a problem as the defendant could not have been expected to file his plea to the amended declaration before a decision granting the application had been made. The position must be accepted that the plaintiff was at fault for bringing the amendment at the last moment. The issue of costs was not determined at the time the application was allowed. It is only fair that the plaintiff be made to bear the costs of that application, as well as the costs incurred by the defendant as a consequence of that amendment.

The plaintiff has otherwise been successful and costs must, subject to what I have said above, follow the event.

It is accordingly ordered as follows that:

1. the defendant is to pay to the plaintiff the sum of $200 000 together with interest thereon at

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the prescribed rate from today's date;

2. the plaintiff is to pay the costs of the application to amend the declaration. For the avoidance of doubt, these are to include the costs of the application itself including the hearing, filing of the amended plea and replication;

3. the defendant is to pay the costs of this action.

Kantor & Immerman, plaintiff's legal practitioners

Chikumbirike & Associates, defendant's legal practitioners

TURNER *v* HEALTH PROFESSIONS COUNCIL 2000 (1) ZLR 722 (HC)

Citation	2000 (1) ZLR 722 (HC)
Case No	Judgment No. HH-134-00
Court	High Court, Harare
Judge	Blackie J and Ziyambi J
Heard	October 12, 1999
Judgment	June 28, 2000
Annotations	None

Civil appeal

Flynote

Medical practitioner - discipline - improper or disgraceful conduct - what constitutes - administration of drugs contrary to normal method - whether constitutes improper or disgraceful conduct - clinical trials - what are

Headnote

The appellant, a medical practitioner, was charged before the Health Professions Council on two charges of improper or disgraceful conduct. The Council convicted him on both charges and directed that his name be removed from the register. He appealed to the High Court against the convictions and penalty imposed.

The first charge was that he had treated a number of patients by injecting them intravenously with a drug which was licensed only for external application. Some of the patients treated in this way were suffering from tuberculosis and it was found that, in using the unconventional medicine to treat them, he had withheld from or delayed administering to them the conventional

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treatment for that disease and had therefore partially caused or contributed to their deaths.

The second charge was that he had continued to treat patients by injecting them intravenously with a drug licensed only for external application after being advised by the Medical Research Council to discontinue the treatment and being required by the Drugs Control Council to stop conducting clinical trials with this drug.

Held, that the Medical, Dental and Allied Professions Act [*Chapter 27:08*] does not define "improper or disgraceful conduct". The Disciplinary Committee of the Health Professions Council must therefore exercise its discretion in determining whether or not the conduct in question amounts to "improper or disgraceful conduct". This discretion is, however, not unlimited. There are rules that must be applied in this regard. Firstly, unless there are good and specialised reasons for not doing so, which reasons must be set out, the words can only be applied to conduct which falls within the ordinary and normal meaning of the words "improper or disgraceful conduct". Secondly, the determining body must know, express and apply the meaning to be given to these words. Thirdly, the conduct complained of must be something more than a mere mistake or lapse; it must be conduct that no medical practitioner would adopt. Fourthly, the determination must be reasoned and reasonable and the reasons why the conduct is condemned must be clearly set out.

Held, further, that in respect of both charges the basis for the finding that the conduct constituted "improper or disgraceful conduct" had not been set out.

As regards the first charge:

Held, that the allegation that the appellant had caused or contributed to the deaths of the

tuberculosis patients must be disregarded as this allegation had not formed part of the charges against him and he had no proper opportunity of meeting this allegation. In any event, the evidence led did not establish that the withholding or delay in administering the conventional treatment had caused or contributed to the deaths of these patients.

Held, further, that while it is *prima facie* wrong to use a substance, tested and licensed for topical use only in a parental application, the determination as to whether such use is necessarily wrong and, more importantly, whether it constitutes "improper or disgraceful conduct", must depend on the substance used, the circumstances in which and for which it was used, on whom it was used and the effects of that use. In the circumstances, the appellant's use of the drug did not constitute "improper or disgraceful conduct". In the past the drug had been administered internally for certain purposes. The medical literature showed that the drug had a beneficial effect on the AIDS virus. The patients, who were all terminally ill, had consented to the use of the drug. None had died from the use of the drug, and there had been beneficial results in most cases. While the appellant's conduct may have been wrong in his ignorance of, or casualness towards, the bureaucratic requirements for experimental work of this nature, it did not constitute "improper or disgraceful conduct".

As regards the second charge:

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Held, that the facts did not establish that the appellant had carried out a "clinical trial" in contravention of the Drugs and Allied Substances Act [*Chapter 15:03*]. The treatments administered were not a "systematic study" as required by the Act to constitute a clinical trial. They were simply therapeutic treatment for patients in a critical condition. Nor did they comply with the generally accepted procedures and steps for a clinical trial. Whilst there were obvious dangers attaching to uncontrolled personal experimentation by doctors, if such conduct is to be regulated the legislation would have to be amended so as to encompass such conduct.

Legislation considered:

Drugs and Allied Substances Act [*Chapter 15:03*], s 16

Medical, Dental and Allied Professions Act [*Chapter 27:08*], s 60

Case Information

A P de Bourbon SC, for the appellant

A Matika, for the respondent

Judgment

Blackie J: The respondent (the Council) is the body invested by the Medical, Dental and Allied Professions Act [*Chapter 27:08*] (the Act), with, *inter alia*, the authority to register persons to practise medicine in Zimbabwe, to discipline such persons and, in appropriate circumstances, to cancel the registration of any person so registered.

The appellant (Dr Turner) was a duly registered medical practitioner in terms of the Act. In 1993, the Council, on the recommendation of its Disciplinary Committee (the Disciplinary Committee), following an inquiry by that committee, in terms of s 55 of the Act, into two charges of "improper or disgraceful conduct" against Dr Turner in which Dr Turner had been found guilty of such conduct on both charges, directed that the registration of Dr Turner as a medical practitioner be cancelled.

Dr Turner appeals to this court, in terms of s 60 of the Act, against both the

decision of the Committee to find him guilty of "improper or disgraceful conduct" and the decision of the Council that his registration as a practitioner should be canceled.

The two charges against Dr Turner were that, firstly, between '25 November 1991 and 1 December 1993, he treated fourteen patients by injecting them intravenously with povidone iodine, a preparation for topical application, two of the patients were HIV positive, one was a tuberculous patient, one a diabetic patient, and the others were cancer patients); and, secondly, that, despite having been advised by the Medical Research Council of Zimbabwe, on 30 March and 14 May 1993, to discontinue treatment involving the administration of povodine iodine by intravenous injection, and being required, on 29 July 1993, by the Drugs Control

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Council to stop conducting clinical trials with povidone iodine (such trials being in contravention of s 15A [now s 16] of the Drugs and Allied Substances Control Act [*Chapter 15:03*]), he "nevertheless thereafter treated A Finaughty with povidone iodine intravenously on 5 April 1993 and 19 May and similarly treated C Matizmambuka with daily intravenous injections of povodone iodine from 24 November 1993 till 1 December 1993".

In convicting Dr Turner in respect of the first charge against him, the Committee found that, povodine iodine was a preparation licensed exclusively for topical (that is, external) application and that it was improper conduct on the part of Dr Turner to use it parentally (that is, to inject it intravenously or intramuscularly). It also found that in withholding the accepted treatments for tuberculoses from his tuberculosis patients while using povodine iodine parentally on those patients, Dr Turner was partially responsible for the death of such patients.

In convicting Dr Turner of the second charge, the Committee found that Dr Turner was conducting clinical trials into the use of povodine iodine in contravention of s 16 of the Drugs and Allied Substances Control Act (the Drugs Act) and that that also constituted "improper or disgraceful conduct" on his part.

The finding by the Disciplinary Committee that part of the improper conduct in respect of the first charge consisted in Dr Turner, while using povodine iodine parentally on his patients who were suffering from tuberculosis, withheld from or delayed administering to them the conventional treatment for that disease and had therefore partially caused or contributed to their deaths, cannot be a factor in this appeal and cannot be sustained on the evidence. In making that determination, the Disciplinary Committee fell into serious error. Dr Turner was not charged with this conduct as an offence and that allegation did not form part of the charges against him. Nor was it supplied to Dr Turner as a particular to either of the charges. Dr Turner was,

therefore, not properly advised of the nature of this charge against him and had no proper opportunity of meeting that allegation and of being heard in respect of it. This allegation against Dr Turner must therefore be disregarded in determining this appeal. Moreover, and in any event, the evidence before the Disciplinary Committee does not establish that either the withholding of such treatment or any delay in its administration caused or contributed to the death of the patients concerned. All these patients were said to be terminally ill. One survived for many years after being treated by Dr Turner. For the remainder, the facts of the case do not establish that the withholding or delay of such treatment either caused or contributed to their deaths. At best it can be said that Dr Turner possibly did not delay the deaths of these patients by administering the conventional treatment for their disease.

The appeal against the first charge is, therefore, concerned solely with whether it was "improper or disgraceful conduct" by Dr Turner to administer povodine iodine parentally to his patients.

The essential facts in the appeal are not in dispute. It is common cause that povodine iodine is a preparation licensed exclusively for topical application and that Dr Turner (a) treated the fourteen patients named in the first charge by administering povodine iodine to them parentally;

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and (b) treated the patients Finaughty and Matizambuka by administering povodine iodine to them parentally after he had received, firstly, the advice from the Medical Research Council and, secondly, the instruction from the Drugs Control Council which is set out in the charge.

What is in dispute in this appeal is, firstly, whether it was "improper or disgraceful conduct" on the part of Dr Turner *per se*, or in the circumstances of this case, to use povodine iodine parentally and, in particular, to so use it after he had been advised and then directed to stop using it in that way by the two Councils and, secondly, whether he was conducting a clinical trial into the parental use of povodine iodine in contravention of s 16 of the Drugs Act.

The Act does not define "improper or disgraceful conduct". The determination as to what is or is not "improper and disgraceful conduct" is left to the discretion and decision of the Disciplinary Committee and the Council. However, the discretion granted to the Disciplinary Committee and the Council in this regard is not unlimited. There are limits to what may be called "improper or disgraceful conduct". There are rules that must be applied in reaching a determination as to what is such conduct. Firstly, unless there are good and specialised reasons for not doing so, which reasons must be set out, the words must be used in their ordinary and normal meaning and can only be applied to conduct which falls within that meaning. Secondly, the determining body must know, express and apply the meaning to be given to the words "improper and disgraceful". Thirdly, the nature, meaning and

conjunction of the words "improper or disgraceful" indicates that the conduct complained of must be something much more than a mistake or lapse. It must be conduct that no medical practitioner would countenance or be allowed to follow. Fourthly, the determination that any particular conduct is improper and disgraceful must be reasoned and reasonable and the reasons why the conduct is condemned must be clearly set out.

In this case, neither the Disciplinary Committee nor the Council stated what they considered to be "improper or disgraceful conduct". Except for saying that Dr Turner "had no yardstick by which to measure the results of the injections and any potential hazards were unknown", they gave no reasons as to why they held that the conduct, which they found proved in respect of Dr Turner, to be "improper or disgraceful". The Disciplinary Committee, in its judgment relating to both charges, passed straight from the finding that Dr Turner factually did what was alleged against him to finding that what he did was "improper or disgraceful". The Council merely endorsed and followed the Disciplinary Committee's recommendation that Dr Turner's name be removed from the roll of medical practitioners.

One can only speculate, therefore, that both the Disciplinary Committee and the Council considered Dr Turner's conduct, in respect of both charges, to be *per se* improper or disgraceful. In neither case can this be so. In respect of the first charge, while, it is *prima facie* wrong to use a substance, tested and licensed for topical use only, in a parental application, the determination as to whether such use is necessarily wrong and, more importantly, whether it constitutes improper or disgraceful conduct, must depend on the substance used, the circumstances in which and for which it was used, on whom it was used and the effects of that

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use. Similar considerations (apart from the separate question as to whether this was a clinical trial at all) apply in respect of the second charge.

In the circumstances of this case, therefore, it is necessary to decide whether Dr Turner's parental use of povodine iodine is "improper or disgraceful conduct" in the sense that has been set out in this judgment.

Povodine, before being superseded by better drugs, has, in the past, been used safely parentally in large amounts as a plasma expander. Iodine, although toxic, can be and is used parentally in limited quantities, particularly in the treatment of thyroid conditions. Povodine iodine, although licensed for topical application only, is frequently used internally and in close association with the blood stream, in procedures such as peritoneal and vaginal wash outs. The medical literature available to Dr Turner showed that a cell culture, inoculated with HIV, when washed with povodine iodine, *in vitro*, had killed the HIV virus but not affected the cell.

Dr Turner was disturbed by the development of the AIDS epidemic. He

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was faced with patients who were seriously terminally ill from complications arising from that epidemic. There is no known cure for the disease and the drugs that are available to treat it are too expensive for use for the patients that Dr Turner was treating. In these circumstances, according to Dr Turner, he resolved to try to use povodine iodine therapeutically to assist or bring relief to those patients. His evidence that he used it in this manner was not challenged. Nor was the fact that he used it only on the terminally ill. The consent of the patients to its use was obtained. In most cases treatment had beneficial results, even if those results were only temporary and short-lived. One patient, however, achieved a remarkable recovery and was still alive to give evidence to the Disciplinary Committee on Dr Turner's behalf. Most importantly, none of the patients who were given the injections of povodine iodine by Dr Turner died as a result of that treatment.

While Dr Turner may have been wrong in his ignorance of, or casualness towards, the bureaucratic requirements for experimental work of this nature, I do not consider that his conduct in administering povodine iodine parentally can, in the circumstances of this case, be said to be "improper or disgraceful", in the sense that has been set out in this judgment.

The second charge against Dr Turner appears to be based on two separate allegations. Firstly, that Dr Turner conducted a clinical trial into the administration of povodine iodine in respect of all fourteen patients generally without the permission of the Medicines Control Authority and therefore in contravention of the provisions of s 15A (now s 16) of the Drugs Act. Secondly, that having been advised by the Medical Research Council of Zimbabwe to discontinue treatment involving the parental administration of povodine iodine, and being required by the Drugs Control Council to stop conducting clinical trials with povidone iodine, he thereafter administered that substance intravenously to two patients and thus continued with the unlawful clinical trial in respect of that substance.

The second of these complaints clearly depends upon the correctness of the finding that Dr

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Turner was conducting a clinical trial. If he was not, then the allegation is simply covered by the first charge relating to the improper parental use of povodine iodine. It is therefore only necessary to deal with the question of whether Dr Turner was conducting an unauthorised clinical trial.

The Drugs Act defines a clinical trial as "a systematic study in human beings or animals in order to establish the efficacy of, or to discover or verify the effects or adverse reactions of, drugs and includes a study of the absorption, distribution, metabolism and excretion of drugs". The evidence of Dr Matenga before the Disciplinary Committee set out the recognised steps by which a clinical trial is carried out in practice.

The general evidence before the Disciplinary Committee does not establish,

either in law or in fact, that Dr Turner's treatment of the relevant patients was a clinical trial. The treatments administered were not a "systematic study" so as to bring them within the definition set out in the Drugs Act, nor did they even remotely comply with the generally accepted procedures and steps for a clinical trial which were clearly outlined by the Dr Matenga in his evidence before the Disciplinary Committee.

"Systematic" according to the *Oxford English Dictionary* involves something "arranged or conducted according to a system, plan or organised method; ... involving or observing a system, regular, methodical ..."

Dr Turner denies that he was conducting a clinical trial. He says that he was providing therapeutic treatment for persons in a critical condition. His interest in this type of treatment arose from his general approach to medicine, his reading and the presence and prevalence of AIDS and the general lack of ability to respond to that question, which was assuming epidemic proportions and for which there was no cheap and reliable treatment or cure.

There is no finding by the Disciplinary Committee that Dr Turner was being untruthful in what he claimed and no reason on the record to find that he was not truthful. More importantly, however, as far as liability for his actions is concerned, the evidence does not reveal any system, plan, organisation or method in the persons or the method of treatment employed by Dr Turner.

Dr Turner treated 14 patients with povodine iodine over two years. Most of these patients, but not all, were HIV positive. The dosage and duration of treatment varied from patient to patient. Records were kept of the treatment given to the patients and their reaction of the patients to the povodine iodine. The records kept were, however, no more than normal records of therapeutic treatment of an ordinary patient and consisted of personal observations of the patient's condition, the drugs (including povodine iodine) administered, the dosage given and the patient's reactions to treatment. There was no cross-referencing of patients, treatment, reactions or results. There was no follow up on persons who did not return for further treatment. Some patients received a *post mortem* after death. Others did not. The only factor that all these patients had in common were that they were terminally ill and that they received povodine iodine from Dr Turner. The evidence establishes no more than repeated *ad hoc* applications of a particular substance on a series of patients. What has happened in this case is that the

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Disciplinary Committee has confused the word "systematic" with the word "repeated".

I am well aware of, and have not ignored, the dangers and undesirability of uncontrolled personal experimentation in the medical field and the susceptibility of the sick, especially the very sick, to agreeing to try anything that they are told may cure them. The appeal in respect of the second charge

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is, however, is concerned only with whether the evidence establishes that Dr Turner, in treating the fourteen patients as he did, was conducting an unauthorised clinical trial into the use of povodine iodine in contravention of s 16 of the Drugs Act. If the relevant authorities and the medical profession feel it necessary to and wish to protect the public from any form of treatment that falls outside the existing definition of "clinical trial" in s 16 or from other forms *ad hoc* personal experimentation, then it will be necessary to amend the law to prevent such treatment and experimentation.

In the result, the appeal succeeds. The decision of the Council to remove the name of Dr Turner from the register of medical practitioners is set aside. The Council is directed to pay the costs of this appeal.

Kavanagh Sakala & Co, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

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Endnotes

1 (Popup - Popup)

This judgment was received too late to be included in 1999 (2) ZLR. - *Editor*.

2 (Popup - Popup)

This judgment was received too late to be included in 1999 (2) ZLR. - *Editor*.

3 (Popup - Popup)

This judgment was received too late to be included in 1999 (2) ZLR. - *Editor*.

4 (Popup - Popup)

This judgment was received too late to be included in 1999 (2) ZLR. - *Editor*.

5 (Popup - Popup)

This judgment was received too late to be included in 1999 (2) ZLR. - *Editor*.

6 (Popup - Popup)

This judgment was received too late to be included in 1999 (2) ZLR. - *Editor*.

7 (Popup - Popup)

Hunt *South African Criminal Law & Procedure* Vol II, 3 ed by Milton, 235.

8 (Popup - Popup)

Cf Milton's Hunt, *op cit* 235-7 and authorities there cited.

9 (Popup - Popup)

The only precedent on sentence of which I am aware, not involving the father/daughter relationship, which can properly be regarded differently, is *R* v *Kandewonda* G-S-49-69.

10 (Popup - Popup)

Attorney-General's Reference (No. 1 of 1989) [1989] 3 All ER 57 (CA) at 574j.

11 (Popup - Popup)

Unlike the child.

12 (Popup - Popup)

E Spiro 4 ed p 280.

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13 (Popup - Popup)

1964 (4) SA 348.

14 (Popup - Popup)

1996 (3) SA 509.

15 (Popup - Popup)

See *The Family, Law and Society: Cases and Materials* 2 ed, Brenda M Hoggett and David S Pearl.

16 (Popup - Popup)

Cited to support this contention is *Rosa* v *Rosa* 1980 ZLR 387.

17 (Popup - Popup)

See pp 74F-75F ante. - *Editor*.

18 (Popup - Popup)

At the referendum, the voters rejected the draft. - *Editor*.

19 (Popup - Popup)

Translated by Edward Fitzgerald. - *Editor.*

20 (Popup - Popup)

As defined in s 2(1) Competition Act 7 of 1996.

21 (Popup - Popup)

An allusion to the captain of the Zimbabwean Cricket team, Andy Flower. - *Editor*.

22 (Popup - Popup)

Cf Firestone South Africa (Pty) Ltd v *Genticaro* AG 1977(4) SA 298 (A) at 306F.

23 (Popup - Popup)

Cf Childerley Estates Stones v *Standard Bank of SA Ltd* 1924 OPD 163, 165-6.

24 (Popup - Popup)

Ibid, 166-7.

25 (Popup - Popup)

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A translation of Voet, 2.4.14.

26 (Popup - Popup)

Childerley supra at 168.

27 (Popup - Popup)

Rule 63.

28 (Popup - Popup)

Rule 449.

29 (Popup - Popup)

Rule 56.

30 (Popup - Popup)

Uzande v *Katsande* 1988 (2) ZLR 47 (H) at 48; *Mukundadzviti* v *Mutasa* 1990 (1) ZLR 342 (H) at 345F-G.

31 (Popup - Popup)

De Wet & Ors v *Western Bank Ltd* 1979 (2) SA 1032 (A) at 1047G-1043A.

32 (Popup - Popup)

Childerley supra Nzingwa v *Moolman NO* 1993 (2) SA 508 (T) at 511J; *Promedia Drukkies Te Uitgewers (Edms) BPK* v *Kaimowitz & Ors* 1996 (4) SA 411 (C) 417J.

33 (Popup - Popup)

Rule 42(1), Uniform Rules of Court.

34 (Popup - Popup)

Per NESTADT JA in *Tshivhase Royal Council & Anor* v *Tshivase & Anor; Tshivase & Anor* v *Tshivase & Anor* 1992 (4) SA 852 (A) at 862H-863A. Also *Theron NO* v *United Democratic Front (Western Cape Region) & Ors* 1984 (2) SA 532 (C) at 593G.

35 (Popup - Popup)

Herbstein & Van Winsen *The Civil Practice of the Superior Courts of South Africa* 3 ed, p 465; Also *Tshivase supra*.

36 (Popup - Popup)

Rule 56, (*cf* nn 9 and 10 *supra*).

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37 (Popup - Popup)

For example, *Mukundadzviti* v *Mutasa* (see n 10 *supra*).

38 (Popup - Popup)

1986 (2) ZLR 216 (S) at 226A-B.

39 (Popup - Popup)

1989 (2) ZLR 195 (H).

40 (Popup - Popup)

At 197 E and 198F-G.

41 (Popup - Popup)

Per GUBBAY JA (as he then was) in *Mudzingwa* v *Mudzingwa* 1989 (2) ZLR 182 (S) at 189G-H. See also MCNALLY JA in *Mchechesi* v *Field NO* 1997 (2) ZLR 191 (S) at 192E-H.

42 (Popup - Popup)

My emphasis, signifying "means" not "includes".

43 (Popup - Popup)

Section 2(1) Act 7 of 1996, *sub voc* "unfair trade practice".

44 (Popup - Popup)

Cf ss 42 and 43.

45 (Popup - Popup)

Section 31.

46 (Popup - Popup)

Section 30.

47 (Popup - Popup)

Section 2(1) of Act 7 of 1996, *sub voc* "restrictive practice".

48 (Popup - Popup)

Baxter *Administrative Law* 728, and the cases cited therein.

49 (Popup - Popup)

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Act 7 of 1996, s 32(2)(f).

50 (Popup - Popup)

Ibid, s 32(2).

51 (Popup - Popup)

See s 30 above.

52 (Popup - Popup)

See pp 74-75 of this volume. - *Editor*.

53 (Popup - Popup)

See also s61 of the Civil Aviation Act [*Chapter 13:16*], which repealed the Aviation Act. - *Editor*.

54 (Popup - Popup)

I cannot trace the attribution for this drinking song.

55 (Popup - Popup)

Per BECK JA in *Nott* v *ZANU* (PF) 1983 (2) ZLR 208 (S) at 211D.

56 (Popup - Popup)

Mkize v *Martens* 1914 AD 382 at 390.

57 (Popup - Popup)

Cf TINDALL JA *Feldman (Pty) Ltd* v *Mall* 1945 AD 733 at 756.

58 (Popup - Popup)

Per BECK JA in *Nott* v *ZANU (PF) supra*, 214C.

59 (Popup - Popup)

Cf JANSEN JA in *Minister of Police* v *Rabie* 1986 (1) SA 117 (A) at 134J-135A.

60 (Popup - Popup)

Cf GUBBAY CJ in *Fawcett Security Operations (Pvt) Ltd* v *Omar Enterprises (Pvt) Ltd* 1991 (2) ZLR 291 (S) at 298A.

61 (Popup - Popup)

Note 7 above.

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62 (Popup - Popup)

At 295F, 298A and 299E.

63 (Popup - Popup)

HH-201-93 (not reported).

64 (Popup - Popup)

At p 5.

65 (Popup - Popup)

At pp 7-8.

66 (Popup - Popup)

1997 (2) ZLR 368 (S).

67 (Popup - Popup)

At 372D-F; 375H and 377D-F.

68 (Popup - Popup)

At 377C-318A.

69 (Popup - Popup)

At 376G-377C.

70 (Popup - Popup)

HH-34-98 (not reported).

71 (Popup - Popup)

At pp 2-3.

72 (Popup - Popup)

At 3.

73 (Popup - Popup)

Labour Relations (Retrenchment) Regulations SI 404 of 1990.

74 (Popup - Popup)

At p 6.

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75 (Popup - Popup)

Section 3(1)(a)(i) of SI 404 of 1990.

76 (Popup - Popup)

See p 136 of this volume. - *Editor*.

77 (Popup - Popup)

See p 141 of this volume. - *Editor*.

78 (Popup - Popup)

See p 139 of this volume. - *Editor*.

79 (Popup - Popup)

See *Collective Self-Finance Scheme* v *Asharia* HH-71-95, a judgment of MUBAKO J. - *Editor*.

80 (Popup - Popup)

See *Mashave* v *ZUPCO* 1998 (1) ZLR 567 (H). - *Editor*.

81 (Popup - Popup)

See p 251 of this volume. - *Editor*.

82 (Popup - Popup)

See 485 of this volume. - *Editor*.

83 (Popup - Popup)

See p 496B of this volume. - *Editor*.

84 (Popup - Popup)

See p 497E ante. - *Editor*.

85 (Popup - Popup)

See p 500B-D ante. - *Editor*.

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