2000 (2)

The Zimbabwe Law Reports 2000 [2]

MSASA LODGE (PVT) LTD v LIGHTFOOT* (1)2000 (2) ZLR 1 (HC)

Citation	2000 (2) ZLR 1 (HC)
Case No	Judgment No. HH-102-00
Court	High Court, Harare
Judge	Gwaunza J
Heard	February 10, 2000
Judgment	May 17, 2000
Counsel	A P de Bourbon SC, for the applicant E W W Morris, for the respondent
Annotations	None

Civil application

Flynote

Property - ownership - acquisition - by prescription - requirements for acquisition of ownership - need for use of property to be adverse to true owner - possession by predecessors in title - need to show that their possession was also adverse to true owner

Headnote

The applicant bought a property from the respondent. The property adjoined another property owned by the respondent. The title deeds showed that the boundary between the properties was a straight line, but the wall between them encroached into the applicant's property. The respondent argued that she had acquired the extra piece of land by prescription, the wall having been erected more than 30 years before the applicant bought the land. Although she had not herself owned the land for 30 years, she claimed that her predecessors in title had also possessed the encroaching land so as to acquire ownership.

Held, that for ownership to be acquired by prescription, it is necessary for the respondent to show that she possessed the disputed land for an uninterrupted period of thirty years and had done so openly, as if she were owner. Her use of the land must have been adverse to the true owner.

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Held, further, that where, as in the present case, the respondent had not possessed the land for the required thirty years and was seeking to rely on the possession of the disputed land by a predecessor in title for a portion of the thirty years, she would have to prove that her predecessor in title had also possessed and used the land openly, as if he was the owner. She had failed to prove this.

Held, further, that the respondent's own period of possession was too short to entitle her to acquire ownership.

Cases Considered

Cases cited:

Pratt v *Lourens* 1954 (4) SA 281 (N)

Legislation considered:

Prescription Act [*Chapter 8:11*], s 4

Case Information

A P de Bourbon SC, for the applicant

E W W Morris, for the respondent

Judgment

Gwaunza J: The applicant seeks an order declaring -

" (a) that the boundary between Lot 164 of Highlands Estate of Welmoed and Lot 165 of Highlands Estate of Welmoed shall be in the form of a straight line connecting the South Western Corner and North Western Corner of the said Lot 165; and

(b) that the applicant shall be entitled to remove any existing wall or other improvements to reinstate the boundary between the properties."

The applicant also prays for costs against the respondent.

The applicant is the registered owner of Lot 165 of Highlands Estate of Welmoed (Lot 165) having obtained title to the property in its (applicant's) previous name of Matabeleland Breweries (Pvt) Ltd, on 30 June 1986 by virtue of Deed of Transfer No. 3953/86 (Annexure B). The applicant bought Lot 165 from the respondent, who had initially owned a half share therein in 1984 but later, in 1985, had became full owner thereof. Before that Lot 165 had been owned by the respondent's mother who had acquired it in 1952.

The respondent is the registered owner of Lot 164 of Highlands Estate of Welmoed (Lot 164), having obtained title to the property in 1981. While the two properties share a boundary, which, according to the diagram attached to the Deed of Transfer in respect of Lot 165, is in a straight line, in reality the part of the boundary that is the subject matter of this dispute is not in a straight

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line. Both parties accept that the disputed part of the boundary encroaches onto Lot 165.

The deponent to the applicant's founding affidavit, Mr Enos Chiura ("Chiura"), avers as follows: After it purchased Lot 165 in 1986, the applicant instructed a construction company to erect a "Durawall" around the boundary of Lot 165 where there existed no previous wall or fence. The construction company ascertained the correct boundary between the properties adjoining Lot 165 and constructed a Durawall along "most of the eastern, southern and northern boundaries". The western boundary of Lot 165 included the old stone/brick wall defining the encroachment in question. The construction company built the Durawall from and up to the points where the stone-brick wall started and ended respectively. Chiura asserts that if it noticed the encroachment in question, the construction company had not drawn his attention to it, and that, in any case, the wall along the area of the dispute was thickly covered by trees, creepers and other vegetation, so that the encroachment was not discernible. He adds that he had always assumed that the stone wall was in line with the existing boundary line and the Durawall constructed at the instance of the applicant. Accordingly, at the time of the purchase of Lot 165 and for a considerable period of time thereafter, he had not been aware of any encroachment onto the applicant's property, which may have been "adverse" to its rights. He had only become aware of the encroachment around April 1998, when the applicant started to

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clear away "most of" the vegetation, creepers and trees which existed on its side of the old stone brick wall. Upon enquiry with the respondent's husband, Mr Philip Bates Lightfoot ("Lightfoot"), he had been informed that at the time the property was purchased, there was a clause in the agreement of sale giving the respondent the right to utilise the area of encroachment. In subsequent discussions between the two, Chiura avers he had been informed that the area in question was a graveyard for the respondent's ancestors.

While the respondent does not dispute that an encroachment onto the applicant's property does exist, nor that this is contrary to the diagram of the property, as per the title deed to Lot 165, she contends the applicant has forfeited any rights it may have had in the disputed property, by virtue of her (respondent) having acquired it through acquisitive prescription. She disputes Chiura's assertion that he was not aware of the encroachment onto his property until 1998, as, vegetation or not, such encroachment would still have been discernible. She asserts, in any case, that the applicant, through Chiura, should have become aware of the old brick and stone boundary at the time that the Durawall he commissioned was constructed, as the construction company must have, in the process, "bricked up" the gate that formed part of the encroaching boundary wall. She denies, and is supported in this respect by Lightfoot, who is her husband, that Chiura had been informed that her ancestors were buried within the area of the encroachment. She asserts, instead, that the area in question was an indigenous gravesite, and that it had been out of respect for the site that her late father, Mr George Richard Audley Johnson, had erected the stone wall in question in such a way that it left the gravesite undisturbed. This had meant that the brick stone wall encroached into his own, or more accurately his wife's, property, that is, Lot 164. Lightfoot, in his supporting affidavit, asserts he had noticed the irregular boundary around 1981 when Lot 164 was transferred into the

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respondent's name and had personally consulted Mr Reeler, a land surveyor, who subsequently visited the two properties and later advised that the value of the small piece of land within the intrusion did not warrant re-surveying costs. Lightfoot denies he informed Chiura that there was a clause in the agreement of sale in respect of Lot 165, guaranteeing the respondent the right to use the disputed area. He avers, instead, that he had spoken to Mr Gabriel of Gabriel Real Estates in 1986 when he came to evaluate Lot 165, about the encroachment, and that Mr Gabriel had indicated that due to its small size, the encroachment was not a "material point" to be included in the agreement of sale. In his affidavit Mr Gabriel, however, denies that he received instructions from Lightfoot to specifically make a note of the discrepancy relating to the wall, in the agreement of sale for Lot 165. Although recalling that he inspected Lot 165

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in 1986, Gabriel does not recall noticing that the boundary wall was not built in a straight line.

Mr Reeler confirms, in a supporting affidavit, that he had investigated the western boundary of Lot 165 at the request of the applicant and ascertained that it did not reflect the true boundary of the property, although he could not carry out a full investigation because he had been denied access to Lot 164.

The respondent avers that the stone/brick wall in question was built by her late father in 1954. The applicant does not question the assertion that the wall could have been built by the respondent's late father, but expresses doubt as to whether this was one in 1954. However, I consider to be equally pertinent to the dispute at hand, the question of who constructed the stone wall. Without stating, specifically, that his father built the wall, the respondent's brother Mr David G Johnson ("Johnson") asserts in his affidavit that the area of the disputed boundary starts at the site of an old workshop and that the existing or remaining wall of this old workshop forms part of the disputed boundary wall between the 2 properties. He asserts that the workshop was extensively used by his father and is certain it was there when he and the respondent acquired Lot 165 in 1984.

It is highly probable then that whether built as a wall *per se* or as part of a workshop, the construction that forms part of the disputed boundary was constructed by the respondent's father. As his wife acquired Lot 165 in 1952, this construction must have been done thereafter. I will accept that the stone/brick wall in question was built by the respondent's late father after 1952.

Put into its proper perspective, the situation that then obtains is that the brick/stone wall marking part of the disputed encroachment was built by or at the instance of a former owner of Lot 165. On the face of it that owner voluntarily divested himself-herself of a piece of the property that was rightfully his/hers. Around that time Lot 164, whose area had been increased to the same extent that Lot 165 had been decreased by the encroachment in question, was owned by Kathlene Norah Southhouse Chainey who had acquired it in May 1952. Thereafter, in 1958, the property, now consolidated with another, was transferred to Eric Jevis Peel Yates, who subsequently transferred it to Lewis Marshall Gregory Foster in 1959 and in 1962 to Eric Paul

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Ward, from whom the respondent bought the property in 1981.

According to Lightfoot, and this has not been disputed, at the time the respondent's parents acquired Lot 165, Lot 164 was an "undeveloped" vacant plot. It is not clear when it ceased being so vacant. No-one can therefore say whether and if so how, the owner or owners of Lot 164 used the disputed area up to the time Lot 164 ceased to be a vacant plot.

The respondent acquired Lot 164 in 1981, a half share of Lot 165 in July 1984 and the other half share in October 1985. She sold Lot 165 to the

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applicant in June 1986. Therefore, from the time she acquired the first half share of Lot 165 in July 1984 to the time she sold it to the applicant in 1986 she was, firstly, part common owner and later common owner of both Lot 164 and Lot 165.

The respondent avers that by the time the respondent took transfer of an equal undivided share of Lot 165 in 1984, the stone/brick wall in question had been in place for over 30 years, and that therefore prescription had probably already run. It is also contended for the respondent that if prescription had not run by 1984, then it would have had less than 12 months to run. Also that even if prescription would not run where the possessor and owner are the same person as respondent was until 1985, she had nevertheless, in her capacity as owner of Lot 164, possessed the disputed piece of land adversely to the rights of her brother to the extent of an unequal undivided share. It is further contended for the respondent that, whatever date in 1954 the wall was built, prescription had run by 1985 when the respondent became the sole owner of Lot 165, a fact which meant that possession had therefore been exercised by the respondent or her successors-in-title for an uninterrupted period of 30 years. Hence, her claim to acquisitive prescription.

Mr *de Bourbon*, for the applicant, contends that the respondent has not acquired the disputed area by acquisitive prescription because it has not been established that the wall in question was built by a predecessor in title to Lot 164, which meant there had been no encroachment by a previous owner of Lot 164 *nec vi, nec clam*, *nec precario* to the interests of the owner of Lot 165. He also contends that it was only the respondent herself who had, for a period starting in 1981, (which falls short of the 30 year period) treated the disputed area as part of Lot 164; and lastly that the transferees of both Lot 164 and 165 acknowledged, by not questioning the point, that the true boundary line was as shown on the official plans, which amounted to an acknowledgement by the owner of the rights of the other party.

I will first consider the law, both common and statutory, on acquisitive prescription before applying it to the facts before me.

The position at common law is correctly summarised on p 1 of the applicant's heads of argument as follows:

> "Any person who acquires full juristic possession, without force and peaceably, so openly and patently to the owner or another or both, and without recognising the title of the owner, becomes the true owner thereof after the

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passage of a period of thirty years. The Latin expression is *nec vi, nec clam, nec precario*, (see *Welgemoed* v *Kotzer* 1946 TPD 701 at p 710)."

The statutory provision is contained in s 4 of the Prescription Act [*Chapter 8:11*] which provides as follows:

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" 4. **Acquisition of things by Prescription**

Subject to this Part and Part V, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for -

(a) an uninterrupted period of thirty years; or

(b) a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."

It is evident that "open possession" of the property in question by the claimant and his predecessors in title, "as if he were the owner" and "for thirty years" are the requisite elements for acquisitive prescription, both at common law and in terms of the Prescription Act.

A perusal of relevant authorities has yielded the following further definitions of these essential elements.

D Carey Miller in *The Acquisition and Protection of Ownership* 1(2) in discussing a similar provision of the South African Prescription Act, defines the concept "openly" in these terms:

"The 'openly' requirement was defined in an early case as '... so patent that the owner, with the exercise of reasonable care, would have observed it ...' As this *dictum* indicates, the 'openly' requirement is subject to an objective test, the practical effect of which is to require the claimant to establish that the nature of his possession was such that a reasonable man would have been aware of it."

The authors of Silberberg and Schoeman's *The Law of Property* 2(3) discuss the elements of possession as if one were the owner as follows:

"There is however, consensus that a person who acquires physical control of a thing can qualify as a possess or for the purpose of acquiring ownership thereof only if he has the intention of an owner *animus domini* with regard thereto. Consequently, a person who wishes to qualify as a possessor for the purpose of acquiring by prescription, has to exercise physical control with the intention of an owner."

The following *dictum* of Broome JP in *Pratt* v *Lourens* 1954 (4) SA 281 (N), (and cited in the applicant's heads of argument at p 1) expands on the same theme:

"It is a mistake to suppose that prescriptive title depends solely on thirty year continuous possession *nec vi, nec clam nec precario*. In addition, such user must be adverse to the true owner ... If the possessor acknowledges the rights of the owner, his ownership *ipso facto* ceases to be adverse to him ... If therefore there has been any acknowledgment, the plaintiff's case must fail, notwithstanding that such acknowledgment has not been followed by any permission, express or implied."

It is evident on the facts of this case that the respondent has not owned Lot 164, on which the disputed piece of land lies, for 30 years. However, she

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may have exercised her rights as possessor of the site. Since she became the registered owner of Lot 164 in 1981 she has only had possession of the disputed piece of land for an uninterrupted period of some 19 years or so. Even were one to accept the argument advanced on her behalf that she still exercised her rights of possession adverse to the owner (albeit part-owner with herself) for the short period that she was joint owner of Lot 165, and therefore part common-owner of both properties, the total period would still fall short of the required 30 year period. Therefore, in order to prove that she has acquired ownership of the land in question by acquisitive prescription, the respondent has to take into account the period of possession of the same piece of land by her predecessors-in-title.

Applying the law as defined by the authorities cited above, it is evident that, in addition to the need to prove uninterrupted possession of thirty years, the respondent has to go further than that and prove that such possession, by both her and her predecessors in title, was open and adverse to the rights of the owner of Lot 165. As a determination of whether or not the respondent possessed the land in question *nec vi, nec clam, nec precario* and adversely to the rights of the owner will not, on its own, suffice to prove her case I need not, at this stage, go into the merits of the respondent's assertion that the nature of her possession of the piece of land in question after she sold Lot 165 to the applicant was such that Chiura could not have failed to notice it.

If it is accepted that the wall in question was built in 1954, then, all things being equal, prescription would have run in 1984, the very year that the respondent acquired a half interest in lot 165. As the exact month in which the wall was constructed in 1954 has not been indicated, it is cannot be ascertained exactly when in 1984 prescription would have run. Fortunately I am spared the effort of trying to work out this puzzle by other, in my view, weighty considerations, which I go into below. The same considerations also render it unnecessary for me to determine the legal implications, in terms of acquisitive prescription, of the respondent having been, for some time, common owner of the two properties.

While the respondent has, in respect of her possession of the land in question, contended that it was open and adverse to the rights of the owner, ie the applicant, from 1981 to date, she has tendered no proof that her predecessors-in-title, that is Kathlene Norah Southhouse Chainey, Eric Jervis Peel Yates, Lewis Marshal Gregory Forster and Eric Paul Ward, had similarly possessed the land. She has, in fact, done no more than state the historical fact that for the period 1952 to the time that she herself acquired the property, it had been passed through the hands of these people. Contrary to what the authorities cited above say should be established, the respondent has not indicated that these predecessors-in-title had possessed the disputed

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piece of land and exercised their rights of possession "adverse" to the owner, who was the respondent's mother. I find the contrary, in fact, to be suggested by the evidence of the

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respondent and her brother, David Johnson, as to what was possibly on the disputed piece of land. According to this evidence there was either a graveyard, a workshop or possibly both. David Johnson asserts in his affidavit that a workshop, which was "extensively used" by his and respondent's father, was built on the disputed site. It is not disputed that the present stone/brick wall constituted the back wall of the workshop facing Lot 165. The suggestion by Johnson that the workshop was located on the disputed area suggests that in order to "extensively" use it, the respondent's father would have had to constantly access Lot 164. If that is the case, then it can be assumed that from whatever time after 1952 that the workshop was built, to the time that it was bricked up (which according to Johnson was after 1984) the respondent's father - and by extension her mother who was then the registered owner of Lot 164, fully exercised control, possession and ownership of the disputed property. There would then have been no question of the respondent's predecessors-in-title having openly possessed the disputed piece of land as if they were the owners thereof.

While the respondent asserts that the area in dispute was the site of an old indigenous gravesite, she has not stated whether her predecessors-in-title to Lot 164 had been aware of this fact. Certainly, there currently are no signs of the area having been respected and left undisturbed, as the court observed for itself on the occasion of the inspection *in loco*. Even if one were to accept that there indeed was a graveyard at the disputed site, one could also safely assume that the respondents' predecessors-in-title were aware of that fact and may have, in fact, respected the wishes of the respondent's father to leave the area undisturbed. The existence of the connecting gate in the wall suggests easy and perhaps constant mutual access to each other by the inhabitants of the two properties, a circumstance which is likely to have rendered them privy to each other's affairs, including the matter of the use to which the disputed piece of land was put. If the predecessors-in-title did indeed leave the site undisturbed and respected the wishes of the respondent's father, such action, in itself would have, in my view, constituted an acknowledgement of the rights of the owner of Lot 165. Thus, whether there was a graveyard, a workshop or both, on the site, and in the absence of any other evidence to suggest otherwise, I would say the probabilities favour a finding that the respondent's predecessors-in-title to Lot 164, did not possess, use and control the land in question adversely to the rights of the owner of Lot 165.

Looked at that way, there is likely to be substance in Mr *de Bourbon*'s suggestion that the brick/stone wall in question was simply an interior wall which did not prevent the then owners of Lot 165 from possessing,

controlling and using the area in question, albeit the wall created an encroachment onto Lot 165.

Another relevant issue raised is the question of the acknowledgement, by the respondent and her predecessors in title, of the title of the owner of Lot 165, as suggested by the unquestioning acceptance of the boundary between the two papers, reflected on the maps attached to the successive title deeds to the two properties. It is Mr *de Bourbon*'s contention that in transferring the ownership of Lot 164 and not claiming the area of land now in dispute, the owners of Lot

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164 acknowledged the rights of the owner of Lot 165 to that land. In disputing this contention, Mr *Morris* for the respondent argues that in terms of ordinary conveyancing practice, all that the buyer and seller see are the necessary powers of attorney and declarations which they sign and that neither party is as a matter of practice given sight of the title deeds, let alone the diagram. Mr *Morris* argues further that the *animus possidendi* of the acquirer relates at all times to the actual object of his possession, and is completely unrelated to diagrams or descriptions in title deeds. I must respectfully disagree with Mr *Morris.* Whatever the practice may be, I doubt the surveyors of the land and the drawers of the diagrams in question go to all that trouble just so that the diagrams can decorate the title deeds that describe the land illustrated in the diagrams. This strikes me as a case where whether one understands the diagram or not (and I will admit many "lay" people do not) one is expected, and taken, at law, to not only understand the diagram but exercise one's rights of ownership within the boundaries of what the diagram suggests is one's property. The *animus possidendi* is thus taken to apply in respect of both the actual property and its graphic representation. However, in the case at hand, there is a suggestion that, incomprehensible as some of these diagrams may be or however much people may disregard them, there are others who take them seriously. One such is Lightfoot, who avers in his affidavit that his attention was drawn to the irregular boundary following an examination of the diagram of Lot 164 which was attached to the title deed issued in the respondent's name.

Even were one to accept that the *animus possidendi* of the possessor relates to the actual object of the possession, that is the land, and not the diagrams and descriptions in title deeds, the respondent has not established that it was so in this case. What is before the court is a suggestion that the respondent's father never relinquished his control and use of the disputed piece of land, thereby effectively precluding any such use by the previous owners of Lot 164. This means that if prescription is to be computed, it can only be with effect from the time that the respondent herself acquired Lot 164, that is, 1981. As the period from then to the time this application was launched falls

far short of the requisite thirty year period, the questions of whether or not the short period the respondent was common owner of the two properties interrupted prescription, and of whether or not Chiura was aware of the encroachment and the respondents' alleged open possession thereof, become irrelevant.

In the final analysis, I find there is no evidence at hand to establish that the respondent's predecessors in title possessed the disputed piece of land since 1952 in a manner that would have satisfied the requirements for acquisitive prescription. As it was necessary to prove such possession, I find that the respondent, on whom lay the burden of establishing she had acquired the land in question by acquisitive prescription, has failed to discharge such burden. I am satisfied the land in dispute remains part of Lot 165 and rightfully belongs to its current owner, the applicant.

In the premises, it is ordered as follows:

1. The boundary between Lot 164 of Highlands Estate of Welmoed and Lot 165 of

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Highlands Estate of Welmoed shall be in the form of a straight line connecting the south western corner and the north western corner of Lot 165 of Highlands Estate of Welmoed.

2. The applicant shall be entitled to remove any existing wall or other improvements to reinstate the true boundary between the properties.

3. The respondent shall pay the costs of this application.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Wintertons, respondent's legal practitioners

ZIMBABWE BANKING CORPORATION & ANOR v SHIKU DISTRIBUTORS (PVT) LTD & ORS 2000 (2) ZLR 11 (HC)

Citation	2000 (2) ZLR 11 (HC)
Case No	Judgment No. HH-122-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	March 23, 2000
Judgment	June 14, 2000
Counsel	A P de Bourbon SC, for the applicant W Ncube, for the respondent
Annotations	None

Civil application

Flynote

Contract - cession - effect - when grants cessionary a right to litigate against debtor - cession taking place after litigation has begun - no right transferred to cessionary to continue with action - necessary for cessionary to be substituted as plaintiff

Headnote

The respondents were debtors of the applicant bank. The bank brought proceedings against them for the recovery of the debts. Some two months after the issue of summons, and after default judgment had been entered against two of the respondents, the debts were ceded to the second applicant. When an application was made to substitute the second applicant as plaintiff, the respondents argued that it was non-suited, the application for substitution having

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been made more than three years after the cession.

Held, that a contract of cession is one in which a personal right against a debtor is transferred to the cessionary. It does not transfer real rights to the cessionary. The cessionary can enforce the claim or accept an amount in settlement or abandon the claim against the debtor.

Held, further, that where the cession takes place before legal action begins, the cedent divests himself of the right to claim and cannot institute an action against the defendant and he cannot even act as agent for the cessionary as an undisclosed principal.

Held, further, that where cession takes place after litigation has begun but before or after *litis contestatio* has been reached, the right to prosecute the action is not transferred. What is transferred is only the *spes* in relation to the benefits that flow from the conclusion of the proceedings begun by the cedent against the debtor. The cedent is not divested of his right to action until the court grants a substitution of the cessionary as plaintiff. Until substitution takes place, the cessionary has no right of action against the debtor and as such prescription does not operate against it as it had no rights that could prescribe. Prescription affects a cause of action and not the parties or the right of action.

Cases Considered

Cases cited:

Brummer v *Gorfil Brothers Invstms (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA)

Clark v *van Rensburg & Anor* 1964 (4) SA 153 (O)

Govt of the Republic of SA v *Ngubane* 1972 (2) SA 601 (A)

Johnson v *Inc General Inss Ltd* 1983 (1) SA 318 (A)

Portion 1 of Wadeville (Pty) Ltd v *Unity Cutlery (Pty) Ltd* 1984 (1) SA 61 (A)

Skjelbreds Rederi A/S & Ors v *Hartless (Pty) Ltd* 1982 (2) SA 710 (A)

Standard General Ins Co Ltd v *Eli Lili (SA) (Pty) Ltd* 1996 (1) SA 382 (W)

Syfrets Merchant Bank v *Jardine & Ors* 1999 (1) ZLR 124 (H)

Waikiwi Shipping Co v *Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A)

Case Information

A P de Bourbon SC, for the applicant

W Ncube, for the respondent

Judgment

Chinhengo J: The applicant commenced proceedings against the respondents in case No.

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HC-5820-96 on 17 July 1996. Those proceedings are contested by the respondents. On 30 September 1996, the first applicant ceded to the second applicant the debt which was the subject matter of the proceedings in case No. HC-5820-96. The first applicant now applies for an order substituting as plaintiff the second applicant in order to correctly reflect the parties to the proceedings.

The agreement of cession between the first and second applicant (the second applicant has since changed its name from Climax Super Investments (Pvt) Ltd to Climax Investment (Pvt) Ltd) is attached to the founding papers. In terms of this agreement, the reason for the cession was that the respondent, together with other debtors of the first applicant were regarded by the first applicant as bad or doubtful debtors. The second applicant was prepared to purchase from the first applicant these bad or doubtful debtors and to recover from them, for its own account, the amounts owing. It was also prepared to take cession of the securities held by the first applicant in respect of the debtors. Thus, the second applicant agreed to purchase the debts at a discount.

Paragraphs 1, 2 and 5 of the agreement provide as follows:

" 1. With effect from 30 September 1996, Zimbank (1st applicant) cedes, transfers and makes over unto and in favour of Climax (2nd applicant) the debts set forth in the schedule marked "A" and totalling ... dollars (938 997 309) for the sum of ... dollars (845 847 793).

2. The said purchase price of ... dollars (845 847 793) shall be paid to Zimbank or otherwise satisfactorily secured by close of business on 30 September 1996.

5. The cession of debts in terms of this agreement is an outright cession for value and Climax shall have no recourse against Zimbank in respect of any debts which it may fail to collect."

Lest I am misunderstood to mean that the respondents were indebted to the first applicant in the sum reflected in the agreement, I must emphasise that their indebtedness to the first applicant was only a part of the debts ceded to the second respondent in terms of the agreement.

The founding affidavit filed on behalf of the first applicant states that the application for substitution of plaintiff is made in order to correctly reflect the real parties in case No. HC-5820-96. It is submitted therein that the respondents would not be prejudiced if the order for substitution were granted. The question of prejudice to one or other of the parties is an important consideration in such an application.

CHINHENGO J

A representative of the second applicant filed an affidavit in which he confirms the cession and to which he attaches the agreement of cession. He confirms that the debt which is the subject matter in case No. HC-5820-96 is amongst the debts ceded by the first applicant to the second applicant. He deposes to the fact that it is the intention of the second applicant to proceed with the recovery of the debt and to be substituted as the plaintiff in case No. HC-5820-96 being the action commenced by the first applicant.

Only the fourth respondent has opposed this application. It was, however, conceded that the outcome of the opposition will affect the third respondent in the same manner as the fourth

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respondent.

In an unusually brief affidavit, the fourth respondent takes no issue with most of the averments made by the applicants. The substance of his opposition is contained in three paragraphs which read:

" 6. *Ad. para 5-6* (of founding affidavit)

There is going to be prejudice to the respondents. Apart from denying that the fourth respondent owed the first applicant the debt ceded, the second applicant is non-suited.

7. The second applicant's claim against the respondents, which is denied, is now prescribed.

11. *Ad. para 5* (of the supporting affidavit)

This is opposed. The applicant's claim is prescribed."

The second applicant's representative filed an equally brief answering affidavit in which he denies that the respondents will be prejudiced by the application. He affirms that the fourth respondent is indebted in the amount claimed and denies that the second applicant's claim is prescribed.

The issue to be decided in this application is clearly spelt out in the heads of argument filed by the parties. The opposition to the granting of the order sought by the applicants amounts to this: any action which the second respondent may have had against the respondents arose on 30 September 1996 i.e. the date of the cession. The applicants failed to effect substitution of plaintiff within three years of that date and because of this failure the second applicant's action against the respondents has prescribed.

The fourth respondent makes the point at p 2 of his heads of argument that the first applicant is non-suited because it is no longer a creditor, having ceded its rights to the second applicant. This point is not really an issue before me in this application. Whether or not the first applicant is non-suited is a matter which will have to be decided in the event that the first applicant wishes to pursue the proceedings in case No. HC-5820-96 for any reason and, of course, depending on my decision in this application. Therefore, the only issue for decision in this application is whether or not the second applicant's action has prescribed because of the failure to have it substituted as plaintiff within three years from the date on which it became the creditor by cession.

CHINHENGO J

Section 15(d) of the Prescription Act [*Chapter 8:11*] provides that the period of prescription of a debt, "in the case of any other debt", shall, be three years from the date on which the debt is due except where any enactment provides to the contrary. The debt concerned in this application is covered by the phrase "any other debt". If the debt *in casu* was owed by the respondents to the second applicant directly, the answer would be a simple one - that indeed the cause of action has prescribed because the creditor failed to institute action within three years from the date on which the debt arose. The issue is however complicated by the fact that the first applicant ceded the debt after it had instituted action against the respondents some two

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months or so before the cession. A perusal of the record in case No. HC-5820-96 reveals that the summons was served at the first respondent's registered office on 17 July 1996 and on the second respondent at the *domiciluim citandi et executandi* on 24 July 1996. A default judgment was entered against the first and second respondents on 18 September 1996 for the payment of the sums of $221 300 and $70 907.48 plus interest and the costs of suit. The first and second respondents' liability was joint and several.

Although the date on which the third and fourth respondents were served with the summons is not readily apparent from the from the record, they entered an appearance to defend the action in case No. HC-5820-96 on 22 and 26 July 1996 respectively. It seems that it is common cause that they were served with the summons on 17 July 1996. They filed their joint plea on 11 November 1996 and, later, an amended plea on 28 November 1996. At the time that the agreement of cession was entered into between the first and second applicants, the stage of *litis contestatio* had not been reached. I point out this fact merely to highlight the stage at which the first applicant's action against the respondents had reached when cession took place. Despite the cession the first applicant continued with its action against the respondents. It is not clear from the record of proceedings in case No. HC-5820-96 or from the affidavits in this application what prompted the applicants to seek a substitution of the plaintiff. No difficulties that may have arisen are revealed. That, however, is beside the point. It is quite likely that the first applicant later appreciated that there was no point in it pursuing the action when the result thereof was, in view of the cession, not of any benefit to it.

The contract of cession is one whereby a personal right and not a real right against a debtor is transferred from the creditor (cedent) to the new creditor (cessionary). In *Johnson* v *Incorporated General Insurances Ltd* 1983 (1) SA 318 (A), which is a judgment in Afrikaans, the headnote reads as follows:

> "Cession, in our modern law, can be seen as an act of transfer to enable the transfer of a right to claim (*translatio juris*) to take place. It is accomplished by means of an agreement of transfer (...) between the cedent and the cessionary arising out of a *justa causa* from

> which the intention of the cedent to transfer the right to claim to the cessionary (*animus transferendi*) and the intention of the cessionary to become the holder of the right to claim (*animus acquirendi*) appears or can be inferred. The agreement of transfer can coincide with or be preceded by, a *justa causa* which can be an obligatory agreement (...) such as e.g. a contract of sale, a contract of exchange, a contract of donation, an agreement of settlement or even a payment (*solutio*)."

The intention of a cession must be to divest the cedent of his rights against the debtor, hence the out and out cessionary would in law be entitled to enforce the claim and retain the proceeds thereof for its own benefit. It would be entitled to accept any amount it pleased in settlement of the claim or it may abandon the claim altogether (*Skjelbreds Rederi A/S & Ors* v *Hartless (Pty) Ltd* 1982 (2) SA 710 (A) at 630F-G). In *Waikiwi Shipping Co* v *Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A), it was stated at 675D that:

> "Today, a cession, absolute in terms, does serve to divest a cedent completely of his right of action even of the

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actio directa which at one time was thought to remain in the cedent, albeit temporarily."

R H Christie in the *Law of Contract in South Africa* 3 ed at p 521 has this to say about the effect of a cession:

> "The effect of a cession depends upon whether it is absolute or by way of security (*in securitatem debiti*). The effect of an absolute cession will be examined first. It divests the cedent of all the rights ceded, the extent and nature of these rights being a matter of interpretation of the contract of cession and vests them in the cessionary, so that thereafter only the cessionary and not the cedent is entitled to sue for the enforcement of those rights ..."

It is important to note that the general statement of law in regard to the effect of an out and out cession presents no difficulty. Depending on the facts under consideration, the difficulty may arise from the nature and extent of the rights ceded which, as correctly stated by Christie above, is a matter of interpretation. Accordingly, the question becomes - what rights have been ceded and what is their nature and extent? I view the whole debate, to which I shall come to later, as to what rights are ceded if the cession takes place after *litis contestatio* or the cession takes place after institution of action but before *litis contestatio* as really a debate as to the nature and extent of the rights ceded. This view of the situation requires an analysis of the contract of cession in order to determine what rights were ceded in a particular case.

The contract of cession in the present application provides in para 5 that:

> "The cession of debts in terms of this agreement is an outright cession for value and Climax shall have no recourse against Zimbank in respect of any debts which it may fail to collect."

The point emphasised in this paragraph is that the second applicant would have no recourse to the first applicant if it should fail to collect the debt.

The contract of cession was entered into after the first applicant had

instituted action against the respondents. Notably, there is no mention of this fact in the contract of cession. Yet in respect of the first two of the respondents, the first applicant already had a judgment in its favour, and in respect of the third and fourth respondents action against them was continuing. Can it then be said that it was the intention of the first applicant that the second applicant would, in respect of the third and fourth respondents, have had to institute action afresh? And that this was the correlative intention of the second applicant? The question as I have framed it highlights my view that the issue as to what rights are ceded if cession takes place after *litis contestatio* or for that matter after the institution of action but before *litis contestatio* is really a question of what rights, as a matter of contractual interpretation, have been ceded - see *Portion I of Wadeville (Pty) Ltd* v *Unity Cutlery (Pty) Ltd* 1984 (1) SA 61(A) and Christie *op cit*. On an interpretation of the agreement between the applicants, I am quite satisfied that, as the first applicant had commenced action against the respondents, it was its intention to retain the right of action, and as such that right was not ceded. It was its intention therefore that an application for substitution of plaintiff would be made.

The law in respect of a cession which is effected after *litis contestatio* is settled. A cedent who is a plaintiff in an action and who after *litis contestatio* cedes, assigns, transfers and makes over

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to a third party all rights, title and interest in a claim, can proceed with the action. This is so because after *litis contestatio* the plaintiff is not permitted by mere agreement between himself and a third party to transfer his rights to prosecute the action. A purported transfer after *litis contestatio* is ineffective against the cessionary unless the cessionary is substituted, at the discretion of the court, as plaintiff. The transfer is only perfected when the court gives its approval by granting substitution. This is the import of the decision in *Waikiwi Shipping Co Ltd* v *Thomas Barlow and Sons (Natal) Ltd & Anor supra*. That decision was approved in a number of subsequent cases in South Africa and in this jurisdiction - see *Government of the Republic of South Africa* v *Ngubane* 1972 (2) SA 601 (A), *Brummer* v *Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 SCA) and *Syfrets Merchant Bank* v *Jardine & Ors* 1999 (1) ZLR 124 (H). These cases clearly show that even where the contract of cession purports to be an out and out cession, it is not in fact such in respect of the right to prosecute the action if *litis contestatio* has been reached in the action between the cedent and the debtor. The right to prosecute the action is not transferred to the cessionary. What is transferred is the *spes* i.e. the benefits that flow from the conclusion of the proceedings began by the cedent against the debtor. The cedent is only divested of all its rights when the court grants substitution of the cessionary as the plaintiff. Thus, according to the view I take of the matter, whilst in such a case the cession has some immediate

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legal force as between the cedent and the cessionary the nature or extent of the rights ceded are circumscribed by the rule that after *litis contestatio* the plaintiff is not divested of all his rights - in particular, his right to prosecute the action. It is not necessary for me to expound on the rationale for this rule as that is extensively dealt with in the authorities which I have cited.

The situation with regard to rights which a plaintiff may transfer where the cession takes place after institution of action but before *litis contestatio* is less clear but it is, in principle, amenable to be dealt in the same way as a cession after *litis contestatio*. Before examining Mr *de Bourbon*'s submissions in this connection I must show what the law is or appears to me to be at present.

In *Syfrets Merchant Bank* v *Jardine & Ors supra*, the plaintiff company advanced a sum of money to a company and the loan capital was paid to the respondents as a cash advance. The company was later placed under voluntary liquidation and the plaintiff claimed the amount outstanding on the loan. Among the defences raised by the respondents was that the plaintiff had no *locus standi* because it had ceded the debt to a third party some two months after it had issued the summons against the respondents. This court held that the plaintiff had no *locus standi*. At 126G-127C, Devittie J stated the position as follows:

> "It seems clear, therefore, that where cession takes place prior to the issue of summons, an action instituted in the name of the cedent gives the plaintiff no *locus standi*. In my view, there can be no difference in principle where the cession is effected after the issue of summons but before *litis contestatio*.
>
> I do not, however, consider that the institution of proceedings by the cedent before cession or the ceding of a debt after summons is fatal to the proceedings. The cedent should make an application to substitute the cessionary. Until substitution is granted, the cedent has no *locus standi* to continue to prosecute the claim because the right

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> will have been transferred to the cessionary. This is the position that the applicant finds itself in, in the present proceedings. No application was made for substitution. Accordingly, I must find that the plaintiff, having ceded its right, has no *locus standi* to continue the action ... It would seem to follow that after a cession, only the cessionary has *locus standi* to initiate legal proceedings related to the ceded rights against the debtor or to continue such legal proceedings, if they were initiated prior to the cession."

The position enunciated in this passage does not provide a ready answer to the issue that has arisen in the matter before me. Is it that where cession takes place after institution of action but before *litis contestatio* the cedent loses its *locus standi* and the cessionary does not, at the same time, acquire the *locus standi*? *Jardine*'s case *supra* is to the effect that the cessionary only acquires the *locus standi* which has been lost by the cedent if the cessionary is substituted as plaintiff. If this be so, does that not beg the question what rights has the cedent transferred? And does it not mean that the right to prosecute the action has not been ceded by the plaintiff in the same way as the right to

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prosecute the action is not transferred in a cession taking place after *litis contestatio*? The decision in *Jardine*'s case seems to me to mean exactly that - that a cession after institution of proceedings, but before *litis contestatio* is exactly the same in its effect as a cession after *litis contestatio,* in that the right to proceed with the action is not transferred. Hence, in both cases substitution of the cessionary as plaintiff is necessary. The situation where a cession takes place before action is instituted is clear - the cedent divests himself of his right to claim and cannot institute action against the defendant and he cannot even act as agent for the cessionary as an undisclosed principal. This was the decision in *Standard General Insurance Co Ltd* v *Eli Lili (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party* 1996 (1) SA 382 (W) which disapproved of the decision in *Clark* v *van Rensburg & Anor* 1964 (4) SA 153 (O). See also MM Loubser on *Extinctive Prescription* at p 128.

The law is therefore clear with respect to cession after *litis contestatio* and cession before institution of proceedings. The grey area remains that of a cession after the institution of action but before *litis contestatio*. In *Jardine*'s case *supra*, the question of prescription did not arise as in the present case. And precisely because the question of prescription did not arise in that case, it is more likely that the learned judge did not consider the issue against the same background as I have to do in this application.

Mr *de Bourbon* submitted that where a cession has been effected after the issue of summons, the cedent is not divested of its right of action until such time as the court grants a substitution of the cessionary for the cedent as plaintiff. He submitted that this is so because the institution of action alters the parties' legal relationship in respect of the dispute between them. The dispute becomes *res litigiosa* and the parties become enmeshed in the litigation and they assume certain obligations to each other and to the court. For instance, a party cannot, for example, withdraw from the action without tendering wasted costs. In his heads of argument, he examines the situation regarding *res litigiosa* and *actiones litigiosa* and, on the authorities to which he refers, he states that a *res litigiosa* may not be sold after institution of action as there is no-one who can be enriched by the right as everyone has an equal right to prosecute it. I agree with Mr *de Bourbon*'s submissions. As with a cession after *litis contestatio*, a plaintiff who

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cedes his rights after institution of action but before *litis contestatio* can only cede the *spes* and not the right to prosecute. The institution of action obviously has some legal force as between the cedent and the cessionary, but until the court grants a substitution of cessionary as plaintiff, the cedent retains his right to prosecute the action. Accepting this argument, therefore, I must find that the cedent did not divest itself of its right to prosecute the action against the respondents and the cessionary was not invested of that right. The cessionary will be invested of

that right only upon the court granting a substitution. It follows, then, that the second applicant has no right of action against the respondents and as such prescription does not operate against it. Prescription in any case affects a cause of action and not the parties or the right of action.

The issue of prejudice must always be considered where an application to substitute a plaintiff is brought before the court. In this case, the prejudice which the respondents alleged they would suffer was the inability to raise the defence of prescription. Having accepted the argument that the second applicant had no rights which could prescribe, the question of prejudice based on prescription falls away. I am satisfied that no prejudice would be caused to the respondents. Mr *Ncube* submitted that the prejudice which the respondents would suffer arises from the fact that further pleadings were filed by a non-suited party, i.e. the first applicant, and submitted further that those pleadings were invalid. The invalidity of the pleadings is a matter to be decided in case No. HC-5820-96. But if the pleadings indeed were invalid, which I do not think they were, still no prejudice would be suffered by the respondents, and more so because this submission was linked to that of prescription.

In the result, the application succeeds with costs. I have no reason to find, as contended by the respondents' legal practitioner, that there should be no order as to costs. The costs of this application must be determined at the hearing of the main action in case No. HC-5820-96. My order is therefore as follows:

It is ordered that:

1. Climax Investments (Pvt) Ltd be and is hereby substituted as plaintiff in place of Zimbabwe Banking Corporation Ltd in case No. HC-5820-96.

2. The costs of this application shall be in the cause in case No. HC-5820-96.

Gill, Godlonton & Gerrans, applicants' legal practitioners

Mabuye & Co, respondents' legal practitioners

S v MHANJE 2000 (2) ZLR 20 (HC)

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Citation	2000 (2) ZLR 20 (HC)
Case No	Judgment No. HH-127-00
Court	High Court, Harare
Judge	Garwe J
Heard	June 21, 2000
Judgment	June 21, 2000
Annotations	None

Criminal review

Flynote

Criminal law - common law offences - rape - penetration - what is required to commit rape - slightest penetration of female genitals sufficient

Headnote

The accused was charged with, and convicted of, attempted rape. He had inserted his penis into the genitalia of the three year old complainant but had failed to penetrate her vagina. The medical evidence was that her hymen was intact. It was on the basis of the medical evidence that he was charged with and convicted of attempted rape.

Held, that the medical perception of what constitutes penetration does not coincide with legal penetration. For rape to take place, it is not necessary that there should be full penetration. The slightest degree of penetration will suffice. To charge the accused with attempted rape only led to an injustice. As the verdict could not be altered on review, all the court could do was certify the proceedings as not being in accordance with real and substantial justice.

Cases Considered

Cases cited:

S v *Chidodo & Anor* 1988 (1) ZLR 299 (H)

S v *Chirunga* 1998 (2) ZLR 601 (H)

S v *Dube* S-39-86

S v *Dziva* 1971 (1) RLR 202 (G)

S v *Hove* 1981 ZLR 610 (H)

S v *James* S-72-87

S v *Mhlanga* 1987 (1) ZLR 70 (S)

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S v *Muvandiri* 1995 (2) ZLR 250 (H)

S v *Muvhaki* 1985 (1) ZLR 252 (H)

S v *Sabawu* 1999 (2) ZLR 314 (H)

R v *Tarusika* 1959 (1) R & N 51 (SR)

S v *Torongo* S-206-96

Judgment

Garwe J: The accused in this matter was convicted of attempted rape and sentenced to receive corporal punishment of 5 strokes with a "ratten" [*sic*] cane and in addition to 2 years' imprisonment with labour, suspended on condition of good behaviour. In response to my query, the trial magistrate has accepted that the word "ratten" is incorrect and that this should read "rattan". Nothing however turns on this.

GARWE J

The facts of this case are that the accused inserted his erect organ into the three year old complainant's vagina and attempted to have sexual intercourse with her but failed to achieve full penetration. Medical evidence confirms that the labia minora and majora were both inflammed. The doctor's report further indicates that there was "bruised *mons pubis*. Slightly inflamed vestibule". The doctor concluded that sexual abuse had "very likely" occurred but stated that no vaginal penetration had been effected. Presumably, on that basis, the accused was charged with and convicted of attempted rape.

I was of the view that the facts established a rape. I accordingly asked the Attorney-General whether the conviction was supported. In a recent minute, the Attorney-General has remarked that the charge of attempted rape is not supported. He has stated as follows:

> **"A: Introduction**
>
> 1. The accused, aged 16 years, appeared before the Provincial Magistrate sitting at Bindura charged with the crime of attempted rape. The case against him was that on 21 December 1999, he had been left in the custody of Sidela Kapuya, a girl aged three years as the child's grandmother proceeded to a local hospital.
>
> 2. The accused dragged the hapless little girl into his bedroom, laid her on her back, removed her pants and threatened her with assault should she cry. He then made attempts at penetrating her with his male member.
>
> 3. The medical practitioner who examined the complainant observed the following:
>
> (i) Extra-genital injuries: bruised *mons pubis*. Slightly inflamed vestibule.
>
> (ii) Labia minora: inflamed.
>
> (iii) Hymen: intact
>
> (iv) Examination: painful

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(v) Sexual abuse very likely but no vaginal penetration was effected.

4. Apparently, basing its case on the medical report the State charged the accused with attempted rape. He pleaded guilty and was duly convicted. He was sentenced as follows:

> To receive corporal punishment of 5 strokes with a ratten (*sic*) cane to be administered in private by a designated officer at Bindura Prison. In addition, 2 years' imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence involving sexual intercourse for which he is sentenced to imprisonment without the option of a fine.

B: The Issue Raised on Review

5. In his minute to the Attorney-General, the Honourable Judge expresses the view that the accused should more properly have been charged with and convicted of rape.

C: The Attorney-General's Views

6. The Attorney-General respectfully agrees with the learned judge. The accused should have been charged with rape on the facts of this case. The reasons for this view follow hereunder.

D: Rape

7. "Rape consists in intentional unlawful sexual intercourse with a woman without her consent" - *per* P M A Hunt *South African Criminal Law and Procedure* Vol II at p 435.

GARWE J

8. For purposes of the case at hand the essential element that needs close examination is the aspect of sexual intercourse. Hunt *supra* at p 440 says:

> 'There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary in the case of a virgin that the hymen should be ruptured, and in any case it is unnecessary that semen should be emitted. But if there is no penetration there is no rape, even though semen is emitted and pregnancy results.'

9. It is respectfully submitted that it is trite that the slightest degree of penetration of the female body by the male organ will found a conviction for rape.

10. It would appear that *in casu* the prosecution as well as the learned trial magistrate were influenced by the medical doctor's comments on penetration. They did not read deeper into the medical report. If they had done so they would have realised the implications of the medical practitioner's findings in connection with the extra-genitals, the labia minora and the vestibule. With respect it would appear that the issue of penetration was approached from a medical rather than a legal perspective.

11. In this, it is submitted that the court *a quo* fell into error and misdirected itself.

12. In *S* v *Torongo* S-206-96, Korsah JA (as he then was) had this to say at p 6 of the cyclostyled judgment:

> 'I have noticed from the many medical reports that are compiled in rape cases that the medical understanding of penetration does not accord with what is legally accepted as penetration. It would seem that the medical perception of penetration is either when there is a bruising of the vestibule or when the hymen is ruptured. If such a view were to be accepted legally, medical evidence would be almost inept in support of allegations or rape by married women and indeed any woman who for other reasons had lost her hymen prior to the allegation of being ravished. The doctor's view is a misconception of what in law amounts to rape and courts are well advised to be wary of opinions

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expressed by doctors in their reports in such cases.'

13. The learned Judge of Appeal in that case was commenting on a medical report compiled in respect of a female juvenile victim of rape. It showed that the hymen was intact and the doctor's view was that penetration had possible been attempted but not effected. The Judge of Appeal went on (at p 7 of the judgment):

> 'One can understand doctor's reasons for adopting a purely scientific approach in order to arrive at an unassailable scientific conclusion. *As far as the law is concerned, placing the male organ at the orifice of the female organ, resulting in the slightest penetration, constitutes rape*' (emphasis added).

See also: *S* v *Mhlanga* 1987 (1) ZLR 70 (S) at p 72; *S* v *Dube* S-39-86 at p 6 of the unreported judgment; *S* v *Sabawu* 1999 (2) ZLR 314 (H) at p 316.

14. In *S* v *James* S-72-87, the appellant was charged with two counts of rape involving two complainants aged six and seven years respectively. He had, in relation to each, made determined but unsuccessful attempts at penetration. Each testified that they had been penetrated and described the experience as painful. Medical evidence indicted that examination was painful, the hymen in respect of each was ruptured and penetration had 'possibly' been effected. Manyarara JA on appeal indicated that on this evidence the appellant should have been convicted of rape and not merely attempts to commit rape.

15. It is respectfully submitted that in view of the accused's intention - which was to have sexual intercourse with the complainant against her will - and the medical evidence, the trial court ought to, in my respectful submission of what constitutes

legal penetration, have convicted the accused of the substantive offence. Both the *mens rea* and *actus reus* for rape were present in this matter.

16. It is consequently submitted that there was a miscarriage of justice in that the accused was convicted of a less serious offence than the evidence showed: see generally, *S* v *Chidodo & Anor* 1988 (1) ZLR 299 (H) at 302F-H.

E. The Way Forward

17. The issue arises as to what should now be done. The accused stands convicted of the lesser charge when he should have been convicted of rape.

18. It is submitted that while the State has a discretion as to what charges to refer to an accused person that discretion should be exercised reasonably. It would be improper and unjust to charge two accused persons differently, one for rape and the other for attempted rape, on the basis of similar facts: *S* v *Chidodo & Anor supra* at p 302F-H, and at p 303D.

19. Where the conduct of an accused person reveals two offences the approach to be adopted has been clearly laid down. It is as follows:

> '... where two offences are committed, the proper thing to do is to charge the accused with the more serious of the two.

If it is not possible to ascertain which is the more serious of the two, then the proper approach is to charge the accused with what may be regarded as the more appropriate charge in the circumstances, and, in ascertaining which is the more appropriate, the courts must look to the existing practice. The accused's dominant purpose in committing the crime is also a factor to be considered': *per* Beadle CJ in *S* v *Dzuva* 1971 (1) RLR 202 at p 205A-B. See too *S* v *Muvhaki* 1985 (1) ZLR 252 (H) at p 258C.

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20. It is submitted that had the prosecution approached the matter on the basis of these principles they would not have proceeded to trial on a charge of attempted rape. The accused went beyond mere attempt.

21. In *S* v *Sabawu supra*, Chatikobo J made the following remarks at 317C-D:

> 'A legally trained mind ought to appreciate that legal penetration connotes the slightest entry of the male organ into the female body ...
>
> These courts have on numerous occasions implored prosecutors to exercise care when preferring charges so as to ensure that the correct charges are put to offenders. Magistrates for their part should not accept without question, charges which are not consistent with the evidence put before them. If it occurs to the magistrate during the course of the trial that the evidence established a more serious offence than the one brought against the accused, he or she should stop the trial in terms of s 54 of the Magistrates Court Act [*Chapter 7:10*] and refer the matter to the Attorney-General.'

22. In that case, as here, the learned judge was faced with a matter wherein the accused had been convicted of indecent assault when the evidence could sustain a rape conviction. At pp 8-9 of the judgment, the judge had this to say:

> '... where the charge as framed and as put to the accused is of a minor nature than the one which is proved on the evidence and which is of greater gravity there appears to be no power either on review or on appeal to substitute the more serious offence. Hence, Reid-Rowland *Criminal Procedure in Zimbabwe* at 26-7 states ...
>
> "... where the accused was charged with and convicted of an attempt to commit an offence but the evidence shows that he committed the substantive offence, it would not be competent to alter the conviction to one of committing the

> substantive offence, because that was not a verdict which the magistrate could have reached."
>
> This statement derives support from respectable authority and I respectfully associate myself with it. See *S* v *Collett* 1978 (2) RLR 288 (G) 291 and *S* v *Nyuke* 1981 RLR 158 (G) at 159.'

23. The Honourable Judge held that all that he could do in the circumstances was to decline to certify the proceedings as being in accordance with real and substantial justice.

24. While it is common cause that s 29(2)(b)(iii) of the High Court Act [*Chapter 7:06*] empowers the court on review to 'correct' the proceedings of an inferior court, that is, alter the verdict of an inferior court, it has been held that this is applicable to situations where the ingredients of the more serious offence are contained in the charge. See *S* v *Hove* 1981 ZLR 610 (H) at 612A-B; *R* v *Tarusika* 1959 (1) R&N 51 (SR); *S* v *Muvandiri* 1995 (2) ZLR 250 (H); *S* v *Chirunga* 1998 (2) ZLR 601 (H) at 606D-G.

25. Whilst the Attorney-General does not support the charge that was preferred, an appeal is inconceivable.

26. It is respectfully submitted that the Honourable Court should in this instance decline to certify the proceedings: there was an injustice arising out of the conviction for a lesser offence when a more serious offence was disclosed by the evidence on record."

I agree with the above remarks. By preferring a charge of attempted rape when in fact a rape had occurred, an injustice has been allowed to take place. Even considering that the accused was a 16 year old juvenile, an effective custodial sentence may well have been warranted, taking into account that the complainant was a mere three year old.

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I find myself unable to certify the proceedings as being in accordance with real and substantial justice.

COTTON COMPANY OF ZIMBABWE v MAMOMBE 2000 (2) ZLR 25 (HC)

Citation	2000 (2) ZLR 25 (HC)
Case No	Judgment No. HH-138-00
Court	High Court, Harare
Judge	Adam J
Heard	July 5, 2000
Judgment	July 5, 2000
Counsel	Miss E Mushore, for the applicant M Mandikumba, for the respondent
Annotations	None

Opposed application

Flynote

Appeal - noting of - effect - whether operation of judgment appealed against is suspended - appeal to Labour Relations Tribunal against decision of disciplinary body established under registered code of conduct - operation of decision is not suspended

Employment - disciplinary proceedings - decision made in terms of code of conduct - appeal against - operation of decision not suspended by noting of appeal

Headnote

The common-law rule that the noting of an appeal automatically suspends the determination or decision appealed against does not apply in relation to an appeal under s 101(7) of the Labour Relations Act [*Chapter 28:01*] against a determination or decision made in terms of a registered code of conduct.

Cases Considered

Cases cited:

Arches (Pvt) Ltd v *Guthrie Hldgs (Pvt) Ltd* 1989 (1) ZLR 152 (H)

Chatizembwa v *Circle Cement* HH-121-94

Oliphant's Tin "B" Synd v *de Jager* 1912 AD 477

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Reid & Anor v *Godart & Anor* 1938 AD 511

South Cape Corp v *Engng Mgmt Svcs* 1977 (3) SA 534 (A)

Wood NO v *Edwards & Anor* 1966 RLR 336 (G); 1966 (3) SA 443 (R)

Legislation considered:

Labour Relations Act [*Chapter 28:01*], ss 97(1) & 101(7)

Case Information

Miss *E Mushore*, for the applicant

M Mandikumba, for the respondent

Judgment

Adam J: In this matter, the applicant seeks summary judgment, which is opposed by the respondent. The applicant commenced proceedings with its summons and declaration filed in this court on 18 October 1999 against the respondent seeking the ejectment of the defendant from House No. 11 Low Density Valley Area, Glendale. The defendant entered an appearance to defend.

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It is common cause that the respondent was employed by the applicant as a plant and maintenance manager. He was dismissed by the applicant in September 1998 after disciplinary proceedings held in terms of a registered code of conduct (Labour Relations (Employment Code of Conduct) Regulations, 1990 SI 379 of 1990). The respondent noted an appeal against his dismissal to the Labour Relations Tribunal on 28 September 1998.

In the founding affidavit, the applicant's secretary averred that the respondent, despite demand, refuses and/or neglects to vacate premises which are required by the applicant and that the respondent has appealed to the Labour Relations Tribunal against his dismissal but the issue to be determined is that of his dismissal not his eviction.

In the opposing affidavit, the respondent denied that he was in unlawful occupation and that the law is clear that in his situation the Labour Relations Act [*Chapter 28:01*] stipulates that an appeal suspends judgment terminating his employment.

Both the applicant's and respondent's heads of argument are agreed that the issue to be determined by this court is whether noting of an appeal to the Labour Relations Tribunal against the decision of the managing director of the applicant accepting the findings of the disciplinary and grievance committee suspends that decision.

Under the common law, normally noting of an appeal automatically suspends the execution of the judgment - *Oliphant's Tin "B" Syndicate* v *de Jager* 1912 AD 477; *Reid & Anor* v *Godart & Anor* 1938 AD 511; *Wood NO* v *Edwards & Anor* 1966 RLR 336 (G) at 339; *South Cape*

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Corporation v *Engineering Management Services* 1977 (3) SA 534 (A) at 542E and *Arches (Pvt) Ltd* v *Guthrie Holdings (Pty) Ltd* 1959 (1) ZLR 152 (H) at 154G.

In *Oliphant*'s case *supra*, Innes ACJ observed at 481:

> "When an appeal has been noted, execution is by law automatically suspended, save in some excepted cases, of which this is not one. It can only be carried out, in that event, by the express direction of the court, acting under the rule, and for that a special application by the successful party would be necessary."

Similarly in *Reid* v *Godart supra*, de Villiers JA said at 513:

> "Now, by Roman-Dutch Law, the execution of all judgments is suspended upon the noting of an appeal, that is to say, the judgment cannot be carried out; and no effect can be given thereto, whether the judgment be for money (on which a writ can be issued and levy be made) or for any other thing or for any form of relief granted by the court appealed from ... The foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage being done to the intending appellant."

The applicant, however, in its heads of argument, while accepting the common-law rule on execution of judgments, submits that the noting of an appeal under s 101(7) of the Labour Relations Act to the Labour Relations

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Tribunal does not suspend a decision or determination made in proceedings in terms of a registered code of conduct. The respondent, on the other hand, in his heads of argument, submits that the legislature could not have intended to give one class of workers (falling under s 97(3) of that Act) certain guarantees and remedies while denying them to another class of workers (falling under s 101(7) of the Act) governed by a registered code of conduct. Mr *Mandikumba* submitted that s 101(7) must be construed within the context of other relevant provisions in that Act as opposed to it being construed in isolation. To pursue the latter brings about an absurdity which the legislature never intended.

Miss *Mushore* relied on *Chadamoyo Chatizembwa* v *Circle Cement Ltd* HH-121-94 where Smith J held that the common-law rule that the noting of an appeal automatically suspended the determination or decision appealed against did not apply to a determination or decision made in terms of a registered code of conduct. The applicant in that case, employed as a workshop foreman, was initially suspended from work in June 1993 with pay and benefits. His contract was terminated after proceedings conducted under a registered code of conduct. The letter terminating his employment was dated 20 July 1993 but the respondent continued to pay him until 31 August 1993. On 16 August 1993, he noted his appeal to the Labour Relations Tribunal. The applicant asserted before Smith J that he was entitled to his salary and benefits until his appeal was determined by the Labour Relations Tribunal, since the applicant considered that the noting of his appeal to the Labour Relations Tribunal suspended the operation of the decision to terminate his employment. It was there submitted on behalf of the respondent that there is provision under s 101(7) for an appeal to the Labour Relations Tribunal but there is no provision in that Act to the effect that the decision appealed against is suspended pending appeal. Smith J reached his conclusion on the basis that the body set up under a registered code of conduct did not have inherent jurisdiction to consider an application for leave

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to execute pending appeal, as this is a common law proviso and not an additional power given to be exercised in terms of a registered code of conduct. Also, in s 97 there is provision for appeal to the Labour Relations Tribunal, with s 97(3) specifically providing that an appeal in terms of s 97(1) "shall have the effect of suspending the determination or decision appealed against", but s 101(7) merely permits an appeal to the Labour Relations Tribunal against a determination or decision made in a proceeding under a registered code of conduct. There is no specific provision like s 97(3). If the legislature had intended that such a determination or decision made in terms of a registered code of conduct should be suspended pending appeal, it would have said so as is done in s 97(3). In addition, it would have inserted a power enabling the

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Labour Relations Tribunal to declare otherwise in appropriate circumstances. The fact that the legislature did not make a specific provision to that effect is a clear indication that it did not intend the noting of an appeal in terms of s 101(7) to suspend the decision appealed against. Further, the introduction of the concept of registered codes of conduct that are binding on employers and employees is consistent with the principle that determinations and decisions arrived at in accordance with the requirements of a registered code of conduct should have effect until such time as the appeal is finalised by the Labour Relations Tribunal.

Sections 96(2) and (3); 97; 101(7) and (8) of the Act provide as follows:

" 96(2) Any party to whom a determination made in terms of section *ninety-three* or *ninety-five* relate may submit for registration copies thereof, duly certified by the labour relations officer or senior labour relations officer, as the case may be, to the clerk of the magistrates court having jurisdiction in the area where the dispute or unfair labour practice are;

(3) Where a determination is registered in terms of subs (2) it shall, for purposes of enforcement, have the effect of a civil judgment of the magistrates court ...

97(1) Any person who is aggrieved by -

(a) the confirmation, variation, substitution or setting aside of a determination by a senior labour relations officer; or

(b) the conduct of the investigation of a dispute or unfair labour practice by a labour relations officer or senior labour relations officer;

may, within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Tribunal.

(2) An appeal in terms of subsection (1) may -

(a) address the merits of the determination or decision appealed against; or

(b) seek a review of the determination or decision on any ground on which the High Court may review it; or

(c) address the merits of the determination appealed against and seek its review on a ground referred to in paragraph (b).

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(3) An appeal in terms of subsection (1) shall have the effect of suspending the determination or decision appealed against.

(4) Upon receiving notice of an appeal, the Tribunal may -

(a) proceed with the appeal by way of a hearing; or

(b) decide the appeal on the record; or

(c) remit the matter to the senior labour relations officer concerned for further investigation, and, upon the conclusion of such investigation, proceed with the appeal by way of a hearing or decide the appeal on the record.

(5) Pending the determination of an appeal the Tribunal may make such interim determination in the matter as it thinks fit.

101(7) Any person aggrieved by -

(a) a determination made in his case under a code; or

(b) the conduct of any proceedings in terms of a code;

may within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Tribunal.

(8) On an appeal in terms of subsection (7) the Tribunal may -

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(a) confirm the determination or proceedings appealed against; or

(b) remit the matter for determination by the person, committee or authority referred to in paragraph (d) of subsection (3); or

(c) substitute its own determination for that appealed against."

From the submission made on behalf of the respondent, it must necessarily follow that without that specific provision under s 97(3) the lodging of an appeal in terms of s 97(1) to the Labour Relations Tribunal would not have automatically suspended the operation of the determination or decision appealed against. In other words, the common-law rule did not apply to appeals to the Labour Relations Tribunal. A provision similar to s 97(3) was a prerequisite before noting of an appeal to the Labour Relations Tribunal could be said to have suspended the execution of the determination or decision appealed against.

Further, a cursory examination of the provisions of that Act clearly shows that employees governed by a registered code of conduct are treated in a different way from other employees. For example, s 96(2) permits a determination made by a labour relations officer or a senior labour relations officer in terms of s 93 or 95 to be registered with the clerk of the magistrates court and so have the effect, under s 96(3), of a civil judgment of the magistrates. A determination or decision under a registered code of conduct in terms of s 101(3) and (d) cannot be registered as there is no express provision to that effect. Also, s 97(4) allows the Labour Relations Tribunal to proceed with the appeal by way of a hearing. There is no such provision for an appeal lodged in terms of s 101(7). Section 101(8) permits the Labour Relations

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Tribunal, on an appeal, to confirm the determination or proceedings or remit the matter for determination by the person or authority who made it or substitute its own determination for that appealed against. It is clear from this that the Labour Relations Tribunal cannot therefore proceed with such an appeal by way of a hearing since there is no express provision to that effect.

It follows from the foregoing that by the deliberate enactment of specific provisions like s 96(2) and s 97(3) and (4) the legislature could not be said to have intended to bring about an absurdity.

The respondent has not been able to establish that Smith J erred in any way or that his judgment could be distinguished in any manner. The applicant is entitled to summary judgment.

Accordingly, there will an order with costs that the respondent be ejected forthwith from House No. 11 Low Density Valley Area, Greendale together with all sub-tenants, guests, invitees and any other persons claiming occupation through him.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Mushonga & Associates, defendant's legal practitioners

VENTURE CAPITAL CO OF ZIMBABWE LTD v CHIROVERO INVESTMENTS (PVT) LTD 2000 (2) ZLR 30 (HC)

Citation	2000 (2) ZLR 30 (HC)
Case No	Judgment No. HH-144-00
Court	High Court, Harare
Judge	Gillespie J
Heard	February 17, 2000; February 18, 2000; February 19, 2000
Judgment	July 12, 2000
Counsel	G S Wernberg, for the plaintiff A J Dyke, for the defendant
Annotations	None

Civil action

Flynote

Contract - terms - renunciation of exceptions non causa debiti, non numeratae pecuniae and errore calculi - effect of - breach - damages - loss - quantification - need for plaintiff to prove loss and not leave court guessing

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Practice and procedure - exception - exceptio non causa debiti, exceptio non numeratae pecuniae and exceptio errore calculi - meaning - wffwct of renunciation

Headnote

The *exceptio non debiti* is a plea by the debtor that there was no just cause for the debt. The renunciation of this by a debtor does not debar the debtor from denying the existence of the principal obligation. It merely serves as a device to shift the onus of proof. Whereas generally the creditor must allege and prove the principal obligation, when there has been a renunciation of this exception the debtor has the burden to prove that no cause of indebtedness existed.

The *exceptio non numeratae pecuniae* is a plea by a debtor that money has not been paid to him by way of a loan. Where the debtor renounces this exception the onus rests upon him to prove that the amount purportedly loaned to him was not paid over to him.

The *exceptio errore calculi* protects a debtor's right to insist upon re-examination of the accounts and where error is found to be discharged from the consequences of a promise to pay made *indebite*, provided that the accounts are not *res judicata* or have not been agreed in a compromise. The renunciation of this exception merely affects the question of onus. If the debtor wishes to challenge the calculation of the amount due, he must undertake the onus of proving the accounts to be wrong. In no circumstances can the renunciation of the plea be construed as an acceptance without question of unilateral calculations by the creditor of the amount outstanding or waiver of any right to insist upon proof by the creditor of any such unilateral calculation.

Where damages are claimed for breach of contract, the plaintiff must produce sufficient evidence to enable the court to calculate the loss. The court should not be left guessing. Failure to produce the evidence where the court would legitimately expect a documented and authentically calculated loss in an ascertainable amount will usually lead to absolution from the instance.

Cases Considered

Cases cited:

Aaron's Whale Rock Trust v *Murray & Roberts Ltd & Anor* 1992 (1) SA 652 (C)

Cohen v *Louis Blumberg (Pty) Ltd & Anor* 1949 (2) SA 849 (W)

Dowson Dobson Industrial Ltd v *van der Werf & Ors* 1981 (4) SA 417 (C)

Dowjee Co Ltd v *M M M E Dawjee & Co* 1930 TPD 240

Ebrahim v *Pittman NO* 1995 (1) ZLR 176 (H)

Hersman v *Shapiro* 1926 TPD 367

Mkwanani v *van der Merwe & Anor* 1970 (1) SA 609 (A)

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

Pangbourne Properties Ltd v *Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W)

Wollach v *Barclays Bank Ltd* 1983 (2) SA 543 (A)

Case Information

G S Wernberg, for the plaintiff

A J Dyke, for the defendant

Judgment

Gillespie J: Mr and Mrs Gumbe have a small holding. On it, they conducted farming business - market garden, chickens and some pigs. They did this through a company, Chirovero Investments (Pvt) Ltd. What they really wanted to do was horticulture. Roses. Perhaps for a love of flowers. Perhaps as a quest for foreign currency. No matter, to stand a chance of exporting blooms for hard currency they needed capital in domestic money. And lots of it.

This is where the Venture Capital Company of Zimbabwe Limited comes in. It has lots of money and is willing to lend it. More particularly, as its name implies, it is willing to invest in a promising endeavour in return for a share in the anticipated proceeds and some control in the business itself. The floral and financial fortunes of Chirovero Investments, and the Gumbes, seemed just such an opportunity.

An initial agreement, signed on 20 August 1991, provided for Mr Gumbe to surrender deeds to his land, Chirovero farm, to VCCZ on payment by VCCZ of $60 754.07, the amount in which Mr Gumbe was indebted to the Agricultural Finance Corporation. These deeds would be held by VCCZ until the land itself was conveyed into the name of Chirovero Investments, where it would be regarded as the purchase price for 60% of the restructured share capital of the company. The remaining 40%, it was agreed, would be subscribed by VCCZ by cash contribution. In addition, VCCZ would acquire a further number of non-voting preference shares to be issued. Profits from the venture would be shared according to the holding ratio of ordinary shares.

This initial agreement was in part performed, and in part refined, under a subsequent joint venture agreement of September 1991. In terms of this second contract, the authorised share capital of the company was increased from 30 000 to 1 521 667 ordinary shares of $1 each, and 664 333 further shares, being 16% non-voting redeemable preference shares, were to be issued. Of the ordinary shares, 40%, *viz* 628 667, were to be subscribed by

VCCZ on cash payment of $628 667. The balance was to be issued to the Gumbes (who already held 2 shares in the company) in return for the transfer of the land. The preference shares were to be subscribed by VCCZ on payment of the sum of $664 333.

The joint venture agreement contained various terms relating to matters of administration and

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accounting within the company. In addition, there was provision made for the termination of the agreement. VCCZ was given the right within the period of one year, after signature, in the event that the project was not viable and misrepresentations to viability had been made, to terminate the agreement and redeem its contributions at a premium. This right was also extended to VCCZ as a consequence of breach by the company or the Gumbes. Finally, the Gumbes were given the option of purchasing the shares of VCCZ after seven years from the commencement of business under the venture , failing which VCCZ would be entitled to sell to third parties.

Apart from these structural agreements, there are outright agreements of loan by VCCZ to the company. Two of them form the subject of the claim. In November 1991, there was an agreement for the loan of $350 000. In August 1992, a loan of $21 480 and another of $95 000. And again in or about August 1993 an agreement for a loan of $560 708.35.

This latter agreement was concluded at a time when there was already substantial souring of the relationship between VCCZ and the Gumbes. The nature of these allegations (evidence concerning which occupied no little time at trial) is to some extent reflected in the terms upon which VCCZ insisted in extending this further loan to the company. These terms included: increase of VCCZ's shareholding to 60%, by an increase in authorised and issued share capitals; Mr Gumbe's resignation as chairman and managing director of the company; the Gumbes' partial removal from the farm house (their home) in order to accommodate a manager and an accountant; written undertaking from the Gumbes not to interfere in the day to day running of the rose business, nor to use the farm for other purposes - on pain of expulsion from the farm; and certain other terms. These terms are set out in a letter of offer, signed by the Gumbes to indicate acceptance, and which specifically records that a separate agreement, stating the terms of the loan, should be prepared.

Despite this, or perhaps because of (or at least foreshadowed by) this, by May 1994 the relationship was no longer workable. VCCZ purported to offer its shares for sale to the Gumbes, but no agreement was achieved. Finally, in October and November of 1994, it simply issued summons against the company for repayment together with interest and costs, of the sums of $530 184 and $704 003, being respectively the alleged amounts outstanding in respect of the terms of $350 000 and approximately $560 000, mentioned above.

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After many false starts and amendments, the details of which would be tedious to recount, the defence to each claim finalised itself as follows. It was admitted that the amount of $360 000 was advanced and averred that it was repaid. It was denied that the loan of $500 000 was advanced.

In addition there was brought a claim in reconvention. This averred the wrongful conduct of the plaintiff in its management of the business of Chirovero Investments and in particular in failing to provide the funding agreed. In consequence of this failure, it is alleged, the company suffered from ruinous undercapitalisation; loss of rose production; and loss of product quality leading to an overall loss of profitable business. A further item of loss related to the alleged wrongful

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withdrawal of a company vehicle which brings the total damages claimed to $6 190 517.19.

The duty to begin, and the onus of proof, was held, after argument at the commencement of trial, to rest with the defendant. The burden on the reconvention is the defendant's. Having admitted receipt of, but averred repayment of, the loan of $350 000, it has also the undoubted burden on that issue. Although it denied receipt of the loan of $560 000, the terms of the contract are such as to oblige it to make its case in that issue too.

The terms of the loan included a renunciation of the exceptions *non numeratae pecuniae; non causa debiti*; and *errore calcule*. In addition reference is made to a supposed defence of "no value received" and "revision of account". The meaning of these is as follows:

The *exceptio non causa debiti* is a plea by a debtor that there was no just cause for the debt. It is alleged that the principal obligation does not exist. The renunciation of the *exceptio non causa debiti* does not debar the debtor from denying the existence of the principal obligation, it serves merely as a device to change the incidence of the onus. Thus, whereas generally the creditor must allege and prove the principal obligation, upon renunciation the debtor must rebut this by undertaking the burden of proving that no cause of indebtedness exists. 1(4)

The *exceptio non numeratae pecuniae* is a plea by a debtor that money has not been paid to him. It is similar to the preceding exception, but is applicable peculiarly to the case of dispute of payment of money purportedly lent rather than to the absence of any cause of indebtedness. It is misleading to say that renunciation of this exception has the effect of an acknowledgement by the debtor of the principal debt. The true effect is confined only to the incidence of the onus.

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A debtor or surety renouncing the debt takes upon himself the burden of proving that the amount purportedly loaned was not paid over to him. He may do this both at trial and even at provisional sentence. Renunciation of the exception does not render liquid an acknowledgement of indebtedness in an uncertain and therefore illiquid amount. 2(5)

Errore calculi comes from the title of Code II, v *De Errore Calculi* - concerning an error of calculation. The text of the title reads:

> *"Errorem calculi, sive ex uno contractu, sive ex pluribus emerserit, veritate non afferre praejudicium, saepe constitutum est: unde rationes etiam saepe computatis denuo tractari posse, si res judicata non sunt, vel transactio non intervenit, explorati juris est. Sed et si per errorem calculi velut debitam quantitatem, cum esset indebita, promissisti, condictio liberationis tibi competit."*

This protects a debtor's right to insist upon re-examination of accounts, no matter how frequently they may have been calculated, and where error is found, to be discharged from the consequences of a promise to pay made *indebite*, provided that the accounts are not res judicata or have not been agreed in a compromise.

It is consonant with the previous pleas, and with the text of the title, that the renunciation of the plea in respect of an admitted amount outstanding merely affects the question of onus such that a debtor who has renounced may no longer himself insist upon a re-accounting but, if he

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wishes to challenge the calculation of the amount due, must undertake the burden of proving the accounts to be wrong.

In no circumstances can the renunciation of the plea be construed as an acceptance without question of unilateral calculations by the creditor of the amount outstanding or a waiver of any right to insist upon proof by the creditor of any such unilateral calculation. 3(6)

As for the expression *No Value Received* no authority exists, nor can any reference be found, pertaining to this time-honoured phrase. It is not an import from English law. The phrase is found in no indexes nor judicial dictionaries. It cannot be anything other than a rendering in English of that which is expressed as the *exceptio non numeratae pecuniae* or *exceptio non causa debiti*.

Revision of Accounts is another phrase supported by nothing other than continuous usage. It can mean nothing more than that expressed by the tag *errore calculi.*

The effect of renunciation in this case is, therefore, to oblige Chirovero to prove that it did not receive the money advanced. It faces an initial serious

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disadvantage in discharging the burden relating to the loans. It is that it is put of its case that it has no books of account, which were taken, and never returned, by VCCZ. Undoubtedly, the accounts were taken. They were signed for. The acknowledgment of receipt is exhibit 2 which is dated in February 1993. That is at a time when disputes had arisen between the parties and it was felt desirable that VCCZ maintain the books. The fate of the books thereafter is a matter of contention. There is no documentary evidence to show what has happened to these books. In their absence of these books, it might well be thought impossible for Chirovero to prove either that it has repaid the first loan or that it never received the second advance.

Despite this, it has put forward a considerable defence based entirely upon VCCZ's documents. These documents are voluminous but, unlike the big Mac, lack beef. Key to VCCZ's cause is a document purporting to be a summary of transactions between the parties. It is a series of annexures to an account entitled "Chirovero Investments (Pvt) Ltd, Management Accounts for the year ended 30 June 1994". The accounts consist of a balance sheet, a trading and profit and loss account and the four pages that now concern me entitled "Summary of Investments". They are pp D-G of exhibit 3.

Page D is a summary of disbursements. It shows disbursements under six categories, the ordinary share capital; the preference share capital; the loan of $350 000; the loan of $21 480; the loan of $95 000 and the loan of some $560 000. In columns, it details the total amounts by month of payments in each category. The payments of the loan of $250 000 of $21 480 and of $95 000 are not in dispute. Of interest are the following payments. Firstly, the preference share capital. The approved disbursements in terms of the agreement, were $665 363. The schedule records a total outgoing of $725 305.67. Second, the loan of some $560 000. Approved under the agreement was a payment of $560 709.35. The schedule shows $567 163.83 disbursed. Third, there is nothing on the schedule to show disbursement of any sum, in terms of the latest

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agreement, as a payment for shares, consequent of the increase to 60% of the plaintiff's holding in Chirovero.

Pages E, F and G are a more detailed analysis of the payments summarised on page D. They show in full particularity every individual disbursement comprising the full outgoings under all categories. The detailed analysis supports the summary. Where there is the reason for doubt? It arises thus.

The entire account is not contemporaneous. It is done by a person who was not called as a witness. The balance sheet contains anomalies or questionable entries, which, however, it is not necessary to detail here. Crucial therefore, is an examination of vouchers supporting the alleged payments listed on pp E, F and G. These vouchers are produced in evidence. These vouchers consist of cheque requisition vouchers and the cheques themselves. Subject

to what I say below, they support the fact of the payments having been made. The requisitions disclose the amount to be paid; the purpose of payment; the cheque requisitioned; and, importantly, the account to which the payment is appropriated. The significant feature of the requisitions is that they reveal that a considerable part of the payments, appropriated in pages D to G to the $560 000 loan, were in fact, requisitioned against payment of share capital.

The very real possibility is therefore raised that the indisputable payments were made not in terms of the loan agreement but rather as part of the capital contribution of the plaintiff to the joint venture. The plaintiff's response to this point is that the appropriate endorsement on the vouchers is "a mistake". To determine whether the payments are properly appropriated to loans or to share capital has therefore been my endeavour. An endeavour hugely complicated by the abysmal failure of the plaintiff to prepare its case and to produce proper accounts timeously or, in some cases, at all.

My view of the issue is such that if it is shown that an equivalent sum were due in respect of a capital contribution then I should find that the payments in question were not a loan, thus holding discharged the defendant's burden. If, however, no such amount was due then I should properly regard the payments as the provisional loan.

As I have already shown, there were three separate categories of share capital contribution called for. These are: the ordinary share capital of $628 667; the preference share capital of $665 333; and a further amount due for the amount due in consequence of the increase of the plaintiff's holding to 60%, a term upon which the loan of some $560 000 was extended. There can be no doubt that the first that two of these were paid. The payments are reflected on pages D and E and the supporting vouchers are to hand. Quite why the schedule shows the approved disbursement of the ordinary share capital as $667 957.65 is inexplicable, the amount was nevertheless paid. The focus of my enquiry must therefore be whether any amount was due in respect of the third category of share capital contribution.

According to the document providing for this third category (it is pp 32-35 of exhibit 1) the amount of $560 708.35 would be advanced (among other terms) upon increase to 60% of the

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issued share capital of the plaintiff's holding in Chirovero. This was to be accomplished by an increase of the authorised share capital to 2 357 500 shares - 943 000 at $1 each to the Gumbes; 628 667 at $1 each to the plaintiff, the balance of 795 833 to be "A" ordinary shares with a par value of 0.05c, fully subscribed at 0,05c per share. In this restructured scheme, the existing preference shares were not even mentioned.

The cost of the further 785 833 "A" ordinary shares at 0.05c would be $39 291.65. That it was intended that this much should have been paid as a capital contribution is beyond question. I say so because the document

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tendering the loan of $560 708.35 refers to additional funding in an amount of $600 000. The sum referred to as a loan is $560 708.35. That, together with the calculated amount of $39 291.65, totals $600 000. Thus, one is able to discover the sum of $39 291.65 due to the defendant as a capital contribution.

I mentioned earlier a point of doubt as to whether the cheques and requisition vouchers completely supported the payments scheduled. Mr *Wernberg*, in his thorough written submissions for plaintiff, has acknowledged that the requisitions total $520 005 whereas the scheduled payments appropriated to the loan in question, total $576 163. The difference, counsel accepts, is made up by three payments of $38 118.13; $9 000; and $40. Counsel submits that, bearing in mind the incidence of the onus, the court should accept that these three amounts were properly charged against the defendant, and that the full amount claimed would be accepted as having been advanced as a loan - any contrary indication on requisition vouchers being recognised as erroneous.

Mr *Dyke*, in his similarly helpful written argument from the defendant, has drawn attention to further factors of doubt surrounding the documentation. The doubt in question arises from a divergence between the plaintiff's requisitions as mentioned above, and requisitions for payment prepared by the defendant requesting individual advances. These two sets of documents should tally exactly. They do not. They are summarised by counsel in schedules produced during trial. The divergences in total and in detail are such that I find it impossible to draw any conclusion from them. Certainly, the documents highlight the lamentable standard of bookkeeping attending this venture and which is the kernel of the defence.

This very lack in proper accounting procedures has complicated this trial beyond measure. The lack has been compounded by a sorry failure in the discovery process. That failure has led to a mad scramble by counsel, during the course of trial, to find and produce documents required to support or contradict blithe statements and assumptions by witnesses. Even their endeavours, fueled by queries and expressions of dissatisfaction from the court, have failed to being about a full and coherent accounting of the transaction. For example, the plaintiff can produce no authentic version of the annual accounts of the company for any part of the period of the venture. It cannot even produce a cash book of its own.

The plaintiff's officer, giving evidence, was obliged to acknowledge serious shortcomings in all

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respects of its accounting. His only explanation was that this was the first major operation of the VCCZ after it started doing business and that it has improved its procedures since then. I must say that it would have to have done so if it intended to enjoy any reputation as a professional and reliable venture capital financier.

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These many criticisms aside, however, the court is left with a claim for repayment of $350 000 the advance of which is admitted. No proof of repayment is advanced by the defendant and no indication of repayment appears in the documents produced. The payments of $95 000 and $21 480 have to be regarded as repayments of separate loans in those specific sums. The court thus has no alternative but to uphold this claim for repayment of $350 000.

As for the second claim. I have given much anxious thought to the matter and have seriously considered dismissing the claim on the basis that such doubt attends the claim, on the plaintiff's own documents, as to render any award unjust. I am, however, in the end driven to the following conclusion. All payments made after the date of the offer to advance $600 000 have been appropriated either to the $95 000 loan, which is not in dispute, or to this disputed claim. Those appropriated to the $95 000 loan must be accepted as properly so appropriated. All other disbursements made on behalf of the defendant, must therefore be accounted for under the agreement to contribute $600 000. That contribution was apportioned as $39 291.65 to the purchase of shares and $560 708.35 to loan. Payment requisition vouchers show that over $39 291.65 was requisitioned as being share capital payments. Since at least $37 291.65 was due on that basis I must exclude that amount from the computation of the amount advanced as a loan. Since the total amount advanced was $567 163.83 no more than $527 827.82 could have been advanced as a loan. Despite purported appropriation to share capital requisitions in excess of $39 291.65, I would not be justified, particularly in the light of the incidence of the caus, in treating these as share payments since no such payments were due and the plaintiff cannot be presumed to have given money to the defendant. Finally this figure of $527 827.82 must be further reduced by excluding the sums of $38 118.13; $90 000 and $40 mentioned above, on the basis that there is no proof on the documents that these admitted disbursements were disbursed to or for the defendant. To the point that the onus is the defendant's, I answer on this issue that the defendant is entitled to rely on the plaintiff's documents and on this the plaintiff's documents do not support its case. I therefore find that on this claim $499 714.05 has been disbursed by way of loan to the defendant and has not been repaid.

I turn to the claim in reconvention. Morally, there may be much to be said for the defendant's cause. The plaintiff poured money into the defendant. It assumed control of the defendant. It did not properly account for all its transactions. It behaved in many respect (for instance in invading the Gumbe's privacy in regard to the use of the homestead) oppressively. It withdrew its commitment to the defendant at a time when the defendant was

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substantially indebted to it; completely underfunded; and in no position to pay its debt, much less engage upon profitable business.

It may well be that in the appropriate case, such behaviour by a venture capital company will be regarded as wrongful and culpable. In this case, however, the counterclaim is predicated upon certain specific alleged wrongs. I determine these seriatim.

First, the failure to appoint an independent chairman. Even assuming no such person was appointed I can find no causal link between any such failure and the loss of profits claimed for the period after VCCZ's withdrawal. Second, the appointment of a manager of the plaintiff's choice. The manager was appointed by the Chirovero board. But even if the allegation had factual substance - again I see no causal *nexus*. For a similar reason I see no point in the complaint concerning the removal of the Gumbe's signing powers in Chirovero's accounts.

Of somewhat greater substance might be the averment of delay in or (or as the amended claim shows) failure of the advance of funding. The averment of failure to commit a loan must fail in the light of the findings on the claim in convention. There is no factual merit on the allegations of delay - certainly none that discloses any causal link with the loss alleged. Similarly, there is no substance in the averment that funds claimed were not used for the defendant's benefit.

Finally, if there were some *prima facie* merit in any of the wrongful acts alleged, there is no proof of loss. This is a case where one would expect a mathematical projection of profits based upon actual figures and performance. It is said that:

> "where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as in the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damages and to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss." 4(7)

It is true that there are cases where the court, aware that some loss has been suffered, is bound to make an award, even if that be only an estimate. But,

> "It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in these circumstances the court is justified in giving, and does give, absolution from the instance." 5 (8)

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The authority of these *dicta* has been accepted in Zimbabwe. 6 (9)

The evidence of loss for the plaintiff was led by a person with experience in horticulture and rose production. His report put forward an assessment of loss based upon an apparently reliable practical and mathematical basis. It took but little examination, however, for the witness to acknowledge that his assessment depends largely upon assumptions and theory. It has no basis in actuality. Mr *Dyke*, who has said all he could for the defendant, was driven to admit that the defendant has not established a certain sum as and by way of damages. He nevertheless submits that there must have been some loss which must have been at least sufficient to

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extinguish any amount owing on the main claim.

This is precisely the exercise in guesswork which the court eschews where it would legitimately expect documented and authentically calculated loss in an ascertainable amount. I would therefore absolve the plaintiff from the reconvention.

On the question of interest, Mr *Wernberg* has conceded that interest to the double has accrued on the first loan. He claims interest in that amount the contractual on the judgment debt from the date of judgment Internet accrues on the second loan at 25% and no dispute arises on the issue.

I have given no little thought to the question of costs. The plaintiff is deserving of censure for the inadequacy of its accounting procedures, preparation for trial and evidence. Its abandonment of the defendant in inextricable debt is questionable (although that was never advanced as a cause of action). However, I do not think that the criticism which the plaintiff should in fairness attract should be reflected in an adverse order of costs despite its success. Rather let its shortcomings be made public in this judgment.

I therefore enter judgment for the plaintiff:

(a) in the sum of $350 000 together with interest thereon in the amount of $350 000; and further interest on the judgment debt at the rate of 4.75% above the base lending note in the aforementioned sum from the date of judgment; and

(b) in the sum of $449 714.05 together with interest thereon at the rate of 25% *per annum* from 1 October 1994;

and costs of suit. On the claim in reconvention the plaintiff is absolved from the instance with costs.

Kantor & Immerman, plaintiff's legal practitioners

Honey & Blanckenberg, defendant's legal practitioners

KANOKANGA v EVANS & ORS 2000 (2) ZLR 41 (HC)

Citation	2000 (2) ZLR 41 (HC)
Case No	Judgment No. HH-140-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	May 23, 2000
Judgment	July 12, 2000
Counsel	H Simpson, for the plaintiff Miss W T Miles, for the defendants

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Annotations None

Civil trial

Flynote

Contract - sale - breach of warranty against eviction - claim against seller - whether buyer must put up virilis defensio against claim by true owner for eviction before being able to claim against seller - what constitutes virilis defensio - notice given by buyer to seller about claim for eviction - form of notice that must be given

Headnote

The defendant bought a motor car from a company and paid the purchase price to the directors. Some time later, he resold the car to the plaintiff. Unbeknown to both of them, the car, though registered in the name of the company, was the subject of a hire-purchase agreement and was the property of a financial institution. The plaintiff surrendered the car to the financial institution on demand, and claimed the purchase price from the defendant, the directors of the company having absconded. The defendant resisted the claim on the grounds that the financial institution's claim was not unassailable and the plaintiff should have resisted the demand for the return of the vehicle.

Held, that a seller of goods warrants that the buyer will not be evicted. Eviction includes voluntary surrender of the goods to the owner who has an incontestable claim to the goods.

Held, further, that the plaintiff had given the defendant adequate and timeous notice of the claim by the financial institution. Such notice does not have to be in writing and no specific form of such notice is required. In any event notice is not required where the buyer can prove that the seller did not have title that would have allowed him successfully to have resisted the owner's claim.

Held, further, that nothing more is required of a purchaser who is threatened with eviction than that he acts as a reasonable litigant. If he does that, he would have put up a *virilis defensio.* A *virilis defensio* against a claim for eviction is a proper or adequate or reasonable defence. However, the buyer is not required to to put up a *virilis defensio* where the true owner's claim for eviction is unassailable, as it was in this case here.

Held, further, that the financial institution was not estopped from claiming against the plaintiff because it had allowed the car to be registered in the name of the lessee. The financial institution was not negligent in allowing this as it was standard practice for the lessee to be shown as owner. The proximate cause of the defendant acting to his prejudice was the dishonesty of the company's directors. Even if there was an element of negligence in allowing the registration of the car in the name of the lessee, the the registration book carried a warning that the book was not proof of ownership and, as a dealer in cars, the seller should not have placed reliance on the registration book.

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Cases Considered

Cases cited:

Akojee v *Sibanyoni* 1976 (3) SA 440 (W)

Bold v *Cooper* 1949 (1) SA 1195 (W)

Broekman v *TCD Motors (Pty) Ltd* 1949 (4) SA 418 (T)

Electrolux (Pty) Ltd v *Khota & Anor* 1961 (4) SA 244 (W)

Garden City Motors (Pty) Ltd v *Bank of OFS Ltd* 1983 (2) SA 104 (N)

Grosvenor Motors (Potchefstroom) Ltd v *Douglas* 1956 (3) SA 420 (A)

Konstanz Properties (Pty) Ltd v *Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A)

Lammers & Lammers v *Giovannoni* 1955 (3) SA 385 (A)

Lavers v *Hein & Far BK* 1998 (3) SA 195 (SCA)

Morum Bros Ltd v *Nepgen* 1916 CPD 392

Moyo v *Jani* 1985 (1) ZLR 112 (H)

Oakland Nominees (Pty) Ltd v *Gelria Mining & Invstms Co (Pty) Ltd* 1976 (1) SA 441 (A)

Quenty's Motors (Pty) Ltd v *Standard Credit Corp Ltd* 1994 (3) SA 188 (A)

Scottish Rhodesian Finance Ltd v *Taylor* 1972 (2) RLR 165 (G);1972 (4) SA 434 (R)

York & Co (Pty) Ltd v *Jones NO (1)* 1961 R & N 490; 1962 (1) SA 65 (R)

York & Co (Pvt) Ltd v *Jones NO (2)* 1961 R & N 784; 1962 (1) SA 72 (R)

Case Information

H Simpson, for the plaintiff

Miss *W T Miles*, for the defendants

Judgment

Chinhengo J: The plaintiff issued summons against the four defendants cited above. He was unable to serve it upon all of them except the first defendant because the last three defendants could not be found. The plaintiff's claim was for the payment of $460 000 being a refund of the full purchase price of a motor vehicle, a Mitsubishi, which he had bought from the first defendant. For all intents and purposes this action is between the plaintiff (Kanokanga) and the first defendant (Evans).

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Kanokanga is a businessmen whilst Evans was a motor vehicle dealer at the time that the cause of action arose. Evans was, however, not an established car dealer. The transaction whereby he sold the Mitsubishi motor vehicle to Kanokanga was his first in an attempt to turn himself into a car dealer. He only sold one or two other vehicles after this transaction.

Sometime in 1998, Evans had responded to an advertisement in a local newspaper in terms of which Italauto (Pvt) Ltd as owner and the third and fourth defendants, as directors of Italauto (Pvt) Ltd, advertised the Mitsubishi motor vehicle for sale. The directors were acting for their company. Evans bought the motor vehicle for $350 000. The money was paid to the third and fourth defendants. Evans took delivery of the motor vehicle. In September of the same year Evans sold the same motor vehicle to Kanokanga for $460 000. Kanokanga paid the full purchase price and took delivery of the motor vehicle. This transaction was recorded in Exhibit 3 being a note by Evans acknowledging the transaction and the receipt of payment by cheque of the purchase price. Unbeknown to Evans and Kanokanga, the motor vehicle,

though registered in the name of Italauto (Pvt) Ltd as appears on the registration book (Exhibit 4) was the subject of a lease agreement (Exhibit 2) entered into between Italauto (Pvt) Ltd and Scotfin Ltd (Scotfin), a registered financial institution. In terms of the lease agreement, the motor vehicle was leased to Italauto (Pvt) Ltd for a period of thirty six months from 18 June 1996, to 17 June 1999, at a monthly rental of $15 622.47. It provided, *inter alia*, that the motor vehicle remained at all times the property of Scotfin and that the lessee would not sell, lend, lease, pledge, deliver or otherwise encumber or dispose of the motor vehicle. It would appear that Italauto (Pvt) Ltd acted in breach of the terms of the lease agreement when it sold the motor vehicle to Evans. The only provision of the lease agreement which would have entitled Italauto (Pvt) Ltd to sell the motor vehicle would have been clause 9 which provides in subclause 9.1 that:

> "Except in the case where this lease is an operating lease (as mentioned in the Schedule) and provided that the Lessee has complied with the terms of this lease, he shall after the date of termination mentioned in the Schedule and for the next thirty days be entitled to obtain an offer from a third party to purchase the goods. The terms of any such offer must provide that -
>
> 9.1.1 the price is equivalent to the market value of the goods;
>
> 9.1.2 the price together with any sales tax, is payable in cash to the Lessor against delivery of the goods to the buyer;
>
> 9.1.3 the sale is *voetstoots*."

The other subclauses would be relevant to a sale authorised in terms of the clause. The schedule attached to the agreement does not indicate whether or not this lease was an "operating lease". The agreement is a standard agreement of a general format used by Scotfin in leasing all sorts of goods. It is therefore difficult to ascertain from the provisions of clause 9 if the Mitsubishi motor vehicle could have been sold in terms thereof. Not much by way of evidence was led to show how clause 9 was intended to be applied, if it was to be applied, in

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respect of the motor vehicle concerned in these proceedings.

It is necessary to set out at this stage, by reference to the pleadings, certain facts which were not in dispute. In his declaration Kanokanga made certain averments which Evans, in his plea, admitted. Paragraph 1 to 9 of the declaration were admitted but it is only paragraph 6 to 9 which are relevant to my consideration of this matter. Paragraph 6 states that the agreement of lease was entered into between Italauto (Pvt) Ltd and Scotfin on 18 June 1996. It specifies the period of the lease and the monthly rental. Paragraph 7 states that during the month of September, 1998 Italauto (Pvt) Ltd "acting through its directors the third and fourth defendants, in breach of the contract of lease, sold unlawfully the Mitsubishi motor vehicle to a car dealer in Harare, Shaun Evans (first defendant). Paragraph 8 states that Evans sold the

motor vehicle to Kanokanga on 29 September 1998 for $460 000 and that Kanokanga paid the purchase price in full and took delivery of the motor vehicle. Paragraph 9 reads as follows:

> "It was an implied term of the agreement of sale between plaintiff and first defendant (i.e. Kanokanga and Evans respectively) that the plaintiff as purchaser of the motor vehicle, had (a) legally implied warrant against eviction."

Paragraph 10 is partially admitted by Evans in his plea. The paragraph reads:

> "Thereafter (after the sale) and during the month of March 1999, plaintiff became aware that the true owner of the motor vehicle was Scotfin Ltd, gave the first defendant notice of Scotfin Ltd's unassailable claim to the motor vehicle and surrendered the motor vehicle to Scotfin Ltd on its demand."

Evans' plea to para 10 above was:

> "21. It is admitted that during March 1999, plaintiff became aware that Scotfin Ltd was the owner of the motor vehicle and surrendered the vehicle to it.
>
> 22. It is denied that Scotfin's claim to the vehicle was unassailable for the reasons set out hereunder."

Evans sets out in subparagraph 2.3 his reasons for saying that Scotfin's claim was not unassailable being that Scotfin was estopped from claiming ownership because the registration book of the motor vehicle reflected Italauto (Pvt) Ltd as the owner of the motor vehicle; its failure to ensure that the motor vehicle was registered was negligent; Evans acted upon the representation in the registration book that Italauto (Pvt) Ltd was the owner of the motor vehicle; Evans sold the motor vehicle to Kanokanga in good faith; and because of the representation Evans acted to his prejudice.

The admissions made by Evans in his plea render it unnecessary to investigate certain fats - whether the series of transactions is as stated in the declaration, or that Italauto (Pvt) Ltd acted in breach of the terms of the lease agreement, or that Evans was a car dealer, or that Evans gave an implied guarantee to Kanokanga against eviction. It also becomes unnecessary to investigate the question whether Kanokanga became aware that Scotfin was the true owner of the vehicle and surrendered the motor vehicle on that basis. It seems that the defendant somewhat went back on this last admission as I shall show later. But the admissions render

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most of the facts in this case common cause.

At the trial Kanokanga gave evidence to the following effect. After he had paid the purchase price Evans attended to the registration of the motor vehicle in his (Kanokanga's) name. Kanokanga was not involved in the procedures except that he provided Evans with his identification particulars. He said that the problem started in March 1999 when representatives of Scotfin called on him and advised him that the motor vehicle belonged to Scotfin and

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demanded that he should surrender it. They produced the lease agreement to prove that the motor vehicle was the subject of that agreement and that it could not have been lawfully sold. Kanokanga said that he immediately advised Evans about Scotfin's claim. He sought legal advice on the matter. His legal practitioner suggested that he should check with Dunn & Bradstreet, a debt collection company to verify from its records if indeed the motor vehicle was the subject of a lease agreement. Dunn & Bradstreet maintains records of motor vehicles on hire purchase or on lease as a service to its customers. Kanokanga said that he acted in terms of this suggestion and was able to satisfy himself, from the records maintained by Dunn & Bradstreet that the motor vehicle was the property of Scotfin and that it was the subject of the lease agreement between Scotfin and Italauto (Pvt) Ltd. He said that he visited the offices of Scotfin and established that there was a substantial amount owing by Italauto (Pvt) Ltd to Scotfin under the lease agreement.

Under cross-examination, Kanokanga stated that he could not remember the exact amount which was owed to Scotfin under the lease agreement. He said that his legal practitioners had also verified the validity of Scotfin's claim and had advised him that Scotfin's claim could not be challenged. He admitted that at the time of the purchase he had been shown the registration book in the name of Italauto (Pvt) Ltd. When he went to Scotfin offices it had been explained to him that the motor vehicle was not registered in Scotfin's name because it was Scotfin's established practice that all vehicles on lease are registered in the lessee's name. This, it was said, was a convenient arrangement in the event that an accident occurred, or for purposes of licensing or when the lessee travelled outside the country in the leased motor vehicle. Kanokanga said that he had approached Evans for his assistance in the matter but Evans had not been of much help. In the end, he had surrendered the motor vehicle to Scotfin believing that its claim could not be challenged. He had immediately entered into negotiations to purchase the motor vehicle direct from Scotfin. He paid to Scotfin the sum of $876 654.45 and took delivery of the motor vehicle. He is now in possession of it qua owner.

Evans' evidence did not differ from that of Kanokanga on many aspects. It tended to complement Kanokanga's evidence. For instance, Evans said that when the problem with Scotfin arose, Kanokanga had gone to him and advised him that the amount owing to Scotfin in terms of the lease agrement was the sum of $206 000. Kanokanga had requested him to pay a half of this amount but he had refused to do so. He had offered only to look for or locate the original owners of the motor vehicle i.e. Italauto (Pvt) Ltd and its directors. He said that he employed tracing agents in an effort to locate them but only managed to establish that the

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directors had left the country and

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Italauto (Pvt) Ltd had closed shop. Evans said that when Kanokanga asked him to pay fifty percent of the amount owing to Scotfin, he had not at the same time, asked him to deal with Scotfin in any other manner to resolve the problem. Evans said that Kanokanga later came to him and advised him that the amount owing to Scotfin in terms of the lease agreement had increased to $376 000. Evans' evidence on the amount owed to Scotfin confirmed as true Kanokanga's evidence, on which he had been taken to task during cross-examination, that there was a substantial amount owed to Scotfin even though he could not remember the exact figure thereof. Evans' evidence also tended to confirm Kanokanga's evidence that he had fully apprised Evans about Scotfin's claim to ownership of the motor vehicle. He confirmed that he alone had attended to the change of ownership. Evans' other evidence was not disputed by Kanokanga or, to put it more accurately, it was not such as Kanokanga could dispute. He said that he had bought the motor vehicle from Italauto (Pvt) Ltd in the bona fide belief that it was its vehicle. He had relied on the registration book which reflected Italauto (Pvt) Ltd as the owner.

In cross-examination, Evans revealed that he was not an experienced motor vehicle dealer but more of a "spot dealer" and did not know that Dunn & Bradstreet offered the service mentioned by Kanokanga. He was asked about the warning appearing on the registration book that "the registration book is not proof of legal ownership" and how he had regarded it. He responded that he had not noticed it. He reiterated several times that he had relied on the representation that Italauto (Pvt) Ltd was the owner. He was also asked whether his suspicions were not aroused by the fact that the motor vehicle was being sold for an apparently low price. He said that he had sought advice from friends and had been told that the price was reasonable and that he had acted on that advice.

I have no doubt that generally speaking Kanokanga and Evans gave their evidence truthfully. The facts of the case are largely undisputed. They however differed as to the extent to which Kanokanga informed Evans about Scotfin's claim. Evans appeared to play down the fact that he was fully apprised of the problem but his own evidence suggests otherwise. It suggests that he was fully informed and regularly advised about developments on the claim. He assisted Kanokanga by trying to locate the original sellers. He employed a tracing agent for this purpose. He remembered more than Kanokanga the amounts which were owing to Scotfin from time to time under the lease agreement. He refused to contribute to those amounts to enable Kanokanga as per his proposal, to retain the motor vehicle. His plea shows that he was kept fully informed about Scotfin's claim. On this score, I find that Kanokanga's evidence was truthful and I reject Evans' evidence.

Evans' defence rested on the legal premise whether or not Scotfin's claim

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was unassailable. At the end of the case for the plaintiff, Miss *Miles* applied for absolution from

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the instance. She submitted that Kanokanga had failed to establish that Scotfin's claim was unassailable; that he had failed to give proper notice to Evans to enable Evans to defend Scotfin's claim and that he had failed to put up a *virilis defensio*. She contended that Kanokanga had failed to adduce evidence upon which the court might find for him. I refused to accede to this application after hearing Mr *Simpson*'s submissions in opposition. At the end of the trial, Miss *Miles* was content to rest her case on the submissions she had made in her application for absolution. That approach was entirely reasonable. She however later filed written closing submissions.

The issues for decision in this case, seem to me to be quite straightforward. Was Scotfin's claim so unassailable as to render Kanokanga's surrender of the motor vehicle without putting up a legal fight, meritorious? In other words should he have put up a *virilis defensio*? And does estoppel invoked against Scotfin operate to defeat Kanokanga's claim for a refund of the purchase price?

The further pleadings in this matter reveal a fundamental misapprehension as to who, on the facts, between Kanokanga and Evans, was required to put up a *virilis defensio*. The misapprehension is evident from the particulars requested by the defendant and the plaintiff's response thereto. The defendant requested further and better particulars as follows:

" 1.1 Is it alleged that the plaintiff requested the first defendant to commence a *virilis defensio* against Scotfin Ltd in respect of the claim to the motor vehicle by the latter?

1.2 If so, when and where did plaintiff make such a request and in precisely what terms did plaintiff request him to commence a *virilis defensio* against Scotfin Ltd? If the request was in writing a copy thereof is required."

The plaintiff's response to this request was:

> "It is not alleged that the plaintiff requested the first defendant to commence a *virilis defensio* against Scotfin Ltd because the latter's title to ownership of the motor vehicle was unassailable."

Now a *virilis defensio* is merely "a proper and competent defence" (*per* Murray CJ in *York & Co (Pvt) Ltd* v *Jones NO (1)* 1961 R&N 490; 1962 (1) SA 65 (SR), which a purchaser who is threatened with eviction is required to put up against the person threatening to evict him. I however, prefer Beadle CJ's rendering of the meaning of *virilis defensio* in *York & Co (Pvt) Ltd* v *Jones NO (2)* 1962 (1) SA 72 (SR) at 83A where he said:

> "It seems to me, on reading these authorities, that nothing more is expected of a purchaser than that he should conduct his case as a reasonable litigant. If he does that, I think it is clear from the authorities that he would have put up a *virilis defensio*."

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A *virilis defensio*, to my mind, need not be a competent defence in the sense that it be skilful or superior. It is sufficient if it is proper or adequate or satisfactory or reasonable. On the facts of this case and, in general, a *virilis defensio,* where required, has to be put up by the purchaser who is under threat of eviction and, in this case, it would have been put up by Kanokanga. It was him, and not Evans, who was in possession of the motor vehicle and against whom Scotfin was making its claim (see *York & Co (Pvt) Ltd* v *Jones NO (1)* and *York & Co (Pvt) Ltd* v *Jones*

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NO (2) supra; *Moyo* v *Jani* 1985 (1) ZLR 112 (H) and the authorities therein cited). The further and better particulars requested by the defendant were to this extent ill-conceived so too was the response of the plaintiff except in so far as that response related to the necessity at all of putting up such a defence in view of his assertion that Scotfin's claim was unassailable.

Miss *Miles* submitted that a purchaser who wishes to claim against the seller on a breach of warranty against eviction must establish three things - that he was evicted; that he gave proper notice of the proceedings to the seller to assist him in defending the case and that he conducted a *virilis defensio* against the claim and was unsuccessful. She submitted that Kanokanga had not met any of these requirements. I do not agree. That Kanokanga was evicted seems to me to be clear. A demand was made on him, properly supported by documentary and other proof, to surrender the motor vehicle. Eviction is not, in cases of this nature, constituted only by a physical act of dispossession. Where a purchaser, against whom a claim to surrender the goods is made and he has no ground on which he can challenge the claim and he agrees to surrender or actually surrenders the goods, he is evicted. In *Garden City Motors* v *Bank of OFS* 1983 (2) SA 104 at 107, Didcott J said:

> "Eviction has a wider meaning, however, in the law of sale. The purchaser does not have to be dispossessed of the property he has before such occurs, or to be disturbed in his possession of it. He is also evicted when he surrenders it voluntarily or pays its value in order to retain it, and even when he agrees to do one or other without having yet done either, provided that in each instance it has been claimed from him on grounds he could not successfully have contested. All this emerges from *Oliver* v *Van der Begh* 1956 (1) SA 802 (C)."

As I have stated above Kanokanga was confronted with documentary proof in the form of the lease agreement (Exhibit 2) that Scotfin was the owner of the motor vehicle. He investigated Scotfin's claim on his own and took legal advice on the matter, He satisfied himself that Italauto (Pvt) Ltd had breached the terms of the lease agreement. Left with no doubt in his mind as to the validity of Scotfin's claim, he relented. He initially surrendered the motor vehicle to Scotfin and then negotiated to buy it direct from Scotfin. I am satisfied that the facts are covered by the meaning of eviction as that meaning emerges from the authorities. He was indeed evicted.

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The question of proper notice by the purchaser to the seller is one which is dealt with sufficiently by the authorities - see *York & Co (Pvt) Ltd* v *Jones NO (2) supra* at 787-790 (R&N); 79-81 (SA). If I understand this judgment correctly, I do not think that it lays down any principle that notice must be given to the seller by the purchaser in any particular format. According to this case the purpose of the notice is to give the defendant or seller full information of what is taking place and to give him an opportunity to take any action in the matter which he considers advisable to take. The notice must be given timeously. See Beadle CJ's statement in *York & Co (Pvt) Ltd* v *Jones NO (2)* (1961) (R&N) at 789D; 80D (SA).

In my view, Evans was placed in possession of all the information about Scotfin's claim and timeously too. He was asked to make a contribution to the amount outstanding under the lease agreement so as to resolve the problem. He knew that he was required to assist Kanokanga to defend Scotfin's claim and the only assistance he gave was by employing tracing agents to locate the other defendants. He was given adequate time and information to take any action

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which he may have seen fit. If the notice was required to be communicated formally in writing then I think that to deny that the notice given to Evans was proper and sufficient notice would amount to "a most blatant procedural technicality" which, as stated by Beadle CJ in *Jones NO (2)* case *supra,* was never the intention of the rule. In *Lammers and Lammers* v *Giovannoni* 1955 (3) SA 385 (A) Schreiner JA said the following in respect of the giving of notice (at 391A-B):

> "Under the early law, too, the buyer could not recover from the seller unless he had given him notice of the other's claim. But the giving of notice has ceased to be a condition precedent to the buyer's claim; he can in his action against the seller free himself from the criticism that he had given no notice to the seller by proving that the latter had no title that could have made resistance to the true owner possible. The object of giving notice to the seller is no longer simply to lay a formally necessary foundation for an action against him; a principal object is, it seems, to convert his general obligation to protect the buyer's possession into something more specific."

The learned judge went on to explain that the seller may take part in the suit, or he may not openly associate himself with the suit and restrict himself to supplying the purchaser with proof or other assistance for the assertion of the right against the claimant, or he may ignore the notice altogether. I am satisfied that Evans was given notice of Scotfin's claim and was asked to do one thing specific at least - to contribute to the payment of the amount outstanding under the lease agreement. He offered other assistance as well but did not associate himself with the suit in any other way. I think that the information communicated by Kanokanga to Evans was sufficient notice and that it adequately laid the necessary foundation for Kanokanga's action

against Evans. In any case, notice is not required to be given where the purchaser can prove that the seller had no title that could have made resistance against the claimant possible.

The next question is whether Kanokanga should have put up a *virilis defensio* against Scotfin's claim in any event. The answer is to be found again in *Lammers and Lammers*' case *supra* at 391H to 392 where it is stated:

> "But whatever may have been the position under Roman Law, it is clear from what has been said above that to-day the buyer is not obliged to put up any, let alone a vigorous, defence against the true owner on pain of being unable to recover from the seller. *Voet* is not here dealing with improvements to the thing sold and in relation to the thing itself the buyer does not today lose his recourse against the seller by not resisting the true owner, since even where he has not given notice to the seller he can recover by proving that resistance would have been useless."

The learned judge continues at 392F-H:

> "Once the seller is called upon to defend the buyer in his possession, but washes his hands of the whole matter, it does not seem to me to be open to him to meet the buyer's claim by saying that the latter could or should have resisted the true owner's claim more energetically or skilfully; for it was open to him, the seller, to have taken steps to protect the buyer and himself. What those steps would be in a particular case would depend on the available procedure; including in appropriate cases, i.e. where it is the right of the buyer and not the seller that may provide the means of resisting the owner, the taking of a p*rocuratio in rem suam*."

See also *Garden City Motors supra* at 108.

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From the foregoing, it must be apparent that the law is that where the true owner's title to the property is unassailable, the purchaser is not required to put up a *virilis defensio*. I am satisfied that, subject to the discussion of the question of estoppel which follows, Kanokanga was not required to put up a *virilis defensio* because Scotfin's right to the motor vehicle was clearly beyond doubt not only against him but also against Evans as well. The conclusion I have reached on this aspect of the case and the reasoning on which it rests would have resulted in a finding for the plaintiff in *Moyo* v *Jani supra* a case which I think was, on its facts and on the application of the law to those facts, wrongly decided.

The more difficult issue in this case is whether or not Scotfin was estopped from claiming to be the owner of the motor vehicle because it permitted the situation to arise whereby Italauto (Pvt) Ltd was able to represent to third parties that it was the owner of the motor vehicle arising from the fact that it was reflected as such in the registration book of the motor vehicle. Miss *Miles* submitted that Scotfin was negligent in allowing the registration book to reflect Italauto (Pvt) Ltd as owner of the motor vehicle In other words, Scotfin was negligent in failing to ensure that the motor vehicle was registered in its name. This negligence resulted in a representation that Italauto (Pvt) Ltd was the owner and led Evans to act on it and buy the motor

vehicle from Italauto (Pvt) Ltd and later to sell it, in good faith, to Kanokanga to his prejudice. The determination of this question is fundamental to Kanokanga's prospects of success for if it is determined that Scotfin negligently represented that Italauto (Pvt) Ltd could proclaim dominium or jus disponendi, then, inevitably, Kanokanga should have put up a *virilis defensio* against Scotfin for Scotfin's claim to ownership would have been assailable on this basis. There would appear to be a contradiction in terms here, indeed, a conflict between two principles - one principle being that if the true owner's title cannot be challenged then the purchaser need not put up a *virilis defensio* and another principle being that if the defence of estoppel could successfully be raised by the seller against the true owner then, despite the incontrovertibility of the title of the true owner to the property concerned, the purchaser is required to put up a *virilis defensio*. To resolve this apparent contradiction or conflict, one only has to appreciate, I think, that in an action against the seller based on a warranty against eviction, the purchaser should resist the true owner's claim on any ground on which the seller could have resisted the same claim. It therefore would not matter that that ground is divorced from ownership of the goods but related purely to a defence or shield, so to speak, which can, ownership admitted, be raised so as to defeat the true owner's claim. As such therefore were any such defence against a claim can be raised, the purchaser should raise it when threatened with eviction.

A number of recent cases in South Africa dealing with the question of estoppel where brought to my attention - among them *Quenty's Motors (Pty) Ltd* v *Standard Credit Corp Ltd* 1994 (3) SA 188 (A); *Konstanz Properties (Pty) Ltd* v *Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A). These two cases can be distinguished from the present case on at least one ground. In these cases the persons who sold the properties concerned were a well known car dealer or a wholesaler who the court found would, in the normal course of business, display to the knowledge, and with the consent, of the person sought to be estopped, the properties

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concerned as belonging to them. In both cases, the court found that the true owner was estopped from claiming ownership because the goods were, with his consent, displayed for sale by the trader in such manner as to proclaim that the *dominium,* or *jus disponendi* was vested in the traders. In the present case, Italauto (Pvt) Ltd was not a dealer in motor vehicles. No evidence was placed before me that it was a dealer. It can not therefore be concluded that Scotfin by registering the motor vehicle in Italauto (Pvt) Ltd's name represented to any person to whom Italauto (Pvt) Ltd would fraudulently sell the vehicle that the latter had *dominium* or *jus disponendi* in respect of the motor vehicle. Scotfin is probably a well known financial institution in the business of hiring motor

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vehicles on terms as contained in the lease agreement. It is its business practice, and perhaps the practice of all financial institutions in the same line of business, to register motor vehicles which are subject to lease agreements in the name of the lessees. The rationale for such a practice has already been given. No cogent evidence was adduced to show that this apparently reasonable business practice has not been adopted generally by financial institutions in this country. And motor car dealers (and Evans admitted that he was one despite his later attempt to deny it) would know of such arrangements. It would appear to me that the mere fact that in the registration book Italauto (Pvt) Ltd was reflected as owner of the motor vehicle was not by itself a representation that Italauto (Pvt) Ltd was the owner thereof or,more importantly, that it had the *jus disponendi*. In *Lavers* v *Vein & Far BK* 1998 (3) SA 195 (SCA) van Heerden DCJ stated in connection with the requirement of estoppel at 194F-H that:

> "The first requisite is that there must be a representation by the owner (or possessor) that the person who disposed of his property ("the defrauder") was the owner, or entitled to dispose, of it. In most cases, of course, the ultimate representation is made by the defrauder. The real question then is whether the conduct of the owner effectively contributed to the making of that representation.
>
> *In casu* the second respondent did not rely upon a representation that, apart from ownership the *jus disponendi* ... vested in Sharman Motors ... No doubt the prior delivery of the motor vehicle to Sharman Motors causally assisted Gavin (the defrauder) in making the representation, but the mere delivery of property by one person to another does not by itself constitute a representation that the latter is the owner (or is entitled to dispose) thereof."

He referred with approval to a passage from *Electrolux (Pty) Ltd* v *Khota & Anor 1961* (4) SA 244 (W) at 247-8 where Trollip J said:

> "... to create the effective representation the dealer or trader must deal with the goods with the owner's consent or connivance in such a manner as to proclaim that the *dominium* or *jus disponendi* is vested in him; as for example, by displaying, with the owner's consent or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary 'scenic apparatus' for begetting the effective representation."

See also *Grosvenor Motors (Potchefstroom) Ltd* v *Douglas* 1956 (3) SA 420 (A); *Broekman* v *TCD Motors (Pty) Ltd* 1949 (4) SA 418 (T); *Bold* v *Cooper* 1949 (l) SA 1195 (W); *Morum Bros Ltd* v *Nepgen* 1916 CPD 392. These cases and many others show that the courts cannot be readily persuaded that on owner is estopped from vindicating his property. Only if: (a) there has been a representation by the owner, by conduct or other means, that the person who sold his property was the owner of it or was entitled to sell it; (b) the representation was, on the

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particular facts of the case negligently made; (c) the person raising the defence of estoppel had relied upon the representation; and (d) his reliance upon it was the cause of his acting to his prejudice - only

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then may the owner be estopped from vindicating his property. In the present case, the mere fact of registering the motor vehicle in Italauto (Pvt) Ltd's name was not by itself a representation that Italauto (Pvt) Ltd was entitled to dispose of it. This registration was in accordance with commercial practice, and it would be most unfortunate if this court were to reach a decision which would deal a blow to such a practice, apparently quite established.

I am fortified by the authorities. I have cited that Scotfin did not, by permitting to be registered the motor vehicle in the name of Italauto (Pvt) Ltd make the effective representation as would have warranted the invocation of the doctrine of estoppel against it. As to whether Scotfin was negligent the decision in *Oakland Nominees (Pty) Ltd* v *Gelria Mining and Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 456-458 appears to me to support the conclusion that Scotfin was not negligent. In that case, the court considered the elements of *culpa* and proximate cause and in respect of the later the principle emerges quite clearly that the true owner's negligence must be the proximate cause of the seller acting to his detriment. Here, I must say that it was not the alleged representation by Scotfin which was the proximate cause of Evans acting to his prejudice but the dishonesty of Italauto (Pvt) Ltd's directors. See also *Scottish Rhodesian Finance Ltd* v *Taylor* 1972 (4) SA 434 (R).

There is an additional consideration in the present case which shows that Scotfin neither made an "effective representation" on which Evans can be said to have acted nor was it negligent. The warning appearing on the face of the registration book that the book is not proof of legal ownership should have alerted Evans to the possibility that Italauto (Pvt) Ltd may not have been the owner or that it may have had the authority to dispose of it, more so as Evans was, on his own admission in the plea, a motor vehicle dealer. That warning would, if any negligence could remotely be ascribed to Scotfin, operate to defeat that ascription. Commenting on the decision in *Akojee* v *Sibanyoni* 1976 (3) SA 440 (W) the authors of the *Law of Property in South Africa* 3 ed by Kleyn & Boraine state at p 293 the following:

> "Nicholas J pointed out that the belief of the applicant that he was protecting himself by retaining the registration certificate and annual licence was illusory. "Such documents do not constitute indication of the *dominium* or *jus disponendi* on the part of the possessor, and, conversely, the fact that a person disposing of a motor vehicle is not in possession of these documents is not inconsistent with the power to dispose."

These words are directly relevant to the present case. The doctrine of estoppel could not have been invoked against Scotfin. Kanokanga could not have been required to put up a *virilis defensio* on this basis because estoppel could simply not have succeeded as a defence against Scotfin's claim.

The conclusion I have come to is in effect that Kanokanga did not have to

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put up a *virilis defensio* as Scotfin's claim to ownership of the motor vehicle was unassailable. Schreiner JA in *Lammers and Lammers supra,* said at 390A that:

> "As I understand the nature of the so called warrant against eviction the basic obligation of the seller is to protect the buyer in is possession ... If he fails to shield the buyer against eviction he must restore the price and pay the damages suffered by the buyer as a result of the eviction."

I fully subscribe to this principle and for the reasons I have given I would decide this matter in favour of the plaintiff. The date from which interest must run was not argued or justified. I will accordingly order that interest begins to run from the date of service of the summons. Judgment is therefore entered for the plaintiff against the defendant in the sum of $460 000 together with interest thereon at the rate of 25% *per annum* from the date of service of the summons to the date of payment.

Kanokanga & Partners, plaintiff's legal practitioners

Coghlan, Welsh & Guest, fist defendant's legal practitioners

GREENICE (PVT) LTD v KHAN 2000 (2) ZLR 55 (HC)

Citation	2000 (2) ZLR 55 (HC)
Case No	Judgment No. HH-146-00
Court	High Court, Harare
Judge	Chinhengo J and Mungwira J
Heard	June 20, 2000
Judgment	July 12, 2000
Counsel	S E Rowland, for the appellant D Mwonzora, for the respondent
Annotations	None

Civil appeal

Flynote

Magistrates court - jurisdiction - order for ejectment - dispute as to right of occupation - jurisdiction depending on value to occupier of occupation - how to be assessed - not based on rental alone

Headnote

The appellant company sought the ejectment of the respondent from the farm she occupied. The farm had been mortgaged to the appellant as security for loans advanced to the company

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of which the respondent and her late husband were directors. The loans were not repaid, the company was liquidated, and the farm transferred to the appellant. When the appellant sought the eviction of the respondent without due process, she sought an interdict from the magistrates court restraining the appellant from evicting her, pending the determination, by the High Court, of the validity of the transfer of the farm. A rule *nisi* was issued and subsequently confirmed. The only issue on appeal was whether the magistrates court had jurisdiction to deal with the matter. The magistrate had ruled that he had jurisdiction, on the basis that the rental value of $8 000 assessed by the respondent was less than the jurisdictional limit then applicable of $10 000.

Held, that the respondent's application in the magistrates court was clearly predicated on her right to occupy the farm. That right was disputed by the appellant, and in that situation the jurisdiction of the magistrates court depended on the value to the occupier of the right of occupation.

Held, further, that the value of such occupation must be assessed by a number of factors, not only by the rental that might be payable for the property. The value is the economic advantage to the occupier. In this case, the value of the occupation far exceeded the "thumb suck" rental value she had given it. In addition, she had some 20 hectares under crop. Consequently, the magistrates court did not have jurisdiction to deal with the matter.

Cases Considered

Cases cited:

Khan v *Rooknodien* 1916 CPD 411

Malherbe v *Britstown Municipality* 1949 (1) SA 281 (C)

Munsamy v *Govender* 1950 (2) SA 622 (N)

van der Westhuizen v *Peterson* 1922 TPD 412

Legislation considered:

Magistrates Court Act [*Chapter 7:10*], ss 11(1)(b) and 12

Case Information

S E Rowland, for the appellant

D Mwonzora, for the respondent

Judgment

Chinhengo J: This is an appeal against the confirmation by the magistrates court at Chivhu of a rule *nisi* obtained by the respondent on an *ex parte* basis The rule *nisi* was issued on 4 July 1997 and confirmed on 21 November 1997. It was to the following effect:

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" 1. The respondent be and is hereby interdicted from evicting the applicant and all those dependent on her from Glen Rhoda Farm Chivhu until finalisation of the High Court action for the determination of the validity of the transfer of the farm from Glen Rhoda Farm (Pvt) Ltd to respondent;

2. The applicant be ordered to file an action with the High Court within 14 days hence;

3. The rule *nisi* do issue hereby returnable to this Honourable Court on 22 August 1997 calling upon respondent to show cause if any why this order should be confirmed.

4. The respondent pay the costs of suit."

By the time that the rule was confirmed, the respondent had in terms of para 2 of the rule commenced action against the appellant in case No. HC-6802-97. At the same time, there was an application by the appellant pending in this court in case No. HC-6937-97. The former action was commenced by summons issued on 17 July 1997 but only served on the appellant on 11 September 1997. In that action, the respondent sued the appellant for the cancellation of a deed of transfer executed on 1 May 1997 in favour of the appellant and in terms of which the farm at the centre of the present proceedings was transferred to the appellant. The latter application (HC-6937-97) was made on 27 July 1997. In it, the appellant sought the eviction of the respondent from the farm. Some argument was made in the *contra quo* as to whether any of these matters were pending in this court so as to enable the appellant to make a plea of *lis pendens*. That argument was snot raised on appeal and so it is no longer relevant.

The background to this appeal is that the respondent and her late husband were the directors of Glen Rhoda Farm (Pvt) Ltd (the company). This company owned a farm known as the Remaining Extent of Glen Rhoda of Inkosi measuring 1858.1007 hectares (the farm). The respondent and her husband had lived on the farm from 1991 until the respondent's husband died in 1996. Thereafter the respondent remained in occupation of the farm.

In 1992, the respondent's husband had obtained a loan of $300 000 from the appellant. It was the respondent's evidence in the court *a quo* that this loan was repaid before her husband died. That this was so, she said, was borne out by the fact that the appellants did not make any claim for the payment of the money until her husband's death.

The respondent alleged that the appellants took advantage of her husband's death and claimed the sum of $4 million from her, or alternatively, the surrender to it of the farm. The respondent does not indicate in her founding affidavit in the court *a quo* how this claim was resolved. The fuller picture

emerges from a perusal of the papers in case No. HC-6937-97. There it is stated that the appellants advanced further moneys, totalling about $2 million, to the company. That loan was secured by a mortgage bond registered over the farm in favour of the appellant. The directors of Glen Rhoda (Pvt) Ltd had apparently agreed that the farm be transferred to the appellant if the company failed to repay the loan. The company was subsequently liquidated but the farm was not, for reasons that are not readily apparent, an asset in the liquidation. The farm was subsequently transferred to the appellant in terms of the agreement allegedly reached prior to

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the company's liquidation. The respondent is opposing the application in case No. HC-6937-97 on the basis, *inter alia*, that the registration of the bond was a convenience resorted to by the appellant and the company to avoid the farm being sold to pay the company's creditors. No money passed hands. The respondent also stated that the farm was fraudulently transferred to the appellant as none of the directors of the company had agreed to surrender the farm. She said that the authority on which the transfer was effected was fraudulent - the signatures on the declaration of seller and other documents necessary to effect a transfer were forged.

The proceedings in cases No. HC-6937-97 and HC-6802-97, which would seem to open a can of worms for the parties, are still to be finalised in this court. Except to the extent that those proceedings provide a fuller picture of the present dispute between the parties, those proceedings are not directly relevant to a determination of this appeal.

The respondent's affidavit discloses that, prior to 4 July 1997, the appellant attempted to evict her from the farm without due process. Security guards were dispatched to the farm by the appellant with specific instructions to forcibly evict her. She refused to move. The appellant threatened that if she did not move away from the farm, it would secure her removal by force, again without an order of court. This is what prompted the respondent to obtain the rule *nisi* on 4 July 1997, which rule was later confirmed. This appeal is against the magistrate's decision confirming the rule *nisi*.

The appellant's grounds of appeal are that the court *a quo* erred in finding that the respondent had established an entitlement to an interdict and in holding that it had jurisdiction to hear the matter. The appellant's legal practitioner stated in his heads of argument, and submitted orally at the hearing of the appeal, that the challenge to the magistrates' court's decision was to be confined to the question of jurisdiction. That therefore in the issue before the court. Mr *Rowland* was right to confine his submissions to the question of jurisdiction because, absent to that ground of appeal, the grant of the interdict cannot otherwise be contested on its merits.

In terms of the argument of the respondent's legal practitioner in the court

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a quo, the magistrate determined that the court had jurisdiction because the value of occupation to the occupier, i.e. the respondent, was $8 000, that is to say, it was below the jurisdictional limit of the magistrates court at that time. The limit was $10 000. As such, the court had the jurisdiction to hear the matter.

It is necessary to clarify the precise nature of the relief sought by the respondent in the court *a quo*. The relief she sought was an interlocutory interdict. As I have already stated, there is no doubt that the respondent established her entitlement to an interlocutory interdict if that were considered separately from the question of the court's jurisdiction. Mr *Rowland*, for the appellant, conceded that the basis for the grant of the interdict was properly established, hence he did not base his challenge of the court's decision on this ground.

The jurisdiction of the court in actions of ejectment is provided in s 11 of the Magistrates Court

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Act [*Chapter 7:10*]. The section provides in subs 1(b)(iii) that the court shall have jurisdiction:

> "in actions of ejectment against the occupier of any house, land or premises situate within the province:
>
> Provided that when the right of occupation of any such house, land or premises is in dispute between the parties, such right does not exceed such amount as may be prescribed in rules in clear value to the occupier."

There are two requirements to the exercise of the court's jurisdiction under this section: that there is a *bona fide* dispute as to the right of occupation (*Khan* v *Rooknodien* 1916 CPD 411 at 414) and that the right of occupation is worth $10 000 to the occupier. In respect of the first requirement Erasmus in *The Civil Practice of the Magistrates Courts in South Africa* states the following at p 63:

> "All that need to be established ... is the existence of the dispute, and that it is a *bona fide* dispute. The magistrate is not called upon to inquire into the merits of the dispute; indeed he cannot do so. It is obviously not competent for the magistrate first to decide that the defendant has no right of occupation and then to decide, for this reason, that the court has jurisdiction to determine the question whether the defendant has a right of occupation."

Mr *Rowland* dealt with this requirement for an interdict and highlighted that there was a dispute between the parties as to the right of occupation. It being the case that the application was not one by the appellant for the ejectment of the respondent but one by the respondent for an interlocutory interdict against the appellant, the jurisdiction of the court falls, in the first instance, to be determined by reference to s 12 of the Magistrates Court Act, which provides that:

> " (1) Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for arrest *tamquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*.

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> (2) Confirmation by the court of any attachment or interdict in the judgment in the action shall operate as an extension or further order of the court."

The power to grant interdicts in terms of this section is subject to the limits of jurisdiction prescribed in s 11 of the Act. And the interdict sought was an interlocutory one - one which is granted *pendente lite* and designed to protect the rights of the respondent pending the action in the High Court brought by her to establish the respective rights of the parties. It freezes the position until the court decides the rights of the parties (see Erasmus *op cit* at p 81).

This being so, it is clear that the question in this appeal is to be determined on a consideration of s 11(1)(b)(iii) as read together with s 12(1) and (2) of the Magistrates Court Act.

The first point I have already somehow dealt with is whether the first requirement under s 11(1)(b)(iii) has been met. The respondent's application in the court *a quo* was clearly predicated on the respondent's right to occupy the farm. Her case can be reduced to this : she occupied the farm together with her husband for many years; when her husband died she continued to reside on the farm, she is not a tenant and is therefore not paying any rentals; the farm was fraudulently transferred to the appellant, her right to occupy it derives in a sense from some claim of ownership which she is pursuing in case No. HC-6802-97; the value of her right of occupation is to be determined by reference to the sum of $8 000 which is the estimated rental which a tenant would pay. The appellant's case can also be reduced to this: the farm has

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been transferred to it and is registered as its property in the Deeds Registry and the respondent has no right to remain on the farm.

These opposed positions of the parties show quite clearly that there is a dispute as to the right of occupation. That can be the only reason why the appellant allegedly attempted to forcibly remove the respondent and the respondent in turn applied to court for protection. I am quite satisfied that there is between the parties a dispute as to the right of the respondent to occupy the farm. Conceding, as it were, that such a dispute exists, Mr *Mwonzora* in the court *a quo* submitted on behalf of the respondent as follows:

> "Mrs Khan has been on the property before and after the fraudulent transfer of the property. She does not have to establish that right beyond a reasonable doubt. All she has to do is to make an averment. The court does not have to go deep into the merits because it would be tantamount to a trial."

This may be so, but the submission was made in blissful disregard of the position that the right of occupation is relevant to the question of the jurisdiction of the court. If it is contested, then the magistrates court has no

jurisdiction to hear the matter (see *van der Westhuizen* v *Peterson* 1922 TPD 412). The magistrate adopted the approach which is clearly wrong as can be seen from the passage which I have cited from *The Civil Practice of the Magistrates Court in South Africa*. It was stated in *Munsamy* v *Govender* 1950 (2) SA 622 (N) at 623 that:

> "If the right of occupation is in dispute, the jurisdiction of the court depends upon the value to the occupier of the right of occupation, whether that right exists or not"

and further that in such a case the onus of proof lay on the party alleging lack of jurisdiction (see also *Malherbe* v *Britstown Municipality* 1949 (2) SA 281 (C). The magistrate did not, as far as I can tell, decide the question whether there was a dispute as to occupation between the parties which, if he had done, would have immediately raised the alarm that his court did not have jurisdiction to hear the matter. He went on to deal with the second requirement of an interlocutory interdict, i.e. the value of occupation to the occupier. He stated in his reasons for judgment as follows:

> "In other words, the applicant's (respondent's) averment on para 15 draws a line between the value of the property and the value of occupation of the property. The fact that the value of the property is in excess of the court's jurisdiction is not in dispute. But that is not the matter in issue according to applicant. The matter in issue is the value of occupation which she avers is determined by rentals of about $8 000 per month. That is not disputed by respondent (appellant). Section 12 of the Magistrates Court Act as read with Order 23 of the Magistrates Court (Civil) Rules give a magistrate jurisdiction to entertain interdicts. The right which applicant seeks to protect is that of occupation and the value of that right should be about $8 000 per month. Respondent has not challenged that. The monetary jurisdiction of the magistrates court in civil matters is $10 000. The applicant's figure of $8 000 has not been challenged therefore there is nothing preventing this court in the exercise of its jurisdiction."

The appellant clearly disputed that the respondent's right of occupation was valued at $8 000. That was the point he made, and it is the same point that he has pursued in this appeal. The magistrate's finding that the appellant was not challenging the respondent's value of her

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occupation is not supported by the submission made in the court below. Be that as it may, the question remains as to what the value of occupation was to the respondent.

In s 11(1)(b)(iii), the legislature has required that a *clear* right of occupation must be shown to exist. By "clear" is meant "over and above the rent payable". See Erasmus *op cit* at p 64 where the learned author lists a number of principles from decided cases on this topic. Some of these principles are germane to a consideration of the present appeal. Among these are:

" (ii) What must be shown is the *clear* value of the right to the occupier. This is not necessarily the same thing as the value to the defendant (respondent *in casu*), for they need not be the same *persona*.

(iii) the value to the occupier of a right of occupation of immovable property is the

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economic advantage (my emphasis) which he enjoys from the exercise of that right ...

(iv) ...

(v) Through the approach in assessing the value of the right of occupation to the occupier is an objective one, there are matters personal to the occupier which must be taken into account.

(vi) The rental of the premises is not necessarily the correct measure for the computation of the value of occupation, for the rent is a measure of value to the landlord, not necessarily to the occupier. A tenant who occupies a flat which is subject to rent control may find that he cannot rent comparable premises elsewhere except at double his present rent; to his landlord the value of the right of occupation is the rental which he receives, but to the tenant it is at least double that figure."

These principles reduce the argument to saying that the rentals payable cannot be an indication of the value of the right of occupation to the occupier. With those principles I am in complete agreement. Applying them to the present case the following factors are relevant:

(a) that respondent was an occupier in the strictest sense of the word - she was *prima facie* not the owner of the farm. She was not a tenant;

(b) the value of $8 000 was a thum-suck figure, which she conceded was only an estimate;

(c) she had lived on the farm for many years and would be homeless if evicted. The value of her occupation, even accepting $8 000 as the correct rental, would exceed that figure;

(d) she had 20 hectares under crop further increasing the value of her occupation to at least well beyond $10 000 (the limit of jurisdiction of the court at that time).

The value of the right of occupation to the respondent was, in my view, clearly greater than $10 000 and therefore far exceeded the jurisdictional limit of the court. I am satisfied, therefore, that the court below was wrong in its approach to the assessment of the value of occupation to the respondent. It was wrong in accepting the figure of $8 000 as representing that value. It was therefore, wrong in finding that it had jurisdiction to deal with the matter.

The question of costs falls to be determined on the desideratum that the appellant's success is in form only. That the appeal has been decided in its favour obviously does not mean that it has acquired a right to evict the respondent without a court order. Farm from it. The appellant has to

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pursue its application in case No. HC-6937-97 before it can evict the respondents. Mr *Rowland* conceded that, even if the appeal were determined in his client's favour, there would be no justification for making an order against the respondent. I think that that concession was proper. I will not make an order of costs in this matter.

CHINHENGO J

In the result, the appeal is allowed but there will be no order as to costs. The order of the court *a quo* is set aside and the following is substituted:

> "The rule *nisi* issued on 4 July 1992 be and is hereby discharged."

Hussein Ranchod & Co, appellant's legal practitioners

Mwonzora & Partners, respondent's legal practitioners

S v GONO 2000 (2) ZLR 63 (HC)

Citation	2000 (2) ZLR 63 (HC)
Case No	Judgment No. HH-136-00
Court	High Court, Harare
Judge	Blackie J and Bartlett J
Heard	June 27, 2000
Judgment	July 12, 2000
Counsel	A A Debwe, for the appellant P Muziri, for the respondent
Annotations	None

Criminal appeal

Flynote

Criminal procedure (sentence) - general principles - forms of punishment - whether court must specifically mention the options open to it before selecting one form rather than another - not a misdirection, provided court's reasons can be inferred from what it says

Headnote

The appellant was convicted on several counts of assault and sentenced to an effective term of imprisonment. The magistrate did not specifically say that he had considered other options, such as community service or a fine, but it was implicit in what he said that he considered that

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imprisonment was appropriate. It was argued that he had misdirected himself.

Held, that merely because the magistrate had not mentioned community service, that did not mean that he had overlooked that option. While it would have been better for him to have specifically dealt with the matter, his reasons for finding one form of punishment as appropriate and another as inappropriate could be deduced from what he said.

Held, further, that not every misdirection entitles an appeal court to interfere. The misdirection must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.

Cases Considered

Cases cited:

S v *Antonio & Ors* 1998 (2) ZLR 64 (H)

S v *Berliner* 1967 (2) SA 193 (A)

R v *Dhlumayo & Ors* 1948 (2) SA 677 (A)

S v *Pillay* 1977 (4) SA 531 (A)

Case Information

A A Debwe, for the appellant

P Muziri, for the respondent

Judgment

Blackie J: The appellant, a 36 year old first offender, was charged in the magistrates court with six counts of common assault. He pleaded guilty to all the counts and was duly convicted of them. All the counts being taken as one for the purposes of sentence, he was sentenced to serve eight months' imprisonment, of which four months were suspended on conditions of good Behaviour. He appeals to this court against the sentence of imprisonment imposed on him. He alleges that the trial magistrate misdirected himself by failing to consider the alternative sentences of a fine or community service

BLACKIE J

before imposing the imprisonment. He submits that, because of that misdirection, this court is free to impose any punishment on him that it considers appropriate. He further submits that imprisonment is not the appropriate sentence for this case and that a fine or community service should be imposed.

The State concedes the misdirection alleged by the appellant but maintains that the imprisonment imposed on the appellant was, in any event, the proper sentence for him.

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The agreed facts of the case are that the appellant, who is employed in the Central Intelligence Organisation in Gweru went, in succession, to the Ministry of Information and then to the offices of two publications, the *Mirror* and the *Tribune*. At the Ministry of Information, the appellant complained to a man, variously described as a sub-editor or an information officer, that his paper had published an article concerning a possible coup in Zimbabwe. When the sub-editor asked to see the article that he was talking about, the appellant hit him several times in the face with his fists. At the *Mirror*, the appellant assaulted two advertising clerks saying that they were irresponsible journalists. He hit both of them several times in the face with his open hands. At the *Tribune*, he accosted the female receptionist, demanded to see the editor and immediately, before she had time to respond, hit her three times in the face with his open hand. He then accosted the sub-editor of the publication. He repeated his accusation concerning an article about a coup, seized the sub-editor by the throat and hit him a number of blows in the face with his fists. A security guard was called to restrain the appellant. The appellant hit the guard in the face with his clenched fists while he was restraining the appellant.

The appellant was asked to explain his behaviour. He said he was carrying out research for an article that he was compiling. After he had unsuccessfully tried to get the information that he needed for the article from various institutions, he approached the sub-editor at the Ministry of Information for the information. The sub-editor refused to give him what he wanted. He assaulted that sub-editor because he felt frustrated by the sub-editor's uncooperative attitude and because of the earlier refusals that he had received. He "formulated an option (*sic*) that all reporters purposefully starve people of information". After assaulting the sub-editor at the Ministry of Information, he went to the offices of the *Mirror* and the *Tribune* "to vent out (his) rage" and his frustration. He assaulted the security guard at the *Tribune* offices because the security guard refused to 'back off' when he told him to.

The appellant's explanation for his behaviour does not exactly match the agreed facts of the State case. The agreed facts state that the appellant accused two of the publications of printing a story about a coup in Zimbabwe and that

the assaults arose from that accusation. The appellant's explanation in mitigation for the assaults speaks of his frustration at not being able to get the information that he wanted for an article. However, the appellant was not challenged or questioned on this apparent discrepancy. The trial magistrate did not comment on it and, for the purposes of the sentence he imposed, he accepted the appellant's explanation. It is the appellant's version contained in his explanation that must therefore be used for the purposes of this appeal.

In sentencing the appellant, the trial magistrate said that the assaults were unprovoked, that the appellant had abused his position as a member of the CIO, disregarded the rule of law and subjected respectable journalists to "the most callous inhuman treatment of physical abuse". He said that a deterrent sentence was required because the assaults "grossly traumatised the complainants" and because it was necessary to "warn like-minded persons that they cannot operate above the law and expect to be treated with leniency".

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The guidelines to sentencing prepared by the National Committee on Community Service stipulate that where a judicial officer would otherwise impose a sentence of imprisonment of less than 12 months he should first consider the option of community service or the imposition of a fine as an alternative to imprisonment. It is common cause that, in his reasons for sentence in this case, the trial magistrate did not expressly state that he had considered these options of punishment and rejected them. Nor did he directly give any reasons for so rejecting them.

The concession by the State that the trial magistrate misdirected himself on sentence relates to the fact that the trial magistrate imposed a sentence of imprisonment of less than 12 months on the appellant without setting out in express terms that he had considered the options of a fine or community service together with his reasons for rejecting those punishments and imposing imprisonment. The concession follows from the statement by Chinhengo J in *S* v *Antonio & Ors* 1998 (2) ZLR 64 at 68B-E:

> "Community service ... is now a substantive punishment in its own right (see s 336 of the Criminal Procedure and Evidence Act as amended by s 11 of Act 8 of 1997 and *S* v *Chinyenze* 1998 (1) ZLR 470 (H)). That being the case, a judicial officer should give reasons in his judgment why he opts for one form of punishment as against any other. It is not a judicious exercise of the sentencing discretion to sentence an accused person to a custodial term, or to payment of a fine or to the suspension of either of them on any condition or to community service without showing why he has settled on any of those forms of punishment. In my opinion not to do so is a misdirection. It is a misdirection because the sentencer will not have applied his mind to the most appropriate sentence. If he would have applied his mind to the question of sentence the clearest evidence of it is to reflect on the record the reason for his choice of sentence. The words of Young J in *R* v *Dematema* 1967 RLR 311 (G) at 316C-D are apposite. He said:

BLACKIE J

> 'The infliction of punishment is perhaps the most important and difficult aspect of the exercise of judicial discretion. A sentence must always have a rational content with no capricious element in it. The judicial officer must take into account, and give proper weight to all relevant factors. As in the case of convicting the accused, so with punishing him where the justification of the sentence is not obvious, the judicial officer should give reasons for his decision. As a member of society the accused is entitled to be treated as a rational being and both society and the accused are entitled to know the justification for the punishment'."

I respectfully agree with and endorse the statements made by both Young J and Chinhengo J in their judgments concerning the importance of and difficulty in exercising the judicial discretion in sentencing, and the need for a judicial officer, in the exercise of that discretion, to apply his mind to and exercise his discretion in respect of all the relevant facts and to explain, in his reasons for sentence to both the accused and to society at large why he has determined on the sentence he has imposed. It is most important that the accused, the general public and, if necessary, the appeal court clearly understand the reasons for which a particular punishment has been selected.

However, with respect to Chinhengo J, there is a portion of his judgment that requires qualification. It is that portion which suggests that if the judicial officer does not express the reasons why he has determined on one form of punishment rather than another, he will not have applied his mind to the most appropriate sentence and will, therefore, have misdirected himself. It does not seem to me that it necessarily follows that because the judicial officer does not expressly mention that he has considered alternative punishments and given reasons why

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he has rejected those punishments, the judicial officer has not applied his mind to them. An express statement that all the alternative punishments have been considered and that the one imposed has been chosen for the particular reasons set out in the judgment is certainly the best evidence that all the appropriate factors have been taken into account and that they have been correctly applied. However,

> "... (m)erely because a relevant factor has not been mentioned in the judgment on sentence, it does not mean that it has been overlooked for 'no judgment can ever be perfect and all embracing"

(See *R* v *Dhlumayo & Ors* 1948 (2) SA 677 (A) at 702), quoted by Trollip JA in *S* v *Pillay* 1977 (4) SA 531 (A) at 535 I. In any event, the reasons for accepting one form of punishment as appropriate and another as inappropriate may be implicit in or deducible from the context or reasoning of the judgment.

In this case, the trial magistrate did not follow the formula set out by Chinhengo J. Nevertheless,

> "A misdirection in the present context simply means an error committed by the court in determining or applying the facts for assessing the appropriate sentence."

BLACKIE J

See *S* v *Pillay supra* at 535E. It is clearly implicit in the trial magistrate's reasons for sentence that, even if this was a case of common assault, he did not feel that the alternative punishments available to him were adequate punishments for the appellant, bearing in mind the abuse of power, the unprovoked nature and number of the assaults, together with the effect of those assaults on the complainants. If there is any doubt in the matter, then trial magistrate's true intention and reasons for sentence appear expressly and clearly from his judgment in respect of the appellant's application for bail pending appeal made immediately after sentencing, and in the trial magistrate's subsequent response to the notice of appeal. In the circumstances, I do not think that the trial magistrate can be said to have misdirected himself in this case.

A final point must be made. It is not every misdirection that will entitle an appeal court to interfere with the decision on sentence of the trial court.

> "An appeal court will not readily differ from the court *a quo* in its assessment of the factors to be had regard to or as to the value to be attached to them."

See *The South African Criminal Law and Procedure* vol. V, p 598; *S* v *Berliner* 1967 (2) SA 193 (A) at 200D.

> "As the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether the court imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually termed one that vitiates the court's decision on sentence. That is the type of misdirection ... that 'the dictates of justice' clearly entitle the appeal court to 'to consider the sentence afresh'."

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See *S* v *Pillay supra* at 535D-G.

In this case, even if the trial magistrate can be said to have misdirected himself (which is not the position), then that misdirection was not of that type which "vitiates the decision of the court on sentence" and for which "the dictates of justice clearly entitle the appeal court to consider sentence afresh". I consider that the appropriate penalty for the appellant's crimes is imprisonment and that the sentence of the trial magistrate should stand.

Bartlett J: The trial magistrate gave very thorough, detailed and carefully considered reasons for sentence. It is clear from a reading of those reasons for sentence that he thought that an effective term of imprisonment was the appropriate punishment. Apparent from his full analysis of the aggravating and mitigating factors is his view that a non-custodial option was not appropriate. It would have been much better if he had said so - but the conclusion nevertheless clearly emerges from his reasoning process.

BARTLETT J

Accordingly, for the reasons given by my brother Blackie, I do not consider that the trial magistrate misdirected himself in this respect.

I personally may have been disposed, despite the aggravating factors, to impose a prison sentence suspended on condition that the appellant carried out a substantial number of hours of community service. It seems to me that working long hours under careful supervision in a government hospital or rural clinic might have adequately punished the appellant and taught him the true meaning of humility and public service - something he does not seem to have learned in the CIO. However, a community service sentence was not asked for either at the trial or on argument on appeal. The sentence imposed is, in my view, well within the reasonable exercise of the trial magistrate's discretion so that there is no basis for interfering with it on appeal. I accordingly agree, for the reasons given by my brother Blackie, that the appeal be dismissed.

The appeal is accordingly dismissed.

Muzenda & Partners, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners

S v MARAMBA & ANOR 2000 (2) ZLR 69 (HC)

Citation	2000 (2) ZLR 69 (HC)
Case No	Judgment No. HH-142-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	July 12, 2000

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Judgment July 12, 2000
Annotations None

Criminal review

Flynote

Criminal procedure (sentence) - community service - direct sentence of community service - whether such sentence may be suspended - whether further suspended term of imprisonment by be imposed in addition

Headnote

The accused, who were convicted separately by the same magistrate, received similar sentences. Each was sentenced to perform community service, failing which he would undergo a period of imprisonment. In addition, a period of imprisonment was imposed, suspended on conditions of good behaviour. The scrutinising regional magistrate raised the question of whether the additional suspended prison sentence was competent, in view of the judgment to the contrary in *S* v *Mugebe* 2000 (1) ZLR 376 (H).

Held, that s 350A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which allows community service to be imposed directly rather than as a condition of suspension of sentence, stipulates the alternatives that may be open to the court in the event that the offender fails to perform the required community service. It does not preclude the imposition of a suspended sentence under s 358 of the Act. Under that section, a sentence of community service can itself be suspended like any other form of sentence. It is also competent for a court, in addition to imposing a direct sentence of community service, to impose a prison term, suspended on suitable conditions, such as future good behaviour or restitution.

Cases Considered

Cases cited:

S v *Mugebe* 2000 (1) ZLR 376 (H)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 350A and 358

Judgment

Chatikobo J: In the first matter, the trial magistrate, sitting at Penhalonga on 14 February 2000, convicted the accused of the crime of theft and sentenced him to perform 105 hours of community service, failing which he would undergo imprisonment for 3 months. In addition, the magistrate imposed 2 months which he suspended on condition of future good behaviour.

On 30 March 2000, the same magistrate, sitting in Mutare, convicted the accused in the second

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matter, of the crime of housebreaking with intent to

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steal and theft and proceeded to impose exactly the same sentence which he had imposed in the first matter one and a half months previously.

The scrutinising regional magistrate, being of the view that the imposition of the additional prison sentence suspended on condition of good behaviour was contrary to the terms of s 350A(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Code") as amended by the Criminal Procedure and Evidence (Amendment) Act 8 of 1997. His view is amply supported by the review judgment of Bartlett J in *S* v *Mugebe* 2000 (1) ZLR 376 (H), with which Garwe J concurred. Both of my brethren undoubtedly have vast experience in the country's system of community service sentencing, as they are not only its architects but were involved in the deliberations which led to the enactment of the provision under consideration.

Could their interpretation of s 350A(3) be wrong? So to state the question is to underpin the deference with which I record my disagreement with Bartlett J's conclusion which is in these terms:

> "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)(i) and (ii) establishes this as the correct interpretation of s 350A(3)."

Section 350A(1) provides that a court which convicts a person of any offence may, instead of sentencing him to prison or a fine, make a community service order requiring him to render service for the benefit of the community. This provision does no more than create the power to impose a direct community service order. Then follows s 350A(3) which provides that:

> "A court which makes a community service order in respect of an offender may sentence the offender to a fine and additionally, or alternatively, to imprisonment as an alternative punishment, to be paid or served, as the case may be, if he fails to render the service specified in the order."

The process of ascertaining the meaning of this provision must start with an analysis of what it says before one delves into the question of what it means. I think it says that, if a court makes a direct community service order, it can impose one alternative of a fine, or one alternative of a prison term, or two alternatives, one of a fine and another of a prison term. Where both a fine and a prison term are imposed as alternatives, an offender who fails to perform the community service either can pay the fine or if he fails to raise the fine, can serve the alternative prison term.

As to what it means, it is important to observe that the section deals with the alternatives which are open to an offender who fails to carry out an order

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CHATIKOBO J

of community service. It does not purport to deal with the suspension of sentences. It is silent on the question of additional punishments. What it does is to stipulate the alternative punishments which a defaulter can be subjected to. The logic behind the authorisation of more than one alternative sentence in the event of default lies in the need to obviate a situation where a defaulter would be returned to court for resentencing. That is achieved by adopting one or more of three possible options which can best be understood by resorting to the examples which follow. In option one, the sentencing court would say:

> "You are to perform community service for 105 hours, failing which you will be required to pay a fine of $200."

The second option would be:

> "You are to perform community service for 105 hours, failing which you will undergo imprisonment for 2 months."

and the third option would be:

> "You are to perform community service for 105 hours, failing which you will pay a fine of $200 and in the event that you fail to pay such fine you will undergo imprisonment for 2 months."

In terms of the first option, if an offender fails to perform community service and he does not have money with which to pay the fine, he will have to be brought before a court to be sentenced to imprisonment, a course which is sanctioned by s 350C(3)(a) and (c). A defaulter sentenced under the second option will serve a prison term without being afforded the opportunity to pay a fine even if he can afford it. If sentenced under the third option, a defaulter who has money with which to pay the fine will pay to avoid going to prison, but if he does not have the money he will go to prison. The self evident efficacy of the third option is that there will be no need to return an offender to court for resentencing but for enforcement of a sentence already passed, and the offender will not be denied the opportunity to pay a fine.

It is true that the section does not deal with the question of suspending a sentence on condition of future good conduct but it is equally true that the section does not prohibit such a course. The suspension of sentences is regulated by s 358(2)(b) and s 358(3). Section 358(2)(b) gives the court the power to pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period of fine on such "conditions as the court may specify in the order". Section 358(3) lays down the conditions upon which a sentence may be suspended and they include future good behaviour. On a proper reading of s 350A and s 358, I would confidently venture the opinion that a direct community service order imposed in terms of s 350A can itself be suspended in terms of s 358. If that be so, then there is no logical ground discernible from within the four corners of s 350A which would justify the conclusion that once a court imposes a direct community service

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order with the concomitant alternatives provided therein, it cannot proceed to impose a prison

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term and to suspend such prison term on condition of future good behaviour or for that matter on any other suitable condition such as restitution. A direct order of community service is clearly a sentence whose operation can be suspended in whole or in part on suitable conditions. Put in a different way, s 358 applies to all offences except those specified in the Eighth Schedule and s 350A(3) does not seek to create an exception.

What the trial magistrate did in this case was to suspend a portion of the sentence which he imposed in the exercise of a discretion vested in him by the provisions of s 358, which provisions, as already observed, designedly encompass s 350A(3) as far as the suspension of sentences is concerned. The sentences imposed are not in conflict with s 350A(3).

The provisions of s 350C(3)(b)(i) and (ii) do not cause me any problems nor do they support a conclusion which is opposed to the one I have reached. Those provisions are procedural. They make provision for the enforcement of an alternative sentence imposed in accordance with one or more of the three options I have dealt with. They do not, in my view, empower a court to pass sentence afresh but to order that a sentence of a fine or a prison term which has already been passed should now be paid or served, as the case may be.

I would accordingly confirm the proceedings as being in accordance with real and substantial justice.

Chinhengo J agrees.

S v MHLANGA & ANOR 2000 (2) ZLR 73 (HC)

Citation	2000 (2) ZLR 73 (HC)
Case No	Judgment No. HH-145-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	July 12, 2000
Judgment	July 12, 2000
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - community service - direct order of community service - whether in addition thereto court may impose sentence of imprisonment on condition of restitution

Headnote

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A court may impose a sentence of direct community service. In addition, a sentence of imprisonment suspended on condition of restitution. Section 350A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] empowers a court to impose a direct community service order and a term of imprisonment as an alternate punishment if he fails to perform the community service. Section 358(3) of the Act empowers the court to impose an additional sentence of imprisonment, all of which is suspended on condition of restitution. Nothing contained in s 350A prevents the court from imposing both a direct sentence of community service and an additional prison sentence suspended on condition of restitution. The opinion to the contrary in *S* v *Mugebe* 2000 (1) ZLR 376 (H) is incorrect.

Cases Considered

Cases cited:

S v *Antonio & Ors* 1998 (2) ZLR 64 (H)

S v *Chinzenze & Ors* 1998 (1) ZLR 470 (H)

S v *Maramba & Anor* 2000 (2) ZLR 69 (H)

S v *Mpofu (2)* 1985 (1) ZLR 285 (H)

S v *Mugebe* 2000 (1) ZLR 376 (H)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 350A(3) & 358(2)(b)

Judgment

Chinhengo J: The accused Jacob Mhlanga pleaded guilty to a charge of theft involving property worth $2 100 (including cash $1 000). The property and cash were recovered except for $400 cash which he had used by the time the offence was discovered. He was sentenced to perform 140 hours of community service at a local clinic and, in addition, to three months imprisonment which was suspended on condition that he pays compensation to the complainant in the sum of $400 by 30 January 2000.

The accused in the second case, Lampson King, pleaded guilty to a charge of theft by conversion involving the sum of $2 400. He was sentenced to 105 hours of community service at a local police station and, in addition, to three

months imprisonment which was suspended on condition that he pays compensation to the complainant in the sum of $2 400 by 6 December 1999. In both cases, direct community service and an additional sentence of imprisonment wholly suspended on certain conditions were imposed.

The proceedings in these two cases were referred to me on review after 20 March 2000 with the

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following comment from the regional magistrate:

> "In both cases the learned trial magistrate added a suspended prison term to a direct community service order.
>
> It is respectfully submitted that a close analysis of s 350A(3) of Act 8 of 1997 shows that the legislature's true intention was to permit the imposition of a prison term only as an alternative to a direct community service order.
>
> If this submission is correct, may the suspended prison term be set aside. If accused had restituted, there is no prejudice to him/her as he/she will have extinguished his/her civil liability to the complainant anyway."

The convictions in both cases are not subject to any criticism. I have only to address the issue raised by the regional magistrate whether the imposition of a term of imprisonment suspended on condition of restitution in addition to a direct community service order was proper.

The basic idea behind an order of community service is that a person who has been convicted of a minor offence is not imprisoned but rather he is given an opportunity to atone for his offence by doing work beneficial to the community whilst he is not in prison. Imprisonment has several adverse effects on a first offender. He may become a hardened criminal by association with other prisoners. He becomes stigmatised and such stigmatisation may affect him psychologically with the result that he may degenerate into criminality - see J Reid Rowland in *Criminal Procedure in Zimbabwe* pp 25-28 and *S* v *Antonio & Ors* 1998 (2) ZLR 64 (H) at 67.

In *S* v *Chinzenze & Ors* 1998 (1) ZLR 470 (H), it was stated that the Criminal Procedure and Evidence Act [*Chapter 9:07*] now provides for community service in three situations, as a condition of suspension of a sentence, as an alternative to a fine, and as a substantive penalty in its own right. This case did not address directly the issue raised by the regional magistrate which is the subject matter of this judgment. Two important principles appear to come into conflict. On the one hand, and dealing with the one, the imposition of community service is intended to keep minor and usually first offenders out of jail. On the other hand, and dealing with the second principle, the suspension of a sentence on condition of restitution is intended to ensure that the accused makes good the wrong he has done by compensating his victim. The two principles would be in conflict if the legislature intended that where a direct order of community service is imposed then no other or additional sentence of imprisonment wholly suspended on condition of restitution may be imposed.

CHINHENGO J

On scrutiny, the regional magistrate relied on subs (3) of s 350A of the Act (as amended by Act 8 of 1997). That subsection reads:

> "A court which makes a community service order in respect of an offender may sentence the offender to a fine and additionally or alternatively, to imprisonment as an alternative punishment, to be paid or served, as the case may be, if he fails to render the service specified in the order."

Section 350A deals generally with direct community service orders. In subs (1) the court is empowered to make a community service order instead of sentencing an offender to imprisonment or to a fine. Subs (3) empowers the court to sentence the offender to a fine and *additionally* or *alternatively* to imprisonment as an alternative punishment if he fails to render the service specified in the order. This subsection makes it clear that a sentence of imprisonment

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may be imposed as an alternative to performing community service where the offender fails to perform such service. But the section does not detract from the court's power to order restitution. That is a sentence which may be imposed separately from and in addition to the substantive punishment imposed. The imposition of such a sentence is authorised by s 358(2)(b) of the Criminal Procedure and Evidence Act. In my view, an offender can be sentenced to community service, and the court can at the same time impose an additional sentence of imprisonment all of which is suspended on condition of restitution. This is more in keeping with the current trend in sentencing where the interests of the victim of the offence take centre stage and are not to be disregarded. As stated by Reynolds J in *S* v *Mpofu (2)* 1985 (1) ZLR 285 (H) at 293E-D:

> "It is in the interests of society as well if restitution takes place in that the complainant is content, the accused is making an effort to redeem himself and part of the affront against the social order has been repaired. As I see it, it is proper for the court itself, if the matter is not raised by the defence, to investigate the prospects of restitution and to give due weight, depending upon the circumstances, if this form of reparation is made. It is, in my view, desirable for the courts to encourage any person convicted of having committed an offence against property, such as theft or arson, to restore to the victim of the crime the value of the property in question."

Section 350A(3) of the Criminal Procedure and Evidence Act cannot therefore be construed as prohibiting the court from imposing a sentence of imprisonment which is suspended on condition of restitution in addition to a direct order of community service. It must be remembered too that an order that the offender should render service beneficial to the community is not a guarantee that the offender may not end up in jail. He may breach the conditions of the community service order and he may, in appropriate cases, end up in jail. In similar vein, where the court has made an order of community service, and has further imposed a term of imprisonment suspended on condition of restitution, its effort at avoiding to send the offender to prison

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CHINHENGO J

cannot be lightly regarded merely because the court has imposed the additional sentence. During the time that the offender is performing community service, he has the opportunity to raise the funds with which to make restitution and should he fail to make restitution there is nothing fundamentally wrong in requiring him to undergo a prison sentence. I am satisfied that the sentences imposed by the trial court are proper. They are not at variance with the lawgiver's intention as enacted in s 350A(3) of the Criminal Procedure Evidence Act. They are in fact competent in terms of s 358(2)(b) of the same Act. What I have tried to articulate is more eloquently stated by Chatikobo J in *S* v *Maramba & Anor* HH-142-2000 *(10) where he says of s 350A(3):

> "It is true that the section does not deal with the question of suspending a sentence on condition of future good behaviour but it is equally true that the section does not prohibit such a course. The suspension of sentences is regulated by s 358(2)(b) and s 358(3). Section 358(2)(b) gives the court the power to 'pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period ... on such conditions as the court may specify in the order'. Section 358(3) lays down the conditions upon which a sentence may be suspended and they include future good behaviour. On a proper reading of s 305A and s 358A, I would confidently venture the opinion that a direct community service order imposed in terms of s 350A can itself be suspended in terms of s 358. *If that be so, then there is no logical ground discernible from within the four corners of s 350A*

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which would justify the conclusion that once a court imposes a direct community service order with the concomitant alternatives provided therein, it cannot proceed to impose a prison term and to suspend such prison term on condition of future good behaviour, or for that matter on any other suitable condition such as restitution. A direct order of community service is clearly a sentence whose operation can be suspended in whole or in part on suitable conditions. Put in a different way, s 58 applies to all offences except those specified in the Eigth Schedule and s 350A(3) does not seek to create an exception."

I would therefore respectfully dissent from the views expressed by Bartlett J in *S* v *Mugebe* 2000 (1) ZLR 376 (H) a case which, had he been aware of, the magistrate would have cited in support of his view. I accordingly confirm the proceedings in these two matters.

Chatikobo J agrees.

BORDER TIMBERS (PVT) LTD v MINISTER OF HIGHER EDUCATION 2000 (2) ZLR 77 (SC)

Citation	2000 (2) ZLR 77 (SC)
Case No	Judgment No. S-58-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Sandura JA
Heard	July 6, 2000
Judgment	July 17, 2000
Counsel	J C Andersen SC, for the appellant A P de Bourbon SC, for the respondent
Annotations	None

Civil appeal

Flynote

Revenue and public finance - levy on employers - exemption for farming and operations related thereto - forestry estate - saw milling of timber grown on estate - test for whether such activities form part of farming operation

Headnote

Under the Manpower Planning and Development Act [*Chapter 28:02*], an education levy is payable by employers other than those engaged in, among other things, farming and related operations. The appellant ran a timber plantation. Timber grown on the plantation was debarked and cut into sections at a saw mill located on the estate for transporting and marketing. The Minister argued that the saw milling process was not part of the farming operation and that the appellant had to pay the levy.

Held, that the character of a trade or industry is determined, not by the kind of occupation in

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which the employees in that trade or industry are engaged, but by the nature of the enterprise in which the employers and employees are associated for a common purpose. Once its character is determined, all the employees are engaged in that trade or industry, whatever the actual work may be which the employer allots to them. What has to be determined, therefore, is the essential character of the agricultural undertaking in which the appellant and its employees are associated for a common purpose.

Held, further, that in this case, the essential character of the undertaking in which the appellant and its employees were associated and engaged was general forestry farming. The "crop" produced was timber logs. One of the operations relating to that crop - indeed an integral part of the whole undertaking - was the preparation of the timber logs for delivery and marketing. This was indispensable to the production of saleable timber. Whether the debarking and cutting is performed by some of the employees manually or at a saw mill on the estate is of no significance. Those employees doing the saw milling were associated with the appellant for the common purpose of forest farming. This enterprise entailed not only growing the crop but also putting the crop in a condition allowing it to be disposed of in the market place. The saw milling was thus part of the appellant's general farming operation.

Cases Considered

Cases cited:

Ambleside Tobacco Grading Co (Pvt) Ltd v *Abrahamson NO* 1958 R & N 842; 1959 (1) SA 295 (SR)

Bryant v *Min of Labour & Anor* 1943 TPD 205

Ko-operatieve Wynbouwers Vereniging van Zuid-Afrika Bpk v *Industrial Council for the Bldg Industry & Ors* 1949 (2) SA 600 (A)

McAvoy v *Down County Council* [1957] NI 183

Min of Higher Education v *Border Timbers (Pvt) Ltd* 1999 (1) ZLR 555 (H)

R v *Giesken & Giesken* 1947 (4) SA 561 (A)

R v *Rohold* 1934 TPD 371

R v *Sidersky* 1928 TPD 109

Legislation considered:

Manpower Planning and Development Act [*Chapter 28:02*], s 53

Vocational Education and Training Levy Notice, SI 802 of 1982, ss 3 and 7 and Second Schedule

Case Information

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J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Gubbay CJ: By virtue of s 53 of the Manpower Planning and Development Act [*Chapter 28:02*] the Minister of Higher Education ("the Minister") is empowered, by notice given, to impose a levy on such employers as may be specified.

On 31 December 1982, the Minister published the Vocational Education and Training (Levy) Notice 1982 (SI 802 of 1982) ("the Notice"), which came into operation on 1 January 1983. In terms of s 3 thereof, every employer is obliged to pay a levy assessed at one *per centum* of his total monthly wage bill, calculated on the wage bill for the preceding month and due on the first day of each month. Exempted from the payment of such levy, under s 7(c) are those undertakings specified in the Second Schedule to the Notice. The first listed class is headed "Agricultural and livestock production, including hunting, trapping and game-propagation". This covers under code 0110:

> "*General farming and ranching, all crops* and animals, *including all operations relating thereto*, and animal dipping, if performed by the farmer and not rendered as a service on a free or contract basis" (emphasis added).

The appellant is the producer of timber on a forestry estate operated by it. Its activities embrace, among others, the planting and cultivation of tree seedlings; the maintenance of growing and established trees; the cutting and clearing of surplus branches; the felling and conveyance of mature tree trunks to the forest mill on the estate where rough saw milling is carried out involving the debarking of the timber logs and the cutting of the logs into sections to be transported for processing. These functions are performed by agricultural workers, drivers, saw millers, mechanics, fitters and turners and administrative personnel in the employ of the appellant.

On 26 June 1997, the Minister issued summons against the appellant

demanding payment of $982 723.70, being an assessment of the amount of levies alleged to be owing for the period 1991 to 1995. The appellant's liability was based on the contention that those employers responsible for the rough saw milling of the timber logs were not involved in an agricultural undertaking or agricultural production; that saw milling is an industrial and not an agricultural activity, and must be treated as such, notwithstanding that the mill is situated on the appellant's estate, and that saw milling is an activity complimentary and indispensable to the production of timber on the estate. The appellant disagreed. It maintained that the rough saw milling of the timber logs, prior to being sawn into sections, constituted no more than the removal of the bark (i.e. waste) from an agricultural product so as to be rendered in a fit condition for transportation from the estate. In other words the saw milling operation, together with the other farming operations, was exempted from payment of the levy.

With the agreement of the parties a special case was submitted for the opinion of the High

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Court. The learned judge presiding held, in essence, that once the felled timber was taken to the saw mill and then debarked and cut into sections, the activity became something more that general farming related or incidental to the operation of the growing and cultivation of tress; that saw milling of any nature, even if carried out on the estate was not an integral part of the appellant's general farming operation; it was not one of the activities in which the appellant and the employers could be said to be associated for the common purpose of the growing and cultivation of trees. See the judgment now reported in 1999 (1) ZLR 555 (H) at 558B-F.

Before the learned judge, the Minister accepted that trees and tree timber logs produced in the course of "general farming" are to be regarded as "crops" for the purposes of code 0110 of the Notice. The correctness of this concession is fully supported by the following observation of Black LJ in the Irish case of *McAvoy* v *Down County Council* [1958] NI 183 at 184-185:

> "The first thing which presents itself to one's mind when the word 'crop' is used is a cereal or agricultural crop, whether it be one grown for food, such as corn or potatoes or turnips, or an agricultural crop not grown for good such as flax or hemp or cotton. These are the kinds of thing one naturally thinks of, and if this phrase had occurred in a statute of 100 or 150 years ago, I think I would have regarded it as meaning something of that sort. Mr *O'Donnell* (counsel for the respondent), however, contends ... that at the present day the growing of trees and the art of forestry have developed to such an extent that trees are planted for the purpose of producing timber, and are treated systematically as a crop to be cut at a definite future time, just as cereals or other crops are, and that they are therefore a growing crop. At first sight, this sounds to be a strong proposition, but when one thinks of the meaning of 'crop' it is hard to find a distinction between the systematic growing of trees for timber and the systematic growing of corn or potatoes; each is sown or planted or cultivated with the intention that it should be harvested in the future."

GUBBAY CJ

The crucial determination for this court to make (as it was for the court below) is, therefore, whether the operation in debarking the timber logs and cutting them into sections at a saw mill for transportation and marketing, related to the appellant's undertaking of general forestry farming.

In the leading case of *R* v *Sidersky* 1928 TPD 109, it was held that the character of the trade or industry is determined, not by the kind of occupation in which the employers in that trade or industry are engaged, but by the nature of the enterprise in which the employers and employees are engaged for a common purpose; and that, once its character is determined, all the employees are engaged in that trade or industry, *whatever the actual work may be which the employer allots to them*. Consequently, the employer concerned, a chemical manufacturer, was found not to be engaged in the building industry and so not subject to a industrial agreement for that industry by reason of his employment of two bricklayers in certain building operations on his premises.

The test in *Sidersky*'s case *supra* has been applied consistently in later decisions. In *R* v *Rohold* 1934 TPD 371, the appellant carried on a saw milling business in which wood of every description was cut and planned for timber merchants, for firms that required shelving cut, for building contractors and also for furniture factories. He was charged with contravening the industrial agreement and wage determination for paying less than the prescribed wage to one Lautenbach. The evidence showed the Lautenbach worked solely on wood which was required

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by persons for the making of furniture. Tindall J (as he then was) was satisfied that the appellant was not an employer in the furniture industry since the nature of his business could not be said to be a collective enterprise in which the manufacturing of furniture was carried out. He said at 374:

> "The enterprise carried out ... was that of an ordinary saw mill - doing the work that saw mills generally do i.e. cutting timber for timber merchants ... I do not think that the fact that the appellant cut timber to certain sizes and certain shapes to be used by a furniture manufacturer constitutes him an employee of persons engaged in the furniture industry.

In a concurring judgment, de Wet J stressed at 374 *in fine*- that:

> "the test is not the kind of work that is done by an employee; the test to find out what the industry is, is to consider what is the collective enterprise in which both employer and employee are associated. If one puts it in this way, one's common sense draws one to the conclusion that the collective enterprise in the appellant's business is not the making of furniture but the cutting of timber for various customers, be they timber merchants or furniture manufacturers."

Then followed *Bryant* v *Minister of Labour & Anor* 1943 TPD 205. The facts were that a dairy farmer's employees were engaged on his farm in the performance of different duties, some of whom were involved particularly in the delivery of milk to customers in adjoining towns. In finding that such

employees were not subject to a wage determination relating to the dairy trade industry, but were engaged in farming operations, Millin J said at 212:

> "As a matter of common sense, there is no reason why ... the disposal of farm produce should cease to be a farming operation merely because the method of disposal brings the producer into direct contact with the customer."

The decision in *R* v *Giesken and Giesken* 1947 (4) SA 561 (A) went the other way. In that case, a dairy farmer who produced and sold milk produced by himself, mixed it with milk purchased by him from other producers. It was held that though he carried on farming operations in producing his own milk, he was, in the disposal of the mixed product, carrying on a dairy trade separate and distinct from his farming operations; and that, consequently, the dairy trade industrial award applied to him; there was a common dual purpose of the employer and his employee - they were engaged on two enterprises, each of which was to be treated as a separate trade or industry.

In *KWV van Zuid-Afrika Bpk* v *Industrial Council for the Building Industry & Ors* 1949 (2) SA 600 (A), the question was whether the construction of wine-receiving tanks by employees of a co-operative and agricultural company was work performed by or on behalf of a farmer. In reaching a conclusion, adverse to the appellant, Centlivres JA (as he then was) said at 613 *in fine* - 614:

> "A wine farmer produces grapes and converts them into wine and brandy: there is no allegation that the applicant produces any grapes. The applicant alleges in its affidavit that it is engaged in wine farming. In my opinion, as it does not produce any grapes, it cannot be said that it is engaged in wine farming. Wine farming consists of a

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number of different operations, such as cultivation of vineyards, pruning the crop, pressing the grapes into wine and probably delivering the finished product to the 'first buyer'... To say that a person who receives grapes from farmers for conversion into wine or brandy, or who receives distilling wine as he thinks fit, is a wine farmer, is a misuse of the language. An operation when performed by or on behalf of a farmer may be a farming operation, but when the same operation is performed by or on behalf of a person who is not a farmer, that operation cannot, in my view, be regarded as a farming operation. The construction of wine-receiving tanks in the present case is not being performed by or on behalf of a farmer: it is being performed by a co-operative agricultural company which is not a farmer."

Similar reasoning was adopted in the one relevant judgment from this jurisdiction, namely, *Ambleside Tobacco Grinding Co Ltd* v *Abrahamson NO*; *Selous and Hartley Tobacco Grading Co Ltd* v *Abrahamson NO* 1959 (1) SA 295 (SR). The plaintiff, a duly registered tobacco grader, sought a declaratory order to the effect that it was exempt from the Urban Areas Native Employment Regulations 1958 on the ground that its business of tobacco grading constituted "an undertaking engaged in farming operations" within the meaning of that phrase in the Regulations. In rejecting the relief claimed, Murray CJ stated at 298B-F:

GUBBAY CJ

"I repeat that this enquiry (again applying the principle in *R* v *Sidersky supra*) concerns the ascertainment of the nature of the enterprise in which the independent contractor, i.e. each of the plaintiffs, and its employees are associated for a common purpose. It seems to me to be fallacious to argue that because, when the question is the association between the farmer and the person doing grading for him, tobacco grading is regarded as a farming operation and consequently the farmer and the grader are jointly associated in this operation as a common purpose, the grader and his employees in turn are also associated in this farming operation as their enterprise ... As I see the position, each of the plaintiffs was associated with its employees in the undertaking or industry of tobacco grading and in nothing else. That association, which is not *per se* a farming operation, did not become such because they were instrumental in rendering services to the farmer required by him as incidental to his farming undertaking."

The situation of a non-farming tobacco grader has now been changed by enactment. Code 0126 of the Second Schedule to the Notice provides that tobacco grading per se is a specified agricultural service, thereby exempting an employer in such an undertaking, whether carried out on or away from a farm, from payment of the levy.

The authorities, to which I have referred, satisfy me of the applicability of the "common enterprise" approach to the present enquiry. What has to be determined, therefore, is the essential character of the agricultural undertaking in which the appellant and its employees are associated for a common purpose. Once a favourable factual finding is made, *all* the employees must be considered as engaged in that undertaking whatever the special nature of the work that is allocated to them by the appellant.

Interestingly, though perhaps of limited relevance, the Collective Bargaining Agreement: Agricultural Industry, SI 323 of 1993 (as amended by SI 27 of 1999), in its classification of occupations in grades, lists "saw mill chargehands" and "saw mill machine operator" (including a debarker) as agricultural workers.

There can be no doubt, in my view, that the essential character of the undertaking in which the appellant and its employees are associated and engaged, is general forestry farming. The "crop" produced is timber logs. One of the operations relating to that crop - indeed an integral

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part of the whole undertaking - is the preparation of the timber logs for delivery and marketing. This necessitates the debarking and cutting of the logs into sections, an activity acknowledged by the Minister to be "complimentary and indispensable to the production of (saleable) timber on the estate". Whether the debarking and cutting is performed by some of the appellant's employees, manually, any means of a chain saw or at the sophisticated saw mill on the estate, is of no significance; nothing turns on the method utilised. For the saw millers, as with all other employees, are associated with the appellant for the common purpose of forestry farming, an undertaking which involves not only the growing of a crop, but the requisite procedures that have to be taken

GUBBAY CJ

to put the product in a proper condition for advantageous disposal at the market place.

It is for these reasons that I reach the conclusion that the learned judge, with respect, erred in holding that saw milling was an industrial activity and not part of the appellant's general forestry farming undertaking.

Accordingly, I would allow the appeal with costs and alter the order of the court *a quo* to read:

"The special case is answered in favour of the defendant. The plaintiff's claim is to be dismissed with costs."

McNALLY JA: I agree.

SANDURA JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

V S Nyangulu & Associates, respondent's legal practitioners

QUEST MOTOR CORPORATION (PVT) LTD v NYAMAKURA 2000 (2) ZLR 84 (HC)

Citation	2000 (2) ZLR 84 (HC)
Case No	Judgment No. HH-143-00
Court	High Court, Harare
Judge	Smith J
Heard	May 29, 2000; May 30, 2000
Judgment	July 19, 2000
Counsel	P Ranchod, for the plaintiff T P Muskwe, for the defendant
Annotations	None

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Civil action

Flynote

Delict - negligence - action for - negligent performance by servant of duties - when employer has right of action

Employment - employee - duty to use skill and care in carrying out work - liability to employer for loss caused

Headnote

The defendant was employed by the plaintiff as a warranty manager. As such, he was responsible for ensuring that warranty claims in respect of Nissan vehicles were collected from the various branches of the plaintiff and submitted to Nissan within 30 days, so that Nissan could refund the cost of the repairs effected by the plaintiff under the warranties. He submitted certain claims after the stipulated period and they were rejected, leaving the plaintiff to bear the costs of the repairs. The plaintiff claimed the costs from the defendant, on the grounds that he had discharged his duties negligently.

Held, that it is an implied term of a contract of employment that an employee will exercise skill and care in the performance of his duties. This must be combined with the employer's duty to provide all necessary assistance. However, if the employee does not hold himself out as possessing any special ability or skill, it may be that the employee undertakes no responsibility, and the employer would be held to have incurred all risks.

Held, further, that the defendant did not hold himself out as possessing any special skills or attributes. The plaintiff had decided that he was suitable for the position, but did not put in place any supervisory procedures to ensure that he carried out his duties. The defendant's failure was due to incompetence rather than negligence. The plaintiff was the author of its own misfortunes.

Cases Considered

Cases cited:

Blake v *Hawkey* 1912 CPD 817

Harvey v *R G O'Dell Ltd & Anor* [1958] 2 QB 78; [1958] 1 All ER 657 (QBD)

Lilford v *Black* 1942 SR 178

Lister v *Romford Ice & Cold Storage Co Ltd* [1957] AC 555; [1957] 1 All ER 125 (HL)

Mhungu v *Mtindi* 1986 (2) ZLR 171 (S)

Ukabana v *van Rooyen* (1904) 25 NLR 134

Williams v *Shub* 1976 (4) SA 567 (C)

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Case Information

P Ranchod, for the plaintiff

T P Muskwe, for the defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "Quest") issued summons claiming from the defendant (hereinafter referred to as "Nyamakura") damages in the sum of $99 625.08 and the return of a Nissan Sunny motor vehicle or, alternatively, the sum of $100 000, being the value of the said vehicle. The basis of the claim for damages is the alleged negligence on the part of Nyamakura, who was an employee of Quest, in failing to submit timeously to Nissan warranty claims in respect of vehicles sold by Quest to various dealers. With regard to the vehicle, it had been issued to Nyamakura for use in the course of his employment. As he had ceased to be employed by Quest, he was no longer entitled to retain possession of the vehicle - so Quest has argued.

Nyamakura raised a plea of *lis alibi pendens*, based on the following submissions. On 25 November 1997, Quest instituted proceedings before a labour relations officer seeking the dismissal of Nyamakura and the return of the vehicle. The application was not successful. Quest then lodged an appeal to a senior labour relations officer. Whilst that appeal was still pending, summons was issued seeking the dismissal of Nyamakura and the return of the vehicle. The claims in the summons are essentially identical to the claims in the application before the labour relations officer. Thus litigation in this matter arises from the same cause of action and in respect of the same subject matter as are the proceedings before the senior labour relations officer. As regard the merits of the case, Nyamakura denies that there was any misconduct or negligence on his part. He avers that it was his predecessors who were responsible for the losses, not him. As regards the motor vehicle, he claims that he is entitled to the use thereof until an amicable settlement is reached between him and Quest.

Nyamakura then filed a claim in reconvention in which the following allegations were made. On 25 November 1997, Quest suspended Nyamakura on allegations of misconduct and made an application to a labour relations officer for approval to dismiss him. On 27 May 1998, (which is just over 6 month later) the labour relations officer dismissed the application and ordered that Nyamakura be reinstated or, alternatively, be paid one year's salary. The Nissan Sunny was purchased by Quest in 1990 for $19 702. As it was depreciated, in the books of Quest, at the rate of 20% *per annum*, its present book value is nil. It has always been the custom and tradition at Quest, and it was an implied term of the contract of employment, that employees such as Nyamakura would purchase the vehicle "after its life span" (whatever that may mean). Nyamakura accordingly sought an order awarding him the motor vehicle upon payment of the book value or nominal value of the vehicle, his salary for one year and other benefits as per his contract of employment, including school fees and medical expenses.

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SMITH J

After reading the written submissions by counsel in respect of the special plea, I dismissed the plea. The appeal to the senior labour relations officer was noted on 19 June 1998 and was dismissed on 3 August on the grounds that it had been filed out of time. One wonders why it took six weeks for such a decision to be made. However, Quest did not pursue any further appeals nor did it apply for condonation for late filing of its appeal and leave to file out of time.

Summons in this case was issued on 22 June 1998 and appearance to defend was entered on 30 June. The special plea was filed on 23 October. At that time, there were no proceedings pending before the senior labour relations officer or the Labour Relations Tribunal, therefore the special plea raised by Nyamakura has no foundation. Even had the application still been pending before the senior labour relations officer or the Labour Relations Tribunal, I would have dismissed the special plea on the grounds that the claim before this court is for the payment to Quest of $99 625.08, which is a completely different remedy to that sought from the labour relations officer, even though both might be based on the same allegations of misconduct and negligence. As is made clear in *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (S), where a plea of *lis alibi pendens* is raised, the court has a discretion as to whether or not it should stay the proceedings. See too *Williams* v *Shub* 1976 (4) SA 567 (C).

[*The learned judge then considered the evidence, and continued.*]

From the evidence led by the parties, it is clear to me that the facts relevant to the claims made by the parties are as follows. Nyamakura was appointed Nissan Warranty Manager in November 1996. As such, he was responsible for ensuring that all warranty claims in respect of Nissan vehicles were collected from the various branches of Quest and submitted to Nissan within 30 days of the repairs being effected. During the period November 1996 to August 1997, he received 71 claims from the branches but he did not send them on to Nissan until 26 September 1997 when Adam started to make inquiries about the claims. All the 71 claims, which totalled $99 625.08, were rejected by Nissan because they were out of time. The excuse offered by Nyamakura, which was that he did not have the Nissan rates, does not hold water. It is clear that he should have submitted the claims using the retail rates charged by Quest if he could not obtain the Nissan rates. It is not clear whether Nissan would have paid the retail rates so claimed or whether it would have reduced them to equate to the actual cost rates. The evidence on this point is equivocal. As regards the Nissan Sunny allocated to Nyamakura, Quest never had a policy of selling vehicles to senior managers who left its employment. The correct value of the Nissan Sunny was not established.

SMITH J

The only issue that requires consideration is Quest's claim for damages arising from Nyamakura's failure to submit the warranty claims within the specified period. It is clear beyond doubt that Nyamakura has no right to retain the Nissan Sunny allocated to his use. It belongs to Quest. However, Quest is prepared to let him keep it, if he pays $100 000. The choice will be his. As regards Nyamakura's claim in reconvention, I have already stated that there is no legal basis for his claim to ownership of the Nissan Sunny car which Quest provided for his use. As

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regards his claim for one year's salary, that too has no validity. Firstly, the wrong procedure was adopted for the enforcement of the determination by the labour relations officer. Section 96(2) and (3) of the Labour Relations Act [*Chapter 28:01*] sets out the procedure for the enforcement of any such determination. A duly certified copy of the determination must be submitted to the appropriate magistrates court and it will then be registered and can be enforced as though it were a civil judgment of the court. That is the prescribed procedure and that is what must be done. Secondly, the determination of the labour relations officer was that Quest reinstate Nyamakura or pay him one year's salary. It was for Quest to make the choice, not Nyamakura. The determination was notified to the parties soon after Nyamakura had obtained alternative employment. Therefore it was not possible for Quest to reinstate Nyamakura. When a labour relations officer orders that an employer reinstate an employee, whether as an alternative to paying damages or otherwise, it is for the employee to present himself or herself to the employer and offer to resume employment. It is for the employer to decide whether or not he wishes to avail himself of the services of the employer and reinstate him. Nyamakura did not do so, because he had taken on another job.

In Selwyn's *Law of Employment* 7 ed, at para 6.61, p 218, the learned author deals with the duty owed by an employee to use skill and care. He expressed the duty as follows:

" **6.61** The employee undertakes to perform his work competently, using reasonable skill and care. This, of course, must be combined with the employer's duty to provide all necessary assistance, etc. (see above), but if the employer has done all he can, then a dismissal for incompetence will usually be fair. Also, the employee undertakes to take proper care of the employer's property. In *Superlax* v *Plaidstead*, the employee negligently allowed some of his employer's property to be stolen from a van, for which he was held responsible. More recently, however, a tribunal has held that an employee who negligently lost the company car should received some disciplinary action short of a dismissal! For a dismissal to be warranted, the act of negligence must be a serious one (*Commerford* v *Swel Foods Ltd*) or a series of minor acts of neglect (*Lowndes* v *Specialist Heavy Engineering Ltd*, para, 8.108). It is an implied term of the contract of employment that an employee will exercise skill and care in the performance of his duties, and a breach of that term entitles the employer to claim damages in respect of the

negligent performance of the contract. In *Janata Bank* v *Ahmed*, the employee worked as a bank manager. It was alleged that he had been negligent in the way he carried out his duties, and after his dismissal, the bank issued a writ claiming £34.640 damages. The court of appeal upheld the claim. He had failed to exercise proper skill and care, as implied by his contract. It is irrelevant that the cause of action arises in contract or in tort (see *Lister* v *Romford Ice and Cold Storage Co Ltd*)."

In the *Lister*'s case referred to above ([1957] AC 555; [1957] 1 All ER 125 (HL)) the court considered the question of an employee's duty to take care. At 130F-I, Viscount Simons said:

"It will be convenient to discuss first the question which divided the court of appeal, *viz.*, what, if any, were the terms to be implied in the contract of service between the parties. It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by Willes J, in *Harmer* v *Cornelius* (1858) 5 CBNS 236 at p 236 at p 246 has never been questioned:

'When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes - *Spondos peritiam artis*. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts ... An express promise or express representation in the

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particular case is not necessary.'

I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case; on the contrary, 'possess' and 'exercise' are there conjoined. Of what advantage to the employer is his servants undertaking that he possesses his skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for 'skill' is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty."

Similar sentiments were expressed by Lord Somervell at 146C where he said:

"I think it is right to imply a duty on the part of the servant to take reasonable care in the carrying out of his duties. There would be a breach, although there were no damage, and, happily, most acts of negligence do not cause damage. In the case of a chauffeur, it would not, of course, be confined to driving, but would apply to the care of the car and other matters. I, therefore, accept the submission on behalf of the respondents that there is normally a contractual duty on a servant to take care."

However, in *Harvey* v *RG o'Dell Ltd & Anor* [1958] 1 All ER 657; [1958] 2 QB 78 where *Lister*'s case was under consideration, McNair J, after citing the extract from the speech of Viscount Simons that I have set out above, went on to say that it was argued that once it is established that on the occasion in question the employee was acting within the course of his employment, the

contractual obligation to drive without negligence is established. He rejected that argument. At 667B-C, he said:

"It is not without significance that in the famous judgment of Willes J in *Harmer* v *Cornelius*, part of which is quoted in, and forms the starting point of, Viscount Simons' conclusion in *Lister* v *Romford Ice & Cold Storage Co Ltd*, there appears the following passage (at p 246) by way of qualification or amplification of the passage quoted:

'It may be, that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, the employer probably would be held to have incurred all risks himself.'

Furthermore, I think that it is clear that, in each of the speeches of the learned Lords who formed the majority in the House of Lords in *Lister* v *Romford Ice & Cold Storage Co Ltd*, there are plain indications that their Lordships were dealing only with the normal engagement of a servant to drive a lorry or other motor vehicle on the road."

There appears to be a dearth of reported cases in this country and in South Africa where an employer has sued his employees for damages resulting from negligent performance of duties. In *Ukabana* v *Van Rooyen* (1904) 25 NLR 134, Broome AJ said that it could hardly be disputed that a servant is answerable for gross negligence resulting in the destruction of his master's property. In that case, the servant, who was engaged to herd cattle, in disobedience of orders, lit a fire under a bucksail, thereby causing its destruction. It was held that the master could recover damages for the loss by way of civil action. Similar sentiments were expressed by Buchanan J in *Blake* v *Hawkey* 1912 CPD 817, where the plaintiff sued his servant for

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damages, alleging that the defendant, who was driving the plaintiff's motor vehicle, drove it negligently or carelessly resulting in damage to it. At p 818, the learned judge said:

> "The first question raised in this case was whether an action could lie on behalf of the master against his employee. I fail to discover any good ground why it should not. I think a man who engages himself for any employment, and especially a skilled workman, if he has not the qualifications which he holds himself out to possess, and which induces the employment, does not exercise that due caution which he ought to exercise in such employment, but by a wrongful act causes damage, he would be liable for any damages so caused."

In *Lilford* v *Black* 1942 SR 178 Lilford sued his farm manager for damages due to lack of supervision of ploughing operations on the farm. Blakeway J held that Lilford was entitled to damages if he could prove them. However, Lilford was unable to do so.

In the case before me, it seems clear that Nyamakura did not hold himself out as possessing special skills or attributes. He had been working for Quest for some 22 years and worked his way up the ladder. It was Quest management that considered that he was suitable for the position of handling the Nissan warranty claims. Although it was his responsibility to submit the claims, he

was not responsible for keeping any moneys that Nissan paid. Presumably, the moneys received from Nissan would have been sent on to the branches which incurred the costs of repairs. Why is it that the branch managers did not inquire at any time during the 12 months about the repair costs that should have been reimbursed? Why is it that Mr Adam's predecessor as General Manager did not make earlier inquiries as to what was happening with the Nissan warranty claims? In my opinion, Quest is the author of its own misfortunes. It appointed Nyamakura to a position which he was obviously not able or equipped to fill and it failed to put in place any supervisory procedures to ensure that Nyamakura carried out his duties. It is therefore responsible for the losses incurred. I accept that Nyamakura did not do what he was employed to do, but Quest has not established

Quest faced another difficulty, even if I had determined that Nyamakura was liable. The $99 625.08 claimed represented the cost of repairs carried out by Quest to Nissan motor vehicles that were still under warranty. However, those costs were based on the retail charges that Quest charged its customers. In giving evidence, Mr Adam said that Nissan fixed the rates it paid for labour and for parts, although sometimes Nissan apparently paid the full amount claimed. However, he said that normally the claim would be reduced by an amount ranging between 15% and 20% of the actual claim. Accordingly, Quest has not established the amount of its damages because it has not proved what it would have been paid by Nissan.

Accordingly, the claim by Quest for damages in the sum of $99 625.08 must be dismissed but Nyamakura must return the Nissan Sunny or else pay Quest $100 000.

As regards the claim in reconvention by Nyamakura, that must be dismissed. He is not entitled to keep the motor vehicle unless he pays the $100 000 demanded by Quest and he is not entitled to one year's salary because he obtained alternative employment and therefore, Quest could not exercise the option given by the labour relations officer of reinstating Nyamakura.

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Nyamakura will of course be entitled to his salary from the date of his suspension to the date of his accepting the alternative employment (26 May 1998) because of the order by the labour relations officer that he be reinstated, which order has not been challenged or appealed against.

As regards costs, Quest has not been successful in relation to the major part of its claim, which is that for damages in the sum of $99 625.08. It has, however, been successful in its claim for the return of the Nissan Sunny. It is clear, from Nyamakura's attitude, that Quest was compelled to come to court for the return of the vehicle. Nyamakura was not willing to return it voluntarily. However, most of the time taken in court and most of the case generally related to the claim for damages which was not successful. It seems

to me that it would be unfair to make Nyamakura pay the full costs of the case. It would be an equitable apportionment if he was to be required to pay for 20% of the costs of Quest.

It is ordered that:

1. The defendant returns to the plaintiff the Nissan Sunny motor vehicle, Registration No. 478-354Z or, alternatively, pays the plaintiff the sum of $100 000, within ten days of the date of this order;

2. The defendant pays the plaintiff's 20% of the costs of action.

Hussein Ranchlod & Co, plaintiff's legal practitioners

Muskwe & Associates, defendant's legal practitioners

TELCON ITALIA SRL v PTC & ANOR 2000 (2) ZLR 92 (HC)

Citation	2000 (2) ZLR 92 (HC)
Case No	Judgment No. HH-149-00
Court	High Court, Harare
Judge	Smith J
Heard	July 6, 2000
Judgment	July 19, 2000
Counsel	A P de Bourbon SC, for the applicant P Nherere, for the first respondent Miss Y Dondo, for the second respondent
Annotations	None

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Civil application

Flynote

Contract - tender - effect - when contractual relationship is created between the person inviting tenders and the tenderers

Headnote

The PTC had invited tenders for a trunk development project. The applicant was one of eight companies submitting tenders. The tenderers had to furnish a guarantee of US $500 000, which could be forfeited if the tender was withdrawn during the period of tender validity. The invitation to tender also provided that before the expiry of the tender period, the successful tenderer would be notified. The closing date for acceptance of tenders was extended, as was the period of tender validity. However, no notification of the successful tenderer was made. The applicant sought an order that the PTC notify the successful tenderer within seven days that its tender had been successful. It was argued that the PTC was contractually obliged to do so.

Held, that although normally a call for tenders is no more than a request to submit offers and each tender is an offer which the advertiser may accept or reject at will, in the present case there were a number of factors that made it clear that a contractual agreement had been entered into between the PTC and the tenderers. The failure on the part of the PTC to comply with its obligations in terms of the tender document might well render it subject to claims for damages.

Cases Considered

Cases cited:

G & L Builders CC v *McCarthy Contractors (Pty) Ltd & Anor* 1988 (2) SA 243 (SE)

PTC v *Support Construction (Pvt) Ltd* 1998 (2) ZLR 221 (S)

Spes Bona Bank v *Portals Water Treatment SA (Pty) Ltd* 1983 (1) SA 978 (A)

Case Information

A P de Bourbon SC, for the applicant

P Nherere, for the first respondent

Miss *Y Dondo*, for the second respondent

Judgment

Smith J: The applicant (hereinafter referred to as "Telcon") was one of eight companies that submitted bids for tender No. 9288 (hereinafter referred to as "tender No. 9288") which was issued by the first respondent (hereinafter referred to as "the PTC"). The facts in this case are not in dispute, it is only the legal implications that are. In March 1997, the PTC issued an

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invitation to tender for a trunk transmission development project (tender No. 9288). The project was to digitalise the trunk transmission telecommunication

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network covering three routes, namely Gweru-Masvingo-Beitbridge, Bulawayo-Beitbridge and Mutare-Chipinge. For the foreign currency component of the costs, a loan was secured from the Overseas Economic Co-operation Fund, Japan. The invitation to tender contained the following stipulations, *inter alia*:

" 1. 'All bids must be accomplished by a security or in other words tender guarantee of US$500 000 (five hundred thousand US$)' (*sic.*);

2. 'Bid offers shall remain valid for 180 (one hundred and eighty) days';

3. 'project must be implemented over a period of not exceeding 30 (thirty) months from the effective day of contract'."

Attached to the invitation to tender were a number of so-called commercial conditions. Those relevant to this case are the following

(a) clause 4.3 - Period of Validity. This clause provides that tenderers shall remain bound by their tenders for the period of 180 days after the date of tender opening. However, in exceptional circumstances, prior to the expiration of the original period of tender validity, the PTC may request the tenderer for a specified extension of the period of validity.

(b) Clause 4.6 - Tender Guarantee. This clause provides that the tenderer must furnish a tender guarantee in the amount of US$500 000, which may be forfeited pursuant to clause 4.8.

(c) Clause 4.7 - Discharge of Tender Guarantee. This clause provides that the tender guarantee of tenderers who have not been selected will be released as promptly as possible but not later than 90 days after the expiration of the tender validity period in accordance with clause 4.3.

(d) Clauses 4.8 - Forfeiture of Tender Guarantee. This clause provides that the tender guarantee may be forfeited without notice if a tenderer withdraws his tender during the period of tender validity specified in clause 4.3.

(e) Clause 4.9 - Withdrawal and Amendment. This clause provides that if a tender is withdrawn in the interval between the deadline for submissions and the expiration of the period of the tender validity, the tender guarantee will be forfeited.

(f) Clause 7.1 - Notification of Award. This clause provides that prior to the expiration of the period of tender validity the successful tenderer will be notified in writing that his tender has been accepted.

Initially, the closing date for tender bids was 3 July 1997 but this date was changed to 28

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August 1997. The period of tender validity was extended on a number of occasions, the last such extension being up to 31 January 2000. Despite the requirements of clause 7.1. no notification of the successful tenderer has been made. In passing, I would comment that the repeated extension of the period of tender validity is not permitted by clause 4.3 of the

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instructions to tenderers. That clause, as stated above, provides that, in exceptional circumstances, the PTC may request the tenderer for a specified extension but such request must be made prior to the expiration of the original period of tender validity. The request cannot, therefore, be made after the expiration of the original period of tender validity which was 180 days after the date when the bids for tender 9288 were opened.

On 1 February 2000, Telcon filed this application seeking an order that PTC, within 7 days of the order being served on it, notify the successful tenderer that its tender has been accepted. The application was opposed by both respondents. The opposing affidavit from the PTC was deposed to by the Manager (Contracts and Tenders) who averred as follows. The tender validity period was extended from time to time and it is denied that the PTC is in breach of its contractual obligations, as final determination of the tender award has not yet been made. Furthermore, the PTC is obliged by law to comply with the procedures and requirements of the second respondent* (hereinafter referred to as "the Chairman"). It continues to comply with all instructions of the Chairman in the tender process. Accordingly, even if the PTC is found to be in breach of its contractual obligations (which is denied), it is unable to comply with these contractual obligations as it is under a statutory compulsion to the contrary.

The Chairman also filed an opposing affidavit in which he averred as follows. The PTC evaluated the bids for tender No. 9288 and recommended that the tender be awarded to Telcon whose bid was the lowest. The Government Tender Board (hereinafter referred to as "the Board") accepted the recommendation and awarded the tender to Telcon. The Board then received a different evaluation report which indicated that the evaluation process had controversies (*sic.*). The PTC then carried out an internal audit. On 3 November 1999, the Board, in view of the anomalies mentioned in the audit report, decided to suspend its decision of 31 March until the anomalies mentioned in the audit report were cleared. (In his opposing affidavit, the Chairman said that the Board had cancelled its earlier decision, but the extract from the minutes of the relevant Board meeting which he annexed to his affidavit shows that the Board actually resolved to suspend the earlier resolution). The PTC was then left with a number of options, which included cancelling the tender, re-evaluating the tender or the bids and drawing detailed specifications for the test equipment and inviting all bidders to provide prices of materials on the bills of quantities. The PTC preferred the option of inviting all bidders to provide prices of materials on the bills of quantities and so, on 7 December 1999, the Board resolved that the PTC should embark on the exercise.

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Before this application was set down for hearing, Telcon filed an urgent application (case No. HC-3790-2000) on 20 March 2000 seeking an order declaring that the PTC's action in calling upon tenderers in respect of tender No. 9288 to resubmit tenders based on re-drawn tender documents was unlawful and restraining the PTC, pending the confirmation of the provisional order, from calling upon the tenderers to resubmit their tenders. The interim relief sought was an order restraining the PTC from calling upon tenderers in respect of tender No. 9288, sometimes referred to as 9299B, to re-submit their tenders on the basis of fresh tender documentation issued by the PTC. On 21 March, Gillespie J granted the provisional order but without granting any interim relief.

At the hearing before me, Mr *de Bourbon* submitted that, in addition to deciding on the main application, I should also confirm the provisional order. Mr *Nherere* argued that once the main application had been determined the provisional order would fall away. It seems to me that I must either confirm or discharge the provisional order. It cannot be left in limbo. I will therefore deal firstly with the main application and then with the provisional order.

Mr *de Bourbon* argued that the PTC had a contractual obligation to notify the successful tenderer that its tender had been accepted. Telcon is seeking to enforce that obligation, not that it be awarded the tender. The PTC cannot avoid its contractual obligations by putting the blame on the Chairman or the Board. There is no obligation on the PTC or any other parastatal to comply with the tender procedures of the Board. A person who has submitted a tender is entitled to know the outcome of the tender. He cannot be expected to wait, year after year, to find out what the decision is regarding that tender. However, in the case of tender No. 9288, the position of Telcon is strengthened by the fact that the PTC had given a specific understanding that it would notify the successful tenderer within a specific period. Mr *Nherere* submitted that a call for tenders is normally no more than a request for interested parties to submit tenders, which may or may not be accepted. No contract comes into existence unless and until the person inviting the tenders had decided to accept one of them and communicated his acceptance to the successful party. Whilst in certain circumstances an antecedent contract could come into existence, as was the case in *G & L Builders CC* v *McCarthy Contractors (Pty) Ltd & Anor* 1988 (2) SA 243 (SE), that would depend on the facts of the case. To result in a binding contract, the offer relied on must have been made with the intention of being bound by the offeree's acceptance thereof - see *Spes Bona Bank* v *Portals Water Treatment SA (Pty) Ltd* 1983 (1) SA 978 (A). In this case, the contents of the tender documents were not intended to be binding on the PTC prior to the acceptance by it of the successful tenderer. Even if clause 7.1 did impose a contractual obligation on the PTC,

it is only the successful tenderer who is entitled to enforce that obligation. Mr *Nherere* then argued that the order sought by Telcon is impossible of performance because the tender process has not yet been finalised. No tender has been accepted and therefore there is no decision to be notified. Finally, Mr *Nherere* argued that clause 7.1 required that notice of acceptance of the tender be given before the expiration of the period of tender validity which was 31 January 2000. That date has now passed and so the obligation is impossible of

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performance.

Miss *Dondo* argued that as the tender had not yet been awarded to anyone, it was not possible to notify any tenderer that it had been awarded the tender. Certain irregularities regarding the tender were discovered before the awarding of the tender was completed and therefore the Board had decided not to award the tender before the irregularities had been dealt with. The irregularities unearthed by the internal audit could not be ignored by the Board and therefore the Board had done no wrong.

In his opposing affidavit, the Manager (Contracts and Tenders) of the PTC claimed that the PTC is obliged by law to comply with the procedures and requirements of the Board. Mr *Nherere* conceded that there is in fact no statutory provision requiring the PTC to submit tenders to the Board for final adjudication. He said that there was a Treasury circular directing parastatals to comply with the procedures and requirements of the Board but his instructing legal practitioner had not been able to lay hands on a copy thereof.

In my opinion, the tender documents issued by the PTC for the purposes of tender No. 9288 clearly constitute the terms and conditions of an offer which was accepted by those companies which submitted tenders that were accepted by the PTC. Clause 4.3 provides that tenderers shall remain bound by their tenders for a period of 180 days. When inserting that provision in the tender documents the PTC must have intended that everyone who submitted a tender that was accepted for evaluation would be contractually bound thereby. Every tenderer was required to furnish a tender guarantee in the sum of US$500 000. In terms of clause 4.7 of the tender documents, the tender guarantee of a tenderer which has not been selected will be released as promptly as possible but not later than 90 days after the expiration of the tender validity period. Surely that must impose a contractual obligation on the PTC. If it does not, can the PTC refuse to release the tender guarantee for a year or so more? Clause 4.8 of the tender document provides that the tender guarantee may be forfeited without notice if the

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tenderer withdraws his tender during the period of tender validity or if the successful tenderer fails to sign the contract within the specified time limit or to furnish the performance guarantee. How can the PTC insist on such forfeiture if there is no contract between the parties? Clause 4.9 of the tender document provides that if a tenderer withdraws its tender in the interval between the deadline for submissions and the expiration of the tender validity, that will result in the tender guarantee being forfeited. If a tenderer did withdraw its tender in that period, would the PTC not insist on the forfeiture of the tender guarantee? That could only be done if there is a contract between the parties which entitles the PTC to do so. Clause 7.5 of the tender document provides that right.

In Christie's *Law of Contract in South Africa* 3 ed at p 44, the learned author says:

> "A call for tenders, then, is normally no more than request to submit offers, and each tender is an offer which the advertiser may accept or reject at will ... The offer which, by mere acceptance, created the contract was his own."

That statement was quoted with approval by Muchechetere JA in *PTC* v *Support Construction*

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(Pvt) Ltd 1998 (2) ZLR 221 (S). However, it must be emphasised that the learned author uses the word "normally". Clearly, there are cases where that is not the position. In this case, as I have endeavoured to point out, there are factors which make it clear that there is a contract between the PTC and each tenderer whose tender is being adjudicated. The terms and conditions of the contract are set out in the tender document.

In *G & L Builders supra*, Mullins J at 247 said:

> "Generally speaking, the seeking of tenders is no more than an invitation to do business and the tender is an offer which can be accepted or rejected at will."

Then at 248I-J, the learned judge continued:

> "In the present case, there is certainly no provision in the tender documents which in any way suggests the creation of a contractual relationship of any sort between second respondent and tenderers prior to acceptance of a specific tender. It is the prerogative of the building owner to specify, *inter alia*, the method of construction he favours. A tenderer is, however, at large to submit a tender which is not in accordance with the specified method of construction. In doing so, he runs the risk of his tender failing on that ground alone."

In this case, there are a number of provisions in the tender document which suggest the creation of contractual obligations. Clause 4.3 provides that tenderers shall remain bound by their tenders for the period of 180 days after the date of tender opening, with the proviso that, in exceptional circumstances, prior to the original period of tender validity, the PTC may request the tenderer for an extension of that period. That period was extended on a number of occasions but finally expired on 31 January 2000. Does that mean that the contracts between the PTC and the various tenderers expired on that date? I do not think so. Clearly, the PTC does not consider that that is the case because it has not returned the performance guarantees and it is continuing to evaluate the various tenders. The PTC bound itself to notify the successful

tenderer that its tender has been successful and that such notification would be made prior to the expiration of the period of tender validity. The PTC has not done so and is clearly in breach of contract. The PTC says that there is in fact no successful tenderer because it has not completed the evaluation exercise. If that is the case, then it is the duty of the PTC to advise all tenderers of that fact. Thereafter, it is for each tenderer to decide whether or not it wishes to enter a fresh agreement with the PTC.

Can the PTC require the tenderers to submit further tenders? Clause 2.2 of the tender documents provides as follows:

"2.2 **Amendment of Tender Documents**

At any time prior to the deadline for submission of tender, the PTC may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Tenderer, modify the tender documents by the issuance of an addendum.

The addendum will be notified in writing or by telex or facsimile to the prospective Tenderers which have received the tender documents and will be binding on them. Tenderers shall promptly acknowledge receipt

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thereof by fax to PTC.

In order to provide prospective tenderers reasonable time for taking the amendment into account in preparing their tenders, the PTC may, at its discretion, extend the deadline for the submission of tenders.

The PTC may without any obligation to publish its reasons declare the tender in response to the invitation to be null and void and issue invitation for re-tendering."

Clearly, the agreement between the PTC and the tenderer contemplates that the PTC may modify the tender documents but it may only do so, prior to the deadline for submission of tenders. Therefore the PTC has no right to call for fresh tenders in terms of tender No. 9288. If the PTC wishes to modify the tender documents at this late stage, it must declare the tenders to be null and void and issue invitations for re-tendering. I accept the contention by Mr *Nherere* that there is no law, whether statutory or common law, which prohibits the PTC from calling upon tenderers to resubmit tenders or indeed any other parties to submit fresh tenders. In doing so, however, the PTC must not purport to be acting within the terms of tender No. 9288. As mentioned earlier, the PTC is contractually bound not to alter the requirements spelt out in the tender documents relating to that tender without the consent of the parties. The PTC must, of course, be mindful of the consequences of any breach of contract on its part.

Having determined that there is a contractual agreement in force between the PTC and each of the tenderers in tender No. 9288, it seems to me that the provisional order granted by Gillespie J must be confirmed.

The PTC has a monopoly in the provision of telecommunication services in Zimbabwe. That monopoly must carry with it an obligation to perform its

duties efficiently and effectively. The PTC certainly seems to be failing in its duties in that regard. The development project envisaged in tender 9288 is for the digitalisation of the telephone system in the southern half of the country. It is obviously a project of great importance to the country as a whole, and to the inhabitants of the southern region in particular. The PTC called for tenders, which were duly submitted by the closing date of August 1997. It was envisaged, and provided in the tender documents, that evaluation of the tenders would be completed within six months, but in exceptional circumstances that period could be extended once, and once only. However, the evaluation process continued for 19 months, over three times longer than the expected period. Then it was discovered that there were alleged irregularities in the process. It took the PTC another 12 months, from March 1999 to March 2000, to decide on what steps to take to sort out the mess. At the end of those 12 months, the mess was not resolved; the decision was taken to call for further tenders. Those will then have to be evaluated and so matters drag on. There appears to be no sense of urgency on the part of the PTC. No attempt was made to show why it took the PTC so long to evaluate the tenders. Its failure to comply with its obligations in terms of the tender documents may well render it subject to claims for damages. There are, of course, no shareholders to call to account those responsible for the inefficiencies and delays. The Minister and Ministry officials who are responsible for supervising the PTC appear to have made no attempts to make the PTC handle

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this tender more efficiently and expeditiously. If any such attempts were made, they were not successful.

It is ordered that:

1. the first respondent, within ten days of the date of service on it of this order, notify in writing the successful tenderer in tender No. 9288 that its tender has been accepted or, alternatively, all tenderers in tender No. 9288 that there is no successful tenderer;

2. the provisional order granted by Gillespie J on 21 March 2000 is confirmed;

3. the respondents shall pay the applicant's costs, the liability being joint and several, the one paying the other to be absolved.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Coghlan, Welsh & Guest, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, second respondent's legal practitioners

LAUE v HARARE CITY COUNCIL & ORS 2000 (2) ZLR 100 (HC)

Citation	2000 (2) ZLR 100 (HC)
Case No	Judgment No. HH-153-00
Court	High Court, Harare
Judge	Blackie J
Heard	July 19, 2000
Judgment	July 19, 2000
Counsel	E Matinenga, for the applicant E W W Morris, for the first respondent F Girach, for the second and third respondents
Annotations	None

Civil application

Flynote

Human rights - freedom of information - extent to which member of the public entitled to have access to official documents and information - objector to grant of permit permitting building contrary to town planning scheme - entitled to have access to applications made by developer, to permits granted and to reasons for grant of permit

Town planning - scheme - development being permitted to take place contrary to scheme - affected property

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owner objecting - property owner entitled to have sight of applications by developer and permits, together with reasons for grant of permit

Headnote

The applicant, the owner of a property in Harare, objected to developments taking place in the property next door. These developments, which involved the building of offices, were contrary to the town planning scheme. The scheme restricted the types of buildings that might be constructed on the stands in question to dwelling houses and outbuildings for such houses. The city council nonetheless permitted the developments to take place. The applicant sought access to the applications submitted by the developer, the permits granted, and the reasons for the grant of the permits. The council refused to supply the information sought.

Held, that where a statute empowers a public official or body to give a decision which will prejudicially affect an individual in his liberty, property or existing rights, the right to a fair hearing is to be given effect to unless the statute expressly or by necessary implication indicates to the contrary. Natural justice required that, at the very least, that the person affected by a decision made a public body should be told of the application giving rise to the decision, given an opportunity to make submissions and, when the decision is made, told of the nature of the decision and the reasons for it. The Regional, Town and Country Planning Act [*Chapter 29:12*] specifically required that a landowner enjoying the protection of a restrictive condition of title be given notice of any decision that affects that condition.

Held, further, that a person whose rights may be affected by a decision made by a public body has a right of access to the relevant records and information held by the public body. Accordingly, the applicant was entitled to the information she sought.

Held, further, that the council's refusal to grant access was unreasonable, given the requirements of natural justice and the specific terms of the Act. Accordingly, costs would be awarded on the higher scale.

2000 (2) ZLR p101

Cases Considered

Cases cited:

Holland & Ors v *Min of the Public Service* 1997 (1) ZLR 186 (S)

Legislation considered:

Regional, Town and Country Planning Act [*Chapter 29:12*], ss 22(1), 24(1) and 26(3)

Case Information

E Matinenga, for the applicant

E W W Morris, for the first respondent

F Girach, for the second and third respondents

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Judgment

Blackie J: The applicant (Mrs Laue) owns stand No. 3073 of Salisbury Township of Salisbury Township Lands. The second and third respondents (the Mambos) jointly own stand No. 3073. The stands are adjacent to each other in Frank Johnson Avenue, Harare, and share a common boundary. They are respectively 13 and 15 Frank Johnson Avenue.

The title deeds of both stands restrict the type of buildings that may be constructed on the stand, where those buildings may be situated, and the total area on the stand that all the buildings on it may occupy in relation to the size of the stand. The only buildings permitted on the stands are a dwelling house for a single family, or two or more separate dwellings each used for a single family, or a "building, not being a dwelling house, but otherwise designed for human habitation including a residential hotel or club", together with the normal outbuildings for such buildings. No part of any building on the stand may be erected closer than 3,05 metres from the boundary of a neighbouring stand. If the principal building on the stand is a building other than a "dwelling house" and is not more than one storey, the total permitted coverage of the stand by all the buildings on the stand must not to exceed one half of the area of the stand.

The stands fall within the general residential zone 2E of the operative City of Harare Town Planning Scheme Phases 2, 3, and 4 (the Scheme). The first respondent (the City) is the relevant planning authority for the Scheme. In terms of the Scheme, guesthouses are a permitted use in Zone 2E. Licenced guesthouses are permitted with the special consent of the City. Offices are prohibited. Further, "No building, other than a building intended for use as a dwelling house for a single family, shall be erected in zone 2 ... unless an area or areas in accordance with the requirements set out Table No. 12 [of the Scheme] shall have been set aside within the stand to the satisfaction of the Authority for the purpose of providing accommodation for the parking of vehicles" (The Scheme, Clause 36; Table 12 of the Scheme).

Until recently, the buildings on stand No. 3073 consisted of a dwelling house for a single family and the property was used for residential purposes. The Mambos have, however, altered and developed the buildings on the

stand. The manner in which the Mambos carried out their building operations for those alterations and extensions has been the subject of other litigation and another judgment between Mrs Laue and the Mambos (*Laue* v *Mambo & Mambo* HH-56-2000).

The alterations and extensions on stand No. 3073 have been completed. The buildings are being used in their altered form. The extended buildings intrude into the building line on the boundary between stands No. 3073 and 3074. Provision for parking has been constructed outside stand No. 3073 in Frank Johnson Avenue and a notice board, advertising the business of the stand, hung, just inside the entrance to the stand.

Mrs Laue, believing that the Mambos had altered and were using the buildings or part of the buildings on stand No. 3073 for office purposes, in contravention of the conditions of title of stands No. 3073 and 3074 and the Scheme, applied to the City and to the Mambos for sight of

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the applications for the permits and the permits granted to the Mambos by the City authorising the development that had taken place on and outside stand No. 3073 together with the reasons for the grant of the permits. The City and the Mambos refused to make that information available to her. Mrs Laue then brought this application.

In her application, Mrs Laue said that she had the right to notice of the proposed change of use of stand No. 3073 and of the extension of the buildings on stand No. 3073 into the building line between stands No. 3073 and 3074, that she had not been given that notice and the opportunity to object to those changes and alterations. She said that, in any event, buildings on stand No. 3073 had been extended and were being used for office purposes, which was a prohibited use on the stand both in terms the conditions of title of the stand and of the Scheme. She further submitted that the off-site parking constructed in Frank Johnson Avenue and the advertising billboard at the entrance to the stand were also contrary to the provisions of the Scheme. She sought, first of all, an order compelling the City to disclose and to make available to her the approved site and development plans for stand No. 3073, the permits granted to the Mambos relating to that stand and the reasons for which those permits had been granted. Depending upon the lawfulness or otherwise that the applications, the permits and the reasons for the grant of the permits disclosed, she asked for further relief of enforcement, demolition and interdict together with the costs of the application on the higher scale.

Pending the determination of the application, Mrs Laue was granted a provisional interdict, prohibiting the Mambos from using any of the buildings on stand No. 3073 for office purposes, from constructing or using, as a business parking area, any motor vehicle parking bays in Frank Johnson Avenue and advertising any business by billboard from stand No. 3073.

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It is now common cause that the City granted to the Mambos a permit to alter and extend the buildings on stand No. 3073 for guest house purposes and a permit for the extended buildings to encroach into the "3m building line by 1,2 m and 600 metres" (*sic*). It is also common cause that Mrs Laue has not been given notice of any of the applications for permits made by the Mambos.

Mrs Laue persists with her application but in altered form. She restricts the relief claimed by her in the application to access to the records of and reasons for the permits granted to the Mambos and to the costs of this application on the higher scale. She accepts that the consequential claims for enforcement, demolition and interdict, in the event of any unlawfulness on the part of the City or the Mambos being exposed, cannot be granted to her under this application. Those claims, if pursued, can only be dealt with at a later stage, either in terms of the Regional, Town and Country Planning Act [*Chapter 29:12*] (the Act) or by separate and subsequent application, if she is granted the limited relief she now seeks and depending upon the results of that award. This judgment, therefore, is concerned solely with Mrs Laue's claims for access to the records of applications made by the Mambos, the terms of and the reasons for the permits granted to them and for the costs of this application on the higher scale.

Mrs Laue persists in her application for the limited relief now sought by her because, she says,

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she has been denied the right to notice and to object to which she was entitled and because the papers show that the law and some of her rights have been infringed by the City in the grant of the permits to the Mambos. She submits that the papers further show every probability that other rights may have been infringed and further contraventions of the law may have been undertaken by the City and the Mambos. She draws particular attention to four aspects of the permits granted to the Mambos which she says are or may be unlawful - the failure to give her notice of the application for the change of use of the premises to a guest house and to the encroachment into the building line between stands No. 3073 and 3074, the apparent approval of off-site parking in Frank Johnson Way for the guest house and the move to approve the grant of a liquor licence to the guest house without the necessary notice for objection.

Mrs Laue persists in her claim for costs on the higher scale because, she says, not only have her rights been infringed and the law broken, but the Mambos and the City have wrongly and rudely rebuffed her legitimate requests for information and her attempts to enforce her rights.

The City and the Mambos oppose the relief claimed by Mrs Laue. They submit that Mrs Laue has no general or particular right to have sight of or access to any application made for a permit in respect of stand No. 3073, or the permit granted by the City or the reasons for the grant of that permit. They

say that that the permits issued to the Mambos in respect of that stand have been lawfully issued to them and that the development on stand No. 3073 has been undertaken in terms of those permits. There has been no infringement of Mrs Laue's rights by the grant of those permits and no infringements of the permits by the Mambos.

Mrs Laue is the owner of stand No. 3074. That stand and 3073 have reciprocal rights and duties to each other both in terms of the title deeds and under the Scheme. In terms of natural justice, "[i]t is settled law that where a statute empowers a public official or body to give a decision which will prejudicially affect an individual in his liberty, property or existing rights, the right to a fair hearing is to be given effect to unless the statute expressly or by implication indicates to the contrary ...": *Holland & Ors* v *Minister of the Public Service* 1997 (1) ZLR 186 (S), *per* Gubbay CJ at 192F-G.

> "At the very least, there are three fundamental requirements of natural justice to which a person directly affected by an impending inquiry is entitled: the first is to have notice of the charge or complaint. The second is the right to be heard - to be given the opportunity to adequately state a case in answer to that charge or complaint. And the third, mentioned expressly in s 18(9) [of the Constitution], is the right to an impartial hearing": *Holland*'s case *supra* at 191F-H.

Although the case from which the quotation just set out is taken was primarily concerned with the rights of person facing an inquiry into a charge or complaint against him, it is clear from that quotation, and from the fundamental requirements of natural justice set out in the quotation, that the principles expressed are equally applicable, *mutatis mutandis*, to any situation in which the rights of an individual will be affected by a decision to be made by another and, in particular, by a public body. Thus, where the rights of a person in regard to his property are to be affected by

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a decision made by a public body, even if the statute under which the public body is established or makes the decision, makes no mention of notice of the application or the decision or the provision of reasons to the affected person, natural justice requires, at the very least, the person affected should be told of the application and of the impending decision, given an opportunity to make submissions in regard to it and, when the decision is made, told of the nature of the decision and the reasons for the decision. It is only if the statute establishing the public body or empowering it to make the decision, expressly excludes the need to give notice and reasons or either of them, that the public body is excused from those duties and then only to the extent expressly set out in the statute.

The Act specifically requires that a landowner, enjoying the protection of a restrictive condition of title, be given notice of any decision that affects that restrictive condition. I have already referred to the reciprocal restrictive conditions of title governing stands No. 3073 and 3074, in which no part of

BLACKIE J

any building on either the stand may be erected closer than 3,05 metres from a boundary that adjoins the neighbouring stand. The alterations and extensions carried out by the Mambos on stand No. 3073 clearly fall within the meaning of development as defined in terms of s 22(1)(a) of the Act. Section 24(1) of the Act requires that all development must be carried out in terms of a permit. Section 26(3)(d) of the Act provides that where an application for planning permission for development is made which "conflicts with any condition which is registered against the title deed of the property concerned and confers a right which may be enforced by the owner of another property, the local planning authority shall require the applicant, at his own expense, to give public notice of the application and to serve notice of the application on every owner of property adjacent to the land to which the application relates ... and submit proof that such notice has been given". The provisions of s 26(3) are mandatory: "... the local planning authority shall require the applicant ..." The encroachment into the building line between the stands permitted to the Mambos by the City is, even in the inaccurate form in which it is expressed, in conflict with the conditions of title of stand No. 3073 and 3074. The Act also provides for an appeal from any decision by the City in this regard to the Administrative Court.

This case is, however, concerned not only about the rights themselves but also about right to the information, which will enable a person to enforce those rights. The right falls into two parts: the general right of the public to have access to the records and information held by a public body like the City and the more limited right of access for a person to the relevant records and information of the public body where a right held by him has been or is being or may be affected by a decision made by that body. The reasons for and the general principles governing both aspects are dealt with in a valuable passage in Baxter's *Administrative Law* where the leaned author deals with access to official information at p 233-4:

> "Secrecy is an undoubted cause of maladministration ... Most would recognise that a completely unrestricted right of access to the information, documents and records held by administrative authorities would be unrealistic and might even be dangerous.
>
> On the other hand, any open system of government must recognise that the considerations which justify the

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> restrictions on public access to public information are limited ones. Free access to such information is a necessary prerequisite for public accountability and an essential feature of modern democratic theory. Even at the level of individual administrative decision-making it is important that persons who may be affected by administrative action should have access to the information upon which the public authority relies. This is essential if they are to make effective representations or if they are to evaluate the ultimate decision rationally. Without this facility those who suffer disadvantage as a result of a decision are hardly likely to regard it as fair, nor are they likely to have confidence in the administrative process.
>
> Although officials may look upon public inspections of their records and documents

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BLACKIE J

> with annoyance and even alarm, while considering any duty to make known their views on a particular issue to be a nuisance, they may even stand to benefit themselves from a policy of openness ... The long-term advantages of open government nearly always outweigh the apparent but short-term gains of secrecy ... The remarks of the American judge, Louis Brandeis, are particularly apposite: 'Publicity is justly recommended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the best policeman'."

In other words, secretive administrative action is both bad policy and bad law.

It is not necessary for the purposes of this judgment to make any decision on the more general right of access by all or any member of the public to the records of a public body like the City. That aspect was not argued in this case and the case can be determined on the more limited right available to an individual whose rights have been, or will or may be, affected by the decision made by a public body, of access to the relevant records of and reasons for a decision. In principle, if a public body has made or will make a decision by which a person reasonably, even if mistakenly, believes that his rights may have been or will be affected, the public body has a duty to disclose to that person the decision made and the reasons for the decision.

That Mrs Laue had rights to notice and objection to certain aspects of the changes to the buildings and use of stand No. 3073 is cannot be doubted. She is the owner of stand No. 3073. That stand has reciprocal rights and duties with stand No. 3073, both in terms of the conditions of title of the stands and in terms of the Scheme. The development undertaken by the Mambos has affected and altered those rights. In terms of natural justice and under the Act, Mrs Laue was entitled to notice of the proposed changes and the opportunity to object to them, together with the right to know of the decision made in respect of the application and the reason for that decision. Mrs Laue thus had a right to notice of the Mambos' applications. She had the right to object to them and to have her objection determined by the body considering the applications. She had the right to be told of the decision by that body and the right to be given the reasons of that body for its decision. She had a right to appeal against that decision. In order to make those rights effective it is important that she should, in the words of Baxter quoted above:

> "have access to the information upon which the public authority relies. This is essential if they are to make effective representations or if they are to evaluate the ultimate decision rationally. Without this facility those who suffer disadvantage as a result of a decision are hardly likely to regard it as fair, nor are they likely to have confidence in the administrative process."

In the circumstances, Mrs Laue is entitled to the principal relief claimed by her.

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It is necessary to deal with the question of costs.

BLACKIE J

Mrs Laue initially brought and based this application in the belief, among other things, that the Mambos had been granted a permit to operate an office on stand No. 3073. She claimed considerably more and much wider relief than could be granted to her in the application. She was mistaken in her belief concerning the office permit. She has only been granted very limited relief in relation to that originally claimed by her. Nevertheless, the mistake made by her concerning the permit granted to the Mambos arose from the attitude of both the City and the Mambos to giving her the information to which she was entitled and both have opposed even the limited relief now claimed by and granted to her. She has had substantial success in the claim pursued by her in argument She is therefore entitled to her costs of this application.

However, Mrs Laue asks for costs on the higher scale. She does so for the reasons which have already been set out in this judgment.

It is not possible to make any determination concerning the personal behaviour of the protagonists in this application. The affidavits are full of accusation and counter accusation concerning such personal behaviour. Most of these accusations have not helped in the determination of this matter. More importantly, all of them are hotly disputed and cannot be determined except by trial and oral evidence. Such a course of action is neither necessary nor desirable.

However, I consider that costs on the higher scale should be awarded in this case for three reasons.

Firstly, the attitude of the City, and in particular the Deputy City Planner, in its and his approach to Mrs Laue's rights. The Deputy City Planner's own words show him to be surprisingly and patently wrong in his approach, both to the rights of an individual who may be or is affected by a decision of a public body (both in terms of natural justice and to the specific terms of the Act) and to general principal of access to information held by a public body where dealing with such persons and rights. In particular, I find the approach of the Deputy Town Planner to the mandatory provisions of s 26(3) of the Act and the rights secured to Mrs Laue in terms of that section to be surprising and extraordinary. That approach and ignorance of the relevant provisions of the Act are unacceptable.

Secondly, the approach of the City and its Deputy Town Planner to this court and to the provision of the information necessary for this court to make a proper determination in this case. The denial of wrongdoing by the City is blanket, bald, vituperative and completely unhelpful to this court in its function of determining whether the law has been complied with: "This permit was properly issued in terms of the relevant planning scheme" and that "there was no requirement on the facts of the case to give notice to [Mrs Laue]". Further, "I do not regard [Mrs Laue] as entitled to receive any notice

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of the application for a permit in terms of s 26(3) of the [Act] or to insist upon the imposition of any particular conditions." "As to the encroachment on building lines ... Here we have an illustration of what I consider to be [Mrs Laue's] overly intrusive and indeed overbearing attitude. It seems to me that she believes that she has a right to know why encroachment was approved. For my part, however, I know of no justification for such a belief. I consider, it is for the planners to decide and that in this particular instance at least there is no obligation on them to take into account [Mrs Laue's] views. This is not a matter in which [Mrs Laue] was entitled to notification." "The Planning Division is satisfied that the 50% coverage limit has not been exceeded." No information is put before the court from which the court can make its own assessment of the lawfulness or otherwise of the City's and the Mambos' actions. Even where the City does provide the permit concerning the coverage of the stand by the extended buildings, the necessary plans, which are essential to determining the validity of the City's claims that those buildings do not exceed 50% of the area of the stand, have been omitted.

Thirdly, and in respect of the Mambos, they have made common cause with the City, both in refusing to provide Mrs Laue and this court with the information to which both she and it are entitled and in denying her right to the relief sought by her. I see no reason to distinguish between the City and the Mambos in regard to the order of costs.

In the result:

1. The first respondent is directed to make available to the applicant or her agent:

   (a) The site plan relating to all developments at stand No. 3073 Salisbury Township of Salisbury Township Lands (stand No. 3073).

   (b) All approved plans relating to all developments to stand No. 3073.

   (c) The permit permitting the use the building on stand No. 3073 for guest house purposes and any other permit granted to the second and third respondents for any activity carried out or to be carried out on stand No. 3073.

(2) The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved, on the scale of legal practitioner and client.

Kantor & Immerman, applicant's legal practitioners

Honey & Blanckenberg, first respondent's legal practitioners

Chinamasa, Mudimu & Chinogwenya, second and third respondents' legal practitioners

HINDOGA v PREDICTIVE MAINTENANCE (PVT) LTD & ANOR 2000 (2) ZLR 109 (SC)

Citation 2000 (2) ZLR 109 (SC)

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Case No	Judgment No. S-84-00
Court	Supreme Court, Bulawayo
Judge	Muchechetere JA, Sandura JA and Malaba AJA
Heard	July 24, 2000
Judgment	July 24, 2000
Counsel	No appearance for the appellant D M Campbell, for the first respondent
Annotations	None

Civil appeal

Flynote

Practice and procedure - pleadings - contents - allegations amounting to a legal proposition - facts supporting that proposition must be set out in pleadings - allegation by party that he was mentally incompetent - need to set out facts from which court could reach such a conclusion

Headnote

The appellant issued a summons against the respondents claiming, among other things, an order setting aside the transfer by him of a piece of land to the first respondent. The appellant claimed in the declaration that at the time the sale agreement was concluded he was mentally disordered. The respondent excepted to the appellant's plea, on the grounds that the particulars pleaded did not support the contention that he was mentally disordered. The only evidence supporting his claim was a medical report compiled some two years after the sale agreement had been concluded, and based entirely on the appellant's say-so.

Held, that the medical report was not helpful and did not support the appellant's contention of mental incompetence.

Held, further, that an averment of mental incompetence is a conclusion of law which is for the court to determine. Such an averment must be supported by facts. The pleading of a legal proposition is no pleading at all. Where a party wishes to rely on facts which lead to a particular legal conclusion, he must set out those facts in his pleadings. The appellant should have set out in his pleadings facts from which it could be concluded that at the relevant time he was mentally incompetent.

Case Information

No appearance for the appellant

D M Campbell, for the first respondent

Judgment

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Sandura JA: This is an appeal against the judgment of the High Court at Bulawayo which upheld the first respondent's exception to the appellant's declaration on the ground that it did not make out a cause of action against either respondent, and dismissed the appellant's claim with costs.

When the matter was called, no legal practitioner appeared for the appellant, but counsel for the first respondent was present. Accordingly, we called upon him to present his argument.

SANDURA JA

After hearing counsel's submissions, we dismissed the appeal with costs and indicated that our reasons would be handed down in due course. I now set them out.

The background facts in the matter are as follows. In July 1997, the appellant issued a summons against the respondents claiming, *inter alia*, an order setting aside the sale and transfer by him of a certain immovable property in the district of Matopo ("the property") to the first respondent. The appellant's declaration was filed and served with the summons. In the declaration, the appellant alleged that when the sale agreement was concluded he was mentally disordered.

Subsequently, the first respondent excepted to the appellants declaration, as amplified by the appellant's further particulars filed of record, on the ground that it did not make out a cause of action against the respondents.

In particular, the first respondent made the following allegations:

"1. That the particulars pleaded in support of (the) plaintiff's contention that he was mentally incompetent so as to justify the avoidance of the agreement of sale, namely the medical report, Annexure B to (the) plaintiff's further particulars, do not in fact support that contention.

2. That the agreement of sale, Annexure A to (the) plaintiff's further particulars, pleaded in support of (the) plaintiff's contention that (the) first defendant undertook to acquire twelve hectares of land for (the) plaintiff does not support that contention even accepting that (the) first defendant admits assuming the rights and obligations of Oracle (Pvt) Ltd under the said agreement.

3. That save for the medical report (Annexure B) and the agreement of sale (Annexure A) aforesaid, (the) plaintiff has pleaded nothing which would justify his claims for:

   (a) an order nullifying the sale and transfer of the immovable property in question;

   (b) the reversal of the transfer thereof;

   (c) an order that the Deputy Sheriff sign transfer documents therefor;

   (d) an order compelling (the) first defendant to seek authority to subdivide the said immovable property;

   (e) an order compelling (the) first defendant to pay damages or any other amount to (the) plaintiff;

   (f) an order that the first defendant pay (the) plaintiff's costs."

When the exception was heard by the learned judge in the court *a quo*, it was upheld, and the appellant's claim was dismissed with costs. Aggrieved by that decision, the appellant appealed

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to this court.

In order to determine the validity or otherwise of the first respondent's exception, it is necessary to examine Annexure A, the agreement of sale, and Annexure B, the medical report.

I shall start with Annexure B, the medical report. Because of the importance attached to it by the appellant, I shall set it out in full. It was compiled by Dr Klaus Miosga, MD, MSc, at St. Luke's Hospital on 18 September 1993.

SANDURA JA

His official designation, appearing below his name, is DMO Lupane. Presumably that stands for District Medical Officer for Lupane.

The report reads as follows:

> "The above-mentioned patient has presented to our hospital (*sic*) on various occasions seeking treatment for the same chronic complains (*sic*). He states that his complains (*sic*) started after an accident in the beginning of 1990, when he sustained a skull fracture and a fracture of his left humerus (upper arm). After the accident he had difficulties in speaking which improved after intensive physiotherapy with speech therapy.
>
> The present complains (*sic*) mainly concern the right part of his body. He now complains of hotness of the chest and right part of the body, loss of hearing in the right ear, loss of sense of touch in the right hand, recurrent cramps in the right leg, loss of memory; he has particular difficulties to remember the meaning of words when seeing them in writing.
>
> On examination he had normal reflexes and equal power on (*sic*) both arms and legs, no apparent loss of sensory (*sic*) on the legs, reduced discrimination of sensoric stimulation in the right hand. He leaves the impression of a depressed man who is unable to cope with the requirement of his job as a teacher.
>
> According to my judgment, it is probable that he sustained a brain injury during the accident with the skull fracture which could have caused the indicated complains (*sic*) with loss of memory etc. Another possible diagnosis would be psychosomatic complains (*sic*) due to excessive demands on his person.
>
> Whatever the cause I believe that he is unable to fulfil the requirements of his post and think that it would be justified to grant him early retirement. If this cannot be granted on this report I propose to send him to a neurology specialist for further investigations."

The appellant relied upon the contents of this report for the contention that he was mentally incompetent at the time the sale agreement was concluded in March or April 1991. I do not think that the report supports that contention. In addition, I do not find the report helpful. It was compiled in September 1993 from what the appellant told the doctor. There was no other source of information to assist the doctor in assessing the appellant's mental condition. In my view, a more thorough investigation was necessary. For example, the appellant's medical records should have been checked.

Annexure A, the agreement of sale, reads as follows:

> "I, Mr M Hindoga, owner of Broadless Farm of Gray Tors of Absent, agree to sell to Oracle (Pvt) Ltd the farm, of 115 hectares, for the sum of Z$30 000, excluding a section of the farm next to Mr Nkomo."

The appellant relied upon this agreement for a number of claims. For example, he alleged that

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the agreement supported the contention that the first respondent undertook to acquire twelve hectares of land for him. I do not think that there is any justification for that assertion.

The appellant's claim for an order nullifying the sale and transfer of the property in question was based upon the averment that at the relevant time he was mentally incompetent. Such an averment is a conclusion of law which is for the court to determine. Whilst it is not fatal to the pleading, it must be

SANDURA JA

supported by facts. No such facts were pleaded by the appellant in this case.

A passage on p 36 of Beck's *Theory and Principles of Pleading in Civil Actions* 5 ed, accurately sums up the position. It reads as follows:

> "The pleading of a legal proposition itself is no pleading at all. But the rule means more than that; it implies that the facts must be set out and it is for the court to say on a consideration of the facts proved in evidence whether they will or will not support a particular conclusion in law. Thus a bare allegation that a defendant is indebted to the plaintiff in a sum certain or that he is under an obligation to perform certain acts is not sufficient. The facts must be set out which reveal the nature of the transaction and the manner in which the defendant became indebted to the plaintiff or under an obligation to him to perform the duty claimed. The mere statement of indebtedness is a conclusion to be drawn from the facts, and is a conclusion of law."

In the present case, the appellant did not plead facts from which it can be concluded, for example, that when he entered into the sale agreement, he was mentally incompetent. The same applies to the appellant's other contentions set out in the declaration. The exception was, therefore, properly taken.

In the circumstances, the appeal was devoid of merit and was, therefore, dismissed with costs.

MUCHECHETERE JA: I agree.

MALABA AJA: I agree.

Calderwood, Bryce Hendrie & Partners, first respondent's legal practitioners

EXPEDITE HAULAGE (PVT) LTD v SCOTFIN LTD 2000 (2) ZLR 113 (HC)

Citation	2000 (2) ZLR 113 (HC)
Case No	Judgment No. HH-156-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	June 29, 2000
Judgment	July 26, 2000

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Counsel J B Colegrave, for the applicant
A P de Bourbon SC, for the respondent

Annotations None

Opposed application

Flynote

Hire-purchase - contract - breach - seller's right to claim for return of goods or recovery of purchase price - claim for damages - prescriptive periods applicable

Headnote

The respondent finance house obtained judgment against the applicant, arising out of 12 hire-purchase agreements. Six had been concluded on 11 March 1993 and the other six on 19 October 1993. The summons was served in August 1999. The applicant argued that the claims had prescribed. Under s 27 of the Hire-Purchase Act [*Chapter 14:09*], a seller has no right to institute a suit or action for the return of goods or the recovery of a portion of the purchase price, after the lapse of the period prescribed. This period is the number of days fixed by the Minister, or if no such number is fixed, 365 days, beginning on the day after the "last day of the appropriate period within which the Act requires the full purchase price to be paid". The Minister had fixed the period at 730 days.

The respondent argued that as the Act fixed the period for payment of the full purchase price at 60 months, it was entitled to institute a suit within 60 months plus 730 days from the time the agreements were concluded, irrespective of whether the parties had agreed to a shorter repayment period. Alternatively, the respondent argued that s 27 of the Act had no application, as it was seeking to recover damages rather than a portion of the purchase price.

The applicant argued that the 730 days would run from the end of any repayment period, less than 60 months, agreed to by the parties. In that event, as the agreed repayment period was 36 months, the respondent would have had no right to institute action.

Held, that the argument advanced by the respondent could lead to absurdity, in that the prescription period after the end of the repayment period might vary, even to the point of being greater than the normal prescription period of three years applicable to other causes of action. In addition, the protection given to purchasers would be eroded.

Held, further, that where, as here, the seller had cancelled the agreement and resold the goods, what was claimed was damages for breach of contract, the purchase price merely representing the measure of damages. In that event, s 27 of the Act did not apply.

Cases Considered

Cases cited:

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Lodge v *Modern Motors Ltd* 1957 R&N 462; 1957 (4) SA 103 (SR)

Scottish Rhodesian Finance Ltd v *Olivier* 1965 RLR 128 (A); 1965 (2) SA 706 (RA)

Smith & Venter v *Fourie & Anor* 1946 WLD 9

Stellenbosch Farmers Winery Ltd v *Distillers Corp (SA) Ltd* 1962 (1) SA 458 (A)

Legislation considered:

Hire-Purchase Act [*Chapter 14:09*], ss 25(1)(b) and 27

Case Information

J B Colegrave, for the applicant

A P de Bourbon SC, for the respondent

Judgment

Chatikobo J: The applicant seeks an order rescinding a judgment entered against it after it had failed to defend the respondent's claim on time.

The summons commencing action was served in accordance with the rules at the chosen *domicilium*. The respondent had left the *domicilium* when summons was served. It is not disputed that the service of summons at the chosen *domicilium* was not brought to the notice of the applicant's representatives. There is therefore no question of the applicant having been in wilful default.

The crisp point upon which the defence on the merits is predicated is whether the claims, based on twelve hire purchase agreements, six of which were concluded on 11 March 1993 and another six, concluded on 19 October 1993, had been prescribed at the time of service of summons in August 1999. This is the only defence upon which reliance is placed by the applicant. It is premised on the provisions of s 27 of the Hire-Purchase Act [*Chapter 14:09*] (the Act) which reads:

" (1) A seller shall have no right to institute a suit or action for -

(a) the return of goods to which an agreement relates; or

(b) the recovery of a portion of the purchase price due under an agreement;

after the lapse of the period prescribed by subsection (2).

(2) The period after the lapse of which no suit or action referred to in subsection (l) may be brought shall be the period, fixed by or under subsection (3), which was so fixed at the time the right to institute the suit or action first accrued.

(3) The period to which subsection (2) relate[s] shall be -

(a) such number of days, being not less than one hundred and fifty, as the Minister may, by notice in a

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statutory instrument, fix; or

(b) if no period is fixed in terms of paragraph (a), three hundred and sixty-five days;

commencing on the day following the last day of the appropriate period within which this Act requires the full purchase price to be paid."

For the sake of completeness, I should state that the agreements were cancelled and the goods which were the subject of the hire purchase agreements were repossessed and sold by the respondent and judgment was then sought and granted in an amount representing the shortfall.

In resisting the application for rescission, the respondent has taken two points, either of which, if found to have been well taken, will dispose of the plea of prescription advanced as the defence on the merits by the applicant. In the first place, it is claimed that the provisions of s 27 of the Act, which is

prescriptive in nature, has no application because the respondent was not seeking to "recover a portion of the purchase price due under an agreement" (s 27(l)(b) of the Act). Rather, it claims that it is seeking damages. That being the case, the prescriptive period set out in s 27 does not come into play. The second point advanced on behalf of the respondent relates to the period of prescription and the manner of its application. I propose to decide the second point first.

A claim for the recovery of a portion of the purchase price shall, in terms of s 27(3), be prescribed "on the day following the last day of the appropriate period within which the Act requires the full purchase price to be paid." The contention of the respondent is that the Act requires the full purchase price to be paid within 60 months (para B2 of the Schedule to the Act). The Minister has, acting in terms of s 27(3)(a), fixed the period after which the right to institute action or suit for the recovery of a portion of the purchase price by promulgating the Hire-Purchase (Limitation of Time) (Variation) Notice 1984, SI 149 of 1984, which sets the period at 730 days. Consequently, the right to institute action or suit only prescribes after the expiration of a period of 60 months plus 730 days from 11 March 1993 in respect of the first six agreements and 19 October 1993 in respect of the last six agreements. On this reckoning, the prescriptive dates after which the right to institute action or suit lapsed were 10 March 2000 and 18 October 2000. As the summons was issued on 30 July 1999 and served in early August, 1999, the claims have not prescribed.

On the other hand, the applicant contends that in computing the period within which the full purchase price is payable s 27(3) must be read together with s 25(l)(b) of the Act, which provides that:

"... the period within which the full purchase price is payable shall not exceed the period specified in the third column of the Schedule ..."

As has already been noted, the period is 60 months. If the two provisions are read together, so the argument goes, the period is 60 months unless the parties by agreement prescribed a lesser period. In context, a lesser period, namely, 36 months, was agreed. Therefore

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prescription applies after a period of 36 months plus 730 days. In other words, the 36 month period which the parties agreed upon in terms of s 25(l)(b) of the Act is as much an appropriate period within which the Act requires the full purchase price to be paid as is the 60 month period set out in the Schedule. Put in another way, the Schedule sets out the "appropriate period" unless the agreement sets out a lesser period in which case the lesser period becomes the appropriate period

On the face of it, the contention advanced by Mr *de Bourbon* seems to be closer to the wording of the statute than that advanced by Mr *Colegrave* and of course the cardinal rule of construction is that the words of a statute must

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be given their ordinary, literal, grammatical meaning, unless to do so would lead to a glaring absurdity. As a matter of logic, the phrase "period within which this Act requires the full purchase price to be paid" in s 27(3) does, at first blush, seem to suggest that such period is the maximum period stipulated in the Schedule, that is, 60 months. The aim of construing a statute is to ascertain the intention which the lawgiver meant to express from the language employed. In context, the aim of the legislature was to limit the period within which a seller could sue for the return of the goods or the recovery of a portion of the purchase price. That period is pegged at 730 days or about 24 months, to be reckoned from the day following the day on which the last instalment is paid. If the agreement stipulates 60 months as the period within which the full purchase price is to be paid, the seller would have 24 months within which to institute action. However, the effect of s 25(l)(b) is to permit the parties to agree that the full purchase price be payable within a shorter period. If one gives the phrase the "appropriate period within which this Act requires the full purchase price to be paid" the meaning contended for by Mr *de Bourbon*, it would mean that when the parties agree that the full purchase be paid in, say, 36 months, as in the present case, the seller would have 50 months within which to institute action whereas if the purchase price is made payable within 60 months he would only have 24 months within which to institute action. The shorter the payment period, the longer the prescription period. Whereas if one reads the same phrase as meaning that the appropriate period is 60 months or any lesser period agreed to by the parties, the prescription period would remain constant at 24 months. The absurdity which would result from a reckoning of a prescriptive period from the end of the 60 month period, even when a lesser payment period is agreed, is two-fold. In the first place, situations would arise when prescription would not run for varied periods greater than the three-year period prescribed for other debts in terms of the Prescription Act [*Chapter 8:11*], a situation which in my view was clearly not intended. There can be no conceivable reason why the legislature could have intended to prefer the hire purchase seller above other sellers who are limited to three years. In the second place, the protection which the legislature intended to accord to purchasers would be greatly eroded, especially bearing in mind the fact that when it comes to determining the payment period the dice are heavily loaded in favour of the seller. Besides, it is undesirable that the period of prescription be fluid and uncertain. Such absurdities can only be avoided by construing "the period within which this Act requires the full purchase price to be paid" to mean 60 months or any lesser period agreed to by the parties. To do this one does not have to read s 27(3) as if it was worded "the period within which this Act, *or the*

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agreement between the parties requires the full purchase price is to be

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paid", because if one reads s 27(3) together with s 25(l)(b), one sees that the words I have underlined are already there. In this regard, I consider that this conclusion accords with what Wessels AJA (as he then was) stated in *Stellenbosch Farmers Winery Ltd* v *Distillers Corp (SA) Ltd* 1962 (l) SA 458 (A) at 476 concerning the importance of interpreting words of a statute by looking at the context in which they appear:

> "In my opinion, it is the duty of the court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question, and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the matter of the statute, its apparent scope and purpose, and, within limits, its background."

The dual purpose of the Act is to protect purchasers as a class and to place a check on hire purchase credit in the interest of the national economy. Hence, Millin J in *Smith and Venter* v *Fourie & Anor* 1946 WLD 9 at 13 spoke of -

> "The mischief of poor persons being enticed into shops and being sold goods of more or less value at prices which they can ill afford to pay, and on terms which are harsh and unconscionable, and it was intended to give protection to such persons against their own improvidence and folly."

And in *Lodge* v *Modern Motors Ltd* 1957 R7N 462 (SR) at 476G; 1957 (4) SA 103 (SR) at 113 Young J said:

> "The Act was intended as an instrument of economic policy as well as for the protection of hire-purchasers as a class."

See also *Scottish Rhodesian Finance Ltd* v *Olivier* 1965 RLR 128; 1965 (2) SA 706 (SRA).

These ideals would not be achievable if hire purchase sellers were allowed to flex their economic muscle against hire purchasers by granting themselves the choice to determine periods of prescription which suit their convenience. In most, if not all, hire purchase agreements, the terms are predetermined by the sellers, with the purchaser invariably being forced to take it or leave it. When tested this way, it becomes clear that the legislative intendment in s 27(3) was to set a certain, fixed and uniform limit of the period during which a seller must commence proceedings. I therefore, have to hold that the correct interpretation to be placed on s 27(3) and s 25(l)(b) is that the appropriate period within which the Act requires the full purchase price must be paid is 730 days reckoned from the end of the payment period, regardless of whether final payment is made within 60 months or a lesser period agreed to by the parties.

This conclusion necessitates the determination of the second contention advanced on behalf of the respondent, namely, whether s 27(3) applies in a case where the agreement between the parties has been cancelled and the

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goods which form the subject of the hire purchase agreement have been repossessed and sold by the seller. When a seller thereafter sues for the shortfall, is his claim one for the payment of a portion of the purchase price or is it a claim for damages for breach of contract?

The definition of "purchase price" in the Act excludes any sum payable as damages or compensation for breach of the agreement between the parties. Properly construed, "damages" in this context includes any consequential loss flowing directly from the breach, such as the cost of repossessing and storing the goods before resale, but does not, in my view, exclude the loss represented by the difference between the original purchase price and the shortfall which remains outstanding after the goods have been resold. In Norman's *Purchase and Sale in South Africa* 4 ed by Belcher at pp 405-6 one finds this helpful passage:

> "Where the seller before delivery is entitled to rescission of the contract on the ground of a breach of contract by the purchaser, as has been pointed out, he may either elect to affirm the contract and sue for the price, interest and damages, or he may elect to treat the contract as rescinded. In the latter case, he has two courses open to him:
>
> (a) He may re-sell the *res vendita*, and where he does so at a price lower than the contract price, he may claim the difference as damages."

And further down the page:

> "... The vendor by reselling them (the goods) does not preclude himself from recovering damages for breach of contract, and the measure was the difference between the contract price and the price on re-sale."

Although the learned author was here dealing with a situation where delivery has not taken place, the remarks quoted above apply with equal force to a situation where the breach and subsequent cancellation takes place after delivery has taken place. Clearly, therefore, in a case such as here, where the seller cancels the agreement and resells the goods, what is claimed is damages for breach of contract, the purchase price merely representing the measure of damages. Section 27(1)(a) and (b) can only refer to an action or suit for the return of the goods or the recovery of a portion of the purchase price during the currency of the agreement. If, in spite of a material breach, the seller nevertheless elects to affirm the contract he can sue for the payment of the purchase price without cancelling the agreement. Similarly, if the purchaser prevents the seller from repossessing the goods without resorting to court proceedings, the latter can sue for the return of the goods. It must be for this reason that a purchaser who makes good his breach is entitled - in terms of s 15 of the Act - to have the goods restored to him. In other words, the Act recognises the right of a seller to repossess the goods or to demand a portion of the purchase price without resorting to cancellation of the agreement. If the seller elects to affirm the contract, s 27 applies; if he

elects to cancel the contract the section is of no application. In this latter situation the seller's remedy is to sue for damages. Mr *de Bourbon* must be undoubtedly correct when he says that what was sought and obtained in this case were damages for breach of contract. The period of

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limitation prescribed by s 27(3) is consequently not of application. That being so, the plea of prescription upon which reliance is placed by the applicant is devoid of any merit and that being the case I have to hold that there is no *bona fide* defence on the merits.

The application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

S v ZIMUNYA & ANOR 2000 (2) ZLR 120 (HC)

Citation	2000 (2) ZLR 120 (HC)
Case No	Judgment No. HH-159-00
Court	High Court, Harare
Judge	Adam J
Heard	August 2, 2000
Judgment	August 2, 2000
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - community service - where inappropriate - need for acceptance of community service by the public

Criminal procedure (sentence) - general principles - factors affecting - mitigation - written statement by legal practitioner in mitigation of sentence - contradicting in material respect facts upon basis of which accused pleaded guilty - need for court to establish whether statement accepted by prosecution

Headnote

The accused had been found guilty of assault with intent to commit grievous bodily harm. They had committed a serious, callous and deliberate assault upon their ten-year-old son after he had sexually abused his young sister. The assault included burning the child with a hot iron and cutting him with a razor. The trial magistrate had suspended part of the prison sentence on condition that the accused perform community service. On review:

Held, that a community service order was entirely inappropriate for this type of offence. The community at large must accept community service and the imposition of community service where the parents were guilty of serious child abuse would cause outrage amongst the public. Furthermore, this sentence would send the wrong signals to other parents who might be

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inclined to abuse their children in this fashion.

Held, further, that the magistrate had allowed defence counsel to introduce facts in his written statement in mitigation that contradicted facts on the basis of which the accused had pleaded guilty. The magistrate should have established whether the prosecution accepted the facts now being presented by the defence.

Cases Considered

Cases cited:

S v *Chikomo* HH-107-94

S v *F (a juvenile)* 1988 (1) ZLR 327 (H)

R v *K* 1956 (3) SA 353 (A)

S v *Katsaura* 1997 (2) ZLR 102 (H)

R v *M* 1949 (4) SA 831 (A)

R v *Magope* 1931 OPD 57

S v *Ndlovu* 1994 (1) ZLR 290 (S)

Judgment

Adam J: The accused persons were convicted on their guilty pleas of assault with intent to do grievous bodily harm. The senior magistrate

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sentenced each of them to 20 months' imprisonment of which eight months was suspended for five years on condition that each of them did not during that period commit any offence involving assault or violence for which each of them is sentenced to imprisonment without the option of a fine and the remaining 12 months' imprisonment was suspended on condition each of them completes 480 hours of community service.

The written record of proceedings disclosed that the senior magistrate put the facts (in the Summary of the Case relied upon by the prosecution) to each of them who understood them. The summary also indicated that on 3 January 2000 the accused persons' ten year old son was bathing when the first accused, his mother, called him to the sitting room where she was doing her ironing. The son went into that room when his mother asked him whether it was true that he had abused his young sister. He denied this and this incensed his mother who used the hot iron to burn him on his right and left arm. The son then admitted, fearing that he might be further assaulted by his mother. However, this did not stop her; she took a plank and started to assault him on the head and all over the body until the plank broke into pieces. The mother then sent the second accused, the father of the child, to go and buy a razor blade. The father bought the razor blade and the son was ordered to remove his trousers, which he did, and the son was cut

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on the left thigh, on the right buttock and also on the penis. The mother continued to assault him with an umbrella all over his body. When the father came from the kitchen into the sitting room he was ordered to assault their son. The father used a belt to assault him. The mother also took a hosepipe to assault their son again who ran to the bathroom where he was further assaulted by his father with his open hands when he was ordered to wash the blood on his body. The son did as ordered. He was kept indoors for three days. Police officers went to their home on complaints made by neighbours who wanted to be nameless. The two accused persons were arrested and on examining their son the police discovered that he had wounds which had healed. Their son had been subjected to abuse by the accused persons for a very long time and this was after he was said to have abused his young sister by putting his fingers in her private parts. The accused persons had no right whatsoever to have assaulted their son or to ill-treat him by not taking him for medical treatment.

The medical report of an examination of their son on 7 January 2000, tendered and accepted by the accused, revealed burns by a hot iron on the back of both arms, forearm, right palm swollen, swollen forehead and face (cheeks), cut with razor on left thigh. The amount of force inflicted to cause those injuries was described as moderate and the medical practitioner's conclusion was that the injuries caused were not serious.

The accused persons were legally represented and a written statement

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dated 28 January 2000 was tendered in mitigation of sentence on their behalf it contained the following:

> "Briefly, the facts for the case being that one of them applied a hot electric iron to the said son in a way to discipline the son after allegedly he raped the accused's three year old innocent daughter. To start with it, is imperative that the correct facts of the case are observed. These are as follows:

1. The first accused is a mother to the complainant (son) and also a mother to the three year old who was raped and/or indecently assaulted for about nine times by the ten year old complainant (son).

2. The complainant (son) had in divers occasions been warned and cautioned to abstain from this immoral act but defied the accused's calls to such effect.

3. The accused ended up beating the complainant (son) in a way to cause complainant (son) to abstain from the said acts but to no avail. In other words, both counselling and beating of the complainant (son) did not yield any result.

4. The last straw was when the first accused had returned from the market where she is a vegetable vendor and started to iron her linen. She had ironed for about roughly five minutes when the current charges she is facing arose.

5. The rape victim (the three year old girl) came to the accused crying helplessly and reported yet another rape that had been coupled with finger pricking into her private parts so as to effect maximum penetration into the girl's private parts. The girl could not walk properly but only mentioned the rape incident and continued crying.

6. It was common trend of the complainant (son) to insert his organ into the one of the young girl and then harshly insert his middle finger into the private parts of the defenceless and helpless three year old girl who would be

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heard crying on top of her voice by the neighbours.

7. On the day in issue, at the instance of the report to the accused by the young girl, accused went wild, felt injured, hopeless, embarrassed and angered by the complainant's (son's) continued futile, bad and immoral habits and the only way she felt could further deter the complainant (son) from further mischief was to apply a stiff immediate punitive measure, hence the application of the hot electric iron to the complainant's (son's) hands through a spontaneous, uncalculated yet outrageous move.

8. The second accused comes in as an accomplice by virtue of his having helplessly observed the above act by the first accused in a situation wherein he was supposed to intervene."

What is most disturbing about the foregoing is that the record of proceedings does not disclose that either the prosecutor or the senior magistrate questioned these new facts as presented by the legal practitioner on behalf of the accused persons. The preamble to the so-called new facts talks of an allegation of rape, the first paragraph mentions rape and (or indecent assault); the fifth paragraph mentions another rape and the sixth paragraph mentions common trend of rape together with insertion of his middle finger. The fifth, seventh and eighth paragraphs clearly contradict the facts put to the accused persons as to what happened on 3 January 2000 according to the Summary of the Case and to which facts the accused persons pleaded guilty. At that stage of the

case, the record of proceedings does not disclose that the accused's legal practitioner was in any way disputing them. According to the Summary of the Case accepted by the senior magistrate for his finding of guilty, the accused's son was taking a bath when his mother, who was doing her ironing, called him into the sitting room. This must have been after their young daughter had complained of being abused. There was no suggestion there that there was "a spontaneous, uncalculated" move on the mother's part to apply the hot electric iron. Rather she questioned him if it was true that he had abused his sister which their son initially denied which incensed his mother and only admitted after being burnt by her. There is mention that their son had been subjected to beatings for a very long time which was after their son "would have been said to have abused his sister with his fingers on her private parts". There was nothing in that summary to confirm that on 3 January 2000 their son had "raped" coupled with finger pricking his young sister.

In this situation, it was the duty of the senior magistrate to have established what facts the accused persons had pleaded guilty to and whether the prosecution was accepting the facts as now presented on behalf of the accused in mitigation, particularly since these facts not only contradicted in material respects the facts relied upon by the prosecution, but also asserted that their 10 year old son had committed rape and/or indecent assault.

A child over seven and under 14 years of age is presumed to be *doli incapax* - *R* v *K* 1956 (3) SA 353 (A) but the onus is on the State to rebut that presumption. There is an irrebuttable presumption that a male person under the age of 14 years is incapable of committing rape 1(11) - *R* v *Magope* 1931 OPD 57; *R* v *M* 1949 (4) SA 831 (A) and *S* v *F (a juvenile)* 1988 (1) ZLR 327 (H). In the last-mentioned case, this court considered it inappropriate that a ten year old

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should have been charged with indecent assault - *S* v *F supra* at 329.

The accused's legal practitioner also submitted in mitigation that there was pre-trial publicity in the media which placed the accused persons in the spotlight with them being labelled "devils", social tyrants who should be incarcerated for a long period of time. The personal circumstances were that the mother was aged 30 years and looked after the family and was a vegetable vendor and that when this crime was being committed she was intending to heal, to discipline and to correct her son. He asserted that both accused are hurt most in that they feel that they suddenly have become national social misfits or "devils" through a nobly intended exercise; that they have lost their children, both the rape victim and their son, in favour of a children's home

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where the two will be kept until further directions; at the same time they risk losing their two children's custody for life from a domestic action of discipline. This case has become a national event of concern and the accused person's rights as parents are being slowly lost in favour of an institution that is believed to be more caring than the parents but the truth is that no-one can take the place of a mother. He asked for the senior magistrate to take particular note that a plea of guilty *per se* is a high element of remorse and full effect should be given to it (*S* v *Katsaura* 1997 (2) ZLR 102 (H)) and that they should be given a non-custodial sentence since sending them to jail in the circumstances will ruin an otherwise harmonious family set-up. It would be a duplication of a sentence in the light of the pre-trial publicity, stress, torture, trauma and anxiety. He suggested either a fine, a suspended custodial sentence or community service. This was an ordinary case of assault with intent to do grievous bodily harm.

The record of proceedings is silent on whether the prosecutor had any submission to make on the question of sentence. In his reasons for sentence the senior magistrate said he took into account what was said in mitigation on their behalf; that they were both first offenders and had pleaded guilty. He also considered the offence they had committed and that they had assaulted their own child. He referred to the medical affidavit which stated that they used moderate force to inflict the injuries which were described as not being serious although there are chances of them being permanent. He said the two accused teamed up to assault their ten year old defenceless child. That she even had the courage to use a hot electric iron and that she used a razor blade to cut their own child. He described them as no doubt heartless parents and one would be forgiven if one thought they were step-parents. It was very difficult for him to accept that they are parents to their son. They were without doubt a disgrace to their family and to the country. He described both of them as "devils on earth". He initially thought of sending the accused persons to jail for a long period but decided to give both of them a second chance to reflect on their behaviour. Because he had earlier said the injuries were not serious - that is what saved them.

On review in such a case in the normal circumstances, the attitude of the Attorney-General on the facts of the case and on the question of sentence would have been sought. However, in a written response to the concern shown by the Child Protection Society the Office of the Attorney-General has concluded that the issue of sentence is largely discretionary; that their Office did not seem to detect any obvious misdirection(s) on the senior magistrate's part and

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that they noted that the accused persons were first offenders. On the issue of community service, they observe that a great deal of caution is required in deciding on this option since its inadvertent application may

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cause public outcry and confidence in such a sentence. They ended by stating that they did not see any misdirection committed in the senior magistrate's sentence assessment.

Both the senior magistrate and the Attorney-General's Office will find that not one of the judges of this court in Harare, all of whom have read the record of proceedings, support the stance taken on the appropriateness of community service for this serious offence committed by the accused persons. There is no quarrel with the custodial term, on these offenders, of 20 months' imprisonment. It is that part of the custodial sentence suspended on condition that these accused persons perform community service of 480 hours that in the peculiar circumstances of this case was most damaging to this novel form of punishment. The Supreme Court and this court has stated that the efficacy of this type of punishment rests generally on its acceptance by the community at large. See also *S* v *Ndlovu* 1994 (1) ZLR 290 (S); *S* v *Chikomo* HH-107-94; *S* v *Gumbo* 1995 (1) ZLR 163 (H); *S* v *Stoddart* 1996 (1) ZLR 1 (H); *S* v *Mabhena* 1996 (1) ZLR 134 (H); *S* v *Antonio & Ors* 1998 (2) ZLR 64 (H).

From what the senior magistrate had to say about the accused for him to opt out of an effective custodial term on a most dubious assessment about the injuries not being serious was not convincing. This particularly when the medical affidavit showed that possibility of permanent injury existed. Surely, there must have been cases of assault with intent to do grievous harm that the senior magistrate has heard in the past over the years where he has sentenced an accused to an effective term of imprisonment which do not come anywhere near to what took place in this case in the callous, calculated and deliberate form of vicious attack on their ten year old son. The senior magistrate's initial inclination that an effective custodial sentence was appropriate was correct. His error was to suspend 12 months' imprisonment on condition of community service. He should not have considered community service for this offence. The reasons are self-evident. The outrage such a sentence of community service would cause amongst the public is very predictable. Further, it sends the wrong signals to like-minded parents such as the accused who may be prone to committing such an offence.

The accused persons' sentence of 20 months' imprisonment should have had 8 to 12 months' imprisonment suspended for five years on condition that the accused persons did not commit any offence involving an assault for which a sentence of imprisonment without the option of a fine is imposed and the rest to an effective term of imprisonment.

Accordingly, I decline to certify the proceedings as being in accordance with real and substantial justice.

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GUMBO v AIR ZIMBABWE (PVT) LTD 2000 (2) ZLR 126 (HC)

Citation	2000 (2) ZLR 126 (HC)
Case No	Judgment No. HH-163-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	June 8, 2000
Judgment	August 2, 2000
Counsel	W Ncube, for the applicant F Girach, for the respondent
Annotations	None

Opposed application

Flynote

Employment - contract - termination - contract of fixed duration - employee engaged on probation - Ministerial approval for termination of contract not required - no need for employer to follow procedures provided in code of conduct

Headnote

The applicant was employed by the respondent on probation. After the end of the probationary period (which had been extended) he was given twenty-four hours' notice of termination. He brought the decision on review, arguing that Ministerial approval was required for the termination of the contract, alternatively, that the respondent should have taken the procedural steps required by the respondent's Code of Conduct.

Held, that employment on probation creates a contract of fixed duration. As long as termination takes place when the probationary period expires or the salary for the period of probation is paid, Ministerial approval for termination of a probationary contract is not required, nor does the employer need to follow the procedures laid down in the Code of Conduct.

Held, further, that the fact that the contract was terminated several days after the end of the probation period did not impliedly confirm the contract. It was also quite clear that the respondent never contemplated giving the applicant a chance to prove his capabilities.

Cases Considered

Cases cited:

Gould v *Lewis* 1913 SR 66

Kazembe v *The Adult Literacy Organisation* S-173-94

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Lilford v *Black* 1943 SR 46

Machiya v *BP Shell Marketing Svc (Pvt) Ltd* 1997 (2) ZLR 473 (H)

Mbedzi v *Deputy Registrar of the High Ct & Anor* S-57-97

Muzondo v *UZ* 1981 ZLR 333 (G)

Ndamase v *Fyfe-King NO* 1939 EDL 259

Pan American World Airlines Inc v *SA Fire & Accident Ins Co Ltd* 1965 (3) SA 150 (A)

Min of Labour & Ors v *PEN Tpt (Pvt) Ltd* 1989 (1) ZLR 293 (S)

Legislation considered:

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985)

Labour Relations (Employment Codes of Conduct) Regulations, 1990 (SI 379 of 1990)

Case Information

W Ncube, for the applicant

F Girach, for the respondent

Judgment

Chatikobo J: The facts upon which this application is based can be summarised as follows:

1. On 25 March 1999, the applicant was offered employment by the respondent as General Manager, Administration. The appointment was with effect from 1 May 1999. He was expected to serve as a probationer for three months and during the period of probation the contract of employment was terminable by either party upon giving 24 hours' notice.

2. When the applicant commenced employment the respondent airline was under the superintendency of an Acting Chief Executive. A substantive Chief Executive (Ticharwa Garabga) was only appointed in July 1999.

3. Soon after his appointment Garabga extended the applicant's probationary period by some two months ending on 30 September 1999.

4. On 26 October 1999, Garabga advised the applicant in writing that he had decided not to confirm the applicant's appointment. He gave the applicant 24 hours' notice.

5. Having been aggrieved by Garabga's refusal to confirm his appointment the applicant decided to bring the decision on review.

Four points were argued before me. I deal with them in the order in which they were taken.

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The first point advanced was that the court has no power to review an employer's discretionary power to decline to confirm a probationary employee's appointment since such a power is purely contractual. The simple answer is that the termination of contracts of employment is governed not by contract but by the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985) (the termination regulations) and the Labour Relations (Employment Codes of Conduct) Regulations, 1990 (SI 379 of 1990). As such, all contracts of employment have an administrative element which makes them susceptible of review. See *Machiya* v *BP Shell & Marketing Service (Pvt) Ltd* 1997 (2) ZLR 473 (H).

The second ground of attack was that it was wrong for Garabga to make a unilateral decision to terminate the contract of employment without taking the procedural steps laid down in the respondent's code of conduct, which applies to all employees of respondent including those on probation. What needs to be noted is that although clause 4 of the code of conduct stipulates that it applies to all employees including those on probation it is misleading to guide oneself by the provisions of the code alone. The applicability of the code to the applicant depends, in part, on s 2(l)(c) of the termination regulations which provides that:

> "No employer shall summarily or otherwise terminate a contract of employment with an employer unless -

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> ...
>
> (c) the employer was engaged for a period of fixed duration ... and the contract of employment is terminated on the expiry of such period."

It admits of no doubt that employment on probation creates a contract of fixed duration. See *Mbedzi* v *Deputy Registrar of the High Court & Anor* S-57-97. When a person is engaged on a contract of fixed duration there is no requirement for obtaining Ministerial approval to terminate the contract of employment in terms of s 2(l)(a) of the termination regulations if the employee is allowed to serve the full period of the probation. Similarly and logically, where there is a registered code of conduct, there is no requirement that the employer must follow the procedure laid down in the code of conduct in order to terminate the contract of an employee who has been allowed to serve his full probation period. This self-evident construction of s 2(l)(c) of the termination regulations derives full support from the judgment in *Min of Labour & Ors* v *PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) at 298D-F, where Gubbay JA (as he was then) said:

> "In order to utilise the right to terminate under s 2(l)(c) of the Regulations the employer was obliged to ensure that the fixed duration period had effectively expired. It would have been proper to have informed the employee in advance that on 28 February 1987, 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(l) of the Regulations - to suspend him without pay and apply forthwith to a labour relations officer for an order terminating the contract of employment."

I perceive this dictum, which I respectfully adopt, to correctly reflect the partial curtailment by the

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legislature of the employer's common law right to terminate a probationer's contract on notice without Ministerial approval during the currency of the probation period. For present purposes, one need only stress the obvious fact that there still remains a residual common law right to terminate a contract of fixed duration without Ministerial approval where there is no registered code of conduct or without having recourse to a registered code of conduct where there is one as long as the termination occurs either on the expiry of the period of probation or upon payment of the salary payable for such period of probation. Since the applicant's contract was terminated some 26 days after the expiry of its stated duration the provisions of the respondent's code of conduct do not apply.

In the words of Ebrahim JA in *Kazembe* v *The Adult Literacy Organisation* S-173-94:

> "A period of probation by its very nature presupposes that during the period of probation

CHATIKOBO J

> the probationer is on trial. At the end of the period stipulated, if there is dissatisfaction by the person placing an individual on probation common sense dictates that he is entitled to elect on whether to continue to employ the probationer or not.
>
> ...
>
> What is clear is that once his probationary period had ended and they were dissatisfied with his performance all they need have done is to have told him that his services were no longer needed and that would have been the end of the matter. There was no need for them to have embarked on the application to terminate his employment through the labour relations officer."

Cases such as *Muzondo* v *University of Zimbabwe* 1981 ZLR 333 (G) and *Ndamase* v *Fyfe-King NO* 1939 EDL 259 are clearly distinguishable. In particular, *Muzondo*'s case was decided prior to the promulgation of the regulations and, in any event, it was concerned with a termination during the currency of the period of probation. *Ndamase*'s case also dealt with an employer's right to terminate a contract of employment during the probationary period, a situation which in this country is now governed by the termination regulations.

Thirdly, and as already observed, the applicant's contract was terminated some 26 days after the expiry of the probation period. Mr *Ncube* who appeared on behalf of the applicant argued valiantly that this delay in deciding whether or not to confirm the applicant's contract of employment was tantamount to acquiescence or implied confirmation of the contract. In spite of the vigour with which it was made, this submission cannot succeed. In *Kazembe supra,* where the employee was advised of the termination nine days after the expiry of the probation period, Ebrahim JA said:

> "It is true that they only notified him of their dissatisfaction with his work on 9 September 1991 some nine days after the conclusion of the probationary period but I do not see how this helps the applicant. It certainly cannot be implied that he had automatically been placed on permanent staff. That was not a term of his letter of appointment dated 31 May 1991. That letter does not intimate that at the end of the period of three months probation he would become a member of permanent staff unless advised to the contrary. The fact that they took time to notify him that they wished to extend his period of probation due to the unsatisfactory nature of his performance cannot be taken as an indication that he had automatically become a permanent member of staff. To hold otherwise, would

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be nonsensical."

In order to import a tacit term into a contract, one must first examine the express terms of the contract. In this regard, I cannot do better than refer to the oft quoted *dictum* of Rumpff JA in *Pan American World Airways Inc* v *SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175C:

> "When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term."

Regard being had to the express terms of the letter of appointment dated 25

CHATIKOBO J

March 1999, there is no room for importing an implied term that the inaction of the respondent for 26 days amounted to confirmation of the appointment.

Finally, the best that can be said for the applicant is that in certain cases akin to the present there is a presumption that when the parties continue the employer-employee relationship beyond the contractual period without agreeing new terms there is a tacit relocation of the expired contract on the same terms and for the same duration. In other words, all things being equal, it could be said that on 1 October 1999, the applicant commenced a new probationary period. See *Gould* v *Lewis* 1913 SR 66 at 69. However, this presumption does not operate when it is clear that one of the parties has no intention of continuing on the terms of the expired contract. See *Lilford* v *Black* 1943 SR 46 at 47, where Blakeway J said:

> "The renewal of a lease or of a contract for services to be performed can take place either by express agreement or tacitly. If, after the expiration of the period provided for the duration of the contract, the parties continue their relationship without any fresh agreement the law presumes, in the absence of indications to the contrary, that they have agreed to enter upon a new lease on the same terms as the expired lease. But this presumption does not operate when it is clear that the parties or one of them does not intend to carry on with the contract on the old terms."

It is quite clear in this case that the respondent never contemplated giving the applicant another chance to prove his capabilities. The correspondence annexed to the papers demonstrate the respondent's dissatisfaction with the applicant's performance as well as its wish to part ways with him. Nothing therefore, turns on the fact that the contract was terminated some 26 days after the expiration of its stated duration.

The application is dismissed with costs.

Mandizha Chitsunge & Co, applicant's legal practitioners

Rainor Robinson, respondent's legal practitioners

ECONET WIRELESS HOLDINGS LTD & ORS v MINISTER OF FINANCE & ORS 2000 (2)

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ZLR 131 (HC)

Citation	2000 (2) ZLR 131 (HC)
Case No	Judgment No. HH-161-00
Court	High Court, Harare
Judge	Gillespie J
Heard	August 2, 2000
Judgment	August 2, 2000
Counsel	EWW Morris, for the applicants MK Achiume, for the respondents
Annotations	None

Chamber application

Flynote

Interdict - final interdict - defamatory material - material contained in report prepared at request of Minister - Minister proposing to report matter to Parliament - whether court can prevent such publication

Human rights - right to freedom of expression - free debate in Parliament - importance of - competing right to protection of reputation against defamation

Headnote

The respondent Minister appointed a committee to inquire into the affairs of an insurance company. The committee's draft report was defamatory of the applicants, in that it alleged fraudulent conduct on their part. The applicants feared that the report would be tabled and debated in Parliament and sought an order restraining its publication. The applicants argued that if this was done they would not have the remedy of suing for defamation as the Parliamentary debate would be subject to an absolute privilege and the media in reporting this debate would also be subject to privilege.

Held, that freedom of expression is a fundamental right that attracts ever-increasing protection as the law develops. The right to freedom of speech in Parliament enjoys particular protection for policy reasons.

Held, further, that assuming that all the requirements for the grant of a final interdict were met, it would only be in an extreme case that the court could prevent matter from being raised and debated in Parliament. The privilege extending to Parliament is a matter of policy. The court should be very slow to do anything that might prevent debate in Parliament of matters of concern. Rather, the court should seek to protect the freedom of parliamentary debate and the democratic process. Instead of seeking to prevent such debate, the court must compel the aggrieved individual to submit to the process of debate. He must be left to seek to protect himself by lobbying his Member of Parliament and by appearing and testifying before the

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Parliamentary Committee. His remedy is thus a political one rather than a litigious one.

Held, further, therefore, that there was no good basis for the court to interfere in this matter even if it were in the court's competence to do so. The allegation was a serious one on a matter of importance. The report was made by a responsible committee appointed to report to the responsible Minister. The Minister should, if he deemed it proper, be permitted to report the matter to Parliament. If it were thought that the deliberations relating to the report were flawed, criticisms, and any response to the allegations, could be made in the House or in

committee. There was no basis whatever for supposing that the elected representatives of the people would behave perversely.

Cases Considered

Cases cited:

Benson v *Robinson & Co (Pty) Ltd* 1967 (1) SA 420 (A)

Hix Networking Technologies v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A)

Mutasa v *Makombe NO* 1997 (1) ZLR 330 (G)

Smith v *Mutasa NO* 1989 (3) ZLR 183 (G)

Universal Merchant Bank of Zimbabwe Ltd v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H)

Legislation considered:

Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], s 5

Case Information

EWW Morris, for the applicants

MK Achiume, for the respondents

Judgment

Gillespie J: Two individuals and two companies bring this urgent application. They sue the Minister of Finance, the Acting Commissioner of Insurance and the chairman of a committee of inquiry appointed by the Minister to investigate a complaint concerning the affairs of an insurance company. The relief they claim is an interdict restraining the respondents from publishing a report prepared by the committee. The grounds relied upon are that the report is defamatory of the applicants.

The application requires, for its resolution, primary consideration of the well-known principles governing the grant of an interdict, in this case a final interdict. Secondary consideration, however, must be given to the principles governing the law of defamation, which latter principles

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are inseparable in this case from those first mentioned. Together these two sets of *essentialia* provide the issues that must be resolved.

The substance of the defamation complained of is that Econet, a cellular telephone operator, and NMBZ, a merchant bank, entered into a fraudulent conspiracy. The former is a company which embarked upon a public flotation; the latter was its underwriter. The allegation is that these bodies colluded in the issue of shares to an insurance company, First Merchant Life Assurance Society of Zimbabwe, for secret profit and in the knowledge that the representative of the insurer was acting contrary to his mandate. Mr Masiyiwa, CEO of Econet, and Mr Chanakira, then on the NMBZ board, are said to be individually implicated in the fraudulent scheme. The report propounding this view, though compiled after lengthy testimony and deliberation, was notably prepared without any reference to, much less submissions from, the parties accused, who were given no opportunity to present their points of view.

GILLESPIE J

The report in which the defamatory statements occur is as yet confidential. It has, however, been leaked to the applicants. They have also been made to believe that the intention is that the report will be tabled and debated in Parliament. This, they say, will render media discussion of the contents of the report and of its debate in the House non-actionable because of the privilege attaching to Parliamentary proceedings and to reports thereof. Hence this present application for an order restraining the publication of the report - even its debating in Parliament.

The publication is undoubtedly defamatory. The respondents do not seek to deny that. They do not even attempt to assert any right to publish the report or to show that publication would not be wrongful for any reason. They content themselves, solely, with the contention that they have no intention of publishing the report in its present form, which is merely a draft. This assurance fails to satisfy the applicants. They do not accept the *bona fides* of the respondents. They persist in their claim.

The principle according to which publication of defamatory matter might be restrained has recently been examined by Bartlett J.1(12) The reasonings of the learned judge set out very clearly the competing considerations which moved him in the exercise of what was an overall discretion to grant or withhold relief. The learned judge placed reliance on the dictum that:

> "Cases involving an attempt to restrain publication must be approached with caution ... freedom of speech is a right not to be overridden lightly. The appropriate stage for this consideration would, in most cases be the point at which the balance of convenience is determined. It is at that stage that consideration should be given to the fact that the person defamed (if this be the case) will, if the interdict is refused, nonetheless have a cause of action which will result in an award of damages. This should be weighed against the possibility, on the other hand, that a denial of a right to publish is likely to be the end of the matter as far as the press is concerned. 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 cases of urgency, the defence which it wishes to raise and the fact that the order may, in substance though not in form, amount to a permanent interdict." 2(13)

I too place reliance upon the principles and approach so propounded.

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I am prepared to assume, for the purposes of argument, that all other requirements are established in a manner that would permit the grant of an interdict and to concentrate upon one feature alone of this case. That feature is one not addressed by either side save in response to questions put by me.

GILLESPIE J

The point that concerns me is that what is sought to be suppressed is the making of a report to Parliament and, by extension, the debate in the House of the matter so reported.

This issue could theoretically be relevant to the determination of any of three of the essential elements to be established. These are: first, whether the applicants enjoy a right. It might well be contended that no individual has any right to prevent Parliament from debating any matter of concern. Second, whether there exists an unlawful threat. It might well be suggested that any person has a lawful right to cause any matter of concern to be debated in the House. Third, whether (assuming an unlawful threat to a *prima facie* right) the balance of convenience favours the issue on the withholding on a restraint.

In the absence of full argument concerning the first two of these prospective defences, and in view of their fundamental nature, it seems preferable not to express a firm view on either of these issues if a satisfactory resolution can otherwise be achieved. It seems to me that it can. Assuming, therefore, that in the appropriate (and, I have no doubt, extreme) case an individual might have the right to prevent lawful matter from being maliciously and injuriously raised for public debate in a legislative assembly, I endeavour to discover whether in the circumstances of this case such relief should justly be afforded.

I think not. On the one hand, according to applicant's argument, the alternative remedies in this case are limited, if not non-existent. There is no obvious cause in damages which will follow publication of the material. That is because the proceedings in Parliament are said to be absolutely privileged.

The immunity from suit of any such debate is accorded by statute:

> "5 (1) There shall be freedom of speech and debate of proceedings in or before Parliament and any committee and such freedom shall not be liable to be impeached or questioned in any court or place outside Parliament.
>
> (2) Subsection (1) shall [subject to the right of the Speaker to extend the privilege by certificate] not apply to a person, other than a member, who gives evidence in or before Parliament or a committee.
>
> (3) It is declared for the avoidance of doubt that a member shall not be liable to any proceedings, arrest, fine, imprisonment or other punishment or damages or other penalty by reason of any matter or thing which he -
>
> (a) may have bought ... in or before Parliament or a committee; or
>
> (b) may have said in or before Parliament or a committee, whether as a member or a witness ..." 3(14)

Subsection (2) of the foregoing section, while acknowledging the absolute privilege of a non-member, nevertheless denies exemption to a member for

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GILLESPIE J

his testimony to Parliament except on due certification by the Speaker. 4(15) It is this provision which renders hypothetically possible a suit for damages against a person who testifies "unfaithfully" 5(16) and which also leaves room for argument that in the proper case there might be good cause shown for preventing a non-member from causing a matter to be raised, by his report, in Parliament where that report is not "full and faithful".

Not only are the proceedings and members of Parliament so privileged; and any non-member duly certified so privileged; 6(17) but also any report of the proceedings will be held to be privileged subject to the qualification that the report is fair and substantially accurate and in the interest of the public. 7(18) It is true to say, therefore, that any person in the applicants' position, wishing redress in damages for a false and injurious submission, to or testimony in, Parliament, would have a Sisyphyean mountain up which to roll his weighty burden.

On the other hand, the privilege extending to Parliament is a matter of policy, and policy may well require that the proceedings of Parliament be not restricted only to matters other than those which any individual, who manages so to move a court, considers harmful to his interest. Just so to state the proposition seems to invite its summary rejection.

Freedom of expression is enshrined in the Constitution. 8(19) That freedom is one which gains more in protection as the development of the law advances. 9(20) That freedom enjoys particular protection in connection with Parliamentary proceedings and privilege. 10(21) The basis of this added protection is

> "Undoubtedly, the furthering of the efficient functioning of democratic government by allowing an uninhibited free flow of information ... " 11(22)

These considerations impel me to the view that the court should be very slow to do anything that might be in its power to prevent debate in Parliament of any topic of concern. Rather, the court should seek to protect the freedom of expression and indeed the democratic process and, instead of forbidding debate, compel the potentially aggrieved person to submit to debate. Let him lobby his member of Parliament. Let him appear and testify. Let him protect

GILLESPIE J

his good reputation by answering transparently to accusations rather than by stifling questions. The lone alternative remedy is thus to be seen as a political than a litigious one and one which should generally and as a matter of policy be preferred, assuming, the court has any power to restrain, rather than hinder.

It may well be appropriate to comment that:

> "The effectiveness of this laudable policy, of course, depends on the extent to which a democratic foundation for government already exists." 12(23)

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A parliament wholly dominated by one party might not be one in which the political remedies outlined are best calculated to be effective where the matter of debate touches on issues close to the political interests or power base of the dominant group. But even if that were the perception in this case,13(24) that would be insufficient ground for any court to declare its mistrust of the democratic process at the hands of any legislative majority and to seek to substitute its own discretion for free and open debate. Any belief that the political process is flawed or partial should find expression in such litigation as is available under the existing legislation and privileges rather than in suppressing free expression - assuming that any such power of suppression exists.

I am satisfied that in this case there is no good cause to make any exception that might be within the court's competence. The allegation is a serious one on a matter of no little moment. It is one made by a presumably responsible committee of inquiry appointed in terms of the law to report to the Minister responsible. He should be permitted, if he deems it proper, to report to Parliament. If the deliberations relating to the report are thought to be flawed, let those criticisms, and any response to the allegations, be made in the House or in committee. There is no basis whatever for supposing that the elected representatives of the people will behave perversely. There is no warrant for trespassing out of the field of jurisprudence and into the sphere of political controversy.

The application is therefore dismissed with costs.

Kantor & Immerman, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

MUZENGI v STANDARD CHARTERED BANK & ANOR 2000 (2) ZLR 137 (HC)

Citation	2000 (2) ZLR 137 (HC)
Case No	Judgment No. HH-166-00
Court	High Court, Harare
Judge	Smith J
Heard	July 4, 2000
Judgment	August 9, 2000
Counsel	Applicant in person L T Biti, for the first respondent
Annotations	None

Civil application

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Flynote

Employment - contract - termination - resignation - when amounts to constructive dismissal - what must be shown - effect of resignation - whether employer has option of accepting resignation

Headnote

The applicant was employed by the respondent as the manager of its branch in Chiredzi. His management was criticised and the bank decided to hold an inquiry. The day before the inquiry was due to be held, the applicant wrote a letter submitting his resignation. The inquiry was nonetheless held and the applicant found guilty of misconduct. The committee of inquiry decided that the applicant should be suspended without pay, pending the decision of a labour relations officer, but he was also advised that he had the option of resigning. He submitted a second letter of resignation which was formally accepted some days later. The bank then instituted proceedings to evict the applicant from the house he occupied as manager.

The applicant sought reinstatement in his position, arguing that he was forced to resign and that amounted to constructive dismissal.

Held, that where a person claims that he has been forced to resign and therefore his resignation was tantamount to unlawful dismissal, the material circumstances giving rise to the fear should be clearly and distinctly averred. There was a dearth of averments from the applicant as to the material circumstances which gave rise to the fear that induced him to resign. It was difficult to accept that the second letter of resignation was made under duress when the applicant had decided to resign before the inquiry took place.

Held, further, that a letter of resignation constitutes a final act of termination by an employee, the effects of which he cannot avoid without the permission of the employer.

Cases Considered

Cases cited:

Bulawayo Municipality v *Bulawayo Indian Sports Ground Cttee* 1955 SR 114; 1956 (1) SA 34 (SR)

de Vos v *Monnik & Visser* 1944 CPD 31

Kadada v *Harare City Council* HH-26-94

Potgietersrust Hospital Bd v *Simons* 1943 TPD 269

Rustenburg Town Council v *Min of Labour & Ors* 1942 TPD 220

Steiger v *Union Govt* (1919) 40 NLR 75

Case Information

Applicant in person

L T Biti, for the first respondent

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Judgment

Smith J: The facts in this case are mostly common cause. The applicant (hereinafter referred to as "Muzengi") started working for the first respondent (hereinafter referred to as "the Bank") as a clerk in 1979. He became branch manager in 1994 and in 1997 was transferred to Chiredzi in that capacity. On 16 November 1998, the Bank's regional support manager, Eastern Region, wrote to the regional sales and services manager advising him that all was not well at the Chiredzi Branch - there was a lack of controls, the reconciliation of suspense accounts was not being done, cash was not being banked timeously and records were not being kept. The report criticizing the state of affairs at the Chiredzi Branch was sent to Muzengi for his comments. He responded by putting the blame on the Senior Service Manager and other members of staff. The management at the Bank decided to hold an inquiry which was scheduled for 26 November 1998. However, Muzengi submitted a letter of resignation on 25 November. Despite his resignation, the inquiry was held on 26 November. The committee of inquiry found Muzengi to be guilty of misconduct and decided to suspend him without pay, pending the decision of the labour relations officer. However Muzengi was advised that he had the option of resigning. He again submitted a letter of resignation on 27 November 1998. On 11 December, the Bank formally accepted his resignation. After accepting Muzengi's resignation, the Bank also instituted proceedings to evict him from the house he occupied in Chiredzi, which he refused to vacate.

Muzengi then made an application to the second respondent, who is the labour relations officer in Chiredzi (hereinafter referred to as "Mutasa"), complaining at the manner in which he had been treated by the Bank. He and his legal practitioner appeared before Mutasa, but no representative from the Bank turned up. Muzengi made his submissions and left the office. Some days later the Bank's legal practitioners submitted written representations to Mutasa, who subsequently dismissed Muzengi's complaints.

On 7 May 1999, Muzengi brought this application for review of the decision by Mutasa and "an appropriate order in terms of the draft". The draft order is not very clear. Paragraph 1 thereof reads as follows: "the first respondent having failed to appear for his defence on 26 February 1999 before the labour relations officer, a default judgment is hereby provided". Paragraph 2 seeks his reinstatement with no loss of pay and other benefits. Presumably, what Muzengi is asking for is a "default judgment" from Mutasa because the Bank's representatives failed to turn up at the hearing on 26 February 1999.

Muzengi's application is based on his averment that he was forced to resign and that amounted to constructive dismissal. He also submitted that Mutasa was guilty of causing a gross miscarriage of justice when he dismissed

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Muzengi's claim against the Bank. Muzengi also made many allegations against the officials from the Bank who constituted the committee of inquiry which investigated the allegations of

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mismanagement at the Chiredzi Branch. He claimed that they were investigators, prosecutors, judge and jury; they had decided to dismiss him long before they started their investigations. Muzengi argued that the members of the committee of inquiry, and especially a Mr Nkatazo, who was one of them, conducted themselves in such a manner as to bring undue pressures on him - these constituted a form of duress which confused him to the extent that he signed the letter of resignation. He was not given time to think things over and give careful consideration to his position. He was compelled to act quickly.

Mr *Biti* argued that the application is defective in that it does not comply with r 259 of the High Court Rules which requires that the application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside and the exact relief prayed for. He also submitted that Muzengi wrote a letter of resignation to the Bank but he did not, at the time, allege that it amounted to constructive dismissal. Furthermore, he failed to use any internal appeal mechanisms provided in the Bank's code of conduct and he did not appeal to the Labour Relations Tribunal.

Muzengi's claim that Mutasa was biased is based on the following grounds. He and his legal practitioner attended at Mutasa's office at about 2:15 p.m. on 26 February as had been agreed. No representative from the Bank appeared. When his legal practitioner indicated that he was ready to start, Mutasa said it was his practice to give the other side some grace period of up to 30 minutes. According to Muzengi, this was a sign that Mutasa was "not partial" - clearly he meant "not impartial". The legal practitioner then suggested that Mutasa phone the Bank's legal practitioner, which was attempted but without success. Mutasa then suggested that the matter be postponed but Muzengi's legal practitioner objected. Mutasa again suggested that the Bank be given a little more time to appear and then heard the submissions from Muzengi, which were "made at length and in details". Mutasa then said that he needed one or two days to consider the submissions made. Despite more than 25 calls from Muzengi's legal practitioner, Mutasa refused to pass judgment. On 15 March, the Bank's legal practitioner sent written submissions to Mutasa and Mutasa then made his determination, without giving Muzengi an opportunity to answer or respond to the submissions. According to Muzengi, Mutasa clearly was "not partial. Right from the beginning and as such the determination was not fair and was not based on the proper facts of the case". There was an obvious travesty of justice in the way the case was handled.

In my view, there is no justification for attacking the *bona fides* and

SMITH J

impartiality of Mutasa on the grounds that he wanted to hear both sides before making his determination. I do not consider that he showed partiality when he decided to give the Bank extra time in which to make its submissions. However, on my view of the facts, the question of whether or not Mutasa showed bias is, in any case, irrelevant. I say that because I consider that Muzengi voluntarily resigned from his employment with the Bank and therefore, when he approached Mutasa, he was no longer an employee. The claim made by Muzengi in his founding affidavit that he was "forced" to write the letter of resignation by Mr Nkatazo is not substantiated. In the "statement of appeal" by Muzengi to the Bank, which is dated 18

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December 1998, he sets out the problems being experienced at the Chiredzi Branch and comments on the investigations of the committee of inquiry and then goes on to say:

> "At the end of the Enquiry, The Regional Manager, Fidelis Gweshe handed out his findings as, 'Warranting Dismissal, resulting in forfeiting all my personal benefits, suspension without pay pending application to Labour, and have a bad record, etc., or to have a clear record I could alternatively tender a letter of resignation as I had commitment by way of school going children and enjoy my terminal benefits'. These words were just echoing in my mind with no meaning. All I could focus on was the school going children and what I would do with them so I opted for a resignation. I handed them my letter of resignation and left the Office about 13.00 hrs. At 14.00 hrs, someone else had taken over my seat. Customers were phoning asking what had taken place.
>
> As each day passed by, I found the whole process unfair and harsh. I decided to take the matter up as this decision to resign was taken *under duress*. The committee made up of Senior Personnel honest and reliable should be able to narrate exactly what took place and the issue of Duress should show. We do not expect any deviation as they must be convinced they took the right decision."

Although the above is a bit garbled, it is clear that there is no indication therein of any actual duress, despite the contention by Muzengi that it existed. Then in the letter dated 5 January 1999 which Muzengi wrote to the chief executive of the Bank asking for his job back, he said:

> "I still strongly believe that my DISMISSAL was UNFAIR as it constitutes a CONSTRUCTIVE DISMISSAL."

He went on to list the constraints and problems at the Chiredzi Bank and said that he had worked for the Bank for 19 years without any adverse report; if he had the right tools, i.e. the people and computers, he would have done a better job. There is no allegation therein that there had been any duress to force him to resign.

In *Steiger* v *Union Government* (1919) 40 NLR 75, the plaintiff claimed that he had been forced to resign and therefore his resignation was tantamount to unlawful dismissal. The court held that where a plaintiff seeks relief on the ground of *metus causa*, the material circumstances

SMITH J

giving rise to the fear should be clearly and distinctly averred. At p 79-80, Dove-Wilson JP said:

> "Force and fear will annul an engagement when the fear is not vain or foolish, but such as to overcome a mind of ordinary firmness. The true ground of the annulment is extortion through the influence of fear induced in various ways: and it is really a question for the court or jury whether in all the circumstances the consent was in fact extorted by coercion. It is therefore very necessary that the material circumstances giving rise to the fear should be clearly and distinctly averred. As de Villiers CJ said in the leading case of *White Brothers* v *Treasurer General* (2 Juta, at p 350):
>
> > 'It is clear from what has been said by him (i.e., Voet) and other Dutch writers on this point, that it is the want of free consent on the part of the person entering into the contract or making the payments which lies at the root of the rule which invalidates contracts or payment extorted by the force or intimidation'
>
> and the principle must be the same where the intimidation has procured the rescission of a contract, and it is sought to annul the rescission It is equally clear, however, that the absence of free consent will not be lightly presumed, and that where the circumstances do not clearly disclose an absence of free consent no restitution will be allowed. Now the difficulty which I have in the present case is in seeing that such circumstances are averred. True, plaintiff says he was 'compelled' to elect to resign, but it seems to me that the facts which he alleges may be read as amounting to no more than that he preferred, in the exercise of his own free will, to do so rather than to be dismissed, even although he may have known that the dismissal would be illegal, as may be taken to be

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> suggested by the reference to his 'protests', the nature of which is, however, not disclosed in the declaration."

In Muzengi's founding affidavit, there is a dearth of averments as to the "material circumstances" which gave rise to the fear that induced him to resign.

Furthermore, it is not disputed that Muzengi wrote a letter of resignation on 25 November, the day before the committee of inquiry arrived in Chiredzi. When the committee did come, he did not tell the members that their journey was unnecessary because he had resigned and was no longer an employee of the Bank. By his conduct, therefore, he must have regarded his resignation as being suspended or withdrawn. Be that as it may, after being told the findings of the committee on 26 November, Muzengi again wrote out a letter of resignation. It is difficult to accept that the resignation on 26 November was made under duress because he had only a few hours to decide what to do, when he had already decided 24 hours earlier to resign. The decision to resign that was made on 25 November was, as I have said, made long before the committee arrived at Chiredzi.

In *Rustenburg Town Council* v *Minister of Labour & Ors* 1942 TPD 220, Murray J dealt with the effect of a notice of termination of a contract of employment. At p 224, the learned judge said:

> "The giving of notice is an unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. If so, it seems to me to follow that notice once given

> is final, and cannot be withdrawn - except obviously by consent - during the time in excess of the minimum period of notice. In the present case, the position was undisputed and I think undisputable, the town clerk is the authorised agent of the applicant council empowered to receive communications to it: once therefore the resignation in question had been lodged with him, it constituted a final act of termination by the third respondent, the effects whereof he could not avoid without the permission of the applicant council."

This statement as to the effect of a letter of resignation has been cited with approval in many cases, including *Potgietersrust Hospital Board* v *Simons* 1943 TPD 269, *de Vos* v *Monnick & Visser* 1944 CPD 31, *Bulawayo Municipality* v *Bulawayo Indian Sports Ground Committee* 1955 SR 114; 1956 (1) SA 34 (SR) and *Kadada* v *City of Harare* HH-26-94. Therefore, even though the Bank purported to accept the resignation on 11 December, it really had no option. The resignation was effective on 26 November. All the Bank could do was to decide whether or not to permit Muzengi to withdraw his resignation.

It is ordered that:

1. the application by Muzengi in case No. HC-6364-99 is dismissed with costs;

2. the application by the Bank in case No. HC-5553-99 is granted and accordingly -

   2.1 Muzengi and all those claiming through him shall vacate stand No. 44 Impala Drive, Chiredzi on or before 31 August 2000, failing which the Deputy Messenger is authorised to evict him;

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2.2 Muzengi pay the Bank's costs.

Honey & Blanckenberg, respondent's legal practitioners

BARCLAYS BANK OF ZIMBABWE LTD v SHERIFF OF ZIMBABWE & ANOR 2000 (2) ZLR 143 (SC)

Citation	2000 (2) ZLR 143 (SC)
Case No	Judgment No. S-68-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Muchechetere JA
Heard	July 27, 2000
Judgment	August 15, 2000
Counsel	A P de Bourbon SC, for the appellant P Nherere, for the respondent
Annotations	None

Civil appeal

Flynote

Practice and procedure - sale in execution - plan of distribution of proceeds of sale - plan confirmed by Sheriff and proceeds distributed - when plan may be set aside - principles - no objection to plan lodged due to negligence of applicant's lawyers - appeal dismissed

Headnote

Due to the negligence of the appellant's lawyers, no objection was raised to the plan of distribution prepared by the Sheriff following a sale in execution. The plan contained a significant mistake which was adverse to the appellant. It was only after the distribution that the appellant realised that it should have received more than it did. It sought to have the plan of distribution set aside.

Held, that a person having an interest in the proceeds of a sale in execution and objecting to the plan of distribution may apply to have the plan set aside or amended. Although the rules of court do not stipulate a time limit for such application, what was intended by the rules was that any objection to the plan must be brought before its confirmation or at the latest before the money has been distributed.

Held, further, that a person who is out of time to make an application to have the plan of distribution set aside or amended is not without a remedy. He nonetheless may challenge such distribution by virtue of the inherent powers of the court under the common law to rescind or set

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aside judgments. In deciding what power the court has to set aside a confirmed and implemented plan of distribution, the principles applicable to the confirmation of distribution accounts under the law of insolvency offer an apt analogy and serve as guidelines. The confirmation of a distribution account has the effect of a judgment of a court, and, before another court can go behind such a judgment, application must be made to have it set aside. The success or failure of such an application must depend on the normal rules applicable to the setting aside of consent judgments, where the court will adopt a wide discretionary approach. The applicant must show sufficient cause for the setting aside of the plan.

Held, further, that on the facts of this case, there was a high degree of negligence on the part of the appellant (through its lawyers). The lawyers did not examine the plan; they simply assumed that it was correct. Even when payment was received, over a year after the plan was made available, the lawyers failed to notice that the amount being paid to the appellant was not correct. In addition, the application was delayed for an unnecessarily long time, being made nearly two years after the plan of distribution had been made available. Consequently, the appellant had failed to prove the existence of sufficient cause for setting aside the plan of distribution.

Cases Considered

Cases cited:

Athanassiou v *Schultz* 1956 (4) SA 357 (W)

CABS v *Pierce NO* 1969 (1) RLR 60 (A); 1969 (1) SA 445 (RA)

Childerley Est Stores v *Standard Bank of SA Ltd* 1924 OPD 163

de Wet & Ors v *Western Bank Ltd* 1979 (2) SA 1031 (A)

Georgias & Anor v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S)

Harare Sports Club & Anor v *United Bottlers Ltd* 2000 (1) ZLR 264 (H)

Mapedzamombe v *CBZ & Anor* 1996 (1) ZLR 257 (S)

Mchechesi v *Field NO* 1997 (2) ZLR 191 (S)

Morfopoulos v *Zimbank & Ors* 1996 (1) ZLR 626 (H)

Mudzingwa v *Mudzingwa* 1989 (2) ZLR 182 (S)

Nyingwa v *Moolman NO* 1993 (2) SA 508 (Tk)

Rulten NO v *Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D)

Legislation considered:

High Court Rules 1971 (RGN 1074 of 1971), rr 364, 365 and 366

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Case Information

A P de Bourbon SC, for the appellant

P Nherere, for the respondent

Judgment

Gubbay CJ: This appeal concerns the issue of whether it is permissible for a court and, if so, in what circumstances, to set aside a plan of distribution of purchase money, prepared by the Sheriff and subsequently confirmed and implemented by him in terms of rr 365 and 366 of Order 40 of the Rules of the High Court. Its determination necessitates a restatement, in chronological sequence, of the relevant events involving the three parties, which are as follows:

1. On 17 February 1995, the appellant, hereafter referred to as "the Bank", obtained judgment against Leonard and Smollie Masiye jointly and severally: (i) in the sum of $68 346.23, plus compound interest at the rate of 33.5% *per annum* from 19 August 1994 to date of payment; and (ii) in the sum of $11 800, plus interest at the rate of 7.5% from 19 August 1994 to date of payment. In addition, the immovable property known as stand No. 3625, Bulawayo Township ("the property") was declared executable.

2. Some ten weeks later, on 1 May 1995, the second respondent, known as "SEDCO", obtained judgment against Leonard Masiye in an amount of $198 285.75. Thereafter a caveat was registered over the property. SEDCO, however, did not enjoy the security of a mortgage bond.

3. On 27 June 1995, the legal practitioners acting on behalf of the Bank, ("the legal practitioners"), having had the property attached, wrote to the first respondent, "the Sheriff", instructing that its sale be proceeded with. Forwarded with the letter were copies of the two mortgage bonds held by the Bank over the property. The Sheriff was advised that Central

Africa Building Society ("CABS") was also a holder of a mortgage bond over the property.

4. The property was sold on 9 January 1996, at a public auction, to the highest bidder, for $140 000. Notification of the sale was received by the legal practitioners on 15 January 1996.

5. By letter dated 10 January 1996 (date-stamped by the Sheriff's office on 17 January 1996), the legal practitioners were advised that the plan of distribution, a copy of which was enclosed, "will be advertised (in the *Gazette*) as lying for inspection at the office of the Assistant Master, Bulawayo, for fourteen days from 18 October 1996 to 6 November 1996". And that if no objections were lodged within that period, the Sheriff would confirm the plan.

6. The plan of distribution, which had been prepared by the Sheriff, showed CABS as the first mortgage bond holder (it had a second mortgage bond as well), due to be paid $68 857.72; and a *pro rata* distribution of the balance of $64 093.35 between the legal

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practitioners representing the Bank, and the firm of Webb, Low & Barry representing SEDCO, in the respective sums of $23 973.87 and $40 119.48.

7. In making the plan of distribution, the Sheriff overlooked that the Bank held third and fourth mortgage bonds over the property. But for such error the Sheriff would have awarded the total balance of $64 093.35 to the Bank as a preferred creditor, with nothing to SEDCO.

8. No objection to the plan of distribution was lodged by the legal practitioners on behalf of the Bank within the prescribed period. They simply assumed, without any form of check, that the plan of distribution was correct. In the result, the Sheriff duly confirmed the plan of distribution and, on 14 February 1997, made payment in accordance therewith.

9. It was only after the legal practitioners had forwarded the payment received to the Bank that it was drawn to their attention that the Sheriff had overlooked the preference of the Bank's mortgage bonds and, in consequence, had made an undue payment to SEDCO.

10. In July 1997, the legal practitioners sought to persuade SEDCO to rectify the effect of the Sheriff's error in omitting to regard the Bank as a preferred creditor, by agreeing to refund the monies incorrectly paid to it under the plan of distribution. This SEDCO declined to do.

11. Ultimately, on 17 September 1998, the Bank applied to the High Court for an order setting aside the plan of distribution.

The learned judge *a quo* did not view the Bank's application with favour. He dismissed it with costs on the ground that the negligence of the legal practitioners precluded the Bank from obtaining relief.

The operative procedure with respect to a plan of distribution is set out in

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rr 362 to 366 of the Rules of the High Court. It is to this effect. Confirmation of a sale in execution, or by private treaty, of immovable property by the Sheriff enjoins him, under r 362, to determine the secured claims to the purchase money and to state them in the order of their preference in a plan of distribution. Once formulated, the plan of distribution, in compliance with r 363, is to lie in the office of the Sheriff for the inspection of parties for fourteen days from a date to be notified by the Sheriff by advertisement in the *Gazette*. Where, as in this instance, the property sold is situate in the Bulawayo magisterial province, the said plan is also to lie for a like period in the office of the Registrar of the High Court, Bulawayo. Any person having an interest in the proceeds of the sale and objecting to the plan of distribution may, pursuant to r 364, make a court application to have it set aside or amended. While no time limit is laid down in r 364 within which such application is to be brought, r 365 recites that:

> "If no objection is made to the plan of distribution within the time provided for that purpose, the said plan *shall be confirmed* by the sheriff" (emphasis added).

Thereupon, in terms of r 366:

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> "... the sheriff shall proceed forthwith to distribute the said purchase money accordingly, and shall pay over the surplus, if any, to the debtor, taking proper receipts for all money so paid by him."

It seems to me that, although r 364 does not specify a time limit, what was intended is that any objection to the plan of distribution must be brought prior to its confirmation or at the very latest before the purchase money has been distributed. For once the plan of distribution has been so implemented, there is no extant plan to set aside or amend in the manner contemplated by r 364.

Thus, the question arises as to whether an aggrieved creditor's lack of vigilance in protecting his rights by timeous objection to a plan of distribution leaves him without a remedy. I think not.

In *Mapedzamombe* v *Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S), *à propos* of judicial sales in execution, this court remarked at 260D-E:

> "Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla* v *Bhura supra* 1973 (2) RLR 280 (A) at 283A-B. Once confirmed by the Sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran* v *Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the sheriff *but transfer effected by him to the purchaser* against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the principles of the common law" (emphasis added).

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See also *Morfopoulos* v *Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H) at 631G-H.

The same reasoning, in my view, applies to situations where the purchase money has been distributed in terms of a duly confirmed plan of distribution. A person having an interest in the purchase money, who is out of time to apply to court to have the plan of distribution set aside or amended under r 364, nonetheless may challenge such distribution by virtue of the inherent powers of the court under the common law to rescind or set aside judgments.

Although there would appear to be no case law dealing specifically with the common law power of the court to set aside a confirmed and implemented plan of distribution, principles applicable to the confirmation of distribution accounts under the law of insolvency offer an apt analogy and serve as guidelines. Such a situation was considered in *Central Africa Building Society* v *Pierce NO* 1969 (1) RLR 60 (A), where at 74E-F, Beadle CJ stated that:

> "the confirmation of a distribution account has the effect of a final sentence; it has precisely the same effect as a judgment of a court, and, before another court can go behind such a judgment, application must be made to have it set aside. The success or failure of such an application must depend on the normal rules applicable to the setting aside of judgments."

See also *Rulten NO* v *Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D) at 604F; Mars *The Law of Insolvency in South Africa* 8 ed at 429 *in fine* - 430.

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The common law grounds for setting aside a judgment were canvassed in *Childerley Estate Stores* v *Standard Bank of SA Ltd* 1924 OPD 163. In that case, de Villiers JP was primarily concerned with the court's jurisdiction to set aside a final and definitive judgment, on the merits of the dispute between the parties, after evidence had been led. In that context, it was indicated by the learned Judge President at 166 that a judgment can only be rescinded under the common law on one of the grounds upon which *restitutio in integrum* would be granted, such as fraud, *justus error* (on rare occasions), the instances provided for in our modern Rules where judgment has been granted by default and, in certain exceptional circumstances, where new documents have been discovered. That approach has been applied by this court in *Mudzingwa* v *Mudzingwa* 1989 (2) ZLR 182 (S) at 189G-H and *Mchechesi* v *Field NO* 1997 (2) ZLR 191 (S) at 192E-H.

In *de Wet & Ors* v *Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 *in fine* - 1043A, it was held by Trengove AJA (as he then was), in whose judgment the other members of the court concurred, that:

> "... the court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in rr 31 and 42(1), and those specifically mentioned in the *Childerley* case. Those grounds do not, for example, cover the case of a litigant, or his legal representative, whose default is due to unforeseen circumstances beyond his control, such

> as sudden illness, or some other misadventure; one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief."

It is important to bear in mind that the South African Appellate Division was concerned with a default judgment, and noted that the courts of Holland enjoyed wider powers of rescission and adopted a more lenient attitude with regard to default judgments which had been granted without going into the merits of the dispute between the parties, than in respect of final and definitive judgments. Thus, as done by the court below (see 1977 (4) SA 770 (T) at 776F-H), it was wrong in an application for rescission of a default judgment, to confine the court's power to grant relief to the grounds specifically mentioned by de Villiers JP in the *Childerley* case.

Nyingwa v *Moolman NO* 1993 (2) SA 508 (Tk) concerned an application for rescission of a summary judgment. The court, having found that the judgment was not erroneously granted, proceeded to consider whether the application could succeed at common law. It held at 511I-512B that:

> "... any judgment, including a summary judgment, can be rescinded under the common law. *If the merits of the dispute were considered before summary judgment was granted, rescission can follow only on the grounds set out in the* Childerley *case*; if the merits were not considered and the judgment was granted by default, the grounds for rescission are virtually unlimited, and the only prerequisite is that 'sufficient cause' therefor must be shown. *It follows that, if an answering affidavit, or evidence, has been considered by the court before it grants summary judgment, the court would then have considered the merits of the case and its judgment cannot then be held to be by default*, even if there was no appearance for the defendant when the application was heard" (emphasis added).

See also the remarks of Ramsbottom J (as he then was) in *Athanassiou* v *Schultz* 1956 (4) SA

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357 (W) at 360C-D.

Apart from two cases in this jurisdiction, namely, *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) and, even more recently, *Harare Sports Club & Anor* v *United Bottlers (Pvt) Ltd* 2000 (1) ZLR 264 (H), I have been unable to trace any other in which an application under the common law to set aside a consent judgment was considered. What approach is to be applied to such an application? Is it to be the more restrictive one enunciated in the *Childerley* case, or the broad discretionary one appropriate to the rescission of judgments granted by default?

Although a consent judgment is a final and definitive judgment, in the sense of not having been granted by default, nonetheless it is not normally one reached by the court after evidence has been adduced on the merits of the dispute. Expressed otherwise, it is not (usually) a judgment duly given after evidence has been led and considered by the court.

Certainly, no evidence was led in the *Georgias* case. For that reason it was

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said at 493B that the setting aside of a judgment by consent enjoins the court to adopt the principles which govern the rescission of a judgment by default. The criticism by Gillespie J in *Harare Sports Club* v *United Bottlers (Pvt) Ltd supra* that the broad discretionary approach advocated in *Georgias* had been enunciated without any cognizance being given to unequivocal *dicta*, apparently to the contrary, in the *Childerley* case and many others, with respect, misses the point. The type of judgment in *Georgias* was different from that in *Childerley*. It was necessary in *Childerley* for there to be established a ground on which *restitutio in integrum* would be granted, since evidence had been adduced on the merits of the dispute. In *Georgias*, no evidence was adduced and considered by the court prior to the grant of the consent judgment.

The learned judge in the *Harare Sports Club* case was undoubtedly correct in applying the wide discretionary approach he did, but not because the approach in *Georgias* was binding "as being the more particular and recent of two apparently inconsistent approaches"; rather because the relief sought in the application before him was not dependent on the existence of the grounds mentioned in the *Childerley* case.

If rescission, under the common law, of a consent judgment, absent evidence, does not fall within the ambit of the principles enunciated in the *Childerley* case, as I perceive to be the position, then even more clearly the setting aside by the court of a plan of distribution confirmed by the Sheriff does not do so. For failure to object to the plan is akin to failure to enter appearance to defend. Logic and commonsense dictate that the Bank be seen as a defaulting party.

What is to be determined, adopting the wide discretionary approach advocated in *de Wet*'s case, is whether the appellant succeeded in proving the existence of sufficient cause for setting aside the plan of distribution. The power to rescind is one entrusted to the discretion of the court. Its exercise, in general, is influenced by notions of justice and fairness, having regard to

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all the facts and circumstances of the particular case.

Having regard to the facts and circumstances of this case, including the reasonableness or otherwise of the explanation for the default, was the learned judge right in refusing to set aside the plan of distribution?

It cannot be gainsaid that the Sheriff was negligent in the manner in which he framed the plan of distribution. He ought to have been aware that the Bank, as well as CABS, was a preferred creditor. He had been specifically alerted to the position of the Bank by the legal practitioners in the letter of 27 June 1995; and a cursory perusal of the attached copies of the two mortgage bonds would have confirmed the information.

The procedure provided for in r 363, that interested parties are to be given

GUBBAY CJ

notice by advertisement in the *Gazette* that a plan of distribution is to lie for inspection for fourteen days from a date to be notified, is aimed at ensuring that if the plan reflects an erroneous distribution of the purchase money - whether due to lack of information on the part of the Sheriff or a mistake by him - an opportunity is afforded to the affected creditor to have it corrected. Simply put, the purpose of making the plan available for inspection is to enable interested parties to inspect it and make objections if minded to do so. In this matter, the Sheriff took the added precaution of actually sending a copy of the plan of distribution to the legal practitioners. They did not have to go to the office of the Assistant Master, Bulawayo, to inspect it.

The legal practitioners assumed that the plan of distribution was correct. They claimed that such assumption was reasonable, as it was the Bank which had instructed the Sheriff to conduct the sale of the property and had provided the particulars of its mortgage bonds to him. So they did not examine the plan. If they had done so, the error in not treating the Bank as a preferred creditor would have been revealed. Nor did the legal practitioners employ the safeguard of forwarding the plan of distribution, upon receipt, to the Bank.

It was this negligence in not detecting the error, and thus failing to raise an objection within the fourteen day period, which caused the Sheriff to confirm the plan of distribution. It misled the Sheriff into believing that the proposed distribution of the purchase money complied with the correct preference to be accorded to the claims of creditors.

Thereafter, three months elapsed before the Sheriff distributed the purchase money. In the interim, it did not occur to the legal practitioners to check the correctness of the somewhat insignificant amount it was proposed to pay the Bank; or to seek the Bank's confirmation of the amount.

Even when payment was received, on or about 26 February 1997, the legal practitioners raised no objection. They simply forwarded the monies to the Bank. It was only when the Bank queried the amount that the legal practitioners realised that the plan of distribution was wrong and

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ought to have been objected to within the fourteen day period.

To have assumed, as the legal practitioners did, that all was in order, was totally unwarranted. The requirement of calling on interested parties to inspect the plan of distribution is an implicit warning to them that it must not be assumed that the distribution of the purchase money proposed by the Sheriff is correct.

In sum, the finding cannot be avoided that in the performance of their duty to protect the preference of the Bank, the legal practitioners were negligent to a high degree. Such negligence was the primary cause of the Sheriff confirming the plan of distribution and implementing it by making an erroneous payment to SEDCO.

GUBBAY CJ

I think it fair to say that the Bank, through the negligence of its legal practitioners, was the author of its own problem.

Another factor which seems to me adverse to the appellant's case was the length of the delay in bringing the application. I do not criticise the time taken in attempting to recover the sum of $40 119.48 from SEDCO which, I would add, had no reason whatsoever to suspect that there was anything amiss in the payment made to it by the Sheriff. But once it became clear by 22 October 1997 that SEDCO was not prepared to refund the amount, there was no justification to wait for eleven months before seeking relief from the High Court - in all a period of one year and eleven months had expired since the plan of distribution was made available.

In the result, I agree with the conclusion of the court *a quo*. I am satisfied that on common law principles, taking account of all the relevant facts and circumstances, the Bank failed to prove the existence of sufficient cause for setting aside the plan of distribution.

Accordingly, I would dismiss the appeal with costs.

McNALLY JA: I agree.

SANDURA JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

Webb, Low & Barry, respondent's legal practitioners

MOVEMENT FOR DEMOCRATIC CHANGE & ANOR v MUDEDE NO & ORS 2000 (2) ZLR 152 (SC)

Citation 2000 (2) ZLR 152 (SC)
Case No Judgment No. S-69-00

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Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	July 31, 2000
Judgment	August 15, 2000
Counsel	A A Brooks, for the appellants M K Achiume, for the respondents
Annotations	None

Civil appeal

Flynote

Elections - postal votes - requirements for issue of postal ballot papers - need for requirements to be strictly complied with - substantial compliance not sufficient to validate issue - lack of prejudice not relevant

Headnote

The appellant political party applied to have all postal ballot papers issued to Zimbabwe military personnel serving in the Congo declared invalid, and all votes cast on the strength of those papers declared void. Due to time constraints and the logistical difficulties of sending application forms to individual servicemen, military commanders had simply compiled lists of military personnel in the Congo. None of the military personnel were asked, at this stage, whether they wanted to vote, or even whether they were registered voters. Someone completed the application forms by inserting the names and registration numbers of the military personnel. In some cases witnesses may have signed before these details were inserted. Some may have had a "witness's" signature inserted before the "applicant" completed the form. The application forms, together with the postal ballot papers, were first submitted to the Registrar-General and then sent back to the military authorities after the names of those who were not registered voters were weeded out. As a result, only about half (6 000) of the "applicants" were sent postal ballot papers. The Registrar-General argued that there had been substantial compliance with the requirements of the Act and that there was no prejudice to anyone.

Held, that the Electoral Act laid down very strict and detailed criteria for the application and issuance of postal ballot papers for the application for and issue of postal ballot papers. Where the criteria were not complied with, as in this case, s 63 of the Electoral Act [*Chapter 2:01*] obliges the Registrar-General to refuse the applications.

Held, further, that s 65 of the Electoral Act requires only that there be substantial compliance in relation to the returning of the completed postal votes. In this case the non-compliance was not merely formal, but substantive. The question of prejudice was thus irrelevant. The postal ballot papers were invalidly issued and the votes cast as a result of them were void.

Held, further, that the intention of the legislature was to allow postal votes only to those who apply in accordance with the provisions of the Electoral Act. In this case the potential voters did

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not apply in this way.

Cases Considered

Cases cited:

Ndlovu Ex p 1981 ZLR 216 (G)

Forum Party of Zimbabwe & Ors v *Minister of Local Govt & Ors* 1996 (1) ZLR 461 (H)

Kutama v *Town Clerk, Municipality of Kwekwe* 1993 (2) ZLR 137 (S)

Macara v *Min of Information & Anor* 1977 (1) RLR 67 (G)

Sterling Products Intl Ltd v *Zulu* 1988 (2) ZLR 293 (S)

Swift's Tpt Svcs (Pvt) Ltd v *Pittman NO & Ors* 1975 (2) RLR 226 (G)

Vrystaat Ests (Pvt) Ltd v *President, Administrative Ct & Ors* 1991 (1) ZLR 323 (S)

ZUM v *Mudede NO & Anor* 1989 (3) ZLR 62 (S)

Legislation considered:

Electoral Act [*Chapter 2:01*], ss 61, 62, 65 & 149

Electoral Act (Modification) Notice, 2000, SI 161B of 2000

Case Information

A A Brooks, for the appellants

M K Achiume, for the respondents

Judgment

McNally JA: The issue in this appeal is the legality of the manner in which the first respondent (the Registrar-General) handled the issuance of postal ballot papers in the recent General Election, for military personnel serving in the Democratic Republic of Congo. The first appellant (the MDC) is a political party and the second appellant was then an MDC candidate and is now the Member of Parliament for Harare Central.

INTRODUCTION

The appellants contended that the Registrar-General had failed to comply with the requirements of the Electoral Act [*Chapter 2:01*], in particular with Part XV dealing with voting by post. The Registrar-General conceded that he had "despatched postal ballot papers without the applications being properly processed". However, he submitted that no prejudice resulted from the non-compliance and, in any event, there had been substantial compliance. Further, appellants' counsel had made a concession on the issue of prejudice which was fatal to his

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clients' case. As to certain other complaints, these had not been adequately specified and could therefore be ignored.

In the court below, the Registrar-General was successful and the application was dismissed, with no order as to costs. The court found that there had been substantial compliance with the provisions of the Act and that prejudice had not been proved. It noted that, in any particular constituency, if prejudice were demonstrated, the issue could be taken up by election petition. The appellants appeal against that decision. Since the election has now taken place, they seek, without objection, to amend their claim by adding a new para 3 praying that:

> "All votes cast which were cast on ballot papers which have been declared not to be validly issued in terms of 2 above, be and are hereby declared to be void and invalid."

McNALLY JA

In fact, the first two prayers are no longer relevant, given that the election has now taken place. The reference to the second prayer is therefore inappropriate. The declaration which I understand the appellants to be seeking may be expressed as follows:

> "It is hereby declared that the postal ballot papers in the Parliamentary Election held on 24 and 25 June 2000, which were issued to military personnel serving in the Democratic Republic of Congo, were invalidly issued. In consequence it is further declared that all votes cast on such postal ballot papers are void and invalid."

I proceed therefore to consider:

A. the relevant legislation;

B. what actually happened;

C. whether the Registrar-General substantially complied with the legislation in doing what he did;

D. whether there was any prejudice as a result of non-compliance;

E. the effect of any concession which was made;

F. the relevance of various general complaints of irregularity.

A. THE LEGISLATION

Part XV of the Electoral Act deals with voting by post. Section 158 of the Act, however, empowers the President to make statutory instruments which provide, *inter alia*, for:

> " (a) suspending or amending any provision of this Act or any other law in so far as it applies to any election."

In pursuance of his power under this section, the President caused to be issued SI 161B of 2000, dated 7 June 2000. It dealt, in part, with postal voting. It provided:

1. that no one apart from members of a disciplined force, polling officials, diplomats and other government officials outside their constituency and spouses would be entitled to a postal

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vote;

2. more relevantly to this case, that, notwithstanding Part XV of the Act -

"(a) all applications for postal ballot papers shall be made to the Registrar-General;

(b) applications for postal ballot papers by members of a disciplined force may be made to the Registrar-General through their commanding officers;

(c) applications for postal ballot papers shall be delivered so as to reach the Registrar-General not later than such date as the Registrar-General may specify by notice in the *Gazette*, either in relation to applications generally or any class thereof;

(d) the Registrar-General shall exercise all the functions of a constituency registrar in terms of the Act and any regulations made thereunder in respect of -

McNALLY JA

(i) applications for postal ballot papers delivered to him in terms of this section; and

(ii) the issue of postal ballot papers to applicants."

I do not think modifications 3 and 4 are relevant, but modification 5 then reads:

" 5. Save as modified by this section, Part XV of the Act, in particular the provisions thereof relating to the completion of postal ballot papers, the posting or delivery of completed postal ballot papers to constituency registrars and the custody of postal ballot papers, shall apply, *mutatis mutandis*, in respect of voting by post in the elections."

It is significant to note that, as late as 7 June, less than three weeks before the election, the Registrar-General, who must have played a major part in drafting the statutory instrument, was satisfied that, with these modifications, his office could comply with the provisions of Part XV of the Act.

I do not propose to set out the whole of Part XV of the Act as modified. I will summarise it.

Section 61 deals with who may apply for postal ballot papers. The categories of such person were limited by SI 161B of 2000, as we have seen. For the purposes of this case the relevant provisions are that:

(1) an application for a postal ballot paper must be signed by the applicant in the presence of a competent witness (s 61(3)(b));

(2) a competent witness must, before witnessing the signature of an applicant: (a) satisfy himself as to the identity of the applicant; (b) see the applicant sign in his own handwriting; and (c) know that the statements in the application are true.

Section 62 deals with the issue of postal ballot papers. It is central to the appeal before us, more particularly subs (1) which reads:

"If the constituency registrar (now read 'Registrar-General' in terms of the modification) is satisfied, in regard to an application received by him not later than noon on the day before the polling day or first polling day, as the case

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may be, fixed in relation to the constituency, that -

(a) it has been properly completed and signed by the applicant and is properly witnessed; and

(b) the name of the applicant is on the voters roll for the constituency and the application is otherwise in order;

he shall issue to him a postal ballot paper in the manner provided in this section."

Section 63 is entitled "Refusal of application for postal ballot paper". It reads:

"If the constituency registrar (now Registrar-General) is not satisfied in accordance with subsection (1) of section *sixty two* in regard to an application received by him, he shall send the applicant notice that he is not so satisfied and that the applicant must attend personally at a polling station to record his vote."

McNALLY JA

Note the word "shall".

Section 64 is not relevant.

Section 65 deals with the procedure for voting by post. Its significance lies in the following words in subs (1):

"The following directions for voting by post shall be substantially observed by every person ..."

The words "substantially observed" do not appear in any of the previous sections dealing with applications for a postal ballot paper.

The remaining sections in Part XV are not relevant.

B. WHAT ACTUALLY HAPPENED

The evidence on this aspect of the case was given essentially by the Acting Deputy Registrar, Mr Batani. I should say that the learned judge *a quo* was most impressed with his competence and honesty. His evidence has not been transcribed, but the parties are agreed that he said what the learned judge quoted him as saying in his judgment HH-133-2000. This is what he said:

"... he conceded as I have said that there has been non-compliance with s 62(1) of the Act in that postal ballots were handed to Lt Col Maguvisi without a duly completed application form having been received - but only in respect of the DRC personnel and Embassy staff. He said that due to administrative delays in the office of the Registrar-General and difficulties related to the war in the Congo army personnel had advised that there would be logistical difficulties in sending application forms to the DRC for completion and then making further trips to return the forms to the Registrar-General and finally returning the ballot papers. His office decided, because of the constraints of time they found themselves under, to request the army to compile a list of all army personnel in the DRC wishing to vote and to send ballot papers together with uncompleted application forms, on the understanding that the forms would be processed upon their return by the various Constituency Registrars. He explained that the request for ballot papers was initiated by the commanding officers in the DRC. He produced telex transmissions which showed lists of members in the DRC with their identity particulars provided by the commanders of the various units. In due course, a detailed list was received of the DRC personnel. An exercise was carried out to ascertain the constituencies where these soldiers were registered. He said about half the number on the list were registered and they numbered approximately 6 000. The list received was accompanied by an application form and Lt Col Maguvisi was required to ensure that the names of the applicants were recorded on the form and that

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the forms were stamped with an official army stamp. This requirement distinguished these forms for record purposes from other divisions of the disciplined forces.

He accepted that, apart from the names of the applicants being recorded and the official stamp on the forms, they were otherwise incomplete. In respect of those soldiers who appeared on a constituency register, they adopted the procedure prescribed in s 62(4) but included an uncompleted and unsigned application for a ballot paper which only recorded the name of the applicant."

McNALLY JA

The learned judge then, after dealing with issues no longer in controversy, went on to quote Mr Batani as follows:

"He said postal registers had been compiled and they showed the number of postal ballots issued in respect of each constituency. He produced a postal register for the Chivhu constituency. It had been decided, he said, that upon receipt by the constituency registrar of the ballot papers the anomaly of issuing of a ballot paper without a duly completed application form in non-compliance with s 62(1) would be addressed. He had instructed all constituency registrars not to count ballot papers in respect of voters whose application forms did not comply with the requirements of s 62(1). He produced a copy of that circular which was issued before the present proceedings were instituted.

Batani said that, save for the non-compliance he conceded to, the prescribed procedures had been complied with in all other respects in regard to all postal votes. In regard to the other complaints raised, namely, that some application forms had been witnessed and/or did not bear the title of the competent witness, he stated that in the absence of specific details he could only surmise that these related to postal ballots within Zimbabwe. He said the allegations were too vague to enable a detailed response. In this regard, his unchallenged evidence was that at all times all interested parties and agents had been allowed free access to the conduct of the postal voting procedures and advised by way of published leaflets as to the proper procedures to raise objections regarding alleged irregularities. More particularly, he said that the applicant's agent was aware that he ought to have noted the objections he now raises in the space provided in the postal register. He said that if this had been done he would have been able to respond to the general allegations now made."

The learned judge then commented:

"I have to say that if Mudzuri, applicant's agent, had made a notation on the postal register that specific application forms in respect of DRC personnel or for that matter any other postal voters were being dispatched with ballot papers in cases where the application forms had already been witnessed - the applicant's case would have assumed a wholly different complexion."

It is quite clear from all this, and not disputed, that the military commanders simply compiled lists of military personnel in the Congo. None of them were asked, at this stage, whether they wanted to vote, or even whether they were registered voters. In respect of each one, a postal ballot application form was completed (by someone other than the "applicant") to the extent that his/her name was entered on the form, together with his registration certificate number. Some may have had a witness's signature, and if so, such a "pre-witnessing" was obviously invalid. The application forms, together with the postal ballot papers, were first submitted to the Registrar-General and then sent back to the military authorities after the names of those who were not registered voters were weeded out. This would explain why only about half (6 000) of the "applicants" were sent postal ballot papers.

C. WAS THIS SUBSTANTIAL COMPLIANCE?

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The concept of "substantial compliance" has been considered in our courts

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on a number of occasions. But before referring to the cases it is necessary to note that s 149 of the Act reads as follows:

" 149. *When non-compliance with this Act invalidates election.*

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."

The point is, as the learned judge observed, that we are not here concerned with an attempt to set aside an election. There are such cases, one understands, before the High Court. Section 149 will be relevant in those cases. It is not relevant in this case.

In *Swift Transport Services (Pvt) Ltd* v *Pittman NO & Ors* 1975 (2) RLR 226 (G) at 228 *et seq*, Goldin J (as he then was) was already moving away from the idea that if a provision was "peremptory" then strict compliance with its provisions was inevitably necessary, whereas if it was merely "directory" then substantial compliance, coupled with a lack of prejudice, was adequate.

In *Macara* v *Minister of Information Immigration & Tourism & Anor* 1977 (1) RLR 67 (G), the same learned judge took the view that there had not been substantial compliance where a person facing deportation had been given oral notice of the grounds for his detention when the statute required such notice to be in writing.

In *Ndlovu* Ex p 1981 ZLR 216 (G), Gubbay J (as he then was) was dealing with a case where less than the statutory period of notice had been given of an application for the rehabilitation of an insolvent. It was clear that neither creditors nor the Master were prejudiced and the matter was treated as a formal defect which should be condoned. At 217F, the learned judge said:

"The test of whether a defect such as this is formal or substantive is not whether the statutory provision is directory or peremptory, but rather whether it aims at some definite object and whether, having regard to the particular facts, non-compliance therewith will result in the defeat of that object."

(His Lordship then referred to several cases and noted that in the last of them the view was expressed) "that this type of defect cannot be said to be formal if it might cause prejudice to the creditors. That, to my mind, puts the same test in a simpler form".

To the same effect, see *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S) at 301B; *ZUM* v *Mudede NO & Anor* 1989 (3) ZLR 62 (S) at 79-81; *Vrystaat Estates (Pvt) Ltd* v *President, Administrative Court & Ors*

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1991 (1) ZLR 323 (S) at 327F; *Kutama* v *Town Clerk, Municipality of Kwekwe* 1993 (2) ZLR 137 (S) at 144D; and *Forum Party of Zimbabwe & Ors* v *Minister of Local Government & Ors* 1996 (1) ZLR 461 (H) at 493 *et seq*.

Looked at against the background of these criteria, it seems to me that:

1. The Electoral Act lays down very strict and detailed criteria concerning the application for and the issue of postal ballot papers - ss 61 and 62.

2. The penalty for non-compliance with these formalities is clearly provided in s 63. If the Registrar-General is not satisfied in accordance with s 62(1) "*He shall send the applicant notice that he is not so satisfied ...*" (my emphasis).

3. This contrasts sharply with the provisions of s 65 where mere substantial compliance is explicitly stated to be acceptable in connection with the returning of the completed postal vote.

4. The Acting Deputy Registrar-General concedes, and quite correctly so, that there was non-compliance with the provisions of ss 61, 62 and 63. The applications were not signed and witnessed as required by s 61(3)(b) and s 62(1). Indeed, they were not applications at all, since they were not initiated by the "applicants". The Registrar-General's clear duty in terms of s 63 was to refuse the "applications". He had no discretion in the matter.

5. Had it been the intention to give the Registrar-General power to act in the way he did, why was such power not given in SI 161B published as recently as 7 June 2000? Yet that statutory instrument specifically recorded that in matters not provided for in it, "Part XV of the Act ... shall apply". (The words "*mutatis mutandis*" which follow do not seem to me to be a licence to drive a horse and carriage through the Act where convenient to do so).

6. Far from there being substantial compliance with the Act, there seems to have been a deliberate decision not to comply with s 63. The section was in fact contravened.

The conclusion to which I come, in line with the decisions to which I have referred, is this:

1. The non-compliance with which we are concerned is not a mere formal defect but a substantive one. See *Ndlovu supra*. Section 63 of the Act clearly required the Registrar-General to refuse the "applications" and he did not do so.

2. If one looks at the intention of the legislator (see the *Sterling Products* case *supra*), then it is clear that the intention is to allow postal votes only to those who apply in accordance with the provisions

of the Act as modified. These potential voters did not apply in that way.

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D. WAS THERE ANY PREJUDICE?

The respondents argue that there was no prejudice to anyone in allowing these voters to vote. They rely on the *dicta* in *Ndlovu supra*, to the effect that if there is no possible prejudice to interested parties then a defect may be condoned.

I am not convinced that in these particular circumstances the prejudice test is an appropriate one. But in any event what the cases say, including *Ndlovu supra*, is that if there is no prejudice to any interested party, a *formal* procedural defect may be overlooked or condoned.

In the present case, a whole part of the Act, Part XV, is devoted to defining who may qualify for a postal vote, and how such persons shall apply. The modification in SI 161B of 2000 in fact denies that right to persons who would otherwise be entitled to it, e.g. students at universities abroad.

For the limited categories of persons who remain, procedures are laid down. Primarily, they are required to apply. These people did not apply. They were sent their postal ballot papers without their applying. To call that "a mere formal defect" seems to me to make a mockery of the procedure. It is, as I have said earlier, a substantive not a formal defect, a deliberate contravention of the requirements of s 63. Accordingly, the question of prejudice does not arise.

I would add that I have some reservations about the effectiveness of the system adopted in avoiding voting fraud, but I will not rely on those doubts because they were not canvassed before the learned judge. They are strengthened by the anecdotal evidence of the newspaper report on the postal votes in the Mutare Central constituency.

E. WAS A CONCESSION MADE, AND IF SO WHAT WAS ITS EFFECT?

The learned judge noted that Mr Sayce, in the course of his submissions for the appellants, had conceded that "if the Constituency Registrar, upon receipt of the ballot papers from the Congo, first satisfied himself in accordance with the instructions issued by the Registrar-General that the application forms complied with the provisions of s 62(1) before accepting the ballot, then no prejudice is occasioned, even though the ballot papers would in the initial instance have been issued in non-compliance

McNALLY JA

with s 62(1)". The concession, said the learned judge, "was fatal to his cause".

Mr Sayce, in a subsequent letter to the judge, respectfully disputed this interpretation of his concession. He said:

> "... it was my intention to concede that insofar as application forms for postal votes from the DRC were found, on examination by constituency registrars to be regular on the face thereof, then I could not argue that the applicant for a postal vote concerned had shown no desire to vote, and, accordingly, I would not submit that the applicants in the case before the court had shown prejudice in that respect."

Whichever version is correct, I have already noted that I do not consider the question of prejudice to be relevant, because the non-compliance was substantive, not merely formal. The

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only real prejudice is to the system. The simple fact is that any registered voter may vote by "attending personally at a polling station" (s 63). The privilege of a postal vote is granted to limited categories of absentee voters. Not all absentee voters may avail themselves of that privilege. As I mentioned earlier, students at universities abroad had that facility denied to them by the provisions of SI 161B of 2000. Military personnel in the DRC were granted the privilege, provided they made application in the manner prescribed. They did not do so. They did not bring themselves within the terms of the privilege. It is not a question of prejudice.

F. THE RELEVANCE OF VARIOUS GENERAL COMPLAINTS OF IRREGULARITY

This point arises as follows. Those who first detected the irregularity observed that some of the application forms they saw being processed had a witness's signature, even though they had not been signed by the applicant. In some cases, the witness's "title under which he acts as a competent witness" was not added, as required by s 61(5). Mr Batani disposed of these complaints by saying he could not deal with such complaints without being told the name of the would-be voter concerned. "He could only surmise that these related to postal ballots within Zimbabwe."

I do not think it necessary to deal with these matters. They merely gild the lily. The essential fact is that the "applications" were glaringly faulty by reason of the fact that they were not signed by the "applicants", who may well not have been aware that they were "applicants". The Act (s 63) required that their "applications" should have been refused. That is the end of the matter.

In my view, the application by the appellants should not have been refused. The appeal succeeds with costs, and I would substitute for the order of the court below the declaration foreshadowed earlier namely:

McNALLY JA

> "It is hereby declared that the postal ballot papers in the Parliamentary Election held on 24 and 25 June 2000, which were issued to military personnel serving in the Democratic Republic of Congo, were invalidly issued. In consequence, it is further declared that all votes cast on such postal ballot papers are void and invalid."

The appellants' costs in the court *a quo* are to be borne by the first respondent.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

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MERCHANT BANK OF CENTRAL AFRICA LTD & ORS v LIQUIDATORS, TIRZAH (PVT) LTD & ORS 2000 (2) ZLR 163 (HC)

Citation	2000 (2) ZLR 163 (HC)
Case No	Judgment No. HH-180-00
Court	High Court, Harare
Judge	Blackie J
Heard	August 30, 2000
Judgment	August 30, 2000
Counsel	A P de Bourbon SC, for the applicants C W Jordaan SC, with him E W W Morris, for the respondents
Annotations	None

Civil application

Flynote

Contract - cession - validity - cession splitting debt among several cessionaries - when valid - challenge to validity of cession - who may raise question of validity - interpretation of contract - whether a pledge or security

Headnote

The applicant financial institutions were the cessionaries in three notarial deeds of cession executed by four companies now in liquidation. The respondents were liquidators of those companies. The companies were part of a group of eight companies, Tirzah being the principal company. All the shares in all the companies were held by one man and his family. The applicants agreed to provide banking facilities for the companies. The money was paid to Tirzah. As security for the money advanced, three notarial deeds of cession were executed. One was in favour of the first applicant, one in favour of the second, and the third in favour of all three applicants. The cessions were all in respect of the same sums of money.

After the cessions had been executed, the companies were placed in liquidation. The liquidators collected the debts covered by the cessions from the companies' debtors. The applicants called on the liquidators to pay the money to them. The liquidators refused to do so, on the grounds that the cessions were invalid. The grounds on which they claimed that the cessions were invalid were that the debts owed to the companies had, without the consent of the companies, been split among the various cessionaries; the first two cessions were void because they exceeded the authority given to the companies to effect the cessions and in any event were contradictory and vague; and the cessions were unenforceable because they were given by virtue of the provision of banking facilities, which were given to Tirzah alone. The applicants argued that even if the cessions did offend against the principle of splitting, it was only the

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debtor who could take that point against the cessionary. Even if the debtors had not consented to the cessions, they were not prejudiced.

Held, that a debtor's position should not, by a cession of his debt, be burdened beyond his obligation to pay his debt, unless he has consented to that cession. A cession which cedes part of a debt or which splits the debt among several cessionaries offends against this principle, in that it burdens or prejudices the debtor by exposing him to the possibility of multiple actions and increased costs. Whether a cession effects a splitting or division of the cedent's claim against the debtor or introduces joint cessionaries depends on the intention of the parties as determined by the wording of the cession documents read in the light of the admissible background and the circumstances surrounding its execution. A composite cession, however, is recognised and permitted in law. This will be the case where the

cessionaries, although being separate entities and having separate claims against the cedent with separate and individual rights of action, under the cession they constitute one composite entity.

Held, further, that although the first two cessions did amount to a splitting of debts between cessionaries, under the third cession, the three applicants constituted one composite entity and not three separate entities and could only enforce the cession jointly.

Held, further, that the right to dispute the validity of a cession can be raised by the cedent and by a surety as well as by the debtor. Accepting that a cedent may, in principle, raise against the cessionary the point of prejudice to the debtor, the prejudice to be considered is the actual prejudice at the time of the attempted enforcement of the cession.

Held, further, that if an agreement is couched in such wide terms that it is not clear that the parties intended a pledge or an out and out security, the agreement should be regarded as void for vagueness. In this case, it was clear that the companies intended to effect a cession of pledge only, the transaction as a whole showing, by inference, that this was the parties' intention to cede a pledge of book debts.

Held, further, in regard to the enforceability of the cessions against the companies, that the deeds of cessions provided that the liability of the cedents was to be joint and several, irrespective of which company received the banking facilities.

Held, therefore, that the deeds of cession were valid and enforceable.

Cases Considered

Cases cited:

Alexander & Anor NNO v *Standard Merchant Bank Ltd* 1978 (4) SA 730 (W)

Anglo-African Shipping Co (Rhod) (Pvt) Ltd v *Baddeley & Anor* 1977 (1) RLR 259 (G); 1977 (3) SA 236 (R)

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Barnhoorn NO v *Duvenage* 1964 (2) SA 486 (A)

BHT Water Treatment (Pty) Ltd v *Leslie & Anor* 1993 (1) SA 47 (W)

Cullinan v *Noord-Kaaplandse Aartappelkernmoerkwekers Ko-operasie Bpk* 1972 (1) SA 761 (A)

Dwyer v *Goldseller* 1906 TS 126

Evins v *Shield Ins Co Ltd* 1980 (2) SA 814 (A)

Field NO v *Standard Bank Ltd* 1979 RLR 345 (G); 1979 (4) SA 452 (R)

Gerber v *Wolson* 1955 (1) SA 158 (A)

Glaum NO v *The Master* 1980 (2) SA 600 (C)

Kotsopoulos v *Bilardi* 1970 (2) SA 391 (C)

Lief NO v *Dettmann* 1964 (2) SA 252 (A)

Mountain Lodge Hotel (1979) (Pvt) Ltd v *McLoughlin* 1983 (2) ZLR 238 (S); 1984 (2) SA 567 (ZS)

Segal & Anor v *Segal & Ors* 1977 (3) SA 247 (C)

Twiggs v *Millman NO* 1994 (1) SA 458 (C)

Case Information

A P de Bourbon SC, for the applicants

C W Jordaan SC, with him *E W W Morris*, for the respondents

Judgment

Blackie J: The applicants are the cessionaries in three notarial deeds of cession executed by four companies now in liquidation. The respondents are the liquidators of the companies in liquidation. I will refer to the applicants individually as the Merchant Bank, Syfrets and Zimbank and jointly as the applicants. The respondents will be referred to as the liquidators. The

companies will be referred to jointly as the companies, and individually as Tirzah, Belmont, G & D and PB Shoes.

The background to the cessions and their composition and to this application is as follows.

The companies were part of a group of eight companies, of which Tirzah was the principal company and in which one man and his family owned the entire shareholdings of all the companies. The applicants agreed to provide banking facilities for the companies. The money was paid to Tirzah. As security for money advanced by the applicants, the three notarial deeds

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of cession were executed.

The first cession was executed in October 1993 by Tirzah, Belmont and G & D in favour of the Merchant Bank. It was for $5 million with a further contingency sum of $1.25 million. The second cession was executed on the same day and by the same cedents in favour of Syfrets. It was for $10 million with a further contingency sum of $2.5 million. Both these cessions ceded "all the cedents' right, title and interest in and to pledge all and any debts of whatever nature now or which may hereafter be or become due to them and all and any rights of action in their favour in respect of all such debts". They were stated to rank *pari passu* with each other.

The third cession was executed in August 1995 by Tirzah, Belmont, G & D and PB Shoes in favour of the Merchant Bank, Syfrets and Zimbank. It was for $70 million, with a further contingency sum of $17.5 million. It ceded, in the same words as the first two cessions, "all book debts of whatsoever nature". In that cession, the $70 million was the aggregate of the separate claims of each of the applicants. The $70 million is referred to in the cession as "the capital sum". The capital sum is stated as being "apportioned *pro rata* to the amounts which may now or hereafter be or become due and owing by the cedents to the Banks (the applicants) by virtue of the provision of the said facility".

After the cessions had been executed, the companies were placed in liquidation. The liquidators collected the debts covered by the cessions from the companies' debtors. They banked that money. The applicants called on the liquidators to pay to them the money that they had recovered and banked in respect of the cessions. The liquidators refused to pay that money. In this application, the applicants seek a declaratory order that the cessions granted to them by the companies are valid and enforceable, together with a direction that the liquidators forthwith pay to them the money paid in terms of the cessions. In the course of the hearing of the matter, the applicants withdrew their claim to the immediate payment to them of the money held by the liquidators. This judgment is, therefore, solely concerned with the validity and enforceability of the applicants' cessions.

BLACKIE J

The liquidators oppose the application. They do so for three reasons. They say that the three cessions are invalid, that the three written contracts recording the cessions are void and that, in any event, the cessions are not enforceable. The cessions are invalid, they say, because the debts owed to the companies have, without the consent of the debtors, been split among various cessionaries. The contracts used to effect the cessions are void, in that the 1993 cessions exceed the authority given by the companies to effect the cessions and the cessions are, in any event, so contradictory and vague in nature as to render them void. Finally, that the cessions are unenforceable because the companies agreed to give the cessions "by virtue of the provision of ... banking facilities" to be supplied by the applicants. However, the banking facilities were provided to Tirzah alone. No other company received any banking facilities from the applicants. Tirzah was not a trading company and had no debts to cede.

In the course of the hearing, the liquidators raised an objection to the right of Syfrets and

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Zimbank to pursue this application.

Prior to this application, Syfrets and Zimbank ceded their rights in terms of the 1993 and 1995 cessions to a company which, for convenience, will be referred to as Climax. For the purposes of this application, Climax receded the cessions to Syfrets and Zimbank. The liquidators make two points. The cession by Syfrets and Zimbank to Climax included securities. The recession by Climax to Syfrets did not include such securities. A cessionary cannot cede his rights to a third party without the consent of the cedent. The cessions by Syfrets and Zimbank did not need that consent because of an express provision to that effect in the 1993 and 1995 cessions. However, the re-cession by Climax to Syfrets contained no such provision and the consent of the cedents was not obtained. The rights attaching to the 1993 and 1995 cessions in the names of Syfrets and Zimbank, therefore, remain with Climax, which is not a party to this litigation.

I will deal now with the merits of the application.

It is a principle of our law that a debtor's position should not, by a cession of his debt, be burdened beyond his obligation to pay his debt, unless he has consented to that cession: Scott *The Law of Cession* 2 ed p 192.

A cession which cedes part of a debt or which splits the debt among several cessionaries offends against this principle, in that it burdens or prejudices the debtor by exposing him to the possibility of multiple actions and increased costs: *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd* v *Baddeley & Anor* 1977 (3) SA 236 (R); 1977 (1) RLR 259 (G) at 265B-E; *Mountain Lodge Hotel (1979) (Pvt) Ltd* v *McLoughlin* 1983 (2) ZLR 238 (S) at 246C; *Lief NO* v *Dettmann* 1964 (2) SA 252 (A); *Kotsopoulos* v *Bilardi* 1970 (2) SA 391 (C).

Whether a cession effects a splitting or division of the cedent's claim

BLACKIE J

against the debtor or introduces joint cessionaries depends on the intention of the parties, as determined by the wording of the cession documents, read in the light of the admissible background and the circumstances surrounding its execution: *Segal & Anor* v *Segal & Ors* 1977 (3) SA 247 (C) at 252G-H.

The applicants do not dispute the principle of law that a debtor is not to be burdened by a cession effected by a creditor unless he consents to that burden. However, they deny that the cessions, and, in particular, the 1995 cession, offend against the principle. They submit that it was not the intention of the parties to the cessions to effect a splitting of the debts owed to the companies and that neither the wording of the cessions nor the surrounding circumstances of them reflect such an intention.

The liquidators rely on what they say is the clear wording and effect of all three cessions. The 1993 cessions, they submit, simultaneously ceded the same debts in two separate documents to two separate cessionaries, who are to rank *pari passu* with each other. In the 1995 cession, the same debts, which had already been ceded in the 1993 cessions to Merchant Bank and Syfrets, are now ceded to the Merchant Bank, Syfrets and Zimbank, each of whom have

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separate claims against the cedents and each of whom are to share in the capital *pro rata*. Further, the 1995 cession, by the introduction of the *pro rata* apportionment among the cessionaries, has placed a further prejudicial burden on the debtors because, in addition to the normal prejudice of exposure to multiple actions created by a division of a debt among several cessionaries, the debtor now does not know to whom and in what amount he is to make his payment.

The respondents' submissions are correct in regard to the 1993 cessions for the reasons advanced by the respondents. The first two cessions do amount to a splitting of debts between cessionaries. However, that is not the position with the 1995 cession. That cession, the applicants submit, was intended to be, is expressed as and is a composite cession, which is recognised and permitted in law: *Mountain Lodge Hotel supra* at 246C; *Kotsopoulos* v *Bilardi supra* at 397; *Barnhoorn NO* v *Duvenage* 1964 (2) SA 486 (A); *Segal & Anor* v *Segal & Ors supra* at 252; *BHT Water Treatment (Pty) Ltd* v *Leslie & Anor* 1993 (1) SA 47 (W) at 50-5.

They say so because, they say, the cession makes it clear that although the applicants, apart from the cession, were three separate entities and each had separate claims against the companies with separate and individual rights of action, under the cession they constituted one composite entity and not three separate cessionaries.

That submission seems to me to be correct. In terms of the 1995 cession, the applicants granted banking facilities to the companies, which totalled $70 million. The money loaned is consolidated and referred to as the capital

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sum. The deed of cession refers to the applicants jointly as "the Banks". Most importantly, only the Banks, as a single entity, and not the individual components of it, could enforce the rights of cessionary against the companies. It is the Banks, as a joint entity, that are given authority to institute proceedings to recover any amount due under a debt ceded (clauses 4 and 9) and it is the Banks, as a joint entity, that are given authority to inspect the cedents' books of account in relation to ceded debts (clause 6.2). There is no suggestion anywhere in the deed that either the Merchant Bank or Syfrets or Zimbank, as individual banks, could invoke or use those powers. In addition, there is no requirement on the debtors to make separate payments to the individual applicants. They can make one payment. How that payment is divided up between the cessionaries is for the cessionaries to determine. In this context, the statement in the deed of cession concerning *pro rata* distribution is no more than notice to the debtor as to how payments will be divided up between the cessionaries.

Even if the 1993 cessions do effect a splitting of the debts and I am wrong in believing that the 1995 cession is a permissible composite cession, that is not the end of the matter. The applicants raise three other points in support of the enforceability of the cessions.

They submit, firstly, that, even if the cessions do offend against the principle of splitting, then it is only the debtor who may take that point against the cessionary. This not an action for the enforcement against the debtor, but an action to enforce the cession against the cedent who

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has been paid the money by the debtor. Thus, neither a cedent, nor the liquidator of that cedent, who has been paid the ceded debt by the debtor, has any right to raise the question of prejudice to the debtor. Further, that even if the cessions have prejudicially burdened the debtors, those debtors, by paying their debts to the liquidators of the cedent, have consented to, or are to be taken as having consented to, the cessions. Finally, even if the debtors are not to be taken as having consented to the cessions, then the prejudice to be taken into account is not the potential prejudice created by the signing of the cession but the actual prejudice to the debtor at the time of the attempted enforcement of the cession. In this case, they say, that there has been no attempted enforcement against the debtors by the cessionary and no prejudice to the debtors because there has been no multiple claims against them and no increased costs.

The liquidators dispute the applicants' claims. They say they have a right to raise the invalidity of the cessions; that the consent of the debtor to the prejudicial burden must be obtained prior to or at the signing of the cession; and that the prejudice to be taken into account is the potential prejudice at the time of the signing of the agreement.

The liquidators support their right to dispute the validity of a cession with

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references to the *Mountain Lodge Hotel* case *supra* at 246, the *Lieł* case *supra* at 246 and the *Anglo-African Shipping* case *supra* at 259. The liquidators' submission appears to be correct. The matter can be raised by the cedent and by a surety as well as by the debtor.

However, even accepting that a cedent may, in principle, raise against the cessionary the point of prejudice to the debtor, the questions remain as to whether the debtors have consented to the cession and what is the relevant prejudice to be considered - potential prejudice at the time of signing or actual prejudice at the time of attempted enforcement.

In respect of those two questions, it is important to bear in mind the rationale behind the principle and the rules which follow from it. As set out in the *Segal* and *Katsopolous* cases *supra*, that rationale is based on convenience and equity and the need to spare the debtor from the risk of multiple actions against him: *Twiggs* v *Millman NO* 1994 (1) SA 458 (C).

The debtors concerned in this case have not raised the question of prejudice to them. They have paid the liquidators what was owed by them to the companies. Their liability is discharged. There is no apparent prejudice to them. There have been no multiple actions and no extra costs against them. Further, this action for enforcement is not against the debtors of the cedent. It is against the liquidators of the cedent. The liquidators have not suggested that there might any prejudice be to the debtors. The additional prejudice alleged by the liquidators in respect of the 1995 cession is, in the light of the earlier finding in this judgment that that cession was a composite cession, illusionary.

However, the liquidators submit that it is the potential exposure of the debtor to prejudice at the time of the granting of the cession that is the relevant factor. In making that submission they rely upon the following cases: *Anglo-African Shipping supra*; *Cullinan* v *Noord-Kaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 (1) SA 761 (A) at 771; *Evins* v *Shield*

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Insurance Co Ltd 1980 (2) SA 814 (A) 827B-C.

In respect of the *Anglo-African Shipping* case, the liquidators, in their heads of argument, do not give page or passage reference to support their submission. The learned judge in that case was not directly concerned with the point in issue here and the judgment is not entirely clear on the point. However, in the passage between 263F-265C of the judgment, there are passages which seem to be saying the opposite to that which is contended by the liquidators.

The other passages on which the liquidators rely for their submission are as follows:

> "The basis for the rule that portion of a debt cannot be split without the consent of the debtor is accordingly that the position of the debtor could be burdened because he could be faced with a multiplicity of actions"

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Cullinan's case *supra* at 771F (English translation provided by the liquidators' senior counsel);

> "The reason is the possibility that it may render the debtor's position more burdensome by causing him prejudice, hardship or inconvenience":

Evins's case *supra* at 827C.

In respect of those cases, the liquidators seem to me to be seeking to draw too fine a conclusion from the very general wording used by the learned judges in those cases. Those quotations seem to me, with respect, to be expressing a general proposition concerning the effect of the rule rather than laying down a precise rule concerning the nature of the relevant prejudice.

On balance, it seems that the relevant prejudice should be the actual prejudice at the time of the attempted enforcement of the cession. This is so principally because, for reasons given in the next paragraph of this judgement, such a cession is unenforceable rather than invalid.

Without doubt, some of the cases use the word "invalid". Others use the words interchangeably or in conjunction with each other. However, two factors point to such a cession being unenforceable rather than invalid. These are that the debtor can consent to such a cession and that such a cession is valid as between cessionary and cedent. See Goldin J in the *Anglo-African Shipping* case *supra* at 265B-E (in the RLR report).

The applicants submit that, even if the cessions do offend against the principle, the debtors, having paid their debts to the cedent without protest, have between themselves and the cessionary, consented to the enforcement of the cessions or have waived their rights to object to their enforcement. Further, that the debtor having so consented, it is not open to the cedent now to raise any objection to the cessions. Both points seem to me to be correct.

The liquidators' second principal point of objection concerns the validity of the deeds themselves.

A cession *securitatem debiti* can be effected in two ways: either as a pledge of personal rights or as an out and out cession with a *pactum fiduciae*: *Alexander & Anor NNO* v *Standard*

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Merchant Bank Ltd 1978 (4) SA 730 (W).

The important difference between the two types of cession is that, in the case of pledge, ownership of the item pledged remains with the cedent. In an out and out cession, ownership passes to the cessionary.

The 1993 and the 1995 resolutions of the companies authorising the cessions, authorised a cession by pledge of the companies' book debts. The preamble to the deeds correctly reflects that authorisation: "... the cedents have agreed to cede to the Bank by way of pledge ... all their book debts". However, subsequent wording of all the cessions shows that the appearer declared to cede "all (the companies') right, title and interest in and to

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pledge" and in the 1993 cessions ceded "all and every debt of whatsoever nature".

The liquidators point out that the general wording declaring the cessions does not make it clear whether the cessions are out and out cessions or cessions of a pledge and that, in any event, the 1993 cessions cede all the companies' debts and not their book debts. The term "book debts", they say, is narrower than "all and every debt of whatsoever nature" and not all debts are book debts: *Field NO* v *Standard Bank Ltd* 1979 RLR 345 (G) at 349D; 1979 (4) SA 452 (R) at 455G-H; *Glaum NO* v *The Master* 1980 (2) SA 600 (C) at 607A-H.

Thus, the general wording of the cessions is too vague for it to be certain what is the nature of the cession and, in any event, the 1993 cessions exceed the authority given to the appearer to execute those cessions. Both errors render the cessions void.

I accept that "(if) an agreement is couched in such wide terms that it is not clear that the parties intended a pledge or out and out security, the agreement should be regarded as void for vagueness": Scott *The Law of Pledge* 2 ed p 252.

However, the following passage from the same learned author on the same page is of assistance in determining both points raised by the liquidators:

> "It is not always easy to determine the intention of the parties. This is particularly so where the following words are encountered in a deed of cession: 'I hereby cede, transfer, assign and pledge as continuing covering security all my right title and interest in'. In such an instance, it is not possible to determine the intention of the parties from the cession itself and the transaction as a whole should therefore, be scrutinised. The words 'as security' indicate that the parties intend to effect a cession in *securitatem debiti* and not an ordinary cession, but from the rest of the words it is not clear whether they intended the cession to be in the nature of a pledge or an out and out security cession ... If the parties intended to effect an out and out cession, there are certain modifications which they will have to bring into effect by agreement. These are a *pactum fiduciae*, an agreement against further cession, and an agreement that the cessionary himself will not institute action before the cedent's debt is due. If the parties use the words cede and pledge, but the above agreements are not included in their transaction, I think the inference may be drawn that they intended to create a pledge."

In this case, it is clear that the companies intended to effect a cession of pledge only. The transaction as a whole shows, by inference, this to be the intention of the parties. The preambles to the deeds state this to be the intention. The deeds do not contain a *pactum*

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fiduciae - an agreement that the cessionary will not institute action before the cedent's debt is due. The deeds are therefore not void for vagueness. What was intended and what may be inferred as having been effected is a cession of a pledge.

The rule, which enables one to find the parties' true intention from vague wording in a cession, can also be used to find that intention from contradictory

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wording in that cession. The statement by the declarer to the 1993 cessions that he was ceding all the companies' debts is contrary to his authorisation. It is also contrary to the expressed intention set out in the preamble. I do not think that that contradiction renders the cession void. The true intention of the parties can be gleaned from the surrounding circumstances. The resolutions of authorisation, the preambles to the deeds and the remainder of the deeds clearly indicate an intention to cede a pledge of book debts. What has occurred in the declaration of cession is an error by the draftsman of the cession and the declarer to it. Whatever might be the position in respect of an affected third party, as between the parties to the cession, the claim of the cessionary is restricted to that of a pledge of book debts.

The final principal objection raised by the liquidators concerns the enforceability of the cessions against the companies. They submit that the cessions to the applicants were granted as security for the repayment of any indebtedness, which will arise from the "granting of banking facilities by (the applicants)". They say that the facilities, which the applicants provided in return for the cessions, were provided to Tirzah alone and not to the other cedents. In so far as the applicants seek to rely on deeds of suretyship executed by these companies for the indebtedness of Tirzah, the applicants' claims against them arise from the suretyship and not from the facilities granted to the companies. The book debts collected by the liquidators come from the other companies in the group and do not arise from the "facilities" extended by the applicants. Moreover, Tirzah was not an operating or trading company. It had no book debts, which it was capable of ceding. In the result, the applicants are not able to enforce the cessions against any of the companies.

The liquidators' argument overlooks the fact that each of the deeds of cession specifically provides that the liability of cedents was to be joint and several. In addition, and in any event, a right to contribution among cedents is well established in law: *Dwyer* v *Goldseller* 1906 TS 126 at 129; *Gerber* v *Wolson* 1955 (1) SA 158 (A) at 184; Christie *Law of Contract in South Africa* 3 ed at 282-284.

The applicants were therefore entitled to claim, from any one or more of the cedents, the sums which were secured under the cessions.

The final point to be considered concerns the cessions by Syfrets and Zimbank to Climax and their effect on these proceedings. It does not prevent the application being heard because the Merchant Bank is not affected by it and the Merchant Bank is involved in two out of the three cessions to be considered. It does not affect the principle of this application as to whether or not the cessions are valid and enforceable. It is concerned with who is able to enforce the cessions

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if they are valid and enforceable. There has been no

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increase in costs, in that the application is a joint application and the three cessions are so inextricably intertwined one with the other that a determination on one requires an examination and determination of them all. However, for the purposes of this judgment, my finding is restricted solely to the validity and enforceability of the 1993 and 1995 cessions and does not deal with the question of who may enforce them.

Both sides ask for an order of costs if the decision of the court is in their favour. However, the liquidators ask for a special order for costs in their favour if the applicants are successful in this application. They do so for a number of reasons. Firstly, they say that the applicants' replying affidavit was filed out of time and, in any event, was improper and unduly lengthy, because it sought as much to argue the applicants' case as to reply to the factual allegations in the liquidators' case. Secondly, the part of original claim made by the applicants which called for the immediate payment by the liquidators of the money paid to them by the debtors was without foundation and unsustainable. Finally, they say that, in any event, any costs which the liquidators are obliged to pay should be should be made costs in the liquidation of the companies and not against the liquidators personally.

The liquidators were wrong in their belief that the applicants' answering affidavit had been improperly filed. They were relying on the wrong rule to support their submission. The resultant application to strike out was, therefore, unnecessary, and even though withdrawn before argument, was dealt with extensively in the heads of argument. As to the nature of the answering affidavit, I accept that it is long and argumentative. However, it is not such as to warrant a special order for costs.

The applicants' claim to immediate payment of the money received by the liquidators took virtually no space in the applicants' application, was dismissed with compete disdain and in one sentence in the liquidators' heads of argument ("We are confident that the applicants will not pursue this claim ... and we accordingly do not propose to deal with it in these heads of argument"), was conceded by the applicants at the hearing and took no time in the hearing.

I, therefore, decline to make the special order requested by the liquidators in respect of those aspects.

However, the liquidators' claim that the costs of the application should be costs in the liquidation was conceded by the applicants and there is no reason to depart from that concession.

In the result:

(a) It is declared that the notarial deeds of cession and pledge detailed in Protocol Nos. 317/93, 318/93 and 394/95 and duly registered are valid and enforceable.

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(b) The respondents are ordered to pay the costs of this application, such costs to be costs in the liquidation of Belmont Leather (Pvt) Ltd, G & D Shoes (Pvt) Ltd, Tirzah Investments (Pvt) Ltd and PB Shoes (Pvt) Ltd (all in liquidation).

Coghlan, Welsh & Guest, first applicant's legal practitioners

Gill, Godlonton & Gerrans, second applicant's legal practitioners

Honey & Blanckenberg, respondents' legal practitioners

CHAPEYAMA v CHAPEYAMA 2000 (2) ZLR 175 (SC)

Citation	2000 (2) ZLR 175 (SC)
Case No	Judgment No. S-71-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA and Sandura JA
Heard	January 20, 2000
Judgment	September 6, 2000
Counsel	S Karuwa, for the appellant G S Wernberg, for the respondent
Annotations	None

Civil appeal

Flynote

Family law - husband and wife - divorce - division of property - matrimonial home registered in names of both parties - effect

Headnote

The parties were husband and wife. During the course of the marriage, they bought a stand in a suburb in Harare. The stand was registered in the names of both parties. A house was built on the stand and it became their matrimonial home. When the marriage broke up, the wife claimed half the value of the matrimonial home. The husband denied that she was entitled to a share of the value of the house, as he had bought the stand and built the house from his income, without any contribution from the wife.

Held, that the registration of a property in the names of husband and wife confers real rights in the property. It is not just a device to confound creditors. Each party has a real right to an

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undivided half share of the property. In addition, the finding by the judge *a quo* that the parties had pooled their resources to buy the stand and build the house could not be assailed.

Cases Considered

Cases cited:

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

Takafuma v *Takafuma* 1994 (2) ZLR 103 (S)

Case Information

S Karuwa, for the appellant

G S Wernberg, for the respondent

Judgment

Sandura JA: This is an appeal against the judgment of the High Court in terms of which the respondent ("Susan") was granted a decree of divorce, half of the value of the matrimonial home, and maintenance at the rate of $600 per month. In addition, the appellant ("Valentine") was ordered to retain Susan as a beneficiary on his medical aid scheme.

The preparation of this judgment was delayed by the fact that in March this year, I was appointed Chairman of the Delimitation Commission and consequently did not have the time to prepare the judgment. Any inconvenience to the parties is sincerely regretted.

The background facts in this case are as follows. The parties were married to each other on 7 December 1986. After getting married they lived in a rented house in Mufakose Township. Valentine worked for a company

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known as Olivine Industries (Pvt) Ltd, and Susan worked at St. Anne's Hospital. Susan's gross salary was about $770 per month, and Valentine's was about $1 200 a month.

After saving some money, the parties bought a stand at Houghton Park in 1988 and registered it in both their names. Subsequently, a house was built on the stand and the parties moved into the matrimonial home.

Although initially the marriage was a happy one, the relationship soured after the parties found that they could not have children. The problem was one of sub-fertility on the part of Valentine. It was after that discovery that he started drinking alcohol to excess and assaulted Susan frequently.

Because of the assaults perpetrated on her by Valentine, Susan left the matrimonial home in 1992. However, she returned after about six months in the hope that the relationship would improve. When that did not materialise, she finally left the matrimonial home in 1995, taking

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with her some of the matrimonial assets.

Later that month, she issued a summons against Valentine claiming a decree of divorce, maintenance at the rate of $100 per month (which was subsequently increased to $1 000), and a division of the matrimonial assets so that each party received half of them. With regard to the matrimonial home, she wanted the property sold and the net proceeds shared equally by the parties.

Valentine opposed Susan's claims. However, at the trial he conceded that the marriage had irretrievably broken down, and agreed that a decree of divorce should be granted.

With regard to the matrimonial assets, he conceded that Susan should have the property which she had taken with her when she moved out of the matrimonial home, but denied that she was entitled to a share of the value of the matrimonial home. He claimed that he had purchased the stand and built the house out of his own income without any contributions from Susan. He denied Susan's allegation that they pooled their incomes.

Both Susan and Valentine gave evidence and had no witnesses to call. After the trial, the learned judge issued the orders now appealed against. These orders are in respect of the matrimonial home, maintenance and the retention of Susan as a beneficiary on Valentine's medical aid scheme.

I shall deal first with the issue pertaining to the matrimonial home. Counsel for the appellant, whilst not conceding the correctness of the decision by the trial judge on the issue pertaining to the matrimonial home, made no submissions in support of the appeal on that issue.

The learned judge in the court *a quo* found that Susan was entitled to half of the value of the matrimonial home. In addition, he granted her the option to buy Valentine's half share by paying him half of the value of the

matrimonial home. The learned judge further provided that if Susan failed to exercise the option within a certain period, the option would lapse and Valentine would have the right to buy her half share.

In my view, the conclusion reached by the learned judge on the rights of the parties in the matrimonial home is undoubtedly correct.

In the first place, as already stated, the property was and is registered in the names of both parties. What this means is that Susan has a real right to an undivided half share of the property. In other words, she is the registered owner of an undivided half share in the property.

A few years ago, this court dealt with a similar issue in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S). At 105H-106A, McNally JA had this to say:

> "The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] (now [*Chapter 20:05*]) is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a

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matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real right' in s 2 of the Act. The real right of ownership, or *jus in re propria*, is 'the sum total of all the possible rights in a thing' - see Wille's *Principles of South African Law* 8 ed p 255."

Those comments apply to the facts of the present case with equal force.

In addition to the fact that the matrimonial home was registered in the names of both parties, the learned judge found that the parties had pooled their incomes, bought the stand and built the house. In my view, that finding is unassailable and leads to the conclusion reached by the learned judge on the rights of the parties in the matrimonial home.

Whilst it is true that in March 1996 Valentine paid the sum of $20 000, being the balance of the housing loan, the learned judge found that Valentine occupied the matrimonial home for about two-and-half years after Susan moved out in November 1995. He concluded that the occupation of the matrimonial home by Valentine had the effect of setting off the sum of $20 000 paid by Valentine.

In the circumstances, the learned judge concluded that Susan was entitled to half of the value of the matrimonial home. I agree with the learned judge's reasoning and the conclusion reached.

I now wish to deal with the issue of maintenance. As already stated, Susan claimed maintenance in the sum of $1 000 per month, but was awarded $600 per month.

The court's power to order the payment of maintenance after divorce is set out in s 7(1)(b) of the Matrimonial Causes Act [*Chapter 5:13*], which reads as follows:

" (1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to -

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(a) ...

(b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage."

It is clear from the wording of the section that the duty of the court involves the exercise of a considerable discretion. However, it is a discretion which must be exercised judicially.

In the present case, the learned judge, after stating that Valentine received a gross salary of $14 500 per month and a monthly allowance of $2 000, and that Susan received a gross salary of $4 550 per month, said:

"With regard to maintenance, I consider that Susan is entitled to some maintenance from Valentine. Had the marriage not broken down she would have been able to look forward to the security of participation in his pension scheme. That has now gone ...

The court must look at the present financial circumstances of the spouses and their prospects of financial improvement in the foreseeable future. Susan is not a young lady. It is unlikely that her financial circumstances will improve materially in the future. The financial circumstances of Valentine and his future prospects are infinitely

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better than hers. According to Susan, it is very unlikely that she will remarry."

The learned judge then awarded Susan maintenance in the sum of $600 per month until she remarried, started living with another man or died.

Before this court can interfere with the exercise of a judicial discretion, it must appear that some error was made by the trial court in exercising that discretion. This point was made very recently by Gubbay CJ in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S). After stating that the exercise of a judicial discretion by the trial court may only be interfered with on limited grounds, the learned Chief Justice said the following as 62G-63A:

> "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. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

In the present case, I am satisfied that the grounds on which this court may interfere with the exercise of a judicial discretion by the trial judge do not exist. There is, therefore, no basis on which the award of maintenance to Susan can be interfered with.

Finally, I wish to deal with the order that Susan be retained as a beneficiary on Valentine's medical aid scheme.

When the appeal was argued, the court was satisfied that the view that Susan be retained as a beneficiary on Valentine's medical aid scheme was

justified for the reasons given by the trial judge. However, we entertained some doubt as to whether this could be done after divorce because we believed that the scheme was only for the employee, his spouse and children.

Accordingly, at the conclusion of counsels' submissions, we requested counsel to seek clarification of the issue from Valentine's employer, Olivine Industries (Pvt) Ltd, and thereafter by agreement place the information before us. Both counsel have now done so.

It is clear from the information placed before us that after divorce, it is possible for Susan to be retained as a beneficiary on Valentine's medical aid scheme, not as a wife, but as an "other dependant". The order made by the trial judge will, therefore, stand.

In the circumstances, the appeal is dismissed with costs.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

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Karuwa & Associates, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

CC SALES LTD v SHERIFF OF ZIMBABWE & ORS 2000 (2) ZLR 180 (SC)

Citation	2000 (2) ZLR 180 (SC)
Case No	Judgment No. S-80-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Sandura JA
Heard	February 8, 2000
Judgment	September 6, 2000
Counsel	R Y Phillips, for the appellant P Nherere, for the second respondent No appearance for the first, third and fourth respondents
Annotations	None

Civil appeal

Flynote

Practice and procedure - sale in execution - setting aside of - sale confirmed by Sheriff - when sale may be set aside - sale of property not belonging to judgment debtor - judgment debtor's right to challenge sale

Headnote

The appellant sought to have a sale in execution set aside. Under the sale, immovable property belonging to a director of the appellant was sold, together with an adjoining piece of land and certain movables on that piece of land. The adjoining land did not belong to the director, but he had a right to take transfer of it. The main issue on appeal was whether the appellant could have the sale set aside in terms of r 359 on the grounds that (a) the property sold had not been attached by the judgment creditor, (b) the property did not belong to the judgment debtor, and (c) the Sheriff did not instruct the auctioneer to sell the property.

Held, that the sale of the movable property could not be set aside under r 359, which covers only sales of immovable property.

Held, further, that the sale of the adjoining property could not be set aside under r 359. This rule applies to the judicial sale of property belonging to the judgment creditor and the adjoining property did not belong to the appellant. That sale would have to be dealt with under common law. Under common law, the director had no *locus standi* to challenge the sale of the adjoining

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property. He had a right to take transfer but this was only a personal right enforceable against the owner and was not a real right. This was because under the Roman Dutch law a person can validly sell property belonging to another without the other's consent.

Held, further, that the mere fact that the auctioneer sold the adjoining property without authority from the Sheriff or the owner did not render the sale null and void.

Held, further, that although the property had not been accurately described in the advertisements for the sale, the buyer had taken possession of all the property, taken out a bank loan to pay for it, and incurred large expenses in relation to it. Those facts, together with the lack of explanation for the delay on the appellant's part in bringing its application, meant that the application could not succeed.

Cases Considered

Cases cited:

Barclays Bank of Zimbabwe v *Sheriff of Zimbabwe & Anor* 2000 (2) ZLR 143 (S)

Frye's (Pty) Ltd v *Ries* 1957 (3) SA 575 (A)

Mapedzamombe v *CBZ & Anor* 1996 (1) ZLR 257 (S)

Zimbabwe Sun Hotels (Pvt) Ltd v *Lawn* 1988 (1) ZLR 143 (S)

Legislation considered:

High Court Rules 1971 (RGN 1047/1971), rr 359 & 360

Case Information

R Y Phillips, for the appellant

P Nherere, for the second respondent

No appearance for the first, third and fourth respondents

Judgment

Sandura JA: This is an appeal against the judgment of the High Court which dismissed with costs the appellant's application for an order setting aside the sale in execution of immovable property situate in the district of Goromonzi, and movable property on part of that property.

The preparation of this judgment was delayed by the fact that in March this year, I was appointed Chairman of the Delimitation Commission and thereafter did not have the time to prepare the judgment. Any inconvenience to the parties is sincerely regretted.

The background facts in this case are as follows. Pursuant to a judgment granted in favour of the third respondent ("Zimbank"), in *Zimbabwe Banking Corporation Ltd* v *Crown Royal Foods (Pvt) Ltd, Guy Charles Harvey and Robert Francis Dyke* case No. HC-5231-95, Zimbank's legal

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practitioner issued a writ of execution against property and placed under judicial attachment the immovable property belonging to Robert Francis Dyke ("Dyke"), a director of Crown Royal Foods (Pvt) Ltd ("Crown Royal"). The property attached was Subdivision B of Halstead, which was held under Deed of Transfer No. 5123/85 and measured 20.7490 hectares. Zimbank held three mortgage bonds over this property ("the main property").

Adjacent to the main property was a piece of land measuring 6.6 hectares ("the adjoining property"). Its registered owner was the Agricultural and Rural Development Authority ("ARDA"). However, Dyke had the right to take transfer of this property because it had been exchanged by ARDA for a piece of land on his property which had been inundated by a dam constructed by ARDA on its neighbouring property.

On the adjoining property was an abattoir and meat processing plant, with all machinery and accessories ("the movable property").

After attaching the main property, Zimbank's legal practitioner forwarded to the first respondent ("the Sheriff") the title deeds of the property, as well as the three mortgage bonds already mentioned, and instructed the Sheriff to sell the property.

Subsequently, the Sheriff instructed G M P Estates (Pvt) Ltd to sell the main property by public auction. The managing director of that company was Gute ("the auctioneer"). When the sale was advertised in *The Herald* by the auctioneer, the property was described as follows:

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> "the defendant's right and title relating to Subdivision B of Halstead measuring 20.7490 hectares, otherwise known as Halstead being a farm land (*sic*) on which there is an abbatoir (*sic*) and meat processing plant complete with all machinery and accessories."

The advertisement indicated that the sale would take place at the Raylton Sports Club in Harare on 30 October 1998.

When the appellant became aware that the main property and the movable property had been put up for auction by the Sheriff, it resolved to try to purchase both. That decision was taken because Crown Royal owed the appellant about one million dollars, a debt which was not secured, and the appellant believed that the main property and the movable property could be resold at a price which would enable it to recoup the debt owed to it by Crown Royal.

On 30 October 1998, Mr Timothy Coughlan ("Coughlan"), a director of the appellant, attended the Sheriff's sale at the Raylton Sports Club. In the sale document made available to the prospective purchasers by the auctioneer, the property on auction was described in the same way as it had been described in *The Herald* advertisement.

However, Coughlan, was aware that the movable property was not on the main property but on the adjoining property. In addition, he had noticed in the edition of *The Herald* for that day a further advertisement by Ferreira's Auctions (Pvt) Ltd, advertising the auction sale of a large quantity of butchery equipment, coldrooms, scales, saws, etcetera, which was to take place at Ashprington Farm, Arcturus, on 13 November 1998. Ashprington Farm was the common name

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of the main property.

When the sale of the main property was called, Coughlan stood up and publicly explained to the auctioneer that the movable property was not on the main property but on the adjoining property which was held under a separate title. He added that although the property as advertised measured 20.7490 hectares, the total area of the land in which Dyke had a beneficial interest, i.e. the main property and the adjoining property, was about 27 hectares. He also informed the auctioneer that an advertisement had appeared in *The Herald* on that day advertising the sale by auction of the movable property on 13 November 1998. He asked the auctioneer to clarify whether the adjoining property and the movable property were to be sold together with the main property.

There is a dispute on what the auctioneer's response was. According to Coughlan, the auctioneer could not clarify the issues raised, but advised him that if he was dissatisfied with the manner in which the auction had been advertised he should consult a legal practitioner.

That allegation was disputed by the auctioneer, whose version was as follows. He thanked Coughlan for raising the issues, but informed him that

SANDURA JA

he was aware that the main property was owned by Dyke and that the adjoining property was owned by ARDA. He added that he had been informed that Dyke had the right to take transfer of the adjoining property, and that the main property, the adjoining property and the movable property were to be sold together.

The auctioneer's version was supported by two men who attended the auction sale. They were the second respondent ("Chirima"), the highest bidder, and Onias Gumbo, who did not participate in the sale because he was told, before the sale commenced, that private bids in the region of $1 200 000 had been rejected. He was not prepared to bid more than a million dollars. Both men averred that the auctioneer made it clear that the main property, the adjoining property and the movable property were being sold together.

Moreover, the fact that Coughlan participated in the sale and bid up to $3 000 000 supports the auctioneer's version. He would not have bid so high if he did not know what property was being sold.

Nevertheless, Chirima was the highest bidder. His bid was $3 100 000.

Thereafter, on 9 November 1998, the appellant's legal practitioner wrote to the Sheriff, indicating that the appellant was objecting to the manner in which the auction sale had been conducted, and urged the Sheriff to decline to confirm the sale.

In a reply dated 17 November 1998, the Sheriff advised the appellant's legal practitioner that the objection should be by way of a court application in terms of r 359 of the High Court Rules, 1971.

Subsequently, on 16 December 1998, when no court application had been filed objecting to the

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sale, the Sheriff declared Chirima, being the highest bidder, to be the purchaser of the property, i.e. the main property, the adjoining property and the movable property.

Following that, on 7 January 1999, the Sheriff confirmed the sale. Immediately thereafter, Chirima borrowed $3 100 000 from Time Bank and paid it to the Sheriff.

Then, on 2 February 1999, Chirima was given vacant possession of the property. From that date to 3 March 1999, when the court application seeking an order setting aside the sale was served on him, Chirima incurred farm and abattoir expenses totalling $3 203 189.10. Of that amount, the sum of $1 717 250 was paid to the appellant for cattle purchased from it by Chirima for slaughter at the abattoir on the adjoining property.

In order to complete the picture of what happened after the sale, I would like to add that in his opposing affidavit Chirima averred that after holding discussions with ARDA officials, it was agreed that the adjoining property would be transferred to him. That averment was not denied by the appellant.

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The appellant's application in the court *a quo* was brought in terms of r 359, which reads as follows:

> "Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum or any other good ground. Any such person shall give due notice to the sheriff of the application stating the grounds of his objection to confirmation of the sale. On the hearing of the application, the court may make such order as it deems fit."

Rule 360 is also relevant. It reads as follows:

> "If no objection is made to the court within seven days from the date that the sheriff declares the highest bidder to be the purchaser in terms of r 356 or from the date of a sale by private treaty in terms of r 358, as the case may be, the sheriff shall confirm the sale."

It was argued on behalf of the appellant in the court *a quo* that the letter written on behalf of the appellant on 9 November 1998 requesting the Sheriff to decline confirming the sale was an objection to the sale and that in the light of such an objection it was wrong for the Sheriff to confirm the sale, However, that argument was abandoned when the appeal was argued, and correctly so, in my view. Rule 359 clearly states that the objection must be by way of a court application. There is no provision for objecting to the sale by means of a letter to the Sheriff.

In the circumstances, the only valid objection to the sale was the court application which was served on Chirima on 3 March 1999. That application, which was made in terms of r 359, was made long after the Sheriff declared Chirima to be the purchaser on 16 December 1998, and long after the Sheriff confirmed the sale on 7 January 1999.

The significance of the confirmation of a sale is that it is much more difficult to have the sale set aside after it has been confirmed than before it has been confirmed. This point was stressed a few years ago by Gubbay CJ in *Mapedzamombe* v *Commercial Bank of Zimbabwe & Anor* 1996

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(1) ZLR 257 (S) at 260C-E where he said:

> "Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla* v *Bhura* 1973 (2) RLR 280 (G) at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran* v *Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7."

See also *Barclays Bank of Zimbabwe Ltd* v *The Sheriff of Zimbabwe & Anor* S-68-2000.*(25)

With that in mind, I now wish to deal with the issues arising in this appeal.

SANDURA JA

The main issue is whether the appellant can have the sale set aside in terms of r 359 on the grounds that: (a) the property sold had not been attached by Zimbank, the judgment creditor; (b) the property did not belong to the judgment debtor; and (c) the Sheriff did not instruct the auctioneer to sell the property. I shall deal with the movable property, the adjoining property and the main property separately.

As far as the sale of the movable property is concerned, the appellant cannot have that sale set aside in terms of r 359. This is because r 359 deals only with sales of immovable property. It does not cover the sale of movable property. The appellant, therefore, adopted the wrong procedure.

With regard to the adjoining property, my view is that the appellant cannot have the sale set aside in terms of r 359. I say so because r 359 applies to the judicial sale of property belonging to a judgment debtor which has been attached at the instance of his judgment creditor. That is not so in the present case. Firstly, the adjoining property did not belong to any of Zimbank's debtors. It belonged to ARDA. Secondly, the property had not been judicially attached and, thirdly, the Sheriff had not instructed the auctioneer to sell it.

It seems, therefore, that the sale of the adjoining property should be dealt with under the common law.

However, at common law the appellant does not have the *locus standi* to challenge the auctioneer's sale of ARDA's property to Chirima. In my view, the fact that the appellant was an unsecured creditor of Crown Royal is not relevant because the adjoining property did not belong to Crown Royal but belonged to ARDA.

Similarly, the fact that Dyke was entitled to take transfer of the adjoining property is irrelevant. Until the property was transferred to him, Dyke did not have real rights in the adjoining property, rights enforceable against the world at large. All that he had was a personal right enforceable against ARDA.

In addition, the fact that the auctioneer sold the adjoining property, which had not been judicially attached and which the Sheriff had not instructed him to sell, did not render the sale null and void. That is so because under Roman Dutch law a person can validly sell property belonging to

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another without that other's consent.

Commenting on such sales many years ago, Hoexter JA said the following in *Frye's (Pty) Ltd* v *Ries* 1957 (3) SA 575 (A) at 581A-C:

> "There can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased. (See *Transvaal Mortgage, Loan and Finance Co Ltd* v *Aronson* 1904 TS 864 at p 866 and *Tobha* v *Moodley* 1957 (1) SA 659 at p 660 (N)). Voet deals as follows with the sale of another's property in 18.1.14 (Gane's Translation):

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> 'Furthermore, it matters little whether things are one's own or belong to others, insofar as the seller is put under obligation to buy up such property in the other person's hands and to make it good, unless he prefers to have judgment given against him for damages if he has knowingly sold the property of another ...'."

In the circumstances, contrary to the submission made by counsel for the appellant, the mere fact that the auctioneer sold the adjoining property without authority from the Sheriff or ARDA does not render the sale null and void.

I now come to the main property. The appellant's complaint relating to this property was that, according to the advertisement in *The Herald*, the abattoir and meat processing plant were on the main property when in fact they were on the adjoining property. In other words, the complaint was that whilst the main property was accurately described as being "farm land" measuring 20.7490 hectares, the statement that an abattoir and meat processing plant were on the property was untrue.

It is significant, however, that the complaint is not that the property was *inadequately* described, but that the advertisement should not have stated that an abattoir and meat processing plant were on the property.

In my view, the inaccuracy in the advertisement was not likely to prejudice the judgment debtor or his creditor. In fact, the appellant was not at all prejudiced because its director, Coughlan, was aware of the true position before the sale, and drew the auctioneer's attention to the inaccuracy. The suggestion by Coughlan that due to the inaccuracy in the advertisement he was not sure what property was being offered for sale does not deserve serious consideration, for reasons already given.

It is clear that the advertisement stated the two main characteristics of the property, namely, that it was a farm and that it measured 20.7490 hectares.

Quite apart from the fact that a lot has taken place since the sale, there is the additional fact that no reasonable explanation was given for the appellant's failure to file the application objecting to the sale before March 1999. In other words, after the sale, a period of four months elapsed before the application was filed. This long delay was completely unjustified and cannot be condoned.

In the circumstances, I am satisfied that the appeal cannot succeed. It is, therefore, dismissed

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with costs.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Wintertons, appellant's legal practitioners

Ziumbe & Mtambanengwe, second respondent's legal practitioners

MAGUCHU v LEVER BROTHERS (PVT) LTD 2000 (2) ZLR 187 (SC)

Citation	2000 (2) ZLR 187 (SC)
Case No	Judgment No. S-78-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Sandura JA
Heard	February 8, 2000
Judgment	September 6, 2000
Counsel	A J Dyke, for the appellant R Fitches, for the respondent
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - dismissal - unlawful - effect of employee thereafter taking up employment with another employer - not entitled to claim reinstatement nor any arrears of salary or benefits after the date of taking up new employment

Headnote

The appellant, who had been employed by the respondent, was dismissed after a disciplinary enquiry conducted by the respondent's grievance committee. He appealed to the Labour Relations Tribunal and was successful. On appeal by the respondent to the Supreme Court, the appeal was allowed and the matter remitted to be dealt with by the disciplinary committee, the grievance committee not having the power to dismiss. The respondent delayed convening the disciplinary committee and the appellant applied for a court order that he be reinstated and be paid arrears of salary and benefits. The judge refused to grant reinstatement but gave the respondent 30 days in which to convene the disciplinary committee. On appeal, the respondent argued that as the appellant had taken up employment with another company, the respondent

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had no obligation to pay salary and benefits after the date he took up the other job.

Held, that an employee who has been wrongfully dismissed cannot claim reinstatement if, after his dismissal, he takes up alternative employment. By doing so, he repudiates the contract of employment and can only claim arrears of salary and benefits up to the time he takes up the other employment.

Cases Considered

Cases cited:

Zimbabwe Sun Hotels (Pvt) Ltd v *Lawn* 1988 (1) ZLR 143 (S)

Case Information

A J Dyke, for the appellant

R Fitches, for the respondent

Judgment

Sandura JA: This is an appeal against the refusal by the High Court to order the respondent to reinstate the appellant as its buying manager and pay him all the arrear salary and benefits due to him. There is, in addition, a cross-appeal against part of the judgment.

The preparation of this judgment was delayed by the fact that in March this year, I was appointed Chairman of the Delimitation Commission and thereafter did not have the time to prepare the judgment. Any inconvenience to the parties is sincerely regretted.

SANDURA JA

The background facts in this case are as follows. At the relevant time, the appellant was employed by the respondent as its buying manager. In June 1995, following certain allegations made against him, he appeared before the respondent's Grievance Committee constituted in terms of the company's code of conduct. The committee recommended that he be dismissed for "managerial ineptitude", and he was subsequently dismissed on 28 June 1995.

He appealed to the Labour Relations Tribunal and was successful. The Tribunal ordered the respondent to reinstate the appellant as its buying manager or, alternatively, pay him damages.

Thereafter, the respondent appealed to this court, but was unsuccessful. The court agreed with the Labour Relations Tribunal that the appellant's dismissal should be set aside, but for entirely different reasons which were essentially procedural. The court ruled that the finding of the Grievance Committee should have been referred to the Disciplinary Committee for a decision, and that the recommendation that the appellant be dismissed should have been a recommendation to the Disciplinary Committee.

Accordingly, this court set aside the order issued by the Labour Relations Tribunal and

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substituted the following:

" (a) The appeal is allowed with costs.

(b) The matter is remitted, in terms of s 101(8)(b) of the Labour Relations Act, to the Disciplinary Committee of the respondent to be determined in terms of the respondent's registered code of conduct."

See judgment No. S-192-98.

After the respondent delayed convening its Disciplinary Committee, the appellant filed a court application in the High Court seeking reinstatement as the respondent's buying manager, and payment of all arrear salary and benefits due to him.

When the matter came up for hearing the learned judge in the court *a quo* refused to grant the orders for reinstatement and payment of the arrear salary and benefits due to the appellant. Instead, he granted the following order:

"That the respondent shall comply with the order made by the Supreme Court in case No. HC-192-98 (should be Civil Appeal No. 182-98 or judgment No. SC-192-98) within thirty days of this order, failing which the respondent shall reinstate the applicant. The applicant's costs shall be paid by the respondent."

The appellant has now appealed against this order, alleging that in refusing to grant reinstatement and payment of the arrear salary and benefits the learned judge in the court *a quo* erred.

In its cross-appeal, the respondent avers that the learned judge erred in failing to find that the appellant's employment with it ended when he took alternative employment with a company called Saltrama Plastics on 1

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January 1996. It further avers that the learned judge should have found that after that date it had no obligation to pay any salary or benefits to the appellant. It accepts the obligation to pay salary and benefits up to the end of 1995.

Before dealing with the issues in this appeal, I must point out that when the matter was argued in this court in 1998, neither party informed the court that after the purported dismissal the appellant took alternative employment with a company called Saltrama Plastics on 1 January 1996. Had that fact been brought to the court's attention, the court would not have made the order which it made. The reason will be apparent when I deal with the effect of taking alternative employment.

In view of the order issued by this court in 1998, it was common cause when the appellant's application was argued in the court *a quo* that the appellant's dismissal had been irregular. That was why this court set it aside. The only issue was whether the appellant was entitled to reinstatement and payment of arrear salary and benefits.

In determining that issue, it is necessary to consider the effect of the fact that on 1 January 1996, the appellant commenced working for another company.

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Whilst it is true that on 28 June 1995, the respondent purported to dismiss the appellant, the legal position was that the appellant remained an employee of the respondent and was entitled to his salary and other benefits. In fact, the appellant himself believed that to be the position. That is why he did not accept the dismissal. He appealed to the Labour Relations Tribunal.

However, by taking alternative employment on 1 January 1996, the appellant repudiated the contract of employment. Thereafter, the respondent did not have any obligation to pay any salary or the benefits to him. See *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S). In my view, the fact that Lawn was an employee under suspension when he took alternative employment whereas the appellant had been "dismissed" makes no difference. The legal position was that before the appellant commenced working for Saltrama Plastics on 1 January 1996 he was an employee of the respondent. The respondent has abandoned its contention to the contrary.

Having elected to repudiate the contract of employment, instead of holding the respondent to it, the appellant cannot claim reinstatement.

As far as the costs of the appeal are concerned, my view is that as both parties have been partially successful there should be no order as to costs.

The same applies to the costs in the court *a quo*. Both parties should have been partially successful. The appellant claimed reinstatement and arrear salary and other benefits from the date of the unlawful dismissal to the date

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of his reinstatement. However, this court has now determined that he was not entitled to reinstatement, nor was he entitled to arrear salary and other benefits after 31 December 1995.

In the circumstances, the following order is made:

1. The appeal is allowed with no order as to costs.

2. The order of the court *a quo* is set aside and the following is substituted:

   "(a) The respondent shall pay to the applicant arrear salary and other benefits due to him from 28 June to 31 December 1995.

   (b) The respondent shall pay interest at the prescribed rate on the said salary and other benefits from the date the salary and benefits were due to the date of payment.

   (c) Each party shall bear its own costs."

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Midzi, Ziweni & Partners, appellant's legal practitioners

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Dube Manikai & Hwacha, respondent's legal practitioners

MINISTER OF HOME AFFAIRS & ANOR v TRIMU AGENCIES AND DISTRIBUTORS (PVT) LTD 2000 (2) ZLR 191 (SC)

Citation	2000 (2) ZLR 191 (SC)
Case No	Judgment No. S-86-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Sandura JA
Heard	March 14, 2000
Judgment	September 6, 2000
Counsel	C Machaka, for the appellants A P de Bourbon SC, for the respondent
Annotations	None

Civil appeal

Flynote

Contract - evidence - parol evidence rule - written contract - when need not be accepted as constituting entire contract between parties - previous conduct of parties

Headnote

The respondent tendered to supply goods to the police, at a stated commission, but with a discount if the police opened their own line of credit with the actual manufacturers. The police accepted the tender, but the written document did not mention the commission, which the police later sought to avoid paying, on the grounds that the document formed the entire contract between them.

Held, that the effect of the parol evidence rule is that where a contract is incorporated into a single and complete written document that reflected the entire agreement, a party to that contract cannot lead evidence to add to or modify that written document.

Held, further, that the conduct of the parties before and after the document was drawn up showed that the parties did not regard the document as constituting the entire agreement. Evidence could thus be led as to what was actually agreed; and the evidence that was led at the trial clearly showed that both parties contemplated the payment of commission.

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Cases Considered

Cases cited:

Johnston v *Leal* 1980 (3) SA 927 (A)

Union Govt v *Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43

Case Information

C Machaka, for the appellants

A P de Bourbon SC, for the respondent

Judgment

Sandura JA: This is an appeal against the judgment of the High Court which granted with costs the respondent's claim against the appellants for the payment of the sum of $1 134 585.30 together with interest at the prescribed rate.

The preparation of this judgment was delayed by the fact that in March this year, I was appointed Chairman of the Delimitation Commission and thereafter, did not have the time to prepare the judgment. Any inconvenience to the parties is sincerely regretted.

SANDURA JA

The background facts in this case are as follows. In July 1994, the Zimbabwe Republic Police ("ZRP") called for tenders for the supply of various types of cloth required for police uniforms.

On 27 July 1994, the respondent tendered for the supply of sixteen different types of cloth. Among other things the respondent's tender provided as follows:

> "All our prices are CIF Harare.
>
> We offer a discount of 2% on our prices on your organisation opening the letter of credit.
>
> A 30% commission will be charged on consignment."

The respondent's tender and others were all submitted to the Government Tender Board ("the Board") which in turn sent them to the ZRP where they were considered by the adjudicating committee. The committee was chaired by Chief Superintendent Heri.

In the result, the ZRP recommended to the Board that most of the material be supplied by the respondent. However, some senior officers in the ZRP were concerned about the risk inherent in placing reliance on one company to supply most of the material.

Consequently, the recommendations which had been sent to the Board were withdrawn, and a revised recommendation was prepared and sent to the Board. In terms of the revised recommendation, two local companies were recommended for the supply of some of the

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material. They were David Whitehead Textiles Ltd and Cone Textiles (Pvt) Ltd.

Subsequently, on 6 October 1993, Staff Inspector Sengweni wrote to the respondent informing it that its tender had been successful in respect of eight types of cloth. The letter did not say anything about the 30% commission stipulated by the respondent in its tender, nor did it mention the 2% discount.

Subsequently, on 12 October 1994 a document headed "Contract For Supplies" was signed by the representatives of the respondent and the ZRP. This document did not mention the 30% commission or the 2% discount mentioned in the respondent's tender.

Following that, on 18 October 1994 the respondent sent to the ZRP a proforma invoice giving the details of the eight types of cloth to be supplied by it. The invoice did not mention the 30% commission or the 2% discount.

The ZRP then issued a requisition to the respondent ordering four of the eight types of cloth listed on the proforma invoice. The requisition was signed by Chief Inspector Chishiri, and indicated that there would be a discount of 2% and a commission of 28%. The discount appears to have been deducted from the commission of 30%, leaving a commission of 28%.

Thereafter, the ZRP opened a letter of credit with its local clearing agent and the respondent ordered three lots of material from Taiwan.

SANDURA JA

When the three consignments arrived in Zimbabwe they were delivered to the ZRP and were accepted by it and paid for.

Following that, on 7 March 1995, the respondent's managing director wrote to the ZRP as follows:

> "I hereby request that the funds for my commission on consignments from Taiwan be sent to Zimbank - Douglas Road Branch."

On 27 March 1995, Staff Inspector Sengweni replied as follows:

> "Reference is made to your letter of 7 March 1995 in connection with the above mentioned order.
>
> We would like to confirm that payments will be directed to Zimbank, Douglas Road branch as per your request."

The total amount of commission payable on three consignments, according to the respondent, was $1 134 585.30. When the ZRP refused to pay that sum, the respondent issued a summons claiming payment.

When the matter came before the High Court, the claim was granted in terms of the summons. Aggrieved by that decision, the appellants appealed to this court.

When the summons was issued, the first appellant was joined as a co-plaintiff because he was and still is the Minister under whose authority the ZRP falls and who is responsible for the

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overall running of the ZRP.

The ZRP refused to pay the commission because it alleged that the document headed "Contract For Supplies", which was signed by the parties on 12 October 1994, formed the entire agreement between the parties, and that as that document did not state that the commission was payable, it was not obliged to pay it.

On the other hand, the respondent maintained that since its tender stipulated that a commission of 30% would be charged on the consignments, and the ZRP did not indicate that it was not prepared to pay the commission, the ZRP was obliged to pay it.

The main issue, therefore, is whether the document signed on 12 October 1994 ("the document") constitutes the entire agreement between the parties. The issue concerns the parol evidence rule.

Dealing with the parol evidence rule in *Union Government* v *Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47, Watermeyer JA (as he then was) had this to say:

> "Now, this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction, and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

Subsequently, in *Johnston* v *Leal* 1980 (3) SA 927 (A) Corbett JA (as he

then was), commenting on the aim of the rule, said the following at 943B-E:

> "... it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract."

In the present case, in order to determine whether the document constitutes the entire agreement between the parties it is necessary to look at the conduct of the parties. Did they treat the document as being the entire agreement between them? I do not think so. Their conduct did not indicate that their contract had been "integrated into a single and complete written memorial".

In the first place, as already stated, the respondent's tender provided that if the ZRP opened a letter of credit in favour of the supplier of the material, a 2% discount would be granted on the price. The ZRP knew that the respondent was not a manufacturer of cloth, and that it would have to order it from countries such as Taiwan and other countries in the Far East. Therefore, in order to effect payment for the cloth, the ZRP opened a letter of credit through its clearing agent in Zimbabwe, and the agent was paid upon delivering the cloth to the ZRP.

However, that is not what was supposed to happen in terms of the document. The document provided as follows:

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> "The contractor undertakes and binds himself to supply and deliver at his own cost and risk the goods required."

Quite clearly, the parties did not consider this provision as binding. It was common cause that at no time was the respondent expected to deliver the cloth at its own cost and risk. It was envisaged that the ZRP would open a letter of credit through its local clearing agent and make payment to the manufacturer directly.

Secondly, Clause 7 of the document provides as follows:

> "Accounts shall be sent monthly to the officers who ordered the supplies, and payment therefor shall be effected within 30 days of receipt of the account ..."

It was common cause that, in practice, this did not happen. What happened was that the ZRP paid its local clearing agent upon delivery of the cloth.

Thirdly, it was common cause that the ZRP was granted a discount of 2% on the prices of the cloth when the document made no provision for the granting of a discount.

In the circumstances, I am satisfied that the parties did not consider the document as constituting the entire agreement between them.

That being the case, parol evidence is admissible in order to establish the actual terms of contract concluded by the parties.

SANDURA JA

The issue which I should now determine is whether the evidence led at the trial established that the parties agreed that a commission of 30% would be paid. In my view, it did.

In the first place, as already stated, the respondent's tender submitted to the ZRP Board for onward transmission to the ZRP provided that a commission of 30% would be charged on all the consignments. It also provided that if the ZRP opened a letter of credit in favour of the supplier of the material, a 2% discount would be granted on the price charged for the material.

In reply, the ZRP in its letter dated 6 October 1994, informed the respondent that its tender had succeeded in respect of eight types of cloth. The letter did not say anything about the 30% commission or 2% discount. If the terms relating to the discount and commission were not acceptable to it, the ZRP should have said so in its letter to the respondent. By not saying so, it gave the respondent the impression that the terms were acceptable. The respondent was, in my view, justified in drawing that conclusion.

Secondly, Chief Superintendent Heri ("Heri") who chaired the adjudicating committee, and Staff Inspector Sengweni, both accepted that the respondent was entitled to the commission. It was Heri's evidence that the documents submitted to the Board by the ZRP had excluded the 30% commission by error. The learned judge found both witnesses reliable.

Thirdly, in a memorandum dated 24 August 1994, which was addressed to Heri, Superintendent Kaseke ("Kaseke"), a member of the adjudicating committee, twice made mention of the effect of the 30% commission on the overall costs of two types of cloth to be supplied by the

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respondent. It seems to me that Kaseke knew that any price fixed in respect of the cloth to be supplied by the respondent would entail a 30% increase to cover the commission. He must have known, as Heri knew, that the respondent was entitled to a 30% commission.

Fourthly, the requisition issued to the respondent by the ZRO in respect of four types of cloth, indicated that the ZRP was granted a discount of 2%, but was charged a commission of 28%. In this regard, it is significant that the requisition was approved and signed by a senior officer, Chief Inspector Chishiri.

Finally, when the respondent requested that the sum due to it as commission be deposited into its account at the Douglas Road branch of Zimbank, the ZRP promised to do that. In this regard, I am satisfied that the learned judge correctly found that Staff Inspector Sengweni had the authority to inform the respondent that its commission would be deposited into its bank account.

SANDURA JA

Finally, if there was no agreement to pay the respondent a commission, it would mean that the respondent provided the services to the appellants free of charge. This could hardly have been the case.

In the circumstances, the learned judge correctly determined the matter. Accordingly, the appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Civil Division of the Attorney-General's Office, appellants' legal practitioners

Gollop & Blank, respondent's legal practitioners

MARASHA v OLD MUTUAL LIFE ASSURANCE CO LTD 2000 (2) ZLR 197 (SC)

Citation	2000 (2) ZLR 197 (SC)
Case No	Judgment No. HH-205-00
Court	High Court, Harare
Judge	Adam J
Heard	September 7, 2000
Judgment	September 7, 2000
Counsel	O Ziweni, for the applicant A Matika, for the respondent
Annotations	None

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Civil application

Flynote

Practice and procedure - review - time limits applicable to - may not be circumvented by seeking declaratory order - need to bring application for declaratory order within reasonable time

Headnote

The applicant had been dismissed from employment and brought an application to have the dismissal set aside as being unlawful. The application was brought well outside the time limits for review proceedings and no application for condonation was made. The applicant argued that what he was seeking was not review, but a declaratory order, to the effect that the decision to dismiss was void.

Held, that the applicant had sought to have the proceedings reviewed. He had failed to make the application within the prescribed period of eight weeks or to first make an application for condonation of the failure to bring the proceedings within the prescribed period.

Held, further, that even if the application could be considered to be an application for a declaratory order, an applicant cannot circumvent the time limits for review proceedings by instituting proceedings for a declaratory order. An application for a declaratory order must be made within a reasonable period of time.

Cases Considered

Cases cited:

Forestry Commission v Moyo 1997 (1) ZLR 254 (S)

Kwete v Africa Community Publishing and Development Trust HH-216-98

Musara v Zinatha 1992 (1) ZLR 9 (H)

Mutare City Council v Mudzime & Ors 1999 (2) ZLR 140 (S)

Case Information

O Ziweni, for the applicant

A Matika, for the respondent

Judgment

Adam J: In this matter, the applicant originally sought in the draft order that:

1. the decision of the respondent to dismiss the applicant from employment is unlawful and be

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and is hereby set aside;

2. the respondent shall pay to the applicant all unpaid salaries that are due to him from 30 April 1999 to the date of judgment;

3. the applicant be and is hereby authorised by Chamber Application on notice to apply for the computation of the salaries and benefits due to him

ADAM J

from the respondent and to pay interest on the above sums at the prescribed rate from the date of judgment to date of payment in full;

4. the respondent is to pay the costs of this application.

An opposing affidavit was filed in which the respondent raised an objection *in limine* that the application was essentially review proceedings and as such ought to have been brought within eight weeks of the alleged offending proceedings and that since the applicant's services were terminated on 30 April 1999, the application which was filed by the applicant on 27 April 2000 was some 10 months late and ought to be dismissed with costs.

As a result of that opposing affidavit, an answering affidavit was filed in response to the point *in limine* in which the applicant averred that the respondent misconstrued the law and that this was not a review application. He was reliably informed by his counsel that where an administrative decision is void any interested party is at liberty to approach this Honourable Court at any time for an order declaring the decision to be void and to be a legal nullity and that this Honourable Court has a fundamental duty to see justice is done with a declaration that a void act is null and void and of no legal effect and force. It further went on and indicated that it is pertinent to observe that what is being assailed herein is a decision by the respondent to dismiss the applicant from employment in the absence of following laid down procedures and laid down criteria in terms of the respondent's code of conduct. No procedures were ever adopted and followed by the respondent. It is therefore demonstrably false and misleading that it was assailing procedural improprieties as if there were any procedures followed by respondent prior to the unlawful decision to dismiss him from employment. The relief he was seeking, which he was properly and competently advised is correct, is for a declaration that the decision to dismiss him from employment was void and should be nullified by this court and that he had successfully established that this is not a review application. It is quite to the contrary an application for a declaratur and rightly so. The respondent is therefore wrong *per se* to contend that this application is essentially review proceedings of alleged procedural irregularities. Such a contention is flawed and unmeritorious in the main.

It is clear from the papers filed before me by the applicant that essentially he sought review of proceedings well out of time without first making an application for condonation and establishing that he was entitled to bring an application out of time. What is significant is not heading the proceeding "Court Application for Declaration", but the draft order filed which asks the decision to be set aside and his salary to be paid. This clearly is not a declaratory order. He belatedly sought in the answering affidavit to convert these review proceedings into proceedings for a

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declaration. In the heads of

ADAM J

argument filed on behalf of the applicant, reference was made to the judgment of this court in the case of *Musara v Zimbabwe National Traditional Healers Association (ZINATHA)* 1992 (1) ZLR 9 (H). But since that judgment a number of judgments have been given by this court as well as by the Supreme Court. This court has held that a declaratory order is merely one of a species of relief available and that a party should not be able to get around the time limits for review proceedings by instituting proceedings for a declaratory order - *Kwete v Africa Community Publishing & Development Trust* HH-216-98. This was approved by the Supreme Court in *Mutare City Council v Mudzime* 1999 (2) ZLR 140 (S). In my view, even if this were an application for a declaratory order the applicant would be required to provide an explanation as to why such an application for a declaratory order has not been brought within a reasonable period of time i.e. two months or eight weeks, otherwise applications for declaratory orders can be made many months or years after the offending proceedings had been finalised.

I am satisfied on the papers before me that the application filed by the applicant is in fact for review proceedings and as such an Application for Condonation has to be made as to why the application was not brought within the time period set out in the Rules of Court: see *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) at 260.

Accordingly, the application is dismissed with costs.

Ziweni & Company, applicant's legal practitioners

OLIVINE INDUSTRIES (PVT) LTD v OLIVINE WORKERS COMMITTEE 2000 (2) ZLR 200 (SC)

Citation	2000 (2) ZLR 200 (SC)
Case No	Judgment No. S-88-00
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	June 26, 2000
Judgment	September 8, 2000
Counsel	A P de Bourbon SC, for the appellant S V Hwacha, for the respondent
Annotations	None

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Civil appeal

Flynote

Employment - collective bargaining - right of workers' committee to represent workers in negotiations - negotiations in respect of workers in certain grades referred to arbitration - applicability of arbitrator's decision to workers in higher grades

Headnote

The respondent trade union represented the workers employed by the appellant. It was negotiating wages on behalf of certain lower grades of employees. The matter was referred to arbitration, and a certain percentage rise awarded in respect of those grades of employees. The union then obtained an order from a labour relations officer that the same percentage rise should be awarded to the employees in higher grades. Those employees were being paid more than the minimum set out in the relevant collective bargaining agreement for the industry, and the respondent sought to obtain an increase over and above the employees' actual salaries. The appellant argued that the union did not represent the higher grades of workers and did not have the power to negotiate wage increments in respect of those employees.

Held, that as there was an appropriate trade union for the appellant's employees in existence, there was a collective bargaining agreement in existence, and the higher grades of workers were not managerial employees, the union was entitled to represent them. The appellant was obliged to negotiate wage increases with the respondent and could not refuse to do so.

Held, further, that the wages of the higher grade workers had not been subject to negotiation, and it would be wrong to wrong to impose on the employer, in respect of the higher grade employees, the percentage increase which had been agreed upon in arbitration as a compromise in respect of the employees in the lower grades. Specific negotiations should take place.

Cases Considered

Case cited:

Old Mutual v *Old Mutual Workers' Cttee* S-257-96

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 24

Case Information

A P de Bourbon SC, for the appellant

S V Hwacha, for the respondent

Judgment

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Sandura JA: This is an appeal against the judgment of the Labour Relations Tribunal ("the Tribunal") which dismissed with costs the appellant's appeal to it, and confirmed the decision of the labour relations officer.

The background facts are as follows. At the relevant time the appellant's employees were graded, and the grades ranged from 1 to 12. In 1997 the appellant and the respondent commenced wage negotiations in respect of employees in grades 1 to 8. As the parties could not resolve their differences, the matter was referred to a labour relations officer, who ordered compulsory arbitration before the Tribunal.

However, just before the labour relations officer ordered compulsory arbitration, the respondent claimed that the wage negotiations should cover all the employees, including those in grades 9 to 12. As the parties could not agree on that issue, the labour relations officer indicated that she would deal with the issue separately at a later stage. She then ordered compulsory arbitration in respect of the wage negotiations for the employees in grades 1 to 8.

As a result of the compulsory arbitration order, the matter came before the Deputy Chairman of the Tribunal. When the matter was initially heard in chambers, the parties resolved their differences, and an order was issued by consent in October 1997. That order granted the employees in grades 1 to 8 a 27% wage increase with effect from 1 April 1997.

Thereafter, the issue of the wage increments for employees in grades 9 to 12 came before the labour relations officer, who made the following determination:

> "Olivine Industries is directed to include grades 9-12 employees in collective bargaining agreements negotiated by the workers' committee at plant level. Any internal negotiations on terms and conditions of employment including wage increases must henceforth apply to all employees of the company who are covered by the National Employment Council's collective bargaining agreement."

Although the order was not carefully worded, it appears that, in essence, it meant that the employees in grades 9 to 12 were to get the 27% wage increase previously granted to the employees in grades 1 to 8.

However, the appellant was dissatisfied and, therefore, appealed to the senior labour relations officer, who made the following determination on 30 April 1998:

> "In the light of the above facts the determination issued by the labour relations officer is set aside and (the) appellant (Olivine Industries (Pvt) Ltd) is ordered to:
>
> (a) pay all the grades 1-12 a 27% wage increase with effect from 1 April 1997 as per the agreement on Annexure 8 (1) and (3); and
>
> (b) that the workers' committee is the proxy for the grades 9-12 employees as per the Labour Relations Act [*Chapter 28:01*] sections 23 and 24."

Again, this order did not satisfy the appellant. It then appealed to the

SANDURA JA

Tribunal which dismissed the appeal with costs, and confirmed the order issued by the labour

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relations officer. Dissatisfied with that decision, the appellant appealed to this court.

The question of law which the appellant would like this court to determine is whether it was obliged to negotiate with the respondent in respect of employees in grades 9 to 12.

The twelve grades into which the appellant's employees are divided and the minimum wage payable in respect of each grade, as well as other conditions of employment, are set out in the first schedule of the Collective Bargaining Agreement: Detergents, Edible Oils and Fats Industry, published in SI 89 of 1997, as amended ("the Agreement"). The Agreement was between the Detergents, Edible Oils and Fats Employers' Association and the Detergents, Edible Oils and Fats Workers' Union, both of which were part of the National Employment Council for the Detergents, Edible Oils and Fats Industry.

Put differently, the question which this court has to determine is whether the respondent, as the appellant's workers' committee, had the power to negotiate wage increments with the appellant in respect of employees in grades 9 to 12. It was common cause that these employees were not managerial employees and that, in terms of s 24(1)(a) of the Labour Relations Act [*Chapter 28:01*] ("the Act"), the respondent was obliged to represent them in any matter affecting their rights and interests.

The powers and functions of workers' committees are set out in s 24 of the Act, which reads as follows:

" (1) A workers committee shall -

(a) subject to this Act, represent the employees concerned in any matter affecting their rights and interests; and

(b) subject to subsection (3), be entitled to negotiate with the employer concerned a collective bargaining agreement relating to the terms and conditions of employment of the employees concerned; and

(c) subject to Part XIII, be entitled to recommend collective job action to the employees concerned; and

(d) where a works council is or is to be constituted at any workplace, elect some of its members to represent employees on the works council.

(2) Subject to subsection (3), where a workers committee has been appointed or elected to represent employees, no person other than such workers committee and the appropriate trade union, if any, may -

(a) act or purport to act for the employees in negotiating any collective bargaining agreement; or

(b) direct or recommend collective job action to the employees.

(3) Where an appropriate trade union exists for any employees, a workers committee of those employees may negotiate a collective bargaining agreement with an employer -

SANDURA JA

(a) in the case where the trade union has no collective bargaining agreement with the employer concerned, only to the extent that such negotiation is authorised in writing by the trade union concerned; or

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(b) in the case where there is a collective bargaining agreement, only to the extent permitted by such collective bargaining agreement; or

(c) where the Minister certifies in writing that -

(i) the issue in question was omitted from or included in the principal collective bargaining agreement when it should not have been so omitted or included; and

(ii) the parties to the principal collective bargaining agreement have failed or are not in a position to reach an agreement on such an issue."

At this stage, I ought to mention that at the relevant time the employees in grades 9 to 12 were being paid more than the minimum wages set out in the Agreement. What the respondent sought to negotiate on their behalf was not an increase over the minimum wages, but an increase over the actual wages which were being paid to them.

In addition, it is pertinent to note that the Agreement only sets out the minimum wages payable to the employees in the various grades, and not the maximum. In this regard, clause 4(1) of the Agreement provides as follows:

" (1) Every employer shall place each employee in a grade appropriate to his occupation, and shall pay to such employee a wage of not less than the amount prescribed in the First Schedule (for) the grade of the employee, and no employee shall accept a wage less than the amount prescribed."

Subject to that restriction, and to s 22(1) of the Act in terms of which the Minister may fix maximum wages, an employer can pay his employees as much as he wants.

I now wish to consider whether the respondent, as the appellant's workers' committee, had the power to negotiate wages with the appellant in respect of the employees in grades 9 to 12.

In terms of s 24(3)(b) of the Act, where an appropriate trade union exists for the employees, and there is a collective bargaining agreement, a workers' committee of those employees may negotiate a collective bargaining agreement with their employer only to the extent permitted by the collective bargaining agreement.

The term "collective bargaining agreement" is defined in s 2 of the Act as follows:

"an agreement negotiated in accordance with this Act which regulates the terms and conditions of employment of employees."

It follows that an agreement negotiated in accordance with the Act in terms of which the employees are granted wage increments is a collective bargaining agreement.

SANDURA JA

In terms of s 24(3)(b), provided the conditions already specified are present, a workers' committee of the employees concerned may negotiate a collective bargaining agreement with their employer only to the extent permitted by the principal collective bargaining agreement. What this means is, for example, that where the principal collective bargaining agreement specifies the minimum wages payable to the employees, the workers' committee is only permitted to negotiate wages above such minimum wages. It cannot negotiate wages below the

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minimum wages because such wages are forbidden.

Similarly, where the principal collective bargaining agreement specifies the maximum and minimum wages payable to the employees, the workers' committee is only permitted to negotiate wages which are above the minimum and below the maximum wages specified. It cannot negotiate wages which are either below the minimum or above the maximum wages laid down because such wages are forbidden. The decision of this court in *Old Mutual* v *Old Mutual Workers' Committee* S-257-96 (not reported) was, therefore, correct.

In the present case, at the relevant time an appropriate trade union existed for the appellant's employees in all the grades. It was the Detergents, Edible Oils and Fats Workers Union of Zimbabwe.

In addition, a collective bargaining agreement was in existence at the time. This is the Agreement already referred to.

That Agreement specified the minimum wages payable to the employees in the various grades, but not the maximum. In other words, whilst wages below the specified minimum were forbidden, those above the minimum were not forbidden but were in fact permitted. In this regard s 74(6) of the Act is pertinent. It reads as follows:

> "The existence of a collective bargaining agreement shall not preclude an employer and his employees from agreeing to the introduction of higher rates of pay or other more favourable conditions of employment before the expiry of such collective bargaining agreement, so however that the rights and interests of the employees are not thereby diminished or adversely affected ..."

In terms of s 24(1)(a) of the Act, a workers committee has the obligation to represent the employees concerned in any matter affecting their rights and interests. That includes wage negotiations.

In the circumstances, the respondent had the power, in terms of s 24(1)(a) and s 24(3)(b) of the Act, to negotiate with the appellant wage increments for the employees in grades 9 to 12, a power which the employees themselves had in terms of s 74(6) of the Act. That being the case, the appellant was obliged to negotiate the wage increases with the respondent. The appellant could not refuse to negotiate with the respondent, one of the reasons being

SANDURA JA

that in terms of s 24(1)(a) of the Act the respondent was legally obliged to negotiate with the appellant the wage increases for the employees in grades 9 to 12. That is so because the respondent is legally obliged to represent the employees in matters affecting their rights and interests.

However, that is not the end of the matter. The Tribunal confirmed the order granted by the labour relations officer. The effect of that order, which was not clearly worded, appears to be that the employees in grades 9 to 12 were awarded a 27% wage increase. The order granted by the senior labour relations officer was to the same effect.

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In my view, it was wrong for the two officers to impose on the appellant, in respect of the employees in grades 9 to 12, the percentage increase which had been agreed upon in arbitration as a compromise in respect of the employees in grades 1 to 8. It may very well be that if the appellant had known that the employees in grades 9 to 12, who were the highest paid, were included in the wage increase negotiations, it might not have agreed to an increase of 27%.

It seems to me that the best way of resolving the matter is to set aside the orders granted by the labour relations officer, the senior labour relations officer and the Tribunal, and then order the appellant to negotiate with the respondent the appropriate wage increments for the employees in grades 9 to 12 in respect of the relevant period.

As far as costs are concerned, since both parties have achieved partial success, I shall make no order as to costs.

In the circumstances, the following order is made:

1. The appeal is allowed with no order as to costs.

2. The order of the Labour Relations Tribunal is set aside and the following is substituted:

   (a) The appeal is allowed with no order as to costs.

   (b) The orders issued by the labour relations officer and the senior labour relations officer are set aside.

   (c) The appellant shall, as soon as possible, negotiate with the respondent the appropriate wage increments for the employees in grades 9 to 12 for the year commencing 1 April 1997.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

ATTORNEY-GENERAL v SPENCER & ANOR 2000 (2) ZLR 206 (SC)

Citation	2000 (2) ZLR 206 (SC)
Case No	Judgment No. S-94-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA and Sandura JA
Heard	September 11, 2000
Judgment	September 11, 2000

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Counsel M Majuru, for the appellant
No appearance for the respondents

Annotations None

Criminal appeal

Flynote

Appeal - right of - fugitive from justice - appellant on bail and failing to report in accordance with bail conditions - appeal should not be entertained until contempt purged

Headnote

The respondents were on bail pending their appeals to the High Court against conviction. The second respondent fled the jurisdiction; the first respondent failed to comply with the reporting conditions of his bail. He was in default when the appeal was called and his legal practitioner had no knowledge of his whereabouts. Nonetheless, the High Court heard his appeal and set aside the conviction. In the purported exercise of its powers of review, the High Court set aside the conviction of the second respondent as well. The Attorney-General appealed against the High Court's decision.

Held, that a person seeking to establish his rights in a court of law must come to court with clean hands. A fugitive from justice, who deliberately puts himself beyond the reach of the law by going into hiding or fleeing the country, is denied the protection of the law. With regard to the first appellant, the information placed before the High Court did not conclusively prove that he was a fugitive from justice, but where the information available to the State points to the probability that an appellant had unlawfully left the jurisdiction before the hearing of his appeal, or is in hiding, he is deemed to be a fugitive from justice. Accordingly, the High Court should not have exercised its discretion in his favour until the appellant returned to court and purged his contempt of the bail order.

Held, further, that the proceedings in the trial court were not susceptible of review. The second respondent had been represented by a legal practitioner and the proceedings did not have to be sent on review unless this had been specifically requested, which had not been done.

Cases Considered

Cases cited:

Maluleke v *Dupont NO & Anor* 1966 RLR 620 (A)

Mulligan v *Mulligan* 1925 WLD 164

S v *Isaacs* 1968 (2) SA 184 (A)

S v *Moshesh & Ors* 1973 (3) SA 962 (A)

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S v *Neill* 1982 (1) ZLR 142 (H)

Stopforth v *Min of Justice & Ors* 1999 (2) SACR 541 (SCA)

Legislation considered:

Magistrates Court Act [*Chapter 7:10*], s 57

Case Information

M Majuru, for the appellant

No appearance for the respondents

Judgment

Gubbay CJ: Under the provisions of s 13(1) of the Supreme Court Act [*Chapter 7:13*] the Attorney-General sought and obtained leave to appeal against the judgment of the High Court quashing the convictions and sentences of the respondents on a joint charge of attempted extortion.

Subsequent to the conclusion of the trial in the regional court the respondents, who had been sentenced to five years' imprisonment with labour, half of such period being conditionally suspended for five years, were granted bail by the High Court pending the determination of the appeal they had noted on 5 June 1998. Among other conditions, each was required to report twice weekly at Avondale Police Station.

The first respondent is a citizen of the Republic of South Africa, ordinarily resident in Louis Trichardt. He entered this country on 29 June 1997 and was alleged to have committed the offence on 1 July 1997. He was arrested on 8 July 1997. The second respondent is a Zimbabwean national. At the material time, he was living in Bindura.

The appeal was set down for hearing on 18 May 1999. On 5 January 1999, the legal practitioner who was acting for the second respondent filed a notice of renunciation of agency. He had learnt that in violation of the conditions of bail the second respondent had fled the jurisdiction and did not intend to return. This fact was brought to the attention of the two judges to whom the hearing of the appeal had been assigned.

Shortly before the hearing, the State was advised that the first respondent was also in breach of the conditions of bail, in that he was failing to report his presence to the police.

When the appeal was called on 18 May 1999 there was no appearance for the first respondent; that there was no appearance for the second respondent was understandable and expected. The Counsel for the State applied for the appeal to be dismissed for want of prosecution. The High Court, however, postponed the hearing to 20 May 1999 so as to afford the first respondent's legal representative an opportunity to explain his non-appearance. The hearing was then further postponed to the following day.

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On 21 May 1999, the first respondent's counsel informed the court that he had been unaware that his client had not been reporting his presence to the police. He stated further that he had attempted without success to contact the first respondent at his last known address. The latter's whereabouts were totally unknown. He was allowed to withdraw from the appeal.

Although the respondents were in default, counsel for the State was directed to argue the merits of the appeals. Having heard him, the High Court

GUBBAY CJ

delivered an *ex tempore* judgment in which it upheld the appeal of the first respondent. It noted that the appeal of the second respondent had lapsed for want of prosecution, as he had unlawfully left the country and estreated his bail. Nonetheless, in the purported exercise of its powers of review, the High Court set aside the conviction and sentence of the second respondent as well.

I entertain not the slightest doubt that, in proceeding to hear the appeal and in making the orders it did, the High Court fell into error.

The well-established principle is that a person seeking to establish his rights in a court of law must come to the court with clean hands. A fugitive from justice is one who has deliberately put himself beyond the reach of the law by going into hiding or fleeing the country. The law denies its protection to such persons. See *Mulligan* v *Mulligan* 1925 WLD 164 at 167; *Maluleke* v *Dupont NO & Anor* 1966 RLR 620 (A) at 624A; *S* v *Neill* 1982 (1) ZLR 142 (H) at 145E-F. To do otherwise would be to stultify the process of the law.

The High Court appreciated that it had no discretion to hear the appeal of the second respondent. Undoubtedly, his action in fleeing signified that he was not prepared to accept or abide by the judicial process of the country. He had set the law in defiance.

The real issue, in relation to the second respondent, is whether the proceedings in the regional court were susceptible of review. Plainly, they were not automatically reviewable at the instance of the High Court. The second respondent had been defended by a legal practitioner at his trial. Consequently, the proceedings that constituted his conviction and sentence did not have to be sent on review unless specifically requested within three days of the hearing. See proviso (ii)(a) to s 57(1) and s 57(2) of the Magistrates Court Act [*Chapter 7:10*]. This was not done, so the proceedings were not reviewable in the normal course of events. See *S* v *Neill supra* at 148A; Reid-Rowland *Criminal Procedure in Zimbabwe* at 27-3.

With respect to the first respondent, the information placed before the High Court did not prove conclusively that at the date the appeal was heard he had *actually* fled the jurisdiction. Certainly he had failed to comply with the conditions of bail. Mr *Majuru*, who appeared for the Attorney-General, assured this court that the first respondent was no longer within the country. But he was unable to say precisely when he had departed. It is very probable that he did so before 18 May 1999, the day when he must have known the appeal was set down for hearing. Of course, if he was then in the country, but in hiding, he still would be considered to be a

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fugitive from justice. See *Maluleke* v *Dupont NO & Anor supra* at 626F.

In *S* v *Moshesh & Ors* 1973 (3) SA 962 (A), the South African Appellate Division was advised that the first appellant had failed to report to the police at Mount Frere as required, and his family had left the residence at Mount

GUBBAY CJ

Frere and all his belongings had been removed. Attempts to trace the first appellant had been in vain. Acting on such information, the court held the first appellant to be a fugitive from justice (see at 963C-E). And in *S* v *Isaacs* 1968 (2) SA 184 (A) the appellant, who was in breach of bail by failing to report and whose family professed to have no knowledge of his whereabouts, but who was thought to have left South Africa for Europe, was found to be "plainly a fugitive from justice" (see at 185F-G).

It is my view that these decisions support the submission advanced in this matter that where the information available to the State points to the *probability* that an appellant has unlawfully left the jurisdiction prior to the hearing of the appeal, or is in hiding, he is deemed to be a fugitive from justice.

However, even if I am wrong in this regard, I consider that the High Court ought not to have heard the appeal of the first respondent. There was no appearance before it. The first respondent's counsel had withdrawn his representation; and correctly so. In the second place, the first respondent was in contempt of the condition of bail set by the High Court requiring him to report to the police. No explanation was forthcoming as to the reason for such disobedience; and his whereabouts were unknown. In such circumstances, the High Court was not in a position to exercise its discretion in the first respondent's favour and hear the appeal. Until the first respondent was found and had made some effort to purge his contempt of the bail order, he had no right to obtain from the court the relief sought by the appeal.

I express no opinion on the merits of the appeal. Whether the High Court was correct or not in quashing the convictions is not a relevant consideration. It suffices to underscore that by their conduct neither respondent was deserving of any relief.

In the result, the appeal must be allowed. The most appropriate order, in substitution for that made by the court *a quo*, is that:

> "The appeal is struck off the roll."

See *S* v *Neill supra* at 149B; *Maluleke* v *Dupont NO & Anor supra* at 624I; *Stopforth* v *Minister of Justice & Ors* 1999 (2) SACR 541 (SCA) at 540j-541a.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

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UDC LTD v SHAMVA FLORA (PVT) LTD 2000 (2) ZLR 210 (HC)

Citation	2000 (2) ZLR 210 (HC)
Case No	Judgment No. HH-182-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	August 17, 2000
Judgment	September 13, 2000
Counsel	F Girach, for the applicant T Chinawa, for the respondent
Annotations	None

Opposed application

Flynote

Practice and procedure - pleadings - amendment - court's discretion to allow - principles

Headnote

The court may at any stage allow either party to amend his pleadings. The court has to exercise its discretion judicially. The approach of our courts is to allow amendments quite liberally. This liberality is only affected where the amendment would cause considerable inconvenience to the court or prejudice to a party, or where there is no prospect of the point raised in the amendment succeeding or where the matters in the amendment are vague and embarrassing. There will be no prejudice if the parties can be placed in the same position as they were when the pleading was originally filed. If the pleading is clear and concise, the other party must deal with it as it is. If the other party suggests that the facts stated are false or cannot be proved, its remedy is to show this at the trial.

Cases Considered

Cases cited:

Angelique Entprs (Pvt) Ltd v *Albco (Pvt) Ltd* 1990 (1) ZLR 6 (H)

Commercial Union Assurance Co Ltd v *Waymark NO* 1995 (2) SA 73 (Tk)

Copper Trading Co (Pvt) Ltd v *City of Bulawayo* 1997 (1) ZLR 134 (S)

Levenstein v *Levenstein* 1955 SR 91; 1955 (3) SA 615 (SR)

Legislation considered:

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High Court Rules 1971 (RGN 1074 of 1971), r 132

Uniform Rules of Court 1965 (South Africa), r 28

Case Information

F Girach, for the applicant

T Chinawa, for the respondent

Judgment

Chinhengo J: In case No. H-8585-96, the respondent sued the applicant for $172 018.82, alleging that sum to be an overpayment in respect of money owed by it to the applicant in terms of a loan agreement entered into on 5 December 1991, a copy of which was attached to the particulars of claim. The respondent alleged that the overpayment arose as a result of it having paid some money in respect of other accounts it maintained with the applicant and from the money so paid the applicant had wrongfully appropriated the sum of $448 533.75 towards a different account. As a result of such wrongful

appropriation, the applicant was overpaid by the sum of $172 018.82. The respondent's claim was, in the alternative, based on the allegation that it had paid the sum of $172 018.82 in the mistaken, but *bona fide*, excusable or reasonable belief that the sum was due to the applicant. In the further alternative, the respondent based its claim on unjust enrichment. It claimed the payment of that sum together with interest at the prescribed rate of interest from 8 December 1995, when the money was paid to the applicant, to the date of payment.

On 5 March 1998, the applicant pleaded to the respondent's claim, praying for the dismissal of the claim, and counterclaimed for the payment to it by the respondent of the sum of $601 604.70, with interest thereon at the rate of 35.5% *per annum* compounded monthly from l December 1996 to the date of payment, and costs of suit.

In the plea, the applicant admitted the loan agreement attached to the respondent's particulars of claim. It admitted that it had lent to the respondent the sum of $784 069.90 and that the repayments by the respondent had to be appropriated, first to interest and any balance thereof to capital. It denied that the rate of interest was fixed at 32% *per annum* on the amount of the loan outstanding from time to time, as alleged by the respondent, and averred that that rate was used only to calculate the total sum outstanding but was subject to escalation in terms of the conditions set out in the loan agreement. The applicant further denied that the respondent had paid some money in respect of other amounts on or around 8 December 1995 or that the money so paid was wrongfully appropriated. It averred that the sum of $448 533.75 paid by the respondent on 8 December 1995 was paid in respect of the loan agreement in question. It therefore denied that there was any overpayment and denied further the alternative bases of respondent's claim as particularised.

In its counterclaim, the applicant alleged that the respondent was indebted to it as at 30

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November 1996 in the sum of $601 604.70 because it had defaulted in its repayment of the loan. The applicant claimed this sum together with interest at the rate of 35.5% *per annum.*

On 30 October 1998, the respondent filed its replication and plea in reconvention. It admitted the existence of the escalation clause in respect of the rate of interest but averred that three months' notice of the increase of the rate of interest was required to be given before the applicant could increase the rate of interest and, because no such notice was given, the applicant was not entitled to interest exceeding 32% *per annum*. In the plea in reconvention, it denied owing any money to the applicant. By the time that the respondent filed its replication and plea in reconvention, the applicant had, on 15 September 1998, filed a notice of amendment to its plea and to its claim in reconvention so as to allege that the respondent was, on four separate

occasions, granted, upon its request, extensions of time in the payment of instalments due to the applicant. Those extensions had resulted in the amounts payable by the respondent to the applicant rising and the rate of interest applicable also rising. It is not clear whether or not the respondent replicated or pleaded after taking into account the contents of the notice of amendment filed on 15 September 1998, which notice the applicant had sought to bring up at a pre-trial conference stage.

The present application is concerned with a further amendment by the applicant to its plea and claim in reconvention filed on 2 December 1999. The notice of amendment seeks to substitute the plea and counterclaim filed on 5 March 1998 and to abandon the notice of amendment filed on 15 September 1998 and replace those pleadings with a plea and claim in reconvention as appears in that notice. In the proposed amended plea, the main averment is that the respondent sought and was granted four separate reschedulings of the loan agreement. It is alleged that in June 1992, August 1992, November 1995 and April 1996, the loan agreement was rescheduled. The applicant avers that the respondent failed to make any payment in terms of the rescheduling agreed in April 1996 and failed to pay the full amount outstanding by the agreed extended date of 31 December 1996. The applicant further alleges that on 8 December 1996 the respondent paid to it the sum of $448 533.75 but states that such sum has been taken into account in the calculations made by it. The claim it makes in reconvention is for the payment of the sum outstanding of $640 494.42 and interest on that sum at the prescribed rate of interest from l January 1997 to the date of payment.

In the founding affidavit to this application, the applicant avers that it filed its notice of amendment on 2 December 1999 and served it upon the respondent's legal practitioners. It avers that the amendment is necessary in order to properly place before this court the issues between the parties, but it has hit a snag in that the respondent's legal practitioners have not indicated whether or not the respondent will consent to the amendment. Various letters were exchanged between the legal practitioners in this connection, but no progress was made. The applicant has therefore had to approach the court for an order granting the amendment, with costs being reserved for determination at the hearing of the main action.

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The letter by which the applicant's legal practitioners sought the respondent's consent to the proposed amendment is dated 3 December 1999 and reads:

> "We refer to this matter and confirm that on behalf of the Defendant we have now filed an amendment to the Plea and Claim in Reconvention. We believe that the amendment once effected will reflect more accurately the issue between the parties and should be grateful if you would kindly confirm rather urgently that you will agree to the amendment. In the event of course that there is no agreement we shall simply have to make application for the formal granting of the amendment. We trust that this will not be necessary."

CHINHENGO J

The substantive response to this letter was made on 27 January 2000 and it reads:

> "Further to your letter of 12th January, 2000, we advise that we have since taken our client's instructions on the proposed amendment and to enable us to make an informed decision on the proposed amendment, we require the following -
>
> (a) The documents in terms of which it is alleged there was a rescheduling of the loan agreements in June 1992, August 1992, November 1995, and April 1996;
>
> (b) Copies of the defendant's repayment terms in respect of each alleged rescheduling;
>
> (c) A schedule of payments in respect of each alleged rescheduled agreement and interest rates applicable.
>
> Upon receiving these documents, we shall take our client's instruction and thereafter revert with our client's attitude."

The applicant considered that the respondent had, by its reply, refused to give its consent to the notice of amendment, hence the present application. Indeed, the respondent was unwilling to give its consent. Its reasons appear in the opposing affidavit in paras 4 and 5 which I must quote in their entirety:

> "4. *Ad paragraph 3*
>
> For the Honourable Court and the plaintiff to determine whether or not the amendment is necessary, I contend that the plaintiff (respondent) is entitled to the information sought in the letter of 27 January 2000. The applicant has not replied to such letter and has not indicated why the information sought has not been provided.
>
> 5. *Ad paragraph 4*
>
> The letter of 27 January 2000 is clear that a decision can only be made upon the perusal of the information sought. It is incredible that the applicant expects the respondent to make a decision on issues whose basis is unclear. I repeat that the respondent is entitled to ask for the information sought before it can deal with the question of the proposed amendment.
>
> 5.1. I particularly require this information as the applicant has admitted in its annual report for 1998 that errors in its systems had the effect of overstating debtor balances. I must therefore be satisfied that the proposed amendments are not based on erroneous information from the admitted errors. Attached hereto as Annexure 'A1' is a copy of p 14 of the applicant's 1998 Annual Report. In the circumstances the applicant must provide the respondent with the information sought before the amendment can be properly dealt with."

Annexure "A1", referred to in para 5.1 of the respondent's affidavit, acknowledges that a figure of $7.66 million had to be deducted from the applicant's after tax profit for the year 1997 and

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states further that:

> "The processing errors were caused by system faults and the corruption of electronic data during the upgrading of the company's computer systems as well as by incorrect operation of this system. These errors had the effect of overstating debtor balances ... "

The applicant's answering affidavit is concerned in the main with one averment, which in fact constitutes the entire question for decision by this court. The applicant avers that whether or not it will be able to prove the allegation contained in the notice of amendment is not a relevant consideration at this stage. The applicant is not required to disclose its evidence at this stage.

CHINHENGO J

If further particulars will be needed by the respondent to enable it to file its amended plea or reply, then those particulars should be sought in terms of the rules. The amendment sought is only intended to place before the court the correct issues between the parties and it is not appropriate that the respondent should be satisfied at this stage that there is or there is not evidence to support the allegations made in the proposed amendment before it will consent to it. The only objection that the respondent can raise at this stage it that it would suffer prejudice as a result of the amendment and it has not said so. The applicant considers that the opposing affidavit has been filed to buy time and asks for an order of costs to reflect the court's displeasure with the respondent's conduct in that regard.

These contentions are carried through to the applicant's heads of argument, where it is submitted that a litigant is not entitled to the evidence supporting an amendment to pleadings to decide whether or not such an amendment should be made. The evidence is a matter for the trial and not an issue in determining whether or not an amendment should be granted. The courts always allow an amendment unless it is made *mala fide* or will cause prejudice to the other party in a manner which cannot be cured by an appropriate order of costs. And the respondent does not suggest any prejudice, but insists on being furnished with evidence which will, in any case, be given at the trial. The fact that any errors may have occurred with debtor balances is not a ground for opposing the amendment - that is a matter for the trial to determine.

The respondent submits that the information it sought is important and the applicant's refusal to respond to the request or provide the information makes its application premature and one that is tainted with *mala fides*. It submits that the information was vital to enable the proper ventilation of the dispute between the parties and assist the respondent to make an informed decision as to whether it would consent to the intended amendment. The documents relating to the rescheduling form the core of applicant's plea and claim in reconvention. Those documents would clarify issues and help the respondent to assess whether an out of court settlement in case No. H-8585-96 would be the best course; they would confirm the authenticity of the applicant's claims as recorded in the intended amendment. The respondent submits that the only reason for the applicant's refusal to furnish the documents is that such documents never existed - the respondent did not sign any documents for the rescheduling of the loan agreement in June 1992, or August 1992, or November 1995, or April 1996; no repayment terms in respect of the alleged rescheduled loans ever existed and no schedule of payment in respect of the alleged rescheduled agreement and the interest rates applicable ever existed. In

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its view, the present application is a desperate attempt by the applicant to prolong the finalisation of the main case.

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The respondent also submits that it is not correct that a litigant is not entitled to the evidence supporting an amendment to pleadings if such litigant is required to decide whether or not such amendment should be made. There is a distinction, the argument continues, between information required to enable a litigant to plead and information required to enable a litigant to make an informed decision as to whether he should consent to an amendment of a pleading. Matters of evidence are not required to enable a litigant to plead, but where a litigant is called upon to indicate whether or not he consents to an amendment of a pleading he becomes entitled to all such information as will enable him to make an informed decision - to see whether the intended amendment will not cause undue prejudice to him or ascertain whether the intended amendment is not tainted with *mala fide*s. In addition, a litigant may require such information with a view to curtailing proceedings by reaching a compromise without the necessity to involve the court.

I think that it must be made clear at the very outset that this is not an application to compel the respondent to consent to the proposed amendment. The stage of giving the consent has already passed and, in any case, no application for that purpose can be made. When the letter of 23 December 1999 was received and considered by the respondent, it was at that stage that the respondent should have decided whether the amendment sought should be granted by consent or not. When the respondent requested the information in its letter of 27 January 2000, the applicant considered that response to be a refusal to give the consent and the applicant filed the present proceedings. At this stage, therefore, there is no question of this court adopting any procedure or making any decision that would place the respondent back in the position where it can decide whether to consent to the amendment or not.

I must digress a little at this stage and comment on the rules of this court in regard to amendments. Quite correctly, they allow for an amendment to be effected by consent of the parties to the proceedings and, where the parties have not agreed, application for leave to amend is provided for. I do not think our rules go far enough. A party may object to an amendment without giving the matter any serious thought. There is no provision in our rules to compel the objecting party to at least apply its mind to the application to amend. Its mere objection, whether unwarranted or otherwise, is the trigger for the application to be made to the court. The reasons for objecting are then given in the affidavits which must be filed with the court. I think that we will do well to emulate the procedure in South African courts. There it is possible to amend a pleading without the necessity of obtaining the leave of the court. In terms of r 28 of the Uniform Rules 1965, a party desiring to amend a pleading or document, other than a sworn statement, must give notice to all the other parties that unless written objection to the proposed amendment is

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CHINHENGO J

delivered within ten days of the delivery of the notice, the amendment will be effected. Thus, in terms of that rule, if no objection is delivered, every party who received the notice is deemed to have consented to the proposed amendment and the party who gives notice may, within ten days of the expiry of the time allowed for objection, proceed to effect the amendment. If the other party objects, its notice of objection must clearly and concisely state the grounds upon which the objection is founded. Only when such objection is raised would the party wishing to amend lodge the application for leave to amend (see van Winsen, Cilliers & Loots *The Civil Practice of the Supreme Court of South Africa* 4 ed p 514). To my mind, our rules should be amended along the lines of the South African rules so as to at least compel the other party to consider the proposed amendment seriously and give his reasons for objecting to the amendment. It is a procedure which can compel a party who would otherwise object to an amendment to consent to it. With such a rule perhaps the present application could have been avoided.

Order 20 r 132 of the Rules of this court provides that if the parties do not consent to an amendment the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

The granting or refusal of an application to amend a pleading is a matter for the discretion of the court. The court has to exercise its discretion in a judicial way and in the light of all the circumstances of the case. See *Copper Trading Co (Pvt) Ltd* v *City of Bulawayo* 1997 (1) ZLR 134 (S) at 143H-144B and at 144G where Korsah JA emphasised that:

> "It is paramount that the discretion reposed in the court in respect of amendments be exercised in a manner which allows the issue between the parties to be fairly tried. The fact that the amendment might lead to the defeat of the other party is not the kind of prejudice which should weigh with the court: *GMF Kontrakteurs (Edms) Bpk & Anor* v *Pretoria City Council* 1978 (2) SA 219 (T) at 222C-F."

In similar vein, I do not think that in considering an application such as the present one, the court should have any regard to placing the other party, the respondent, in a position in which it could reconsider whether to agree to the amendment or not. That also is not envisaged as a consideration by the court in the exercise of its discretion.

The approach of our courts has been to allow amendments to pleadings quite liberally in order to avoid any exercise that may lead to a wrong decision and also to ensure that the real issue between the parties may be fairly tried. This liberality is only affected where to allow the amendment would cause considerable inconvenience to the court or prejudice a party or where there

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is no prospect of the point raised in the amendment succeeding or where matters set out in the amendment are vague and embarrassing and therefore excipiable: *Levenstein* v *Levenstein*

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1955 SR 91; 1955 (3) SA 615 (SR). Thus, the question of prejudice to the other party if the amendment is allowed is a paramount consideration. It is singularly important where such prejudice cannot be compensated for by an appropriate order of costs: *Angelique Enterprises (Pvt) Ltd* v *Albco (Pvt) Ltd* 1990 (1) ZLR 6 (H). It is accepted, however, that there will be no prejudice if the parties can, for the purpose of achieving justice, be placed in the same position as they were when the pleading which is sought to be amended was originally filed.

In *Commercial Union Assurance Co Ltd* v *Waymark NO* 1995 (2) SA 73 (Tk), White J examined a number of cases dealing with amendments to pleadings. At 77F-I, he summarised the principles enunciated in the cases as being:

" 1. The court has a discretion whether to grant or refuse an amendment.

2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.

3. The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue'.

4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.

5. The party seeking the amendment must not be *mala fide*.

6. It must not 'cause an injustice to the other side which cannot be compensated by costs'.

7. The amendment should not be refused simply to punish the applicant for neglect.

8. A mere loss of time is no reason, in itself, to refuse the application.

9. If the amendment is not sought timeously, some reason must be given."

I agree that these principles are derived from the decided cases in South Africa as well as in Zimbabwe - see *Copper Trading, Levenstein* and *Angeline Enterprises supra*. They are the principles which I will follow to decide this application.

The respondent does not allege that it will be prejudiced by the amendment in any respect whatsoever. It avers in the opposing affidavit that the issues contained in the proposed amendment have no clear basis, but does not go so far as to show what is unclear about the proposed amendment or to show that the amendment is vague and embarrasing. The emphasis seems to be on the fact that the proposed amendment does not enable the respondent to determine whether it would be prejudicial to it in the sense adumbrated above or to determine whether it is *mala fide*s. I find this averment as to lack of clarity to be wholly inappropriate. To me, the proposed amendment is quite clear in all respects. A litigant is required to deal with an amendment as it is where the amendment is clear as to its purpose and in its terms or where the amendment meets the objective of pleadings:

CHINHENGO J

"The object of a pleading is to state in clear and concise terms the facts upon which a party relies to enable each side to come to trial prepared to meet the case of the other and to enable the court to isolate the issue it is to

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adjudicate upon."

(LTC Harms *Civil Procedure in The Supreme Court,* para J1).

Where the pleading is clear and concise, the other party must deal with it as it is. In this case, the amendment is designed to place before the court the applicant's defence to the respondent's claim. It contains facts which form the basis of its defence. Whether at the trial the applicant will be able to prove those facts is a different matter. If the respondent, as it suggests, is of the view that those facts cannot be proved because of the absence of documentary evidence to support them, its remedy lies in showing, at the trial, the falsity of those documents or their inadequacy or their non-existence. If the respondent considers that it must be availed of the documents in order to enable it to plead to the claim in reconvention or to replicate then the proper procedure for it would be to request for particulars. In the circumstances of this case, and at this stage, I doubt that such a request for particulars would be appropriate as the documents sought are really evidence to prove the applicant's defence or support its claim in reconvention.

I am particularly averse to any procedure which only serves to prolong litigation. The respondent has argued that the information it seeks is vital to enable it to determine whether the amendment would be prejudicial to it or whether the amendment is not *mala fide*. I do not see how, in the first place, that information will place the respondent in a different position in so far as the assessment it talks about is concerned. The respondent is not a stranger to the dispute. It must be assumed to know certain facts, such as whether any scheduling of the loans was agreed upon. If, as it says, no such rescheduling was agreed upon, then that can only bolster its case at the trial. I also do not think that it would be proper to allow the respondent, at this stage of the proceedings, to obtain information for the purpose of placing it in a position to decide whether or not to make an out of court settlement. That purpose, which would be achieved if the information sought conclusively establishes that reschedulings took place, is not a purpose for which opposition to an amendment can be mounted. If I were to disallow the amendment for any such purpose I would set a precedent for other litigants, and open the door to them to seek to delay the finalisation of proceedings for the same reason.

The respondent has ingeniously sought to distinguish between particulars (information) required to enable a party to plead, which if it is evidence, should not be provided, and particulars which are required to enable a party to decide whether a proposed amendment is prejudicial to it or is *mala fide*s. The distinction to me is one of form only. The respondent has not cited any authority for this distinction, because none exists. The provision of particulars

is reserved only for the purpose of enabling the other party to plead or to prepare for trial. When it can plead with any such particulars, that party must do so and the court cannot compel the other to furnish the particulars in the manner and circumstances of this case. I therefore reject the proposition that any such distinction can be drawn. An amendment of a pleading is always allowed where its object is to place the issue in dispute between the parties clearly before the court. And where justice requires that the amendment be allowed the court will invariably allow

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it subject to the principles which I have outlined herein. I am therefore unpersuaded that the respondent's opposition to the granting of the amendment has any merit. It is dismissed and an order is granted in terms of the draft order attached to the application, to wit, that:

1. The amendment sought by the applicant in terms of a notice filed of record on 2 December 1999 be and is hereby granted;

2. The costs of this application be made costs in the main action.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

FOROMA v MINISTER OF PUBLIC CONSTRUCTION & ANOR 2000 (2) ZLR 220 (SC)

Citation	2000 (2) ZLR 220 (SC)
Case No	Judgment No. S-91-00
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	February 3, 2000
Judgment	September 15, 2000
Counsel	P Nherere, for the appellant M K Achiume, for the respondents
Annotations	None

Civil appeal

Flynote

Revenue and public finance - expenditure - housing and guarantee fund - purpose of - not to be used to assist in construction of houses for private individuals

Headnote

The Ministry of Public Construction built a house for the appellant. In terms of the agreement, the appellant paid half the cost of the construction and the Ministry gave a loan to the appellant to meet the other half of the costs. This loan was advanced from the Housing and Guarantee Fund established under the Housing and Building Act [*Chapter 22:07*].

When the appellant sought to take possession of the house, the Ministry refused to hand it over to him. He sought a court order compelling the Ministry to hand it over, but his claim was

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dismissed on the grounds that the scheme was unlawful. He appealed against this decision.

Held, that while the national housing fund could have been used to fund the building of a house for a private individual, the only fund that could be utilised for that purpose is the National Housing Fund set up in terms of s 14(1) of the Act, although this Fund was meant to help low income earners and not members of the middle class.

Held, further, that the Minister was not authorised to use the Housing and Guarantee Fund set up in terms of s 3(1) of the Act to fund the construction of a private dwelling for a private individual. This Fund was intended to be used mainly as a guarantee for housing loans.

Held, therefore, that the agreement between the Ministry and the appellant did not have any force or effect against the State.

Cases Considered

Case cited:

Foroma v *Min of Public Construction & Anor* 1997 (1) ZLR 447 (H)

Legislation considered:

Housing and Building Act [*Chapter 22:07*], ss 3, 4, 5, 6, 14 & 15

Case Information

P Nherere, for the appellant

M K Achiume, for the respondents

Judgment

Sandura JA: This is an appeal against the judgment of the High Court which dismissed with costs the appellant's claim that the first respondent

SANDURA JA

("the Minister") hand over to him the house constructed by the Ministry of Public Construction and National Housing ("the Ministry") on Stand 682 Mt. Pleasant, Harare ("the Stand").

The preparation of this judgment was delayed by the fact that in March this year, I was appointed Chairman of the Delimitation Commission and thereafter did not have the time to prepare the judgment. Any inconvenience to the parties is sincerely regretted.

The background facts in this matter are as follows.

The appellant ("Foroma") owned the Stand and wanted to build a house on it. He bought some building materials and subsequently heard that the Ministry was building houses for members of the public. In July 1995, he met the then Permanent Secretary of the Ministry ("Kodzwa") and concluded an agreement with him. In terms of that agreement, the Ministry undertook to build a

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house on the Stand at an estimated cost of $743 560.40. Part of the agreement was oral and part was in writing. The oral terms were as follows. The Ministry would take about three months to build the house. Foroma would contribute half of the cost of construction either in money or in the form of materials. The other half of the cost would be met by the Ministry as a loan repayable over a period of twenty-five years. The interest payable on the loan was 13% *per annum*, which rate was to be reviewed from time to time. The construction of the house started in July 1995, and Foroma agreed to pay the Ministry $12 000 per month until the construction of the house was complete. It was agreed that at that stage the project would be costed and Foroma's liability to the Ministry would be quantified. Foroma was then to be permitted to take occupation of the house and commence paying his monthly instalments to the Ministry.

Although the construction of the house was virtually complete by the end of June 1996 the second respondent ("Zamchiya"), who had then replaced Kodzwa as the Permanent Secretary of the Ministry, refused to hand over the house to Foroma until the final costing had been done. Eventually, Foroma made a court application in the High Court for an order that the house be handed over to him. However, as the application raised issues which could not be resolved on the papers, the matter was referred to trial by consent, and Foroma was ordered to pay to the Ministry $12 000 per month until the trial was concluded. After the trial, Foroma's claim was dismissed with costs. However, it was declared that he was entitled to remain in occupation of the house on condition that he paid the Ministry $12 000 per month, and subject to the right of the State to take such action as it thought fit to recover the money owed to it by Foroma. The judgment was reported in 1997 (1) ZLR 447 (H). Aggrieved by that decision, Foroma appealed to this Court.

I now wish to determine whether there is any merit in this appeal. When

SANDURA JA

Kodzwa was cross-examined, he stated that when he established the housing scheme, referred to as the VIP housing scheme by the learned trial judge, he relied upon the provisions of ss 4 and 5 of the Housing and Building Act [*Chapter 22:07*] ("the Act").

However, it was common cause on appeal that neither section empowered the Minister to undertake the construction of a private dwelling house for a private individual. It is, therefore, unnecessary for me to set out the provisions of the two sections.

Mr *Nherere*, who appeared for Foroma, however, submitted that the Minister was perfectly entitled to set up the housing scheme in question under s 15 of the Act. In order to test the validity of that submission, it is necessary to examine the provisions of Part IV of the Act. Sections 14 and 15 fall under that Part.

Section 14(1) of the Act reads as follows:

" *14. Establishment of Building Funds*

(1) Notwithstanding anything to the contrary contained in the Audit and Exchequer Act [*Chapter 22.03*], there is hereby established a fund, to be known as the National Housing Fund, which shall be vested

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in the Minister and of which the Minister shall, subject to this Act, have the sole management."

It is important to bear in mind that s 14(1) of the Act establishes a National Housing Fund. The significance of this fact will appear in due course.

The relevant parts of s 15(1) of the Act relied upon by Mr *Nherere* read as follows:

" *15. Power of Minister under this Part.*

(1) The Minister may -

(a) to (d) ...

(e) on such terms and conditions as he may think fit, undertake, on behalf of other persons -

(i) to construct dwellings and other buildings and to provide essential services on land owned or leased by such other persons;

(ii) to sell or let the dwellings and other buildings so constructed;

(f) to (i) ...

(j) on such terms and conditions as he may think fit, make advances to any person for the purpose of purchasing land and building thereon a dwelling or building intended to be used for business or industrial purposes or of building on land owned by the borrower a dwelling or building intended to be used for business or industrial purposes or of purchasing an existing dwelling or building intended to be used for business or industrial purposes;

(k) to (q) ..."

It is clear from the provisions of s 15(1) of the Act set out above that the Minister is empowered by those provisions to undertake the construction of, *inter alia*, a private dwelling for a private individual like Foroma.

SANDURA JA

However, it is also clear that the Fund to be utilised for that purpose is the National Housing Fund set up in terms of s 14(1) of the Act, and not any other fund.

When Kodzwa gave evidence he made it quite clear that in the construction of the house he had utilised the Housing and Guarantee Fund, and not the National Housing Fund, as the following question and answer show:

" Q. There are two sets of funds which are set up in terms of the Housing and Building Act. Were you utilising any particular fund or were these inter-related?

A. ... for this scheme we could not use the National Housing Fund. We used the Housing and Guarantee Fund which is a self-sustaining (fund). It does not get any injection of funds from Treasury. It depends on the payments that are coming in to keep it revolving. This was done under the Housing and Guarantee Fund."

Kodzwa went on to say that the National Housing Fund was meant to help members of the low income group. He added that as there was no fund to assist members of the middle class who

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were having difficulties in raising the finance required for the construction of suitable houses, he established the scheme in terms of which Foroma's house was built.

The Housing and Guarantee Fund was set up in terms of s 3(1) of the Act. As conceded by Mr *Nherere*, the Act does not authorise the Minister to utilise this Fund in the construction of a private dwelling for a private individual. It is a Fund mainly used as a guarantee for housing loans. See ss 4, 5 and 6 of the Act.

It follows, therefore, that the learned trial judge correctly found that Kodzwa had no authority to build a house for Foroma using the Housing and Guarantee Fund. The agreement did not, therefore, have any force or effect against the State.

Finally, I come to the question of costs. As already stated, the learned trial judge dismissed Foroma's claim with costs. I do not think that the order in respect of the costs was justified, bearing in mind the fact that Kodzwa was more to blame for what happened than Foroma. He was the head of the Ministry and represented the State in the agreement. In my view, the learned trial judge should not have made any order in respect of costs.

As far as the costs of the appeal are concerned, as the appeal has partially succeeded, albeit in respect of costs only, I shall make no order as to costs.

In the circumstances, the following order is made:

1. Paragraph 1 of the order of the court *a quo* is altered so that it reads as follows:

SANDURA JA

"1. The plaintiff's claim is dismissed with no order as to costs."

2. Subject to that alteration, the appeal is dismissed with no order as to costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

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MARAWA v MINISTER OF TRANSPORT & ORS 2000 (2) ZLR 225 (SC)

Citation	2000 (2) ZLR 225 (SC)
Case No	Judgment No. S-75-00
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA

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Heard	June 26, 2000
Judgment	September 15, 2000
Counsel	A P de Bourbon SC, for the appellant No appearance for the Minister L T Biti, for the second and third respondents E T Matinenga, for the fourth respondent
Annotations	None

Civil appeal

Flynote

Administrative law - review - decision of statutory authority - appointment by authority of manager - requirement for manager to have specific qualifications - authority choosing person lacking such qualifications in preference to person who had them - irrationality of such decision

Aviation - Civil Aviation Authority - Board of Authority - composition - requirements - need for Minister to appoint persons with knowledge of civil aviation - mandatory requirement for appointment of person with knowledge of law - Board appointed without such persons a nullity - suitability of persons for appointment to board - suitability must relate to functions Authority is to carry out - transfer of personnel from former Department of Civil Aviation to Authority - no automatic transfer and no requirement that persons transferred be appointed to equivalent position in Authority

Constitutional law - statutory authorities - appointment of members of board by relevant Minister - limits on Minister's discretion as to who may be appointed

Headnote

The former Department of Civil Aviation was replaced by a statutory authority, the Civil Aviation Authority. The appellant was, until then, the Director of the Department. The then Minister of Transport appointed a board for the Authority. Not one member of the Board had any knowledge of civil aviation, and there was no person with a knowledge of law, contrary to the qualifications for appointment set out in s 10 of the Civil Aviation Act [*Chapter 13:16*]. The chairman of the Board was a member of the board of two other statutory bodies and thus disqualified for appointment.

The Board sought applications for the post of general manager. The first requirement set out in the advertisements for the position was that the candidate should have a professional qualification in civil aviation. Although the appellant had such a qualification, the person selected by the Board did not. The appellant claimed that the appointment made was a nullity. Two grounds were given for this assertion. The first was that the Board was not itself properly constituted and its decisions were null and void. Secondly, even if the Board was properly constituted, its decision to appoint the other candidate was grossly unreasonable.

Alternatively, he argued that he should have been regarded as being automatically transferred

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to the Authority, and to a position equivalent to that which he held previously.

Held, that in view of the nature and functions of the Authority, the Minister's decision to appoint a Board consisting entirely of people lacking knowledge of civil aviation was irrational. Although s 10 of the Act does allow the Minister to appoint persons who do not have knowledge, experience or ability in civil aviation or finance, provided they are otherwise "suitable" for appointment, it would be expected that the majority of the members of the Board would have knowledge, experience or ability in civil aviation. "Suitability" otherwise for appointment must in any event relate to the objects and functions of the Authority and the tasks the Board is expected to perform.

Held, further, that the failure to appoint a person with a knowledge of law meant that the Board was in any case not properly constituted. The situation was not saved by s 23 of the Act, which did not envisage a situation where the entire Board was disqualified. Consequently, any decision by the Board was a nullity.

Held, further, that the Board's decision to appoint a person lacking the qualifications laid down by the Board itself, in preference to a person who had such qualifications, was irrational. This did not mean, though, that the appellant should necessarily have been appointed: one of the several other candidates might have been more suitable.

Held, further, that s 83 of the Act did not require all personnel to be transferred from the Department to the Authority, nor did it require that anyone transferred should assume a position in the Authority equivalent to that he held in the Department.

Cases Considered

Legislation considered:

Civil Aviation Act [*Chapter 13:16*], ss 5, 6, 7, 10, 11, 23 and 83

Case Information

A P de Bourbon SC, for the appellant

No appearance for the Minister

L T Biti, for the second and third respondents

E T Matinenga, for the fourth respondent

Judgment

Ebrahim JA: The appellant was the Director of Civil Aviation under the Ministry of Transport and Energy immediately before the Department of Civil Aviation (DCA) was abolished and its functions taken over by the Civil Aviation Authority of Zimbabwe (the CAAZ), which is the second respondent. The CAAZ is a body corporate, created by the Civil Aviation Act [*Chapter 13:16*]. Its objects and functions are set out in ss 5 and 6 of the Act, which read as follows:

> "5. *Objects of Authority*

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The objects of the Authority shall be -

(a) to promote the safe, regular and efficient use and development of aviation inside and outside Zimbabwe; and

(b) to advise the Government on all matters relating to domestic and international civil aviation.

6. *Functions of the Authority*

(1) Subject to this Act, the functions of the Authority shall be -

(a) to control and regulate the operation of aircraft in and over Zimbabwe;

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(b) to provide air navigation services, including air traffic control, in Zimbabwean airspace and in any areas outside Zimbabwe for which the Authority, pursuant to international arrangements, is responsible for providing such services;

(c) to provide aviation meteorological services in relation to Zimbabwe;

(d) to provide aeronautical information services with respect to aerodromes, air traffic control and facilities, meteorological services, hazards to air navigation and such other matters relating to air traffic as may be prescribed or as the Authority may consider appropriate;

(e) to ensure the maintenance of safety standards prescribed by or under this Act in relation to personnel, aircraft and aerodromes;

(f) to provide technical services to the Government or any other person for the design, installation, maintenance and modification of electronic, radio and other equipment used in the provision of air navigation and communication services;

(g) to investigate the circumstances surrounding all accidents involving aircraft and, where appropriate, to take such measures as are necessary to prevent their recurrence;

(h) to establish, develop, operate and own aerodromes in Zimbabwe;

(i) to exercise the functions conferred upon it in terms of this Act in relation to -

(i) the registration of aircraft; and

(ii) aviation security; and

(iii) search and rescue services provided in relation to aircraft and aviation; and

(iv) fire-fighting services provided at aerodromes; and

(v) the training and licensing of persons engaged in the inspection, supervision, repair, overhaul, maintenance, operation and use of aircraft; and

(vi) the design and construction of aircraft;

(vii) the licensing of aerodromes;

(j) to exercise any other function that may be conferred or imposed on the Authority by or in terms of this Act or any other enactment.

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(2) For the better exercise of its functions, the Authority shall have power, subject to this Act, to do or cause to be done, either by itself or through its agents, all or any of the things specified in the First Schedule, either absolutely or conditionally and either solely or jointly with others."

General policy directions may be given to the CAAZ by the Minister of Transport in terms of s 7 of the Act.

The operations of the CAAZ are controlled by a board appointed in terms of s 10 of the Act, which reads as follows:

" (1) Subject to this Act, the operations of the Authority shall be controlled by a board consisting of not fewer than five and not more than seven members appointed by the Minister after consultation with the President and subject to such directions as the President may give him.

(2) Members shall be appointed for their *knowledge of and ability and experience in aviation or finance or for their suitability otherwise for appointment as members*.

(3) At least one member shall be appointed for his knowledge of law, in particular the law relating to aviation" (my emphasis).

Section 11 of the Act sets out the disqualifications for appointment to the

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Board. Among these are that the member in question is neither a citizen of nor ordinarily resident in Zimbabwe, that he has been convicted of certain offences, and, most importantly for this appeal, that he is a member of two or more other statutory bodies. In terms of s 11(3)(b):

"'statutory body' means -

(i) any commission established by the Constitution; or

(ii) any body corporate established directly by or under an Act for special purposes specified in that Act, the membership of which consists wholly or mainly of persons appointed by the President, a Vice-President, a Minister or any other statutory body or by a Commission established by the Constitution."

Early in 1999, the first respondent, the then Minister of Transport and Energy, appointed six persons to constitute the Board of the CAAZ. The Board caused advertisements to be placed in the media for the position of General Manager, who is the person responsible to the Board for the day-to-day running of the CAAZ. The advertisements required the following qualifications, among others:

- a professional qualification in civil aviation or a related field;
- at least ten years' experience in a high-level managerial position, experience in the aviation field being an advantage; and
- high level of management competence and proven ability to achieve business objectives.

Applications were received from numerous applicants, among them the appellant and the fourth respondent, Mr Manhambara. The applications were in the first instance vetted by a firm of consultants and a short list prepared. The appellant and Manhambara were subsequently

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interviewed by the Board, which selected Manhambara to be the new General Manager of the CAAZ.

The appellant brought an application before the High Court, seeking to have the appointment of Manhambara set aside and himself substituted as General Manager. There were three bases for his application. The first was that in terms of s 83(3) of the Act, he should have automatically been transferred to the CAAZ as its general manager, since he effectively held the equivalent post in the DCA. The second was that the Board was not properly constituted and that its decisions were null and void. The third was that, even if the Board was properly constituted, its decision to appoint Manhambara in preference to the appellant was grossly unreasonable.

The learned Judge President rejected these arguments. He held that s 83(3) was not applicable. He held that although the Board was indeed not properly constituted, its decisions were saved by the provisions of s 23 of the Act. This section reads as follows:

> "No decision or act of the Board or a committee or act that is authorised by the Board or

> a committee shall be invalid solely because there was a vacancy in the membership of the Board or the committee or because a disqualified person purported to act as a member of the Board or the committee, as the case may be, at the time the decision was taken or the act was done or authorised."

Finally, he held that the appellant had not come anywhere near discharging the onus of showing that the Board's decision to appoint Manhambara was so unreasonable that it must have taken leave of its senses to have come to the decision it did.

I will deal with each of these findings, though in a different order.

COMPOSITION OF THE BOARD

It is common cause that not one of the members of the CAAZ Board has been appointed for his knowledge of the law, in particular the law relating to aviation as is required by s 10(3). It seems to me that this provision is mandatory. It is separate from the requirements for the appointment of the other members. It seems to me clear that the legislature considered it essential to have a legally qualified member of the Board. Failure by the Minister to appoint such a person means that the Board is not properly constituted, even if the other persons are qualified in every other way.

The appellant alleged at the outset that none of the members appointed by the Minister has any knowledge, ability or experience in civil aviation. That allegation has not been refuted and it must be accepted that none of the members is so qualified. It is, of course, correct that the section allows the Minister to appoint members who have knowledge, ability or experience in finance or who are otherwise "suitable" for appointment. In this context, it seems to me that suitability must relate to the objects of the CAAZ. Bearing in mind that one of the objects of the CAAZ is to advise the Government on all matters relating to domestic and international civil aviation, it seems to me that a Board consisting entirely of persons lacking in knowledge, ability

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or experience in civil aviation cannot hope to achieve that object. I do not say that all the members of the Board must have knowledge of civil aviation, but I would have expected that the majority should have such knowledge. The Minister has, in effect, appointed a Board which cannot carry out its objects. That surely cannot have been contemplated by the legislature.

I can find no authority on this matter, so must approach the issue on general principles.

Section 10(2) requires that the members of the Board be "appointed for their knowledge of and ability and experience in aviation or finance or for their suitability otherwise for appointment as members". Bearing in mind the objects and functions of the CAAZ, as set out in ss 5 and 6, knowledge of and

ability and experience in aviation would clearly be the most desirable qualification. To have someone who has knowledge of and ability and experience in finance would also be desirable, as the CAAZ is dealing with a great deal of money. Mrs Mpofu is such a person. But the suggestion is that other persons chosen by the Minister are "otherwise (suitable)". This begs the question: suitable for what?

Webster's *Third New International Dictionary* defines "suitable" as follows:

> " **2 a**: adapted to a use or purpose ... **b**: appropriate from the viewpoint of propriety, convenience or fitness ... **c**: having the necessary qualifications ..."

The first definition is not relevant here. The second and third are. There is no adverse suggestion about the character of any of the members. But are any of them "fit" to carry out the functions required of them? Do any of them have "the necessary qualifications"?

As mentioned before, one must look at the objects and functions of the CAAZ. These are all clearly specialist functions and it would be entirely inappropriate to select people who are not qualified in some aspect of civil aviation. There are, in addition, international obligations. Zimbabwe is a signatory to the Chicago Convention (see ss 3 of the Act). Our international obligations can hardly be secured by the appointment of a Board and General Manager, neither of whom have any background in civil aviation. For the Minister to choose unqualified people is therefore, in my view, irrational.

It is necessary, I think, to look at the qualifications of the Board and those of the General Manager together. How can the Board appoint a suitable General Manager, who has the functions set out in s 24(4), as read with s 6(1), if neither the Board nor the General Manager have any qualification in civil aviation? It may be acceptable for a qualified Board to appoint an unqualified General Manager, because the Board has the knowledge to keep an eye on what he is doing. But if the Board is unqualified, how can they even presume to select a General Manager who can be expected to carry out the functions required of the CAAZ?

The next stage is: who is going to determine the suitability of other staff appointed in terms of s 26? There can be no doubt that there must be personnel qualified in the relevant branch of civil aviation to carry out the various functions of the CAAZ set out in s 6. If the Board is qualified,

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they at least can determine the suitability of the personnel appointed. If the General Manager is qualified, presumably he can, if the Board assigns that function to him under s 24(4), select suitably qualified people. But that returns us to the argument above: if the Board is unqualified, how are they going to know whether the General Manager is suitably qualified? And even if they should appoint a qualified General Manager, how can they supervise what he is doing?

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On the requirement that the members of the Board be chosen for their knowledge of aviation or finance or for their suitability otherwise, I suggest that this does not give the Minister *carte blanche* to choose anyone he pleases. I suggest it gives him an order of priority. Because this is a technical organisation, it is essential that the Board should have a preponderance of people qualified in the subject. There is certainly an argument for having a person or a couple of people qualified in finance.

If there were no people qualified in aviation who could have been chosen, then it might have been acceptable for the Minister to have chosen other people. But there can be no doubt - even without formal evidence - that there are numerous people in the country qualified in aviation. There are people at Air Zimbabwe, at the charter companies, at the aircraft maintenance companies, etc. For them all to be ignored is not just the wrongful exercise of the Minister's discretion but, in my view, irrational.

This is surely not "suitability" in the air and unrelated to anything. "Suitability" must relate to something, and in this case it must relate to the task the Board is expected to perform. Now there may be grounds for having someone on the Board who is not qualified in aviation or finance, such as someone who is an expert in management or corporate structures, whose expertise would help the Board perform its functions. But it must be stressed that the CAAZ is primarily a technical body and so such people should be in the minority on the Board.

It is further alleged by the appellant that two members of the Board, - the chairman, Mr A Nduna (who is the third respondent) and Mrs T Mpofu - are disqualified by virtue of the fact that they are both members of two or more other statutory bodies. He claims that Mr Nduna is a member of the board of the Zimbabwe Reinsurance Corporation (Zimre) and of Zimbabwe Development Bank and that Mrs Mpofu is a member of the board of the Grain Marketing Board and of the Zimbabwe Schools Examination Council.

Mr Nduna admits his membership of Zimre and Zimbabwe Development Bank, but argues that Zimre is no longer a statutory body, by virtue of the publication of the Zimbabwe Reinsurance Corporation (Repeal) Act 24 of 1998. In fact, the statutory instrument to be published in terms of s 8 of that Act has not yet been published, and Zimre remains in existence as a statutory body. I would agree that Mr Nduna was thus disqualified for appointment at the time he was appointed.

Mrs Mpofu denies being a member of the Zimbabwe Schools Examination Council, though she admits being on the board of the Grain Marketing Board. Mr *de Bourbon*, for the appellant, says that the appellant alleged that Mrs Mpofu is a member of the Board of Zimre and, as that allegation is not denied, that she can be taken to have admitted membership of the Zimre

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EBRAHIM JA

board. I do not read the appellant's affidavit as making that allegation. It seems to me that it has not been shown that Mrs Mpofu is disqualified from being a member of the Board of the CAAZ.

The learned Judge President found that the Board's decision was saved by s 23, which has been cited above. It is true that under s 9(2) of the Interpretation Act [*Chapter 1:01*]:

> "words in the singular include the plural and words in the plural include the singular."

However, this would not apply where the result would be inconsistent with the intention or object of the enactment: see s 2(1) of the Interpretation Act. Where an essential member of the Board has not been appointed, where the chairman is disqualified, and where not one of the members has the qualification that would enable the Board to fulfil its object of advising the Government on all matters relating to civil aviation, I consider that the result of reading s 23 as validating the Board's decisions would lead to absurdity. It would mean that in this Act (or in any other creating a statutory corporation) the responsible Minister could appoint anyone he pleased, even if they had no expertise whatever in the subject with which the corporation had to deal.

I would agree with Mr *de Bourbon*'s argument that the Board was not properly appointed and that its decisions cannot be saved by s 23. What should happen now is that the Minister should appoint a properly constituted Board and that the Board should reconsider the question of the appointment of the General Manager.

In case I am wrong in this, I turn to the other grounds argued by Mr *de Bourbon*.

IRRATIONALITY OF DECISION TO APPOINT MANHAMBARA

The advertisement required the General Manager to have certain qualifications. The qualifications are, in the light of what is said above, entirely reasonable. This is a specialist field and there is no place for non-specialists. To lay down qualifications and then to choose a person who does not meet the qualifications in preference to someone who does must surely be irrational, irrespective of whether or not the Act requires qualifications.

It is of interest to look at the requirements of some other legislation (the list is not exhaustive) in respect of the qualifications of members of the Boards of statutory bodies:

1. Broadcasting Act [*Chapter 12:01*] - no specific qualifications;
2. PTC Act [*Chapter 12:03*] - no special qualifications;
3. ZESA - Electricity Act [*Chapter 13:05*] - no special qualifications;
4. Inland Waters Shipping Services Board - Inland Waters Shipping Act [*Chapter 13:06*] - no special qualifications;

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5. NRZ - Railways Act [*Chapter 13:09*] - s 5 - no special qualifications;

6. Export Processing Zones [*Chapter 14:07*] - two members of the Board must be chosen for their ability and experience in business;

7. Industrial Development Corporation [*Chapter 14:10*] - the members must be chosen for "their ability and experience or (*sic*) administration and (*sic*) their suitability otherwise for appointment" (there are clearly errors in this provision);

8. Zimbabwe Tourism Authority [*Chapter 14:20*] - s 5 - the members must be chosen for their knowledge of and ability and experience in the tourist industry or for their suitability otherwise for appointment as members;

9. Zimbabwe State Trading Corporation Act [*Chapter 14:27*] - s 5 - two members of the Board shall be appointed for their knowledge and experience in the field of foreign trade, export production or import procurement;

10. Parirenyatwa Hospitals [*Chapter 15:05*] - the majority of the Board consists of persons qualified in medicine or nursing;

11. NSSA [*Chapter 17:04*] - the members of the Board must be chosen for their ability and experience in administration or finance or their professional qualifications or for their suitability otherwise for appointment as members;

12. ARDA [*Chapter 18:01*] - the members must be chosen for their ability and experience in agriculture, business or administration and their suitability otherwise for appointment as members;

13. Agricultural Finance Corporation [*Chapter 18:02*] - s 5 - no specific qualifications;

14. Cold Storage Commission [*Chapter 18:06*] - s 5 - the members of the Board must be chosen for their ability and experience in agriculture, business or administration or their suitability otherwise for appointment as members;

15. Cotton Marketing Board [*Chapter 18:07*] - s 5 - the members of the Board must be chosen for their ability and experience in agriculture, business or administration or their suitability otherwise for appointment as members;

16. Dairy Marketing Board [*Chapter 18:09*] - s 5 - the members of the Board must be chosen for their ability and experience in agriculture, business or administration or their suitability otherwise for appointment as members;

17. Grain Marketing Board [*Chapter 18:14*] - s 5 - the members of the Board must be chosen for their ability and experience in agriculture,

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business or administration or their suitability otherwise for appointment as members;

18. Pig Industry Board [*Chapter 18:15*] - no specific qualifications;

19. Regional Water Authority [*Chapter 20:16*] - s 6 - the members of the Board must be chosen for their ability and experience in the management of water resources or business or administration and their suitability otherwise for appointment as members;

20. National Water Authority [*Chapter 20:25*] - s 4 - one must be an engineer and the rest of the board must be persons recognised for their ability and experience in the development and management of water resources, business or administration;

21. National Education Advisory Board [*Chapter 25:04*] - s 29 - members must be chosen for their ability and experience in administration or education of their professional qualifications or their suitability otherwise for appointment.

There are other Acts, where the Board consists of members appointed from lists of nominees, the lists being provided by named bodies, councils, associations and the like; or where the Board consists of persons holding a particular office; or a combination of the two methods.

Mr *de Bourbon* argues that the appellant met the qualifications laid down in the advertisement and that Manhambara did not. It seems to be common cause that this is so. Whatever Manhambara's qualifications are - and they are considerable - the first requirement stipulated by the advertisement is that the applicant should have a professional qualification in civil aviation or a related field. What is meant by "related field" is not clear, but I would have thought that the qualification should at least be something "related" to civil aviation; perhaps a qualification in military aviation might be relevant. Manhambara does not have a professional qualification in civil aviation or a field related to civil aviation and so did not meet the initial requirements for the position. His experience in running Affretair, while relevant in judging his management competence, does not constitute a professional qualification in civil aviation. It seems to me that to appoint a person who does not have the laid down qualifications in preference to someone who does is irrational. It is not an answer to say that the Act does not require that the general manager should have a professional qualification in civil aviation. Section 24 of the Act lays down no qualifications at all; it merely states that the "Board shall appoint, on such terms and conditions as the Board may fix, a person approved by the Minister to be the General Manager of the Authority". The Board stipulated the qualifications required for appointment and it should have adhered to them.

In connection with this argument, Mr *de Bourbon* seeks to place before this

court documents which were not placed before the court *a quo*. The documents consist of an anonymous letter addressed to the appellant, in which aspersions are made about Manhambara's qualifications; two documents, supposedly emanating from the consultants engaged by the Board and containing assessments of the appellant and Manhambara; and minutes of a meeting of what is described as the CAAZ Board Sub-committee on Administration

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and Human Resources Matters. The appellant apparently was at that meeting, at which, among other things, the qualifications of the fifteen applicants for the post of general manager were discussed. The respondents object to the production of the letter and the documents from the consultants, but do not place the copies of the minutes in issue. The minutes confirm that Manhambara does not have a professional qualification in aviation. In passing, I observe that several candidates were rejected because they did not have degrees, which the minutes describe as a "pre-requisite" for the post. The advertisement did not require a degree; it required a professional qualification in civil aviation. There are several professional aviation qualifications which do not constitute degrees: professional pilot's licences, air traffic controller's licences and aircraft maintenance engineers licences, issued in terms of Aviation (Air Navigation) Regulations 1988, would, I should have thought, constitute professional qualifications in civil aviation.

In view of the finding I have made about the Board's decision to appoint a person who was not qualified, I would have preferred not to have to decide whether the documents should be admitted. However, in view of the attitude of the respondents, and their submission that the application to adduce the further evidence be dismissed with costs on the higher scale, I must make a ruling. They do not dispute the minutes, contending only that the minutes add nothing to the appellant's case. In my view, the appellant has made out an adequate case for the production of the minutes. The same cannot be said for the other documents. The anonymous letter clearly has no probative value, but the appellant has made it clear that the letter is only included as an explanation for how the other documents came into his possession. I would have regarded with great disfavour any attempt to make any more use of the letter than that. It would, I think, have been better for the letter not to have been included at all. The authenticity of the documents allegedly emanating from the consultants is in dispute and for that reason alone should be excluded. The result is that the appellant has, on this issue, been only partly successful. In the circumstances, I would make no order as to costs on this application.

I should add, however, that it does not follow that, because Manhambara should not have been appointed, the appellant should necessarily have been

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appointed instead. It could be that one of the other candidates would have been more suitable.

THE EFFECT OF SECTION 83 OF THE ACT

Section 83 appears in Part XII of the Act, which is titled "Repeal and Transitional Provisions".

It appears from the minutes of the first few meetings of the CAAZ that the appellant attended those meetings as "Director of Civil Aviation". These meetings took place after 1 January 1999, the date of commencement of the Act (see SI 404 of 1998). The appellant's argument, in a nutshell, is that by virtue of s 83 of the Act he was transferred to the CAAZ in a position equivalent to the one he held in the DCA.

Section 83(3), upon which the appellant places reliance, reads:

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"All bonds, hypothecations, deeds, contracts, instruments, documents and working arrangements which subsisted immediately before the relevant transfer date in relation to any asset, right, liability or obligation transferred to the Authority under this section and to which the Government was a party shall, on and after that date, be as fully effective and enforceable against or in favour of the Authority as if, instead of the Government, the Authority had been named therein."

His argument, essentially, is that his contract of employment was transferred to the CAAZ. Mr *Biti* argues that "contracts" here does not refer to contracts of employment, for two reasons: (1) contracts of employment are dealt with by s 83(6); and applying the principle *noscitur a sociis* the kind of contracts referred to in s 83(3) are contracts of kinds similar to bonds, mortgages and so on. I agree with Mr *Biti* in this regard. Since employment contracts are dealt with specifically in subsections (6) and (7), it cannot have been the intention of the legislature that all contracts of employment were automatically transferred to the CAAZ. Similarly, the term "working arrangements" cannot, as argued by Mr *de Bourbon*, refer to employment contracts and the terms and conditions of such contracts.

Section 83(6) and (7) read:

" (6) Subject to the Public Service Act [*Chapter 16:04*] and to the consent of the employees concerned, the Authority shall engage such of the persons who on the fixed date were employed in the Government's Department of Civil Aviation as the Public Service Commission, after consultation with the Board and the Minister, may direct.

(7) Persons engaged in terms of subsection (6) shall be employed on such terms and conditions as may be fixed by the Board with the agreement of the persons concerned and after consultation with the Public Service Commission."

Mr *de Bourbon* argued that the effect of subs (6) is to oblige the CAAZ to employ anyone from the former DCA whom the Public Service Commission

EBRAHIM JA

does not want to retain in Government service, subject to his consent. It is true that the CAAZ is obliged to employ such persons, but it should also be noted that the Public Service Commission is obliged to consult the Board and the Minister. The Commission cannot unilaterally compel the CAAZ to take on any person. If the Board or the Minister objected to the transfer of any particular person or class of persons, I do not read the subsection as compelling the CAAZ to engage that person or those persons. It is also clear, from subs (7), that there is no requirement for the CAAZ to employ a transferred person in a position corresponding to the position he held in the DCA.

There does, however, appear to be a factual dispute as to whether the appellant was transferred to the CAAZ by virtue of s 83(6). The minutes show that he attended meetings as "Director of Civil Aviation", although the DCA had ceased to exist. In his opposing affidavit to the application to adduce further evidence, the CAAZ's company secretary says that the appellant was "Acting General Manager" until the end of February 1999. How he came by that title is not apparent from the papers. The appellant alleges, in an answering affidavit, that the first respondent (the Minister) had in his affidavit confirmed that the appellant was transferred to

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the CAAZ. I can find no reference in the Minister's affidavit to this effect.

CONCLUSION

My conclusions can be summarised thus:

1. The Board was, and presumably still is, not properly constituted by the Act. Its appointment of the fourth respondent was a nullity. Its acts cannot be saved by the provisions of s 23.

2. Even if the Board's acts are valid, the appointment of the fourth respondent, who did not have the required qualifications, in preference to the appellant, who did, was irrational and should be set aside.

3. The appellant was not automatically transferred to the CAAZ at all, nor was he transferred at the level equivalent to that which he held in the DCA.

I do not hold that, because the fourth respondent's appointment must be set aside, the appellant must be appointed in his place. What I do say is that the Minister should appoint a properly constituted Board. That Board must consider the question of who should be the General Manager of the CAAZ.

In the result, the following order is made:

1. The appeal is allowed, and the order of the court *a quo* is altered so that it reads as follows:

EBRAHIM JA

" 1. The appointment of the fourth respondent as the General Manager of the second respondent is set aside.

2. The costs of this application shall be borne by the respondents jointly and severally, the one paying the other to be absolved."

2. The costs of this appeal, save those in respect of the application to adduce further evidence, shall be borne by the second, third and fourth respondents, jointly and severally, the one paying the other to be absolved.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Honey & Blanckenberg, second, third and fourth respondents' legal practitioners

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S v McLEAN 2000 (2) ZLR 239 (SC)

Citation	2000 (2) ZLR 239 (SC)
Case No	Judgment No. S-104-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Sandura JA
Heard	September 21, 2000
Judgment	September 21, 2000
Counsel	D S Mehta, for the appellant M Nedamire, for the respondent
Annotations	None

Criminal appeal

Flynote

Criminal law - common law offences - culpable homicide - traffic case - negligence - duties of driver overtaking stationary vehicle - whether should expect pedestrian to appear from behind vehicle

Headnote

The appellant was convicted of culpable homicide arising out of a traffic accident. His car had struck and killed a person who had just alighted from a stationary bus. The deceased had walked round the front of the bus, intending to cross the road, without checking whether it was safe to do so. The appellant had not seen any pedestrians at the rear, side or front of the bus when he approached it.

Held, setting aside the conviction, that it is not expected of a reasonably careful driver that he should, without more, be alive to the possibility that there may be a pedestrian concealed behind the front of each and every stationary vehicle who could suddenly appear in front of him in the road. The appellant was entitled to assume that there were no pedestrians in the vicinity of the bus and that if any pedestrian intended crossing the road he would do so only after making sure that such a move was safe.

Cases Considered

Case cited:

Olivier NO v *Rondalia Asurance Co of SA Ltd* 1979 (3) SA 20 (A)

Case Information

D S Mehta, for the appellant

M Nedamire, for the respondent

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Judgment

Sandura JA: The appellant was charged in the magistrates court with culpable homicide, the allegation being that whilst he was driving a pick-up truck he negligently struck and killed Michael ("the deceased"). He pleaded not guilty but was convicted and sentenced to a fine of $800 or, in default of payment, three months' imprisonment with labour. In addition, he was prohibited from driving all classes of motor vehicles for three months.

He appealed to the High Court against conviction only but the appeal was dismissed. He then appealed, with the grant of leave, to this court.

After hearing counsel, we allowed the appeal and set aside the conviction and sentence. We indicated that our reasons would be given in due course. I now set them out.

SANDURA JA

The relevant facts are as follows. On 16 February 1996, the appellant left Gweru for Harare and was driving a pick-up truck ("the truck"). By about mid-day he had reached the outskirts of Harare when he saw a commuter omnibus ("the bus") ahead of him. It was stationary at a bus stop on the left side of the road.

As he drove past the bus, he struck the deceased, a sixteen-year-old boy. He immediately stopped the truck and rendered the necessary assistance, but the deceased later died in hospital.

The State's version of what happened was set out in paras 4 and 5 of the summary of the State's case as follows:

" 4. After alighting from the stationary bus the pedestrian (the deceased) went via the front part of the stationary bus intending to cross the road.

5. Whilst in the process of crossing the road the pedestrian (the deceased) was then hit by (the) vehicle driven by the accused (the appellant)."

The State called two witnesses. These were two women who, at the time the deceased was struck, were on the side of the road just opposite the scene of the accident. They were roasting green mealies for sale.

The first witness was Shirley Mubvumbi ("Shirley"). Her evidence-in-chief was as follows. The bus arrived and stopped on her side of the road about twenty-one paces away from where she was seated. The deceased alighted from the bus intending to cross the road from the rear of the bus. He did not cross the road but was standing on the side of the road when he was struck by the appellant who was travelling at an excessive speed.

However, when cross-examined Shirley said that the bus had stopped, not on her side of the road, but on the side of the road opposite hers. When asked to explain the contradiction, she said that she had been misunderstood in her evidence-in-chief. She added that when the deceased alighted from the bus he waited for it to drive away, and that it was after it had moved

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away and had covered some distance that the deceased was struck by the truck.

The evidence given by this witness clearly contradicted, not only the summary of the State's case, but also her own sworn statement to the police. In that statement she said that after alighting from the bus the deceased tried to cross the road from the front of the bus, and not from the rear of the bus as stated in her evidence.

Furthermore, in her sworn statement she did not say that she saw the deceased being struck as stated in her evidence. Instead, she said that she heard a bang and that when she looked in that direction she saw the deceased "flying in the air".

The second witness called by the State was Elizabeth Munenzwa ("Elizabeth"). Her evidence was as follows. She was seated with her back to the road and was roasting green mealies when a ZUPCO bus, travelling in the

direction of Harare, arrived and stopped at a bus stop on the other side of the road. The deceased alighted from the bus and stood by the side of the road. He did not try to cross the road from the front of the bus. The bus then drove away and when it was about one hundred metres away from the bus stop she heard a bang and saw the deceased "flying in the air".

As was the case with Shirley's evidence, Elizabeth's evidence contradicted the summary of the State's case. She denied that the deceased tried to cross the road from the front of the bus and that he was struck whilst in the process of crossing the road, as alleged by the State. In addition, she saw a ZUPCO bus, and not a commuter omnibus.

The policeman who attended the scene of the accident was not called, and no sketch plan of the scene was produced.

The appellant's evidence was as follows. He entered a fly-over which had a dual carriageway and was travelling at about 50 km/h. As he approached the point where the dual carriageway converged into a single carriageway with construction works ahead, he slowed down. There was traffic behind him and ahead of him.

He saw the bus stationary just off the road at the point where the road converged into a single lane. He thought that it intended rejoining the traffic to Harare, and this caused him to reduce speed and exercise caution. He did not see any pedestrians at the rear or on the side or front of the bus who might have presented any danger.

As he passed the front of the bus, he heard a bang on the left side of the truck. He immediately applied his brakes, instinctively swerved to the right and came to a halt in the middle of the road. He then moved the truck to the left side of the road, parked it off the road and then rendered the necessary assistance to the deceased. The bus left the scene shortly after the accident.

It was the appellant's evidence that he did not see the deceased before the collision and that he

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was not negligent.

On the evidence, I am satisfied that the two State witnesses were unreliable and should not have been believed. One of them contradicted her own sworn statement, and both contradicted the summary of the State's case.

On the other hand, the appellant gave his evidence well and was not discredited in cross-examination. He gave a straightforward account of what happened which, in my view, accords with the probabilities.

It seems to me that what happened was that after alighting from the bus the deceased walked around the front of the bus intending to cross the road, without checking whether it was safe to do so, and collided with the truck which was overtaking the stationary bus.

The issue which I now wish to consider is the duty of a driver who overtakes a stationary motor vehicle.

SANDURA JA

That issue was considered in *Olivier NO* v *Rondalia Assurance Co of SA Ltd* 1979 (3) SA 20 (A), a case with facts similar to the facts of the present case. The judgment is in Afrikaans, but the headnote at p 21 reads as follows:

> "A bus had stopped alongside a pole which served as a bus stop while a passenger, who had left her handbag at home, sent her eleven year old son to go and fetch it. The son climbed on the bus to give it to her, climbed off again and trotted around the front of the bus with the intention of crossing the road homewards. He collided with a motor car which was overtaking the stationary bus. The car was insured by the defendant and driven by C. The child sustained serious injuries and an action for damages was instituted on his behalf in a Provincial Division. The trial judge gave judgment with costs in favour of the defendant. In an appeal it appeared that, when C had driven around an 'elbow' in the road and first seen the bus, there were no passengers or pedestrians in the vicinity of the bus visible to him, and also for a further ten seconds thereafter before the collision. C could with safety have swerved more to his right-hand side of the road. He had not hooted.
>
> *Held*, that the reasonably careful driver would not, in all the circumstances, have foreseen the possibility that a teenager would trot around the front of the stationary bus at the last moment with the intention of crossing the road without first looking to the right, and have regulated his manner of driving in accordance with that possibility."

According to the English translation, Wessels JA said the following at 29G-H:

> "It cannot, in my opinion, be expected of the reasonably careful driver that he should, without more, be alive to the possibility that there may be a pedestrian concealed behind the front of each and every stationary vehicle who could suddenly appear in front of him in the road. His duty is in fact not that of an insurer."

I am in complete agreement with the learned Judge of Appeal. His comments apply to the present case with equal force. The appellant did not see any pedestrians at the rear, or on the side or front of the bus, who might have presented some danger. He was, therefore, entitled to assume that there were no pedestrians in the vicinity of the bus, and that if any pedestrian intended crossing the road he would do so only after making sure that such a move was safe.

The appellant was, therefore, wrongly convicted, and the conviction and sentence had to be set

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aside.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Wintertons, appellant's legal practitioners

CAPITAL RADIO (PVT) LTD v MINISTER OF INFORMATION (1) 2000 (2) ZLR 243 (SC)

Citation	2000 (2) ZLR 243 (SC)
Case No	Judgment No. S-99-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	September 22, 2000
Judgment	September 22, 2000
Counsel	A P de Bourbon SC, for the applicant Mrs L Moyo, for the respondent
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20(1) - freedom of expression - monopoly given to Zimbabwe Broadcasting Corporation - inconsistent with section

Headnote

The applicant sought a declaration that the legislative provisions giving a monopoly on broadcasting to the Zimbabwe Broadcasting Corporation were unconstitutional and that it should be allowed to establish a broadcasting station in Zimbabwe. The Minister agreed that the legislation was unconstitutional but argued that the application should be deferred until the end of the second session of the new Parliament, by which time an appropriate regulatory framework, consistent with the Constitution, would be put in place.

Held, that a reasonable time to set up such a framework had already passed, and the order sought would be granted.

Held, further, that as the legislation in question was invalid at the present time there was nothing to prevent the applicant from proceeding immediately to operate and provide a broadcasting

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service within Zimbabwe.

Cases Considered

Cases cited:

Retrofit (Pvt) Ltd & Anor v *PTC & Anor* 1995 (2) ZLR 199 (S)

Retrofit (Pvt) Ltd v *Min of Information* 1995 (2) ZLR 422 (S)

Legislation considered:

Constitution of Zimbabwe 1980, s 20(2)

Broadcasting Act [*Chapter 12:01*], s 27

Radiocommunication Services Act [*Chapter 12:04*], s 14(1) & (2)

Case Information

A P de Bourbon SC, for the applicant

Mrs L Moyo, for the respondent

Judgment

Gubbay CJ: At the hearing of an application brought in terms of s 24(1) of the Constitution of Zimbabwe, this court, having listened to counsel for the parties, issued the following order:

GUBBAY CJ

"IT IS HEREBY DECLARED THAT:

A.

1. The monopoly on broadcasting services created by s 27 of the Broadcasting Act [*Chapter 12:01*] is inconsistent with section 20(1) of the Constitution of Zimbabwe and is therefore invalid insofar as it vests in the Zimbabwe Broadcasting Corporation the exclusive privilege of carrying on a broadcasting service in Zimbabwe;

2. Sections 14(1) and 14(2) of the Radiocommunication Services Act [*Chapter 12:04*] are inconsistent with s 20(1) of the Constitution of Zimbabwe and are, therefore, invalid insofar as those provisions prohibit any person, other than the Zimbabwe Broadcasting Corporation, from possessing or working a radio station for the purpose of carrying on a broadcasting service in Zimbabwe.

B. In the premises and for the sake of clarity, it follows that:

(a) The applicant is entitled under the law to operate and provide a broadcast service from within Zimbabwe.

(b) The applicant is entitled under the law to import into Zimbabwe all radio and other equipment to operate a commercial radio station and to broadcast within and outside Zimbabwe, subject to the payment of all customs dues and import taxes lawfully levied in terms of the law, and to possess and utilise such broadcast equipment.

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C. It is ordered that:

Each party shall bear its own costs of this application."

The reasons for our decision are these:

The applicant, a company incorporated with limited liability in accordance with the laws of Zimbabwe, wishes to establish and operate within Zimbabwe a radio transmitting station for the purpose of carrying on a broadcasting service for reception by members of the general public. It is disabled by legislation from doing so. By virtue of s 27 of the Broadcasting Act [*Chapter 12:01*], the Zimbabwe Broadcasting Corporation has an exclusive monopoly over broadcasting services in Zimbabwe. And ss 14(1) and (2) of the Radiocommunication Services Act [*Chapter 12:04*] specifically prohibit any person, other than the said broadcasting corporation, from possessing or working a radio station for the purpose of carrying on a broadcasting service in Zimbabwe.

The applicant's contention was that the aforementioned provisions in both Acts are inconsistent with s 20(1) of the Constitution of Zimbabwe and therefore invalid. Section 20(1) reads, in relevant part:

> "... 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 ..."

Reliance was correctly placed by the applicant on the judgments of this court in *Retrofit (Pvt) Ltd & Anor* v *PTC & Anor* 1995 (2) ZLR 199 (S), as read with *Retrofit (Pvt) Ltd* v *Minister of Information, Posts & Telecommunications* 1995 (2) ZLR 422 (S). In that matter, the applicant

challenged the constitutionality of the monopoly vested in the PTC in respect of public telecommunications services. It argued successfully that the monopoly, and consequent inability under the law to licence it to become a provider of a public mobile cellular telephone service, infringed s 20(1) of the Constitution. It interfered with the applicant's freedom of expression and, more particularly, its right to receive and impart ideas and information.

The respondent accepted, in an opposing affidavit deposed to by his senior secretary, Mr Willard Chiwewe, that the legislation under attack offends against s 20(1) of the Constitution. It was stated by Mr Chiwewe that:

> "As I see it, the solution in this matter is for me to be required to amend the Broadcasting Act and the Radiocommunication Services Act [*Chapter 12:04*] so as to establish a regulatory authority to consider and grant applications for broadcasting licences and applications for permission to operate diffusion services in Zimbabwe.
>
> The present law does not give me the power nor authority to licence an operator and therefore the order sought by (the applicant) is impossible.
>
> In the premises, I submit that we await the enactment of a regulatory framework to provide for licensing of broadcasting and diffusion services by other service providers."

It is unfortunate that the parties have failed to agree upon a reasonable time limit within which "a

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regulatory framework to provide for licensing of broadcasting and diffusion services by other service providers" could be put in place. What the respondent subsequently proposed was that he be given not later than the end of the second session of the Fifth Parliament to pass legislation relating to broadcasting which is consistent with the Constitution; after which the applicant would submit its application in conformity with such legislation.

Not surprisingly, the length of the delay implicit in this proposal was totally unacceptable to the applicant. It had filed the application on 27 April 2000. The opposing affidavit was filed on 5 May 2000. Four months have since passed without the setting up of a regulatory authority.

In the circumstances, it was considered that the applicant was entitled to the grant of an order in the terms sought.

Having thus declared the legislation invalid, there is at the present time (as indicated in para B of the order) nothing to prevent the applicant from proceeding with immediate effect to operate and provide a broadcasting service from within Zimbabwe.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners

HINGESTON v LIGHTFOOT 2000 (2) ZLR 247 (SC)

Citation	2000 (2) ZLR 247 (SC)
Case No	Judgment No. S-97-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA and Sandura JA
Heard	September 11, 2000
Judgment	September 28, 2000
Counsel	Miss W T Miles, for the appellant Mrs J B Wood, for the respondent
Annotations	None

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Civil appeal

Flynote

Family law - husband and wife - divorce - maintenance following - agreement by husband to pay for "ongoing" education of children - effect - includes tertiary education, but not indefinitely

Prescription - Prescription Act [Chapter 8:11] - s 15(a)(ii) - claims pursuant to judgment debt - expenses paid for children following divorce - expenses paid in terms of consent paper - wife paying expenses and claiming them later - debts more than three years old prescribed

Headnote

As part of the consent paper following divorce, the respondent husband agreed to pay for the "ongoing education" of the children of the marriage. At that stage, one child was at university but the others were still at high school. The husband objected to paying for the tertiary education of the two younger children and to paying for a second degree course for one of them.

Held, that a proper construction of the consent paper showed that the husband had undertaken to be responsible for paying for the tertiary education of all three children. One background factor was the affluence of the respondent. Taking into account the standard of living, social status and income of the parties, university education would be considered to be part of ongoing education of the children. But this did not mean that the respondent would be responsible for paying for university education indefinitely if the children went on to do a series of postgraduate degrees. As regards the son who had started on one degree with a definite career path in mind, the respondent was not responsible for paying for him after the first degree, when he decided to change his career path and embark upon another unrelated degree.

Held, further, that by paying some of the educational expenses herself, the appellant had not waived her right to claim back these amounts from the respondent.

Held, further, that the appellant's claim to reimbursement from the respondent for certain amounts paid by her arose when she made those payments and did not arise from the order of the court incorporating the consent paper. These claims thus did not amount to judgment debts in respect of which a longer period of prescription would apply.

Cases Considered

Cases cited:

Coopers & Lybrand & Ors v *Bryant* 1995 (3) SA 761 (A)

Hingeston v *Lightfoot* 1999 (2) ZLR 281 (H)

List v *Jungers* 1979 (3) SA 106 (A)

Pangbourne Properties Ltd v *Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A)

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Scott v *Scott* 1946 WLD 399

Total SA (Pty) Ltd v *Bekker NO* 1992 (1) SA 617 (A)

Legislation considered:

Matrimonial Causes Act [*Chapter 5:13*], s 8(3)

Prescription Act [*Chapter 8:11*], s 15(a)(ii)

Case Information

Miss *W T Miles*, for the appellant

Mrs *J B Wood*, for the respondent

Judgment

Gubbay CJ: The parties to this appeal were married to one another. Three children were born to them. They are: Kirsten on 10 October 1973, Shaun on 4 April 1976 and Kathleen on 15 September 1980. The marriage was dissolved on 13 May 1992. The consent paper that was made part of the divorce order provided that the appellant was to have custody of the two minor children, Shaun and Kathleen, and, to the extent that it was necessary or appropriate, that of Kirsten, who was then a major. Clause 2:5 stipulated that the respondent:

> "shall be solely responsible for all costs incurred in the ongoing education of all the children, together with the costs of their uniform, private clothing, shoes, sports equipment, stationery and such other items as any of them may in the (appellant's) opinion reasonably require in accordance with the standard of living that each of them has enjoyed to the date of these presents."

Save for such expressed liability there was no requirement that the respondent make any payment for the monthly maintenance of the children.

A first draft of the consent paper, prepared by the respondent's legal practitioners, was rejected by the appellant. It provided, *inter alia*, that the respondent was to maintain the three minor children and bear all the costs of their education, clothing and housing. The appertaining clause was altered to meet the agreement of the parties that the term "ongoing education" of the children be the basic criterion for determining the extent of the respondent's financial responsibility to the children.

At the date of signing of the consent paper, Kirsten had commenced her university degree course. Shaun and Kathleen, on the other hand, were still school-going - the boy attending secondary school, the girl primary school.

The respondent paid the university fees for Kirsten without quibble from 1992 to 1995. He also paid the tuition and residence fees for Shaun at Rhodes University, South Africa, in 1995, 1996 and 1997; but only the tuition fees for 1998. He refused to pay for Shaun's second degree course, that of Bachelor of Laws, at the University of Cape Town, in 1999. Kathleen commenced her tertiary education at Rhodes University in 1999. The

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GUBBAY CJ

respondent declined to meet any such expenditure. He paid for her secondary school fees and pocket money of $400 a month in 1998.

On 29 April 1999, the appellant brought an application before the High Court seeking reimbursement from the respondent of the following expenditure: (a) $140 770.05 paid towards Shaun's tertiary education at Rhodes University during 1996, 1997 and 1998; and, then in 1999, a further $143 224.92 to the University of Cape Town; (b) $57 645.43 paid towards Kathleen's secondary education at Girls College during 1996, 1997 and 1998; and $190 084.84 towards her tertiary education at Rhodes University in 1999. Annexed to the appellant's founding affidavit were a set of schedules detailing the payments made in respect of Shaun and Kathleen over the four-year period in question.

The respondent opposed the appellant's claims. He contended that he was not obligated under clause 2.5 of the consent paper, or by s 8(3) of the Matrimonial Causes Act [*Chapter 5:13*] ("the Act"), to pay for the tertiary education of Shaun or Kathleen. He had, however, paid for Shaun's tertiary education from 1995 to 1998 from a moral commitment to do so; he drew the line at Shaun's second university degree course. With regard to Kathleen, he had paid all her legitimate secondary school tuition and boarding fees, but was not prepared to meet the costs of her tertiary education at Rhodes University, and was not legally obliged to do so. Furthermore, the respondent did not admit the payments made and claimed by the appellant. They had been incurred without his knowledge and consent and, in any event, some were prescribed.

The presiding judge (Smith J) held that in compliance with s 8(3) of the Act, clause 2.5 contained a sufficiently clear direction that the respondent would pay the education costs of the three children even after they had attained the age of eighteen years. Nonetheless, a reasonable interpretation of such provision did not extend the liability of the respondent to the costs of Shaun's degree course at the University of Cape Town. With respect to the specific expenses which the appellant sought reimbursement of, the learned judge found that those incurred more than three years before the proceedings were instituted on 29 April 1999 were prescribed; and some of the later expenses did not qualify as costs incurred in the ongoing education of the children. He concluded, in a judgment now reported in 1999 (2) ZLR 281 (H) at 287E-F, that:

> "It is not possible for the court to go through each of the expenses claimed by the applicant and decide which should, and which should not, be allowed. It is hoped that the parties will be able to reach agreement thereon in the light of the indications given above. As neither party has been completely successful in this case, I consider that each should bear his or her costs. Therefore, there will be no order in relation to costs.
>
> The application is dismissed."

GUBBAY CJ

The order dismissing the application was perhaps somewhat misleading to the parties. The

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appellant had succeeded to the extent that she was entitled to reimbursement of the expenses (particularised in the schedules) which it was the respondent's responsibility to pay, as being the costs of the ongoing education of Shaun and Kathleen, and which had been incurred subsequent to 29 April 1996.

Neither party was satisfied with the outcome of the High Court proceedings. The appellant raised the grounds that the learned judge had erred in finding that:

1. it was an unreasonable interpretation of the consent paper that the respondent be obliged to pay the cost of Shaun's course at the University of Cape Town, when such course was concomitant to his first university course and to his becoming a lawyer;

2. the expenses paid by the appellant more than three years before the institution of the application did not constitute "judgment debts" for the purposes of s 15(a)(ii) of the Prescription Act [*Chapter 8:11*] and had thus prescribed;

3. some of the costs claimed by the appellant did not constitute "costs incurred in the ongoing education of the children".

The cross-appeal noted by the respondent, on the other hand, alleged that the learned judge had erred:

1. in construing the words "ongoing education" as implying a direction that the respondent's liability for the costs of the education of the two minor children would continue beyond the age of eighteen years;

2. alternatively, in failing to find that the parties had abandoned the consent paper/court order.

I did not understand either party to take issue with the view of the learned judge that it would be a sufficient compliance with the requirements of s 8(3)(a) of the Act if the direction of the appropriate court arises implicitly from the wording of the order or from the relevant provision in the consent paper that was incorporated in the grant of the order. I too agree with the reasoning set out at 285C-F of the judgment:

> "I do not think that the legislature could have intended that the court would have to state, specifically, that the maintenance would be payable even after the child concerned attains the age of eighteen years. In the majority of divorce cases which come before the High Court, the court does not make an order in which the details of the maintenance payable (are) actually spelt out. In most cases the court order merely provides, *inter alia*, that the questions of custody and maintenance for the children of the marriage shall be in terms of the consent paper filed of record. That was what the divorce order granted by Sandura JP on 13 May 1992 stated. I consider that if the consent paper or the court order clearly implies that education costs will continue to be payable after the child attains the age of eighteen years, then the requirements of subs (3) of s 8 of Chapter 5:13 would be satisfied.

GUBBAY CJ

> Therefore, if, for example, the consent paper or court order specifies that one of the parties will pay for the tertiary or university education of a child, that would be a sufficiently clear indication that the court has indicated that the maintenance order shall be extended beyond the date the child attains the age of eighteen years."

The initial question to consider, therefore, is whether clause 2:5 of the consent paper directs,

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with sufficient clarity, that the respondent is liable to pay the education costs of the children *after* they attained the age of eighteen years.

The meaning to be assigned to the phrase "ongoing education of all the children" is not open to conjecture. It connotes the continuance of their education. See *The Oxford English Dictionary* Vol VII. What was in dispute was whether "ongoing education" was to bear the same meaning with respect to all three children; for, so far as Kirsten was concerned, the education that was "ongoing" at the material time was university education; whereas in the case of Shaun, who was fifteen years of age, and Kathleen, who was twelve, the education that was ongoing for them was schooling. Based on such factual situation, it was the submission of the respondent's counsel, both in this court and below, that "ongoing education" as applied to the two youngest children meant the education in progress at the date of the finalisation of the consent paper, which was schooling. Accordingly, there was no unequivocal direction in the consent paper that the maintenance order extended beyond the date each of them attained the age of majority (see s 8(c) of the Act).

In disposing of this argument, Smith J said at 286D-G:

> "I do not think it could be said that, because they were not attending university at the time, the parties intended that it was only the costs of attending school that would be covered by the consent paper. If it was contemplated and agreed that the respondent would be liable to pay the costs of a university education for Kirsten as part of her ongoing education, why should the same not apply in relation to Shaun and Kathleen? Where a child, after finishing school, goes on to attend a university, technikon, college or other tertiary education institution, surely that is part of its ongoing education? If the respondent could not afford to pay the costs of university education or the circumstances of the parties changed, he could have applied, in terms of clause 7.1 of the consent paper, for a variation of the terms thereof."

Again, I regard this reasoning as unassailable. It was borne out by information of the background circumstances under which clause 2:5 of the consent paper was formulated, furnished so as to enable the court "to understand the broad context in which the words to be interpreted were used": *per* Diemont JA in *List* v *Jungers* 1979 (3) SA 106 (A) at 120C: see also, *Total South Africa (Pty) Ltd* v *Bekker NO* 1992 (1) SA 617 (A) at 624H; *Coopers & Lybrand & Ors* v *Bryant* 1995 (3) SA 765 (A) at 768B-C; *Pangbourne Properties Ltd* v *Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187B-C.

The pertinent background was that the original provision which read

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"(the respondent) shall maintain the three minor children and bear all costs of their education, clothing and housing" (i.e. during minority) was substituted by the present clauses 2.1 and 2.5 of the consent paper. If the term "ongoing education" was intended by the parties to mean that already embarked upon by each child, in the case of Shaun and Kathleen school education as opposed to post secondary education, there would have been no necessity to alter the original provision; and the respondent would not have agreed to the change. Kirsten had already turned eighteen on 18 October 1991 when the first consent paper was drawn up. When the final consent paper was signed she had commenced her university course. The respondent had

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agreed to bear the costs of her tertiary education, and did so.

A further important background factor was that the respondent was a person in affluent circumstances. He was an executive director of a large public company and enjoyed, among other perquisites, educational benefits for his children. It seems to me that, taking account of the standard of living, social status and income of the parties, tertiary education for the children would be considered as part of their necessary maintenance. See *Scott* v *Scott* 1946 WLD 399 at 401.

Contrary to the contention of the appellant's counsel, I share the view of the learned judge that the respondent's liability to meet Shaun's ongoing education did not extend to the degree course he embarked upon at the University of Cape Town. It seems that while at school Shaun had aspirations of becoming a pilot and, later, a professional hunter. The degree he obtained at Rhodes University was Bachelor of Human Movement Studies. This, I understand, is the qualification necessary to pursue a career in physical education. Not a word is said by the appellant that it was Shaun's intention to qualify as a lawyer when he commenced at Rhodes University; and that the first degree was simply a preliminary to the Bachelor of Laws degree. The absence of such an assertion - and the onus of proof was on the appellant - points to the probability of a change of career intention on Shaun's part. The costs of Shaun's ongoing education was the degree course he chose to undertake at Rhodes University. Had Shaun embarked upon a legal Bachelor of Arts degree with a view to proceeding to the Bachelor of Laws degree, different considerations might well have applied to the respondent's financial responsibility. But this was not the case. I think that the learned judge put the position correctly at 286F-H of the judgment:

> "The provision in the consent paper must be given a reasonable interpretation. It should not be construed as meaning that, as long as the child wants to stay at university, the respondent has to foot the bill. That would be unreasonable. If, for example, one of the children had wanted to become a doctor and spent seven years at university and then decided that he or she would rather be a lawyer and embarked on a six year BA, BComm,

> LLB course, the respondent would not be expected to continue paying for the additional university costs. It seems to me that the costs of the degree course at the University of Cape Town fall into the unreasonable category."

I now turn to the alternative substantive argument advanced on behalf of the respondent. It was that the parties had by their conduct abandoned the consent paper/court order and that the appellant could no longer hold the respondent to its terms.

It was common cause that the appellant paid some of the educational expenses for Shaun and Kathleen. Yet the fact that she did so does not, to my mind, warrant the inference that she waived her right to receive reimbursement of whatever costs incurred in their ongoing education it was the respondent's responsibility to meet. Nowhere in the respondent's opposing affidavit was it suggested that the appellant had acquiesced in a situation in which he paid less than he should have. Indeed, his assertion was that he paid for the two children all that he was obliged to under the consent paper; and that, in any event, some of the expenses to which the appellant laid claim had become prescribed.

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Furthermore, it is clear that the relationship between the parties was not one which was conducive to an agreement being reached on the respondent being released from any part of his financial responsibility. A letter written by the appellant on 3 September 1996 voiced dissatisfaction over the respondent's contribution towards the costs of Kathleen's ongoing education.

The learned judge held that some of the appellant's claims in respect of the years when Kathleen was attending school were prescribed by virtue of s 15(d) of the Prescription Act. They had been incurred more than three years before the institution of the proceedings. The appellant has argued that such ruling was wrong. The claims were made pursuant to an order of court and, therefore, constituted judgment debts for the purposes of s 15(a)(ii) of the Prescription Act; hence, the prescriptive period is thirty years.

This submission is untenable. Again, I have very little to add to the learned judge's reasons for rejecting it. He said at 287B-D:

> "The actual school fees and associated expenses paid by the applicant are clearly required, in terms of the consent paper, to be paid by the respondent. However, that does not mean that the obligation of the respondent to pay any particular expense arose out of the divorce order and became a debt when the divorce order was granted. Each particular expense became a debt due by the respondent when it was actually incurred. Therefore, the respondent's obligation to reimburse the applicant for the education costs that she paid arose when she actually paid the costs concerned. If she paid them more than 3 years before this action was instituted, then they have become prescribed in terms of s 15(d) of the Prescription Act [*Chapter 8:11*]."

I think it clear beyond doubt that the appellant's right to claim reimbursement

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arose not from the order of court incorporating the consent paper, but from the decision to pay, and the actual payment of, the expenses herself.

Finally, as already pointed out, the learned judge left it to the parties to identify the expenses claimed by the appellant which constituted costs incurred in ongoing education in accordance with the findings he had made. He was not prepared to undertake the exercise himself. I have not disturbed any of the findings made, so the task remains to be carried out by the parties. In the event of their not being able to reach agreement thereon, leave is given to raise the dispute before the same learned judge by way of the filing of further affidavits in case No. HC-1034-99.

For the reasons aforegoing, both the appeal and cross-appeal must be dismissed. As neither party has achieved success it is equitable that no order for the costs incurred in this court be made.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

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Byron Venturas & Partners, respondent's legal practitioners

UDC LTD v HOFRHO (PVT) LTD & ANOR 2000 (2) ZLR 255 (HC)

Citation	2000 (2) ZLR 255 (HC)
Case No	Judgment No. HH-192-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	September 21, 2000
Judgment	October 4, 2000
Counsel	E W W Morris, for the plaintiff A J Dyke, for the defendants
Annotations	None

Civil trial

Flynote

Hire-purchase - finance charges - rates of interest - limits on - extent to which purchase price may exceed cash price - hire-purchase agreements entered into with financial institutions between April 1990 and January 1995 - provision in Hire-Purchase Act condoning charging of interest higher than that specified by the Minister - interest on overdue payment - no provision in Act setting maximum rate of interest on arrear instalments where purchase price is over $3 000.

Headnote

A hire-purchase agreement was entered into in February 1994. The finance house used an interest factor of 31.98% *per annum* to calculate the purchase price of goods. This factor exceeded the rate specified by the Minister, namely 25%. When the defendant fell into arrears with its instalments, the finance house charged interest at the rate calculated at the new business rate plus 2%.

Held, that s 29(2) of the Hire-Purchase Act [*Chapter 14:09*] rendered valid a hire-purchase agreement entered into between April 1990 and January 1995 in terms of which interest was to be charged at a rate in excess of that specified by the Minister and condoned the charging of interest in an amount in excess of the maximum rate specified by the Minister. The finance company was thus entitled to recover all payments on a purchase price calculated by using finance charges at a rate of 31.98% *per annum*.

Held, further, that the Act did not provide any maximum rate of interest that could be charged on arrear instalments where the purchase price was in excess of $3000 and thus the finance house

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was entitled to charge the rate of interest it had done.

Cases Considered

Cases cited:

Pyramid Products (Pvt) Ltd v *Stanbic Finance Zimbabwe Ltd* 1998 (2) ZLR 526 (S)

Scotfin Ltd v *RPK Buses (Pvt) Ltd & Ors* 1998 (1) ZLR 167 (H)

Standard Finance Zimbabwe Ltd v *Marongwe Tpt (Pvt) Ltd* 1998 (2) ZLR 317 (H)

Legislation considered:

Hire-Purchase Act [*Chapter 14:09*], ss 8(2), 28 & 29(2)

Case Information

E W W Morris, for the plaintiff

A J Dyke, for the defendants

Judgment

Chinhengo J: The plaintiff is a financial institution. It sued the defendants, the first defendant being the principal debtor and the second defendant being a surety and co-principal debtor, for $1 539 046.60 arising from the failure by the defendants to honour their obligations in terms of a hire-purchase agreement ("the agreement") entered into between the plaintiff and the first defendant on 22 February 1994. The amount sued for was the balance of purchase price and finance charges in respect of a second-hand Nissan 8 Tonne truck purchased by the first defendant from Irrig-Designs (Pvt) Ltd, the latter having thereafter, ceded its right, title and interest in the agreement, including ownership of the truck to the plaintiff. Also included in the amount sued for are the interest charges on arrear instalments and collection commission as agreed between the parties.

After the summons was served on the defendants, they entered an appearance to defend and there being no disputes of fact arising but only matters of law the parties agreed that the issues of law should be resolved by this court. The parties stated their case for determination. The facts as agreed are the following.

In concluding the hire-purchase agreement (Annexure "A"), the plaintiff was entitled in terms of the Hire-Purchase Act [*Chapter 14:09*] ("the Act") to charge interest. The plaintiff used an interest factor of 31.98% to calculate the purchase price of the goods as provided in s 28 of the Act, which rate exceeded the finance charges rate of 25% laid down in SI 277 of 1992. The defendant fell into arrears with its instalments and the plaintiff charged penalty interest in terms of clause 3(b) of the agreement. The said clause 3(b) provided that should the purchaser fail to make any payment on due date then he shall pay interest on all overdue payments up to a maximum rate permitted by the Act as a penalty. The rate of interest charged was the plaintiff's

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new business rate from time to time plus 2%. The new business rate was the interest rate used by the plaintiff in order to calculate the purchase price in terms of s 28 of the Act.

The defendant contended that the purchase price in terms of the agreement was calculated so as to exceed the maximum permitted by s 28 of the Act as read with SI 277 of 1992. The plaintiff on the other hand contended that s 29(2) of the Act validated the calculation of the purchase price.

The defendant also contended that by virtue of clause 18(c) of the Agreement the parties accepted that the rate of interest applicable would not exceed that permitted by the Act as at the date of the agreement and that the retrospective provisions of s 29 did not vary the contract between the parties in this regard. The defendant further contended that the plaintiff had no right to unilaterally increase the rate of interest applicable to the calculation of the purchase price from time to time during the currency of the agreement. The

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defendant in addition disputed the plaintiff's right to charge penalty interest on overdue instalments at the rate so utilised by the plaintiff.

The issues for decision by the court were stated as follows:

1. whether the plaintiff was by law entitled to recover all payments on a purchase price calculated by using a finance charge percentage rate of more than 31.98% *per annum* or whether the appropriate finance charge rate was 25%;

2. whether plaintiff is entitled to claim no interest on overdue payments or interest at the rate of 25% *per annum* or interest at the rate calculated at the new business rate plus 2%;

3. what interest rate was to be lawfully applied to overdue instalments.

4. whether the plaintiff was entitled to increase the finance charge rate and/or the interest rate during the currency of the agreement and, if so, what formalities were required to give effect to such an increase.

In their heads of argument, counsel for both the plaintiff and the defendants relied for their submissions on two cases - *Standard Finance Zimbabwe Ltd* v *Marongwe Transport (Pvt) Ltd* 1998 (2) ZLR 317 (H) and *Pyramid Products (Pvt) Ltd* v *Stanbic Finance Zimbabwe Ltd* 1998 (2) ZLR 526 (S). Mr *Dyke* for the defendants submitted that when they decided these cases the High Court and the Supreme Court were not addressed on certain important issues and that had they been so addressed they would have arrived at a difference conclusion. He distinguishes the present case from the *Marongwe* and *Pyramid* cases.

Mr *Dyke* submitted that s 28(4) of the Act is merely a protection of the operation of the agreement against infringement of the maximum permitted by the Minister and does not affect the common law position of a purchaser in circumstances where the calculation of the purchase price and instalments by the seller has resulted in an excess of the maximum permitted. It does not establish in law the purchaser's entitlement to a reduction of the purchase price or

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instalments. That right already exists under the common law where there has been a breach of the maximum permitted by the Minister under a statutory instrument. The suspension of s 28(4) by s 29(2) of the Act does not affect the other subsections of s 28 nor does it affect the right of the purchaser to resist payment of an unlawful claim made by a seller based on a calculation in excess of the maximum permitted by the Minister at the time.

Mr *Dyke* submitted further that it may be that the intention of the Legislature when enacting s 29(2) of the Act was to render lawful excess charges which had been unlawful by virtue of them having exceeded the maximum permitted by the Minister but the subsection does not have that effect. It leaves intact not only the Minister's obligation to fix a maximum amount by which the purchase price under an agreement may exceed the cash

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price but also the prescribed maximum published thereunder. It follows, the submission continues, that to exceed the maximum provided by the Minister in subsidiary legislation remains unlawful and that the purchaser is entitled to resist any demand for an unlawful excess.

The distinguishing feature of the present case, he argues, is that the agreement between the parties provided that charges would not exceed the maximum permitted under the Act. Clause 18(c) of the agreement is relevant in this regard. As such, therefore, the parties had agreed that the plaintiff would be bound, in its calculation of the charges, to the maximum amount permitted under the Act but the plaintiff nevertheless calculated the amount on the basis of a higher percentage than that fixed by the Minister.

On the question whether the plaintiff is entitled to claim interest on overdue payments or interest at the rate of 25% *per annum* or interest at the rate calculated at the new business rate plus 2% and the question what interest rate was to be lawfully applied to overdue instalments, Mr *Dyke* submitted that in terms of clause 3(b) of the agreement the purchaser was to pay interest on all overdue payments at a maximum rate permitted under the Act, which was 25% *per annum*. This understanding was not affected by s 29(2) of the Act since there was at the time no other maximum provided for. He submitted that the plaintiff was not entitled to anything more than 25% interest *per annum* on overdue instalments.

The last issue for decision was whether the plaintiff was entitled to increase the finance charges rates or the interest rate during the currency of the agreement, and if so what formalities were required to give effect to such an increase. It is not necessary for me to decide this issue as it became common cause during oral argument that the plaintiff had not increased the finance charge rate or the interest rates during the currency of the agreement. Mr *Morris* for the plaintiff conceded that if plaintiff had wanted to do so, it would have had to give notice as required by the agreement.

In response to the remaining issues for decision, Mr *Morris* made a simple and straightforward submission. He said that the questions raised in the stated case were answered in the *Marongwe* and *Pyramid Products* cases *supra* and there was no basis for this court to revisit them.

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The facts of the *Marongwe* case *supra* are summarised in the headnote. I shall rely on the headnote for my outline of those facts. The defendant company entered into a hire-purchase agreement in March 1992 with another company to buy a heavy motor vehicle. The selling company ceded its rights, title and interest in the hire-purchase agreement and its ownership of the vehicle to the plaintiff, which was a registered finance institution. For three years, the defendant met its obligations under the hire-purchase agreement but defaulted on the final payment. The plaintiff sued for the outstanding

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balance plus interest. The defendant claimed that the price fixed in the hire-purchase agreement exceeded the maximum permitted by s 28 of the Act as read with the Hire-Purchase (Finance Charges) Notice, 1992 (SI 64 of 1992). It claimed that it had in fact overpaid the plaintiff and filed a counterclaim for the amount of the alleged overpayment. The parties submitted a stated case, the question being whether the manner in which the plaintiff calculated the finance charges was lawful having regard to s 29(2) of the Act. Smith J decided that the finance charges calculated by the plaintiff were lawful having regard to the provisions of s 29(2) of the Act. He stated at 321H-323B the following:

> "The General Laws Amendment Act, 1994, was promulgated on 20 January 1995. Section 11 of that Act amended what is now s 29 of the Act by making the new subs (2) which I have referred to above. That section provides that for the purpose of calculating the amount owing under a hire-purchase agreement which subsisted between 1 April 1990 and 20 January 1995, subs (4) of s 29 shall be deemed not to have applied. The subsection does not amend or suspend any other provision of s 28 of the Act. Therefore it cannot have been the intention of the Legislature to empower the Minister of Finance to fix new rates retrospectively to cover the period specified in the new subsection. Had that been the intention, then subs (1) of the Act would have been amended so as to enable the Minister to issue notices with retrospective effect. Without such specific empowerment, the Minister would not be able to provide that the maximum rates he prescribed would operate retrospectively. The Legislation did not give him the necessary authority. It merely suspended the effect of subs (4) of s 28 in so far as that subsection applied to hire-purchase agreements that subsisted at any time during the specified period. This meant that where such a hire-purchase agreement provided for the payment of a purchase price which exceeded the cash price by more than the appropriate rate specified by the Minister of Finance, the excess was not nullified by virtue of the provisions of s 28(4) of the Act. Thus the relevant hire-purchase agreements remained valid and enforceable despite that they did not comply with the provisions of s 28(1) of the Act. If the intention of the Legislature had been to empower the Minister to regulate the maximum purchase price with retrospective effect, that intention could not have been achieved by suspending the operation of s 28(4) of the Act. I say that because the suspension of s 28(4) would mean that whatever maximum purchase price was prescribed, the requirement that the purchase price, in so far as it exceeded the prescribed maximum, must be reduced would not apply.
>
> I agree with the submission by Mr *Hwacha* that the rights of the parties are governed by the agreement they entered into. I do not agree, however, with his conclusion that the agreement must be read as meaning that the purchase price and instalments must be those fixed in accordance with the provisions of s 28(1) of the Act as read with the notice issued by the Minister that was in force when the agreement was entered into. The purchase price and instalments must be as specified in the agreement because, as provided by s 29(2) of the Act, the consequences specified in s 28(4) of the Act are not visited upon offending hire-purchase agreements that subsisted between 1 April 1990 and 20 January 1995. Section 28 of the Act does not interfere with the common law rights of parties to enter into agreements, save to the extent that the parties may not agree on a purchase price which exceeds the maximum rate prescribed by the Minister of Finance. If they agree on a purchase price which does not exceed the prescribed maximum, s 28 does not affect the

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agreement. If they agree on a purchase price that does exceed the prescribed maximum the agreement remains in force and effect save that the purchase price and monthly instalments must be reduced. In respect of hire-purchase agreements which subsisted in the period 1 April 1990 to 20 January 1995, even if the maximum purchase price were fixed with retrospective effect, hire-purchase agreements could still provide for greater purchase prices with impunity because the consequences of exceeding the maximum purchase price were suspended."

Commenting on s 29(2) of the Act, McNally JA in *Pyramid Products supra* said at 531D-G:

"This is a strange provision. It provides that bodies in the position of Stanbic, who charged unlawfully high purchase prices, and who would otherwise have to refund the difference between their price and the lawful price do not have to do so:

1. if the hire-purchase agreement (or financial lease) subsisted at any time during the period 1.4.90 - 20.1.95; and

2. in respect of that period.

The present hire-purchase agreement was signed on 26 August, 1991, so it is covered by condition 1 above. Therefore, the overcharge during that period only is condoned and does not have to be repaid."

The learned Judge of Appeal approved the decision in the *Marongwe* case *supra* - see his remarks at 531G.

The decisions in *Marongwe* and *Pyramid Products supra* have settled the first question placed before me in this stated case. I think, however, that I must add my own thoughts on the correctness of the decision in *Marongwe* if only to do justice to Mr *Dyke*'s submissions. Section 28 provides in subs (1) that the Minister of Finance shall, for all classes of agreements and goods fix, by notice in a statutory instrument the maximum amount by which the purchase price under an agreement (defined in s 2 of the Act as the total sum payable under an agreement including a deposit or other initial payment credited or to be credited under such agreement) may exceed the cash price. The Minister fixes the maximum amount by specifying the percentage rate *per annum* in relation to the balance of the cash price remaining unpaid before the due date of each instalment. Section 28(4) of the Act provides that:

"A provision in an agreement shall be of no effect in so far as it provides for the payment of a purchase price exceeding the cash price by more than the appropriate amount, fixed for the time being in terms of subsection (1), and the amount of each instalment payable under an agreement containing such a provision shall be decreased accordingly."

This provision was obviously not intended to be superfluous. If the parties entered into an agreement which contravened s 28(1) as read with the relevant statutory instrument, that agreement would be unlawful. Section 28(4) saved the agreement from the consequences of this unlawfulness. This was part of Mr *Dyke*'s contention and I agree with it but no further. The device by which s 28(4) of the Act saved an otherwise

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unlawful agreement was to visit upon it the sanction that any overpayment made by the purchaser would be refunded to the purchaser - the agreement otherwise remaining intact and valid. The provision was primarily part of a control mechanism in respect of purchase prices on hire-purchase agreements. The intention of it was not to render hire-purchase agreements unlawful for the reason that they did not comply with the controls imposed by the Minister. Those agreements remained valid but were controlled not only by the fixing of a maximum amount but also by providing for the reimbursement to the purchaser of any amount paid in excess of the prescribed amount.

Section 29(2), which was a later amendment to the Act, provides that:

> "For the purposes of calculating any amount owing under a financial lease or a hire-purchase agreement which subsisted at any time between 1 April 1990 and 20 January 1995, subsection (4) of section *twenty-eight* shall be deemed not to have applied to such financial lease or hire-purchase agreement during that period."

Section 28(4) was not a superfluous provision, as I have demonstrated. Section 29(2) of the Act was inserted precisely because s 28(4) was not an irrelevant provision and precisely to condone the charging of an amount in excess of the maximum amount prescribed by s 28(1). The provision is clear that in calculating any amount owing under a hire-purchase agreement which subsisted during the period specified the provisions of s 28(4) of the Act were not to apply. A difference was intended to be struck between agreements which subsisted before and after the period specified and those that subsisted during that same period. Any reading of s 29(2) of the Act which does not accord with this interpretation would, in my view, be clearly wrong. I do not therefore agree with Mr *Dyke*'s submission that because s 29(2) did not remove the Minister's power to prescribe limits in terms of s 28(1) and *ipso facto* the limits prescribed remained in place, s 29(2) did not have any effect such as would alter the rights and obligations of the parties under the hire-purchase agreement. The decision in the *Marongwe* case is clearly correct. It was approved by the Supreme Court in *Pyramid Products supra* and that should put paid any endeavour to have this court revisit the issue. In any event, the defendant may still appeal against my decision to the higher court and hopefully persuade it to change its mind. I think however that its prospects of success are dim.

Mr *Dyke* submitted, as I have already alluded to, that the present case is distinguished from the *Marongwe* case because in the present case the agreement between the parties provided that the charges would not exceed the maximum permitted under the Act. He relied on clause 18(c) of the agreement. Clause 18 of the agreement is concerned with the increase in charges and the manner in which the charges were to be calculated. It does

not apply to any hire-purchase agreement under which the purchase price does not exceed $3 000. Clause 18(c) reads:

> "Notwithstanding the aforegoing, the charges shall not in any event, be increased beyond the maximum prescribed in terms of [section 28] of the Hire-Purchase Act."

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The charges are defined in clause 18(a)(iii) as -

> "that portion of the capital consisting of the charges referred to in part (iii) on p 1 (of the agreement); and in respect of the balance of the Capital owing at any time after the commencement of this agreement, that portion of such balance consisting of the charges applicable thereto."

These charges are finance charges defined in *Scotfin Ltd* v *RPK Buses & Ors* 1998 (1) ZLR 167 (H) at 170B as being "an element akin to interest being the difference between the cash price and the purchase prices of the goods". It is to these charges that clause 18(c) of the agreement relates and the same as those to which ss 28(1), 28(4) and 29(2) relate. It is common cause that in calculating the purchase price appearing in the schedule to the agreement the parties, or the plaintiff as the dominant party, not only contravened s 28(1) of the Act as read with the relevant statutory instrument, which contravention was condoned by s 29(2) of the Act, but they necessarily and intrinsically contravened clause 18(c) of the agreement. Clause 18(c) of the agreement cannot be divorced from, and cannot be read in isolation to s 28(1) of the Act. To my mind, the condonation extended to a contravention of s 28(1) by s 29(2) of the Act extended as well to a disregard of clause 18(c). We are here dealing with one and the same animal, one and the same agreement and one and the same mischief which must be dealt with on the same interpretation of the effect of s 29(2) and s 28(4) of the Act. Therefore, if the calculation of the purchase price was condoned by s 29(2) of the Act it cannot be permissible to detract from that condonation by invoking clause 18(c) of the agreement. That would be to frustrate the intention of the Legislature which condoned the illegality concerned. The essential issue here is that the parties entered into an agreement which did not comply with the law in the way it calculated the purchase price of the goods. That agreement as a whole was however condoned or given a seal of approval by s 29(2) of the Act, despite the strangeness thereof. This explains why I accept Mr *Morris*'s submission in para 10 of his heads that:

> "The parties, may well have agreed that the charges would not exceed the maximum prescribed in terms of section [28] of the Hire-Purchase Act, but in fact in terms of the written agreement, the parties did so contract. Their having done so was sanctioned by the introduction of s 29."

That they did so contract as submitted by Mr *Morris* is evident from the fact that charges incorporated in Part III of the Schedule of the agreement were based on a calculation which disregarded clause 18(c) of the agreement and

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s 28(1) as read with the relevant statutory instrument. I would, therefore, find for the plaintiff on the first issue.

On the second issue whether the plaintiff was entitled to claim no interest on overdue payments, or interest at the rate of 25% *per annum* or interest at the rate calculated at the new business rate plus interest - it was submitted on defendant's behalf that clause 3(b) of the agreement provides that the purchaser shall pay interest on all overdue payments at the maximum rate permitted under the Act. The maximum rate provided for in the Act was that prescribed by the Minister under s 28(1). At the time, the rate was 25%. That rate was not affected by the provisions of s 29(2) since there was no other maximum provided for. It was argued that the

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plaintiff was not entitled to levy more than 25% interest *per annum* on overdue payments.

The plaintiff's counsel again dealt short thrift with this issue. He submitted that the plaintiff's right to charge interest on overdue payments was limited by the ceiling provided for in the Act. Section 8(2) is the only provision of the Act dealing with interest on arrear instalments. It however applies to agreements where the purchase price does not exceed the sum of $3 000. Agreements where the purchase price exceeds $3 000 are not covered by that provision. It was submitted that in the absence of any ceiling provided for in the Act in respect of agreements where the purchase price involved exceeded $3 000, the finance institution was at large regarding the rate of interest.

Clause 3(b) of the agreement provides as follows:

> "If the Purchaser does not make any payment on the due date, then he shall pay interest on all overdue payments at the maximum rate permitted under the Act as compensation or damages for breach of contract."

This clause is of general import and intended to provide for an eventuality that a maximum rate may be prescribed under the Act in respect of agreements where the purchase price exceeds $3 000. Only section 8(2) of the Act provides for any limit at all and it does not apply to an agreement where the purchase price exceeds $3 000. I am therefore in agreement with Mr *Morris*. In any case I would think that the conclusion I have reached in respect of clause 18(c), and the justification therefore, applies as well to clause 3(b). The difference if any is the same!

My conclusion is that:

(a) on the first issue - whether the plaintiff was entitled to recover all payments on a purchase price calculated by using a finance charge percentage rate greater than that fixed by the Minister in terms of s 28(1) of the Act - the stated case is decided in favour of the plaintiff;

(b) on the second issue - whether the plaintiff was entitled to claim no interest on overdue payments, or interest at the rate of 25% *per annum*,

CHINHENGO J

or interest at the rate calculated at the new business rate plus, the 2%, the stated case is decided again in favour of the applicant - the decision being that the plaintiff was entitled to claim interest on overdue payments at a rate calculated at the new business rate plus 2%;

(c) the third issue is answered in favour of the plaintiff as in para (b) above;

(d) the first part of the fourth issue falls away as it is conceded that the plaintiff did not increase the finance charges or the interest rate during the currency of the agreement. The second part of the fourth issue is of academic interest only and no decision is made on it.

The order which I make, therefore, is that the stated case is decided in favour of the plaintiff and the defendant shall pay the costs of this application.

Wintertons, plaintiff's legal practitioners

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Kantor & Immerman, defendant's legal practitioners

CAPITAL RADIO (PVT) LTD v MINISTER OF INFORMATION & ORS (2) 2000 (2) ZLR 265 (HC)

Citation	2000 (2) ZLR 265 (HC)
Case No	Judgment No. HH-202-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	October 4, 2000
Judgment	October 4, 2000
Counsel	A A Brooks, with him J Samkange, for the applicant
Annotations	None

Ex parte application

Flynote

Criminal procedure - search - warrant - validity - magistrate issuing warrant purporting to cover whole country - powers limited to area of his jurisdiction - warrant not specifying premises to be searched or reason for seizure - invalidity of warrant - purpose of seizure - seizure not necessary to prove act alleged - ulterior motive for warrant

Headnote

The applicant company had won a case in the Supreme Court, which held that there was no legal impediment to its operating a radio station in Zimbabwe. The respondent Minister sought to prevent it from operating and sought an interdict to prevent it from doing so. The applicant, in its turn, sought an order declaring that it was entitled to operate the radio station.

A search warrant was issued by a magistrate, authorising the police to seize the applicant's broadcasting equipment. The warrant purported to extend to the whole of Zimbabwe. It did not specify the premises to be searched, nor did it state why the seizure was necessary. It stated that the search related to a contravention of the Radiocommunication Services Act [*Chapter 12:04*]. The applicant sought a further order to prevent the proposed search, pending a hearing to be held the next day, at which the legality of the actions of the applicant were to be considered by the High Court. In granting the order:

Held, that, in view of the Supreme Court's ruling, no offence was disclosed justifying the issue of a warrant.

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Held, further, that the courts must ensure that the power of search and seizure is not abused. The police cannot be allowed to exercise uncontrolled powers of search and seizure. Search warrants will be interpreted with reasonable strictness and, in cases of doubt, they will be interpreted so as to protect the liberty and privacy of the subject.

Held, further, that the warrant issued by the magistrate was invalid as it contained two serious flaws. Firstly, the warrant purported to be applicable throughout the country, whereas a magistrate only has jurisdiction to issue a warrant in respect of his area of jurisdiction. Secondly, the warrant was far too broad and vague and was lacking in specific detail. The warrant did not specify the premises to be searched, nor did it state what the reason for the seizure was.

Held, further, that as the applicant admitted broadcasting, the stated reason for seizing the radio equipment - that it was necessary to prove the commission of an offence - was untenable. The only purpose for the seizure would be the closure of the applicant's business, a move which might indicate the existence of an ulterior motive.

Held, further, that the order should be granted until the dispute on the merits could be dealt with the next day.

Cases Considered

Cases cited:

Brinegar v *US* 338 US 160 (1949)

Capital Radio (Pvt) Ltd v *Min of Information & Ors (1)* 2000 (2) ZLR 243 (S)

de Wet & Ors v *Willers NO & Anor* 1953 (4) SA 124 (T)

Divisional Comr, SA Police, Witwatersrand Area & Ors v *SA Assd Newspapers Ltd & Anor* 1966 (2) SA 503 (A)

Green v *Fitzgerald & Ors* 1914 AD 88

Highstead Entertainment (Pty) Ltd v *Min of Law and Order & Ors* 1994 (1) SA 387 (C)

Minister of Justice & Ors v *Desai NO* 1948 (3) SA 395 (A)

Pullen NO & Ors v *Waja* 1929 TPD 838

S v *Mujee* 1981 ZLR 176 (G); 1981 (3) SA 800 (Z)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 50(l)

Magistrates Court Act [*Chapter 7:10*], s 56

Case Information

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A A Brooks, with him *J Samkange*, for the applicant

Judgment

Chatikobo J: On 4 October 2000, I made an order, after hearing Mr *Brooks* and Mr *Samkange* who appeared on behalf of the applicant (Capital Radio), in the following terms.

" 1. Until 4 p.m. on 5 October 2000, the respondents be and are hereby interdicted from:

(i) interfering in any way with, or acting to prevent applicant, its directors, employees and agents from operating a radio broadcasting station which broadcasts a radio signal on the 90mHz wavelength, or such other wavelength as may be reasonably specified by the respondents in terms of this order;

(ii) making any statement which imputes that applicant is acting outside the scope and provision of the law in operating its radio broadcast services.

2. Until 4 p.m. on 5 October 2000, the applicant be and is hereby interdicted from removing, concealing or destroying any broadcasting apparatus or articles in its possession.

3. Costs are reserved for determination on 5 October 2000."

The facts which gave rise to the chamber application brought before me are these.

Capital Radio made a chamber application to this court on 4 October 2000 in which it sought a declaration to the effect that it is entitled to broadcast radio signals at the frequency of 90mHz unless the respondents allocated an alternative frequency to it. On the same day, the first respondent (the Minister) also brought a chamber application in which he sought to interdict Capital Radio from operating a broadcasting service. Again, on the same day, a search warrant was issued by a magistrate in the following terms:

CHATIKOBO J

"(Issued in terms of s 54(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*] as read with s 22(3) of the Radio Communication Services [*Chapter 12.04*].

To: Assistant Commissioner L. Ndlovu and his Lawful Assistants

WHEREAS it appears to me: G KASHORA (Magistrate ESQ)

from information on oath, that there are reasonable grounds for believing that there is in the possession or under the control of: Capital Radio (Pvt) Ltd situated at a place or places to be yet established but within Zimbabwe or its Directors-owners (see annexure) and at or near their residences or places of business.

or upon in in their motor vehicles, vessels, aircraft, strong room or any other related place.

Certain article(s) that is to say: Broadcasting equipment, apparatus, articles, items or documents related to broadcasting in contravention of s 13(a)(b)(e) as read with Section 29(R)(ii) of the Radio Communication Services Act [*Chapter 12:04*] and any other offensive material.

which are concerned or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence/ *(26)

which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an

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offence/ *(27)

which are intended or on reasonable grounds believed to be intended to be used in the commission of an offence.*(28)

THIS IS, therefore, to require you to seize the above-mentioned article(s), and to that end you are authorised, where necessary, to search any person identified in this warrant and to enter and search the premises identified in this warrant and to search any person found in or upon those premises. This warrant shall be executed by day or by night. *(29)

Given under my hand at HRE this 4th day of OCTOBER 19 2000

Magistrate or Justice of the Peace"

During the evening of the same day, I presided over yet another chamber application in which Capital Radio was seeking a temporary stay of execution of the search warrant, which stay was to pend the determination of the chamber application brought earlier in the day and which had been placed before Gwaunza J.

The order which I made, which is quoted above, was intended to achieve a temporary stay of execution of the warrant. I granted the order because I was satisfied, after hearing Mr *Samkange* and Mr *Brooks* that the search warrant was invalid. I came to that conclusion for the reasons which now follow:

1. *Supreme Court Ruling*

In *Capital Radio (Pvt) Ltd* v *Minister of Information, Posts and Telecommunications* S-99-2000,*(30) the Supreme Court ruled that s 27 of the Broadcasting Act, [*Chapter 12:01*] and ss 14(1) and 14(2) of the Radiocommunication Services Act [*Chapter 12:04*] were inconsistent with

s 20(1) of the Constitution of Zimbabwe and are therefore invalid. Paragraph B of the order reads:

"B. In the premises and for the sake of clarity, it follows that:

(a) The applicant is entitled under the law to operate and provide a broadcast service from within Zimbabwe.

(b) The applicant is entitled under the law to import into Zimbabwe all radio and other equipment to operate a commercial radio station and to broadcast within and outside Zimbabwe, subject to payment of all customs dues and import taxes lawfully levied in terms of the law, and to possess and utilise such broadcast equipment."

And at p 4 of the cyclostyled judgment, *(31) the learned Chief Justice stressed that:

"Having thus declared the legislation invalid, there is at the present time (as indicated in para B of the order) *nothing to prevent the applicant from proceeding with immediate effect to operate and provide a broadcasting service from within Zimbabwe*" (my emphasis).

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The contention of the respondents was that the order of the Supreme Court did not have the effect of excusing a prospective broadcaster from compliance with s 12 of the Radio Communication Services Act, in particular s 12(1)(b) which deals with the allocation of frequencies and that failure to comply with s 12 amounts to a contravention of s 13 of the same Act. That is the dispute which was before Gwaunza J. For my part, I merely had to be satisfied that *prima facie* the applicant had not committed any offence and consequently that the search warrant should not be executed before Gwaunza J determined the opposing contentions. I was satisfied that once ss 14(1) and 14(2) were struck down as being unconstitutional the bedrock upon which ss 12 and 13 were predicated ceased to exist, and since those sections are consequential provisions intended to facilitate the practice of the monopoly given to the Zimbabwe Broadcasting Corporation, they too fell away. The mischief which the legislature sought to prevent by enacting ss 12 and 13 was the risk of alternative broadcasters making inroads into the monopoly granted to the Zimbabwe Broadcasting Corporation. Once the monopoly ceased to exist, all protective provisions also fell away. To allow the execution of the warrant to go ahead would have been tantamount to pre-empt, undermine and render nugatory the proceedings pending before Gwaunza J. Faced with the clear judgment of the Supreme Court, I could not but hold that the conduct of the applicant was, *prima facie* - to put it at its lowest - lawful and consequently that no offence had been committed or could be committed in contravention of the Radiocommunication Services Act thereby justifying the proposed seizure of the applicant's equipment.

CHATIKOBO J

The maxim *cessante ratione legis cessat ipsa lex* applies in this case. The words of Willes CJ which were quoted with approval by Gubbay J (now Chief Justice) in *S* v *Mujee* 1981 ZLR 176 (G) at 178; 1981 (3) SA 800 (Z) at p 802-3 are apposite:

> "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

See also *Green* v *Fitzgerald & Ors* 1914 AD 88 at 118.

2. *Irregularities in the Warrant*

The warrant was purportedly issued in terms of s 54(1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. This is the old section. The correct section is s 50. As the applicant had always been legally represented, no prejudice was occasioned. It would be helpful if in future, care is taken to ensure that the correct section is cited so as to avoid the possibility of people resisting the execution of a lawful warrant.

The power of search and seizure in the hands of the State operates as a

> "vigorous device in the administration of criminal justice, facilitating the identification of offenders, enabling the police to accomplish their functions of investigating offences and preventing crime and providing the authorities with evidence essential in the prosecution and punishment of wrongdoers. But this device is a double-edged weapon whose effective use in protecting society against lawbreakers at the same time exposes members of the community to the danger of improper law enforcement ...
>
> The exercise of the power of search, coupled as it is with the invasion of the privacy and dignity of the citizen,

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> often in circumstances of shock and resentment, will be closely scrutinised by the courts. In the event of a dispute as to what power is conferred by a warrant, the warrant will be construed with reasonable strictness and, in cases of doubt, all questions pertaining thereto will be interpreted in favour of the person whose privacy has been invaded." *Per* Lansdown and Campbell *South African Criminal Law and Procedure* vol 5, p 135.

With these remarks I proceed to construe the warrant. It proclaims that there are reasonable grounds for believing that there is in the possession or under the control of Capital Radio "at a place or places to be yet established but within Zimbabwe or its Directors - owners (see annexure) and at or near their residences or places of business". There are two fundamental irregularities in the words I have quoted. It says the location of the premises to be searched are unknown but are located within Zimbabwe. The power of a magistrate to issue a warrant in terms of s 50(1)(a) before trial is limited to the area of his jurisdiction. In context, the magistrate's area of jurisdiction is limited to the province in which his court sits (*vide* s 56 of the Magistrates Court Act [*Chapter 7:10*]). The warrant which the magistrate issued covers the whole of Zimbabwe. Clearly, the magistrate exceeded his jurisdiction and for want of jurisdiction the warrant is bad in law and unenforceable. See Reid-Rowland *Criminal Procedure in Zimbabwe* (s 7-9).

CHATIKOBO J

The second flaw which is manifest in the words I have quoted and in the rest of the warrant is that the premises and the "vehicles, vessels, aircraft, strong rooms, and other related places" have not been specified. In fact, the warrant says that such places are yet to been identified. Although the names of the directors of Capital Radio whose residences must be searched have been specified, the addresses are not given. Similarly, the particulars as well as the location of the "vehicles, vessels, aircraft, strong rooms" have not been furnished.

There is a plethora of cases which lay down in no uncertain terms the need to ensure specificity in a search warrant. I refer only to a passage in Lansdown and Campbell *supra*, p 138 where the learned authors state the principle in these terms:

> "The very purpose of a search-warrant is to authorise acts which would otherwise be illegal. Consequently, a search-warrant must clearly state what the officer entrusted with the execution thereof is empowered to do, namely, what person, premises, place, vehicle or receptacle he may search, and precisely what property, if found, is to be seized. Where a specific thing is to be searched for and seized, it must be described in the warrant with such precision, as may lead to its identification and so as to preclude the possibility of other property being seized."

The warrant further proclaims that the articles to be seized are: (a) concerned in the commission of an offence; (b) may afford evidence of the commission or suspected commission of an offence; and (c) intended to be used in the commission of any offence. Are all three grounds applicable or is it only one or two of the grounds on which reliance is placed? One is left to guess, an endeavour which is made more problematic by the bold assertion that the applicant has contravened s 13(a), (b) and (e). If it is known what offence has been committed then there is no need to allege in the warrant that the articles are intended to be used in the commission of an offence. The inescapable conclusion is that the terms of the warrant are too vague and too broad.

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In *Pullen & Ors* v *Waja* 1929 TPD 838, 846-847, Tindall J said:

"... that the courts ought to examine the validity of warrants with a jealous regard for the liberty of the subject and his rights to his property and refuse to recognise as valid a warrant the terms of which are too general."

See also *Divisional Commissioner of SA Police, Witwatersrand Area & Ors* v *SA Associated Newspapers Ltd & Anor* 1966 (2) SA 503 (A) at 512 and *Minister of Justice & Ors* v *Desai NO* 1948 (3) SA 395.

An important aspect of this case is that it was common cause that Capital Radio was operating a radio broadcasting service. Capital Radio itself had come to court to seek a declaration to the effect that its activities were lawful and the Minister for his part was also in court contending that the activities were illegal and must be stopped. If the activities were illegal no further proof

CHATIKOBO J

would be required to secure a conviction. The purpose of a search warrant is the procurement of articles which it is reasonably believed may be of use in proving a criminal case. As the conduct was admitted no purpose would be served by searching for and seizing Capital Radio's equipment. The only purpose which would be served by such a search would be the closure of applicant's business, a move which might be interpreted as indicative of the existence of an ulterior motive.

Compare *Highstead Entertainment (Pty) Ltd t/a "The Club"* v *Minister of Law and Order & Ors* 1994 (1) SA 387 (C).

Such conduct cannot survive the cautious scrutiny which the courts must bestow upon enactments which invade the liberty of the subject and, discharging its function as a buttress between the Executive and the subject as best as it can, a court would be hard put to find justification for the search. I draw inspiration from the *dictum* of Ramsbottom J in *De Wet & Ors* v *Willers NO & Anor* 1953 (4) SA 124 (T) at 127B-C

"To enter premises, to search those premises, and to remove goods therefrom is an important invasion of the rights of the individual. The law empowers police officers to infringe the rights of citizens in that way provided that they have a legal warrant to do so. When a dispute arises as to what power is conferred by the warrant the warrant must be construed with reasonable strictness, and ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed."

Finally in this regard, I would commend to those whose unenviable task it is to issue and to execute search warrants the apposite remarks of Jackson J in *Brinegar* v *United States* 338 US 160 (1949)

"Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. Human personality deteriorates and self-reliance disappears where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

Before concluding this judgment I must deal briefly with the manner in which this matter was brought before me.

I was telephoned at about 8.00 p.m. on 4 October 2000 by Mr *Samkange* who requested me to

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preside over an urgent application involving Capital Radio. I was advised that the duty judge was unable to deal with the matter. Mr *Samkange* also advised me that the Registrar had indicated that he would only come if the judge required his presence.

On arrival at the courthouse, I was advised by the security guard that Mr *Samkange* had gone to Capital Radio's station to ascertain if the search had started. I waited. He returned with Mr *Brooks* and I was furnished with copies of the applications which had been filed during the course of the day as explained earlier on in this judgment. I was also supplied with a copy of the search warrant whose stay was being sought. I was advised that the police were at the premises of Capital Radio and were about to start dismantling the

equipment and to seize it. The extreme urgency of the matter was self-evident. I was satisfied that the urgency was such that it would not conduce to the attainment of justice for me to delay the matter in order to give notice of the hearing to the respondents. I opted to deal with the matter as an *ex parte* application. After hearing, the submissions of Mr *Brooks* and Mr *Samkange*, I granted an order in the terms set out above the effect of which was to delay the search and seizure by 15 hours in order to allow Gwaunza J to determine the dispute on the merits.

These then are the reasons for the order I made.

Honey & Blanckenberg, applicant's legal practitioners

CHERERA v CHITUNGWIZA MUNICIPALITY 2000 (2) ZLR 273 (HC)

Citation	2000 (2) ZLR 273 (HC)
Case No	Judgment No. HH-214-00
Court	High Court, Harare
Judge	Gwaunza J
Heard	October 11, 2000
Judgment	October 11, 2000
Counsel	E Chivhenge, for the applicant E Matinenga, for the respondent
Annotations	None

Civil application

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Flynote

Employment - contract - termination - dismissal - local authority employee - decision by council to dismiss several employees - individual cases not considered by council - dismissal set aside

Local authority - employee - dismissal - board of inquiry into misconduct recommending dismissal - executive committee and council approving board's recommendation without going into merits of employee's case - fatal irregularity

Headnote

The applicant and several other employees of the respondent municipality were suspended from duty after allegations of misconduct. A board of inquiry was convened. Following the board's findings, the municipality's executive committee recommended the dismissal of the employees. This recommendation was accepted by the council. The applicant argued that the council had not considered her case individually.

Held, that, although there was detailed evidence in relation to misconduct by the other employees, who were employed in a different section from the applicant, there was nothing to show that the applicant's case had been considered by the executive committee or the council on the merits. It was not the function of the committee or the council to simply rubber stamp whatever conclusion the board of inquiry had come to. Section 141 of the Urban Councils Act [*Chapter 29:15*] provided safeguards to prevent a situation where weighty decisions like the termination of an employee's employment are left to one authority within an urban council, to the exclusion of higher levels of authority. These safeguards ensure that the employee is given an opportunity to be heard and that the decision as to his dismissal or continued employment is meaningfully considered on the merits by the higher decision- making authorities. Merely going through the motions of following the provisions of the section was not enough. The result was injustice and prejudice to the applicant. The failure to consider the merits was a fundamental irregularity going to the root of the whole proceedings. The applicant's dismissal would have to be set aside.

Cases Considered

Cases cited:

Mutambara & Ors v *Min of Home Affairs* 1989 (3) ZLR 96 (H)

Mutare City Council v *Mudzime & Ors* 1999 (2) ZLR 140 (S)

Legislation considered:

Urban Councils Act [*Chapter 29:15*], s 141

Case Information

E Chivhenge, for the applicant

E Matinenga, for the respondent

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Judgment

Gwaunza J: After hearing argument from counsel for the applicant and respondent, I granted the application and indicated the reasons would follow. These are the reasons.

The applicant seeks a review of the proceedings of the respondent, which led to her dismissal from her employment therewith. She gives the grounds for review as non-compliance by the respondent with the relevant provisions of the Urban Councils Act [*Chapter 29:15*] and unreasonableness of the ground upon which the respondent dismissed her. The applicant accordingly seeks nullification of the proceedings and reinstatement to her job with the respondent from the date of suspension, without loss of salary and benefits.

It is common cause that the applicant was employed as a cashier by the respondent. It is also common cause that she was suspended from duty without salary and benefits on 29 January 2000. After she attended a board of inquiry, the matter of her dismissal was put before the respondent's Executive Committee on 22 June 1999. The Executive Committee recommended that the applicant and 13 others be dismissed from their employment with effect from the date of their suspension. Although the respondent thereafter unsuccessfully sought the permission of the Ministry of Labour to dismiss the applicant, it is not in dispute that, the determination of the Labour Tribunal notwithstanding, this action was taken in error, in light of the Supreme Court judgment in *Mutare City Council* v *Mudzime & Ors* 1999 (2) ZLR 140 (S). On 28 June 1999, respondent's council endorsed the resolution of the Executive Committee to dismiss the applicant. Respondent thereafter proceeded to implement the resolution to dismiss the applicant. It is not disputed that in doing so, the respondent followed the procedures laid down in the Urban Councils Act [*Chapter 29:15*].

It is contended for the applicant, however, that while on the face of it all the procedures were properly followed, in reality the applicant's case was not specifically dealt with, on the merits, by both the Executive Committee and respondent's council.

The evidence before me suggests that there is substance in this contention. Annexure "E", which is the minutes of the Executive Committee meeting, indicates that the applicant's case was lumped together and dealt with jointly with that of 13 other employees of the respondent.

The pertinent passage from Annexure "E" starts from para 2:10 of the minutes:

GWAUNZA J

"2.10 APPLICATION FOR AUTHORITY TO DISMISS THE FOLLOWING EMPLOYEES IN THE LIQUOR SECTION AND TREASURY DEPARTMENT.

The acting town clerk had circulated in advance the following report:

1. ...

2. ...

3. ... up to 8

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9. Cherera M

10. ...

11. up to 14 (the other names, not being relevant, have deliberately not been mentioned).

The reason for seeking permission to dismiss these employees is that they prejudiced Council of large amounts of money by claiming that beer had been delivered at outlets they were either working at or where responsibility for checking to ensure that the deliveries had actually been made (*sic*). In some cases, they incurred shortfalls which were inexplicable. The methods used to prejudice Council of its money are in most cases strikingly similar giving one the feeling that there was connivance among those involved."

The minutes go on to show that the Executive Committee had granted the authority to dismiss the 14 employees from the date of suspension and that it had also resolved that application to dismiss the employees be made to the Ministry of Public Service, Labour and Social Welfare. It is pertinent, although both parties agree the matter should not have been referred to the Ministry of Labour, to note that the labour relations officer who considered the matter found in favour of the applicant. The officer had also ordered the respondent to reinstate the applicant and pay her salary from the date of suspension. The determination was made on 11 October 1999. By then, the matter had already been referred to and considered by respondent's council, which sat for this purpose on 28 June 1999.

After the realisation was made that the matter should not have been referred to the Ministry of Labour, the respondent regarded itself as not being bound by the findings of the labour relations officer. It reverted to the position it had reached through its council on 28 June 1999.

The pertinent passage from the minutes of the council's meeting reads as follows:

" (b) Item 2.10 - *Application For Authority To Dismiss The Following Employees In the Liquor Section and Treasury Department*

The Committee had resolved to recommend to Council that fourteen (14) employees be dismissed for their involvement in the racket in the Liquor Undertaking Section. A councillor wanted to know whether it was not proper for some employees involved to have been sent to the Zimbabwe Republic Police (ZRP). The Acting Town Clerk advised that all the listed employees had signatures on the stock sheet forms to indicate that beer was transferred from point 'A' to point 'B' when in actual fact there were no beer transfers done, adding that they did not want to sent those employees who were implicated in the cases to the Zimbabwe Republic Police because criminal cases take too long with the courts for them to be heard.

GWAUNZA J

Noted.

A proposal made was seconded.

Resolved:

That Council adopts the recommendations/resolutions of the Committee."

A consideration of the pertinent passages from the minutes of the meetings of both the executive committee and respondent's council shows there is nothing in either document to show that the case of the applicant was dealt with specifically on its own merits. Counsel for the

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respondent, Mr *Matinenga,* makes the important concession in para 7 of the respondent's heads of argument that the respondent's executive committee and council were obliged to consider the applicant's misconduct individually. He correctly cites as authority for this contention *Mutambara & Ors* v *Minister of Home Affairs* 1989 (3) ZLR 96 (H) where the court held that failure to consider each individual separately resulted in an improper exercise of a discretion. Mr *Matinenga* argues, however, that while the principles in *Mutambara*'s case apply *in casu*, the case is distinguishable on the facts. He contends that after an inquiry was held, presumably looking into the applicant's matter individually, the executive committee, which had caused the inquiry to be conducted, was not obliged to look into an employee's allegations of misconduct. He contends that the executive committee was there only to "consider the result of the inquiry" and make a decision.

I am not persuaded to the correctness of this submission, which seems to suggest that the role of both the executive committee and council is to unquestioningly rubber stamp whatever decision the board of inquiry reaches regarding the employment of an employee. The submission, in addition, does not explain why, if its intention was simply to provide for this type of rubber-stamping, the legislature could have found it necessary to carefully provide for the various stages a matter like this has to go through before the final decision is made. I am not persuaded such was the intention of the legislature. In my view, such safeguards (for that is what they are) as are contained in s 141 of the Act were put there specifically to prevent a situation where weighty decisions like termination of an employee's employment are left to one authority within an organisation, to the exclusion of higher levels of authority. The safeguards ensure that the employee is given an opportunity to be heard and that thereafter, the decision to either fire or reinstate the employee is meaningfully considered, on the merits, by the higher decision-making authorities within the institution. One might otherwise well ask what would there be to stop someone with dishonourable motives from inserting, into a list of employees doomed to dismissal, the name of some hated but innocent employee, so that the latter is effectively disposed of through the rubber-stamping of the executive committee and council.

GWAUNZA J

Essentially, *in casu*, there were two categories of employees in the list of 14. In one category belonged the employees (presumably 13) in the liquor section. In the other category belonged the applicant, who was in the Treasury Department. The reasons for the recommended dismissal of the employees in the liquor section are specifically given in Annexure "E". The reasons are also either peculiar to the type of work in that section or imply team work, for example "claiming that beer had been delivered at outlets ...", reference to the *modus operandi* used to prejudice the respondent being "strikingly similar" and therefore suggesting "connivance among those involved" and "all concerned had evidence that they signed the stocks involved".

It is correctly contended for the respondent that there is nothing in these reasons, nor for that matter in the tenor of Annexure "E", to suggest that the executive committee consciously applied its mind to anything other than the matter of the employees in the liquor licencing section. If reference to the case of these employees is removed from the minutes, there would clearly be nothing left to show that the committee also considered the other matter, that is, that

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of the applicant. As if to put the truth of this default beyond any doubt, Annexure "F", in the paragraph cited above, specifically refers to the dismissal of the fourteen (14) employees for their "involvement in the racket" in the liquor undertaking section.

The tenor of Annexures "E" and "F" raises the high probability that neither the executive committee nor the respondent's council was aware of the fact that the 14 listed employees did not all belong in the liquor licencing department. I find that not even the most liberal interpretation of Annexures "E" and "F" would impute to the committee and the council a consciousness of having properly considered the case of the applicant, on the merits. In this respect, I am not persuaded that reference in the minutes to the "Treasury Department" alone carries the respondent's case any further.

When all is considered, I find merit in the contention made for the applicant that the only contemplated compliance with s 141 of the Act, *in casu*, would have been for her case to be dealt with separately by both the executive committee and council. Merely going through the motions of considering the matter is obviously not enough.

As it is evident that the intention of the legislature was to ensure a fair hearing at every turn for an employee facing dismissal, the following passage, cited in the applicant's heads of argument is eminently relevant:

> "One must look to the subject matter, consider the importance of the provision that had been disregarded and the relation of that provision to the general object intended to be secured by the Act" (Baxter *Administrative Law*).

While it may be true, as argued for the respondent in its heads of argument,

GWAUNZA J

that the respondent had "meticulously followed" the provisions of s 141 of the Act, I find that the general object intended to be secured by the Act in cases such as the applicant's is defeated by the lack of any substance to or purpose in, this seemingly meticulous adherence to the provisions. The intention of the legislature is clearly not that an institution should just go through the motions, but that it must in addition address its mind meaningfully to the task at hand. The fact that this clearly did not happen *in casu* is tantamount, in my view, to a substantial, if not total, disregard of the relevant legal provisions.

I can, in this respect, do no more than concur with the following *dictum* of my brother Chinhengo in *Muchabaiwa* v *Chairman, Executive Committee of the City Council & Anor* H-8252-99 (the applicant's heads of argument at p 35).

> "A procedural irregularity, if it is to be a basis for setting aside a decision reached by a *quasi* judicial authority, must be of such a nature as to result in some unfairness or some injustice and it must be fundamental and prejudicial to the party which complains. If an irregularity is technical or of an academic interest only, then I think it is not an irregularity as should move the court to set aside the proceedings challenged."

The effect of the irregularity complained of *in casu* is that the applicant's dismissal was based on the decision of the board of inquiry, which may or may not have been correct in its determination. She did not have the benefit of having her case considered on the merits by the

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two decision-making authorities of the respondent, that is, the executive committee and the council. This, I find, is not a technical irregularity or one of an academic interest only. It resulted in unfairness, injustice and prejudice to the applicant. It was a fundamental irregularity going to the root of the whole proceedings. On that ground alone, even without considering the merits of the applicant's dismissal, the applicant would have been entitled to the relief sought.

For the record, however, I should mention that the allegations of gross negligence levelled by the respondent against the applicant do not appear to be borne out by the evidence before the court. It was alleged against the applicant that she financially prejudiced the respondent of $967.65. The issue had come to light when the drawer of a cheque in that amount complained to the respondent that the same amount was being demanded from him when he had paid it. Upon investigation, it was discovered that the cheque had been presented to the council by an employee who was not the applicant, and had been banked but not receipted. Although the applicant, who was accused of having converted the money to her own use, indicated that she and five other employees who worked under the supervision of a section supervisor, all had instructions to handle cash, she was still held accountable and was as a result suspended from her employment.

The respondent has not disputed the applicant's assertion that she was not

the only one receiving money in the section in which she worked. Nor has it been disputed that she and the others worked under the supervision of the sectional supervisor. The respondent, it appears, did not take the trouble to question the employee established as having brought the cheque in question but failed to hand it over to the registry section for record purposes. It would have been important to find out from this employee firstly, who he or she had handed the cheque to and secondly, why he or she had not received a receipt for it.

I do not find, in all the evidence that the respondent seems to have acted on, anything to reasonably point at the applicant as the misappropriator of the funds represented by the cheque.

All in all, I was satisfied the applicant had proved her case on a balance of probabilities.

Hence, my granting of the application as prayed.

Manase and Manase, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

LAFONTANT v KENNEDY 2000 (2) ZLR 280 (SC)

Citation 2000 (2) ZLR 280 (SC)

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Case No	Judgment No. S-103-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	September 5, 2000
Judgment	October 12, 2000
Counsel	P Nherere, for the appellant A P de Bourbon SC, for the respondent
Annotations	None

Civil appeal

Flynote

Family law - husband and wife - divorce - division of property - divorce granted by foreign court - Zimbabwean court not empowered to make property distribution order

Property - ownership - immovable property - property registered in joint names - rebuttable presumption that parties own it in equal shares - how presumption may be rebutted

Headnote

The parties were formerly married to each other. Neither was domiciled in Zimbabwe, though they had both worked and acquired property in the country. They were divorced by a court in Haiti. The wife sued in Zimbabwe for a declaration that she was the sole owner of the house in Zimbabwe which they had lived in, as well as a car. The house was registered in their joint names. It was argued for the wife that it would be "just and equitable" that she be declared sole owner. Her argument was based on s 7 of the Matrimonial Causes Act [*Chapter 5:13*].

Held, that as the divorce had been granted by a court in Haiti, which was by definition not an "appropriate court", relief could not be afforded. Any order relating to the distribution of property was ancillary to the decree of divorce, and could be granted by an appropriate Zimbabwean court either when it granted the decree or at any time after it had granted that decree. A Zimbabwean court could not make a property distribution order following a divorce granted by a foreign court.

Held, further, that although the proprietary consequences of a marriage are governed by the law of the husband's domicile at the time of the marriage, there was no evidence as to what the law of Haiti was, if indeed Haiti was the husband's domicile. The law of Zimbabwe should apply: it was the *lex loci rei sitae*, and the dispute over the immovable property was not a matrimonial dispute, but one between co-owners.

Held, further, that where there is joint ownership of immovable property, there is a rebuttable presumption that the parties own in it equal shares. This presumption is strengthened where the parties are married to each other at the time the ownership was acquired. As joint owner, the

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wife was entitled to a half share in the property. The court could not award her more merely because it would have been fair and equitable to do so; there had to be a more solid foundation in law than that. In this case, the wife had claimed and proved that she alone paid for the property. By registering it in their joint names, she effectively gave him the half share, as her nominee, for convenience. By instituting action, she was terminating that nomination and was accordingly entitled to the whole of the property.

Cases Considered

Cases cited:

Esterhuizen v *Esterhuizen* 1999 (1) SA 492 (C)

Faria v *Clarridge* 1988 (2) ZLR 202 (H)

Frankel's Est & Anor v *The Master & Anor* 1950 (1) SA 220 (A)

Ncube v *Ncube* S-6-93

Nyamweda v *Georgias* 1988 (2) ZLR 422 (S)

Sperling v *Sperling* 1975 (2) SA 707 (A)

Takafuma v *Takafuma* 1994 (2) ZLR 103 (S)

Walls v *Walls* 1996 (2) ZLR 117 (H)

Young v *van Rensburg* 1991 (2) ZLR 149 (S)

Legislation considered:

Matrimonial Causes Act [*Chapter 5:13*], s 7

Case Information

P Nherere, for the appellant

A P de Bourbon SC, for the respondent

Judgment

McNally JA: At the hearing of this appeal on 5 September 2000, the court asked the parties to submit further written argument. As a result of confusion in the registry, it was only on 4 October, when I enquired about Mr *Nherere*'s supplementary heads, that I discovered they had been lodged promptly on 12 September.

The respondent (Mrs Kennedy) has been resident for some years in Zimbabwe. She worked, until her retirement, for an international organisation which posted her here. So she did not acquire domicile. She lived here with her husband, the appellant (Mr Lafontant). They were

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married in Italy in 1983. She is a New Zealand citizen. He is domiciled in Haiti.

The parties were divorced, at her instance, in Haiti on 21 November 1997. She reverted to her maiden name. Subsequently, they became embroiled in a dispute before the High Court of Zimbabwe over certain immovable and movable property situated in Harare. They are still involved in litigation in the United States of America over two apartments in New York and the money in various bank accounts.

We are concerned only with the Zimbabwean litigation. Mrs Kennedy sued Mr Lafontant for a declaration that she was the sole owner of the immovable property at 13 Hillary Road, Ashbrittle, Harare, and of a certain 1992 Nissan Sedan vehicle. There were other disputes, but they are no longer important. Mr Lafontant asserted that the immovable property, acquired long after the marriage but before the divorce, was registered in both their names and thus he was entitled to half of it, or 50% of the net proceeds. The car, he said, was his.

Mrs Kennedy's claim to the whole of the immovable property, despite the fact that the property was registered as theirs jointly, was based in the

declaration on an averment that it would be "just and equitable" that she be declared sole owner. The evidence and the argument make it clear that this claim was based on s 7 of the Matrimonial Causes Act [*Chapter 5:13*] ("the Act"). From the beginning, I must add, Mr Lafontant disputed the application of s 7 to the issue of the house.

The learned judge, on the other hand, seems not to have relied on the section. He said:

> "It was not in dispute that the said property (he was speaking of both the movables and the immovable property) was acquired *stante matrimonio* - i.e. during the subsistence of the marriage. However, the parties have not asserted any claim as to ownership based on any matrimonial régime. The whole basis of this case has been to invite this court to determine which of the properties belongs to one or other of the parties in his or her name. Furthermore, where it is jointly owned, as in the case of the house, the court is being asked to make an apportionment based on their respective contributions towards the acquisition of the property."

His Lordship then went on to find that they had contributed to the immovable property 80:20 in her favour. He found that the vehicle was hers, but that Mr Lafontant might buy it from her for $100 000.

Since both in this court and the court below Mr *de Bourbon* has based his case on s 7 of the Act, it is appropriate to deal first with the question - is this a case in which s 7 of the Act can be applied?

Section 7(1)(a) reads:

" (1) Subject to this section, in granting a divorce ... or at any time thereafter, an appropriate court may make an order with regard to -

(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to another."

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The words "subject to this section" do not concern us in this case. So the simple question is: "Given that the Civil Court of Port-au-Prince, Haiti, is not an 'appropriate' court by definition (s 2 of the Act), is the section applicable in a case where two former spouses, divorced in Haiti, subsequently dispute the ownership of property in Zimbabwe?"

To my mind, the answer is quite obviously "no". I agree entirely with Mr *Nherere*'s submissions. The relief is ancillary to the decree of divorce and may be granted by an appropriate Zimbabwean court either when it grants the decree or at any time after it has granted that decree. By the same reasoning one may say that "thereafter" in the context means "after it has granted the decree".

I am pleased to note that in two judgments in the High Court this reasoning has been adopted. Blackie J in *Faria* v *Clarridge* 1988 (2) ZLR 202 concluded, by parity of reasoning, that a woman already divorced under the old Act (which had no such provisions as to property division) could not seek a division of property under the new Act after it was introduced. (See

especially at 206C-D). And in *Walls* v *Walls* 1996 (2) ZLR 117 a three judge bench (Chidyausiku, Bartlett and Gillespie JJ) affirmed the correctness of the decision in *Faria supra*. I refer in particular to the judgment of Bartlett J at 143D-E and to that of Gillespie J at 160D-H. Both refer to an unreported decision in 1995 of Bartlett J in *Lewis* v *Beeson*. Gillespie J says of it:

> "This latter decision is not an authority dealing with retrospectivity; rather it shows that where a marriage is dissolved by a foreign court, this court has no powers under Act 33 of 1985 (now [*Chapter 5:13*]) to make a property distribution order."

I am satisfied therefore that the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] do not apply in cases where the parties have previously been divorced outside Zimbabwe, that is to say, by a court other than "an appropriate court".

The learned judge, however, did not rely on the section. He was of the view that the court was being asked "to make an apportionment based on their respective contributions towards the acquisition of the property". I turn therefore to consider whether there is any basis in law for such an approach, apart from the provisions of s 7 of the Act.

What law is applicable? In Roman-Dutch law, the proprietary consequences of a marriage are governed by the law of the husband's domicile at the time of the marriage. See *Frankel's Estate & Anor* v *The Master & Anor* 1950 (1) SA 220 (A) at 233, 237, 238 and 251; *Sperling* v *Sperling* 1975 (3) SA 707 (A); *Esterhuizen* v *Esterhuizen* 1999 (1) SA 492 (C) at 494C-D. No evidence has been led as to the law of Haiti, if that was indeed the country of domicile of Mr Lafontant at the time of the marriage. Nor may we, since 23 October 1992, presume that that law is the same as that of Zimbabwe, by virtue of the provisions of s 25 of the Civil Evidence Act [*Chapter 8:01*].

In the present case, both parties accepted that the law of Zimbabwe applied; there was no

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suggestion that the law of Haiti applied; in the case of the immovable property Zimbabwean law is the *lex loci rei sitae*; and in any event the matter is not, as I have ruled, a matrimonial dispute at all. The parties are not married to each other. It is a dispute between co-owners. I propose to apply Zimbabwean law.

What, then, is the Zimbabwean law relating to joint ownership of immovable property? It seems that joint ownership is the same as co-ownership, which in turn coincides with what the Deeds Registry Act [*Chapter 20:05*] calls "land held by two or more persons in undivided shares" - see ss 24, 25, and 26 of that Act.

Where two persons own immovable property in undivided shares (as is the case here) there must, I think, be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when (as here) the

parties are married to each other at the time ownership was acquired. Thus, Jones *Conveyancing in South Africa* 4 ed p 118 states:

> "Where transferees acquire in equal shares it need not be stated in the deed that they acquire 'in equal shares', as this fact is presumed in the absence of any statement to the contrary."

The title deeds of the immovable property were not produced in evidence. We do not know whether the deed shows that the property was transferred specifically in equal shares or not. But either way, the fact remains that they are *prima facie* owners in equal shares. This is the basis of such decisions in this court as *Takafuma* v *Takafuma* 1994 (2) ZLR 103. As Korsah JA said in *Ncube* v *Ncube* S-6-93 (unreported):

> "As a registered joint owner she is in law entitled to a half share of the value of the property."

That, therefore, is the starting point.

The court cannot move from that position on mere grounds of equity. It cannot give away A's property to B on the mere grounds that it would fair and reasonable, or just and equitable, to do so. There must be a more solid foundation in law than that.

In *Nyamweda* v *Georgias* 1988 (2) ZLR 422 (S), the reason was that Miss Nyamweda was found by the court to have been an agent for her undisclosed principal, Mr Georgias. She was in effect his nominee at will. In *Young* v *van Rensburg* 1991 (2) ZLR 149 (S), Korsah JA held that van Rensburg created Young "a nominee for the respondent (van Rensburg) (and) that on demand the appellant would transfer the farm to the respondent" (155C-D).

There are other situations in which the court can intervene such as fraud or mistake or, as I suggested as the hearing, an allegation that Mr Lafontant's share was a donation between spouses, voidable at the instance of the donor. See Lee and Honoré *Family, Things and Succession* 2 ed at para 61. None of these grounds was specifically alleged in the pleadings.

In evidence, Mrs Kennedy was asked (at p 8):

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"Was it ever your intention that he should have a beneficial half share in the property?"

She answered:

"No, that was not the intention."

The evidence that was accepted by the court, although Mr Lafontant disputed it, was that all the money for purchasing the land and building the house came from her. He had neither money nor income - odd jobs excepted. There seems every justification for that finding on credibility. We accept therefore that she paid for the land and the building. He played a part in supervising the building work - he had, after all, little else to do.

In evidence she was also asked, at the same page:

"(This plot) was registered in your joint names. How did that come about?"

McNALLY JA

She answered:

"Since I have worked for the United Nations I have travelled quite extensively, and for convenience sake I have had our property registered in both names. This was so that if I were to be away, and something needed to be done, then my former husband could have attended to it."

I have given a great deal of anxious consideration to the question whether Mrs Kennedy's declaration discloses a cause of action. She has not alleged specifically that he was a nominee. She has not in terms claimed that it was a donation revoked, whether for ingratitude or otherwise. She has alleged simply:

"(The) plaintiff paid for the purchase of the property and avers that it is just and equitable that (the) defendant transfer to (the) plaintiff as her sole and exclusive property his share of the property."

I think, by claiming and proving that she alone paid for the property, it must necessarily follow, if it was registered jointly in their names, that she effectively gave him the half share as her nominee, for convenience. By instituting action, she is terminating that nomination. The cases of *Nyamweda supra* and *Young supra* are appropriate precedents.

Had the matter been properly pleaded, I believe the learned judge would not have been induced to deal with the matter on the basis of apportionment. In fact, his choice was between awarding the property entirely to Mrs Kennedy, or leaving things as they were. However, in the absence of any cross-appeal, we can do no more than dismiss the appeal in respect of the immovable property with costs. The application to amend the prayer, in the supplementary heads of argument, accordingly falls away.

As far as the movable property is concerned (and I note that the amendment to include further property was not pursued), it seems to me that once Mr Lafontant's evidence was disbelieved, his case collapsed. As I indicated earlier, this court agrees with the findings of the trial judge on the question of credibility.

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Accordingly, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Muzenda & Maganga, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners

MUCHERO & ANOR v ATTORNEY-GENERAL 2000 (2) ZLR 286 (SC)

Citation	2000 (2) ZLR 286 (SC)
Case No	Judgment No. S-107-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA and Sandura JA
Heard	October 12, 2000
Judgment	October 12, 2000
Counsel	J Samkange, for the applicants N J Mushangwe, for the respondent
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 24(2) - referral of matter to Supreme Court - referral can only be of matter pending, not of a concluded matter - not competent for magistrate to decide matter then refer it under s 24(2)

Headnote

The applicants, who were on bail on allegations of fraud and corruption, challenged the right of the State to continue to remand them for trial and applied for their discharge on the grounds that no reasonable suspicion existed that they had committed an offence, as required by s 13(2)(e) of the Constitution. Having heard evidence, the magistrate refused the application. The applicants' counsel requested that the question of whether s 13(2)(e) had been contravened be referred to the Supreme Court under s 24(2) of the Constitution.

Held, that the referral was incompetent. It should have been requested before the magistrate rendered a decision. Once he had made a decision, the matter could only be dealt with by way of appeal or review. In this situation, no appeal was available, and the rules of court precluded a

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review being instituted in the first instance before the Supreme Court. Recourse would have to be heard to the High Court.

Cases Considered

Cases cited:

Mandirwhe v *Min of State* 1986 (1) ZLR 1 (S)

S v *Mbire* 1997 (1) ZLR 579 (S)

Legislation considered:

Constitution of Zimbabwe 1980, s 24(2)

Case Information

J Samkange, for the applicants

N J Mushangwe, for the respondent

Judgment

Gubbay CJ: The applicants are the chief executive and the financial executive, respectively, of the Grain Marketing Board, a body corporate. They were arrested on 25 February 2000 upon allegations of having committed, both jointly and individually, various acts of fraud and contraventions of the Prevention of Corruption Act [*Chapter 9:16*] involving the Grain Marketing Board. At the initial hearing before a magistrate the applicants were placed on remand, out of custody, on bail.

GUBBAY CJ

On 16 May 2000, counsel who appeared for the applicants challenged the right of the State to continue to remand them for trial. He did so on the ground that no reasonable suspicion existed, as required by s 13(2)(e) of the Constitution, of either applicant having committed any of the offences referred to and particularised in the request for remand forms prepared by the investigating officer. Numerous memoranda emanating from the Grain Marketing Board and other written material were produced to the magistrate through the two applicants. This documentary evidence was designed to establish, upon an overall and objective assessment, that the facts relied upon by the State as constituting the offences were unreliable and at variance with the true position. The State responded by calling upon the investigating officer to testify.

The magistrate reserved his decision. On 16 June 2000, he dismissed the application. The relevant portion of his ruling reads:

> "What is required of this court at this stage is to be satisfied whether or not the State has established facts or grounds from which the court can objectively determine whether or not a reasonable suspicion exists that the accused persons committed the offence or offences alleged against them. Further, the court has to be satisfied

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that on the facts, that the allegations by the prosecutor were sufficient to enable such a determination to be made in favour of the State.

There is no doubt in my mind that the accused persons have solid defences to the allegations levelled against them as evidenced by the detailed material displayed on their behalf.

It is also quite clear that the State has made certain concessions as regards some of the counts which were subsequently dropped. However, at this stage the remand court has been satisfied that the facts presented were sufficient to raise reasonable suspicions for the accused to be placed on remand.

This court acknowledges that there are a lot of differences between the defence version and that of the State. It is my humble view that such differences can and should be resolved by evidence during a trial. Accordingly, it is this court's humble view that the application by the defence can, therefore, not succeed."

Counsel immediately requested that the question of whether the applicants' rights under s 13(2)(e) of the Constitution had been contravened by the refusal to discontinue their remand, be referred to the Supreme Court for its decision in terms of s 24(2) of the Constitution. The magistrate acceded to the request, and the matter was duly enrolled by the registrar of the Supreme Court.

It is regrettable that the magistrate was requested to render a decision and not merely to refer the question raised to the Supreme Court. The procedure adopted makes the reference to this court erroneous.

The purpose of s 24(2) is to afford a speedy procedure under which the Supreme Court determines whether there has been a contravention of the Declaration of Rights without having first to conclude the proceedings which

GUBBAY CJ

had been instituted in the High Court, or in a court subordinate to the High Court, and then come to the Supreme Court by way of appeal. See *Mandirwhe* v *Minister of State* 1986 (1) ZLR 1 (S) at 8B-C. The referral of the question, provided the raising thereof is neither frivolous nor vexatious and its determination is necessary to enable the judicial officer to reach a decision on the relief sought, effectively interrupts the proceedings. Once the Supreme Court has answered the question, the proceedings must finally be concluded in the court in which they were commenced.

It is abundantly clear, therefore, that s 24(2) does not envisage a situation in which the question may be referred *after* a determination has been given by the court in which the proceedings have been instituted. Such an interpretation would amount to permitting an appeal against the determination of the lower court. It would mean that the Supreme Court would not be rendering a decision on the question *at first instance*.

In sum, once the magistrate gave his ruling as he was asked to do, the applicants lost the opportunity to seek a referral under s 24(2) of the Constitution. And no appeal against the decision refusing to discontinue the remand of the applicants is presently available to them. See *S* v *Mbire* 1997 (1) ZLR 579 (S) at 582B-D.

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Appreciating the insurmountable difficulties confronting this so-called referral, Mr *Samkange* urged the court to treat the matter as if it were an application to review the decision of the magistrate.

Quite apart from the non-compliance with rr 257 and 259 of the High Court Rules (applicable to the Supreme Court by virtue of r 58 of the Supreme Court Rules), s 25(3) of the Supreme Court Act [*Chapter 7:13*] denies any person the right to institute a review in the *first instance* before the Supreme Court or a judge of the Supreme Court. Recourse must be had to the High Court.

In the result, this court is left with no option but to declare that the referral to it is incompetent. The matter is accordingly struck off the roll. An order for costs is not made as it is not sought by the Attorney-General.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Byron Venturas & Partners, applicants' legal practitioners

CAPITAL RADIO (PVT) LTD v MINISTER OF INFORMATION & ORS (3): in re NDLOVU 2000 (2) ZLR 289 (HC)

Citation	2000 (2) ZLR 289 (HC)
Case No	Judgment No. HH-201-00
Court	High Court, Harare
Judge	Gwaunza J
Heard	October 10, 2000
Judgment	October 13, 2000
Counsel	Mrs L Matanda-Moyo, for the respondents
Annotations	None

Contempt of court proceedings

Flynote

Court - contempt - failure to obey court order - duty to obey order and seek redress afterwards - claim that order "blatantly absurd" - onus on person so alleging to prove it

Criminal law - common law crimes - contempt of court - failure to obey court order - duty to obey order and seek redress afterwards - claim that order "blatantly absurd" - onus on person so alleging to prove it

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Headnote

Following a ruling in its favour by the Supreme Court, the applicant company established a private radio station, which had started broadcasting. The police, at the instigation of the respondent Minister, were attempting to seize the radio station's broadcasting equipment. A search warrant had been obtained from a magistrate. The applicant obtained a High Court order, declaring the warrant to be invalid and interdicting the police from interfering with or confiscating the broadcasting equipment pending a High Court hearing the next day in which the legality of the applicant's actions in broadcasting was to be raised.

Even though the police officer in charge had sight of the High Court's order, he said he would not obey it. He openly defied it by breaking into the studio from which the radio station was operating and seizing the broadcasting equipment. He did this in the face of contrary advice given by the Attorney-General's office and the applicant's lawyers. Contempt of court proceedings were brought against the police officer. The police officer's counsel submitted that no contempt had been committed because the order that was disobeyed was blatantly absurd.

Held, that where a person believes that a court order is invalid he must normally obey that order but may seek relief by way of review or appeal. To disobey such an order constitutes contempt of court. It is not for the person to decide that the order is invalid.

Held, further, that the person disobeying a court order will not be guilty of contempt if he proves that the order was blatantly absurd in its command and that it would itself tend to weaken respect for the administration of justice.

Held, further, that the order disobeyed was not blatantly absurd in its command. It simply restrained temporarily the police from seizing the equipment until the matter of the legality of the broadcasting was determined the next day. The action taken by the police seemed to been done in order to pre-empt the judicial determination of the matter. The alleged irregularities in the order did not make it blatantly absurd. The police officer was accordingly guilty of contempt of court.

2000 (2) ZLR p290

Cases Considered

Cases cited:

S v *Mushonga* 1994 (1) ZLR 296 (S)

Whata v *Whata* 1994 (2) ZLR 277 (S)

Case Information

Mrs *L Matanda-Moyo*, for the respondents

Judgment

Gwaunza J: The background to these contempt of court proceedings is as follows:

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On 22 September 2000, the Supreme Court, sitting as a Constitutional Court delivered its judgment in the case of Capital Radio versus the Minister of Information, Posts and Telecommunications (S-99-2000). In that judgment, the Supreme Court declared unconstitutional and invalid certain sections of the Broadcasting Act [*Chapter 12:01*] and the Radiocommunication Services Act [*Chapter 12:04*] that gave the Zimbabwe Broadcasting Corporation (ZBC) a monopoly to carry on a broadcasting service and to possess or work a radio station for the purpose of carrying on a broadcasting service in Zimbabwe.

The effect of the judgment was to create a gap in the law and make it possible for other players, including Capital Radio, to lawfully operate and provide a commercial broadcast service from within Zimbabwe, and to import into the country all the necessary radio and other equipment, subject to the payment of all customs and import dues lawfully levied in terms of the law.

Acting on the strength of the Supreme Court ruling, Capital Radio, a company formed in 1996 for the purposes of establishing a radio broadcasting station, commenced broadcasting a test signal, and after identifying a suitable FM frequency, continued to broadcast at that frequency.

Suspecting that the Minister of Information and Publicity might interfere with its operations or confiscate its equipment - given the fact that the latter had publicly declared the radio station unlawful and threatened to "take appropriate action" - Capital Radio filed an urgent chamber application seeking, among other relief, an order interdicting the respondents cited above from interfering with or confiscating any equipment which belonged to it and which was used in connection with its radio broadcast services. The application was placed before me on the afternoon of 4 October 2000. Almost at the same time, another urgent *ex parte* application, this time by the Minister responsible for Information and Publicity was placed before me. In the application, the Minister was seeking an order interdicting Capital Radio from operating a broadcasting service, on the basis that to do so contravened ss 12 and 13 of the Radiocommunication Services Act [*Chapter 12:04*]. After reading the papers in both files, I decided that I would set both matters down for a joint hearing the following day, that is 5 October 2000, as the disputes were related.

GWAUNZA J

However, on the evening of 4 October 2000, Assistant Commissioner Liberman Ndlovu (Ndlovu) together with some police details came to the studio of Capital Radio, then located at the Monomotapa Crowne Plaza Hotel, armed with a search warrant authorising the search and seizure of the equipment of Capital Radio. The search warrant stated that Capital Radio and its directors were under suspicion of having contravened s 13 of the Radiocommunication Services Act [*Chapter 12:04*].

Before the search was conducted, the legal practitioners for Capital Radio came to the studio and remonstrated with the police and indicated that in their view the search warrant was deficient in a number of respects. After Ndlovu indicated he intended to proceed with the search, an urgent application was made to this court on behalf of Capital Radio. The matter was heard *ex parte* around 8.00 p.m. by my brother Chatikobo on 4 October 2000. Chatikobo J, after noting, among other things, that the same matter was due to be heard by me the following day,

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issued an order, on the same papers, interdicting the respondents in this case from, *inter alia*, interfering with or confiscating any broadcasting equipment belonging to Capital Radio until 4.00 p.m. the following day, that is 5 October 2000. This was to allow for the determination of the matter that was already before me.

It is common cause that despite having sight of Chatikobo J's order, Ndlovu nevertheless proceeded later that night to break down the door to the studio and have certain of Capital Radio's broadcasting equipment seized.

This situation was explained and presented to me at the hearing that I had set down for 3.00 p.m. on 5 October 2000. The two legal practitioners representing Capital Radio, Mr *J Samkange* and Mr *A Brooks,* both deposed to affidavits in which they explained how they had tried to prevent Ndlovu from acting on the search warrant, and how, after being presented with a copy of Chatikobo J's order, Ndlovu had indicated he would not obey it as he did not take his orders from the court, but only from his superiors. Mr *Samkange* avers in his affidavit that Ndlovu disregarded even the advice of the Attorney-General not to proceed with the search and seizure. Ndlovu, who had later proceeded to break down the doors to the studio and seize the equipment, has not disputed these assertions.

It was this defiance of the order of my brother Chatikobo J, which defiance had indeed by then become public knowledge (having been broadcast in the public media), that prompted my order of 5 October 2000 calling upon both Ndlovu and the Police Commissioner to show cause to this court why Ndlovu should not be found to be in contempt of court for his defiance of the order of Chatikobo J. The Police Commissioner only filed an affidavit on Friday 13 October 2000, after the matter had already been heard. In the affidavit, the Commissioner of Police chose to say no more than that he had

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read Ndlovu's affidavit and would abide by the contents therein. He did not explain his own position on the matter. The rest of his affidavit however seeks to impugn the integrity of this court, question the impartiality of the presiding judge and criticise the procedures followed at the hearing of the matter on 10 October 2000. One may well wonder what the Commissioner of Police would have had to say in his affidavit had he submitted it, as he should have done, before 10 October 2000. As most of the contents of the affidavit clearly go beyond what was requested of him, I do not propose to delve into the merits or demerits of the Commissioner's complaints. I shall instead accept that for reasons not made clear to the court, the Commissioner is not prepared to meaningfully stand by his officer and show cause why he should not be held to be in contempt of court.

Mrs *Matanda-Moyo* of the Civil Division of the Attorney-General's Office, representing the Commissioner of Police and Ndlovu, and indeed Ndlovu himself, do not deny that the order of Chatikobo J was defied by Ndlovu. She submits in his defence that Ndlovu had made the conscious decision to defy the order and proceed with the search and seizure of Capital Radio's equipment after realising that the order was "so blatantly absurd" that defiance thereof would not constitute contempt of court. It is submitted for and by Assistant Commissioner Ndlovu, who

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filed an affidavit with this court, that the order of Chatikobo J was blatantly absurd in the following respects:

(a) that as an order containing both a final declaration and an interim interdict, it was suspect and confusing;

(b) that the order contained, in the section containing the interim order or interdict, handwritten notations that may or may not have been made by Chatikobo J. This, it is also submitted, cast doubt on the authenticity of the order.

(c) that there was no way of telling whether the signature at the end of the order was genuinely that of Chatikobo J; and

(d) that there was an anomaly in the dates indicated as those on which the order was made, specifically that below the first handwritten notation in the interim order, were the judge's signature and the handwritten date of 4 October 2000, while at the bottom of the page the date 5 October 2000 was noted against the judge's signature.

Ndlovu submits in his affidavit that, not being familiar with High Court orders, he generally found the order confusing and because of the time of the day and the seriousness of the matter he was investigating, he had no opportunity to verify its genuineness. He submits further that he had also been informed that SI 255A of 2000, which contained the new Broadcasting Regulations, had by then come into force. These regulations, he submitted,

made it an offence for Capital Radio to possess the equipment and broadcast in the manner they were doing. He submits, without elaborating, that in gaining entry into Capital Radio's studio and seizing the equipment, he had considered both the order of Chatikobo J and the Criminal Procedure and Evidence Act. Ndlovu also submits that he had proceeded to seize the equipment in terms of the new regulations and without a warrant because he feared Capital Radio would remove or hide the equipment, thus defeating the object of the search, had he taken the time to obtain another warrant.

Mrs *Matanda-Moyo* for Ndlovu and the Commissioner of Police cited, as authority for the contention that defiance of an order of court that is blatantly absurd does not amount to contempt of court, the Supreme Court case of *Whata* v *Whata* 1994 (2) ZLR 277 (S).

My perusal of the judgment in that case indicates that it does not support Ndlovu's case. The pertinent passage from that judgment does not appear in the reported judgment but is contained on p 5 of the cyclostyled copy thereof (S-162 of 1994) where, citing with approval from another case, *S* v *Mushonga* 1994 (1) ZLR 296 (S), Gubbay CJ had this to say:

> "The proposition advanced was closely considered by this court in *S* v *Mushonga*. It was there held, after a review of the cases, that generally a person may not refuse to obey an order of court merely because it has been wrongly made; for to do so would be seriously detrimental to the standing and authority of the court. The judgment went on to point out that the proper approach was for the person to first obey the supposed invalid order and thereafter seek redress, if any, by way of appeal or review. It was not for him to determine for himself whether the

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order ought not to have been made. He should come to the court for relief if advised that it was invalid. The exception being where the order was blatantly absurd in its command and would itself tend to weaken respect for the administration of justice. *Only in that remote eventuality would disobedience not be regarded as contemptuous.* However, as was noted in *S* v *Mushonga* above, it is not an inevitable consequence that disobedience to a simply wrong order of court constitutes the crime of contempt. It must be committed intentionally and in relation to the administration of justice in the courts" (my emphasis).

Applied to the circumstances of this case it becomes evident -

(a) much though Ndlovu might have viewed the order of Chatikobo J as suspect and not genuine, he should not on that ground alone have refused to obey it;

(b) that he should have obeyed the order first and thereafter sought any appropriate redress. In this case the order could only have stood until 4.00 p.m. the following day;

(c) it certainly was not for him to determine for himself whether or not the order was valid; and

(d) Ndlovu has to prove that by virtue of the irregularities alleged by him to have been in Chatikobo J's order, the order had indeed been rendered so blatantly absurd in its command and effect on respect for the

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administration of justice, that it constituted an exception to the general rule that one may not disobey a court order, even an apparently invalid one.

As already mentioned Ndlovu did not take the options listed in paragraphs (a)-(c) above.

On the authority of *Whata*'s case the only way his actions can be justified is if he can establish that the circumstances under which he acted constituted an exception as outlined in para (d).

The condition in that paragraph will be considered in light of the evidence before the court.

Disregarding for a moment the irregularities alleged and contrary to what is submitted on behalf of Ndlovu, I am not persuaded the order of Chatikobo J was blatantly absurd in its command. The order simply sought to temporarily restrain the police from seizing the equipment in question, only until 4.00 p.m. the following day. I find in this respect no merit in the submission that Ndlovu feared perverse conduct on the part of Capital Radio if he had gone away without carrying out the search and seizure. The evidence before the court indicates that Ndlovu at one time, before the seizure was carried out, left the premises of the hotel but left police details guarding the studio. In a similar vein there was nothing to prevent him, in my view, from posting police details outside the studio the whole of the night of 4 October 2000, and through to 5 October until 4.00 p.m. or such time as the matter would have been determined by me. Nor am I satisfied that compliance with the order of Chatikobo J would have weakened respect for the administration of justice. Quite the contrary. Both Capital Radio and the Minister of Information and Publicity had filed urgent applications with this court, the former to interdict the latter from interfering with its operations and seizing its equipment and the latter to interdict Capital Radio from continuing with its broadcasting services. This was the correct procedure to follow. Both

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matters were due to be heard the following day. Chatikobo J's order simply required the Minister and the Police to wait until the matter was determined before taking whatever action, if any, would have been necessary. In my view this process would have ensured proper administration of justice in this case. An order that was meant to bring about this desirable end is not, in my view, absurd, much less blatantly so.

The evidence before me suggests that both the Minister of Information and the Police, through Ndlovu, if not the Commissioner of Police, proceeded to pre-empt the judicial determination of the matter which the Minister of Information, at least, had instigated through the filing of his urgent chamber application. The defiance of Chatikobo J's order also smacks of an attempt to subvert the due process of the law that all parties concerned knew very well

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had been set in motion by both Capital Radio and the Minister of Information.

I am thus not persuaded that the circumstances of this case constituted the exception that is defined in *Whata* v *Whata supra,* which would have justified defiance of the order of Chatikobo J.

I would still not be so persuaded even had there been merit in the other submissions of Mrs *Matanda-Moyo* on the alleged irregularities which were meant to prove the absurdity of the order of Chatikobo J.

I will, for the record, consider these alleged irregularities.

Firstly, it is submitted that the order appeared to contain a final declaratory order while at the same time it contained an interdict. I do not understand Mrs *Matanda-Moyo* to say a declaratory order and interim interdict cannot be sought as part of one order. Indeed, a reading of Chatikobo J's order, in the section dealing with the interim relief, makes it clear that the order he was granting amounted to a provisional order, for confirmation or discharge by me the following day, failing which it would have lapsed by 4.00 p.m. of the following day. I am not persuaded that one can impute blatant absurdity to the order of Chatikobo J, on this ground.

Secondly, it is contended the handwritten notation in the interim order cast doubt on the authenticity of the order. I find no merit in this submission. The judge in question, Chatikobo J, was called upon to hear the matter after the usual working hours, at around 8.00 p.m. It should be noted that there was nothing sinister in a judge adjudicating on a matter at such a time, since judges are on call 24 hours a day to hear urgent matters, with or without notice to the other side, depending on the urgency and circumstances of the case. The judge is certain, as would have been required of him, to have considered the evidence before him before deciding to grant an interim order up to 4.00 p.m. the following day. Because he had been presented with an already typed draft order - another common practice - he deleted what he determined was irrelevant and inserted, by longhand, the amendment he wished to give effect to the order he was giving. He signed against the handwritten notation and dated it the 4 October 2000. He did the same with the other notation he made at the bottom of the page, even though he proceeded to give the date as 5 October 2000. Had the matter been determined during working hours, the draft order

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would then have been submitted to the registry for typing. Needless to say, there was no one to type the order at that time of the night. The order of Chatikobo J, however, contains three High Court date-stamps bearing the date of 4 October 2000. This in my view should have allayed any doubts that may have been raised in the mind of Ndlovu as to the authenticity or otherwise of the judge's order. Again, I am not persuaded blatant absurdity in the order has been established, on this ground.

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As for the two conflicting dates for the order, my view is that any doubt raised by what apparently was a slip of the pen should have effectively been removed on the strength of the three High Court date-stamps dated 4 October 2000, which also tallied with the handwritten date inserted by the judge against the first notation in the interim order. I would dismiss that ground as evidence of absurdity in the order in question.

When all is considered and done I am not persuaded that any absurdity, much less a blatant one, has been established in so far as the order of Chatikobo J is concerned.

Ndlovu not only expressly stated he was going to disregard the order, itself a contemptuous utterance, he went on to openly defy it. He took it upon himself to judge whether or not the order was valid and, having decided it was not, consciously and deliberately proceeded to defy it. He did this, the court is informed, against the advice of the Attorney-General and indeed that of the legal practitioners of Capital Radio. The latter had clearly explained to Ndlovu the consequences of openly defying an order of the court. He apparently paid no heed. He therefore had the necessary *mens rea* to commit the offence. As Ndlovu has failed to prove to my satisfaction that the order of Chatikobo J was so blatantly absurd that his defiance of it did not amount to contempt of court, I am satisfied he was in contempt of court .

I therefore, find him guilty of that offence.

LINCOLN INVESTMENTS (PVT) LTD v SARBAH 2000 (2) ZLR 297 (SC)

Citation	2000 (2) ZLR 297 (SC)
Case No	Judgment No. S-106-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA and Sandura JA
Heard	October 5, 2000
Judgment	October 19, 2000
Counsel	A P de Bourbon SC, for the appellant J C Andersen SC, for the respondent
Annotations	None

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Civil appeal

Flynote

Contract - sale - conditional - special condition that buyer should obtain loan for purchase of immovable property by certain date - buyer's right to waive condition if funds obtained from other source by such date - buyer not having obtained loan or raised purchase price by such date - agreement lapsing

Headnote

The appellant was buying a property from the respondent. A special condition of the contract of sale provided that the sale was conditional on the appellant being offered a loan from a building society or financial institution before a specified date, the loan to be secured by a mortgage bond. Just before the specified date, the appellant stated that it had raised the necessary finance. There were problems attendant on the transfer, but when the problems had been resolved the appellant requested transfer of the property. The respondent refused, on the grounds that the appellant had not complied with the special conditions and that the agreement had thus lapsed. The appellant had not actually obtained a loan but claimed to have raised the purchase price. The appellant applied for an order compelling the respondent to transfer the property.

Held, that the special condition was for the benefit of the purchaser. If the appellant had raised the finance from a source other than a building society or financial institution by the due date, it was entitled waive the clause and to pay the purchase price from this other source.

Held, further, there was no evidence that the appellant had raised the money by the due date.

Held, further, that the appellant was not entitled to waive the clause after the due date.

Held, further, that the respondent could not be said to have waived the appellant's obligation to comply with the special condition. To be able to do so, he would have to have had full knowledge of all the relevant facts as well as the rights that it was argued were being waived. Here the respondent was led to believe that the purchase price had been raised by the stipulated date.

Cases Considered

Cases cited:

Mekwa Nominees v *Roberts* 1985 (2) SA 498 (W)

Meyer v *Barnado & Anor* 1984 (2) SA 580 (N)

Ming-Chieh Shen v *Meyer* 1992 (3) SA 496 (N)

Phillips v *Townsend* 1983 (3) SA 403 (C)

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Pretorius v *Greyling* 1947 (1) SA 171 (W)

Sterling Products Intl Ltd v *Zulu* 1988 (2) ZLR 293 (S)

Trans-Natal Steenkool Korporasie Bpk v *Lombard en 'n Ander* 1988 (3) SA 625 (A)

van Diggelen v *de Bruin & Anor* 1954 (1) SA 188 (SWA)

Westmore v *Crestanello & Ors* 1995 (2) SA 733 (W)

Case Information

A P de Bourbon SC, for the appellant

J C Andersen SC, for the respondent

Judgment

Gubbay CJ: On 21 June 1990, the appellant, represented by its director Mr Patrick Kennan, entered into a written agreement of sale, effectively with the respondent, in terms whereof it purchased stands Nos. 357 to 362 and 367 to 372 Quinnington Township 13 ("the property") situate in Crowhill Road, Borrowdale, Harare. The purchase price of $600 000 was payable in accordance with general condition 2 of the agreement, which recited that:

> "The seller shall tender transfer of the property to the purchaser within a reasonable period of the date of sale and the purchaser shall within fourteen days after the date of tender of transfer provide the seller with a bank guarantee or other guarantee acceptable to the seller for the payment of the purchase price, and shall deposit with the seller's conveyancers the amount of the costs of transfer."

The operation of the agreement was dependent upon compliance with a special condition, under which the sale was:

> "conditional upon the purchaser being offered a loan in principle or otherwise on the usual terms and conditions from a building society or other financial institution in the sum of $600 000 or such lesser amount as may be acceptable to the purchaser not later than 10.7.1990, unless an extension of this period is agreed to by both parties, such loan to be secured by means of a first mortgage bond registered over the property hereby sold. The purchaser undertakes to apply for such loan by not later than 22.6.1990 and agrees not to withdraw such application made and further agrees to accept such loan when offered."

An application for a loan of $633 000 (inclusive of transfer fees of about $33 000) was made in writing to Standard Chartered Bank Zimbabwe Ltd ("the Bank") on 22 June 1990. Three days later the respondent's estate agent, Action Property Sales (Pvt) Ltd, was informed in writing by the appellant that it had duly submitted the application for finance "as we were required to do and will let you know as soon as possible *as to the result*" (emphasis added).

On 2 July 1990, or thereabouts, the appellant would have been advised by the Bank that pending the receipt of further information its application for the loan had been "laid aside".

On 9 July 1990, the appellant wrote to the estate agent stating that "we have successfully raised the capital required to purchase the land and would be pleased to take transfer in due course".

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No disclosure was made of the fact that the application referred to in the letter of 25 June 1990 had been laid aside for the present time. The clear intimation conveyed to the estate agent was that the capital required had been successfully raised as a result of the application for finance mentioned in the earlier letter. Understandably, the

estate agent was prompted to forward the agreement of sale to a firm of legal practitioners in order for the transfer of the property to be effected. The unequivocal averment that the appellant had raised the capital required was accepted without challenge.

Difficulties were then encountered with the conveyance of the property. Diagrams for the separate stands had to be prepared and approved by the Surveyor-General's Office. Furthermore, at some stage the original title deed was mislaid.

Nothing of particular importance took place until 28 February 1991, when the appellant was written to by a firm of legal practitioners purporting to act on behalf of the respondent. Their authority to do so was promptly disavowed. Yet of significance was the allegation in the letter that the appellant had failed to obtain an offer of a loan for $600 000 from a building society or other financial institution by 10 July 1990. The answer came from the appellant within a few days. It was an assurance that the necessary finance had been raised. No explanation was provided that the finance had not been raised from a financial institution but rather in some other manner. Again the omission to reveal this fact instilled the justified belief that the source of the money emanated from a financial institution.

In other letters, written to the estate agent on 8 April 1991 and to the respondent on 8 May 1991, the implicit representation was made that the finance had been raised from the Bank before the deadline. In both instances, specific reference was made to the confirmatory letter of 9 July 1990, and it was repeated in the letter of 27 May 1991 written on behalf of the appellant by its legal practitioners.

Even at the pre-trial stage the appellant maintained the same deceptive stance. Its replication to the respondent's plea alleged that the special condition was fulfilled "in that it indicated to the defendant's agent on 9 July 1990 that it had raised the capital required to purchase the property". And in the summary of evidence prepared for the pre-trial conference it was stated that:

> "Having concluded the agreement, the plaintiff applied to Standard Chartered Bank Zimbabwe Ltd and other financial institutions for a loan of $633 000 in respect of the transfer. By letter dated 9 July 1990, the defendant's agents, Action Property Sales (Pvt) Ltd, were advised that the capital required had been raised."

That this was not true was revealed for the first time in the course of the evidence given by the appellant's directors at the trial.

It was only in January 1993 that the necessary diagrams for the stands were approved by the Surveyor-General's Office and that transfer of the property could be passed. However, before such tender was made the respondent instructed the conveyancers not to proceed with the

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transfer. He did so not

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because he doubted the ability of the appellant to pay the purchase price within fourteen days, but because he was not satisfied that the appellant had complied with the special condition to the agreement of sale.

Refuting the alleged non-compliance, the appellant sought an order from the High Court directing the respondent to pass transfer of the property into its name; or, in the event of him refusing or failing to do so, a direction to the Deputy Sheriff that he sign all documents necessary to pass such transfer.

Garwe J, who presided at the trial of the action, held that the appellant had failed to establish that it had complied with the special condition; and that no waiver by the respondent of the obligation to so comply had occurred. He accordingly dismissed the claim with costs.

At the outset, it is necessary to decide what meaning is to be assigned to the special condition. Mr *de Bourbon*, who appeared for the appellant, advanced the submission that the special condition had to be read together with general condition 2 in order to make sense. He said that the appellant's ability to raise the purchase price did not have to be established by 10 July 1990; the test as to the availability of the money only arose upon tender of transfer by the respondent; and then, the appellant had a grace period of fourteen days.

I am unable to agree with counsel's interpretation. I think it would defeat the whole purpose of the special condition. Two distinct obligations were cast upon the appellant. The first, under the special condition, was for the appellant to be able to demonstrate by 10 July 1990, unless it had waived the special condition prior thereto, that the purchase price was available; that the money had been raised. Only if it succeeded in doing so would the agreement of sale survive. Once the special condition was met the second obligation arose - that of paying the purchase price within fourteen days of the tender of transfer. This scenario may appear somewhat illogical but, as underscored in the preamble to the special conditions, where a special condition differed in any respect from a general condition, it was to prevail over the latter.

The learned judge correctly pointed out that an analysis of the special condition reflected the following position:

1. It was for the appellant to raise the loan by 10 July 1990, failing which the agreement of sale would terminate.

2. It was sufficient if the loan was offered in principle or otherwise by a building society or other financial institution by 10 July 1990.

3. The loan could be in the sum of $600 000 (i.e. the purchase price) or an amount acceptable to the appellant. If the appellant could raise the full amount in cash, no mortgage bond was necessary; or, alternatively, the appellant could raise say $550 000 in cash and a bond for $50 000. In other words, the special condition could be

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satisfied *per aequipollens*, provided an equivalent secured source of money in addition to cash had

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been obtained but not one which was speculative, potential, uncertain, unsecured or illiquid. See *van Diggelen* v *de Bruin & Anor* 1954 (1) SA 188 (SWA) at 193D-E.

4. Any loan offered was to be secured by a first mortgage bond registered over the property.

5. The appellant was to make application for such loan by not later than 22 June 1990.

6. Once the application was made it was not to be withdrawn; and, if granted, the loan was to be accepted.

Next, His Lordship proceeded to consider whether the special condition had been inserted for the appellant's benefit only. He was much persuaded by the judgment in *Westmore* v *Crestanello & Ors* 1995 (2) SA 733 (W). In that case Marais J, in the course of a close review of the relevant authorities, enunciated these principles:

(a) The interest of the seller in a cut-off date, in the sense of requiring certainty by that date as to whether to be bound by the sale or not, did not mean that the pertaining clause was to the benefit of both parties.

(b) The fact that a "subject-to-bond" clause contained, or was coupled with, a cut-off date for fulfilment did not mean that it was no longer for the exclusive benefit of the purchaser and that it could therefore not be unilaterally waived by him.

(c) This did not mean that the purchaser was entitled to waive the clause *after* the cut-off date. Clearly, a purchaser could not unilaterally waive a clause of a lapsed agreement (which by definition no longer exists) and by so doing breathe new life into it. See *Phillips* v *Townsend* 1983 (3) SA 403 (C); *Meyer* v *Barnado & Anor* 1984 (2) SA 580 (N); *Mekwa Nominees* v *Roberts* 1985 (2) SA 498 (W); *Ming-Chieh Shen* v *Meyer* 1992 (3) SA 496 (N); *Trans-Natal Steenkool Korporasie Bpk* v *Lombard en 'n Ander* 1988 (3) SA 625 (A) at 640B-C.

The learned judge then summed up in these words at 737G-J:

> "(It) seems to me that the respondents had no interest in from what source or against what security the money was obtained. It would be absurd that, if the applicant inherited R20 million and was prepared to use this to provide the guarantees and to pay the purchase price, she could not enforce the sale because the purchase price had not been borrowed against the security of a bond to be registered over the property owned by the fourth respondent.
>
> I am therefore of the view that, in accordance with the principles in the case of *van Jaarsveld* v *Coetzee* (1973 (3) SA 241), and in the line of Transvaal cases already referred to, that portion of the bond clause which makes the agreement conditional upon 'obtaining a first mortgage bond over the property' is purely for the benefit of the applicant/purchaser. The fact that a date was added by which there must be compliance (failing which the

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agreement fails) does not to my mind alter that conclusion. The date for fulfilment may be

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wholly or partially for the benefit of the respondent/seller; but the stipulation that the contract is conditional upon the obtaining of a bond remains purely for the benefit of the purchaser."

See also Christie *The Law of Contract in South Africa* 3 ed at 162.

An application of this rationale led Garwe J to say:

"There can be no doubt in the present case that the condition precedent was purely for the benefit of the purchaser and could therefore have been waived by the purchaser before due date. I do not, with respect, share the views of Greenland J in *Malaba* v *Takangovada* 1991 (1) ZLR 1 (H) to the contrary. Moreover, in this case, there is uncontroverted evidence by the plaintiff that the condition precedent was inserted at its request as the company did not have funds to pay the purchase price immediately. The amount of the bond was to be determined by the plaintiff. Whilst I accept (the) submission that the condition precedent in some respects protects the interests of the seller it is quite clear that the clause was inserted for the benefit of the purchaser who could waive the subject-to-bond clause. In waiving such a clause, the plaintiff was at liberty not later than 10 July 1990 to raise the purchase money from any source and advise the estate agent that the money had been raised. In this case, the plaintiff advised the defendant's estate agents by letter dated 9 July 1990 that the capital had been 'successfully raised' ... Once it is accepted that the condition precedent was for the benefit of the purchaser the fact that an overdraft was to be used instead of a loan poses no difficulty as the purchaser was entitled, before due date, to raise the money by any means available."

In my view, this reasoning is unassailable and I respectfully adopt it.

I turn now to the purely factual determination of whether the appellant proved that it had raised the purchase price by 10 July 1990.

The learned judge subjected the evidence given by Mr Kennan and the appellant's other director, James Fox, to close scrutiny. He did so against the background that they had caused the respondent's estate agent and legal practitioners to believe that the capital had been raised in conformity with the application submitted to the Bank. They never disabused the respondent of that assumption. Rather it was reinforced in the appellant's replication to the plea, pre-trial minute and summary of evidence. Moreover, when regard is had to the Bank's inter-branch memorandum of 2 July 1990, which set out the reasons for the application being laid aside, it is highly probable that the appellant would have been informed of that decision in writing and failed to disclose the existence of such letter in its discovery affidavit.

Having examined the evidence of the two witnesses with care, and bearing in mind that, surprisingly, no documents were produced in support of the claim that the money had been raised or was available from some other source by 10 July 1990, I totally endorse the finding of the learned judge *a quo* that:

"In short, no reliable evidence has been placed before this court to show that the money had indeed been raised. All there is before this court are bald and somewhat inconsistent claims by Mr Fox and Mr Kennan that the money was available. The failure to produce the documents in my view justifies an inference that no such documents exist. In my

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> view, the plaintiff has not proved that the purchase price had been raised on or before 10 July 1990. On that basis, the plaintiff's claim must fail."

Finally, it remains to deal with the issue of waiver. This may be disposed of fairly shortly against the appellant. The argument here is that the respondent waived his right to enforce the obligation of the appellant to comply with the special condition. Reliance was placed especially on a letter of 1 July 1991 written by the respondent's legal practitioners, in which it was stated that the respondent would proceed with the sale:

> "because it is now apparent that his agent (Mrs Scallan of Action Property Sales (Pvt) Ltd) was advised that finance was available and further, she instructed a firm of (legal practitioners) to proceed with the transfer. On this basis, we have advised client that it would be bound to proceed."

For waiver to operate there must be an unequivocal act done with full knowledge of all the relevant facts as well as of the rights which it is argued have been waived. See *Pretorius* v *Greyling* 1947 (1) SA 171 (W) at 177. Whether a particular act evinces an unequivocal intention to waive a particular right is a matter of fact of which clear evidence is required. The onus of proof is on the party alleging the waiver. See *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S) at 304B-C.

There can be no doubt that it was not established that the letter of 1 July 1991 and certain earlier correspondence were written in the full knowledge that the money had not been raised by 10 July 1990. To the contrary the respondent and those acting for him were led to believe that the purchase price had been successfully raised by the stipulated date. That was not the correct position. There was no possible basis therefore on which it could be found that the respondent's rights had been waived.

It follows that the appeal must be dismissed with costs.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners

APOTEX INCORPORATED v SURGIMED (PVT) LTD 2000 (2) ZLR 304 (HC)

Citation	2000 (2) ZLR 304 (HC)
Case No	Judgment No. HH-208-00
Court	High Court, Harare
Judge	Smith J

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Heard	October 12, 2000
Judgment	October 25, 2000
Counsel	R Fitches, for the applicant F Girach, for the respondent
Annotations	None

Civil application

Flynote

Company - winding up - application for - debt prescribed - amount of debt in dispute - application made by single creditor - lengthy delay between filing of application and hearing of case - application refused

Headnote

The applicant filed an application seeking the provisional winding up of the respondent company on the groiunds that it could not pay its debts. The applicant was a foreign company which had been awarded a licence to sell its products in Zimbabwe. The respondent fell into arrears with its payments because its principal customer, the Ministry of Health, was dilatory in making payment. The amount owing was not clear.

Held, that a company's inability to pay its debts can be proved in any manner. Evidence that the company has failed to pay a debt on demand which is due is cogent *prima facie* proof of its inability to pay its debts.

Held, further, that the application for winding up could not be brought as the claim had prescribed. The filing of the proceedings for winding up had not interrupted the running of prescription. Section 19(2) of the Prescription Act [*Chapter 8:11*] provides that the running of prescription is interrupted by the service on the debtor of any process in which the creditor claims payment of the debt. An application for a winding up order is not process in which the applicant is claiming payment of a debt due.

Held, further, that an application for winding up could not be brought where the amount of the debt is disputed on *bona fide* and reasonable and substantial grounds.

Held, further, that an application made by a single creditor will also not be lightly granted, as liquidation affects all creditors and shareholders.

Held, further, that a lengthy delay between the filing of the application and the hearing of the case may also be relevant, as the financial situation of the company may well have changed for the better in the mean time.

Cases Considered

Cases cited:

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Badenhorst v *Northern Construction Entprs (Pty) Ltd* 1956 (2) SA 346 (T)

Clarke v *Protein Foods (Pvt) Ltd* 1970 (2) RLR 278 (A)

Ebrahim (Pty) Ltd v *Pakistan Bus Services (Pty) Ltd* 1964 (4) SA 146 (N)

Misnun's Heilbron Roller Mills Hldgs (Pty) Ltd v *Nobel Street Central Invstms (Pty) Ltd* 1979 (2) SA 1127 (W)

Mukadam Entprs & Ors v *Stanbic Bank Zimbabwe Ltd* 1997 (2) ZLR 117 (S)

Prudential Shippers SA Ltd v *Tempest Clothing Co Ltd* 1976 (2) SA 856 (W)

Rosenbach & Co (Pty) Ltd v *Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D)

Stambolie & Anor v *Nyamutamba Tpt (Pvt) Ltd* 1985 (2) ZLR 320 (H)

Timmers & Anor v *Spansteel (Pty) Ltd* 1979 (3) SA 242 (T)

Legislation considered:

Companies Act [*Chapter 24:03*], s 207

Prescription Act [*Chapter 8:11*], s 19

Case Information

R Fitches, for the applicant

F Girach, for the respondent

Judgment

Smith J: The applicant (hereinafter referred to as "Apotex") has filed an application seeking the provisional winding-up of the respondent (hereinafter referred to as "Surgimed"). The background to the application is as follows. Apotex is a Canadian based company which, *inter alia*, manufactures generic pharmaceutical products. In 1992, it awarded Surgimed an exclusive agency to sell Apotex products in Zimbabwe. Surgimed imported and sold under licence Apotex products. Until 1993, Surgimed paid its debts to Apotex in accordance with the agreement between the parties. By 1995, however, Surgimed had fallen into arrears. Apotex claims that at that time the outstanding debt was approximately US$280 000 but Surgimed disputes the *quantum*. The principal reason why Surgimed was not able to pay promptly was because its major customer was the Ministry of Health, which took a great deal of time to effect payments to Surgimed. There was considerable correspondence between the parties in 1995 and 1996 concerning payment of the amounts owed to Apotex. Apotex claims that the correspondence shows that Surgimed clearly and unconditionally admitted the amount due. Surgimed, on the other hand, submits that no specific and agreed amount outstanding was ever referred to; Apotex accepted that the socio-economic and political environment in Zimbabwe meant that Surgimed would only be able to effect payment of its debts once it had

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received payment from its largest customer, the Ministry of Health; Apotex clearly understood and accepted the constraints faced by Surgimed and allowed Surgimed three to four years in which to effect payment.

In my view, the correspondence filed by the parties shows that there is no clear evidence of the amount that Surgimed owes Apotex. It is obvious, however, that Surgimed did owe Apotex a considerable amount, especially when one has regard to the present value of the Zimbabwe dollar as against the United States dollar.

The present application was filed on 2 November, 1998. The notice of opposition was filed on 23 November. The matter was set down on the unopposed roll and was heard by Bartlett J on 3 February 1999. He ordered that it be transferred to the roll of opposed applications. Thereafter, Apotex filed a replying affidavit on 30 November 1999. Apotex then filed its heads

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of argument on 4 April 2000 and those of Surgimed were filed on 12 May. A supplementary affidavit by the Financial Controller of Surgimed was filed on 9 October 2000.

Mr *Fitches* argued that Apotex has shown conclusively that Surgimed is unable to pay its debts and ought to be wound up. Surgimed has made unequivocal, contemporaneous admissions of inability to pay the debt owed to Apotex, such admissions being both express and implied not only in the letters, but also by its conduct, Surgimed has, at all material times, admitted that money is owed to Apotex but blamed the Ministry of Health for its failure to pay because the Ministry did not pay Surgimed for the products sold to Government. Surgimed has admitted that US$207 933.50 is owing but has not tendered payment thereof. Such admission justifies the grant of a provisional winding-up order - see *Mukadam Enterprises & Ors* v *Stanbic Bank Zimbabwe Ltd* 1997 (2) ZLR 117 (S) where it was held that an admission was properly relied on. In order to satisfy the requirements of s 207 of the Companies Act [*Chapter 24:03*] (hereinafter referred to as "Chapter 24:03"), all that Apotex is required to do is to show a *prima facie* case - see *Prudential Shippers S A Ltd* v *Tempest Clothing Co Ltd* 1976 (2) SA 856 (W) and *Timmers & Anor* v *Spansteel (Pty) Ltd* 1979 (3) SA 242 (T). That it has done. The correspondence from Surgimed is replete with admissions that Surgimed owed Apotex money and that it could not pay its debts because of the delays in receiving payment from the Ministry of Health. At no material time did Surgimed ever suggest that Apotex would wait until the former was paid before it paid its debts to Apotex. A company's inability to pay its debts may be proved in any manner. Evidence that a company has failed, on demand, to pay a debt which is due is cogent *prima facie* proof of inability to pay its debts - see *Rosenbach & Co (Pty) Ltd* v *Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D). It is not disputed that Surgimed owes Apotex money and it is sufficient if a large enough portion of the debt is conceded to be owing - see *Ebrahim (Pty) Ltd* v *Pakistan Bus Services (Pty) Ltd* 1964 (4) SA 146 (N).

Mr *Girach* argued that Apotex did not have the relevant *locus standi* to bring the present application as it is no longer a creditor. Its claims are now prescribed. It is Apotex's contention that Surgimed acknowledged liability to pay US$225 390.75 in a letter received by Apotex in July 1996. That is more than three years ago. The present application has not interrupted the

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running of prescription. Even if Apotex had the necessary *locus standi*, the court, in considering an application in terms of s 207 of Chapter 24:03, will not have regard to the interests of a single creditor but must consider the interests of the creditors as a whole - see *Badenhorst* v *Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T). No other creditor has supported

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Apotex's application. Finally, as regards the merits, it would be wholly appropriate for liquidation proceedings to be instituted in circumstances where there is a dispute of fact in relation to the debt claimed. It is clear that there is a dispute between the parties as to the amount owing to Apotex and as to the extent of the counterclaim by Surgimed. When one has regard to the history of the filing of the pleadings and the heads of argument, it is apparent that Apotex is trying to enforce payment by way of instituting liquidation proceedings. The courts do not favour such a course of action - see *Stambolie & Anor* v *Nyamutamba Transport (Pvt) Ltd* 1985 (2) ZLR 320 (H). Finally, Mr *Girach* submitted that it would be inappropriate for the court to make an assessment of Surgimed's financial position on the basis of papers filed almost two years ago.

As regards the question of prescription, it seems clear to me that the proceedings filed in this case have not interrupted the running of prescription. Section 19 of the Prescription Act [*Chapter 8:11*] (hereinafter referred to as "Chapter 8:11") deals with the interruption of prescription by legal proceedings. Subsection (1) thereof defines what is meant by the term "process" and subs (2) provides as follows:

> "The running of prescription shall, subject to the provisions of subsection (3), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

The application in this case is clearly process as defined in subs (1) of s 19 of Chapter 8:11. But, is it process whereby Apotex is claiming payment of the debt? In *Misnun's Heilbron Roller Mills Holdings (Pty) Ltd* v *Nobel Street Central Investments (Pty) Ltd* 1979 (2) SA 1127 (W) the court considered whether an application for the winding-up of a company constituted proceedings relating to the enforcement of a right relating to the applicant's debt. The court was considering promissory notes, the first of which was governed by the 1943 Prescription Act and the last by the 1969 Prescription Act of South Africa. In the former Act, s 6(1) thereof provided that prescription was interrupted by the service on the debtor of a notice joining him as a party to an action, which was defined as any legal proceedings of a civil nature brought in a competent court for the enforcement of a right. Section 15 of the latter Act, which is similar to s 19 of Chapter 8:11, provides that the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of a debt. Goldstone AJ (as he then was) referred to the case of *Prudential Shippers SA Ltd* v *Tempest Clothing (Co) Pty Ltd & Ors* 1976 (2) SA 856 (W), saying that McEwan J had, in that case, considered the nature of an application for winding-up in a similar context. At p 1128H-1129C he then said:

> "The question which was thus pertinently raised before McEwan J was whether an

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application for a provisional winding-up order was a proceeding 'for the recovery of a debt'. After a full and careful consideration of the authorities the learned judge held that s 11 of the Limitation and Disclosure of Finance Act was not intended to apply in an application for the winding-up of a company. I would respectfully adopt that portion of the judgment which appears at 863D-865A of the report. It would serve no purpose to repeat what is there stated. Suffice it to say that, adapting the words of de Villiers CJ in *Collett* v *Priest* 1931 AD 290 at 299, a winding-up order is not one for a debt due by the debtor to the creditor. Such proceedings are instituted by a creditor, not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor wound up.

> 'No doubt, before an order so serious in its consequence to the debtor is given, the court satisfies itself as to the correctness of the allegations in the petition. It may, for example, have to determine whether the debtor owes the money as alleged in the petition. But, while the court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against the debtor on any such claim.'

It follows, in my judgment, that an application for a winding-up order is not a legal proceeding for the enforcement of a right relating to the applicant's debt and it is not a process whereby the applicant claims payment of that debt. The service of such an application does not therefore have the effect of interrupting the running of prescription of a debt in terms of s 6(1) of the 1943 Prescription Act or s 15(1) of the 1969 Prescription Act."

He then, at p 1129F-G, continued:

"Having come to the conclusion that any debt which the applicant might have had against the respondent has become prescribed, it follows that the applicant cannot obtain a winding-up order against the respondent. As was stated by Mason J in *Nicholl* v *Nicholl* 1916 WLD 10 at 13:

> 'To hold otherwise, would produce the remarkable result that the estate of a debtor might be sequestrated upon a claim which could not be proved in insolvency.'

This approach was approved and followed by Holmes J (as he then was) in *Jhatam & Ors* v *Jhatam* 1958 (4) SA 36 (N) at 38. In both *Nicholl*'s case and *Jhatam*'s case the debtor had not relied upon prescription."

The reasoning of Goldstone AJ appears to me, with all due respect, to be sound and to be applicable to the interpretation of s 19 of Chapter 8:11. I would therefore agree that the filing of this application by Apotex has not interrupted the running of prescription.

In *Stambolie*'s case *supra*, Sandura JP dismissed an application for the provisional winding-up of a company because the debt in question was disputed by the respondent on *bona fide*, reasonable and substantial grounds. At p 323-324 he said:

"Whether the petitioners succeed or not depends entirely upon whether the debt in question is disputed by the respondent on *bona fide* and reasonable grounds. This has been made abundantly clear in a number of cases. In *Machanick Steel & Fencing (Pty) Ltd* v *Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W), Nestadt J had this to say at 269A-B:

> 'In my approach to this matter, I must bear the following in mind. An application for the

> liquidation of a company should not be resorted to to enforce the payment of a debt which is *bona fide* disputed by the company. The liquidation of a company affects the interests of all creditors and shareholders and an order for its liquidation should not lightly be granted on the application of a single

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creditor (*Badenhorst* v *Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T)).'

On the other hand, as appears from this case, where it *prima facie* appears that a respondent is indebted to an applicant in an application of this kind, the onus is on the respondent to show that such indebtedness is disputed on *bona fide* and reasonable ground.'

The same principle was expressed by Ramsbottom J in *McLeod* v *Gesade Holdings (Pty) Ltd* 1958 (3) SA 672 (W) at 678E, as follows:

'It is well recognised that a winding-up order will not be made where there is a *bona fide* dispute as to an existence of a debt. Where there is a *bona fide* dispute, the court may order an applicant to prove his debt by action before applying for a winding-up order, but ... the dispute must be a *bona fide* one.'

Thus it is well established that winding-up proceedings should not be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* disputed on reasonable and substantial grounds; the procedure is not designed for the resolution of disputes as to the existence or non-existence of a debt."

In this case, excluding the issue of prescription, the existence of the debt is not disputed by Surgimed, it is only the amount thereof. It seems to me, however, that even where the dispute is limited to *quantum*, the considerations expressed by Sandura JP equally apply and therefore Apotex should have instituted proceedings for enforcement of the debt it claimed. In *Stambolie*'s case *supra*, Sandura JP said that winding-up proceedings are not designed for the resolution of disputes relating to the existence or non-existence of a debt. Neither are they designed for the resolution of disputes relating to the *quantum* of a debt. Accordingly, following the reasoning of Sandura JP and applying it in this case, I consider that Apotex has followed the wrong procedure in seeking the winding-up of Surgimed.

Even if I had found that the running of prescription had been interrupted by the filing of this application and that, although there was a dispute as to the *quantum*, Surgimed has admitted that it owes Apotex a substantial amount of money when one has regard to the rate of exchange of the Zimbabwe dollar in relation to the United States dollar, I consider that it would not be proper to grant the order sought in view of the long delay between the filing of the application and the hearing of the case. The application was filed on 6 November 1998 and thereafter, the case was enrolled as an unopposed application, despite the opposing papers filed by Surgimed, and it was heard by Bartlett J on 3 February 1999, almost 10 months later. A further four months elapsed before Apotex's heads of argument were filed. In *Clarke* v *Protein Foods (Pvt) Ltd* 1970 (2)

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RLR 278 (A) the Appellate Division considered an appeal in a case where a rule *nisi* placing a company under provisional judicial management had been discharged by the court *a quo*. Beadle CJ at pp 280-281 said:

"For one reason or another, some 12 months have elapsed since the delivery of the judgment appealed against. In matters of this sort, it is absolutely essential that, if the order of the court *a quo* is to be reversed on appeal, it must be reversed as soon as possible after judgment has been given, because the affairs of a commercial company may change from day to day, Even on the assumption that, under the circumstances existing a year ago, it may have been desirable to place the respondent company under judicial management, it by no means follows that the same circumstances exist today. It would be highly artificial if this court, acting on the assumption

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that the circumstances were unchanged from what they were a year ago, reversed the judge's order, and now ordered that the respondent company be placed under judicial management, only for it to emerge that circumstances had changed and the respondent company had overcome its difficulties, because the respondent company would then be placed in the position of having to apply forthwith to have the order of judicial management discharged before it ever became operative."

In this case, Apotex wants the court to make a finding based on circumstances that pertained some two years ago. I do not consider that it would be justified. The supplementary affidavit filed by the Financial Controller of Surgimed, which was admitted with the leave of the court, shows that the financial position of Surgimed appears to be reasonably sound. Furthermore, as was held in *Badenhorst*'s case *supra*, the liquidation of a company affects the interests of all creditors and shareholders, and so an order for its liquidation should not be lightly granted on the application of a single creditor.

The application is dismissed with costs.

Wickwar & Chitiyo, applicant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

S v CHIKAMBA 2000 (2) ZLR 311 (HC)

Citation	2000 (2) ZLR 311 (HC)
Case No	Judgment No. HH-216-00
Court	High Court, Harare
Judge	Gillespie J
Heard	November 1, 2000
Judgment	November 1, 2000
Annotations	None

Criminal review

Flynote

Criminal procedure - review - court's powers on review - alteration of verdict - alteration from finding of guilty to one of not guilty by reason of insanity - institutionalisation of accused following such verdict - not an alteration or increase of sentence previously passed

Criminal procedure - verdict - special verdict on grounds of accused's insanity - courses open to trial court after returning such verdict

Headnote

The accused was charged with infanticide, alternatively concealment of birth. She was

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convicted of the latter, on the grounds that the body was not discovered. She was sentenced to a suspended term of imprisonment. The accused admitted killing and eating the baby. She claimed to be acting under the influence of a malign spirit. She was found to be suffering from a form of epilepsy which could be triggered by scenes of birth.

Held, that on the facts she should have been found to have killed the child.

Held, further, that a special verdict should have been returned under the Mental Health Act, that she was not guilty because of insanity. The court had a discretion as to whether to discharge her, require her to undergo treatment, or institutionalise her. This was a case where institutionalisation was appropriate.

Held, further, that institutionalisation, though more burdensome for the accused than the sentence actually passed, was not a sentence. There was therefore no obstacle, arising from the High Court's powers on review, to the substitution of the suspended sentence with an order of committal. The accused should be summoned to appear before the magistrate to show cause why she should not be institutionalised. At the remitted hearing, the court should receive such evidence, including psychiatric evidence, as is necessary.

Cases Considered

Cases cited:

Crow v *Detained Mental Patients Special Bd* 1985 (1) ZLR 202 (H)

Legislation considered:

High Court Act [*Chapter 7:06*], s 29(2)(b)

Mental Health Act 15 of 1996, s 29

Judgment

Gillespie J: The accused was charged with the offence of infanticide, with an alternative of unlawful concealment of birth. The accused put forward a gruesome and extraordinary answer to the charge. She claims that

she has had previous deliveries and that on each occasion she feels moved to kill her infant and dispose of the body by eating it. The cannibalism she attributes to the malign influence of a spirit possessing her at the time of birth.

The horrifying account is given substantial support by a psychiatrist, Dr Rajkovic, in whose care the accused spent some time after the date of commission of the offence charged. He had her under his care and observation from February to September 1998, the date of the offence having been May 1997. He found her to be generally free of any sign of mental disorder. But not completely. One of three electro-encephalogram tests revealed suggestions of epileptic

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seizure. Significantly, she had fallen pregnant again after the date of the offence charged and had given birth while under the psychiatrist's care. Just after delivery she exhibited agitated and confused behaviour. She demanded "her meat ... to eat" and snatched at bloodied clothes, the placenta and the new-born baby in an attempt to devour them.

Notwithstanding the graphic demonstration of the horrifying truth of her claim, the magistrate, quite unaccountably, found otherwise. His judgment is, regrettably, unfinished. He seems, however, to have rejected the explanation given; to have found an inability, in the absence of a recovered baby, to prove a live birth; and to have entered a conviction in the alternative charge. On that conviction, he sentenced the accused to a wholly suspended term of imprisonment of 18 months. This result seems to me to be a potentially dangerous miscarriage of justice.

It is true that there is no clear and direct proof of the infant being born alive. The accused has, however, clearly admitted giving birth and eating the child, and indeed acknowledged having done so on a previous occasion. She did not attempt to suggest that the child was stillborn. I see no good reason to doubt that the child was born alive.

The accused did, extra-curially, claim to have buried the child. She even pretended to indicate where she had done so. In her evidence on trial, she acknowledged this to have been a false statement. She said she lied because she was -

> "shy because there were many people present."

when questioned by police. In view of the compelling and spontaneous behaviour witnessed by the alienist at the last pregnancy, there can be no shadow of a doubt that the absence of any body recovered is indeed because the accused ate her newly-delivered baby. In the circumstances there seems to me to be no reasonable doubt that she killed it too.

But without question she was mentally disordered when she did so. It was put to her on trial that she was found to have been "mentally stable". She was indeed found fit to stand trial. It is certainly the case that she appears generally of sound mental health. The medical evidence is, however, that:

2000 (2) ZLR p313

GILLESPIE J

> "Fortunate Chikamba suffers from Partial Complex Type Epilepsy. This case is illustrative for intricacies of epileptic illness of this type. Attacks of this type are characterised with automatic behaviour which can look purposeful, but Fortunate was not aware of what she was doing, in such a state she has not willing to control over the actions, and actions where followed by retrograde amnesia. This type of epilepsy does not have necessarily to show obvious clonic - tonic or any convulsion attacks, frequently it requires multiple repeated EEG records because of fact that of brief critical period EEG can be normal. The abnormal electrical activity and attack of illness itself can be triggered by different stimuli including emotionally charged events, followed by long periods of normal behaviour.
>
> Therefore, to reiterate, the above named patient is mentally disordered, suffering from Epilepsy (Partial Complex Type). Attacks are triggered by scenes of birth - being emotionally intensively chartered situations" (*sic*.).

In the circumstances, the verdict is a miscarriage of justice. The only correct result would have

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been a special verdict in terms of the Mental Health Act. 1(32)

I called the decision a potentially dangerous miscarriage of justice for reasons also given by the specialist:

> "She is commenced on appropriate medication, monthly check ups in Annexe will be required. The patient is going to be advised about nature of her illness. Possibility of tubar ligation should be considered, and she will be advised and patient warned about potentially critical situations in future. Fit for trial."

The grisly spectre presents itself of the accused undergoing repeated pregnancies and committing countless future acts of anthropophagy on unnumbered babies yet to be born. Indeed, there is a risk to other women and children. The accused herself has said that whenever -

> "I enter a room where a woman would have given birth I always feel like eating the child ..."

The doctor himself found that "scenes of birth", not necessarily her own confinements, could trigger attacks.

The re-enacted Mental Health Act provides a special verdict different from that enacted under preceding legislation. Formerly, the verdict was that the person was guilty of the acts laid to his charge but mentally disordered at the time of their commission. 2(33) The proper result following such a verdict was institutionalization subject to the decision of a board to review and, if appropriate to release detained mental patients. 3(34)

The special verdict under the new law is that the person charged is not guilty because of insanity. 4 (35)That special verdict is more in keeping with legal theory and, more importantly, is consistent with some result other than automatic institutionalization of the patient. In keeping with this, a court

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returning a special verdict may discharge the person. 5(36) Alternatively, it may release him from custody on condition of his submission for examination and treatment on an informal basis in terms of Part VI of the Act or of an application for his temporary treatment or training in terms of Parts VII or VIII of the Act. 6(37) Finally, it may institutionalize the patient. 7(38)

There is thus a discretion vested in the courts, a judicial discretion. The basis upon which the discretion is to be exercised is not stated and must evidently depend upon all the circumstances of the case. Prime amongst the factors to be considered, however, must be the nature of the offence; the extent of the mental illness; and the degree of danger posed by the patient to the community if released.

A discharge would generally only be ordered where sufficient evidence is placed before the court, either on trial or after verdict, to satisfy the court that there is no appreciable risk of future lunatic behaviour jeopardizing other people or their interests. The release conditional upon submission for informal treatment might be proper where there is a risk of recurrence of aberrant behaviour such as that charged, but that the mental disability is controllable. The order,

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however, may only be made following conviction for a petty offence punishable by a fine of less than $500. In all other cases, institutionalization is proper.

The consequence of institutionalization is to place the patient under the control and direction of the mental health review tribunal. 8(39) I would suggest that unless the evidence clearly and concisely exhibited meaningful risk of future dangerous conduct, the court would generally defer to the expertise of the mental health review tribunal.

In this case, the evidence shows a very real likelihood of future violent and fatal behaviour by the accused. In her present condition, she is an inescapable threat to any infant she might bear and possibly to other newly-borns. It may well be that upon treatment and counselling, particularly if she might choose to undergo surgery to control her fertility, she could be safely restored to her freedom. In the absence of other evidence, it does seem as though the magistrate should have institutionalized her.

I thus propose quashing the conviction in favour of a special verdict. This necessarily involves setting aside the sentence and perhaps ordering institutionalization. This latter is potentially much more burdensome than the sentence imposed. The law prohibits the substitution on review of a more severe sentence than the sentence originally imposed (subject to certain

exceptions not relevant here). 9(40) Hence, if the institutionalization of the accused would constitute a "sentence" for the purposes of this law, one would not be entitled to make that order.

Under the old Act, when a special verdict involved a finding of guilty in some measure, there might have been some reason to consider the committal of the accused as the sentence of the court. Under the present Act, however, there is no such justification. The special verdict is, as the common law would dictate as proper, a finding of not guilty. This verdict, for all purposes other than formal procedural purposes, such as review; the reservation of a question of law; or the noting of an appeal, is an acquittal. 10(41) The institutionalization of the mental patient thereafter is properly seen as a protective measure whereby the law sanctions certain restrictions to be placed on the liberty of a non-criminal person. It is not the sentence of the court pronounced upon a convict. There is, therefore, no obstacle, arising from this court's powers on review, to the substitution of the suspended sentence with an order of committal. If, in any particular case, it were thought that institutionalization would be unduly burdensome, it would be open to the review court to direct the adduction of evidence, whether on remittal or otherwise, for the purpose of exercising the discretion whether or not to commit the patient to an institution.

That leaves me to decide whether to make the order of institutionalization myself or to remit the matter to the trial magistrate to exercise the discretion provided for. Although, on the face of it, institutionalization may seem the better course, I consider it more prudent not to decide too hastily. The opinions of Dr Rajkovic on this point might be valuable. In addition, practically speaking, the accused is now at liberty and her attendance at court needs to be secured.

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Moreover, if she is to be committed to an institution it has always been the practice that the institution be named in the court order.

I therefore quash the conviction and substitute for it a special verdict in terms of subs (2) of s 29 of the Mental Health Act, 1996, that the accused is not guilty of infanticide because of insanity. The sentence is set aside. It is directed that the trial magistrate shall summon the accused to appear before him to show cause why she should not be placed in an institution, or otherwise dealt with in terms of the Mental Health Act, 1996; for which purpose the matter is remitted to the court *a quo*. In dealing with the issue on remittal, the court shall receive such evidence, including psychiatric evidence, as is necessary.

Bartlett J agrees.

MATABELELAND TURF CLUB v COMMISSIONER OF TAXES 2000 (2) ZLR 316 (HC)

Citation	2000 (2) ZLR 316 (HC)
Case No	Judgment No. HH-220-00
Court	High Court, Harare
Judge	Smith J
Heard	July 27, 2000
Judgment	November 1, 2000
Counsel	J C Andersen SC, for the appellant A P de Bourbon SC, for the respondent
Annotations	None

Civil appeal

Flynote

Revenue and public finance - taxes - betting tax - overpayment by turf club - to whom repayment due - whether turf club is taxpayer with locus standi *to reclaim overpayment*

Headnote

After the percentage of betting tax had been reduced from 10% of gross takings to $7^{1/2}$%, for a period the appellant turf club continued to pay at the higher rate. When it discovered its mistake, it sought to reclaim the overpayment. The Commissioner refused to repay, on the grounds that the taxpayers were the persons who placed the bets, and not the turf club, and that the turf club had no *locus standi* to claim a refund.

Held, that the statute imposed the obligation to pay the tax on the holder of the tote licence and

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not on the punters. The rate of tax is a specified percentage of the gaming revenue, not of all the bets placed. Only the winning punters would be entitled to claim any shortfall from the turf club, not from the Commissioner.

Held, further, that as the Finance Act is silent as to the question of appeals in terms of s 33(6) of the Betting and Totalizator Control Act, the principle that a successful party is entitled to its costs must apply.

Per curiam: the legislation should be amended so that an appeal against the decision of the Controller in terms of s 33(6) of the Betting and Totalizator Control Act should be to the Fiscal Appeal Court instead of to the High Court.

Cases Considered

Legislation considered:

Betting and Totalizator Control Act [*Chapter 10:02*], ss 21, 29 & 30(1)(b)

Finance Act [*Chapter 23:04*], Item 6 of Schedule to Chapter V

Sales Tax Act [*Chapter 23:08*], s 4(1)

Case Information

J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Smith J: This is an appeal in terms of s 33(6) of the Betting and Totalizator Control Act [*Chapter 10:02*] (hereinafter referred to as "Chapter 10:02").

The facts in this case are common cause. For the period l April 1992 to 31 March 1993, the rate of betting tax payable by the appellant (hereinafter referred to as "the Turf Club") in terms of Item 6 of the Schedule to

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SMITH J

Chapter V of the Finance Act [*Chapter 23:04*] (hereinafter referred to as "Chapter 23:04") was 10% of the gross takings of the totalizator (hereinafter referred to as "the tote"). It was reduced to 7 1/2% for the period 1 April 1993 to 31 March 1994, the reduction being made by SI 220 of 1993, which was promulgated on 2 July 1993. The reduction was subsequently confirmed by s 31(a) of the Finance Act, 1993 (No. 12 of 1993). The Turf Club paid the betting tax at the rate of 10% for the month of April, 1993, instead of 7 1/2%, thereby overpaying the amount of betting tax payable by it by $68 585. When the Turf Club became aware of the reduced rate of betting tax that was payable for the month of April it attempted to recover the overpayment from the Department of Taxes but without success. Having failed to recover the said amount, the Turf

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Club deducted the amount concerned from the total betting tax payable by it for the month of November 1993. In consequence, assessment No. JBT 2/6 was issued against the Turf Club.

The Turf Club, by letter dated 5 April 1994, objected to the assessment. The Commissioner disallowed the objection in a letter dated 27 November 1996. In the letter he said:

> "Refund will be made to your client once proof of a refund to punters who are the real payers of the tax has been submitted. It follows therefore that your objection is disallowed."

During April 1993, the Turf Club collected a total of $274 342 betting tax from those who placed bets on the tote in that month. It is, and was at all material times, impossible for the Turf Club to determine the names of those who placed bets on the tote during April 1993, let alone the amount of the bet each person placed. Therefore, it is impossible for the Turf Club to refund the $68 585 in the appropriate amounts to the punters who paid the tax.

The Turf Club's contention is as follows. After allowing for the deduction of the $68 585, it has paid the full amount of betting tax payable by it for the period April to November 1993. Accordingly, the assessment in question was issued unlawfully and/or in error. The Turf Club had no legal obligation to comply therewith. There was no valid legal ground upon which the Commissioner was entitled to require that, in order to obtain the refund, the Turf Club should produce proof that it had refunded the amount to the punters from whom it was collected. The fact that, if the Turf Club's objection to the assessment were upheld, it would be enriched by the amount of $68 585 was irrelevant to the issue of whether or not the assessment was lawfully issued. The question of enrichment was legally a matter between the Turf Club and the punters who placed their bets on the tote in April 1993 and did not concern the Commissioner. Accordingly, the Turf Club was entitled to an order setting aside assessment No. JBT 2/6 with costs.

2000 (2) ZLR p318

SMITH J

The contentions of the Commissioner are as follows. Betting tax is raised and collected in the same way as sales tax, in that it is paid by the consumer and not the provider of the services or goods. The provider of the services or goods simply acts as the agent of the Commissioner in levying and collecting the sales tax. It is not a coincidence that s 29 of Chapter 10:02 is virtually the same as s 4(1) of the Sales Tax Act [*Chapter 23:08*]. The betting tax was levied on the punters and collected by the Turf Club for the Commissioner. It over-collected by $68 585 and that over-collection belongs to the punters and not the Turf Club. The Turf Club has no *locus standi* to claim the refund in its own right. It can only do so as agent of the punters. No such agency has been alleged and, in any event, the Turf Club has admitted that it is impossible to remit the money to the punters because they cannot be identified. The assessment was properly issued. What the Turf Club did, or attempted to do, was to withhold $68 585 from what it was obliged to pay to the Department of Taxes for the month of November 1993. Given the peremptory nature of s 30(1)(b) of Chapter 10:02, that could not possibly be lawful. It would be against public policy to return the money to the Turf Club if it conceded that it would be unable to pass it on to the rightful owners. In such circumstances the Turf Club will convert the money to its own use, which will be unlawful. Therefore the appeal must be dismissed with costs.

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Mr *Andersen* argued as follows. The operation of totes is regulated and controlled by Chapter 10:02. Punters place bets on the tote, which is operated by a licensed turf club. The bets are pooled, the operator deducts his commission and the balance is paid out to those who successfully forecast the results of the races. No tax is collected from the punter. It is the operator who pays the tax from its commission. Part V of Chapter 23:04 imposes the liability on the operator and not the punter. Section 21 of Chapter 10:02 specifies what may be deducted. That is the provision that should have been increased by 2 1/2% instead of the tax being reduced by 2 1/2%. If the operator collects too much tax the punters who placed bets have no right to claim a refund from the operator of the tote. Certainly, the Commissioner has no right to claim the money.

Mr *de Bourbon* submitted that payment of the betting tax is the same as payment of sales tax. In the case of sales tax, the seller of goods or the supplier of services collects sales tax on behalf of the Commissioner and pays it over. Likewise, the licensed tote operator collects the betting tax and hands it over to the Commissioner. The betting tax is imposed by s 29 of Chapter 10:02 and s 30 thereof provides, in para (b), that the tax on bets is payable by the holder of the licence. That is the same mechanism as is imposed by the Sales Tax Act [*Chapter 23:08*]. The tote operator merely collects the tax payable on the bets placed. There is no tax imposed on the tote itself. Where bets are placed on

the tote, the gross takings constitute a pool. From that, the betting tax is deducted and then the charge for administration is deducted. The legislature could have imposed a tax of 10% or 7 1/2% on each bet, but it chose not to do so. Instead, it imposed the tax on the gross proceeds of the bets, which had the same result. The transaction which is subject to the tax is the bet or stake that is made. When the legislature reduced the tax from 10% to 7 1/2%, that did not have the effect of increasing the administration charge. It increased the amount in the pool that was to be paid out to those who correctly forecasted the results of the races. If the over-collection were to be refunded to the Turf Club it would mean that the Turf Club had breached s 21 of Chapter 10:02 because it had taken from the pool more than it was entitled to take. The Turf Club has no right to retain the over-collection. As it is the punter that is taxed and not the tote operator, the Turf Club had no right to claim set-off.

The Commissioner's case is based on the premise that it is the punter who is liable to pay the betting tax and not the tote operator. Is that the case? Section 29 of Chapter 10:02 provides that the betting taxes set out the Schedule to Chapter V of Chapter 23:04 shall be charged, levied and collected. Then s 30, which deals with the payment of the betting tax, provides that the tax shall be paid by the licensed bookmaker or the holder of the tote licence, as the case may be. If the licensed bookmaker or holder of the tote licence fails to pay the betting tax he is guilty of an offence. Section 33 empowers the revenue officer to assess the amount of tax payable by a licensed bookmaker or holder of a tote licence in certain circumstances and imposes an obligation on the bookmaker or tote operator to pay the assessed amount within thirty days of being notified of the assessment. Clearly, the obligations are imposed on the bookmaker and

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the tote operator and not on the punter.

Chapter V of Chapter 23:04 deals with betting and gaming taxes. The transactions or receipts which are taxed and the rates of the taxes are specified in the Schedule to Chapter V. Paragraphs 1, 2 and 3 specify various kinds of bets placed with a bookmaker. The rate of the tax is a specified percentage of the amount payable by the bookmaker to the punter, excluding the amount that is stated, and a specified percentage of the net winnings of the bookmaker in respect of the six-month period from l April to 1 October in each year. Paragraph 4 specifies bets or stakes made by way of pool betting and the rate of tax is a specified percentage of the aggregate total bets or stakes in each pool competition. Paragraph 6 specifies bets or stakes made through the medium of a tote and the rate of tax is a fixed percentage of the gross takings of the tote. Finally, I would refer to paras 7 to 10 which specify the gaming revenue received by the holder of a casino licence in terms of the Casino Act

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SMITH J

[*Chapter 10:03*] and the banker's revenue received by a banker in terms of that Act. The rate of tax is a specified percentage of the gaming revenue or banker's revenue, as the case may be. Gaming revenue is defined as meaning the amount of all sums received by the licensee as winnings, or as deductions for his benefit from any stake or bank in any game or from any gaming machine or in pursuance of an agreement with the banker, less only the amount of all money paid out by the licensee as losses. The banker's revenue is defined as the amount of all winnings won by the banker less all sums paid out by him as losses and the deductions made for the benefit of the licensee. It seems clear to me that these betting taxes are imposed on the bookmaker, tote operator, holder of a casino licence or banker, as the case may be, and not on the punter. In the case of bets made with a bookmaker, the tax is based on the net winnings of the bookmaker over the six-month period. That can only mean that he is the taxpayer. Likewise, in the case of the holder of a casino licence, clearly the tax is calculated on his winnings, not on the amount of any bets placed with him. If, in the abovementioned cases, it can only be the bookmaker or holder of the casino licence who is the taxpayer, and he is not just a collector of the betting tax, then the tote operator must be in a similar position.

In my opinion, it is not all those punters who placed their money on the tote in the relevant period who would be entitled to repayment of the 2 1/2% over-collected. It is those lucky punters whose forecasts were correct and who consequently participated in the shareout of the tote takings who were prejudiced by the retention by the Turf Club of the additional 2 1/2%. They are the ones who should have received the money that was wrongly retained. They would have been entitled to claim the shortfall from the Turf Club. They would not be entitled to claim the money from the Commissioner. It is the Turf Club that collected the money and is entitled to keep it until the lucky punters submit their claims. The Commissioner has no right to the money and therefore cannot impose any condition that must be satisfied before he repays it to the Turf Club.

Accordingly, I find that the Commissioner's case is not supportable. That means that the Turf Club is entitled to retain the money that was over-collected.

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The Commissioner is entitled to demand payment of taxes which are due. In respect of the month of April 1993, the betting tax payable by the Turf Club was 7 1/2% of the gross takings of the tote. That amount was duly paid. The Collector has no right to demand payment of the excess. The Turf Club paid the Collector more than was due. In my opinion it was fully justified in setting off the excess against an amount that it was liable to pay the Collector in a subsequent month.

SMITH J

The Act is silent as to the question of costs on an appeal in terms of s 33(6) of Chapter 10:02. It seems to me that the principle that a successful party is entitled to its costs must therefore apply.

Subsection (6) of s 33 of Chapter 10:02 provides that any person who is aggrieved by a decision of the Controller in terms of subs (4) of that section may appeal to the High Court. I would strongly recommend that the subsection be amended so as to provide that the appeal lies to the Fiscal Appeal Court.

Assessment No. JBT 2/6 is set aside. The respondent shall pay the appellants' costs.

Coghlan, Welsh & Guest, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners

In re: CHINAMASA 2000 (2) ZLR 322 (SC)

Citation	2000 (2) ZLR 322 (SC)
Case No	Judgment No. S-113-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 6, 2000
Judgment	October 9, 2000
Counsel	P Nherere, with him S Moyo, for the applicant
Annotations	None

Constitutional application

Flynote

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Appeal - right of - to Supreme Court - refusal by lower court to refer matter to determine whether Declaration of Rights has been breached - not subject to appeal

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18 - protections afforded to person charged with criminal offence - allegation of contempt of court committed ex facie curiae - person charged with contempt entitled to same protections as person charged with ordinary criminal offence

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair trial by impartial court - not violated by court hearing allegation of contempt of court, where judge hearing matter is not the judge who was criticised

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(3) - presumption of innocence - citation issued to person calling on him to show cause why he should not be committed for contempt of court - does not violate presumption - guilt of person must still be established beyond reasonable doubt

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 20 - freedom of expression - common law offence of scandalising the judiciary - whether a constitutionally permissible restriction on right of freedom of expression - offence has purpose of maintaining authority and independence of courts - offence creates real risk of impairing public confidence in judiciary - as such reasonably justifiable in a democratic society

Court - contempt - contempt ex facie curiae - scandalising the judiciary - offence still extant in our law

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2000 (2) ZLR p323

Criminal law (common law offences) - contempt of court - contempt ex facie curiae - scandalising the judiciary - offence still extant in our law

Headnote

The applicant, who was, at the time of the incident giving rise to the proceedings, the Attorney-General, had made critical comments about the sentence passed in a criminal case which was attracting much public attention. In his comments, the applicant expressed, in terms which the trial judge considered contemptuous, outrage and shock at what he considered the leniency of the sentence. The trial judge caused the applicant to be cited for contempt of court. Another judge heard the matter.

Before the merits were dealt with, the applicant requested that six questions be referred to the Supreme Court in connection with whether the proceedings were in contravention of the Declaration of Rights. The judge declined to refer some of the questions, holding that two of the points were frivolous and vexatious, and that one did not concern a breach of the Declaration of Rights. He referred the other three questions to the Supreme Court. The applicant lodged an appeal against the refusal to refer all the questions. The questions that were referred to the Supreme Court were: (1) whether a charge of contempt of court is a charge of a criminal offence entitling the person accused to the protection of s 18; (2) if so, whether the procedure whereby the court which complains of the contempt deals with the matter violates the right under s 18 of the Constitution to be tried by an independent and impartial tribunal, and whether the citation issued to the applicant calling on him to show cause why an order for contempt should not be made against him violated the presumption of innocence; and (3) whether the law of contempt violated s 20, the right to freedom of expression. The applicant lodged an appeal against the refusal of the judge *a quo* to refer the remaining questions to the Supreme Court.

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Held, that under s 24(3) of the Constitution, where a matter is not referred to the Supreme Court by a lower court, the proceedings in the lower court are not interrupted. There is no right of appeal against such a refusal; the questions that had not been referred could only be raised in any appeal against a finding that the applicant was guilty of contempt.

Held, further, that the kind of contempt in this case was what has been called "scandalising the court". This offence is committed by the publication, either verbally or in writing, of words calculated to bring a court, a judge of a court, or the administration of justice through the courts generally, into contempt. Though seldom prosecuted, is still extant in several jurisdictions, including South Africa. It is plain that the line between scandalising comment and fair and legitimate criticism is not always easy to draw. Although there has been academic and judicial criticism of the offence, it should continue to be recognised here as a species of contempt. Whether what the applicant said fell within the ambit of the offence was a question of fact, the resolution of which was irrelevant to these proceedings.

Held, further, that freedom of expression is one of the most crucial protections to a democratic society. Without the freedom to express, interchange and communicate new ideas and advance critical opinions about public affairs or the functioning of public institutions, a democracy cannot survive. The courts play an important role in a democratic society and are bound to be criticised. Statements on matters of public interest are protected by s 20 of the Constitution, as long as they are not obscene or criminally defamatory.

Held, further, that the limitation on freedom of speech imposed by the common law of contempt is aimed at protecting the administration of justice and is thus a permissible derogation from the general freedom of expression. The courts of Zimbabwe are strong enough to withstand criticism; but criticism imputing improper or corrupt motives or conduct does

create a real or substantial risk of impairing public confidence in the administration of justice. Applying the 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, the limitation was not shown to be one that was not reasonably justifiable in a democratic society. The objective of preventing confidence in the administration of justice from being undermined could not be said not to be sufficient importance to warrant overriding the fundamental right of freedom of expresson. The measures designed to meet that objective were rationally connected to it; and the means used to impair the right were no more than was necessary to accomplish the objective. The offence is narrowly defined; and prompt action is required, which might not be achieved by normal proceedings at the instance of the Attorney-General.

Held, further, that contempt by scandalising the court is an offence *sui generis* and not part of the ordinary criminal law. It is an offence against the court rather than against the state. It is an injury committed against a person or body occupying a public judicial office, by which injury the dignity or respect which is due to such office, or its authority in the administration of justice, is intentionally violated. Nonetheless, the judicial officer hearing the matter must ensure that the procedure adopted complies with the constitutional protections afforded in an ordinary criminal case.

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Held, further, that the procedure adopted, whereby a judge other than the one who had been criticised heard the matter, did not violate the right to be tried by an impartial court. There was only the remotest possibility that such a judge would be influenced by extraneous matters. It was wholly unconvincing to suggest that a judge was incapable of dealing with the proceedings in an impartial and objective manner because the criticism levelled at a colleague affected the authority of the High Court in the administration of justice.

Held, further, that the citation, which set out the publication complained of, did not violate the presumption of innocence. All it did was require him to appear and oppose it if he so wished. His guilt still had to be established beyond reasonable doubt. The hearing would therefore be resumed before the High Court.

Cases Considered

Cases referred to:

Abrams v *US* 250 US 616 (1919)

Ambard v *A-G, Trinidad & Tobago* [1936] 1 All ER 704 (PC)

Ahnee & Ors v *DPP* [1999] 2 WLR 1305 (PC)

A-G v *Crockett* 1911 TPD 893

A-G v *Times Newspapers Ltd* [1973] 3 All ER 54 (HL)

A-G, New South Wales v *Mundey* [1972] 2 NSWLR 887

Badry v *DPP, Mauritius* [1982] 3 All ER 973 (PC)

Banana v *A-G* 1998 (1) ZLR 309 (S); 1999 (1) BCLR 27 (ZS)

Bridges v *California* 314 US 252 (1941)

Cape Times Ltd v *Union Trades Directories (Pty) Ltd* 1956 (1) SA 105 (N)

Chavunduka & Anor v *Min of Home Affairs* 2000 (1) ZLR 552 (S); 2000 (8) BCLR 390 (ZS)

Chokolingo v *A-G, Trinidad & Tobago* [1981] 1 All ER 244 (PC)

Duncan, Re (1958) 11 DLR (2d) 616 (SC)

Garrison v *Louisiana* 379 US 64 (1964)

Handyside v *UK* (1979-80) 1 EHRR 737

McLeod v *St Aubyn* [1899] AC 549

Martin v *A-G* 1993 (1) ZLR 153 (S)

Muchero & Anor v *A-G* 2000 (2) ZLR 286 (S)

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Muskwe In re 1992 (1) ZLR 44 (H); 1993 (2) SA 514 (ZH)

Neethling In re (1874) 4 Buch 133

Noel Lancaster Sands (Edms) Bpk v *Theron* 1974 (3) SA 688 (T)

Nyambirai v *NSSA & Anor* 1995 (2) ZLR 1 (S); 1995 (9) BCLR 1221 (ZS)

Phelan In re (1877) Kotzé 5

Retrofit (Pvt) Ltd v *PTC & Anor* 1995 (2) ZLR 199 (S); 1995 (9) BCLR 1262 (ZS)

S v *Benatar* 1984 (1) ZLR 296 (S); 1984 (3) SA 588 (ZS)

S v *Beyers* 1968 (3) SA 70 (A)

R v *Cohn* (1985) 10 CRR 142 (Ont CA)

R v *Dunbabin*, Ex p *Williams* (1935) 53 CLR 434 (HC)

R v *Fuleza* 1951 (1) SA 519 (A)

R v *Gray* [1900] 2 QB 36; [1900-3] All ER Rep 59 (QBD)

S v *Hartmann & Anor* 1983 (2) ZLR 186 (S); 1984 (1) SA 305 (ZS)

R v *Keyser* 1951 (1) SA 512 (A)

R v *Kopyto* (1988) 47 DLR (4th) 213 (Ont CA)

S v *Lavhengwa* 1996 (2) SACR 453 (W)

S v *Mabaso* 1990 (1) SACR 675 (T)

S v *Mbire* 1997 (1) ZLR 579 (S)

R v *Metropolitan Police Comr*, Ex p *Blackburn (2)* [1968] 2 All ER 319 (CA)

S v *Oliver* 1964 (3) SA 660 (N)

R v *Robberts* 1959 (4) SA 554 (A)

S v *Tobias* 1966 (1) SA 656 (N)

R v *Torch P & P Co (Pty) Ltd & Ors* 1956 (1) SA 815 (C)

S v *van Niekerk* 1972 (3) SA 711 (A)

Safcor Forwarding (Johannesburg) (Pty) Ltd v *National Tpt Commission* 1982 (3) SA 654 (A)

Sec of State for Defence & Anor v *Guardian Newspapers Ltd* [1984] 3 All ER 601 (HL)

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Solicitor-General v *Radio Avon Ltd* [1978] 1 NZLR 225 (CA)

Uncedo Taxi Svc Assn v *Maninjwa & Ors* 1998 (3) SA 417 (E); 1998 (6) BCLR 683 (E)

United Parties v *Min of Justice & Ors* 1997 (2) ZLR 254 (S); 1998 (2) BCLR 224 (ZS)

US v *Schwimmer* 279 US 644 (1929)

Wiley NO v *M* 1979 RLR 144 (G)

Wong Yeung Ng v *Sec for Justice* [1999] 2 HKLRD 293 (CA)

Zimbabwe Township Developers (Pvt) Ltd v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S)

Legislation considered:

Constitution of Zimbabwe 1980, ss 18, 20 and 24(3)

Case Information

P Nherere, with him *S Moyo*, for the applicant

Judgment

Gubbay CJ:

I. INTRODUCTION

In August 1999, three nationals of the United States of America, Gary George Blanchard, Joseph Wendell Pettijohn and John Lamonte Dixon, were jointly indicted with the commission of two offences. The first was a

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contravention of s 7(1)(a) of the Aircraft (Offences) Act [*Chapter 9:01*], as read with s 360(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], in that on 7 March 1999 they had attempted to place aboard an aircraft dangerous goods, namely, various revolvers, pistols, rifles, knives and ammunition; the second was a contravention of s 37(2) of the Law and Order (Maintenance) Act [*Chapter 11:07*], in that on the same day they were in unlawful possession of arms of war and offensive materials, consisting of a variety of pistols, revolvers, rifles, firearms, ammunition, knives, teargas and electric shock devices.

The trial, which was protracted, was presided over by Adam J and assessors, in the High Court, at Harare. The judgment was delivered on 10 September 1999. The three accused were convicted on both counts. On 13 September 1999, the learned judge sentenced them to six months' imprisonment with labour on the first count; and on the second, to twenty-one months' imprisonment with labour, of which period nine months were conditionally suspended for five years, and six months were to run concurrently with the sentence imposed on count one. The effective punishment of six months' imprisonment with labour was then back-dated to 7 March

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1999, being the day when the incarceration of the accused as remand prisoners began. The judgment on both conviction and sentence is now reported, *sub nom S* v *Blanchard & Ors*, in 1999 (2) ZLR 168 (H).

On 15 September 1999, a statement made by the applicant, then the Attorney-General for Zimbabwe and presently the Minister of Justice, Legal and Parliamentary Affairs, was published in *The Herald* newspaper under the headings:

> "US gunmen's sentence causes outrage
>
> Attorney-General's office expresses shock at court's trivialisation of offence."

The article that followed reported that:

> "The Attorney-General's Office is shocked and outraged by the effective six-month jail term imposed on the three Americans, convicted for illegal possession of weapons and attempting to take them on board an aircraft.
>
> It intends to appeal to the Supreme Court against the sentence which it said had trivialised the seriousness of the crime.
>
> In a statement yesterday, the Attorney-General, Mr Patrick Chinamasa, said the sentence handed down by High Court Judge Justice Adam 'induces a sense of shock and outrage in the minds of all right-thinking people'.
>
> He said Gary George Blanchard, Joseph Wendell Pettijohn and John Lamonte Dixon were convicted of offences which were treated as serious by all civilised countries worldwide, including America, which was in the forefront of fighting terrorism and gun-running.
>
> By imposing sentences which do not match the seriousness of the offences, Justice Adam has in effect trivialised crimes of unlawful possession of arms and has seriously erred in doing so.

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> 'The Attorney-General's Office is left bemused by the meaninglessness of it all. The nation should know and be told that the leniency of the sentences constitutes a betrayal of all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests.'
>
> Mere unlawful transiting of firearms through the territory of Zimbabwe is in itself a serious and gross violation of the sovereign and security interests of Zimbabwe.
>
> Mr Chinamasa said the attitude taken by the court in meting out sentences which did not match the severity of the crimes committed came against the backdrop of repeated complaints made to him by his law officers of hostility and verbal abuse directed at them and their submissions by the bench during proceedings.
>
> All these developments erode the office's confidence in the administration of criminal justice."

Reaction to the article led to the issuance of a citation for contempt of court. It was served on the applicant on 28 September 1999. In its amended form, the citation reads:

> "TAKE NOTICE THAT on the 28th day of September 1999 The Honourable Mr Justice Adam caused a citation to be issued against you whereby YOU ARE TO APPEAR in person before the High Court of Zimbabwe in Harare on the 1st day of October 1999 at 10.00 a.m. or soon thereafter to show cause why an Order of Contempt should not be made for the wilful and intentional contemptuous statement issued by you, which statement you caused to be published or alternatively was published in the issue of 15 September 1999 of *The Herald*, as appears more fully

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from the attached copy entitled 'US gunmen's sentences causes outrage'."

II. THE PROCEDURE ADOPTED BY THE HIGH COURT

The hearing of the proceedings initiated by the citation was assigned to Blackie J. He immediately appointed a legal practitioner in private practice to appear as *amicus curiae* to present the complaint against the applicant. On 1 October 1999, the learned judge held a pre-hearing conference at which the parties agreed to a time-frame for the filing of a defence outline by the applicant and written heads of argument by both him and the *amicus curiae*. The matter was then postponed for a week.

At the commencement of the proceedings on 8 October 1999, the *amicus curiae* particularised the passages in the reported words of the applicant which were considered to contain the contempt alleged against him. These were:

(a) The statement that the sentence handed down "induces a sense of shock and outrage in the minds of all right-thinking people".

(b) The statement that:

"By imposing sentences which do not match the seriousness of the offences, Justice Adam has in effect trivialised crimes of unlawful possession of arms and has seriously erred in doing so.

'The Attorney-General's Office is left bemused by the meaninglessness of it all. The nation should know and be told that the leniency of the sentences constitutes

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a betrayal of all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests'.";

(c) The statement that:

"All these developments erode the office's confidence in the administration of criminal justice."

Thereafter, counsel for the applicant, acting in terms of s 24(2) of the Constitution of Zimbabwe, requested the court to refer to the Supreme Court for determination a number of questions in respect of which it was contended that the proceedings were in contravention of the Declaration of Rights. The questions, subsequently re-drafted and re-presented to the court, were these:

" 1. Whether the High Court, and/or counsel appearing *amicus curiae*, can before the High Court present allegations of contempt of court in the light of the provisions of ss 76 and 18(2) of the Constitution.

2. Whether the choice and assignment to deal with this matter by the judge, who passed the sentence which was commented upon in the alleged contemptuous statement of the presiding judge and the selection of counsel to appear *amicus curiae* by the assigned judge violates the Attorney-General's right to appear before an independent and impartial court established by law as provided in s 18 of the Constitution.

3. Whether the order issued by the High Court on 1 October 1999, which order was issued in the presence of the Attorney-General and, in respect of which the Attorney-General, when invited, elected to make no submissions:

(a) violates the Attorney-General's right not to be compelled to give evidence as provided for in s 18(8) of

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the Constitution, given that he was ordered to file a defence outline;

(b) violates the Attorney-General's right to be given adequate time to prepare his defence as provided for in s 18(3) of the Constitution, in circumstances where the Attorney-General, at no stage, applied for or requested an extension of time, nor did he, at any time object to the time limits set out in the said order, and in circumstances where the Attorney-General requested a postponement to 6 October 1999 and then 8 October 1999, to enable him to travel to Zambia on Government business, both requests being granted;

(c) violates the Attorney-General's rights to examine witnesses as provided for in s 18(3)(e) of the Constitution, in circumstances where he was ordered to file argument relating to the facts and the law before the hearing.

4. Whether the procedure in terms of which the registrar can issue a court application, which is not supported by any affidavit as to facts, as is provided in Order 43 r 389, violates the Attorney-General's right to a fair trial as is provided for in s 18 of the Constitution.

5. Whether the citation issued on 28 September 1999, which calls upon the Attorney-General to show cause why an order of contempt should not be made, violates the presumption of innocence of the Attorney-General and unfairly places the onus to prove innocence on the Attorney-General in contravention of s 18 of the Constitution.

6. Whether the contempt proceedings, as particularised, violate the Attorney-General's freedom of expression, that is to say, his right to hold opinions and to express such opinions without interference as is provided for in s 20 of the Constitution."

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After reserving his decision on the questions raised, Blackie J ruled that it had not been shown to his satisfaction that question 1 concerned a breach of the Declaration of Rights; and that questions 3 and 4 were frivolous and vexatious within the meaning attributed to the phrase in *Martin* v *Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157C-F. He therefore declined to refer these three questions. His Lordship's detailed reasons for so concluding are to be found at 297B-298A and 299E-300D of the judgment, which is reported in 1999 (2) ZLR 291 (H). However, the request to refer questions 2 and 6 (as modified in the judgment), as well as question 5, was acceded to. Added thereto was the further question of whether a person charged with contempt of court falls under the protections provided to a person charged with a criminal offence under s 18 of the Constitution. The learned judge recast the questions in the following manner:

" 1. Whether a charge of contempt of court is a charge of a criminal offence entitling the person charged to the protections afforded by the provisions of s 18 of the Constitution.

2. If the answer to question 1 is in the affirmative:

(a) Whether the procedure whereby a person charged with contempt of court is tried by the court which complains about the contempt violates the right of a person, in terms of s 18 of the Constitution, to be tried by an independent and impartial tribunal.

(b) Whether the citation issued on 28 September 1999, which called upon the accused person to show cause why an order of contempt should not be made against him, violates the presumption of innocence on the part of an accused person in contravention of s 18 of the Constitution.

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3. Whether the law of contempt of court, as contained in the common law of Zimbabwe, is such as cannot be shown 'to be reasonably justifiable in a democratic society' and, therefore, is incompatible with the provisions of s 20 of the Constitution."

III. THE REACTION OF THE APPLICANT

The applicant felt aggrieved by the refusal of Blackie J to refer questions 1, 3 and 4 to this court. He lodged a notice of appeal against that part of the judgment, setting out several grounds in which it was claimed the learned judge had erred.

In seeking to appeal against the refusal of the High Court to refer the aforementioned questions to the Supreme Court, the applicant obviously overlooked the limitation expressed in s 24(3) of the Constitution. It is there provided:

"Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those

proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)."

The purport of s 24(3) was considered by this court in *S* v *Mbire* 1997 (1) ZLR 579 (S) where, at 581G-582D, it was stated:

"It is clear from the wording of this provision that where a referral has been refused by the High Court or by any court subordinate to it, albeit the opinion that the raising of the constitutional question was merely frivolous or vexatious was manifestly erroneous, there is to be no interruption in the proceedings. They are to continue to the stage of determination, which in a criminal case is when the accused is convicted and the final sentence delivered. See *R* v *Mhosva* 1980 ZLR 74 (G) at 75C; *S* v *Morrisby* 1995 (2) ZLR 270 (S) at 271C. Thereafter, the right to raise the constitutional question as a ground of appeal against such determination becomes permissible.

Quite apart from there being no provision in the Constitution permitting an appeal to the Supreme Court against a refusal to refer to it a question raised under s 24(2) thereof, there is no right of appeal given in either the Magistrates Court Act [*Chapter 7:10*] or the Supreme Court Act [*Chapter 7:13*] against such a ruling. To repeat the self-evident words of Kennedy LJ in *National Telephone Co Ltd* v *His Majesty's Postmaster-General* [1913] 2 KB 614 (CA) at 621:

'The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal nor both combined can create such a right, it being essentially one of the limitation and of the extension of jurisdiction'."

See also *Muchero & Anor* v *Attorney-General* 2000 (2) ZLR 286 (S).

It follows that any determination of the three questions which were not referred may only be made by this court in the event of an appeal brought before it against a finding by the High Court that the applicant was guilty of contempt.

IV. WHETHER THE LAW OF CONTEMPT OF COURT UNDER THE COMMON LAW OF ZIMBABWE IS SUCH AS CANNOT BE SHOWN "TO BE REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY" AND, THEREFORE, IS INCOMPATIBLE WITH THE PROVISIONS

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OF S 2O OF THE CONSTITUTION

It is convenient at the outset to consider what I regard as the main question. In doing so a preliminary matter must be made clear. In the context of the applicant's statements, the reference in the question to the law of contempt must be taken to mean that species of the common law of contempt which has been given the colourful nomenclature of "scandalising the court"; and not any of the other different ways in which the offence may be committed.

A consideration of the following issues is, I believe, essential to the resolution of the question posed.

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(1) *Does the form of contempt known as scandalising the court continue to exist as an offence under the common law of Zimbabwe?*

There are two modes of conduct which fall within the scope of criminal contempt. First, there is contempt *in facie curiae*, which encompasses any word spoken or act done within the precinct of the court that obstructs or interferes with the due administration of justice, or is calculated to do so.

Secondly, the offence may be committed *ex facie curiae* by words spoken or published or acts done which are intended to interfere with, or are likely to interfere with, the fair administration of justice. An example of this type of contempt is that described as "scandalising the court". It is committed by the publication, either in writing or verbally, of words calculated to bring a court, a judge of a court, or the administration of justice through the courts generally, into contempt. It need not be an attack directed at any specific case, either past or pending, or at any specific judge. It is sufficient if it is a scurrilous attack on the judiciary as a whole, calculated to undermine the authority of the courts and endanger public confidence, thereby obstructing and interfering with the administration of justice. See *Chokolingo* v *Attorney General of Trinidad and Tobago* [1981] 1 All ER 244 (PC) at 248f *per* Lord Diplock. See also, Borrie & Lowe's *Law of Contempt* 2 ed at 226-227; Snyman *Criminal Law* 3 ed at 316; Milton *South African Criminal Law and Procedure* 3 ed vol II at 184.

At one stage in England, the continued existence of this branch of contempt law was called into doubt by Lord Morris in *McLeod* v *St. Aubyn* [1899] AC 549. After pointing out that committals for contempt are ordinarily in cases where: (i) some contempt has been committed in the face of the court, and (ii) comments have been made on cases pending in the courts, Lord Morris dealt with a third form of contempt. Of this, he said at 561:

> "Committals for contempt of court by scandalising the court itself have become obsolete in this country. The courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

The observation proved to be premature. Nine months later an application was made in *R* v *Gray* [1900] 2 QB 36 to the Queens Bench Division to commit the editor of a Birmingham newspaper for writing and publishing a scurrilous personal attack on Mr Justice Darling. It described him as an "impudent little man in horse-hair - a microcosm of conceit and

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empty-headedness", adding:

> "No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt ... Mr Justice Darling would do well to master the duties of his own profession before undertaking the regulation of another."

The article did not deal with pending litigation; it was about the conduct of

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a judge in a case in which a conviction had been recorded and sentence passed. After defining the offence, Lord Russell Of Killowen CJ went on to say at 40:

> "That description of that class of contempt is to be taken subject to one and an important qualification. The judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism, I repeat that it is personal scurrilous abuse of a judge as a judge."

Although Lord Russell did not mention *McLeod* v *St Aubyn supra*, it was referred to by the reporter of *R* v *Gray* in a footnote at the end of the judgment. In the course of his note, the reporter accurately summed up the effect of *R* v *Gray* as follows:

> "The present case is reported as showing that in this country the court will still, where the circumstances demand its action, exercise its jurisdiction to punish, on summary process, the contempt of 'scandalising the court', although no contempt has been committed *ex facie* of the court, or in respect of a case pending."

At the present time, prosecutions in England for scandalising the court have once again become a rarity. However, there can be little doubt as to the continued application of this branch of the law of contempt. Lord Hailsham of St Marylebone made this clear in *Badry* v *Director of Public Prosecutions of Mauritius* [1982] 3 All ER 973 (PC) at 979b-c in stating:

> "(Whilst) nothing really encourages courts or Attorneys-General to prosecute cases of this kind in all but the most serious examples, or courts to take notice of any but the most intolerable instances, nothing has happened in the intervening eighty years to invalidate the analysis by the first Lord Russell of Killowen CJ in *R* v *Gray*."

Yet in *Secretary of State for Defence & Anor* v *Guardian Newspapers Ltd* [1984] 3 All ER 601 (HL) at 605b, Lord Diplock ventured the opinion that contempt for publishing material that scandalises the court was "virtually obsolescent".

It is well established that this form of contempt continues to exist in other jurisdictions.

The principle enunciated in *R* v *Gray supra* was adopted by the Supreme Court of Canada in Re *Duncan* (1958) 11 DLR (2d) 616 (SC) at 618; see also *R* v *Kopyto* (1988) 47 DLR (4th) 213 (Ont CA) at 222 and 246-247. In New Zealand, reservations expressed by some judges were dispelled by the Court of Appeal in *Solicitor-General* v *Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 237-238. In Australia, a number of prosecutions illustrate that

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this species of contempt continues to be recognised. See *R* v *Dunbabin*; ex p *Williams* (1935) 53 CLR 434 (H); though the scope for its use seems more limited following *Attorney-General for New South Wales* v *Mundey* [1972] 2 NSWLR 887. Under Hong Kong law scandalising contempt is accepted as an offence. See *Wong Yeung Ng* v *Secretary for Justice* [1999] 2 HKLRD 293 (CA) at 307B-C.

This is not the law in the United States of America. In *Bridges* v *State of California* 314 US 252 (1941) all the members of the Supreme Court were agreed that there is no such offence in the United States (see at 273 and 287). Justice Frankfurter referred to the scandalising of the court as an offence as "English foolishness". He considered criticism of the courts, no matter how unrestrained, *made after a decision has been rendered*, to be an exercise of the right of free discussion and free speech.

Nearer to home, in South Africa the authority to punish scandalisation contempt, summarily or otherwise, was given in 1874 by the Cape Supreme Court in In re *Neethling* (1874) 5 Buch 133. Three years later Kotzé CJ in In re *Phelan* (1877) Kotzé 5 at 7 explained the nature of this form of contempt thus:

> "No principle of law is better established than this: that any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to contempt of court. Now, nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open court."

Anything spoken or written imputing corrupt or dishonest motives or conduct to a judicial officer in the discharge of official duties, or reflecting in an improper or scandalous manner on the administration of justice, has been held to fall within the ambit of this species of contempt. See *R* v *Torch Printing & Publishing Co (Pty) Ltd & Ors* 1956 (1) SA 815 (C) at 819G-820B; *S* v *Oliver* 1964 (3) SA 660 (N) at 664A; *S* v *Tobias* 1966 (1) SA 656 (N) at 660G-H. In *S* v *van Niekerk* 1972 (3) SA 711 (A) it was held that this type of contempt is even committed by exhorting the judiciary to embark on a course of action which is in clear conflict with its duties, for example, by asking that it refuse to give credit to a certain class of evidence irrespective of its intrinsic merit (see at 721 *in fine*- 722G).

The issue of whether scandalising the court is an offence in Zimbabwe has not been addressed directly by the courts. Nonetheless, the general case law on the law of contempt in this country, the weight of the authorities referred to and the principles they enunciate, satisfy me that a refusal to recognise scandalising as a species of the offence of contempt of court is not warranted. Indeed, Mr *Nherere*, who appeared for the applicant, did not seek to argue the

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contrary. Consequently, it is unnecessary that the conduct complained of does not relate to

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pending legal proceedings.

Having said that, it is plain that the line between scandalising comment and fair and legitimate criticism is not always easy to draw. As a general rule, as alluded to by Ogilvie Thompson CJ in *S* v *van Niekerk supra* at 720H:

> "genuine criticism, even though it be somewhat emphatically or unhappily expressed, should, in my opinion ... preferably be regarded as an exercise of the right of free speech rather than as 'scandalous comment' falling within the ambit of the crime of contempt of court."

Much the same thought, though in slightly stronger language, was expressed earlier by Lord Denning MR in *R* v *Metropolitan Police Commissioner*, ex p *Blackburn (No. 2)* [1968] 2 All ER 319 (CA) at 320F-G:

> "Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms."

In the same case, Salmon LJ stated the position even more succinctly at 321A-B:

> "... no criticism of a judgment, however vigorous, can amount to contempt of court, provided it keeps within the limits of reasonable courtesy and good faith."

It should not be overlooked that some legal writers, and a few judges, have been vehement in their criticism of the recognition of scandalising the court as an offence. They argue that the basic assumption embodied in the offence of scandalising the court, namely, that public confidence in the administration of justice would be undermined by comments that tend to lower the authority of the court, is highly speculative. They contend that an intelligent and sophisticated public should evaluate the merits of the comments rather than the judiciary which, in effect, acts as both prosecutor and judge. They take the position that the courts, like other public institutions, should be open to lively and constructive criticism and do not need, and should not have, specific rules for their protection. See for instance, Borrie & Lowe *op cit* at 244; Walker "Scandalising in the Eighties" (1985) 101 *LQR* 359 at 378. In the Australian case of *Attorney-General for New South Wales* v *Mundey supra* at 908, Hope JA said:

> "There is no more reason why the acts of courts should not be trenchantly criticised than the acts of public institutions, including parliaments. The truth is of course that public

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> institutions in a free society must stand upon their own merits: they cannot be propped up if their conduct does not command respect and confidence of a community; if their conduct justifies the respect and confidence of a community they do not need the protection of special rules to shield them from criticism."

Despite the strong objection levelled at scandalising contempt, I reiterate that it remains an

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offence according to the common law of Zimbabwe.

Whether the statements of the applicant fall within or outside the limits of reasonable courtesy; whether they represented the expression of a genuinely held belief; and whether, emanating as they did from the country's chief law officer, being a person of high standing in the community, they were intended or likely to bring MR Justice Adam into disrepute, as reflecting upon his capacity as a judge, and to shake public confidence in the manner in which justice had been administered by the High Court in the case in question, are issues of fact, the resolution of which is of no relevance to these proceedings.

The advent of the Constitution makes it necessary for this court to review the offence of scandalising the court in order to ensure that it meets the requisite constitutional standards. The statements of the applicant touched on a matter of public interest - the high-profile and much-publicised trial of the three Americans and the punishment meted out to them. They concerned the functioning and operations of a public institution. It is necessary therefore to consider whether they attract the protection of s 20(1) of the Constitution.

(2) *Are the words of the applicant protected by the freedom of expression provision set out in s 20(1) of the constitution?*

Section 20(1) of the Constitution protects the freedom of expression in the following terms:

> "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."

This court has held that the provision is to be given a benevolent and purposive interpretation. It has repeatedly declared the vital and fundamental importance of freedom of expression to the Zimbabwean democracy - one of the most recent judgments being that in *United Parties* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) at 268C-F; 1998 (2) BCLR 224 (ZS) at 235I-236C. What has been emphasised is that freedom of expression has four broad special objectives to serve. The most significant, in the present context, is the second, namely, "it assists in the discovery of the truth". The search for truth rationale has been articulated in terms of the famous "marketplace of ideas" concept. This holds that truth will emerge out of the competition of ideas. In his classic dissent in

Abrams v *United States* 250 US 616 (1919) at 630, the redoubtable Justice Holmes said that:

> "... when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out."

It is indeed difficult to imagine a more crucial protection to a democratic society than that of freedom of expression. Without the freedom to express, interchange and communicate new ideas and advance critical opinions about public affairs or the functioning of public institutions, a democracy cannot survive. The use of colourful, forceful and even disrespectful language may

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be necessary to capture the attention, interest and concerns of the public to the need to rectify the situation protested against or prevent its recurrence. People should not have to worry about the manner in which they impart their ideas and information. They must not be stifled in making such exchanges. The point is well made in the majority judgment of the European Court of Human Rights in *Handyside* v *UK* (1979-80) 1 EHRR 737 at 754 (para 49) that freedom of expression 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 *Garrison* v *State of Louisana* 379 US 64 (1964) at 75 *per* Justice Brennan.

A similar observation was made recently in *Chavunduka & Anor* v *Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S); 2000 (8) BHRC 390 (ZS) where, after citing a *dictum* of MR Justice Holmes in *US* v *Schwimmer* 279 US 644 (1929) at 654, this court said at 558F (ZLR); 396a (BHRC):

> "Mere content, no matter how offensive (save where the expression is communicated in a physically violent form), cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression."

With particular regard to criticisms levelled at the courts, I can find no more eloquent and pertinent *exposé* than that of Cory JA in *R* v *Kopyto supra* at 227:

> "The courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens but also for the resolution of disputes between the citizen and the state in all its manifestations. The more complex society becomes the greater is the resultant frustration imposed on citizens by that complexity and the more important becomes the function of the courts. As a result of their importance, the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered

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> that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy. Rules of evidence, methods of procedure and means of review and appeal exist that go far to establishing a fair and equitable rule of law. The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need they seek to sustain unnecessary barriers to complaints about their operations or decisions."

I am thus firmly of the view that statements made on a matter of public interest, even if intemperately or offensively worded, or in fact false, so long as they are not obscene or criminally defamatory, come within the protection of s 20(1) of the Constitution.

Undoubtedly, the comments of the applicant come within the parameters of that protection.

It remains to be determined whether the common law offence of contempt by scandalising the court is a constitutionally permissible restriction on the protection afforded the applicant's statements.

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(3) *Is the limitation which the common law offence of scandalising the court imposes on the right of freedom of expression saved by s 20(2)(b)(iii) of the Constitution?*

Section 20(2)(b)(iii), in relevant part, reads:

> "Nothing contained in ... *any law* shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -
>
> ...
>
> (b) for the purpose of -
>
> ...
>
> (iii) *maintaining the authority and independence of the courts ...*
>
> except so far as that provision ... is shown not to be reasonably justifiable in a democratic society."

The italicised portions of the subsection give rise to three specific questions:

(a) *Is the limitation upon freedom of expression contained in any law?*

The term "law" is defined in s 113(1) of the Constitution to include "any unwritten law in force in Zimbabwe, including African customary law". The common law in force in Zimbabwe falls within the definition. And, as I have endeavoured to show, the common law of scandalising the court does limit the freedom of expression.

(b) *Is the limitation upon freedom of expression employed for the purpose of maintaining the authority and independence of the courts?*

Unquestionably, the offence of scandalising the court exists in principle to

protect the administration of justice. It is thus a permissible derogation from the freedom of expression.

(c) *Has the offence of scandalising the court been shown to be reasonably justifiable in a democratic society?*

This is the crucial inquiry. From a procedural aspect, the burden of proof is on the challenger to establish that the impugned law goes further than is reasonably justifiable in a democratic society; and not, as is common with the Constitutions of other countries, 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 *Nyambirai* v *National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) at 13D-F; 1995 (9) BCLR 1221 (ZS) at 1231H-J, and *Retrofit (Pvt) Ltd* v *Posts and Telecommunications Corporation & Anor* 1995 (2) ZLR 199 (S) at 220A-C; 1995 (9) BCLR 1262 (ZS) 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

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excessive. To be answered are whether -

(i) the objective which the limitation in the law is designed to promote is sufficiently important to warrant overriding a fundamental right;

(ii) the measures designed to meet the objective are rationally connected with 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 *Ahnee & Ors* v *Director of Public Prosecutions* [1999] 2 WLR 1305 (PC) - an appeal from the Supreme Court of Mauritius - the question arose as to whether the offence of scandalising the court had been shown by the appellants not to be reasonably justifiable in a democratic society (s 12(2) of the Constitution of Mauritius). Holding that it had not, Lord Steyn, in delivering the opinion of their Lordships, offered two main reasons for that view. He said at 1313 *in fine*-1314F:

> "In England, such proceedings are rare and none has been successfully brought for more than sixty years. But it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater: see Feldman *Civil Liberties and Human Rights in England and Wales* (1993) pp 746-747; Barendt *Freedom of Speech* (1985) pp 218-219. Moreover, it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the

> need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the 'right of criticising, in good faith, in private or public, the public act done in the seat of justice' .... The classic illustration of such an offence is the imputation of improper motives to a judge ... Given the narrow scope of the offence of scandalising, the court, their Lordships are satisfied that the constitutional criterion that it must be necessary in a democratic society is in principle made out. The contrary argument is rejected."

With regard to the first reason, I must respectfully disagree with the sweeping observation that in small islands the need to retain the offence of scandalising the court is greater than in the United Kingdom because the administration of justice is more vulnerable. By alluding to "small islands", I assume that the learned Lord of Appeal in Ordinary was including comparatively small jurisdictions. In supporting the proposition by reference to academic writings it may well be that the Board wished to be spared the embarrassment of citing Lord Morris's racist comment in *McLeod* v *St Aubyn supra* at 561 that:

> "in small colonies, consisting principally of coloured populations, the enforcement in proper courts of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court";

yet, like Lord Atkin in *Ambard* v *Attorney-General for Trinidad and Tobago* [1936] 1 All ER 704 (PC) at 708 *in fine*, believed it necessary to pronounce, somewhat condescendingly, a modern

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non-racist justification of *McLeod* to small countries.

Whether the administration of justice in Mauritius was correctly perceived to be more vulnerable than in the United Kingdom appears to me to be a contentious proposition.

But one thing is certain: the same epithet does not fit the situation in Zimbabwe. I am confident that our courts are strong enough to withstand criticism after a case has been decided, no matter how scurrilous that criticism may be. Communication with a fair proportion of the population is easily achieved. The court proceedings are widely publicised in the media. Most, if not all, judges are known by name. Trust in the legal system and the authority of the courts are matters of importance to the ordinary citizen. The courts are looked upon as the ultimate refuge from injustice.

The second reason, that the narrow scope of the offence of scandalising the court makes its retention "necessary" in a democratic society, is much more persuasive. Criticism which imputes improper or corrupt motives or conduct to those taking part in the administration of justice, which "excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office", *does* create a real or substantial risk of impairing public

confidence in the administration of justice.

Unlike other public figures, judges have no other proper forum in which to reply to criticisms. They cannot debate the issue in public without jeopardizing their impartiality. This is why protection should be given to judges when it is not given to other important members of society such as politicians, administrators and public servants.

The other case to which reference must be made is that of *R* v *Kopyto supra*, where, save for unanimity in the setting aside of the conviction, the Ontario Court of Appeal was split three ways. Cory and Goodman JJA were of the view that in order to accord with the fundamental freedoms in the Canadian Charter of Rights and Freedoms, the contempt must be shown to involve a real, substantial and *present or immediate danger* to the administration of justice. Their view that such a contempt could not be committed unless it interferes with the fair trial of present or pending proceedings, was influenced by American jurisprudence and its test of "clear and present danger" to the administration of justice. Houlden JA went even further. He was of the opinion that no offence of scandalising the court, however framed, would be consistent with the Charter; therefore there could be no such contempt.

Dubin JA (with whom Brooke JA concurred), on the other hand, considered the offence to be a necessary exemption, provided that the statement complained of is calculated to bring the administration of justice into disrepute; and it is shown that there is a "serious risk that the administration of justice would be interfered with". Rejecting the approach of the majority, he said at 285:

> "In other words, as I understand it, if the words complained of are stated in court while the judge is still sitting in court, my colleagues would hold the offence to be constitutional, but if the words were stated after the judge had

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> delivered his judgment and withdrawn from the court-room, and the statement was made to the press or to the public in his absence, the offence becomes unconstitutional. The result of the majority ruling is that in this jurisdiction there is, at present, no limit on what is permissible with respect to comments made which are intended to interfere seriously with the administration of justice and the rule of law unless the comment is made in the face of the court, or would interfere with the fair trial of pending proceedings. With respect, I see no basis for such a distinction."

The learned Judge of Appeal then pointed out that the distinction had been rejected by Richmond P in *Solicitor General* v *Radio Avon Ltd supra* at 232-233 where Lord Diplock's analysis in *Attorney-General* v *Times Newspaper Ltd* [1973] 3 All ER 54 (HL) at 72e-g, was cited with approval.

In dismissing the relevance of the American jurisprudence, Dubin JA at 287 approved of another passage of the judgment in the *Radio Avon* case at 234, namely:

> "The American courts appear to have directed their attention to the existence of a clear

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> and present danger of a court being influenced, intimidated, impeded, embarrassed or obstructed in the administration of justice. English law, on the other hand, has also attached great importance to the need to preserve public confidence in the administration of justice generally. This court should not depart from that attitude subject, of course, in the type of contempt now under consideration, to the public right of fair comment and criticism, and to the possible defence of justification earlier referred to in this judgment."

Turning to the merits of the appeal, Dubin JA was satisfied that the conviction could not stand as the requisite elements of the offence had not been made out.

In my respectful view, the minority judgment is impressive. The serious risk test - preferred to the one adopted in American case law in which the administration of justice must be imperilled immediately - conforms with that applied in this country. See *S* v *Hartmann & Anor* 1983 (2) ZLR 186 (S) at 195F; 1984 (1) SA 305 (ZS) at 312E-F; *Banana* v *Attorney-General* 1998 (1) ZLR 309 (S) at 318F-H; 1999 (1) BCLR 27 (ZS) at 36I-37A. Furthermore, the danger in adopting the American approach is that it is predicated upon the conception that scandalising contempt is to "preserve the dignity of the bench". This is wrong.

The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed.

I pass now to the application of the three criteria, but would repeat that the onus is upon the applicant of showing that the law of contempt by scandalising the court is not a limitation that is reasonably justifiable in a democratic society.

First, the primary objective of the impugned law of scandalising the court must relate to concerns which are pressing and substantial and of sufficient importance to override the constitutionally protected freedom. See *Chavunduka* v *Minister of Home Affairs supra* at 402f.

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The objective of the law of contempt is well captured in the following passage in Borrie & Lowe *op cit* at 226:

> "The necessity for this branch of contempt lies in the idea that without well-regulated laws a civilised community cannot survive. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute."

The same sentiment was neatly put by Richmond P in *Solicitor General* v *Radio Avon Ltd supra* at 230, in these words:

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> "The justification for this branch of the law of contempt is that it is contrary to the public interest that public confidence in the administration of justice should be undermined."

I do not therefore consider that this objective, which the limitation in the law is designed to promote, can be said not to be of sufficient importance to warrant overriding the fundamental right of freedom of expression.

It was conceded by counsel for the applicant, and correctly so in my opinion, that the second criterion is satisfied, in that the measures designed to meet the objective are rationally connected to it.

With regard to the third criterion which the applicant must meet, two points must be made. First, as emphasised in *Ahnee & Ors* v *Director of Public Prosecutions supra*, the offence of scandalising the court does not extend to hostile criticism of the behaviour of a judicial officer unrelated to his performance on the Bench. Any personal attack upon him unconnected with the office he holds must be dealt with under the laws of defamation. See *McLeod* v *St Aubyn supra* at 561; *R* v *Fuleza* 1951 (1) SA 519 (A) at 533A-B; *R* v *Robberts* 1959 (4) SA 554 (A) at 557 *in fine*. The offence is narrowly defined.

Secondly, prompt action to preserve the authority of the court and the due carrying out of its function, which are subject to being undermined by scandalising contempt, is required. The institution of criminal proceedings at the instance of the Attorney-General, with all the attendant delays, would be too dilatory and too inconvenient to offer a satisfactory remedy. Once a matter has been referred to the Attorney-General, it is removed from the court's control, and the Attorney-General might well be reluctant to prosecute. Moreover, criminal defamation is concerned with personal reputations. And, in any event, it would not be applicable to an attack upon an unspecified group of judges or upon the court system in general.

In sum, the applicant has failed to meet the criteria laid down. He has not shown that the limitation placed on the right to freedom of expression for the purpose of maintaining the authority and independence of the courts is not one that is reasonably justifiable in a democratic society.

V. WHETHER A CHARGE OF CONTEMPT OF COURT (BY SCANDALISING THE COURT) IS A CHARGE OF A CRIMINAL OFFENCE ENTITLING THE PERSON CHARGED TO THE

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PROTECTIONS AFFORDED BY THE PROVISIONS OF S 18 OF THE CONSTITUTION

Subsection (1) of s 18 of the Constitution recites that:

> "Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

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Subsections (2) to (9) spell out the fundamental protections which a person charged with, and tried for, any criminal offence must be afforded.

The nature of contempt of court was correctly described by the learned judge in the reported judgment *supra*, at 296F, as follows:

> "Contempt of court, although it may have a penalty attached to it similar to that which is imposed in criminal cases, has never been treated as crime *strictu sensu*. It is, and has always been, treated as *sui generis*."

Textbooks are replete with discussion of the peculiarities of contempt law and the extent to which proceedings for contempt defy classification *strictu sensu* as criminal or civil, but are to be regarded as *sui generis*. So far as contempt involving disobedience to the order or process of a court is concerned, the offence is often treated as "civil contempt". This is because such contempts are, in reality, a form of execution, pursuant to which the person of the defaulting party may be attached in order to coerce compliance with the order. See *Cape Times Ltd* v *Union Trades Directories (Pty) Ltd* 1956 (1) SA 105 (N) at 120F-121D; *Wiley NO* v *M* 1979 RLR 144 (G) at 146A-D; and because proceedings to punish the contempt are almost invariably initiated by the party in whose favour the civil order was made and who may waive punishment. Nonetheless, such contempt is a criminal offence for which the contemnor may be indicted at the instance of the Attorney-General. See Milton *op cit* at 189; and particularly, *S* v *Beyers* 1968 (3) SA 70 (A) at 81C-E; *S* v *Benatar* 1984 (1) ZLR 296 (S) at 303A-304C; 1984 (3) SA 588 (ZS) at 592H-593H.

In its most recent consideration of the matter, the Privy Council in *Ahnee & Ors* v *Director of Public Prosecutions* *supra* at 1314G described scandalising the court as a form of contempt that is not part of the *ordinary* criminal law. As I understand it, that conclusion does not mean that such contempt is not an offence for particular purposes. It is an offence against the court rather than against the state. It is an injury committed against a person or body occupying a public judicial office, by which injury the dignity or respect which is due to such office, or its authority in the administration of justice, is intentionally violated. See *Attorney-General* v *Crockett* 1911 TPD 893 at 911; *Noel Lancaster Sands (Edms) Bpk* v *Theron* 1974 (3) SA 688 (T).

In In re *Muskwe* 1992 (1) ZLR 44 (H); 1993 (2) SA 514 (ZH), Adam J held that the right of an accused person under s 18(2) of the Constitution to be tried by an independent and impartial court established by law, had been denied in a situation in which the magistrate, at whom the contemptuous conduct had been directed, presided over the contempt proceedings which followed. For this involved the magistrate being arbiter in his own cause. The Canadian case of *R* v *Cohn* (1985) 10 CRR 142 (Ont CA), cited by the learned judge, is to the same effect (see at

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156 *per* Goodman JA). See also *Uncedo Taxi*

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Service Association v *Maninjwa & Ors* 1998 (6) BCLR 683 (E) at 694E-F, 1998 (3) SA 417 (E) at 429C-D; Milton *op cit* at 199.

I respectfully agree with these decisions.

It follows, in my view, that although contempt by scandalising the court is an offence *sui generis* and is not part of the *ordinary* criminal law, it is nonetheless the responsibility of the judicial officer hearing the matter to ensure that the procedure adopted complies with the constitutional protections afforded an accused person charged with an *ordinary* criminal offence. After all the contemnor, like the convicted accused, is liable to punishment in the discretion of the court.

VI(A) WHETHER THE PROCEDURE WHEREBY A PERSON CHARGED WITH CONTEMPT OF COURT IS TRIED BY THE COURT WHICH COMPLAINS ABOUT THE CONTEMPT VIOLATES THE RIGHT OF A PERSON, IN TERMS OF S 18(2) OF THE CONSTITUTION, TO BE TRIED BY AN INDEPENDENT AND IMPARTIAL COURT

The contention advanced by the applicant is that the High Court which he is accused of having scandalised, is the very one which is to determine whether the statements he made were contemptuous of it; it will thus be acting as judge in its own cause. Expressed differently, the injured party is not, in the circumstances, an independent judicial body. It cannot impartially adjudicate when it itself has been offended against and has issued the citation. Consequently, any proceedings brought before the High Court would amount to a contravention of the applicant's rights under s 18(2) of the Constitution. A fair hearing would be denied him.

The contention, which must be assessed against the factual situation and not hypothetically, raises the question of whether there is a real or substantial risk of Blackie J, or any judge of the High Court (other than Adam J, for there was never any prospect of him being chosen as the adjudicator) being unable to disabuse his or her mind of extraneous and prejudicial information or attitudes which they are not entitled to consider in reaching a decision.

I am satisfied that only the remotest possibility exists of a judge, imbued with basic impartiality, legal training and the capacity for objective and unemotional thought, being consciously or subconsciously influenced by extraneous matter. I would repeat what was said in *Banana* v *Attorney-General supra* at 321D-E (ZLR) and 36I-37A (BCLR):

> "To accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused

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> could never receive a fair trial. The result would be nothing less than judicial abdication. The proposition needs

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merely to be stated to convince of its unsoundness."

I regard the decision to assign the matter to Blackie J as entirely proper. He was not the author of the judgment criticised by the applicant. He had not been involved at any stage of the proceedings brought against the three accused. It was not his personal dignity, respect and professional ability that had been injured. To suggest, therefore, that Blackie J (or any other judge for that matter) is incapable of dealing with the proceedings in an impartial and objective manner since the criticism levelled directly at a colleague affected the authority of the High Court in the administration of justice, is wholly unconvincing.

(B) WHETHER THE CITATION ISSUED ON 28 SEPTEMBER 1999, WHICH CALLED UPON THE APPLICANT TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE MADE AGAINST HIM, VIOLATES THE PRESUMPTION OF INNOCENCE ON THE PART OF AN ACCUSED PERSON IN CONTRAVENTION OF S 8(3)(A) OF THE CONSTITUTION

The citation instructed the applicant to appear before the High Court on a certain day at a specified hour to indicate why he should not be subject to an order of contempt following upon the statement he caused to be published, or was published, in *The Herald*. A copy of the publication was annexed. Prior to the hearing the citation was amplified, by referring specifically to utterances in the publication which were relied upon. It informed the applicant, with sufficient clarity, of the contempt he had allegedly committed *ex facie curiae*. Procedure by way of citation is not uncommon. See *R* v *Keyser* 1951 (1) SA 512 (A) at 518F-H; *S* v *Mabaso* 1990 (1) SACR 675 (T) at 678a-c.

The submission advanced by the applicant's counsel was this. The adoption of the summary procedure, which called upon the applicant to show cause "why a contempt order should not be made", violated his constitutional right to be presumed innocent.

The same argument has been tried in other jurisdictions without success.

In *R* v *Cohn supra* Goodman JA said at 157:

> "It is not a matter of the presumption of innocence being made inapplicable in contempt proceedings. In a case such as this, it is simply a matter that the facts known to the presiding judge which took place in his court and with respect to which there can be no doubt and no better proof adduced are such as to amount to *prima facie* proof unless the alleged contemnor calls evidence or gives evidence which affords to him a proper defence. In that regard he is in no different position than a person accused of an offence under the *Criminal Code* where the prosecution has established a *prima facie* case."

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And further at 158:

> "At its highest, the application of a rule *nisi* by the presiding judge merely shifts the burden of adducing evidence as distinct from shifting the burden of persuasion to the accused. This court has already so held in *R* v *Pereira* (released September 22, 1983, as yet unreported), where Martin JA, speaking for the court, said:
>
> > 'Summary proceedings for contempt in the face of the Court do not infringe the right of an accused to be tried before an impartial tribunal and his right to be presumed innocent. The burden on the accused is an evidential one only and if at the end of the proceedings there exists a reasonable doubt as to guilt, he is

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entitled to be acquitted'."

These remarks apply *a fortiori* to summary proceedings for contempt *ex facie curiae*.

South African decisions share this view. Accepting, as I think one must, that for all practical purposes, the form of the citation is no different from that of a rule *nisi*, the words of Corbett JA (as he then was) in *Safcor Forwarding (Johannesburg) (Pty) Ltd* v *National Transport Commission* 1982 (3) SA 654 (A) at 676A as to its effect upon the onus of proof are apposite:

> "The objection that the issue of such a rule *nisi* places an unwarranted onus on the respondent is, in my view, unfounded. All that the rule does is to require the respondent to appear and to oppose should he wish to do so. The overall onus of establishing his case remains with the applicant and the rule does not cast an onus upon the respondent which he would not otherwise bear."

More directly in point are *S* v *Lavhengwa* 1996 (2) SACR 453 (W) and *Uncedo Taxi Service Association* v *Maninjwa & Ors supra*. The first case dealt with contempt of court committed *in facie curiae* under the summary procedure provided in s 108(1) of the Magistrates Court Act. The issue debated was whether the accused's constitutional right to be presumed innocent had been infringed. After a close examination Claassen J found that it had not. He reasoned at 486f-j:

> "I am also of the view that the summary contempt proceedings envisaged in s 108(1) do not offend the presumption of innocence in s 25(3)(c) of our Constitution. Firstly, this is so because the summary proceedings do not create a duty to prove a defence or excuse. Even if it had that effect, that in itself would not be relevant, for the reasons stated in *R* v *Whyte* (1988) 51 DLR (4th) (SCC). Secondly, the procedure triggered by s 108(1) does not mean that the accused is liable to be convicted despite the existence of a reasonable doubt. What is important is whether the summary procedure maintains the accused's right to be convicted only upon proof that he contravenes s 108(1) *beyond a reasonable doubt*. It is manifestly so that when these summary proceedings are implemented, the magistrate, after hearing the accused, is obliged to convict only if he has been satisfied beyond reasonable doubt that a contravention of s 108(1) is proved. The onus remains with 'the prosecution' to prove this fact."

In the second case, Pickering J held that the summary procedure of obtaining, by way of notice of motion, a rule *nisi* calling upon the respondents to show cause why they should not be committed to prison for contempt

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committed *ex facie curiae*, did not violate the fundamental right of the respondents to be presumed innocent. The learned judge supported his decision by reference to *R* v *Cohn supra* and *S* v *Lavhengwa supra* (see at 690C-F). He went on to find, after an exhaustive review of the authorities, that the civil standard of proof was inapplicable; that as contempt of court is an offence of a criminal character, proof of its commission beyond reasonable doubt was required (see at 692C-693B).

I respectfully agree with these decisions, and would underline that at the moment of being cited for contempt, the applicant was presumed to be innocent. It follows that no valid complaint of prejudice lies against the procedure adopted in bringing the applicant before the High Court.

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VI. DISPOSAL

In the result, save then for the first question referred (which is dealt with in section V above), the remaining questions are answered in the negative. The proceedings therefore remain alive. The hearing is to be resumed before Blackie J.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Scanlen & Holderness, applicant's legal practitioners

X-TREND-A-HOME (PVT) LTD v HOSELAW INVESTMENTS (PVT) LTD 2000 (2) ZLR 348 (SC)

Citation	2000 (2) ZLR 348 (SC)
Case No	Judgment No. S-112-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA and Sandura JA
Heard	October 24, 2000
Judgment	November 6, 2000
Counsel	Mrs J B Wood, for the appellant J C Andersen SC, for the respondent
Annotations	None

Flynote

Contract - sale - conditional - agreement for sale of portion of immovable property, subject to approval for subdivision - agreement constitutes a contract

Town and country planning - subdivision of property - prohibition on agreement for change of ownership of portion of property without permit allowing for subdivision - effect

Headnote

The appellant tendered to buy a portion of a stand from the respondent. Both parties were aware that the stand would have to be subdivided. The respondent accepted the offer, but a few months later repudiated the arrangement, stating that there was no valid agreement. The

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appellant sought the transfer of the piece of the stand. The question for decision was whether, when an agreement for the sale of a portion of property was made conditional on the obtaining of a permit for subdivision, the agreement was valid. In the High Court, the judge had ruled, on the facts, that the transaction fell foul of s 39 of the Town and Country Planning Act [*Chapter 29:12*]. He did not give a ruling on the correctness or otherwise of the decision in *NCR Zimbabwe (Pvt) Ltd* v *Gulliver Consol Ltd & Anor* 1993 (1) ZLR 205 (H), where it was held that s 39 did not cover a sale agreement if it was made conditional on the grant of a permit for subdivision. On appeal:

Held, that, assuming this was an agreement of sale subject to a suspensive condition, such an agreement constituted a contract which could be enforced, subject to any legislation to the contrary.

Held, further, that s 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for the change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited.

Appeal dismissed: decision in *NCR Zimbabwe (Pvt) Ltd* v *Gulliver Consol Ltd & Anor* 1993 (1) ZLR 205 (H) overruled.

Cases Considered

Cases cited:

Absa Bank Ltd v *Sweet & Ors* 1993 (1) SA 318 (C)

Cohen & Ors NNO v *Saphi (Pty) Ltd* 1996 (1) SA 1190 (A)

Corondimas & Anor v *Badat* 1946 AD 548

Horticultural Specialists Ltd v *Wyrley-Birch* 1951 SR 197

Melamed & Anor v *BP Southern Africa (Pty) Ltd* 2000 (2) SA 614 (W)

Moser v *Milton* 1945 AD 517

NCR Zimbabwe (Pvt) Ltd v *Gulliver Consol Ltd & Anor* 1993 (1) ZLR 205 (H)

Soja (Pty) Ltd v *Tuckers Land & Development Corp* 1981 (3) SA 314 (A)

Speaker of the KwaZulu-Natal Provincial Legislature Ex p 1996 (4) SA 1098 (CC)

Tuckers Land & Development Corp v *Strydom* 1984 (1) SA 1 (A)

York Ests Ltd v *Wareham* 1949 SR 197

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Legislation considered:

Regional, Town and Country Planning Act [*Chapter 29:12*], s 39

Town and Country Planning Act 19 of 1945, s 65

Case Information

Mrs *J B Wood*, for the appellant

J C Andersen SC, for the respondent

Judgment

McNally JA: The respondent (Hoselaw) owns land at Borrowdale Brooke. The appellant (X) wanted to buy a stand, but later turned its attention to a portion of a stand, on which it planned to build a retirement village. X submitted a tender to buy this portion of land. Both parties knew that it would have to be subdivided. Hoselaw accepted the offer on 20 July 1999, but then, on 15 September, advised X that there was no valid agreement between the parties. X disputed this and sought an order from the High Court that Hoselaw transfer to it -

> "the proposed remainder of Stand No. 668 in extent 3.9116 hectares as set out in Annexure S immediately upon the grant of approval of the Town Planning Authorities to the proposed subdivision."

The learned judge dismissed the application with costs. He ruled that the transaction fell foul of the provisions of s 39 of the Regional Town and Country Planning Act [*Chapter 29:12*]. He did so on the facts. He held that the agreement was not subject to a suspensive condition relating to the granting of authority to subdivide. Accordingly, he decided that it was not necessary for him to give a ruling on the correctness or otherwise of the decision in *NCR Zimbabwe (Pvt) Ltd* v *Gulliver Consolidated Ltd & Anor* 1993 (1) ZLR 205 (H). In that case, it was held that the provisions of s 39 did not cover a sale agreement if it was made conditional on the granting of a permit for subdivision.

However, the learned judge did remark, in passing, that he found the contentions of Advocate Gillespie (as he then was) which were rejected by the learned judge in the *NCR* case *supra*, very convincing. This means there is doubt on an important question of law. The *NCR* decision is *prima facie* in conflict with the well-known decision in *York Estates Ltd* v *Wareham* 1949 SR 197. It is desirable to eliminate any uncertainty which may exist as to the state of the law in relation to transactions involving portions of land which

are not yet subdivided. Accordingly, I propose, for purposes of argument only, to assume the correctness of Mrs *Wood*'s contention that this is an agreement of sale subject to a suspensive condition.

It is necessary, then, squarely to face the question: "Does s 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*] prohibit persons from entering into an agreement for the

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change of ownership of any portion of a property, even where the agreement is made, expressly or impliedly, conditional upon the obtaining of a permit for subdivision of that portion?"

The section reads, in relevant part, as follows:

" 39. *No subdivision or consolidation without permit*

(1) ... no person shall -

(a) subdivide any property, or

(b) enter into any agreement -

(i) for the change of ownership of any portion of a property, or

(ii) ...

(iii) ...

or,

(c) ...

except in accordance with a permit granted in terms of section *forty*."

This wording has been in place since 1976, although the relevant section was called s 40 before the revised edition of the laws was published in 1996.

Before, that the section had a complex history. I propose to begin by looking at the provisions of the Southern Rhodesian Country Land Sales Restriction Regulations 1943, which were considered by the Appellate Division of South Africa on appeal from the High Court of Southern Rhodesia in the case of *Moser* v *Milton* 1945 AD 517.

Milton had sold land to Moser. The sale was subject to an express condition that the approval of the Minister was to be obtained. His approval was necessary in terms of the following provision in the regulations:

" 3. No agreement for the sale of immovable property shall be of any force or effect unless -

(a) such agreement has been reduced to writing ... and

(b) the purchaser, the purchase price and the other terms and conditions of such agreement have been approved by the Minister."

Moser resiled from the agreement on 12 July 1944. The Minister gave his approval the following day. Milton argued that Moser had no right to resile. He lost. The court ruled that:

"inasmuch as the parties were not bound unless the contract had been approved by the Minister, the buyer was entitled to resile from the contract before such approval was given."

The fact of the suspensive condition was irrelevant in the light of the wording of s 3(b).

McNALLY JA

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The very next year the same court came to an apparently different conclusion in the case of *Corondimas & Anor* v *Badat* 1946 AD 548. This case arose out of the interpretation of a different statute - a South African statute - and I will deal with it later in this judgment.

Meanwhile, reverting to this country, the Town and Country Planning Act 19 of 1945 came into effect on 11 January 1946. The relevant s 65 read:

> "No person shall sell or lease or offer for sale or lease any portion of a property or enter into any contract or arrangement or do any act which may lead to the subsequent subdivision of a property unless the permission of the Minister has been obtained for the subdivision of such property."

In the light of that definition, Lewis ACJ had to decide *York Estates Ltd* v *Wareham supra*. He had no difficulty in concluding that the agreement, under which W agreed to sell Y a small unsubdivided portion of his farm, was illegal and unenforceable. It was immaterial that ministerial approval had already been granted at the time the agreement was sought to be enforced. It did not matter that s 65 contained no express declaration of nullity. He said:

> "As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute."

The decision was followed by Tredgold CJ in *Horticultural Specialists Ltd* v *Wyrley-Birch* 1951 SR 197. Curiously, neither judge referred to *Moser* v *Milton supra*. They must have been aware of it, if only because it was Lewis ACJ whose decision the Appellate Division had reversed. Nor did they refer to *Corondimas & Anor* v *Badat supra*. Perhaps they thought the wording of the Act was so clear, and its coverage so extensive, that is was unnecessary to cite too much authority.

The *York Estates* decision stood unchallenged in our courts for many years. But meanwhile, in South Africa, strange things were happening.

The problem began with *Corondimas & Anor* v *Badat supra* in 1946. Almost the same court sat as in *Moser* v *Milton supra* the year before (Feetham AJA replaced Davis AJA). The facts were these. Corondimas had sold to Badat (an Indian) some land in Durban. The agreement was subject to "removal of AA clause at expense of seller". AA meant Anti-Asiatic.

On 24 August 1944, the Minister of the Interior approved the removal of the clause. On 6 October 1944, Corondimas repudiated the agreement, claiming that it had been entered into without the authority of a permit issued in terms of Act 35 of 1943, and was therefore null and void.

The relevant section of the Act read:

> "5(1) No European shall, except under the authority of a permit issued under section 7, enter into any agreement with an Asiatic in terms of which any party to the agreement acquires or purports to acquire -

McNALLY JA

(a) any land or premises ...

(b) ...

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(c) ...

(2) Any such agreement entered into after the commencement of this Act, between a European and an Asiatic, otherwise than under the authority of such a permit, shall be null and void."

The court ruled that the contract was binding and the repudiation by *Corondimas* unlawful. It has been suggested that the decision was based more on the court's dislike for the policy of racial discrimination than on legal logic. Essentially, the reasoning was that the agreement was not an agreement of sale until the suspensive condition relating to compliance with the law was fulfilled. Therefore, it was not hit by the section, and was valid. Once the permit was granted, the agreement ripened into one of purchase and sale. But by then it was lawful, the permit having been obtained. So subsequent repudiation was unlawful. *Moser* v *Milton supra*, was distinguished on the grounds that in *Moser* the defendant resiled *before* the Minister's approval was granted, whereas in *Corondimas* he resiled *afterwards*.

I find this distinction difficult to justify. If the agreement in *Moser* was not a contract of sale, what was it? And if it was not a contract of sale, and thus not hit by the prohibition, and thus lawful, on what grounds could Moser lawfully resile?

Over the years, criticism of the *Corondimas* decision mounted, although as a decision of the highest court it was followed. Criticism centred on the contention that it was wrong to say that a sale subject to a suspensive condition was not from the very beginning a contract of sale. In *Soja (Pty) Ltd* v *Tuckers Land and Development Corporation* 1981 (3) SA 314, Trollip JA, writing for the 3-2 majority, noted, at 321F-G, that the principle enunciated above had been "trenchantly criticised by writers." However, he followed it, on the grounds that the point had not been argued.

By the time the matter came to be considered again in *Tuckers Land Development Corp* v *Strydom* 1984 (1) SA 1 (A), the law had been amended, though not in time to affect the decision in that case. The facts of the case had arisen in February 1971. The law had been changed in October 1982. The court sat in August/September 1983.

The contract for the sale of an undivided portion of a township had been entered into in 1971, subject to a condition that "the sale hereby made is suspensive and subject to the due proclamation of the said township."

The relevant legislation was s 57A(1) of Transvaal Ordinance 25 of 1965, which provided:

"After an owner of land has taken steps to establish a township thereon, no person shall, subject to the provisions of s 58, enter into a contract ... for the sale of an erf ... in such township ... until such township has been declared an approved township."

McNALLY JA

Strydom sought to resile in 1978, after the township had been approved in 1977.

The court held, following *Corondimas*, that he could not resile. But it is reasonably clear (I qualify my statement because the judgment is in Afrikaans, and I rely on the headnote, from which it appears that different judges gave different reasons) that it did so only because "the

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vested rights of a considerable number of purchasers and sellers depended on this approach".

Three of the judges conceded that the *Corondimas* approach was difficult to accept on logical grounds. A fourth said it was directly in conflict with the common law. And it was noted (I suspect, with relief) that s 57A(1) had since been amended by s 3 of Ordinance 19 of 1982 (T) so as to bring contracts subject to a condition, including a suspensive condition, within the ambit of the prohibition from 13 October 1982. Thus, one feels, was an awkward legal chapter brought to a close.

Meanwhile, back in this country, the legislation underwent a number of changes in wording. Section 65 of the Town and Country Planning Act, 1945, was repealed and replaced by s 30 of Act 54 of 1954. The new s 65 read:

> " 65(1) Subject to the provisions of this section, no person shall subdivide or enter into any agreement for the subdivision of any property unless the permission of the Minister has been obtained for such subdivision.
>
> " (2) Any agreement for the sale or alienation of any portion of a property and any agreement whereunder any person is given -
>
> (a) a right, whether vested or contingent, to acquire any portion of any property whether immediately or on the fulfillment of any condition or on the happening of any event ...; or
>
> (b) ...
>
> shall for the purposes of this section be regarded as an agreement for the subdivision of a property."

That wording, which is explicit and restrictive, was carried forward as s 75 of Chapter 133 of the Revised Edition of the Laws in 1963, and as s 78 of Chapter 213 of the Revised Edition of 1974.

The major change in wording was introduced by Act 22 of 1976, whose s 40 remains today as s 39 of the current Act, spelt out earlier in this judgment.

I have been unable to find any reason why the wording was changed. The relevant *Hansard*, Vol 92 for September 1995 to February 1996, at Column 889 shows that there was no discussion on this aspect. The relevant passage reads, starkly:

> "Clauses 26 to 64 put and agreed to."

This leads me finally to the decision in the *NCR* case *supra*. The facts there were that the seller of the undivided stands (Gulliver) admittedly sold them

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McNALLY JA

to NCR on the basis of a suspensive condition that subdivision would be approved. Gulliver then must have sought to resile, because NCR brought an application to interdict them from selling to anyone else.

The learned trial judge granted the interdict. In so doing, he relied both on the *Corondimas* decision and on the fact that the wording of the section had been changed in 1976.

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I have to say with respect that I do not agree, for a number of reasons.

First, if *Corondimas* was correct, which with great respect I do not think it was, it drew a distinction between cases where the party resiled *before* the ministerial or Town Planning Authority had approved the subdivision, and cases where it sought to resile *after* approval had been granted. Corondimas had sought to resile *after* approval. That was why the court was able to distinguish *Moser* v *Milton supra*. Moser had resiled *before* the Minister's approval.

The facts in the *NCR* case, and in the present case, are that the party resiling did so *before* ministerial approval. So *Corondimas* is not the correct precedent. *Moser* is.

Second, it does seem to be the general judicial view that the decision in *Corondimas* was wrong in principle. It was followed only because it was considered that so many people had relied on it as "the law" that it was undesirable to contradict it until legislation was enacted. I do not think I need go further than to cite the words of Joubert JA in *Tuckers Land and Development Corp* v *Strydom supra* which I have (very roughly) translated as follows:

> "Unfortunately, there are instances in our jurisprudence, eg in *Corondimas & Anor* v *Badat* 1946 AD 548, in which it is stated without reference to our common law, that where a thing is sold subject to a suspensive condition (which wholly or partly suspends the operation of the agreement which arises from the sale) then no contract of sale exists *pendente conditione* until the suspending condition is fulfilled, but only a contractual relationship, as it may be described. This approach is wholly in conflict with our common law, it is wrong, and it ought not to be followed unless the contrary is apparent from the wording of the relevant legislation."

See also *Absa Bank Ltd* v *Sweet & Ors* 1993 (1) SA 318 (C) at 322G; *Cohen & Ors NNO* v *Saphi (Pty) Ltd* 1996 (1) SA 1190 (A) at 1193G-H. The matter is still theoretically open in South Africa: see *Melamed & Anor* v *BP Southern Africa (Pty) Ltd* 2000 (2) SA 614 (W) at 625C-D. But there can be little doubt that the opinion of Joubert JA is correct - see, for example, ex p *Speaker of the Kwa-Zulu Natal Provincial Legislature* 1996 (4) SA 1098 (CC) at 1117D-E, and *Christie on Contract* 3rd ed p 152.

Thirdly, and finally, I agree that one has to look at the wording of each individual statute, and one has to take note of the fact that a statute has been re-worded. One must therefore, consider the precise wording of s 39.

I have already quoted the section. The relevant words are:

> "no person shall ... enter into any agreement for the change of ownership of any portion of a property ... except in accordance with a permit granted in terms of section *forty*."

It seems to me to be clear that the legislature has simplified, but not modified, the previous wording. The statute no longer speaks of "a sale" or "an agreement of sale". It uses the much wider expression "agreement for the change of ownership". The agreement with which we are concerned is clearly "an agreement for the change of ownership" of the unsubdivided portion of a stand. What else could it be for? Whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited.

The evil which the statute is designed to prevent is clear. Development planning is the function

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and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say "but I have already entered into conditional agreements; major developments have taken place; large sums of money have been spent. You can't possibly now refuse to confirm my unofficial subdivision or development".

In short, I am satisfied that the learned judge in the *NCR* case *supra* was wrong to follow *Corondimas*, both on the facts and on the law. It follows that the learned judge in the court *a quo* in the present case came to the correct conclusion and was right to query the decision in the *NCR* case *supra*.

The appeal is dismissed with costs.

GUBBAY CJ: I agree.

SANDURA JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

CHAPEYAMA v MATENDE & ANOR 2000 (2) ZLR 356 (SC)

Citation	2000 (2) ZLR 356 (SC)
Case No	Judgment No. S-109-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	July 10, 2000
Judgment	November 21, 2000
Counsel	W Ncube, for the appellant T Magwaliba, for the respondent
Annotations	None

Civil appeal

Flynote

Family law - husband and wife - divorce - marriage contracted under customary law - marriage not registered - distribution of property following divorce - when distribution may be made under general law - general law applicable where justice of case requires - marriage where wife's contribution equal to husband's - justice requiring application of general law - guidance to be obtained from statutory law

Headnote

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The appellant was formerly married to the first respondent. They had married under customary law, but the marriage was not registered. They lived together for several years and had two children. They acquired considerable property during the subsistence of the marriage, through their joint efforts. The property included a house, which was registered in their joint names. The husband terminated the relationship. He sought an order from the High Court that the wife's name be deleted from the deed of assignment in connection with the house. The wife counter-claimed for a fair distribution of all the assets, including the house, acquired during the subsistence of the union.

The trial judge allowed the wife's counter-claim. He held that the application of the concept of a tacit universal partnership was fully justified. In coming to his conclusions on the application of that concept, he expressed the view that the courts should adopt a reformative approach to the application of customary law. On appeal:

Held, that where a husband and wife marry under customary law, and that marriage is not registered, customary law will apply to a dispute arising out the marriage or its dissolution. It is only possible to bring in the general law concept of a tacit universal partnership if the court lays a foundation for applying such law. Such a foundation had not been clearly articulated.

Held, further, that the foundation for applying the concept of a tacit universal partnership was provided in 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 applies in any civil case where the parties have expressly agreed that it should apply or, regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply. A general law concept such as tacit universal partnership may be relied on if in the circumstances the application of customary law would have led to injustice. Where the elements of a tacit universal partnership have been established, useful guidance may be found in s 7 of the Matrimonial Causes Act [*Chapter 5:13*] in considering the division of the matrimonial property.

Held, further, that it was on the basis of s 3 of the Customary Law and Local Courts Act that the application of the principles of s 7 of the Matrimonial Causes Act could be justified, rather than on the basis of the court's reformative duty to interpret customary law in a progressive manner. However, it would be desirable for the law to be amended to provide that s 7 should apply to an unregistered customary law union.

Held, further, that this was a case where the justice of the case required that the general law should apply and where the elements of a tacit universal partnership had been established.

Cases Considered

Cases cited:

Chapeyama v *Matende & Anor* 1999 (1) ZLR 534 (H)

Deputy Sheriff, Harare v *Mafukidze & Anor* 1997 (2) ZLR 274 (H)

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Jenah v *Nyemba* 1986 (1) ZLR 138 (S)

Kuzora v *Madondo NO & Ors* HH-147-98

Makovah v *Makovah* 1998 (2) ZLR 82 (S)

Mashingaidze v *Mashingaidze* 1995 (1) ZLR 219 (H)

Mashingaidze v *Mugomba* HH-3-99

Masimbe v *Mungofa* HH-96-94

Matibiri v *Kumire* 2000 (1) ZLR 492 (H)

Mhungu v *P J Motoring Svcs* S-60-97

Zimnat Ins Co Ltd v *Chawanda* 1990 (2) ZLR 143 (S)

Legislation considered:

Customary Law and Local Courts Act [*Chapter 7:05*], s 3

Matrimonial Causes Act [*Chapter 5:13*], s 7

Case Information

W Ncube, for the appellant

T Magwaliba, for the respondent

Judgment

Muchechetere JA: This is an appeal against the judgment of the High Court, Harare, in which the court *(42) dismissed the appellant's claim with costs and upheld the first respondent's counter-claim. The court went on to order that the appellant should pay to the first respondent 50% of the declared value of $150 000 of the house at 22 Handira Road, Mufakose, ("the said house") within six months of the date of judgment and that the appellant deliver forthwith to the first respondent certain items of movable property listed in the order or pay to her the amount in respect thereof as shown opposite each item. It also ordered that the rest of the movable property at the appellant's rural home be the sole property of the appellant.

The facts in the matter, as found by the court *a quo*, are that the appellant and the first respondent were school and classmates. They fell in love when they were in Grade 7 and their affair subsisted until they married under customary law in 1990. Their marriage was, however, not registered in terms of s 8 of the Customary Marriages Act [*Chapter 5:07*]. They had sat "O"

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Levels together and both had failed. The first respondent decided to take up employment as a domestic worker in Zimunya and was so employed, earning $50 per month, when they decided

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to marry in 1990. She always desired to improve herself by training as a dressmaker and had saved most of her earnings, with the avowed aim of paying for her training as a dressmaker. And at the time they married, she had saved about $250.

Soon after the marriage, the first respondent came to Harare to live with her husband. She immediately registered at a dressmaking school in Highfield and successfully completed a six months' dressmaking course in 1990. During training, she made many garments, ladies and men's suits, which were later sold by the appellant. He used the proceeds to open "a family account" with the POSB, but in his own name. At the time, he opened the account she was away at the appellant's rural home and, in any case, she did not have an identity card. In the circumstances, it was inevitable that the account would have been opened in the appellant's name only. However, according to her the account was a family account into which both of them would and did deposit their respective earnings from time to time.

Upon completion of the dressmaking course, the appellant and first respondent ("the parties") purchased a ZEX sewing machine. They later purchased two other sewing machines. The first respondent's sister also taught her how to knit jerseys and thereafter the parties bought a knitting machine. The first respondent thereafter used the machines to make garments and jerseys which she and the appellant sold in Harare. She also would send some of the garments and jerseys to her mother to sell in the rural areas. According to her, the business was so successful that she would earn up to $3 000 a month from it. She would deposit the proceeds into the family account. She also stated that at times her income exceeded that of the appellant. At some stage she sent some of her earnings to her mother-in-law so that she would buy them (appellant and first respondent) their first cow which her father-in-law named "Majuzi" in recognition of the fact that it was bought from the proceeds of selling jerseys and garments. Later, a second cow was similarly bought. These later multiplied to four beasts.

The above business was initially being carried on from the parties' home but they were later allocated a table at a stall at Highfield market from where they carried on the business. The parties' home at first was a room at the appellant's brother's house, later a rented one room in Highfield and after that a two-roomed house they built on a stand they acquired at Churu Farm near Harare. They later purchased a motor vehicle to enable them to travel from Churu Farm to their stall and the hardware business when their savings reached $16 000. Later, they were evicted from Churu Farm and moved to

Hatcliffe where they lived in a shack for a while before they relocated to Highfield.

The appellant was, at the time, employed as a security guard. He stated that he could not remember his salary at the time, but that over time he was able to establish a hardware business which thrived. At the time of the court proceedings, it was employing between four and nine people. According to the first respondent, part of the income from her side of the business was used to purchase goods for the hardware business.

In 1995, after the parties had saved about $44 000 in the family account, they agreed that it was

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time they purchased their own home. The appellant conducted negotiations with the seller of the said house but was rather reluctant to buy it. The first respondent, however, urged him to buy the said house. In the end, an agreement to purchase the said house was entered into. Although it was reflected in the agreement that the purchaser was the appellant, to the first respondent they were both purchasing a family home. The appellant, together with the first respondent, went to the bank and withdrew $44 000 from the family account. This money was later paid to the seller in the first respondent's presence. The said house was, however, later registered in the Deeds Registry in the names of both parties. In the meantime, the parties had also constructed a dwelling house at the appellant's rural home, which the first respondent valued at $70 000 at the time of separation. They had also acquired all the movables listed in the counter-claim during the subsistence of the union.

About thirty-five days from the day they first occupied the said house, the appellant indicated that he no longer wished to remain married to her. She and some family members (mostly on the appellant's side) attempted a reconciliation but the appellant remained adamant. Thereafter, she went to the appellant's rural home and resided there for a year. She was not allowed to return to the matrimonial home (the said house) to take any matrimonial assets. In 1997, she obtained employment again as a housemaid and was at the time of hearing currently so employed, earning $600 per month. The parties have two minor children.

The appellant sued the first respondent, seeking the relief that her name be deleted from the deed of assignment in connection with the said house. The first respondent, in turn, counter-claimed for a fair distribution of all the matrimonial assets, including the said house, which were acquired during the subsistence of the unregistered customary union.

The first respondent attributed the breakdown of the union to the appellant who, she said, consorted with many women throughout the subsistence of the union. One of them, Grace Machekanyanga (Grace), who gave evidence for the appellant, had a child with the appellant who was being maintained by the

appellant. Grace was an employee of the parties and worked in the hardware shop and also assisted in selling the garments and jerseys. Grace attempted to play down the first respondent's contribution towards the income of the parties, but her evidence was rejected by the learned trial judge because he found it to be patently biased in favour of the appellant.

The learned judge accepted the evidence of the first respondent and rejected that of the appellant, who sought to deny that the first respondent made any financial contribution towards the purchase of the family assets. He was also not forthcoming about the breakdown of the union. These were proper findings by the learned trial judge and Mr *Ncube*, who appeared for the appellant, conceded as much.

During the appeal hearing, Mr *Magwaliba* applied to amend the first respondent's counter-claim in the matter. This was granted, with costs to be borne by the first respondent. It had the effect of adding an additional claim. This was to the effect that, even though there was no express

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agreement between the parties, there was a tacit agreement that the properties jointly acquired by the parties would be divided in equal shares. In other words, there was a tacit universal partnership which arose between the parties on living together as husband and wife.

The learned trial judge properly put the issue he had to resolve at p 543A-B of *Chapeyama* v *Matende & Anor* 1999 (1) ZLR 534(H) ("the said judgment") as follows:

> "... A man and a woman contract an unregistered customary union. They live together for six or seven years as husband and wife under such an unregistered union. During those six or seven years, they have two children. They accumulate considerable property through their joint effort. The property both movable and immovable is valued at $350 000. Their relationship is terminated by the husband and the woman leaves everything behind. Is she entitled to claim a fair share of the property?"

The learned trial judge, after an exhaustive review of a number of authorities, also properly found that, in view of the fact that the union was not registered, this issue could not be dealt with in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Those provisions only apply in cases where the union was either registered in terms of the Marriage Act [*Chapter 5:11*] or in terms of the Customary Marriages Act [*Chapter 5:07*]. In connection with whether or not there was a tacit universal partnership between the parties when that had not been specifically pleaded, his Lordship stated the following at pp 546E-547H of the said judgment:

> "... whatever inference I may make from the facts and evidence in this case I *recognise that it is generally undesirable to determine a case on the basis of an issue which has not been pleaded. In a case, such as the present, where the evidence given during the trial indicates beyond any shadow of doubt that the parties to an unregistered customary union contributed equally for their mutual benefit to the accumulation of property acquired*

MUCHECHETERE JA

> *during such a union, a departure may be made from the general rule. None of the parties will be prejudiced by an approach whereby the matter is decided on the basis of the whole evidence led during the trial, which evidence discloses the existence of a relationship on which a fair apportionment of property can be based*. In this case, the evidence led discloses the existence of a tacit universal partnership. A tacit universal partnership is a common law concept and a basis must be laid for its application depending on the choice of law (See *Chapendama*'s case *supra* (1998 (2) ZLR 18(H)).

> "... The application of the concept of a tacit universal partnership in this case is fully justified. *The division and apportionment of the property acquired by the parties should therefore be decided on the basis of a tacit universal partnership in which their contribution is assessed to be equal, as I have already determined*.
>
> It seems to me, however, that even where a tacit universal partnership has not been pleaded a division and distribution of property acquired during the subsistence of an unregistered customary union is possible. The basis thereof is, however, unclear. In *Pasipanodya* v *Muchoriwa* 1997 (2) ZLR 182 (S), a case involving an unregistered customary union and in which prescription had been raised as a bar to a claim for the division and apportionment of property and the court had found that the Prescription Act [*Chapter 8:11*] did not apply, Muchechetere JA said at 184E-G:
>
> > 'I am of the view that even if the Act (Prescription Act) had been held to apply, the claim for a formal distribution of matrimonial property would not have become prescribed. This is because in my view, the marriage was not dissolved - a marriage under an unregistered customary law (union) can be dissolved either by giving the wife "*gupuro*" or before a customary law court. The parties merely separated. *On the separation, there was no proper distribution of the matrimonial property. In the circumstances, the appellant's claim for a formal distribution cannot be prescribed*.

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> *The respondent was all along labouring under a misapprehension. There is need for a formal distribution of matrimonial property. Formal evidence must therefore be heard over the issue which includes the said property*' (emphasis added).

> Unfortunately, for my purpose, this matter was remitted for trial. It is significant however that the learned Judge of Appeal quite clearly stated that when husband and wife in an unregistered customary union terminate their relationship there must be a proper distribution of property. *The judgment unfortunately does not state the law on the basis of which the 'proper distribution' would be made. Although it was stated at 184D that the rights and obligations of the parties in that case were governed by customary law, it was not made explicit that customary law would apply to the 'proper distribution' of the matrimonial property. It was also not clarified how* 'gupuro' *was to be given*" (my emphasis).

I should perhaps explain that what I had in mind in the *Pasipanodya* case *supra* was that the "proper distribution" of the property would be in accordance with customary law. This is evident from the fact that I clearly mentioned that the rights and obligations in the union would be governed by customary law. And I made reference to "*gupuro*", a term only known to customary law. Further, I indicated that divorces of that nature were normally resolved in a "customary law court". The said court has jurisdiction to apply only customary law in cases before it. Under customary law, although the wife is not entitled to matrimonial property acquired during the

subsistence of the marriage she is nevertheless entitled to property classified as "*umai*" and "*mavoko*". In this connection, see *Mhungu* v *P J Motoring Services* S-60-97 at p 2; *Jenah* v *Nyemba* 1986 (1) ZLR 138 (S) at 142; Ncube in *Family Law in Zimbabwe* at pp 171-172 and *Deputy Sheriff, Harare* v *Mafukidze & Anor* 1997 (2) ZLR 274 (H). As for the giving of "*gupuro*", this, under customary practice and law, occurs when a husband gives a token to the wife, usually in the form of money, with an intimation that he is divorcing her. The wife would thereafter take this to her guardian/s as proof of her husband's intention to divorce her. Thereafter, action on the divorce commences.

As has been pointed out above, the counter-claim in this case has now been amended to include the allegation that a tacit universal partnership existed in this case. On the concept of tacit universal partnership, in addition to *Chapendama*'s case *supra*, see also *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) and cases cited therein. See also *Masimbe* v *Mungofa* HH-96-94 and the cases cited therein, and Sinclair's *The Law of Marriage* vol 1 at pp 278-279.

In coming to the above conclusion on the application of the principles of a tacit universal partnership, and as will be discussed below on the application of s 7 of the Matrimonial Causes Act, the learned judge expressed the view that he was being guided by the need for the courts to adopt a reformative approach to the application of customary law. In this connection, he said at pp 536E-F of the said judgment:

> "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 existing law it is possible for the courts to interpret it in a purposive manner and render it more useful in the changed

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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."

On this, see also *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 153E-154F where the Chief Justice expressed similar sentiments on the need for the courts to make law dynamic and accommodating to change and to adapt it to the fluid economic and social norms and values and to altering views of justice.

Mr *Ncube*, for the appellant, submitted that the learned trial judge erred in utilising the equitable powers conferred by s 7 of the Matrimonial Causes Act to resolve the issue before him. He stated that those powers are limited to situations of divorce under the Marriage Act or a registered

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common law marriage or annulment of marriage or judicial separation. In this connection he cited, in support of his submission, the cases *Makovah* v *Makovah* 1998 (2) ZLR 82 (S); *Chapendama*'s case *supra* (1998 (2) ZLR 18 (H) at 26B-C); *Mashingaidze*'s case *supra* at 223B and *Mashingaidze* v *Mugomba* HH-3-99 at p 19.

The submission is strictly correct. However, as already indicated above, the learned trial judge also appears to have come to that conclusion. In this connection, he said at p 543B-C of the said judgment:

"... But that issue, if viewed from the standpoint of the plaintiff's declaration and the fact that the marriage was not solemnised means that the court *is not being called upon to exercise its matrimonial jurisdiction (in terms of s 7 of the Matrimonial Causes Act). In my view, the court's matrimonial jurisdiction is exercised only in relation to cases involving marriages registered in terms of the Marriage Act* [*Chapter 5:11*] *or the Customary Marriages Act* [*Chapter 5:07*]. *Different considerations would apply to this case - see Kader* v *Kader* 1972 (1) RLR 302 (G) at 313A-E" (my emphasis).

From the above, it is clear that the learned trial judge was alive to the fact that the provisions of s 7 of the Matrimonial Causes Act would not apply in the present situation and, as indicated above, he stated that the court was not being called upon to apply them. But there is a clear distinction between applying the provisions of the section as a matter of law (which would be incorrect) and using them as a guide when applying the common law principles. The learned trial judge should, as I consider he intended to, have clearly stated that he was using them as a guide in the application of common law principles in a situation such as the present one where a tacit universal partnership has been found to exist. He instead indicated the following at pp 551G-552B and 553D of the said judgment:

"A conclusion such as that alluded to by Gwaunza J in *Mashingaidze*'s case *supra* (*Mashingaidze* v *Mugomba* HH-3-99) to apply as a guide (and it is a good guide) the criteria set out in s 7 of the Matrimonial Causes Act to determine the apportionment of matrimonial assets is called for in relation to cases such as the present one. It would, in the words of Gubbay ACJ, not be an interference with the prerogative of Parliament to make new laws but simply the effect of applying the principles deriving from recent cases and legislative developments to a specific situation. After all, the power of the court under s 7 of the Matrimonial Causes Act is a discretionary and equitable power (*Muzanenhamo & Anor* v *Katanga & Ors* 1991 (1) ZLR 182 at 188D). *There would be no prejudice caused to other tenets of customary law if it was decided in a specific case to apply the principles of the Matrimonial Causes Act to determine the respective proprietary rights of a spouse to an unregistered customary*

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union which has come to an end. This case, to my mind, merits the application of those principles. The principles are widely used in all divorce cases in this country. A 'divorce' under the regime of an unregistered customary marriage is no less a divorce for the parties. It puts an end to cohabitation. It puts an end to the other reciprocal obligations of the parties. It is a divorce in everything but name. *I see no harm in applying those principles to this case*" (my emphasis).

And he went on to say at p 553D:

MUCHECHETERE JA

"Therefore, *applying as a guide* the provisions of s 7 of the Matrimonial Causes Act ... the order I make is the following ..."

It is clear that the learned trial judge felt compelled to apply those provisions as a guide in the situation stated above, because of what he properly considered would have been an injustice done to the first respondent if customary law was applied. He, however, ought to have justified this intervention on the basis of the provisions of s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] and not on what he stated as the court's reformative duty to interpret customary law progressively so as to adapt it to the changing social and economic conditions. This issue is discussed below.

The learned trial judge also concluded that the principles of a tacit universal partnership were or could be applicable in this case. And that even though a tacit universal partnership was not pleaded it could still be relied upon because the facts and the nature of the case cried out for those principles to be applied. As has also been indicated above, the counter-claim was amended before this court to include tacit universal partnership.

Mr *Ncube* submitted that it was not proper for the court *a quo* (if it so did), nor for this Court, after the amendment, to apply common law principles, as in this case, customary law principles are clearly applicable. I have already indicated above that an unregistered customary law union can be dissolved and the property distributed in terms of customary law. Although Mr *Ncube* did not cite any authority for this submission it appears to receive support in *Mashingaidze*'s case *supra* (1995 (1) ZLR 219 (H)) where the facts were similar to those of this case. Robinson J said at pp 222H-224A:

" 2. On the merits, the application is ill-founded in that *it seeks to apply a general law concept, namely, the concept of a tacit universal partnership, to an unregistered customary law union which has come to an end, without attempting to lay any foundation for applying general law to the facts of this case in lieu of the application of customary law, in accordance with the choice of law rules prescribed by s 3 of Part 1* (which still stands - see s 1(1) as read with s 31 of the Customary Law and Local Courts Act 2 of 1990, as amended by s 18 of Act No. 22 of 1992, as read with SI 127A of 1993) of the Customary Law and Primary Courts Act 6 of 1981. No doubt the applicant grasped at the straw of a tacit universal partnership in the light of her knowledge *that the court was empowered to make an order with regard to the division apportionment or distribution of matrimonial assets in terms of s 7 of the Matrimonial Causes Act 33 of 1985 only in the case of a marriage duly solemnised under the Marriage Act* [Chapter 37] *or the African Marriages Act* [Chapter 238].

Too many legal practitioners tend to *labour under the simplistic belief that the concept of a tacit universal partnership is their client's salvation where there appears to be no other solution open to them.* However, they should be cautioned that in *Chiromo* v *Katsidzira* 1981 ZLR 418 (A) at 421D, Fieldsend CJ referred to the South African case of *Verster* v *Verster* 1964 (4) SA 310 (T) (the judgment is in Afrikaans) as

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demonstrating the difficulties in the way of establishing a claim

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of this nature. As it is, the closest to which I have come in finding a case in our jurisdiction where the concept of a tacit universal partnership has been applied is the case of *Masimbe* v *Mungofa* HH-96-94 (not reported), in which the applicant, a medical doctor, and the respondent, a nursing sister, had lived together as man and wife for a number of years before their relationship broke up. For cases in South Africa where the concept of a tacit universal partnership have been applied, see *Fink* v *Fink & Anor* 1945 WLD 226; *Isaacs* v *Isaacs* 1949 (1) SA 952 (C); *V* (also known as L) v *De Wet NO* 1953 (1) SA 612 (O) and *Muhlmann* v *Muhlmann* 1981 (4) SA 632 (W). (In the last mentioned case at 634F-635E, McCreath J summarised the principles which the court will apply where in divorce proceedings a spouse married out of community of property claims that a universal partnership had existed between them and claims an order in respect thereof and a division of the assets of such partnership). See also *Ally* v *Dinath* 1984 (2) SA 451 (T) and *Kritzinger* v *Kritzinger* 1989 (1) SA 67 (A).

However, from my remarks *I do not wish it to be thought that the applicant, for whose position I have much sympathy, does not have good grounds for recovering a share of, or a share in the value of the assets towards the acquisition or improvement of which she can establish that she has contributed financially or otherwise during her union with the respondent, particularly so in the case of the immovable properties in regard to which general law and not customary law applies.* See *Komo & Leboho* v *Holmes NO* 1935 SR 86 at 94-95; *Vela* v *Mandinika & Anor* 1936 SR 171 at 174; *Dokotera* v *Master of the High Court & Ors* 1957 R&N 697 (SR) at 701E; *Gwebu* v *Gwebu* 1961 R&N 694 (SR) at 699E-F; *Jirira* v *Jirira & Anor* 1976 (1) RLR 7 (G) at 15G; *Katsidzira* v *Chiromo* 1981 ZLR 87 (G) at 95H; *Jenah* v *Nyemba* 1986 (1) ZLR 138 (S) at 141F and *Ncube Family Law in Zimbabwe* p 166 para. 10.2.1" (my emphasis).

I should point out in the *Masimbe* v *Mungofa* case *supra* there was no claim to the effect that the parties had contracted an unregistered customary law union.

I agree that, as the union in this case is governed by the principles of customary law, it is only possible to bring in the concept of a tacit universal partnership, a general law concept, if a court lays a foundation for applying such law. And further that in this case such a foundation was not clearly articulated.

That foundation is provided in the provisions of section 3 of the Customary Law and Local Courts Act [*Chapter 7:05*]. This reads:

" 3. Subject to this Act and any other enactment *unless the justice of the case otherwise requires* -

(a) customary law shall apply in any civil case where -

(i) the parties have expressly agreed that it should apply; or

(ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply; or

(iii) ...

(b) *the general law of Zimbabwe shall apply in all other cases*" (my emphasis).

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In the case of *Matibiri* v *Kumire* 2000 (1) ZLR 492 (H), Chatikobo J considered the above provisions in connection with a case whose facts are similar to those of the present case. He found, in that case, that the parties had not expressly agreed that customary law should apply in their case. He also found that no inference could be drawn from the surrounding circumstances that the parties had agreed to have the matter determined according to customary law. He found on the facts that there was no tacit universal partnership, but made it clear that he would have applied the common law, had the facts warranted such an approach.

He said at p 497E-498B of the judgment:

> "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 common law should apply.* This was precisely the case in *Chikosi* v *Chikosi* (1) 1973 (3) SA 142 (R) and *Chikosi* v *Chikosi* (2) 1973 (3) SA 145 (R) where it was held in essence that where the justice of the case requires, common law principles shall apply. ... 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" (my emphasis).

See also *Mashingaidze* v *Mugomba supra* where Gwaunza J said:

> "The plaintiff has based her claim on unjust enrichment, a general law principle. This court has in the past urged legal practitioners in a case where customary law may be applicable, *to advert to the choice of law rule in terms of s 3 of the Customary Law and Local Courts Act* [Chapter 7:05] *and lay a proper foundation for the application of general law and the invocation of a concept such as unjust enrichment*" (my emphasis).

And the learned trial judge himself agreed with the above sentiments. For he said at pp 15-16 of the cyclostyled judgment in *Kuzora* v *Madondo NO & Ors* HH-147-98:

> "In what circumstances does the court declare the existence of a universal partnership? Where parties have been married in community of property the court ordinarily finds that a universal partnership existed ... The present case is different on its facts from the two cases I have just cited and it is distinguishable on the ground that the plaintiff and the late Detlev Pasalk were not mistaken as to the invalidity of their marriage. No evidence was led to show that they were mistaken. Though lobola had been paid and they were at custom husband and wife, they did not register their marriage in terms of the Customary Marriages Act [*Chapter 5:07*] or the Marriage Act [*Chapter 5:11*].

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> In *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219, Robinson J cautioned against the practice of invoking the concept of a tacit universal partnership to an unregistered customary law union which has come to an end without laying a foundation for applying the general law to the facts of the case in lieu of the application of customary law. I adopted his approach in *Chapendama* v *Chapendama* HH-107-98. *I stated that in a case where the litigants were married customarily in an unregistered marriage the appropriate route is to apply the choice of law rule in s 3 of the Customary Law (Application Act) (Customary Law and Local Courts Act)* [Chapter 7:05] *and I concluded that the general law applied in that case. In the present case, too, the conclusion is inescapable that the general law of Zimbabwe should apply ... I must again state that the litigants and their legal practitioners who become involved*

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in a case as the present in which customary law may be applicable must, in every case, advert to the choice of law and lay a proper foundation for the application of the general law and the invocation of a tacit universal partnership" (my emphasis).

I agree with the views expressed by the three learned judges and, in particular, with the approach of Chatikobo J in *Matibiri* v *Kumire supra*. I therefore consider that it would have been better and proper for the learned trial judge to have, in the present case, also followed what he said and held in the *Kuzora* and *Chapendama* cases *supra* in finding that the general law was applicable in the circumstances and that in the result the principles of a tacit universal partnership should be applied. The facts in this case are similar to those in the above cases.

The court found that the first respondent's contribution to the acquisition of the matrimonial property was equal to that of the appellant. And this merits her being awarded about half of the property acquired during the subsistence of the union. If customary law principles were to be applied she would therefore have been deprived of this property not because of her fault - the divorce was, as already stated above, because of the appellant's fault and she tried all she could to effect a reconciliation. She would also have been deprived of the property before any formal divorce proceedings were made. There is, in this connection, no mention in the appellant's claim that divorce proceedings before a customary law court had been gone through. Formal proceedings would have enabled a customary law court to award the first respondent the "*umai*" and "*mavoko*" property and perhaps ameliorated some of the difficulties the first respondent was facing. The evidence is that after she was excluded from the said house she was never allowed back to collect any property even "*umai*" and "*mavoko*" property. A strict application of customary law would have also glossed over or ignored, as Mr *Ncube*, in my view, wrongly urged this court to do, the fact that the ownership of immovable property in this case the said house, is determined in accordance with the general law. In this connection see *Jenah* v *Nyemba supra* at p 141F-G where the Chief Justice said:

"Ownership of immovable property, in the event of a divorce or the death of the husband,

is determined in accordance with the general law. This is because the concept of private ownership of immovables is unknown to customary law. See *Dokotera* v *The Master* 1957 R&N 697 (SR) at 702H-703C; *Gwebu* v *Gwebu* 1961 R&N 694 (SR) at 699E; *Jirira* v *Jirira & Anor* 1976 RLR 7 (G) at 15G-H; *Chiromo* v *Katsidzira* 1981 ZLR 418 (A) at 419D-E."

I therefore come to the conclusion that the judgment of the learned trial judge would have been clearer if he had set out the following two consecutive findings that:

(a) this is a matter where the justice of the case required, in terms of s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*], that the general law be applied;

(b) the elements of a tacit universal partnership have been established and that in considering the division of property under that concept useful guidance can be found in the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*].

It is however, clear that the learned trial judge dealt with the distribution of the property between

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the parties as if he had made those specific findings. In the circumstances I see no reason to interfere with his decision in that respect.

I would, however, urge the legislature to visit this part of the law with a view to doing justice to women who find themselves in the same situation as that of the first respondent in this case. A simple amendment would be to state that the provisions of s 7 of the Matrimonial Causes Act would also apply to an unregistered customary union. The call for change in the law has also been made by Gwaunza J in *Mashingaidze* v *Mugomba supra* (HH-3-99) at p 21 of the cyclostyled judgment where her Ladyship stated:

> "However, while I would support the view that a proven unregistered customary union should be treated like any other marriage when it comes to dissolution and the division of assets jointly acquired by the parties during its subsistence, such view is currently not supported by the law. *All that can be said is that time has surely come to actively consider reviewing the situation especially in the light of the increasing and not inconsiderable recognition being extended to unregistered customary law unions.* The latest is through the Administration of Estates Amendment Act No. 6 of 1997, where the definition of widow includes one in an unregistered customary law union. This is however, not to say that registration of marriages is not important and desirable; but that this must be balanced against the practical reality of people's daily lives. Statistics show that the vast majority of 'marriages' (other than non-African marriages) are unregistered customary law unions. *In such cases a situation allowing courts to apply, purely as a guide, the criteria set down in s 7 of the Matrimonial Causes Act for determining the apportionment of matrimonial assets between a divorcing couple would, in my view, go a long way towards ensuring gender equity* in the distribution of resources between parties whose entitlements should by right be measured according to their gender contribution. After all, the problem arises out of a relationship that has all the peculiarities of marriage" (my emphasis).

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I associate myself with the above sentiments.

In the result, the appeal is dismissed with costs. The costs of the amendment to the counter-claim are payable by the first respondent.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

LM Kabote & Co, appellant's legal practitioners

Magwaliba Matutu & Kwirira, first respondent's legal practitioners

CHIREMBA & ORS v RESERVE BANK OF ZIMBABWE 2000 (2) ZLR 370 (SC)

Citation 2000 (2) ZLR 370 (SC)

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Case No	Judgment No. S-117-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	September 7, 2000
Judgment	November 21, 2000
Counsel	S V Hwacha, for the appellants J C Andersen SC, for the respondent
Annotations	None

Civil appeal

Flynote

Employment - contract - variation - right to regular reviews of salary - not a right to regular increases in salary - freeze on salaries above a certain level - not a breach of contract

Revenue and public finance - Reserve Bank - duties of Reserve Bank - must operate on a viable basis

Headnote

The Reserve Bank introduced a new job evaluation and reward system. One of the features of the system was the freezing of all salaries above a certain level until the salaries fell within the new scales. Certain benefits would also be converted into salary. The appellants claimed that this was an arbitrary variation of their conditions of service and a breach of their contracts of employment. They said that they were entitled to regular reviews of salary. The Bank argued that the appellants had no right to annual increases in salary, nor to benefits which were converted into salary. In any event, a review of salary did not have to produce an increase in salary.

Held, that a right to a salary review constitutes no more than a right for the employees' salaries to be reconsidered. It does not give a right to an increase in salary.

Held, further, that the Bank had a right to have regard to the need to rationalise salaries and remove anomalies. It had to ensure that salaries were not excessive, especially because salaries were at the expense of the Consolidated Revenue Fund and ultimately the taxpayer. The Reserve Bank was obliged by legislation to operate on a viable basis.

Held, further, that there was no provision in the appellants' conditions of service that they were entitled to benefits or that the benefits might not be incorporated into salary.

Cases Considered

Case cited:

Min of Information v *PTC Managerial Employers Workers' Cttee* 1999 (1) ZLR 128 (S)

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Legislation considered:

Audit and Exchequer Act [*Chapter 22:03*], Part V

Reserve Bank of Zimbabwe Act [*Chapter 22:10*], s 17

Case Information

S V Hwacha, for the appellants

J C Andersen SC, for the respondent

Judgment

Muchechetere JA: This is an appeal against the judgment of the High Court, Harare, on 5 January 2000 in which the appellants' application in the court *a quo* was dismissed. The appellants had applied for the following order:

> "It is ordered that:
>
> 1. The freeze on the applicants' (appellants) salaries applied by the respondent be and is hereby declared null and void and/or (be) set aside.
>
> 2. The respondent (is) ordered not to enforce the freeze on the applicants' salaries.
>
> 3. The respondent is ordered to pay costs of the application."

The facts in the matter are that the appellant and two hundred and six others are employees of the respondent ("the Bank"). The said Mirirai Edson Chiremba ("Mr Chiremba") was chairperson of the Workers' Committee and therefore filed the application on behalf of all employees of the Bank who fell under the Workers' Committee. Before the hearing of the matter in the court *a quo* Mr Chiremba was declared a managerial employee and his place as the chairperson of the Workers' Committee was taken by one C Gambiza ("Mr Gambiza"). Mr Gambiza therefore swore the answering affidavit in this matter and Mr Chiremba swore an affidavit to state that he still remained an applicant in his own capacity.

On 3 December 1998, the Governor of the Bank issued a circular ("the circular") by which he introduced a new job evaluation and reward system. Clause 5.5(f) of the circular stated that the Board of Directors of the Bank had resolved that there would be a new reward design system, one of whose essential features would involve freezing all salaries above 140% of the market rate until such time as those salaries fell within the new scales. And that at the same time there would be no offer of exit.

The appellants contend that the effect of the resolution is to freeze salaries at a certain level for those employees whose salaries exceed the market rate by more than 140% and that the period of such freeze is indefinite. Further, one of the things which the Bank resolved to do is to convert benefits enjoyed by the employees, such as clothing, parking and transport allowances, into salary. The appellants also contend that the effect of such conversion is that the percentage by which the salaries exceed the cut-off point would be increased markedly, thereby lengthening

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the time it will take for the salaries of the affected employees to fall within the new scales.

The appellants complained that the Bank's above action is an arbitrary variation of their conditions of service and that it amounts to a breach of the contract of employment between each employee and the Bank. They contend that in particular it is a breach of para 4.2 of the conditions of service, which reads:

" 4.2. Salary offers will be indicated at interview.

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> All staff salaries are reviewed annually in May and July, and the principal factors influencing awards are the cost of living and individual performance, subject only to any government regulations in force."

It is further contended that the conduct of the Bank is inconsistent with the Labour Relations Act [*Chapter 28:01*], whose requirements are that parties to an employment contract negotiate in good faith - negotiations between the Workers' Committee and the Bank's Works Council were broken off by the Bank's Board of Directors, who then proceeded to impose the above changes unilaterally.

The Bank, on the other hand, denies that the Board's decision has the effect of depriving the appellants of any payments contractually due to them. It contends that any changes which have been made fall within the powers possessed by the Board. They also contend that the appellants have no contractual rights to annual increases in salary and that benefits which were converted into salary do not form part of the conditions of service and are not included in the letters of appointment. They therefore submit that as the employees are not statutorily entitled to receive annual increments, or to be paid any of the benefits which are being incorporated into salary, there is no contractual bar to the Bank incorporating such benefits into salary. Therefore the appellants have no cause of action in the matter. The Bank explained that the incorporation of benefits into salary would benefit employees, in that they will form part of their pensionable emoluments and will also enhance any future increments in salary as well as the level of loan entitlements.

The Bank also explained that restructuring exercises which incorporated the above reward system were preceded by the survey conducted by Coopers & Lybrand in 1994 to examine the Bank's reward system in comparison with the financial sector in Zimbabwe. This was followed by a salary survey of the banking and financial sectors of Zimbabwe, which was conducted by Hay Management Consultants and their associates, Lorimak, in 1997. Both surveys concluded that there were serious salary and grading distortions and anomalies within the Bank and that in the lower and middle grades salaries and benefits were above the market rate. The Bank states that at all times all employees of the Bank were kept abreast of the developments taking place and that the proposed pay system was explained to them, amongst other matters.

The Bank also states that the Board acted upon the advice it received because it considered that not so acting would be failing in its management duty. It had to act to correct the anomalous situation which was economically unsound and unfair and a disincentive to those employees whose remuneration packages were close to or below the market rate to remain. As it could not

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reduce the salaries of its overpaid employees, it decided to impose a

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temporary freeze on those affected, the length of which will depend on the rate of inflation and the consequent escalation of the market rate.

It also stated that five hundred and eighty-four out of seven hundred and eighty-five employees would be affected by the temporary freeze and the excess salary paid over the upper quartile of the market in connection with those five hundred and eighty-four employees was $47 671 652.66 *per annum*. It went on to state that if it were practicable to align their salaries to the market rate immediately the Bank's salary bill would be reduced by $92 475 600 *per annum* from the present $140 147 252.66. It further explained the Hay System which the Bank has adopted in determining salaries of employees and the market rate, and stated that the Bank was advised to adopt the median quartile which marks the 50th quartile as its comparative level. It, however, decided to adopt the upper quartile of the market as the level at which it will pay its employees in order to attract, motivate and retain quality employees. This and other factors mean that the new salaries will continue to compare favourably with those in the banking and financial sectors.

The Bank also explained that, although certain employees will not receive increments until their salaries fall within the new scales, the performance related increases will continue to be paid as a cash performance bonus. Salary reviews will be conducted once annually when merit increases and cost of living will be taken into account.

The first question to resolve is whether or not the Bank varied the terms and conditions between it and the appellants.

Mr *Hwacha*, for the appellants, submitted that the circular already referred to had the effect of varying the contractual terms and conditions between the appellants and the Bank, which before the circular provided the following:

> "All staff salaries are reviewed annually in May and July, and the principal factors influencing awards are the cost of living and individual performance."

He went on to say the variation is confirmed by the Bank, for at para 12(b) of the opposing affidavit one Timothy Kandashu Majero, the Bank's assistant director in the Institutional Development and Governor's Office, said:

> "... Salary reviews will now be conducted once annually and not separately for merit increases in May and cost of living in July but on an annual basis considering both factors. The two factors of performance and cost of living are and will remain important or principal factors but it is the respondent's view that it is fully entitled to consider any other relevant factors in its review including its financial ability to pay an increase and the relationship of the respondent's salaries to the market ..."

Mr *Hwacha* also submitted that the circular had the effect of freezing the appellants' salaries without their consent and that the freeze is also a

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unilateral variation of the said terms and conditions of the contract between the parties.

Mr *Hwacha* thereafter argued that what occurred was that whilst before the appellants were entitled to two reviews in every year, at times fixed by the contract, they are no longer entitled to any reviews. He went on to state that a change from fixed and scheduled reviews to none or uncertainty should have been held to be a variation of the terms and conditions of the contract. He also stated that at best the appellants will now receive increments or be entitled to reviews according to uncertain timing at the respondent's sole discretion and that the reviews are no longer guided by performance and inflation, but by comparisons with the market solely undertaken by the respondent. In conclusion, he stated that the variations which were made to the appellants' contracts of employment without the consent of the appellants were in connection with the criteria and the timing of the review process and also the conversion of their benefits into salary.

Although the question of the alleged failure or refusal by the Bank to negotiate in good faith with the appellants over the above issues was raised by the appellants as being an unfair labour practice in terms of ss 8(c) and 24 of the Labour Relations Act [*Chapter 28:01*], it was not persisted with during the hearing. This was because there is evidence on the papers that the Bank did approach the appellants' Workers Committee representatives in the Works Council on the matter.

Mr *Andersen*, for the Bank, in his submissions denied that the conditions of employment of the appellants were varied in any respect. He firstly argued that there was no condition to the effect that a review would result in an increase of salary. Secondly, that the factors referred to which may be taken into account are not the only factors but the principal ones. Other relevant factors may be taken into account. And that the matters to be taken into account, the weight to be afforded to them and the decision as to whether or not an award should be granted are all matters left to the discretion of the Bank.

Mr *Andersen* also submitted that a statutory or contractual right for review of a salary constitutes no more than a right for it to be reconsidered in the light of prevailing circumstances. I agree with that submission and the finding on the matter by the learned trial judge. He said at p 10 of the cyclostyled judgment (HH-10-2000):

> "A review involves a process of re-looking (at) or re-examining something with a view to correction or improvement. The duty cast upon the respondent (the Bank) by clause 4.2 is to revise its employees' salaries annually against the backdrop of the prevailing cost of living as well as the individual employee's performance. The outcome of such a process of revision will always depend on the state of the economy. If it turns out that during the

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> year under review, inflation has been greatly reduced and the economy is buoyant with consequent slashing of prices there would be no justification for an upward adjustment of salaries. Similarly, if it turns out that a particular

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> employee's performance has been unsatisfactory, a performance related increase would be unjustified. And, as the respondent contends, where salary receivable by the employees is way above the market rate there would be no justification to award an increase in salary to cushion the employees against increases in the price of commodities or the cost of services. The undertaking to review salaries annually is intended to ensure that employees' salaries do not lag behind the cost of living as well as to reward individuals for performance. The respondent's attitude concerning increases based on performance is that such increases will not be stopped although the increase will be paid as a performance cash bonus which will not be built into salary. In this regard therefore, there will be no pecuniary prejudice for those employees whose performance merits rewarding. There is, in my view, no breach of the duty to reward employees annually for good performance."

I also agree that the Bank's Board resolutions stated above do not constitute a breach or a change of the appellants' conditions of service. The resolutions were not to the effect that annual salary reviews would not take place. All that they indicated, as was stated above, was that such reviews would take place annually and would include, in respect of those employees subject to the freeze, consideration of the above aspects and as to whether the freeze is still applicable to the employees in question. The real objection of the appellants is not that reviews will not take place but that the result will not be an increase where the freeze is applicable. And, as already found above, a review does not always result in an increase of salary. Further, in my view, the appellants were entitled to one annual review and it does not matter that the review is now being done once a year when all relevant elements will be considered instead of twice, in May and July, when the separate elements were considered.

I also agree that the Bank was entitled to have regard to the need to rationalise salaries to remove anomalies and ensure that they were not excessive. This is more so because not to have done so would have been at the expense of the Consolidated Revenue Fund and ultimately the taxpayer. And that would have been in breach of the Bank's general duty, implied by s 17 of the Reserve Bank of Zimbabwe Act [*Chapter 22:10*] and the general provisions of Part V of the Audit and Exchequer Act [*Chapter 22:03*], to operate on a viable basis. In this connection, see *Minister of Information* v *PTC Managerial Employers Workers' Committee* 1999 (1) ZLR 128 (S) at 138A-D, where the Chief Justice said:

> "In holding that irrationality was present, Chinhengo J stated at 467E-G that:
>
> > 'the mere fact of designation is not of itself the root cause of the problem here. It is rather the Minister's refusal to adjust the salaries of the designated employees to take account of the changes in the salary structure brought about by the job evaluation exercise. I think that the situation obtaining at the Corporation is untenable. The applicant's members should not be in receipt of salaries and allowances that are exceeded in some instances

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> by those received by their junior managers. Equally, the junior managers should not be in receipt of salaries which are disproportionately close to those received by the designated employees without suitable adjustment of the latter's salaries and allowances. That cannot be said to be in the interests of the Corporation. The applicant adverted to the dangers and detrimental effects of such a salary and allowances structure. It is disastrous for the Corporation.'
>
> I respectfully agree with these remarks. The irrationality lay not in the failure of the Minister to adjust the emoluments of the designated employees to the level recommended in the job evaluation exercise, but rather in the omission to adjust them to a level which did away with the present anomalies.

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I am conscious of the argument that the pay structure anomalies were in part attributable to the Corporation's Board because its failure to contain the emoluments of non-designated employees at appropriate levels resulted in the need to designate successive levels of management from time to time."

In connection with the objection that certain benefits have been incorporated into salary, I also agree that there are no provisions in their conditions of service which indicate that the appellants are entitled to such benefits as of right or that they may not be incorporated into salary. The Bank was, therefore, entitled to incorporate the benefits into salary in order to rationalise the packages payable. It has also been persuasively argued that incorporating such benefits into salary has the effect of benefiting the appellants, in that they will now form part of their pensionable emoluments. This alteration cannot be said to be irrational in the circumstances.

In the result, the appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Dube, Manikai & Hwacha, appellants' legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

WARREN-CODRINGTON v FORSYTH TRUST(PVT) LTD 2000 (2) ZLR 377 (SC)

Citation	2000 (2) ZLR 377 (SC)
Case No	Judgment No. S-144-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	November 21, 2000
Judgment	November 21, 2000
Counsel	E W W Morris, for the appellant R M Fitches, for the respondent
Annotations	None

Civil appeal

Flynote

Appeal - further evidence - application to adduce such evidence - criteria which must be satisfied before further evidence may be called

Contract - commodatum (loan for use) - liability of borrower for damage done - degree of negligence required -

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responsibility normally limited to failure to exercise normal standard of care

Headnote

The appellant borrowed an aircraft from the respondent to fly to the Congo. Shortly after taking off from the respondent's farm, the aircraft crashed and was destroyed. The respondent sued the appellant for damages, originally alleging negligence, but later changed the basis of its claim to one of *commodatum*, or loan for use. This meant that the onus was on the appellant to prove that he was not negligent. At the trial, the appellant tried to show that the accident was caused by adverse weather conditions, but the court found that a more likely explanation was pilot error.

On appeal, apart from arguing the merits, the appellant sought to adduce further evidence from an expert in South Africa. This evidence was to the effect that the crash had been caused by a structural failure, which was in no way the fault of the appellant.

Held, that when one person lends his property to another, and the property is damaged or destroyed, the owner may sue for the return of the property or its value. The onus is cast on the borrower to prove that he was not negligent. Generally, the borrower's liability will be limited to a failure to exercise ordinary care, but it was not necessary to decide whether a gratuitous borrower is liable for slight negligence or only for ordinary negligence.

Held, further, that where an application is made at an appeal to call further evidence, the appeal court will normally remit the matter to the trial court, if the following criteria are satisfied: (1) Could the evidence not, with reasonable diligence, have been obtained in time for the trial? (2) Is the evidence apparently credible? (3) Would it probably have an important influence on the result of the case, although it need not be decisive? (4) Have conditions changed since the trial so that the fresh evidence will prejudice the opposite party? In this case, the evidence could have been obtained at the time of the trial. The expert's evidence would be opinion rather than fact, and was based on photographs rather than examination of the actual aircraft. Whether his evidence would be credible must be a matter of opinion. As the evidence clashed with other opinions expressed, it was not possible to say whether it would have an important influence on the outcome of the case. Finally, the other party

would have been prejudiced by having to call expensive evidence from America and by the delay in getting his money, if he won the case. The matter would therefore not be remitted for further evidence.

Held, further, on the evidence, that it was not possible to disagree with the finding of the trial court that the probable cause of the crash was pilot error.

Cases Considered

Cases cited:

Beval Trading (Pvt) Ltd v *Voest-Alpine Intertrading GmbH* S-149-94

Farmers' Co-op Ltd v *Borden Synd (Pvt) Ltd* 1961 R & N 28 (FS)

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Kearns v *Walter Entprs* S-160-90

Leopard Rock Hotel Co (Pvt) Ltd & Anor v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S)

MFV Kapitan Solyanik, Ukrainian-Cyprus Ins Co & Anor v *Namack Intl (Pty) Ltd* 1999 (2) SA 926 (Nm)

Mostert v *Cape Town City Council* 2001 (1) SA 105 (SCA)

Randfontein Transitional Local Council v *ABSA Bank Ltd* 2000 (2) SA 1040 (W)

S v *Banga* 1995 (2) ZLR 297 (S)

Silhouette Chemical Works (Pty) Ltd v *Steyn's Garage (Brooklyn) (Pty) Ltd* 1967 (3) SA 564 (T)

Strelitz (Pty) Ltd & Anor v *Siegers & Co (Pty) Ltd* 1959 (3) SA 917 (E)

United Bldg Soc v *D I Stone (Pty) Ltd & Anor* 1988 (4) SA 795 (E)

Case Information

E W W Morris, for the appellant

R M Fitches, for the respondent

Judgment

McNally JA: These two appeals were heard together, and were preceded by an application by Mr Warren-Codrington to have the first appeal remitted to the High Court for the hearing of further expert evidence. At the end of the hearing, we gave judgment in the following terms:

1. The application is dismissed with costs.
2. The first appeal is dismissed with costs.
3. The second appeal (cross-appeal) is dismissed with costs.

We indicated that our reasons would follow. These are they.

The reason there were two appeals is that the case was initially heard in the High Court on the question of liability only - the parties indicated that they would settle the question of *quantum* between themselves. This proved impossible, so they came back to court. For practical purposes I will refer to the cases as the appeal, which concerned liability, and the cross-appeal, which concerned *quantum*. Since Forsyth Trust (Pvt) Ltd is a family trust company, which was represented by a Mr Forsyth in court I will speak of the parties as Warren-Codrington, or the pilot, on the one hand, and Forsyth, or the owner, on the other.

I should also mention that the case was unusual in that the learned judge very sensibly decided to use the services of an expert assessor. He sat with Mr John Reid-Rowland, a commercial pilot and well-known lawyer.

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McNALLY JA

THE FACTS

The facts were these. On 22 November 1995, Warren-Codrington took off from the airfield at Melrose Farm, Arcturus, in Forsyth's 'plane, a Cessna 206, which he had borrowed for the occasion, intending to fly to Charles Prince Airport, Harare, and from there to Zambia and the Congo. Within less than twenty seconds the 'plane crashed and caught fire. The pilot very luckily was thrown out and suffered relatively minor injuries. The 'plane was destroyed.

THE PLEADINGS

After a considerable lapse of time, in March 1997, the owner sued the pilot for damages, alleging negligence. However, at the door of the court, on 27 May 1998, the owner's legal representative very wisely amended the basis of his claim to one of *commodatum* or loan for use.

It is a common and sometimes costly mistake to sue in delict in such cases when you should sue in contract.

If the owner alleges delictual negligence, he must prove it. That is very difficult, if not impossible, in a case like this, where the owner really does not know why the 'plane crashed. The law provides for this situation. The owner may simply sue in contract for the return of his property or its value. The onus is then cast on the borrower to prove that he was not negligent. Amler *Precedents of Pleadings* deals with the way in which such cases are pleaded at pp 117 and 203 of the 4 ed. And see *Randfontein Transitional Local Council* v *ABSA Bank Ltd* 2000 (2) SA 1040 (W) at 1056A-F.

THE DEGREE OF NEGLIGENCE TO BE PROVED

It must be noted in passing that there is a distinction between the defence of a gratuitous depository and the defence of a gratuitous borrower for use. The gratuitous depository is doing the owner a favour, and therefore he will not be responsible for any damage to the thing deposited unless he was seriously negligent. But in the case of a gratuitous borrower for use, the position is different. Here it is the owner who is doing the favour, so the borrower will be liable for damages unless he can show that the damage occurred without fault on his part. See generally Beck *Principles of Pleadings in Civil Actions* 5 ed pp 221-2. I would note in passing that if the borrower pays a fee we are at once in a different field of law - that of letting and hiring.

In the present case, it is quite clear that Forsyth was doing Warren-Codrington a favour in lending him the aircraft at no charge. It was thus for the latter to prove, on a balance of probabilities, that the destruction of the

McNALLY JA

aircraft occurred without fault on his part: *Strelitz (Pty) Ltd & Anor* v *Siegers & Co (Pty) Ltd* 1959

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(3) SA 917 (E) at 919B; *Silhouette Chemical Works (Pty) Ltd* v *Steyn's Garage (Brooklyn) (Pty) Ltd* 1967 (3) SA 564 (T) at 568H; *United Building Society* v *DI Stone (Pty) Ltd & Anor* 1988 (4) SA 795 (E) at 798I-799B; Joubert *Law of South Africa* Vol 15 para 281.

I do not think it is necessary to go into the question whether the gratuitous borrower is liable for slight negligence (*culpa levissima*) or only for ordinary negligence (*culpa levis*). I note that Joubert *supra* favours a more flexible approach, depending on the circumstances of the case, but generally would limit responsibility to a failure to exercise ordinary care, the care of a *bonus et diligens paterfamilias*.

In this connection, it seems to me significant that, according to Forsyth, Warren-Codrington had not adhered to the original arrangement that "he was to fly off the strip with me, so that I could see what his flying ability was like and what his engine handling was like". This comment, elicited only in cross-examination and not disputed, suggests that right from the beginning Warren-Codrington adopted a rather cavalier attitude towards a man who was very generously lending him a valued and treasured aircraft for quite a long trip. He had flown the 'plane once before, with an instructor.

THE APPLICATION

At the hearing of the appeal, we were faced with an application from the appellant to adduce further evidence. We were furnished with a statement (not an affidavit, but under cover of an affidavit from Warren-Codrington) from a Mr Marais from South Africa. Mr Marais has clearly a considerable amount of experience both in flying and in aircraft accident investigation. He expressed a firm view that the crash had been caused by the left wing strut detaching from its fuselage coupling. This was, he said, in no way the fault of the pilot.

We considered whether to remit the matter to the High Court so that this fresh evidence could be considered. We decided not to do so. Our reasons for this are as follows.

When a request is made to lead further evidence on appeal this court will normally, unless the evidence is simple, straightforward and uncontested, remit the matter to the High Court so that the witness can be tested by cross-examination. But we will only do so where certain criteria are satisfied. These criteria were established, in this jurisdiction, in *Farmers Co-op Ltd* v *Borden Syndicate (Pvt) Ltd* 1961 R&N 28 (FS). See also *S* v *Banga* 1995 (2) ZLR 297 (S) at 301G-H; *Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 260C-H; and *Beval*

McNALLY JA

Trading (Pvt) Ltd v *Voest-Alpine Intertrading GmbH* S-149-94 (not reported).

The criteria are, briefly -

1. Could the evidence not, with reasonable diligence, have been obtained in time for the trial?

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2. Is the evidence apparently credible?

3. Would it probably have an important influence on the result of the case, although it need not be decisive?

4. Have conditions changed since the trial so that the fresh evidence will prejudice the opposite party?

Now, it is true that Warren-Codrington was taken partially by surprise at the hearing by the alteration in the basis upon which the case was presented, and the resulting alteration of the onus. But his counsel expressly disavowed any problem with that. "I have not been taken by surprise" he said. "I am quite happy to start the trial on the basis that we are a lender (he must have meant "borrower") who has returned the goods in a poorer condition than when they were handed over".

On that basis, it seems to me that Warren-Codrington decided to rest his case on what his two expert witnesses were going to say, namely, that "it is more probable that the crash was caused, not by pilot error but by climate conditions". That is what counsel said at p 9 of the record. Had he wished to obtain further expert evidence from South Africa he could have tried to do so, and might then have found Mr Marais, with his theory that the cause of the crash was the fracture of a wing strut. Incidentally, Mr Marais' report speaks of two other experts who apparently supported two quite different theories as to the accident. Mr Marais' disagrees with those theories, as also, apparently, with the "climate conditions" theory. *Tot homines quot sententiae* may be interpreted in this situation as "each expert has a different opinion".

I would repeat what I said in *Kearns* v *Walter Enterprises* S-160-90 (unreported):

> "In the circumstances, we did not wish to set a precedent for litigants to treat the Supreme Court as a second court of first instance, a court in which they can try out the issues again on fresh facts if the first set of facts proves to be inadequate."

It is in the public interest that there be finality in litigation, as Hannah J said recently in *MFV Kapitan Solyanik, Ukranian-Cyprus Insurance Co & Anor* v *Namack International (Pty) Ltd* 1999 (2) SA 926 (Nm) at 932D-E. I bear in mind that were we to allow Warren-Codrington to lead this evidence, Forsyth has indicated he would have to call an expert from the manufacturer in the United States.

All in all, and bearing in mind that we have a discretion in the matter, we were of the firm view -

McNALLY JA

1. That the evidence could have been obtained at the time of the trial;

2. That, without wishing in any way to discredit the evidence of an expert we have not heard, the fact is that his evidence would be opinion rather than fact, and moreover opinion based on photographs and apparently differing from the opinions of other experts. Whether it would be credible must therefore be a matter of opinion.

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3. It is impossible to say whether it would have an important influence on the outcome of the case, particularly since it clashes with other opinions expressed or referred to.

4. The opposite party will be prejudiced both by having to call expensive evidence from America and by having to wait for its money (if it succeeds) in the face of a devaluing currency and the *in duplum* rule.

We therefore declined to allow the matter to be remitted for fresh evidence.

THE APPEAL ON LIABILITY

The position in the trial court was there was an onus on Warren-Codrington to show that he had not been negligent. Strictly, he was not obliged to show what exactly was the cause of the accident. But in reality, unless he was able to show some probable cause other than his own negligence, he would have serious difficulty in discharging the onus. One might say he was in a *res ipsa loquitur* situation. He crashed an aircraft. Why would that happen, unless he was negligent in some way? That is what he had to explain.

However, since he bore the onus in any event, *res ipsa loquitur* reasoning is unnecessary. Compare *Mostert* v *Cape Town City Council* 2001 (1) SA 105 (SCA) at 120B.

Warren-Codrington decided to pin his hopes to the theory that adverse weather conditions caused the crash. In particular, the court was told about "microbursts" - sudden down-rushes of air in the vicinity of thunderstorms - and "wind-shear" - described as a sudden reverse of wind direction. There was thunder activity in the distance on the day in question, but no noticeable turbulence at the airstrip. He called an expert, Mr Carson, who elaborated that theory. He admitted pilot error was a possibility, but preferred the microburst/wind-shear theory.

Those who gave evidence for Forsyth were more interested in the fact that the flaps on the aircraft were retracted. This was visible by looking at the wreck. It is remotely possible that this could have been caused by the crash, but the strong probability is that they were retracted by the pilot. If they had been forcibly retracted by the impact there would have been visible damage to them. There was not.

McNALLY JA

Retracting of flaps, which give an aircraft lift, will cause an aircraft to sink, and if done too early on take-off, can cause the aircraft to sink to the ground.

The other very persuasive piece of evidence, to my mind, was the evidence of Forsyth, who conveyed a very dazed Warren-Codrington to hospital. He said, and this was believed, that the latter kept saying in the car, "I removed the flap, was that the correct thing to do?". It seems to me that Warren-Codrington is to be believed precisely because he was dazed and therefore unguarded in his remarks. It shows that he was afraid he had done the wrong thing. "She would not fly", he said, "I took off the flap. Was that the correct thing to do?"

The clear view seems to be that it was not the correct thing to do. The conclusion reached by the court, and shared by the expert assessor, was that it could only worsen a difficult situation.

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Moreover, a difficult situation could have resulted from the aircraft bumping into the air before it had attained adequate airspeed.

That version seemed to the court and the assessor to be the more likely, and that version is consistent with pilot error.

Two incidental points need to be disposed of. First, neither party placed any reliance on the Department of Civil Aviation ("DCA") report on the crash (which blamed the pilot). The court ignored the report, counsel ignored it, and so did we.

Secondly, Mr *Morris* made much, on appeal, of the statement by Warren-Codrington (which was not challenged in cross-examination) that the stall warning device did not go off. Therefore, he said, the plane could not have stalled, and there had to be some other explanation for the fact that the aircraft sank into the ground, namely, the wind shear or microbust theory. The trial court found that nothing turned on Warren-Cordington's statement. After all, he had little memory at all of the accident or how it happened, so the fact that he did not remember the stall warning device going off was of little significance. It certainly did nothing to discharge the onus on him, or to refute the more likely explanation given by Forsyth.

I do not therefore, find it possible to disagree with the conclusion of the court *a quo* that the probable cause of the crash was pilot error.

THE CROSS-APPEAL ON *QUANTUM*

The amount of damages claimed was $1 million. The amount suggested by the defence was half of that. The award was $660 000 with interest at the prescribed rate from 22 November 1995.

The learned judge gave his customarily careful attention to the evidence placed before him. While we appreciate the force of Mr *Fitches*' contentions,

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McNALLY JA

we were motivated to decline to intervene by two considerations. The one is the traditional reluctance of anappeal court to alter a discretionary decision simply because its own discretionary decision might have been somewhat different. We did not consider the misdirections alleged to be true misdirections. And indeed, the refusal to make any deduction on account of the accident history of the aircraft was an instance of a discretionary decision in favour of the owner. The second, and more general, consideration is that this court adopts a conservative approach to awards of damages, preferring to err, insofar as it errs at all, on the low side rather than on the high side.

These are the reasons why we dismissed the application, the appeal and the cross-appeal.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

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Scanlen & Holderness, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

TRINITY ENGINEERING (PVT) LTD v COMMERCIAL BANK OF ZIMBABWE LTD 2000 (2) ZLR 385 (HC)

Citation	2000 (2) ZLR 385 (HC)
Case No	Judgment No. HH-229-00
Court	High Court, Harare
Judge	Gillespie J
Heard	March 3, 2000
Judgment	November 22, 2000
Counsel	G Chikumbirike, for the applicant C Lemani, for the respondent
Annotations	None

Chamber application

Flynote

Appeal - leave - application for - grounds - bias on part of judicial officer - what must be shown - critical comments and adverse decision - not indicative of bias

Practice and procedure - particulars - application for - what party requesting particulars is entitled to ask for

Headnote

The applicant had been sued by the respondent for the repayment of loans made. The applicant filed no plea, but filed several requests for further particulars. The latest of these requests was refused, and the applicant sought leave to appeal against that refusal. The grounds for appeal were the alleged bias of the judge and the alleged error in the finding by him that the particulars supplied were sufficient to enable him to plead. The judge had found that the various applications for further particulars were not brought in good faith and were an abuse of process. He found that the bulk of the application consisted of repetitious, irrelevant or worthless matter; that the applicant had delayed in setting the matter down; and the application amounted to vexatious conduct.

Held, that for bias on the part of a judicial officer to be established, the aggrieved party must show that an adverse decision must have been a partial decision or one that would reasonably

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cause the aggrieved party to conclude as much. An adverse decision and critical comments are not in themselves evidence of bias.

Held, further, that a litigant is entitled to know the cause or defence he has to meet; not only to know whether he should admit or deny the particular allegation. He is entitled to be placed in the position of being able to decide whether to persist in his claim or defence. The particulars to which a litigant is entitled, however, are particulars of averments forming part of the opposing case; or put another way, particulars of matters in respect of which the onus is on the opponent. A litigant is not entitled to request particulars of matters the onus in respect of which is upon himself, nor is he entitled to request further particulars for the purpose of enabling him to ascertain whether he has a defence to the claim or to formulate such a defence.

Held, further, on the merits, that the cause of action was sufficiently particularised. The applicant was demanding information none of what was part of the respondent's cause of action. The views of the judge were entirely justified. There was nothing of substance to confirm the alleged bias.

Cases Considered

Cases cited:

Commercial Bank of Zimbabwe Ltd v M M Builders & Suppliers (Pvt) Ltd & Ors 1996 (2) ZLR 420 (H)

Irvine v Serfontein 1979 RLR 273 (G)

Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S)

Muringi v Air Zimbabwe Corp & Anor 1997 (1) ZLR 357 (H)

R (Donoghue) v County Cork Justices [1910] 2 IR 271

Smyth v Ushewokunze & Anor 1997 (2) ZLR 544 (S)

Timsecurity (Pvt) Ltd v Castle Hotel (Pvt) Ltd 1972 (1) RLR 155 (A)

Legislation considered:

High Court Rules 1971 (RGN 1047 of 1971), r 37

Case Information

G Chikumbirike, for the applicant

C Lemani, for the respondent

Judgment

Gillespie J: In February 1997, the plaintiff (respondent in this application) instituted action against the defendant (the present applicant) claiming the repayment with interest of amounts

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allegedly disbursed as a loan from 1993 onwards. The defendant has still not filed a plea. It has, however, filed many requests for further particularity to the claim. The latest request was refused by SMITH J 1(43) in December 1999. This application is for leave to appeal against the decision of the learned judge. The proposed grounds of appeal are the alleged bias of the judge and the alleged error in the finding that the particulars supplied to date are sufficient to enable the defendant to plead.

The allegation of bias is purportedly founded upon the finding of the judge that the various applications for further particulars were not brought in good faith and were an abuse of proceedings. 2(44) The finding in question was based upon subsidiary findings. The first is that the bulk of the application is "repetitious, irrelevant or worthless matter" and amounts to an abuse of process. 3(45) The second is that the defendant had delayed in setting the application down. 4(46) The third is based upon the passage at the end of the judgment that:

> "It is clear that the applicant has been ducking and diving for a long time in order to avoid coming to court. Its managing director has used whatever stratagems have come to hand. At least three firms of legal practitioners which have handled the applicant's case have renounced agency. Having regard to the many lengthy and verbose letters written by the

> managing director of the applicant, I am not surprised that the legal practitioners have found it impossible to represent the applicant. This application clearly amounts to vexatious conduct on the part of the applicant and an abuse of the process of the law. That being the case, the respondent is entitled to its costs on the higher scale." 5(47)

There is no doubt that the learned judge was very critical of the applicant's conduct of the proceedings. That, however, is a great degree removed from saying that his decision was actuated by bias against the applicant. It should be noted here that the ground of appeal is not the reasonable perception of bias raised in the mind of the litigant, but an allegation of actual bias. The notice reads:

> "The learned judge in the court *a quo* was blatantly biased against the applicant ..."

No such allegation of bias can be supported.

The allegation really amounts to no more than the argument "because he found against me, and because he was critical of me even in pejorative terms, he must be biased". That sort of argument is not convincing - rather than justify an inference of bias it does little more than demonstrate its own circularity. In order for there to be any justification in the inference drawn, it would have to be shown that the decision was so outrageous that it could only be explained on the assumption of bias. Anything else amounts to no more than saying, "He is biased against me but his adverse decision is admittedly correct." Which is not a valuable ground of appeal. I will, therefore, determine the allegation of bias in conjunction with my investigation of the prospects of success of the appeal, insofar as it addresses the merits of the decision.

Lest it be thought that I treat the notice of appeal too strictly, I have given consideration to the situation as it would have been had the accusation been not actual bias but the reasonable apprehension of bias. The test here is whether there is some basis upon which a reasonable

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person in the position of the applicant would have entertained the belief that he was disadvantaged in the litigation because of the partiality of the judge. 6(48)

Looked at from this perspective, there is still nothing other than the terms used by the learned judge in criticizing the applicant to ground any such belief. It must be said that the mere fact that a judge finds against one does not cause the reasonable litigant to apprehend bias, any more than the fact that a judge might find for one would justify the assumption that anything more than the merits of one's cause have met with favour. Without wishing to

personalize the matter, I have not been able to avoid noticing that in the voluminous papers accompanying the original application there is clear indication that the person in overall control of the defendant is prone to see partiality or prejudice where there is only justice.

The clear example of this propensity emerges from numerous letters written by the defendant's Mr Georgias and attached to the answering affidavit. These letters, addressing as they do the subject of calculation of interest on overdraft, make extensive citation of the decision of this court in *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd & Ors.* 7(49) These references are accompanied by fulsome, indeed lavish, praise for the judges involved in the decision, of whom SMITH J was one. The encomium bestowed by the winning party might just as well have been recrimination from the party condemned in judgment. The point is that neither response is meet where its content goes beyond comment on the merits of the decision and addresses any assumed motive of the judge. Any such allegation must be made responsibly and must be based on reasonable grounds.

I accept that the learned judge in this case did use expressions with a certain disparaging content that might be misunderstood as subjective utterances. The phrases made which might breed such misapprehension are "ad nauseam" and "ducking and diving". 8(50) It is easy to pick on these two idioms and to attempt to spread their colour throughout a whole judgment. Easy, but not reasonable, unless the merits of that judgment cannot withstand scrutiny. Those words in themselves may well be not untoward.

In the result, I consider that on this approach, as well as on the allegation of actual bias, proof of the accusation depends upon the existence of sufficient cause on the merits such as would show that an adverse decision must have been a partial decision or would reasonably cause the aggrieved party to conclude as much. In the absence of such reinforcement, any such conclusion is no more than -

> "flimsy, elusive and morbid suspicions" 9(51)

which do not ground an attack upon the integrity of the judgment. I turn then to examining the merits of the decision, or to put it more properly, the prospects of success on appeal against those merits. I examine it on the assumption that the requests and this application are made in good faith, leaving till later a consideration of the finding that the defendant has litigated vexatiously.

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GILLESPIE J

To follow the dispute concerning requisite particularity, it is necessary first to understand what the defendant demands and what the plaintiff has supplied. It is unduly burdensome to explicate in full the claim and the requests for, and supplements of, particulars further thereto. It is enough to note that an intelligent reading of these discloses that the defendant wishes to make a point which is by no means unarguable.

It wishes to show that the accounts which it held in the plaintiff were originally held in the plaintiff's predecessor, the Bank of Credit and Commerce of Zimbabwe. It requires an audited accounting from the plaintiff of the operation of all such accounts; it requires proof of the balances of each account. It demands similar details in respect of the account in respect of which the present claim is made. It requires, in effect, an audited account of interest charged by the plaintiff in all of the defendant's accounts, "whether closed or ongoing". This all appears from those points of the request for particulars that are still at issue. 10(52)

In support of its claim to these particulars it cites many passages from my judgment in the *CBZ* case 11(53) concerning necessary particularity and necessary proof, on an application for default judgment in similar claims. What the defendant, or its lawyers, have not properly understood, however, is a feature frequently overlooked concerning the entitlement to further particulars.

In terms of the rules of court, 12(54) particulars of a claim may be supplied on the principle that:

> "A litigant is entitled to know the cause or defence he has to meet; not only to know whether he should admit or deny the particular allegation. He is entitled to be placed in the position of being able to decide whether to persist in his claim or defence." 13(55)

The particulars to which a litigant is entitled, however, are particulars of averments forming part of the opposing case; or put another way, particulars of matters in respect of which the onus is on the opponent. A litigant is not entitled to request particulars of matters the onus in respect of which is upon himself.

> "where particulars are sought...the incidence of onus is important and particulars will not be ordered of matters which form no part of the plaintiff's cause of action or which relate to matters extraneous to the *facto probanda* put forward by the plaintiff." 14(56)

This is the same point made by SMITH J, in somewhat different terms, where he stated on authority that a litigant:

GILLESPIE J

> "is not entitled to request further particulars for the purpose of enabling him to ascertain whether he has a defence to the claim or to formulate such a defence." 15(57)

The metaphor "a fishing expedition", often loosely applied to characterize any unnecessary request for particulars, is best applied to the litigant who is intent upon procuring from his

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opponent information not germane to the opponent's case but which he hopes might become useful to his own defence or hoped-for claim in reconvention. It also eminently describes the litigant who is trying to form some impression of the strength of the evidence of the opponent.

I have no doubt that the defendant's insistence on further particularity is misplaced. At best for the defendant, the appearance is given that it is seeking to have the plaintiff prove its case, i.e. produce all its evidence, in the pleadings. On top of that, however, it is clear to me that the defendant wishes to challenge the operation of, and in particular the calculation of interest on, all the accounts it has operated, not only with the plaintiff but also with BCCZ, over a period of many years, extending beyond the usual prescriptive period. To this end, it is demanding information none of which is part of the plaintiff's cause of action. In the result, I am satisfied that that cause of action is sufficiently particularized and do not consider that the defendant has prospects of success on appeal.

I do not wish to be misunderstood as saying that there is no basis upon which the defendant can obtain the information it seeks. There are many ways of doing that, ranging from an application for interrogatories, or for discovery, after it has pleaded its own claim and joined issue, to substantive action for the rendering of an account. It must take its own counsel as to the method best suited. What I do hold is that no court will permit the defendant to delay any further in stating its defence to the present claim by persistent requests for greater particularity.

The view which I have expressed on the merits is entirely in accordance with that of SMITH J. I am unable, therefore, to find anything of substance, arising from his decision, to confirm the alleged bias said to have been demonstrated by him. It follows that I am satisfied on that point too that no court is likely to alter his decision on that ground.

In confirmation of that conclusion, I finally turn to consider the criticisms of the *bona fides* of the defendant. I have discovered a further fact, not mentioned by SMITH J and apparently not disclosed to him. That fact, together with the existing chronology of this litigation, persuades me that the prosecution of this suit by the defendant has been vexatious. It has been characterised by a multiplicity of competing, overlapping or repetitive and

unnecessary proceedings. No attempt has been made, as is the duty of every litigant, to adopt the most expeditious, expedient and practical and least burdensome mode of litigation. To support that view, I give this chronology of events:

DATE	EVENT
18/02/97	Issue of summons in HC-1582-97
25/02/97	Request for further particulars
24/03/97	Application to compel
28/04/97	Particulars supplied

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30/04/97	Application to compel dismissed with costs (GARWE J)
9/05/97	Notice of taxation
20/06/97	Notice to plead and of intention to bar
26/06/97	Court application for dismissal of claim
27/06/97	Request for further and better particulars
17/07/97	Opposing affidavit
20/08/97	Application withdrawn
29/09/97	Further and better particulars supplied
21/10/97	Notice to plead and of intention to bar
24/10/97	"Amendment and better request for further particulars"
27/11/97	Bar
2/12/97	Issue of court application to compel in HC-6053-97
3/12/97	Application for default judgment (refused)
4/12/97	Amendment of particulars supplied on 29/9/97
17/12/97	Opposing affidavit in HC-6033-97
26/03/98	Further and better particulars (requested 24/10/97) supplied
24/04/98	Inspection of documents by defendant
28/05/98	Notice to plead and of intention to bar
3/06/98	Court application to compel in HC-6268-98
9/06/98	Bar
25/06/98	Opposing affidavit
21/09/98	Application for default judgment (not granted)
17/11/98	Respondent's heads of argument 6268/98
2/12/98	Applicants heads of argument 6268/98
25/03/99	Application 6268/98 refused (DEVITTIE J)
1/04/99	Application for default judgment (not awarded)

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28/05/99 Respondent's heads of argument in HC-6033-97

22/09/99 Bar on applicant in 6033/99 lifted (GWAUNZA J)

28/09/99 Applicant's heads of argument filed

23/11/99 Application 6033/99 dismissed (SMITH J)

12/01/00 Chamber application for leave to appeal

GILLESPIE J

The fact unknown to SMITH J is that, as appears from this chronology, the defendant effectively abandoned the application in 6033/97 in favour of a duplicate one in 6268/98. Only after that latter application failed did it revert to 6033/97. Worse yet, in each of those two cases the matter was set down by the plaintiff to have it dismissed because the applications were not prosecuted by the defendant. In fact, in 6033/98 the defendant was barred.

A glance at the chronology shows that at least three proceedings of the defendant were prompted by a notice to plead and of intention to bar. One was the "amended and better request" of 24 October 1997; another was the application to compel in 6033/97; a third was the application to compel in 6265/98. On the facts, I have no doubt that the reason 6033/97 was abandoned was so that 6268/98 could cynically be filed to defeat yet another bar. And the only reason 6033/97 was resuscitated was because the plaintiff needed finality on it in order to persuade the registrar to put the latest application for default judgment in front of a judge.

There is no doubt whatsoever in my mind that the defendant acted quite improperly in contesting the dismissal of 6033/97. Although DEVITTIE J gave no written judgment in dismissing 6260/98, I have consulted him and he informs me that in oral reasons given extemporaneously he referred both to the lack of merit in the application and to the lack of *bona fides* of the defendant in the litigation. That fact causes me to reject the *bona fides* of the defendant in its attack upon the integrity of SMITH J and upon the merits of his decision.

I have one penultimate comment to make. This case is an illustration - no doubt the most extreme and reprehensible of illustrations which I have in my career encountered - of two abuses which must be checked. The one is the filing of unnecessary requests for further particulars, or of applications to compel, motivated at least partly by a desire to escape barring. The other is the filing of unnecessary correspondence with the registrar. The resort to tactics in this case (and in many others) has generated a multiplicity of files, all bulging with paper, of which only a small fraction is relevant to decision. That fraction is not only well-hidden amongst the dross but is inevitably misfiled or wrongly numbered and impossible to trace without exhaustively going through every file bearing reference; reading each document; placing it in chronological order; and, if necessary, restoring it to the correct file. 16(58) I have done that in this case and it has taken me a long, long time and much effort. The effect of this deluge of paper (other than on the environment) is grossly to delay justice and substantially to increase

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the possibility of error.

GILLESPIE J

I suggest that the time has come to abolish the system of request for further particulars in favour of the exception to the vague claim. The time has come to redefine what may or may not be filed of record and perhaps to stipulate sanctions for disregard of the order.

Finally, I realise I cannot prevent the defendant from attempting to appeal this decision, since I have been asked to make no order or direction to the contrary. I do, however, emphasize the importance of being seen to comply with rules and orders and to state a defence unequivocally. In my judgment, leave to appeal is refused with costs on the attorney and client scale.

Chikumbirike & Associates, applicant's legal practitioners

Hove, Dzimba & Associates, respondent's legal practitioners

S v TAENDA 2000 (2) ZLR 394 (HC)

Citation	2000 (2) ZLR 394 (HC)
Case No	Judgment No. HH-231-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	October 12, 2000; October 20, 2000
Judgment	November 22, 2000
Counsel	Applicant in person Miss B Manyowa, for the State
Annotations	None

Bail application

Flynote

Criminal procedure - irregularity - fatal - inordinate and unreasonable delay between conviction and passing of sentence - appropriate remedy - permanent stay of proceedings granted

Headnote

The accused was in custody for a year before his trial and conviction in the magistrates court on a charge of rape. He was committed to the High Court for sentence but the matter proceeded no

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further because the record was lost. After he had been in custody for a further three years awaiting sentence, he applied for bail.

Held, that the principles to applied in determining whether the delay was unreasonable and the interests to be considered in such a determination are similar to those where there has been a delay pending trial. Applying those principles, the accused's constitutional right to a fair hearing within a reasonable time had been breached. The delay from the time of conviction was unreasonable. Had he been sentenced at the time of conviction, the accused would probably have already been released.

Held, further, that the breach of the accused's constitutional rights constituted a gross irregularity. The court had the power under s 26 of the High Court Act [*Chapter 7:06*] to review the proceedings and take what action it considered appropriate in the circumstances. Where there has been a violation of constitutional right, the appropriate relief must be granted, whether or not prejudice is shown to have existed.

Held, further, that the appropriate remedy, the case of a delay in bringing an accused person to trial, would be a permanent stay of proceedings. In a case like the present, where the accused has been convicted, it might be appropriate to grant another remedy. This would depend on the seriousness of the offence, the length of the appropriate period of imprisonment that would have been imposed, the interests of society in having the accused punished in spite of the delay, and the availability of the record of proceedings. In this case, however, the record of proceedings was lost and there was no prospect of finding it or reconstructing it. The court was left with no option other than to grant a permanent stay of proceedings.

Cases Considered

Cases cited:

Mlambo In re 1991 (2) ZLR 339 (S)

Nhari v *PSC & Anor* 1998 (1) ZLR 574 (H)

Nhari v *PSC & Anor* 1999 (1) ZLR 513 (S)

S v *Chakwinya* 1997 (1) ZLR 109 (H)

S v *Kusangaya* 1998 (2) ZLR 10 (H)

S v *Mavharamu* 1998 (2) ZLR 341 (H)

S v *Tau* 1997 (1) ZLR 93 (H)

Sanderson v *A-G, Eastern Cape* 1998 (1) SACR 227 (CC)

Case Information

Applicant in person

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Miss *B Manyowa*, for the State

Judgment

Chinhengo J: The facts in this case are not entirely clear because the record of proceedings has gone missing. From the scant facts available, the accused was 17 years old when he was convicted of rape by the magistrates court in November 1997. The proceedings before the magistrate were stopped in terms of s 54(2) of the Magistrates Court Act [*Chapter 7:10*] and the record was referred to the Attorney-General for directions on sentence. This was in March 1998. It appears that the record was returned to the magistrates court at Harare with a direction that the accused be committed to the High Court for sentence. He was so committed on 12 June 1998 and the record was signed for by the Registrar of the High Court or by an official in that office. That record has not been located since.

The accused appeared before me on 12 October 2000 on an application for admission to bail. It was then that the applicant advised me that he has been waiting to be sentenced for a long time. I directed that the Attorney-General should investigate the matter and report to me. The facts to which I refer in this judgment have been gathered as a result of that investigation. The accused committed the offence in November 1996. He was arrested and placed on remand in custody on 26 November 1996. He has been in custody since then. It took a year before his trial commenced and then, when it did and he was convicted, another three years have passed and he has still not been sentenced. There is therefore no likelihood that the accused will be brought before the High Court for sentence unless and until the record of proceedings is located - which, on all indications, is unlikely to happen.

The Attorney-General's Office investigated the circumstances of this case and tried as hard as it could to locate the record of proceedings. The Registrar of this court does not appear to have been moved by the apparent administrative incompetence that has occurred. I find the Registrar's attitude as reported by Miss *Manyowa* of the Attorney-General's Office to be a cause for concern. Miss *Manyowa* reported that:

> "The undersigned had word with the Registrar of the High Court as directed by his Lordship. However, from the discussion held the undersigned got the impression that the Registrar did not seem to appreciate the urgency with which this matter had to be dealt with. Upon being requested to make a finding in writing to his Lordship regarding the whereabouts of the record, the Registrar insisted on the undersigned writing first and advising on the current position. The undersigned did not find the Registrar's insistence on formalities to be reasonable as it would obviously cause delays. The Registrar did not further appreciate the timeless and diligent efforts that the Attorney-General's Office had

> taken in investigating this matter, the delay in finalising the matter which has been entirely caused by his office."

I am concerned that the Registrar of this court should adopt such an attitude. It was recorded in the regional magistrates court that the record of proceedings was signed for by the Registrar's office and it seems to me that it is his office that mislaid the record of proceedings. The Registrar should have been more active and availed me of any information he may have had on the matter. For him to fail to appreciate or to give an impression that he fails to appreciate

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that this matter, touching on the liberty of the individual and the due process of the law, is of concern to many who expect the Registrar to administer the affairs of the High Court with the highest degree of commitment and efficiency, is indeed a cause for concern. His attitude, which I have no doubt has been correctly reported, leaves a lot to be desired and should be deprecated.

The right to the protection of the law, which includes the right of a person charged with a criminal offence to a fair hearing within a reasonable time, is enshrined in s 18(2) of the Constitution. It is a fundamental right which all those of us concerned in the administration of justice in this country should observe to the letter. In the case of In re *Mlambo* 1991 (2) ZLR 339 (S), the Chief Justice stated that the Supreme Court is empowered by s 24(4) of the Constitution 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. Where an accused person charged with a criminal offence has not had his case finalised within a reasonable time, then quite obviously s 18(2) of the Constitution has been contravened in relation to him. The High Court has, as I shall show later, the power to grant an appropriate remedy.

In this case, as I have already mentioned, the accused has been in custodial remand since his arrest in 1996. He was not brought to trial for 12 months to November 1997. The reason for the delay can now not be ascertained because the record of proceedings has been lost. The trial magistrate left the service of the State after the accused was convicted in November 1996 and the matter was referred to the High Court for sentence. It is then that the record went missing and the accused has remained in custody from that time. I have to determine whether there has been an unreasonable delay. That determination must be made on a consideration of all such facts as are relevant to the case and in the context of s 18(2) of the Constitution. To do this, it is necessary to give an appreciation of why the right to a fair trial within a reasonable time is made an element of a fair trial and what interest it is intended to protect. These rights to my mind encompass the liberty of the individual, his security and interests related to the trial. A person who is charged with a criminal

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offence is exposed to anxiety, concern and stigma, which must be minimised by bringing him speedily to trial. Because of restrictions to liberty, due to either to incarceration or to onerous bail conditions, his liberty is curtailed. Passage of time tends to reduce the reliability of evidence as witnesses' memories fade with time. In general, an unreasonable delay to the finalisation of criminal proceedings causes prejudice to the accused. He suffers social prejudice arising from doubt as to his integrity or conduct. The presumption of innocence does not, in the eyes of the public, family and friends, continue to operate the longer he is on remand or his case remains uncompleted. As for the purpose of s 18(2) of the Constitution see *Mlambo*'s case *supra* at 334B-345F. Post conviction delays in sentencing the accused produce two distinct kinds of prejudice - the accused suffers oppressive pre-sentence incarceration; he suffers from anxiety and concern about the sentence and generally about his future and that of his family.

To arrive at a determination whether there has been an unreasonable delay one has to balance

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several interests - the conduct of the prosecution, the conduct of the accused, the length of the delay, any reasons given to justify the delay and prejudice to the accused. Regard, it has been said, must also be had to the accused's assertion, or failure to assert, his right to a speedy trial. But it must be borne in mind always that accused persons who are not legally represented should not be penalised for lack of knowledge as to their rights in this regard. The accused's failure to assert his right to a speedy trial should not generally be regarded as an important factor, especially where it is not established that the accused has in his own way contributed to the delay. To overemphasise that as a factor may result in a failure to afford the accused the protection to which he is entitled once it is established that the delay was unreasonable. In this regard, I agree entirely with the sentiments expressed by Gillespie J in *S* v *Mavharamu* 1998 (2) ZLR 341 (H) at 347A-E where he said:

> "The question, therefore, is whether the accused's undeniable failure to assert his right at any time can justify excluding from consideration the manifest delays that have occurred.
>
> I acknowledge not only the binding nature but also the persuasive force of this, and other pronouncements, on the duty to stand up for oneself. I would nevertheless suggest that there is a real and necessary point of distinction between the class of cases that would and do justify the remarks cited above, and the present. This is a matter involving a person with no recourse to legal representation. One who has no learning or knowledge of the law. He has no obvious education on his rights. He had no legal assistance at any stage. His only knowledge of the law must have been that it is, to all intents and purposes, overwhelming in its might and intractable in its exigencies.
>
> The duty of the administration of justice towards the unrepresented accused is taken very seriously by this court. It may be that in a jurisdiction with a burgeoning population of legal practitioners and generous budgets for public defenders, or for work *pro bono publico*, a more demanding view can be taken of a duty to assert one's own rights. As I have elsewhere

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> suggested, however, it would be most inappropriate to hold against an unrepresented accused failure to take assiduous steps to enforce his freedom. Such an one relies for his protection upon the court itself. He can look only to the presiding magistrate for an explanation of his rights or an investigation of apparent breaches of those rights. Where that advice or protection is not afforded he cannot be expected either to have known of or to have waived the rights which he never asserted. To hold otherwise would be to retain the constitutional safeguard as a preserve of the privileged rather than to extend it as the birthright of the ordinary person."

In the present case, the accused must have perceived that there was a delay to the finalisation of his case. He applied for bail pending sentence. His application was a form of asserting his rights but he was not fully apprised of other possible remedies. I will not hold against him the failure to assert his rights over the past three years.

The determination as to whether there has been an unreasonable delay therefore calls for a rational and objective assessment of all relevant factors. Included among the factors are systemic conditions arising from the practical situation appertaining in this country - resource limitations and congestion in the courts and, perhaps, administrative incompetence, all of which, though taken into account, must not be accepted as excuses so as to diminish the State's responsibility in regard to them or to detract from their prejudicial effect on the accused - *Mlambo*'s case *supra* at 346A-B. The words of Kriegler J in *Sanderson* v *Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) are apposite. At 242a-c he said:

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"The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or pre-ordained. In some jurisdictions, prejudice is presumed - sometimes irrebuttably - after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to impose semi-formal time constraints on the prosecuting authority. That would be a law making function which it would be inappropriate for the court to exercise. The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice that s 25(3)(a) [equivalent to our s 18(2)] seeks to diminish."

And at 244c-f:

"Having isolated some of the relevant considerations, how are they assimilated in determining whether or not a lapse of time is reasonable? The qualifier 'reasonableness' requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. Particularly, when the applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit from belonging to a society which requires

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the prosecution to prove its case in a public forum. We have also to be prepared to pay a price for our membership of such a society, and accept that the criminal justice system such as ours invariably imposes burdens on the accused. But we have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are reasonable. Delay cannot be allowed to debase the presumption of innocence, and become itself a form of extra-curial punishment. A person's time has a profound value, and it should not become a play-thing of the State or of society."

This case, on which I have relied for my determination of the question before me, was not concerned with a person who had been tried and convicted as in the present case, but with one who had not been tried but had been on remand for a long time from the time that he was charged with the offence to the time that he applied for a permanent stay of prosecution. But the principles to be applied in determining whether the delay was unreasonable and the interests to be considered in such a determination are similar.

I am satisfied that the delay of three years from the time of conviction to the present when the accused has still not been sentenced is unreasonable. Had he been sentenced in 1996 and condemned to a period of imprisonment at the very worst, he would no doubt have either completed his term or he would have served the greater part of the term of imprisonment. If he had been sentenced then and the age factor taken into account, as it surely would have, the punishment would have been less severe than if he were to be sentenced now, when he is about four years older. He has been in pre-sentence incarceration for three years now. He suffered from anxiety and concern for himself. There is not, to my mind, a clearer contravention of s 18(2) in respect of the accused.

This is not the first time that this has occurred. There are many other cases - *S* v *Tau* 1997 (1) ZLR 93 (H) and *S* v *Mavharamu supra,* to mention only two. *S* v *Chakwinya* 1997 (1) ZLR 109 (H) was another of many cases involving the mislaying of the record of proceedings in a matter

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heard in the magistrates court and referred to the High Court for sentence. The delay in that case was some six years from the time that the accused had committed the crime to the time that he was brought before the High Court for sentence. Gillespie J ordered that the passing of sentence upon the accused person and any further proceedings in the matter be permanently stayed. The learned judge found that the power reposed in the Supreme Court by s 24(4) on which the Chief Justice commented in *Mlambo supra* was exercisable by the High Court also. He stated at 115C-D as follows:

> "A similar provision to s 24(4), which pertains to the Supreme Court, is not made in respect of the High Court. That does not mean, however, that the High Court is powerless to give a remedy. Indeed, this clause pertaining to the Supreme Court appears *ex abundante cautela* and lest otherwise it be thought that the Supreme Court, a court of appellate

> jurisdiction, has no original jurisdiction pertaining to the point in issue. *Ubi ius, ibi remedium*; and the remedy for the accused here lies in the inherent jurisdiction of this court to regulate its own proceedings and to protect the rights of those coming before it.
>
> This court has a common law power to put a stop to any wrong that has been done to an accused person in the name of the law. In addition, I respectfully agree with the sentiments of the learned Chief Justice that where an infringement of a right to a speedy disposition of a trial has occurred, the minimum remedy must be a stay of further proceedings."

I am in agreement with the above statement. It must be noted, however, that in *Chakwinya*'s case *supra* the accused had been eventually brought to the High Court for sentence. In the case before me, that was not the situation. The accused came before me on an application by him to be admitted to bail pending the passing of sentence upon him. This fact provides another basis on which I can act to protect the rights of the accused. By s 26 of the High Court Act [*Chapter 7:06*], this court is empowered to review the proceedings and decisions of all inferior courts of justice, tribunals and administrative tribunals on the grounds stated in s 27 of the same Act. One of the grounds specified in s 27(1)(c) of the High Court Act is gross irregularity in the proceedings. In my view, a contravention of s 18(2) of the Constitution is a gross irregularity in the proceedings. This court therefore has the power to review the proceedings and take any action as it considers appropriate in the circumstances. Section 29(4) of the High Court Act is quite explicit that:

> "Subject to the rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

It would appear that where there has been a violation of a constitutional right, the appropriate remedy must be granted, whether or not prejudice is shown to have existed. In *S* v *Tau supra*, which involved an inordinate delay in the finalisation of a criminal trial, the learned judge, relying on credible authority such as *Mlambo*'s case *supra*, stated that prejudice to the accused was a relevant consideration (at 98D and 100E-100A) and concluded his judgment with the following

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words:

> "I consider all this to disclose a fatal irregularity in the proceedings. I cannot possibly say that there has been no miscarriage of justice. I therefore quash the conviction and set aside the sentence."

This statement was criticised in *Nhari* v *Public Service Commission & Anor* 1998 (1) ZLR 574 (H) at 581 (A) where Devittie J said:

> "I express the view, without making a firm finding, that in criminal proceedings, where rights enshrined in the Constitution are found to have been breached, appropriate relief must be granted regardless of whether there has been prejudice or an actual miscarriage of justice resulting from the breach."

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On appeal in the same matter and as reported in 1999 (1) ZLR 513 (S), the Chief Justice expressed approval of Devittie J's view when he said at 519C that:

> "... I deem it proper to indicate that I share the view expressed by the learned judge that where a postponement ought to have been granted, the refusal of it amounts to a fatal irregularity in procedure, obviating the need of the court of review or appeal to have regard to the merits of the matter. Put differently, where there has been a violation of a constitutional right, appropriate redress must be granted whether or not prejudice is shown to have existed. See *Nhari* v *Public Service Commission supra* at 581E)."

See also *S* v *Kusangaya* 1998 (2) ZLR 10 (H) at 14D-16B.

It seems to me that in *Nhari*'s case *supra*, both in the court of first instance and on appeal, the learned judges were concerned with trial-related prejudice. The refusal of a postponement in that case meant that Nhari would *ipso facto* suffer trial related prejudice. Quite clearly, where a court refuses to postpone a matter so as to enable the applicant for postponement to exercise his right to representation by a legal practitioner, that refusal necessarily involves another breach of a right if it is not otherwise justifiable. The learned judges were also quite evidently concerned with having to afford a remedy to a person whose constitutional rights have been infringed. That remedy must, as stated, be accorded without regard to any prejudice that may have occurred. In this connection, I think I would be right to say that, in considering a matter such as the present, there are two stages to it with the principle stated in *Nhari supra* applying only to the second stage.

The first stage would then be to determine whether there has been an unreasonable delay, such as constitutes a breach of the accused's right under s 18(2) of the Constitution. At this stage, it is necessary to determine, by reference to prejudice to the accused and other relevant factors, whether the accused's rights have been infringed. This was accepted as the correct approach in *Mlambo supra* at 352B-H. *Sanderson supra* shows how material and central the question of prejudice is to the determination whether or not there has been such an unreasonable delay as infringes the right to a fair trial within a reasonable time. The second stage occurs after a determination has been made that the accused's constitutional right to a speedy trial has been infringed. At this stage, the concern shifts to the appropriate remedy which must then be granted whether or not prejudice is shown to have existed. In other words, once it is established that the accused's fundamental right has been breached the question of prejudice need not be revisited again. The remedy flows from the determination that the

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accused's right under s 18(2) has been infringed. I think that it is on this basis that the decision in *Nhari supra* can be reconciled with the decision in the *Mlambo* and *Sanderson* cases and possibly with the decision in *Tau*'s case as well.

CHINHENGO J

The Declaration of Rights in the Constitution is of such fundamental importance that a breach of any of its provisions must result in an appropriate remedy being immediately granted to the person affected by such breach without further ado. If it were not so, then the rights therein enshrined would be subject to so many qualifications regarding the circumstances of the breach and entitlement to the remedy as to render them less protective of those rights. This means that in the present case, having satisfied myself, with the concurrence of the Attorney-General as contained in his report on the matter, that the accused's fundamental rights have been infringed, I must grant the appropriate redress. The question however is - what is the appropriate remedy? In *Mlambo*'s case *supra* the Chief Justice stated that where an infringement of a right to a speedy disposition of a trial has occurred, the "minimum" remedy must be a stay of further proceedings. This is stated at 355C where he said:

> "But relative to s 18(2) where, upon balancing the various factors, it is decided that an accused's right to a fair hearing within a reasonable time has been contravened, a stay of proceedings must be the minimum remedy. For to direct, for instance, that the trial proceed forthwith would be to contradict the accepted claim that the inordinate delay has denied him the very right that is safeguarded under s 18(2). It would amount to a further violation of the provision."

Mlambo's case was concerned, as is normally the case in matters of this nature, with a person who had not been convicted and not, as *in casu*, with a person who has been convicted. Is the approach to be the same - that the "minimum remedy" is a stay of proceedings? Gillespie J accepted this proposition in *Chakwinya supra*. But I find what appears at first sight to be a dissenting voice in *Sanderson supra* at 245C-G where the learned judge describes the remedy of a permanent stay as being a drastic one, both philosophically and socio-politically, and one that should only be granted if there is significant prejudice to the accused. He distinguishes between trial-related prejudice and other forms of prejudice suffered by the accused and opines that where the prejudice is not trial-related other remedies may be granted. He says at 245g that:

> "Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a whole range of "appropriate" remedies less radical than barring prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

I think that the correct understanding of this statement is that, depending on the degree of prejudice occasioned by the delay, and trial related prejudice would ordinarily be the most serious, a permanent stay of proceedings would

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be the minimum remedy. This would accord with the Chief Justice's statement on the "minimum remedy" in the context of *Mlambo*'s case where I should say a trial-related prejudice arose as a significant consideration.

The Chief Justice's reasoning is unassailable in relation to an accused who has not been tried, for indeed to grant other relief other than a stay of proceedings "would be to contradict the accepted claim that the inordinate delay had denied him the very right that is safeguarded under s 18(2)". In my view, the emphasis must be on trial-related prejudice: hence in *Mavharamu supra* at 351F the learned judge says that "if the trial is not yet complete then the minimum remedy will generally be a stay of proceedings". In the present case, no such prejudice arises or can arise because the accused has already been convicted and what remains is for him to be sentenced. The present case can, therefore, be distinguished from *Mlambo*'s on that basis. In such a case, depending on the seriousness of the offence, the length of the appropriate period of imprisonment that would have been imposed upon the accused, the interests of society in having the accused punished despite the admitted delay and the availability of the record of proceedings, it may be appropriate to grant a remedy other than a stay of proceedings. As an example, I have in mind a situation where the accused is convicted of a grisly rape. The record of proceedings cannot be located for three years running but it is found by the time the accused applies for bail pending sentence. The appropriate punishment, if the accused had been sentenced timeously, was imprisonment for a period of 15 years because of the seriousness of the offence. In such a case, despite accepting that the accused's rights under s 18(2) of the Constitution have been violated, I think a court would be entitled to proceed and order, not a stay of proceedings so that the accused may not be sentenced, but release from custody pending sentence or that the accused be forthwith sentenced, with due account being taken of the period he has been incarcerated after conviction but before sentence. The present case presents a difficulty which would not be covered by the example I have given. The record of proceedings cannot be located. I am satisfied, from the diligent search for it made by the Attorney-General's Office, that there is no prospect of it being found. I am therefore left with no option but to grant a permanent stay of proceedings. I cannot order his release on bail or act otherwise because there presently is no hope that the record of proceedings will be found or that it can be reconstructed. I am quite alive to the fact that the offence of which the accused was convicted is a very serious offence which causes revulsion to so many people and in respect of which an offender must ordinarily be suitably and, in many cases severely, punished.

My decision in this case is fully endorsed by the Attorney-General. It is a remedy which, as stated in *Sanderson*'s case, vindicates the Constitution and

acts as a deterrent against the violation of the right under s 18(2). It is, I believe, a remedy which will bring home to administrators of the criminal justice system that the courts will not stand idly by when individual rights enshrined in the Constitution are trampled upon because of inexcusable systemic inefficiencies. It is a remedy that assures accused persons that, despite

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their transgressions, the court will act to protect them when occasion demands.

In the result, it is ordered that the passing of sentence upon the accused and any further proceedings in this matter be permanently stayed. The accused shall be released forthwith. I have already issued a warrant for his liberation.

COMMERCIAL FARMERS' UNION v MHURIRO & ORS 2000 (2) ZLR 405 (SC)

Citation	2000 (2) ZLR 405 (SC)
Case No	Supreme Court, Harare
Court	Judgment No. S-131-00
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 24, 2000
Judgment	November 24, 2000
Counsel	A Kara, for the first respondent C Machaka, for the second and third respondents
Annotations	None

Constitutional application

Flynote

Court - jurisdiction - High Court - order given by the Supreme Court - High Court has no power to suspend effect of such order, even temporarily

Practice and procedure - parties - class action - may only be brought in High Court

Headnote

The Supreme Court issued an order, with the consent of the parties, requiring the police to remove persons unlawfully occupying commercial farms. The first respondent, a peasant farmer who was unlawfully occupying a commercial farm, filed a chamber application with the High Court, seeking to interdict the police from carrying out the evictions ordered, pending the institution of a class action in the Supreme Court by the respondent. The application was granted by the Judge President. The applicant applied to the Supreme Court for an order setting aside the High Court's order, on the grounds of lack of jurisdiction.

Held, that the High Court had no jurisdiction to interfere with the order of the Supreme Court. The fact that the High Court has jurisdiction under s 7 of the Supreme Court Act [*Chapter 7:13*] to execute and enforce judgments of the Supreme Court did not give it jurisdiction to stay the operation of such a judgment. An order of the Supreme Court may only be varied or set aside

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by the Supreme Court. The fact that the order was given by consent did not alter the situation.

Held, further, that there is no provision for a class action to be brought in any court other than the High Court. It would be extraordinary if a lower court was authorised to give leave to a party to institute an action in the highest court in the land without the latter court having any say in the matter.

Cases Considered

Cases cited:

Ahmed v *van der Merwe* 1911 CPD 846

Brink v *Dreyer* (1909) 26 SC 410

Shandling & Anor v *Southern Union Mfg Co Ltd* 1933 CPD 607

Legislation considered:

Supreme Court Act [*Chapter 7:13*], s 7

Case Information

A P de Bourbon SC, for the appellant

A Kara, for the first respondent

C Machaka, for the second and third respondents

Judgment

Gubbay CJ: On 10 November 2000, this court, in an application brought before it by the Commercial Farmers Union ("the CFU") pursuant to s 24(1) of the Constitution of Zimbabwe, was requested by the parties to issue an order by consent. The order which was so made in case No. S-314-2000 against the respondents, who were the four Ministers most closely involved with agricultural land reform, the Commissioner of Police and the eight Provincial Governors, provided in relevant part that:

" 1. It is declared that resettlement of commercial farming lands implemented by the First, Second and Third Respondents and the Sixth to the Thirteenth Respondents inclusive, in so far as it has involved the entry of persons who are not the invitees of the owners or lessees of properties, before all requirements set out in para 4 of this Order have been fulfilled, has contravened the fundamental rights, contained in s 17(1) and s 16(1) of the Constitution of Zimbabwe, of the owners and the lessees in occupation of those properties.

2. Each of the respondents, and every officer or employee of the State responsible to him or acting on his behalf, be and is hereby interdicted from in any way or form:

(a) causing;

(b) facilitating;

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(c) participating in; or

(d) giving sanction to:

the entry upon or continued occupation of any property owned or occupied by a member of the Commercial Farmers Union until all the requirements set out in para 4 of this Order have been fulfilled, by any person or persons engaging in, publicising or promoting any activity related to resettlement or the laying out of any housing or plots on that property.

...

5. The fifth respondent and every Police Officer, whose geographical area of duties covers any property referred to in para 2 of this Order, be and is hereby ordered to use all means and authority available to him, upon complaint to him or his becoming aware of the occurrence of any unlawful entry upon any of the said properties or the likelihood of such occurring, to ensure that no breach of the peace shall occur upon any such property covered by this Order, and that all persons found to have unlawfully entered or conducted themselves upon any such property be removed therefrom."

Six days later, the first respondent filed a chamber application with the High Court, under a certificate of urgency, against The Commissioner of Police, The Minister of Home Affairs and the CFU. What was sought was: (1) an order interdicting the respondents from evicting him and all such persons he represented from specified farms; and (2) leave to institute a representative class action in accordance with the Class Actions Act [*Chapter 8:17*].

GUBBAY CJ

The application was heard by Chidyausiku JP on 20 November 2000. His Lordship issued a provisional order which, pending confirmation, granted the interim relief set out below:

" 1. Samson Mhuriro be granted leave in terms of the Class Actions Act [*Chapter 8:17*] to represent rural peasant farmers on all occupied farms in a Supreme Court application to be filed against the respondents.

2. The application referred to in (1) above be filed within 15 days of the date of this order.

3. The Minister of Home Affairs and The Commissioner of Police and all officers below them be and are hereby interdicted, prohibited and restrained from acting in accordance with, executing or in any way actioning the evictions as ordered, granted and directed by the Supreme Court through a consent order granted via case No. 314/2000 on 10 November 2000, pending the finalisation of the Constitutional case to be instituted in terms of para (1) above."

The CFU was perturbed at what was considered to be an interference with the jurisdiction and authority of the Supreme Court and a consequent violation of its constitutional rights as declared in the order made in case No. 314/2000. It applied forthwith to this court, effectively in terms of s 24(1) of the Constitution, for an order setting aside the interim order of 20 November 2000 on the ground of want of jurisdiction.

After hearing argument from counsel for the CFU and the first respondent (counsel who appeared for the Commissioner of Police and the Minister of Home Affairs advised that those respondents would abide the judgment) this court was firmly of the view that the High Court had exceeded its jurisdiction in making the interim order. Accordingly the following order was pronounced:

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" 1. The application is granted with no order as to costs. The following order will issue:

> 'It is hereby declared in terms of s 24(4) of the Constitution of Zimbabwe that the order of the High Court in the matter of *Samson Mhuriro* v *Commissioner of Police & Ors*, which purported to suspend temporarily the order of this court in the matter of *Commercial Farmers Union* v *Minister of Lands, Agriculture and Resettlement & Ors* S-314-2000 and to grant leave to bring a class action before this court, is invalid and of no force and effect for want of jurisdiction on the part of the High Court to interfere with the order and procedure of this court.'

It follows therefore, that the interim relief granted by the High Court falls away."

These are the reasons for that declarator.

In making the order by consent in case No. S-314-2000, the court acted under the original jurisdiction conferred upon it by s 24(4) of the Constitution. In the exercise of such jurisdiction, the court is not subject to the authority or control of any other court. It is the first and final arbiter as to whether there has been, is being or is likely to be a contravention of the Declaration of Rights. No appeal to or review by any other court is permissible. Consequently, any order made is binding on all other courts which, as is

evident from the provisions of subsections (2) and (9) of s 24, are subordinate to the Supreme Court. See also the hierachy and judicial authority of the courts in Zimbabwe as set out in s 79(1) of the Constitution.

Section 7 of the Supreme Court Act reads:

> "The process of the Supreme Court shall run throughout Zimbabwe and any judgment of the Supreme Court shall have effect in Zimbabwe and shall be executed and enforced by the High Court in like manner as if it were an original judgment of the High Court."

Counsel for the first respondent placed much reliance on this provision. He advanced the submission that, as the High Court is empowered to execute and enforce any judgment of the Supreme Court as if it were an original judgment of its own, it necessarily followed that the High Court is vested with the authority to stay the operation of such judgment.

While s 7 of the Act undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this certainly does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court either made in the exercise of its appellate jurisdiction or pursuant to s 24(4) of the Constitution. For such would constitute a direct interference with the authority of a superior court by one subordinate to it. It would be to sanction, as occurred in this matter, an interference by a single judge of the High Court with an order concurred in by five judges of the Supreme Court. The proposition only needs to be stated to reveal its inherent flaw.

The fact that an order of the Supreme Court was made by consent does not alter the situation. It remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court.

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This interpretation of s 7 of the Supreme Court Act conforms with the common law principle that the proper court to stay an order or writ other than by way of appeal or review is the court which issued the same. Buchanan ACJ in *Brink* v *Dreyer* (1909) 26 SC 410 at 412 stated:

> "Now an application is made to the court to stay the writ of execution issued in the Magistrates Court, I cannot conceive upon what principle this application was not made in the Magistrates Court, in exactly the same way as it is now made in this court. There is no decision of the Magistrate brought under review. All that is applied for is that this court should stay the writ of execution of the Magistrates Court. I think, on all the authorities and on parity of reasoning, the proper tribunal to decide whether this writ of execution should be stayed or not is the Magistrates Court. When the Magistrate has given his decision, there might be an appeal, but that is quite another question. The applicant has misconceived his remedy by applying to this court instead of to the Magistrates Court."

See Also *Ahmed* v *van der Merwe* 1911 CPD 846 at 850; *Shandling & Anor* v *Southern Union Mfg Co Ltd* 1933 CPD 607 at 609.

This disposes of the application adversely to the first respondent. However,

GUBBAY CJ

for the sake of clarity it is as well to point out that the order granting the first respondent leave to institute a class action in the Supreme Court was also beyond the jurisdiction of the High Court to make.

The Class Actions Act [*Chapter 8:17*] allows a class action to be brought in the High Court. There is no provision for such actions to be brought in any other court. Quite simply, it would be an extraordinary situation if a lower court was authorised to give leave to a party to institute an action in the highest court of the land without the latter court having any say in the matter. Clearly, that was not the legislative intention. As stated in Report No. 56 (October 1996) of the Law Development Commission at p 7, class actions may be extended in the future to other courts. It follows that any attempt to bring a class action in the Supreme Court would be rejected for want of authority.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Mandizha Chitsunge & Co, first respondent's legal practitioners

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Citation	2000 (2) ZLR 410 (HC)
Case No	Judgment No. HH-232-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	October 27, 2000; November 1, 2000; November 17, 2000
Judgment	November 29, 2000
Counsel	G Chikumbirike, for the plaintiff Mrs R Makarau, for the defendant
Annotations	None

Civil trial

Flynote

Delict - adultery - customary law marriage - no right reposing in woman to claim damages for adultery - marriage to second wife solemnised under civil law - second wife having no right to claim damages for adultery from first wife

Customary law - adultery - claim for damages for - polygamous marriage - second wife having her marriage solemnised under civil law - no right to claim damages for adultery from first wife

Headnote

The defendant was married under customary law to one G. The marriage was not registered. The parents of the defendant had accepted *roora* from G. A child was born of this union. The plaintiff subsequently married G, also under customary law. At the time she married G the plaintiff was aware that G was already married to the defendant in a customary union. The plaintiff later had her marriage solemnised under the Marriage Act. This was done before a magistrate and not before a minister of religion. The plaintiff did not require G to terminate the customary union before contracting the civil marriage with him. G and the defendant continued to have sexual relations and another child was born. The plaintiff claimed damages for adultery from the defendant. The defence was raised that as the defendant was married to G in a customary union, she could not be held liable to pay adultery damages to the plaintiff.

Held, that there was a serious conflict between customary and general law. This conflict continues to affect the law because of the legislature's reluctance to change the law so as to secure equality for all people irrespective of the nature of the marriage contracted by them. Additionally, the female spouse's rights have been looked at exclusively from the perspective of the man's rights and not independently.

Held, further, that under customary law a woman adulterer cannot be sued for damages whereas under general law a spouse in a civil marriage may sue the female adulterer for adultery damages.

Held, further, that the law recognises both customary and civil marriages. A customary union

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which is unregistered is given considerable recognition for many legal purposes.

Held, further, that the Constitution provides for the application of customary law. The defendant had a constitutional right to choose which system of law would govern her marital relationship with G and she had chosen the customary law system. This was the system of law that therefore applied to her relationship with G. She had acquired rights as a result of

the customary union. The plaintiff was aware of G's customary law marriage to the defendant and did not require him to terminate it. She was attempting to force the application of general law principles upon a defendant who had not chosen that system of law. The rights acquired by the plaintiff when she entered into the civil marriage with G should not be construed as automatically eliminating the defendant's rights under customary law. There was no justification for subordinating the defendant's rights to those of the plaintiff.

Held, further, that the position would conceivably have been different had the plaintiff and G entered into a Christian marriage by having their civil marriage solemnised by a minister of religion, as this may have amounted to a profanation of the Christian marriage.

Held, further, that adultery today is not regarded as seriously as it used to be, particularly by persons married under polygamous unions. People's views on extra-marital sex have changed and the cultural views of an African man or woman are determined by his or her culture and the prevalence of polygamous marriages.

Held, further, that one of the bases for awarding damages for adultery is loss of *consortium*. There had been no such loss in this case.

Held, therefore, that the claim should be dismissed.

Cases Considered

Cases cited:

Carmichael v *Moyo* 1994 (2) RLR 176 (S)

Chamboko v *Chamboko* 1998 (2) ZLR 516 (H)

Chapenyama v *Matende* 1999 (1) ZLR 534 (H)

Chapman v *Chapman & Anor* 1977 (4) SA 142 (NC)

Chikosi v *Chikosi* 1975 (1) RLR 140 (G)

Kanjera v *Muchanyuka* S-222-96

Katsumbe v *Buyanga* 1991 (2) ZLR 256 (H)

Kumalo v *Mandishona* 1996 (1) RLR 434 (H)

Magaya v *Magaya* 1999 (1) ZLR 100 (S)

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Mkwiramiti v *Fidelity Life Assurance of Zimbabwe (Pvt) Ltd & Anor* 1998 (2) ZLR 471 (S)

Mutaisi v *Muzondo* 1999 (2) ZLR 435 (H)

Nkambula v *Linda* 1951 (1) SA 377 (A)

Reith v *Antao* 1991 (2) ZLR 317 (S)

Takadini v *Maimba* 1996 (2) ZLR 737 (S)

Legislation considered:

Customary Marriages Act [*Chapter 5:07*], s 3

Marriage Act [*Chapter 5:11*], s 27(a)

Case Information

G Chikumbirike, for the plaintiff

Mrs R Makarau, for the defendant

Judgment

Chinhengo J: At the commencement of the trial in this matter, it was agreed that the defendant should give evidence first. This was so because the trial looked like it would be concerned only with establishing whether the defendant, who was being sued for damages for adultery by the plaintiff, had entered into an unregistered customary marriage with the plaintiff's husband,

CHINHENGO J

Douglas Gwatidzo (hereinafter referred to as "Gwatidzo") before the plaintiff's marriage to Gwatidzo. It was also because her defence to the plaintiff's claim was that her customary marriage excused her from liability for adultery damages. After the defendant had given evidence and had been cross-examined on it, it became apparent, and the parties agreed, that there were no disputes of fact and the matter could proceed as a stated case for the court's determination. Indeed most of the facts were common cause. I therefore agreed that the matter be brought up as a stated case. The case for the court's determination was framed in the following terms:

" 1. That it is assumed that the defendant and Douglas Gwatidzo (plaintiff's husband) were customarily married and such marriage was not solemnised in terms of the Customary Marriages Act [*Chapter 5:07*] or the African Marriages Act prior to the solemnization of the marriage between the plaintiff and Douglas Gwatidzo in terms of the Marriage Act [*Chapter 5:11*].

2. That the plaintiff and Douglas Gwatidzo contracted a valid marriage under the Marriage Act on 6 September 1996 at Harare and that marriage still subsists.

3. That the defendant had sexual intercourse with Douglas Gwatidzo after the solemnization of his marriage to the plaintiff resulting in the birth of the defendant's second child (with Douglas Gwatidzo).

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The Stated Case to be decided is:

(a) Whether the assumed prior existing unregistered customary union between the defendant and the plaintiff's husband excuses the plaintiff from liability for adultery damages in this suit.

(b) Whether the customary union contracted in 1995 as alleged by the defendant is a valid marriage so as to preclude Douglas Gwatidzo from entering into a valid marriage in terms of the Marriage Act as he did in September 1996 with the plaintiff.

(c) Whether the sexual intercourse between the plaintiff's husband and the defendant (admitted by the defendant) amounts to adultery. If it is, what is the *quantum* of damages."

The stated case framed in these terms would appear to pose an academic question because of the use of the word "assumed" in paras (1) and (a) above. Its use was unfortunate and can be attributed to the reluctance of legal practitioners to concede facts which are supposed to be common for fear that the client may accuse them of misrepresenting his or her case. The facts in this case are quite clear from a reading of the pleadings, the evidence of the defendant and from the summary as agreed between the parties. They can on this basis be amplified upon without prejudice to the case as stated as follows.

The defendant and Gwatidzo contracted an unregistered customary union in 1995. Gwatidzo paid *roora* to the defendant's parents and Gwatidzo and the defendant became husband and wife at customary law. They did not register their customary law marriage in terms of any of the marriage statutes. I will henceforth refer to their unregistered customary law marriage as a "customary union". A child was born in March 1996 to this customary union. A customary union permits the husband to marry, also at customary law and

enter into a customary union or unions with another or more women. It is potentially polygamous. Gwatidzo apparently did that. He fell in love with the plaintiff and also entered into a customary union with her (see para 2 of plaintiff's replication). The plaintiff who was aware of the defendant's relationship with Gwatidzo had her customary union "upgraded" to a civil marriage by solemnization in terms of the Marriage Act. The defendant became aware of Gwatidzo's marriage to the plaintiff. This however did not deter her from continued sexual intimacy with him. It must be said too that Gwatidzo was also not deterred from the same conduct. A second child was born in about October of 1998 of Gwatidzo and the defendant. This was incontrovertible evidence of sexual intimacy between Gwatidzo and the defendant. The plaintiff issued summons in August 1999 and claimed the sum of $15 000 as damages for adultery together with interest at the rate of 25% *per annum* from the date of service of the summons to the date of payment. The plaintiff amended its claim by increasing the *quantum* to $35 000. This amendment was made orally by the plaintiff's legal practitioner during the course of his closing address. He argued that the amendment was not prejudicial to the defendant as in any case the amount to be awarded was in the discretion of the court. Mrs *Makarau* for the defendant did not oppose this last minute amendment.

We come up in this case against a serious conflict of laws. The common law scholar or judge would have no difficulty with the facts in this case or the application of the law to them. The

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conclusion which he would quickly come to is that the defendant committed adultery with the plaintiff's husband and as a result she is liable in damages to the plaintiff. The civil law marriage between the plaintiff and Gwatidzo established a monogamous relationship which excludes another woman in Gwatidzo's life. The common law judge would not be concerned with the customary union between the defendant and Gwatidzo except perhaps in relation to the *quantum* of damages.

I am concerned with the customary union because it has been raised as a defence in this case. It exemplifies a conflict between customary law and the general law. It would have a bearing on the *quantum* of damages if I were to find for the plaintiff. I will amplify upon the parties' respective positions in order to illustrate more graphically the question in dispute.

We have here a woman, the defendant, who is married to Gwatidzo in a customary union. The union is obviously unregistered. Her parents have accepted *roora* from Gwatidzo. They regard him as their son-in-law. They regard his relationship to their daughter as a marriage. Conjugal relations between the defendant and Gwatidzo are recognised as legitimate. They have a child between them. Despite his civil marriage to the plaintiff Gwatidzo returns to the defendant, a woman in respect of whom he has paid *roora* and

with whom he has a child and asks for or perhaps demands sexual intimacy with her. The woman may be under some social pressure to accede to Gwatidzo's demands. After all she has a customary union with him and Gwatidzo has not formally terminated that union. Her predicament arises from many causes, perhaps from family pressures, *roora* having been paid or from her own love for him. In her evidence she said that she still regarded him as her husband. She is perhaps tribally minded, as shown by her customary union, and morally she does not feel inhibited by her husband's marriage to the plaintiff. Is this court to adopt the attitude of the court in *Nkambula* v *Linda* 1951 (1) SA 377 (A) where at 382-383A, the court rejected such a morality in preference to its own? It stated as follows:

> "The Acting President said that as Lena is shown by her tribal marriage to be a tribally-minded individual, it cannot matter to her morally under what conditions her husband contracted the second marriage. But it surely must matter to her when the second marriage is contracted under conditions that are incompatible with the continuance of his conjugal relations with her'; and if indeed Lena's moral views in respect of a civil marriage are sufficiently adaptable, those of this court are not, and we should in a matter of this nature base our order on our standard, not on hers."

The court was on a civilising mission! To me, such a supercilious attitude should not be adopted in Zimbabwe where many couples have not registered their customary unions and the law, by not outlawing customary marriages whether registered or not, shows no contempt for marriages at customary law. To adopt such an attitude would be patronizing on a large number of people in this country and would constitute the "intolerable affectation of superior virtue ... inherited from the colonial past" mentioned by the Chief Justice in *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 153A. I think our courts must recognise customary law for what it is - a law which our people believe in and accept as binding on them (*Mutaisi* v *Muzondo* 1999 (2)

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ZLR 435 (H) at 437).

In this case, we have on the other hand the plaintiff who, with knowledge of the defendant's customary union, initially entered into a similar union with Gwatidzo and "upgrades" it to a civil marriage. She is entitled under the law to do so, in fact encouraged as the law in this country looks more favourably on monogamous relationships. See generally *Chikosi* v *Chikosi* 1975 (1) RLR 140 (G), *Chamboko* v *Chamboko* 1998 (2) ZLR 516 (H) and *Mkwiramiti* v *Fidelity Life Assurance of Zimbabwe (Pvt) Ltd & Anor* 1998 (2) ZLR 471 (S). She seeks to protect her position by contracting a civil marriage which she knows precludes her husband from a sexual relationship with another woman. Is she not to be afforded the full protection resulting from her civil marriage? And when she sues a woman who has had a sexual relationship with her husband, why should she not recover the damages she claims?

CHINHENGO J

We have in this tragi-comedy Gwatidzo in the middle. He is not the target of either woman. He is watching the scene from a distance and perhaps rubbing his hands gleefully as the drama unfolds and the women who both love him battle it out in the courts. The battle is over him. None dares call him the culprit. None has the pride to tell him off and terminate her relationship with him. She must fight the other woman to the bitter end until she can have Gwatidzo exclusively for herself, in the case of the plaintiff, or until she can lawfully "share" him with the other woman, in the case of the defendant. Is there not sufficient pride on the part of either woman to terminate her relationship with this man? Perhaps there is, but social realities may impede such action.

The law of adultery under customary law was that a woman adulterer would not be sued for adultery damages. Only the male partner would, with the woman partner being exposed at most to family sanctions which were not in the public domain. Under customary law only a husband could sue for damages for adultery - see TW Bennett *Application of Customary Law in Southern African* at p 158 and Gelfand *The Genuine Shona* at p 87 where it is stated:

> "The woman would not be held responsible. Instead, the blame and fine are the affair of the man who committed adultery. Even if he has been enticed by her, he is declared the guilty one."

See also *Takadini* v *Maimba* 1996 (2) ZLR 737 (S).

Going by the fact that the defendant was tribally minded as evidenced by the customary union, for which I am not prepared to condemn her, it may be said that the defendant in line with the customary law of adultery could not ever have contemplated being sued for adultery damages by Gwatidzo's other wife, for to her the plaintiff could only have been Gwatidzo's other wife.

Under the general law, a spouse of a civil law marriage may sue to recover damages for adultery from a third party. Thus, the female spouse may sue the female partner to the adultery and can recover damages. The position under customary law, which the defendant espouses in her defence, and the general law on which the plaintiff bases her action, are diametrically opposed. This conflict between customary law and the general law has resulted in the defence which the defendant has raised and which for those of us enamoured of the general law would

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regard as spurious. To resolve the question before me, I have to examine the arguments advanced on behalf of the parties.

Mr *Chikumbirike*'s argument was fairly simple and straightforward. It was this. Section 3 of the Customary Marriages Act does not recognise the defendant's customary union as a valid marriage. The law does not prevent the male party to a customary union from contracting a civil marriage with

another woman. Gwatidzo had the competence to contract the civil marriage with the plaintiff. Section 12 of the Customary Marriages Act enabled him to convert his customary union with the plaintiff to a civil marriage. He did so and the validity of this marriage is not disputed. Once he contracted a civil marriage with the plaintiff any sexual relationship between him and another woman is adultery and that other woman can be sued for damages under the general law. To him the law is clear - adultery has been committed and the defendant is liable in damages to the plaintiff.

Mr *Chikumbirike*'s argument finds support in statute law and the decided cases in this country and in other jurisdictions. Section 3 of the Customary Marriages Act provides in subs (1) that:

> "Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless -
>
> (a) such marriage is solemnised in terms of this Act; or
>
> (b) ...
>
> (c) ...
>
> (d) ..."

Mr *Chikumbirike* submitted that this provision means that a customary union is not a valid marriage. The effect of a marriage under the civil law was clearly articulated by the Chief Justice in *Makwiramiti supra*. In that case a man married in terms of the Marriage Act purported to marry another woman in terms of the Customary Marriages Act and registered that marriage. The issue was whether the second marriage existed or was valid. The Chief Justice stated the following at 473B-F:

> "The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary was bigamous and, consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the Marriage Act. By embracing a monogamous regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to the general law of the land. He was precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry. See *R* v *Moyo* 1946 SR 12; *R* v *Francis* 1947 SR 95; *R* v *Tarasanwa* 1948 SR 6; *Mudzingwa* v *Mudzingwa* 1989 (2) ZLR 182 (S); *South African Criminal Law and Procedure* 3 ed vol III at 263 *in fine* - 264; Goldin and Gelfand *African Law and Custom in Rhodesia* at 270; Ncube *Family Law in Zimbabwe* at 130. Indeed, so jealously does the law guard against the profanation of the Christian ceremony of marriage that it criminally punishes bigamy and delictually punishes adultery. Moreover, it renders null and void a promise of marriage made by a married person even where that promise is conditional upon

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> divorce or the death of the promisor's spouse. Such a promise, being *contra bonos mores*, debars an action for breach of contract. See *Friedman* v *Harris* 1928 CPD 43 at 45 *in fine* - 46; *Claassen* v *van der Walt* 1969 (3) SA 68 (T) at 70B-C."

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The situation in this case was that the man concerned contracted a civil marriage before he contracted the customary marriage. The court correctly declared the subsequent customary marriage invalid. The opposite situation arose in *Chamboko*'s case *supra*, where a man contracted a customary marriage and registered it in terms of the Customary Marriages Act. He contracted a civil marriage with another woman later without first dissolving the customary marriage. This court declared that the subsequent marriage was invalid. The point is made in both cases that these two types of marriages cannot co-exist between two women and one man. *Chamboko*'s case, though accepting that the law jealously guards against the profanation of the civil marriage, did not recognise the civil marriage between the man and the second woman as automatically supplanting a duly registered customary marriage between the same man and the first woman. It placed the two marriage on a par to the extent that one excludes the other if different women are involved with the one man.

In South Africa, it was stated in *Nkambula* v *Linda supra* at 384B-C that:

> "To my mind, a partner to a Native Customary Union who contracts a civil marriage with a third person thereby creates a situation so incompatible with the continuance of the conjugal relationship as to make the act tantamount to desertion and to free the other partner from the obligation of continuing the habitation."

This is the position which Mr *Chikumbirike* urged the court to accept. But should it? In *Chamboko*'s case *supra*, I was much persuaded by the position as stated in the above-quoted passage that at 522B-E and 524D, I was prepared to accept that a wife in a customary union can be "discarded" where the man marries another woman under the Marriage Act. I think I did not fully appreciate the import of the authorities I quoted at 523D-E and 524B which suggest that under Zimbabwean law, bigamy may be committed "in the case of polygamous marriages even perhaps unregistered, when the first or second marriage is a valid Christian or civil marriage".

Mrs *Makarau* lamented the fact that whilst the facts in this case bring into sharp focus the lack of harmony in the marriage laws of this country, they bring to the fore the unfortunate consequences of the application of two parallel laws within one legal system and for the same group of people. She lamented the fact that court decisions in customary law have been inconsistent and have driven the development of customary law into a cul-de-sac from which it can only emerge by further pronouncements which seek to infuse into the subject some consistency. I tend to agree with her in this regard. She formulated the question arising in this case as being whether or not the three types of marriage systems in Zimbabwe can co-exist - customary unions, customary marriages (registered) and civil marriages - each with its own peculiar rights, obligations and consequences for the parties to it. She

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submitted that each of these marriages affords to the parties to that marital union conjugal privileges and legitimacy. She argued that s 3 of the Customary Marriages Act poses a difficult question, whether or not it invalidates customary unions for purposes of customary law. This is not a difficult question at all. The meaning of the word "valid" in s 3(1) of the Customary Marriages Act is limited to the context of the general law but under customary law a marriage contracted in accordance with that law is valid, whether solemnised or not - *Carmichael* v *Moyo* 1994 (2) ZLR 176 (S) at 181B-C; *Chapeyama* v *Matende* 1999 (1) ZLR 534 (H) at 545E-546A. I agree with this conclusion because it must be presumed that the Legislature did not intend to alter the existing customary law as to the validity of customary unions more than was necessary. It is improbable that the legislature would have departed from customary law recognition of customary unions without expressing itself with irresistible clearness - see Maxwell *The Interpretation of Statutes* 12 ed at p 116.

Mrs *Makarau* went further to make what I think is an important point - that a customary union confers certain rights and obligations on the parties, which rights and obligations are recognised by customary law and the community to which the parties belong. She argued that a customary union is a marriage in the full sense of the word except that it is not registered as required by law. The rights and obligations of parties to it are the same as those of the parties to the marriages recognised by statute such as community of life or *consortium omnis vitae* which means that the spouses live together and are obligated to afford each other conjugal privileges. In any case, she submitted, the customary union is an institution which is recognised as a valid union. It results from the consent of both spouses, the woman's guardian, the agreement or contract between the woman's guardian and the intending husband with regard to *roora*; the payment of *roora* and the formal handing over of the woman to the man. Mrs *Makarau* added another dimension to this issue which strikes me as valid. She submitted that the defendant chose to have her relationship with Gwatidzo governed by customary law, and so only customary law principles can be applied to determine her rights under that law and in that relationship. She has a constitutional right to choose which law shall govern her marital relationship and she chose customary law. It is therefore that law only which must be applied to her relationship with Gwatidzo. Poignantly Mrs *Makarau* submitted that the plaintiff's claim, which is founded in the general law, is an attempt to force the application of the general law principles upon the defendant who had not chosen that the general law should apply to her. Further that the plaintiff's rights which she acquired in consequence of her civil marriage should not be construed as automatically and completely eliminating or defeating the defendant's rights

under customary law. She submitted that the application of customary law is sanctioned by the Constitution. She relied on a statement in *Magaya* v *Magaya* 1999 (1) ZLR 100 (S) where Muchechetere JA stated at 113D-E that:

> "... the application of customary law generally is sanctioned by the Constitution and some would elevate this to a right having been conferred by the Constitution."

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In this connection, the learned Judge of Appeal had referred to ss 23(3) and 89 of the Constitution. The latter section recognises that customary law remains valid and of force in Zimbabwe and the former stipulates that customary law shall apply, as an exemption from the discrimination provisions, to Africans in matters relating to adoption, marriage, divorce and other areas in which Africans are involved. The question which Mrs *Makarau* raises and which will have to be answered in this judgment is on what basis should the rights of one woman married in terms of the Marriage Act, supersede or supplant or override those of another woman married to the same man earlier in point of time under a customary union? In other words, on what basis should the court disregard the latter woman's rights and uphold those of the former? Mrs *Makarau* illustrated this dichotomy or difficulty in the following words, which I must say impress me:

> "It is respectfully submitted that the parallel and equal application of the two laws within the jurisdiction resemble two parallel trains travelling in the same direction, each with its own facilities different from the next. The plaintiff and the defendant have chosen the different trains and it is Dr Gwatidzo who has one leg each in the different trains. The point being made for the defendant is that she cannot be dragged to the plaintiff's train just for the purpose of being sued for adultery damages. She has not chosen the plaintiff's train and her right to choose which train to travel in should not be interfered with. Both women have rights to Dr Gwatidzo's affection, each granted those rights by a different law. No one law is superior to the other and therefore the loss should lie where it falls."

These words sound a familiar note to me. In *Chapeyama*'s case *supra* (which I understand is on appeal to the Supreme Court) I endeavoured to show that a customary union is as much a marriage as any other with the exception that it is not registered. I attempted to show that nothing much is left in the way of the full recognition for all purposes of a customary union. At 550 in *Chapeyama*'s case, I stated that a customary union is recognised as valid for the purpose of the status, guardianship, custody and rights of succession of the children of such union; a claim for maintenance; the ownership of property both *mavoko* and other property acquired by means of earnings from employment and other productive activities of the woman; a claim for damages by the husband in respect of the woman's adultery, inheritance in intestate succession; dependency claims and compensation/payments under various statutes, among others. The problem of the conflict between customary law and the general law, as I see it, has dogged us for so

long, because of the legislature's reluctance to change the law so as to secure equality for all our people irrespective of the nature of the marriage contracted by them. More importantly, I think the female spouse's rights have been looked at exclusively from the perspective of, or with regard to, the man's rights. The female spouses' rights have not been viewed independently from those of the male spouse. The man has been central in our conceptions of rights in this area of the law - the woman peripheral. Mrs *Makarau*'s example of the two trains moving parallel to each other would change the focus in favour of examining the problem from the woman's standpoint. A woman to a customary union has acquired rights in that union. A woman to a civil marriage has also acquired rights in that marriage. Why should the one woman lose her rights merely because the other woman has acquired certain rights which purport to exclude the rights of the one? For a while in South Africa the law as stated in *Linda*'s case *supra*

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regarded the first woman as having been discarded. But the injustice of such an approach to the problem was soon acknowledged hence the amendment of the law in that country which I indicated in *Chamboko*'s case *supra* at 521. The position in South Africa now is that a man who is a partner in a subsisting customary union shall not be competent to enter into a civil marriage with another woman. If he contracts a civil marriage during the subsistence of a customary union with a different woman that civil marriage is void. Our own s 16 of the Customary Marriages Act only addressed the problem half way as shown in *Chamboko*'s case *supra*. It left out of the picture a customary union and the gap so created has led to the emergence of problems such as I have to resolve in this case.

A civil marriage in this country is solemnised in terms of the Marriage Act. No useful or purpose-related distinction is made between a Christian marriage and a marriage solemnised by a magistrate. In *Makwiramiti*'s case *supra*, the Chief Justice commented with respect to the profanation of the Christian marriage. The marriage between the plaintiff and Gwatidzo is not a Christian marriage and as such the question of its profanation, lacking as the marriage does a religious background or flavour, should not to arise. But as stated by McNally JA in *Takadini* v *Maimba supra*, the delict of adultery is however based on an offence against the institution of marriage in terms of the Marriage Act. No case to my knowledge has distinguished between a Christian marriage and an ordinary civil marriage. A Christian marriage and an ordinary civil marriage are or can be different, hence in terms of s 27(a) of the Marriage Act a minister of religion is not compelled to solemnise a marriage which does not conform to the rites of his religious denomination. There is therefore no reason to treat these two forms of marriage the same in respect of profanation. The one is religious, the other secular.

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The aforegoing would seem to suggest that I have lost track of what this case is all about. I have not. This case is concerned with the plaintiff's claim for adultery damages. I must again refer to the Chief Justice's words in *Chawanda*'s case at 152G-153A that:

> "As our law accepts customary unions it should endeavour to secure equality to the parties thereto and discard the intolerable affectation of superior virtue (to borrow a phrase) inherited from the colonial past. To continue to exhibit a vestige of condescension and conservatism towards customary law unions will befits the current and unyielding movement by the State to remove the legal disabilities suffered by African women."

The delict of adultery is no longer as momentous as it used to be in the olden days. Awards of damages have tended to diminish in size over the years. See *Reith* v *Antao* 1991 (2) ZLR 317 (S); *Chapman* v *Chapman & Anor* 1977 (4) SA 142 (NC); *Kumalo* v *Mandishona* 1996 (1) ZLR 434 (H) and the cases therein cited and *Takadini* v *Maimba supra*. This is an indication of societal liberality in moral views in this area of the law despite Robinson J's admonition in *Katsumbe* v *Buyanga* 1991 (2) ZLR 256 (H) at 258H-259A where he said:

> "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 a part of society's further slide down the slippery slope to the unlicenced promiscuity which scoffs at the spiritual prohibitions against pre-marital or 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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But the law's function is not principally that of social engineering. The law is conservative. It must, however, adjust to the mores of the people. If the people's views of extra-marital sex have changed so too must the law. The reality today is that society has adopted very liberal views towards the delict of adultery. And for the African man or woman whose cultural views are determined to a large extent by the culture and prevalence of polygamous marriages, the delict is that much more liberally viewed. This together with the argument advanced by Mrs *Makarau* persuades me to the conclusion that the plaintiff's claim in this case cannot succeed.

The plaintiff married Gwatidzo initially under a customary union. From the agreed or "assumed" facts she was aware of Gwatidzo's customary union with the defendant. She must have prevailed upon Gwatidzo to register her marriage in terms of the Marriage Act. That course of action to me did not automatically extinguish the defendant's rights in the customary union between her and Gwatidzo. The defendant was not discarded as a wife. This is borne out by Gwatidzo's continued sexual association with the defendant and his failure to formally terminate the customary union by giving "*gupuro*" (*Pasipanodya* v *Muchoriwa* 1997 (2) ZLR 182 (S)). There is no allegation by the plaintiff that she required of Gwatidzo to terminate the customary union

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before contracting a civil marriage with him. She had ample opportunity to do so after living with him for a while also in a customary union.

If the plaintiff's marriage was a Christian marriage perhaps I would have reached a different conclusion. But it is not. The parties must continue to ride in their respective trains each according to her choice of train with the attendant privileges and frustrations. The real culprit in this tragi-comedy is Gwatidzo and to my mind the women must exhibit sufficient pride in themselves unless they are prepared to carry on as they began the train journey with Gwatidzo. I am satisfied that unless and until the legislature steps in and changes the law, there is no justification for subordinating the defendant's rights in relation to Gwatidzo to those of the plaintiff in relation to him. The loss if any, to borrow Mrs *Makarau*'s words must lie where it falls. It seems to me that on this basis, this is a proper case for granting absolution from the instance, if it should not be dismissed on another basis, as I proceed to do. I do not think that the law of adultery must be used for the purpose of validating one form of marriage as against another by women who find themselves in the situation of the parties in this case.

If I am wrong in the approach I have taken there is another approach on which the plaintiff's claim should fail. In *Takadini* v *Maimba supra*, McNally JA stated that the action for adultery is based in Roman-Dutch Law. The damages are recoverable on the grounds that the aggrieved spouse has suffered an injury (*contumelia*) and has lost companionship, love, affection, comfort and services by the aggrieved spouse. The learned Judge of Appeal said at 738F that:

> "Evidence of adultery is therefore only the beginning of the enquiry. The *quantum* of damages is really dependant 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).

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> And on the second ground, to what extent had that companionship, love, affection, comfort and services already disappeared before the adultery took place?"

He then examined the facts of the case and came to the conclusion that virtually no *consortium* was lost; that although there was *contumelia* it was more on the part of the husband than the adulteress. He speculated, as I am also entitled to do in this case, that the husband entered into a formal marriage because the plaintiff, suspecting danger, insisted on the formalisation and the husband could not refuse without explaining why. I can speculate further that the formal marriage was entered into for the purpose of defeating the defendant's rights and gaining an unfair advantage. *In casu*, I have shown that initially the plaintiff accepted a polygamous situation. She was aware of the defendant's customary union with Gwatidzo. It is she who in fact disrupted the defendant's relationship with Gwatidzo. She could not possibly

have suffered any real injury or *contumelia* and she could not have lost any *consortium* to talk about. Her claim for adultery damages though technically valid is not such as would warrant any award of damages. Talking of technical adultery Ebrahim JA in *Kanjera* v *Muchanyuka* S-222-96 said:

> "It seems to me that as soon as the appellant became aware that the respondent was married to Peter Chakanyuka and thereafter continued to associate with him she technically and knowingly committed adultery. In my view, however, it would be taking an armchair view to have expected her on making the discovery to have immediately left her matrimonial home taking with her their newly born child and leaving behind a man who had entered into a customary union with her by paying lobola for her. One could have sympathy for him (*sic*) but it could never have been an easy decision for the appellant on what to do once faced with the predicament she found herself in.
>
> In the light of these facts as outlined above, I am of the view that no award should have been made against her for what amounts to nothing more than a technical transgression by her. Compare *Madziwa* v *Muchatuta* S-45-96. The appellant by her conduct committed adultery but this was nothing more than a mere technical transgression deserving of an award of damages being levied against her."

This statement applies with equal, if not greater, force to this case.

I think women in circumstances of the plaintiff should not bring actions for adultery. The court's time is wasted by persons who must know that they have no real claim at law. It is necessary, I think, in order to discourage women in this class of litigant from instituting actions of this kind for the court to award costs against them. I was very much inclined to do so in this case were it not for the fact that a "technical adultery" was committed and that Mrs *Makarau* submitted that each party must pay its own costs regardless of the result. But there are costs in this matter which must be borne by the defendant. The trial did not commence on time and was postponed three times during the same week because of the conduct of the defendant's legal practitioners who were at pains to ensure that Mrs *Makarau*, who was out of the country for part of that week, should represent the defendant at the trial but were not open with the court in that respect. As a result, the commencement of the trial was delayed for a reason that was not put to the court. The defendant must therefore, pay the costs associated with those postponements.

In the result, the plaintiff's claim is dismissed. The defendant shall pay the costs occasioned by

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the postponements of the trial, otherwise each party shall pay its own costs.

Chikumbirike & Associates, plaintiff's legal practitioners

Makarau & Associates, defendant's legal practitioners

S v KANDA 2000 (2) ZLR 424 (HC)

Citation	2000 (2) ZLR 424 (HG)
Case No	Judgment No. HH-242-00
Court	High Court, Harare
Judge	Chinhengo J
Heard	November 29, 2000
Judgment	November 29, 2000
Annotations	None

Criminal review

Flynote

Criminal law - common law crimes - housebreaking - with intent to commit a crime to the prosecutor unknown - procedure on plea of guilty to such offence

Criminal procedure - charge - housebreaking with intent to commit a crime to the prosecutor unknown - procedure on plea of not guilty - amendment of charge to reflect intent established by evidence

Headnote

The accused broke into a house late at night and went to the room of a woman he knew. When she woke and screamed, he escaped. He was charged with, and pleaded guilty to, housebreaking with intent to commit a crime to the prosecutor unknown. In his explanation, he said he broke in to see the woman. On automatic review:

Held, that housebreaking *per se* does not constitute an offence unless it is coupled with an intent to commit a crime.

Held, further, that it is competent to charge a person with housebreaking with intent to commit a crime to the prosecutor unknown. On such a charge, however, a plea of guilty should not be accepted because it would be impossible to produce evidence to enable the court to establish a specific crime which the accused may have wanted to commit. The court would then be unable to assess sentence properly.

Held, further, that where a person pleads guilty to a charge of housebreaking with intent

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unknown, a plea of not guilty should be entered and evidence should be led to establish what specific crime the accused intended to commit. If the evidence shows what that crime is, the charge may be amended to allege the specific crime established.

Cases Considered

Cases cited:

R v *Comuya* 1905 TS 402

R v *Grobler & Anor* 1918 EDL 124

S v *Maketsi* 1981 (3) SA 591 (BS)

R v *Mdoda* (1907) 28 NLR 337

R v *Mhlongo* 1959 (1) SA 167 (N)

S v *Mkize & Ors* 1976 (2) SA 448 (N)

S v *Ndhlovu & Ors* 1979 RLR 236 (G)

S v *Wilson* 1968 (4) SA 477 (A)

S v *Zamisa* 1990 (1) SACR 22 (N)

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 214

Judgment

Chinhengo J: John Kanda, the accused, is 22 years old, married and with one child. On 9 April 2000 and at Morgenster Mission in Masvingo, he went out drinking beer until after midnight. At about 1.30 a.m, he was apparently on his way home and passed by the residence of the complainant, a lecturer at the mission. The complainant lived with a girl who I shall call "R". The accused broke the window pane to one of the complainant's bedrooms, opened the window and entered the house. He moved from the spare bedroom to the lounge, from there to the kitchen and pushed the door to the room where R slept. R saw him as he pushed the door to her room. She screamed. The accused ran out of the house through the window by which he had entered the house.

The accused was charged with the offence of housebreaking with intent to commit an offence to the prosecutor unknown. He was not legally represented. He admitted the abovementioned facts but gave the reason for breaking into the house as having been "to see R". He told the court that R was not his girlfriend. He was convicted of the offence charged and sentenced to eight months' imprisonment of which three months were suspended on condition of good behaviour and the remaining five months were suspended on condition that he completed 175

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hours of community service at a local police station.

The following minute was addressed to the trial magistrate by the regional magistrate, Mr Nyamwanza, who scrutinised the record of proceedings:

> "May the trial magistrate please comment.
>
> Did the trial court actually make an inference that the accused wanted to commit some offence?
>
> Accused said he wanted to see R. What was wrong/unlawful in wanting to see R who may not have been his girlfriend? Is there an offence inherent in seeing R? Was it not a proper case for entering a plea of not guilty so that the basis of the inference could be established and the accused's purpose could have been tested?
>
> P.S. If the accused pleaded guilty did he say he did *not know* which offence he wanted to commit? It sounds rather odd!"

When asked by the trial court why he wanted to see R, the accused stated that he "wanted to propose love to her". Understandably, the court retorted - "At 1.30 a.m.!".

The trial magistrate's reply to the minute from the regional magistrate is the following:

> "The factual basis upon which the charge was premised is not in dispute hence I did not find it necessary to carry out a full trial to establish what in essence was common cause. The accused person admitted that his breaking and entering were unlawful and intentional.

2000 (2) ZLR p426

CHINHENGO J

> The manner in which the accused broke and entered and the time of night at which he did so suggests that he had ulterior motives and I drew such inferences myself.
>
> However, I do concede that the charge of housebreaking with intent to commit an offence to the prosecutor unknown does present various legal difficulties. Professor Milton in *South African Criminal Law and Procedure Vol II* at pp 806-7 had this to say about this offence, which was created by South Africa's equivalent of our s 214 of the Criminal Code:
>
> 'Housebreaking with intent to commit an offence unknown creates problems.
>
> > At common law such charge or verdict was not permitted but the Criminal Procedure Act sanctions both. It would seem that if an accused is charged with housebreaking with intent to commit an offence to the prosecutor unknown, he cannot be convicted unless the evidence shows that he intended to commit some offence known to our law. But if the evidence does reveal such an intent, then it is logically contradictory and farcical to convict of housebreaking with intent to commit an offence unknown because the offence is known.'
>
> If I had proceeded to alter the plea of guilty to one of not guilty as suggested in the scrutiny minute and assuming I had subsequently arrived at the inference that accused intended to commit a crime of (say) rape - how then could I return a verdict of housebreaking with intent to commit an offence known?
>
> The State, I believe, was in a quandary as to exactly which charge to prefer given the set of facts here. The State, I believe, could not charge accused with the offence of housebreaking with intent to rape or steal or rob or any such common law or statutory offence because there was just no such evidence of that crime. Conversely, the State could not (neither can I) accept that someone who unlawfully and intentionally breaks and enters into someone's house at 1.30 a.m. and tip toes into the bedroom of a sleeping girl commits no offence.
>
> In conclusion, although I agree with the sentiments expressed by Prof Milton at p 807 of this above cited book

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thus '... it is submitted that charges of housebreaking with intent to commit an offence to the prosecutor unknown are potentially prejudicial to the accused and smack very much of fishing expeditions', I nonetheless believe that this is one case where it was appropriately charged by the State and candidly admitted by the accused.

However, if I am wrong I stand corrected."

The trial magistrate's response is quite comprehensive. It prompted the regional magistrate to submit the record of proceedings for review with the following comment:

"With the apt reply by the trial court it becomes questionable whether it is competent/proper to lay such a charge or whether it was competent to return such a verdict in the circumstances.

Would it not have entitled the accused to an acquittal given that the accused never admitted that he wanted to commit any offence?"

My task is to deal with the issues arising from the regional magistrate's comment. The charge put to the accused was framed as follows:

"*Housebreaking with intent unknown*

In that on 9 April 2000 and at Morgenster Mission in Masvingo, *John Kanda*, unlawfully and with intent to commit some crime unknown to the prosecutor broke and entered the house of [the complainant]."

CHINHENGO J

Milton in *South African Criminal Law and Procedure Vol III* 3 ed. discusses the problems associated with convictions for housebreaking with intent to commit an offence to the prosecutor unknown. He says at p 793:

"Surely, there can be no conviction at all unless there is sufficient proof of an intent to commit some offence known to our law, and if an intent is proved, how can one convict for housebreaking 'with intent to commit an offence unknown', for the intended offence is now known."

Further at p 806, the learned author says:

"Housebreaking with intent to commit 'an offence unknown' creates problems. At common law such charge or verdict was not permitted, but the Criminal Procedure Act sanctions both. It would seem that if X is charged with housebreaking with intent to commit an offence to the prosecutor unknown, he cannot be convicted unless the evidence shows that he intended to commit some offence known to our law. But if the evidence does reveal such an intent, then it is logically contradictory and farcical to convict of housebreaking with intent to commit an offence unknown, because the offence is known."

In *R* v *Grobler & Anor* 1918 EDL 124, the accused were charged with the statutory offence of housebreaking with intent to commit an offence unknown. The court considered that two issues arose on the facts - the breaking in and the intention to commit an offence. The breaking in was common cause but the intention to commit a specific offence was not, although it was established during the trial. The court was satisfied that the accused had broken into the complainant's house with an intention to commit an assault. The important point made in this case is that it is necessary that it be alleged what offence it was intended to commit. That is made even clearer in *R* v *Cumoya* 1905 TS 402 where it is stated that a charge of housebreaking with intent to commit an offence must allege an intent to commit some specific offence. If the indictment or charge does not specify the offence intended to be committed it is

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bad in law because it does not give the accused an opportunity to prepare his defence. The court however stated that whilst this was the position at common law it was not necessary if the person was charged under statute law. In respect of the charge under the common law, the court stated at 405 that:

> "If the Crown does not allege a particular intent, then the accused, at the last moment, may find that evidence is to be produced to prove that he intended, when he broke into the house, to commit a crime like murder or rape - in which case the punishment would be very different from the punishment for housebreaking with intent to steal. It is right that the accused should know what offence the Crown intends to suggest he meant to commit when he broke into the house."

The court reasoned that no prejudice would be occasioned to the State in specifying the offence the accused intended to commit and the State could even charge him in the alternate. The issue arose squarely in *R* v *Mdoda* (1907) 28 NLR 337 where the accused was charged with wrongfully and unlawfully entering the bedroom of a certain person with intent to commit

some crime to the prosecutor unknown. The question was whether the indictment disclosed an offence under the law and whether it was not too vague to require the prisoner to plead to it. The court referred to *R* v *Comuya supra* with approval and stated further that the indictment embarrassed the accused and the judicial officer. The accused would not know how to prepare his defence and the judicial officer would not know what intent to consider for purposes of sentence. He might come to the conclusion that the very serious crime of rape was intended to be committed when another judicial officer might have thought that theft was intended. The indictment and conviction were quashed.

In *R* v *Mhlongo* 1959 (1) SA 167 (N), the accused was charged in the second count with housebreaking with intent to commit a crime to the prosecutor unknown whilst at the same time it was known that he had broken into the house to recover an axe or hammer of his. It was argued that the breaking was not with intent to commit either a crime at all or a crime unknown to the prosecutor as charged. The court accepted this argument and altered the charge to housebreaking with intent to commit the offence of contravening s 1(a) of Act 52 of the 1951, which made it an offence to enter and be in a house without lawful reason.

I have referred to these cases to show that the issues raised by the regional magistrate are not easy to resolve. Section 214 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that:

> "Any person charged, either at common law or under any enactment, with breaking into any premises with intent to commit an offence specified in the indictment, summons or charge may be found guilty of housebreaking with intent to commit some other offence than that specified or some offence unknown, if an intent to commit some such offence or offence unknown is sufficiently proved."

The nearest that any case came to dealing with the issues raised herein was *S* v *Ndhlovu & Ors* 1979 RLR 236 (G), a judgment by Beadle AJ with which the current Chief Justice concurred. In that case, the three accused persons had been arrested inside a factory in circumstances which clearly indicated that they had broken in for the purpose of theft. Notwithstanding this,

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they were charged only with housebreaking with intent to commit some crime to the prosecutor unknown. They raised an unsuccessful alibi and were convicted as charged. The court held that the charge should be amended to allege housebreaking with intent to steal before the accused could be convicted on the charge as amended. The learned judge cited several South African cases on this subject, some of which did not support the decision he reached. Some of course supported his conclusion. He quoted s 214 (then s 202) of the Code and at 241D-G had the following to say about the provision:

> "The section deals specifically with competent verdicts on housebreaking charges and

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> while some may consider it is rather illogically worded, it is quite clear from that section *that before an accused can be convicted of housebreaking with intent to commit some specific offence, other than the specific offence charged, or to commit some offence to the prosecutor unknown he must first be charged with housebreaking with intent to commit some specific offence*. The section does not read as might seem more logical that an accused charged with housebreaking with intent to commit some crime to the prosecutor unknown may, if the evidence so proves, be convicted of house-breaking with an intent to commit a specific crime. These cases seem based on the maxim *expressio unius est exclusio alterius*, and applying that principle to s 202 (s 214) it can be said that the legislature could never have intended that on a charge of housebreaking with intent to commit some crime to the prosecutor unknown it was competent to return a verdict of housebreaking with intent to commit some specific offence because had it intended this to be the case it would have said so. On the contrary, it worded the section quite differently" (emphasis added).

He then examined the decisions in *S* v *Wilson* 1968 (4) SA 477 (A) and *S* v *Mkhize & Anor* 1976 (2) SA 448 (N) and concluded at 242 that:

> "... *Mkhize*'s case was wrongly decided and that the long line of decisions hold that the charge must first be amended must be followed."

In *Ndhlovu*'s case counsel for the accused persons had agreed that the accused could not be convicted of housebreaking with intent to steal without the charge being amended first but had argued that the court has no right, once an accused has been arraigned, to change entirely the charge on which he has been arraigned and substitute a more serious charge for the less serious one on which the accused was originally charged. The learned judge found this argument attractive and dealt with it, stating the following at 244D-2405:

> "Let me now examine Mr *Jordaan*'s argument on its merits. Mr *Jordaan*'s argument is based on the assumption that on a charge that the accused has committed the offence of housebreaking with intent to commit a crime to the prosecutor unknown the charge is in itself a charge of a specific crime *eo nomine* and not merely a charge which covers a particular crime which may be committed in a variety of ways. The crime *eo nomine* is housebreaking with intent to commit some crime. When the prosecutor knows what the crime intended was, he says so in the charge but when he does not know he says he does not know. It seems 'housebreaking' *per se* (as distinct from malicious injury to property) is no crime. It only becomes a crime when it is coupled with an intent to commit a particular crime or crime unknown. To say that 'an intent to commit a crime unknown' can be categorised as a specific crime *eo nomine* seems an abuse of language. In my opinion therefore, when an amendment is asked to delete the word 'unknown' from the charge and substitute in its place a specific offence, the court is doing nothing more than adding a particular to the original charge. It is not substituting for the charge a charge for an entirely different crime. It is giving more particulars of the original charge and provided those extra particulars can be given without prejudice to the accused it seems to me this is precisely the sort of amendment contemplated in s 191 (now s 202) because that section specifically states that if evidence so discloses more particulars of the

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charge may be given. I regard an amendment of this sort as nothing more than giving more particulars of the original charge and not similar to the facts of such cases as *Collett*'s *supra*."

Ndhlovu's case is almost on all fours with the present case. The only

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difference, and it is a significant one, is that in *Ndhlovu*'s case clear evidence was placed before the court that the accused persons broke into the factory with an intention to steal. In this case, the crime which the accused may have intended to commit was not indicated by the evidence. If anything, the evidence showed that the accused did not intend to commit any offence. He intended, as it is recorded, "to see R" or to propose love to R. The time of the day at which the accused broke into the house caused consternation to the court but no inferences were drawn from it. The whole problem arose from the fact that the matter proceeded on a plea of guilty. The question therefore necessarily arises - pleading guilty to what offence?

My research has not revealed that subsequent to *Ndhlovu*'s case, any other case has been reported relative to s 214 of the Code. *Ndhlovu*'s case did not address squarely the problem that has arisen in this case. If it dealt with it, it was so indirect that the case is not very helpful to resolve the present problem. I may ask the following questions to indicate more clearly what the problem is. Does s 214 of the Code create a specific offence of housebreaking with intent to commit an offence unknown? Is housebreaking *per se* a recognised criminal offence? It seems to me that the answer under the common law is in the negative in respect of both questions. The last passage I have quoted from *Ndhlovu*'s case *supra*, suggested that no crime of housebreaking with an intent to commit an offence unknown is known at common law. Beadle AJ, as he then was, in that passage clearly states that:

> "To say that 'an intent to commit a crime unknown' can be categorised as a specific crime *eo nomine*, seems an abuse of language."

In stating thus he is, in my view, saying that no such crime can exist. At p 796, Milton *op cit* says:

> "But mere housebreaking on its own without any intent to commit an offence is not a crime, though the 'breaking' may, of course, constitute the quite separate offence of malicious injury to property and the entry may constitute an offence under the Trespass Act."

So *Ndhlovu*'s case is authority for the proposition that a conviction of housebreaking with intent to commit a specific offence on a charge alleging an intent to commit an offence unknown is possible only if the charge could be amended and was actually amended. This means that housebreaking is not a crime *eo nomine* and must always be linked with an intent to commit a specific offence (*S* v *Maketsi* 1981 (3) SA 591 (BSC) at 592B). As I have already noted, this suggests that a charge and verdict, such as in this case standing alone, would be incompetent. In *Maketsi*'s case *supra* at 593 Hiemstra CJ said that it is not competent for any court to convict a person of the crime of malicious injury to property on a charge of housebreaking with the intention to commit theft or any other crime, whether specified or to the prosecutor unknown, if it is proved that that person had only broken into

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the house without any intention to commit any offence. The offender would have to be charged with malicious injury to property before being so convicted.

The law in Zimbabwe seems to have been arrested at *Ndhlovu*'s case. In South Africa, however, more cases on this subject have come before the courts. In *S* v *Zamisa* 1990 (1) SACR 22 (N) Thirion J said that:

> "[Section] 262(2) deals only with a charge of housebreaking with intent to commit a crime to the prosecutor unknown and the competent verdicts on such a charge. All it does is to make it competent for a court, on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, to convict the accused of housebreaking with intent to commit some specific offence if it is proved that the housebreaking was committed with the intent to commit that specific offence ... The verdict which is rendered competent therefore remains one of housebreaking with intent to commit an offence, save that it now becomes a specific offence, and it now becomes competent to convict of housebreaking with intent to commit a specific offence although the crime charged was housebreaking with intent to commit an offence to the prosecutor unknown ... Any other interpretation would lead to startling results. If the interpretation contended for by the prosecution were to be given to the subsection it would mean that on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, it would for example, be competent to convict the accused of housebreaking with intent to commit rape and rape if such be the facts proved. An accused charged with the relatively less serious offence of housebreaking with intent to commit an offence to the prosecutor unknown might, if that interpretation were to be adopted, find himself convicted of the capital offence of rape. That could never have been the intention of the legislature."

I think this reasoning applies with equal force to s 214 of the Code. To simplify what I understand these cases to mean and in respect of the charge and verdict in this case, I can summarise the position as follows:

1. There is nothing wrong with charging an accused person with housebreaking with intent to commit a crime to the prosecutor unknown. Such a charge is competent in terms of s 214 of the Code.

2. It is improper to accept a plea of guilty to a charge of house-breaking with intent to commit a crime to the prosecutor unknown because -

   (a) it will not be possible for evidence to be placed before the court to enable the court to establish a specific crime which the accused may have intended to commit;

   (b) the judicial officer will not be placed in a position in which he can properly assess the appropriate sentence. He will, if the matter goes on plea, be forced to conclude in his mind that either the accused intended to commit a serious crime such as rape, or a less serious crime such as theft. In the event he will have no basis on which to arrive at a sentence which does not prejudice the accused in terms of severity or which does not prejudice the ends of justice because of its leniency.

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3. Having accepted the charge as in (1) above, and entering a plea of not guilty as

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indicated in (2) above, evidence is then led from which it might be established what specific crime the accused intended to commit. If such specific crime is established the charge should then be amended to allege the crime of housebreaking with intent to commit the specific offence established by the evidence. This is the law as enunciated in *Ndhlovu*'s case *supra*. The court will then be able to return a verdict of guilty of housebreaking with intent to commit the specific offence and an appropriate sentence or penalty can be imposed.

The trial court in this case failed to appreciate the difficulties attendant on accepting the plea of guilty. Section 214 of the Code specifically requires that an intent to commit the specified offence or the offence be sufficiently proved. It must therefore be construed in the sense adumbrated above. The verdict returned by the trial court is therefore incompetent, more so because in this case, the little evidence that was placed before the court indicated that the accused did not intend to commit any crime at all, however much that may be doubtful considering the fact of breaking in, the time of day and the accused's ultimate destination within the house. The regional magistrate is therefore correct that the verdict returned cannot stand.

For the reasons set out above, the conviction is quashed and the sentence is set aside.

Smith J agrees.

CARR v REGISTRAR-GENERAL 2000 (2) ZLR 433 (SC)

Citation	2000 (2) ZLR 433 (HC)
Case No	Judgment No. S-136-00
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA, Sandura JA, Korsah AJA and Adam AJA
Heard	November 30, 2000
Judgment	November 30, 2000
Counsel	A P de Bourbon SC, for the applicant A Kara, for the respondent
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - citizenship - renunciation of foreign citizenship - form of renunciation - no need for person to renounce citizenship in manner provided by law of foreign country - renunciation under Zimbabwean law sufficient

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Headnote

The applicant, who was born outside Zimbabwe, was registered as a citizen of Zimbabwe in 1995. When she did so, she renounced her United Kingdom citizenship in accordance with the form of renunciation set out in the Schedule to the Citizenship of Zimbabwe (Dual Citizenship) Regulations 1984 (SI 384 of 1984). She handed in her foreign passport and was issued with a Zimbabwean passport. When her passport expired after five years, her application to extend the passport was rejected on the grounds that she had not renounced her former citizenship according to the requirements for renunciation provided by the relevant British legislation and was thus not a citizen of Zimbabwe. She applied to the Supreme Court for an order (1) declaring that her right of freedom of movement under s 22(1) of the Constitution was being contravened by the respondent's action and that she was a citizen of Zimbabwe; and (2) directing the respondent to extend the passport.

Held, that, in terms of s 9 of the Citizenship of Zimbabwe Act [*Chapter 4:01*], a person who renounces his foreign citizenship in order to become or remain a citizen of Zimbabwe had only to do so "in the manner prescribed". The manner is prescribed in the Regulations. There is no need for the person in addition to renounce citizenship under the law of the country of his former citizenship. If he complies with the requirements of the relevant regulations, he is deemed to have renounced his foreign citizenship. There is no need to look at the requirements of the law of the relevant foreign country. Indeed, some countries do not permit renunciation of citizenship in any circumstances.

Cases Considered

Cases cited:

Chrmn, PSC & Ors v *Zimbabwe Teachers' Assn & Ors* 1996 (1) ZLR 637 (S)

Movement for Democratic Change v *Mudede NO & Ors* HH-123-00

Legislation considered:

Citizenship of Zimbabwe Act [*Chapter 4:01*], s 9

Case Information

A P de Bourbon SC, for the applicant

A Kara, for the respondent

Judgment

Muchechetere JA: This is an application in terms of s 22(1) of the Constitution of Zimbabwe. The applicant alleged that, as she had complied with the requirements prescribed by the relevant law on citizenship, the respondent's refusal to issue her with a passport because she was no longer a citizen of Zimbabwe was a breach of her right to freedom of movement and in

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particular her right to enter and leave Zimbabwe.

During the hearing, counsel for the respondent properly, in my view, conceded that the respondent's interpretation and understanding of the law applicable in the circumstances was incorrect and that the applicant's contention that she had fully and properly complied with the relevant law on citizenship was correct. After consultation with the respondent, he agreed that the following order be issued with the consent of both parties. In the result, the court made the following order:

" 1. It is hereby declared that the right of the applicant under section 22(1) of the Constitution of Zimbabwe to protection of freedom of movement has been contravened by the action of the respondent.

2. It is declared that the applicant, Robyn Anne Carr, is a citizen of Zimbabwe.

3. The respondent be and is hereby directed, within 30 (thirty) days of the payment of the prescribed fees, to process the applicant's application for the extension of her Zimbabwe passport, which application was made on 18 August 2000, and extend the applicant's Zimbabwe passport No. ZE 079342 for a period of 5 (five) years.

4. It is ordered that the respondent shall pay the applicant's costs."

We indicated that our reasons for the order would follow in due course. These are they.

The facts in the matter are that the applicant was born in Ndola, Zambia, on 21 February 1967. She came to Zimbabwe, whilst still a minor, in 1971. In 1992, she applied for registration as a citizen of Zimbabwe. Her application was duly processed and on 5 June 1995 she was registered as a citizen of Zimbabwe. She thereafter duly renounced her foreign citizenship. This is evidenced by an affidavit made in terms of s 9(b) of the Citizenship of Zimbabwe Act [*Chapter 4:01*] ("the Act"), as read with s 2(1) of the Citizenship of Zimbabwe (Dual Citizenship) Regulations 1984, SI 348 of 1984 ("the Regulations"). She also handed in her foreign passport and made an application for a Zimbabwe passport. Later she was issued with Zimbabwe passport No. ZE 079342.

The said Zimbabwe passport expired on 18 August 2000. Subsequent to its expiry, the applicant applied for an extension of the same and paid the prescribed fee. On 25 August 2000, she attended upon the offices of the respondent to collect her passport. There she was advised by officials of the respondent that it could not be extended as she was no longer a citizen of Zimbabwe.

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On 6 September 2000, the applicant's legal practitioners wrote to the respondent stating the following:

"Dear Sir,

RE: MS R.A. CARR

...

Ms Carr has recently tried to have her Zimbabwe passport No. ZE 079342 extended, the five year term having

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expired on 18 August 2000. She was unsuccessful and was advised by your officials that she is no longer a citizen.

Our client refutes this allegation and we have been instructed to approach the High Court for relief. Our client's position is that she has complied with s 9(b) of the Citizenship of Zimbabwe Act as read with s 2(1) of the Citizenship of Zimbabwe (Dual Citizenship) Regulations in SI 384 of 1984.

Our client has complied with the specific directions of the Regulations and there is no lawful reason for your refusal to extend the passport" (my emphasis).

The respondent replied on 13 September 2000 as follows:

"Dear Sirs,

RE: EXTENSION OF ZIMBABWE PASSPORT: R.A. CARR

...

Your client attempted to renounce British Citizenship in 1995 which renunciation is invalid because in terms of the British Nationality Act 1981 one does not lose British Citizenship unless and until one has renounced according to the British Law. The British Authorities have been very kind in explaining their position to us as regards citizenship renunciation by their nationals. Your client is a *British Citizen* and accordingly ceased to be a citizen of Zimbabwe in terms of s 9(1) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], which prohibits dual citizenship.

As far as the Citizenship Office is concerned, we have no problem on this one. We need the applicant to complete Citizenship forms for the purposes of restoring the lost citizenship and paying statutorily prescribed fee, thereafter correctly renounce her British Citizenship according to British Law. *A Zimbabwe passport is unquestionably granted to a person of mono Zimbabwe citizenship. In the case of your client, because of the failure in renouncing her British Citizenship she is unquestionably a British Citizen* ..." (my emphasis).

As already indicated above, the relevant statutory provisions in this case are the Act and the Regulations. Section 9 of the Act provides two things which are relevant here, namely:

(1) that *subject to this section (s 9)*, no citizen of Zimbabwe who is of full age and sound mind shall be entitled to be a citizen of a foreign country; and

(2) that a citizen of Zimbabwe of full age who, on the 1st December 1984, is also a citizen of a foreign country shall cease to be a citizen of Zimbabwe one year after that date *unless on or before the expiry of that period he has renounced his foreign citizenship in the form and manner prescribed* (my emphasis).

The power to prescribe the form and manner in which a person can

renounce his foreign citizenship was delegated to the Minister of Home Affairs. He in turn made the Regulations. Sections 2(1) and (2) of the Regulations read:

" (1) *A person who wishes to renounce his foreign citizenship for the purpose of s 9 of the Act shall* -

(a) make *the renunciation in the form set out in the Schedule*, which he shall swear before a magistrate, justice of the peace or commissioner of oaths; and

(b) submit the form, duly completed and sworn, to the Registrar-General, either by delivering it to the

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office of the Registrar-General, at the Old Drill Hall, Moffat Street, Harare, or by posting it by registered post addressed to the Registrar-General, Private Bag 7734, Causeway; and

(c) submit to the Registrar-General, with the form, *any valid passport or other travel document issued to him by the Government of any foreign country*.

(2) The Registrar-General shall, without delay, return to the foreign Government concerned, any passport or travel document submitted to him in terms of para (c) of subsection (1)" (my emphasis).

I should state that the proper form in this case is provided in the Schedule to the Regulations, and reads as follows:

"FORM OF RENUNCIATION OF FOREIGN CITIZENSHIP

I ..... (*full names in block capitals*) do solemnly and sincerely swear:

1. I was born at ..... (*city, town or place*) in ..... (*country*) on ..... (*date of birth*).

2. I am a citizen of Zimbabwe by *(59) birth/descent/registration.

3. I am also a citizen or national of ..... (*name of country*) by *(60) birth/descent/naturalization/registration/marriage/other (if 'other', specify) .....).

4. As I am desirous of retaining my status as a citizen of Zimbabwe, I hereby renounce, so far as it lies within my power, my status as a citizen or national of ..... (*name of country*) and any claim I have to the protection of that country.

.....
Signature of Deponent

Sworn at ..... (*place*) this ..... day of ..... 19 ....., before me.

.....

*(61) Magistrate/Justice of the Peace/
Commissioner of Oaths

It is similar in every respect to the one sworn to by the applicant. Such forms are kept at the Registrar-General's Office and I have no doubt that the applicant obtained the form she swore to from that Office.

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I should also state that there is an explanatory note to the Regulations which reads:

"EXPLANATORY NOTE

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(*This note forms no part of the regulations, but is intended simply to explain their purport.*)

Section 9 of the Citizenship of Zimbabwe Act 1984, requires persons who hold both Zimbabwean and foreign citizenship to renounce their foreign citizenship within one year after the date of commencement of the Act or within one year of becoming a foreign citizen, failing which they will automatically cease to be citizens of Zimbabwe.

These regulations set out the manner and form in which persons may renounce their foreign citizenship so as to retain their Zimbabwean citizenship. The regulations also provide for the manner in which persons may apply for exemptions from the provisions of s 9 of the Act" (my emphasis).

Counsel for the applicant submitted that the manner in which persons of dual citizenship were required to renounce their foreign citizenship is a matter within the power of the legislature and that it elected to prescribe the manner of renunciation in the form outlined in the Regulations. He went on to state that a reading of the Regulations indicates that the word "shall" is used in the Regulations and that that on its own makes the manner in which foreign citizenship should be renounced mandatory. In the circumstances, a person holding dual citizenship has no option but to act in accordance with the procedure stated in the Regulations. He argued that the respondent cannot in the circumstances be heard to contend that there is an additional requirement in renouncing foreign citizenship, that is, that one must comply with the Regulations that are purportedly imposed by the foreign country concerned, in this case Britain.

I agree with counsel for the applicant's submissions. Indeed, counsel for the respondent could not point to any Act or regulations which gave the respondent the power to impose the extra condition he now seeks to impose. As counsel for the applicant pointed out, the Regulations came into force in 1984 and surely between that time and August 2000 the legislature or the Minister would have known the British authorities' attitude towards renunciation in terms of the Regulations. And if the legislature wished to have renunciation in the terms the respondent now contends, it would have acted to amend the Regulations accordingly. The respondent has no power to amend the Regulations. That is for the legislature and/or the Minister.

Indeed, at some stage in 1994, the legislature attempted to amend the legislation to reflect the present contention by the respondent. That was in the Citizenship of Zimbabwe Amendment Bill 1994. Clause 4 of the memorandum to that Bill reads:

"Clause 4

Section 9 of the Citizenship Act prohibits citizens of this country from holding foreign

citizenship. This clause will alter the requirements of the section in several respects. In the first place, it will prohibit all citizens, whether by birth, descent or registration, from voluntarily acquiring the citizenship of a foreign country; if they do they will immediately lose their Zimbabwean citizenship. Secondly, persons who hold foreign citizenship when they become citizens by registration will be required to forego their foreign citizenship within a year - *and their renunciation of foreign citizenship will have to be made according to the law of the foreign country concerned, not according to Zimbabwean law as at present*. The same will apply to citizens by registration who acquire foreign citizenship through marriage or through some circumstance other than their voluntary act (for instance, through a change in a foreign law): *they will have to renounce their foreign citizenship within a year, and their renunciation will have to be effective according to the foreign law ... People who have already made a*

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declaration renouncing their foreign citizenship in the form and manner prescribed under the Act will not be obliged to make a fresh renunciation: see the new subs (5) ... " (my emphasis).

And the proposed new subs (5) to s 9 of the Act would have read as follows if the amendment had gone through:

"*A person who renounced his foreign citizenship before the fixed date in the form and manner then prescribed under this Act shall be deemed, for the purposes of subsections (2), (3) and (4), to have ceased to be a citizen of the foreign country concerned by virtue of that renunciation*:

Provided that this subsection shall not apply to such a person if, after the renunciation, he re-acquired citizenship of the foreign country concerned or availed himself of that citizenship" (my emphasis).

I understand the above amendment was abandoned after its first reading in Parliament. The reasons for the abandonment are not very clear but one factor which must have exercised the thinking of Parliament is that the amendment would have worked a hardship on some Zimbabweans of foreign origin whose countries of origin do not in any event accept renunciation of citizenship by birth.

What, however, was clear from the proposed amendment was the fact that Parliament was aware of the present state of the law - that is, that a renunciation of foreign citizenship in the form prescribed in the Regulations was proper and sufficient renunciation under Zimbabwean law. In other words, there was no necessity to look to the law of the foreign country in question on the matter. Another matter which was also clear was that the legislature had wished to change that position so as to reflect the position now being contended for by the respondent. Further, the Legislature was not about to make the proposed amendment retrospective - a reflection, perhaps, of its respect for vested rights. See *Chairman, Public Service Commission & Ors* v *ZIMTA & Ors* 1996 (1) ZLR 637 (S) at 651-655.

The proposed amendment therefore serves to clarify the legal position in this matter and clearly bolstered the contentions of the applicant.

In addition to the above, consideration ought to be given to the provisions of s 9(6) of the Act. The subsection reads:

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"A person who becomes a citizen of Zimbabwe by registration while he is a citizen of a foreign country shall cease to be a citizen of Zimbabwe one year after such registration unless, on or before the expiry of that period, he has renounced his foreign citizenship in the form and manner prescribed.

Provided that a person who, at any time between 1 January 1985 and 31 December 1985 -

(a) became a citizen of Zimbaabwe by registration; and

(b) was enrolled as a voter on any roll in terms of the Electoral Act, 1979 (No. 14 of 1979);

shall be deemed not to have lost his citizenship of Zimbabwe solely on account of his not having renounced his foreign citizenship in terms of this subsection."

The proviso to the subsection is most significant and it applied to a limited class of persons who

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fell into that category. The effect of the enactment is to the effect that such persons, including those of British citizenship, who had between 1 January and 31 December 1985 become citizens of Zimbabwe by registration and were enrolled on any such roll under the Electoral Act 1979, had not lost their citizenship simply because they had not renounced their foreign citizenship. This, if anything, is indicative of the legislature, in its wisdom, choosing to permit dual citizenship in this special category.

All the above indicates that the law in this matter is very clear. And that Parliament, through the above-quoted explanatory notes, made its intention clear. It is the result which is probably unpalatable to the respondent and others.

In the circumstances, I must agree with the submissions of counsel for the applicant that the sentiments expressed by Chidyausiku JP in the judgment *Movement for Democratic Change* v *Mudede NO & Ors* HH-123-2000 at pp 9-10 of the cyclostyled judgment, to the effect that the law on the matter is absurd and nonsensical and that one does not expect such law being drafted by a first year law student, are unfortunate. They, in my view, do an injustice to draftsmen who, in any event, work under the direction and supervision of the Attorney-General. And indeed, they also do an injustice to Parliament, which must be held to have passed the legislation after careful consideration.

Faced with what in a way was "a mission impossible", counsel for the respondent had no option but to concede that the present state of the law is that being contended for by the applicant and her counsel. For, as already indicated, he could not point to any provisions which gave the respondent the power to impose the conditions he sought to impose on the applicant. The function of the respondent, and indeed all public servants, is to implement the law as it is and not, as in this case, as he thinks it ought to be. And, as already indicated, any change in the law must be made by Parliament and not by an administrative decree of the respondent.

As the applicant followed, to the letter, the provisions of the Regulations the respondent had no option but to extend her Zimbabwean passport.

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Refusal and failure to do so amounted to violation of her rights under the Constitution.

There was some allegation raised in the respondent's heads of argument and later in his supplementary affidavit that there were some irregularities in the handing in of the applicant's foreign passport and the issue of the Zimbabwean passport to her. This court dismissed the allegation because in the first place those allegations were raised as an afterthought and after "the pleadings" were closed, so to speak. Secondly, they were denied by the applicant. Thirdly, the allegations were not a matter of any substance because the applicant had a year within which she had to "perfect" her renunciation of the foreign citizenship. She must have done so, as evidenced by her use of the Zimbabwean passport from the date of her handing over of the foreign passport to the date it expired without the respondent's objection. Fourthly, the respondent's real objection to renewing the applicant's Zimbabwean passport was not because of the new alleged irregularities but on the basis that her renunciation of foreign citizenship in

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terms of the Regulations was not enough and that she ought in addition to have satisfied him that such renunciation was in accordance with the relevant provisions of the foreign country in question, in this case Britain.

In conclusion, I should state, for the sake of clarity, that what this Court upheld in the above *consent order* is the present state of the law - the respondent and therefore the State agreed with the order. And it is to the effect that all persons who renounced their foreign citizenships in terms of the Regulations are Zimbabwean citizens and should therefore be accorded and enjoy all the rights flowing from that status. Further, in terms of the laws of Zimbabwe they are deemed to have renounced their foreign citizenships and are therefore not dual citizens, as a misleading article in one of the local newspapers indicated. The question of Zimbabwean citizenship is therefore to be looked at from the point of view of the laws of Zimbabwe and not those of the foreign country in question.

I should also state that it is, in my view, a matter of concern that, whilst in many developed and developing countries the relevant officials, for the sake of developing their countries economically, socially or otherwise, go out of their way to woo and attract honest persons of all races, who have professional and other skills, financial and business know-how, to acquire residence and/or citizenship in their countries, the respondent and his colleagues in the Immigration Department on the other hand - see the number of cases against the latter heard in this court - seem to be doing the opposite. There ought to be a rethink of their attitude for the development of the country.

Lastly, on costs, the applicant in her first heads of argument had sought costs to be awarded against the respondent in his personal capacity. This was

because of what was viewed as the persistent and unreasonable attitude of the respondent in refusing to renew the Zimbabwean passport when the law on the matter was clear and the applicant had fully complied with it. I agree that in the circumstances the attitude of the respondent was inappropriate, but he may have been encouraged in that attitude by the said sentiments expressed in the judgment *Movement for Democratic Change* v *Mudede NO & Ors supra*. In the circumstances, I agree with the attitude of counsel for the applicant in this court to the effect that costs should be awarded against the respondent in the usual manner, that is, in his official capacity.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

KORSAH AJA: I agree.

ADAM AJA: I agree.

Stumbles & Rowe, applicant's legal practitioners

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Civil Division of the Attorney-General's Office, respondent's legal practitioners

HOVE v CHAIRMAN, HEALTH PROFESSIONS COUNCIL'S DISCIPLINARY COMMITTEE 2000 (2) ZLR 442 (HC)

Citation	2000 (2) ZLR 442 (HC)
Case No	Judgment No. HH-237-00
Court	High Court, Harare
Judge	Chidyausiku JP and Devittie J
Heard	July 6, 2000
Judgment	December 6, 2000
Counsel	C Lemani, for the appellant G Mamvura, for the respondent
Annotations	None

Civil appeal

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(9) - right to determination of civil rights within a reasonable time - applicability to hearing by administrative tribunal - s 24(2) - referral of matter to Supreme Court - person subject to disciplinary proceedings under Health Professions Act - right of Tribunal to refer matter to Supreme Court

Headnote

Nearly three years after an incident relating to a patient, the appellant was attending, the Health Professions Council brought disciplinary proceedings against the appellant. The appellant's lawyers requested the disciplinary committee that the matter be referred to the Supreme Court under s 24(2) of the Constitution, on the grounds that his right to a fair hearing within a reasonable time had been breached. The committee refused to do so, on the grounds that the application was frivolous, and ordered that the proceedings continue. The appellant sought to appeal to the High Court against the committee's ruling. The court had to consider: (1) whether the constitutional right to a fair hearing within a reasonable time extended to the sphere of administrative law; (2) if it did, whether the right to refer the matter to the Supreme Court under s 24(2) applied to administrative proceedings; and (3) if not, and the constitutional right to a fair hearing did extend to such proceedings, what the appropriate mechanism was for invoking the right.

Held, that an administrative tribunal established by law, such as the respondent's disciplinary

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committee, fell into the category of "adjudicating authority".

Held, further, that a hearing by this administrative tribunal involved a determination of a person's civil rights, as it would affect his right to exercise his profession.

Held, further, that s 24(2) allows the reference to the Supreme Court of a constitutional question by the High Court and courts subordinate to it, not by other tribunals. However, as a person subject to disciplinary proceedings has rights under s 18(9), a disciplinary tribunal is competent to refer a matter to the Supreme Court.

Held, further, that as no appeal lies from a refusal to refer a matter to the Supreme Court, the matter must continue until its determination. The constitutional issue may be raised in any appeal from that determination.

Cases Considered

Cases cited:

Holland & Ors v *Min of the Public Svc* 1997 (1) ZLR 186 (S)

Marumahoko v *Chrmn, PSC* 1991 (1) ZLR 27 (H)

S v *Mbire* 1997 (1) ZLR 579 (S)

Taylor v *Min of Higher Education & Ors* 1996 (2) ZLR 772 (S)

Legislation considered:

Constitution of Zimbabwe 1980, ss 18(9) and 24(2)

Case Information

C Lemani, for the appellant

G Mamvura, for the respondent

Judgment

Devittie J: The appellant is a specialist surgeon practising in Gweru. In September 1996, he had under his care a patient who had been involved in a serious road traffic accident. The patient succumbed to his injuries. In December 1996, the patient's wife made a formal complaint to the Health Professions Council regarding the conduct of the appellant during the time her husband was under his care. Accordingly in February 1997, the Health Professions Council convened a preliminary inquiry to investigate the allegations made. The appellant was advised, after the inquiry, that he would be notified in due course of the inquiry and decision on whether to bring formal charges being preferred against him. He heard nothing further from the Health Professions Council for about two and half years. In July 1999 he was notified that a disciplinary inquiry would be convened on 20 August 1999. His legal practitioners sought a postponement

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of that date and the matter was eventually set down for 1 October 1999.

The charge levelled against the appellant was framed thus:

> "That you, a registered medical practitioner and specialist surgeon have been guilty of improper conduct or disgraceful conduct or conduct, which, when regarded to your professional calling is improper or disgraceful;
>
> The allegation being that on 22 September 1996 when asked by Mr Gwaunza over the telephone whether you had noticed that Timmy Mesa a patient who was under your care, chest was swollen and whether any x-ray had been taken. You asked the said Gwaunza what his profession was and when told he was a teacher you asked him what a teacher could possibly know about medicine.
>
> Further, 24 September 1996 when Mrs Sithokozile Mesa came to discuss with you the issue of her husband, Timmy Mesa who was a patient under your care you hurled insults and called her an uneducated teacher accusing her of having persuaded Timmy Mesa to refuse blood transfusion."

Before the commencement of the disciplinary proceedings, the appellant's legal practitioner moved an application for a referral of the proceedings to the Supreme Court in terms of s 24(2) of the Constitution of Zimbabwe. The constitutional questions raised was that by virtue of the long delay in convening the disciplinary inquiry, the appellant's right to be afforded a fair hearing within a reasonable time, had been violated. The disciplinary committee held that the application was frivolous and, accordingly, that the proceedings should continue. Upon intimation that this ruling would be

taken on appeal, the proceedings were stayed pending a determination of the appeal. In the grounds of appeal, the point taken is that the disciplinary committee erred in holding the application to be frivolous.

It seems to me that the resolution of this case requires a consideration of three questions, which, I may add, were not raised in argument. The first question is whether the constitutional right to a hearing within a reasonable time extends to the sphere of administrative law. The applicable constitutional provision was not cited when the application was made, nor was reference made to it in the present proceedings. Section 18(2) of the Constitution, it seems, applies to criminal proceedings. It provides as follows -

> "If any person is charged with a criminal offence, then unless the charge withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

It is clear that this subsection does not apply to disciplinary proceedings. Section 18(9) provides that -

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

Administrative tribunals established by law fall into the category of "other adjudicating authority". Accordingly, I accept that, in principle, the right to a hearing within a reasonable time in administrative proceedings does have constitutional status. The usual question to consider is

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whether the disciplinary proceedings brought against the appellant, involve a determination of the existence or extent of the appellant's civil rights and obligations. In *Holland & Ors* v *Minister of the Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S) at 190E, Gubbay CJ dealt with the meaning of the term "civil rights":

> "The term 'civil rights' is of wide import. Its ambit is not easily defined. It has been held to embrace the rights of access to a lawyer for the purpose of instituting a civil action. See *Golder* v *United Kingdom* (1975) 1 EHRR 524 at paras 26 and 27. The decision in *König* v *Federal Republic of Germany* (1978) 2 EHRR 170 gives a more apposite illustration. In that case, a medical practitioner in Germany had his authorisation to practise medicine and run a clinic withdrawn by a regional medical society for illegal unprofessional conduct. The European Court held, *inter alia*, that a civil right was at issue - that the right to exercise his profession and the right to run his clinic were civil rights."

See also *Marumahoko* v *Chrmn, Public Service Commission* 1991 (1) ZLR 27 (H) and *Taylor* v *Minister of Higher Education & Ors* 1996 (2) ZLR 772 (S).

I am satisfied that the proceedings before the disciplinary committee involved a determination of the existence or extent of appellant's civil rights or obligations.

DEVITTIE J

The chairman of the disciplinary tribunal, relying on the wording of s 24(2) of the Constitution, refused the application for a referral on the grounds that the question raised was frivolous or vexatious. Section 24(2) provides as follows:

> "If any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any part to the proceedings shall, refer the question to the Supreme Court, unless, in his opinion the raising of the question is merely frivolous or vexatious."

The preliminary question to be resolved therefore is whether s 24(2) applies to administrative proceedings such as the present. It seems, from a reading of subs (2), that it refers to proceedings in the High Court, or "in any court subordinate to the High Court". That is, the provisions of this section do not apply to administrative proceedings. In this regard, it is noted that s 18(9) draws a distinction between "adjudicating authorities established by law", as distinct from courts "established by law".

This, however, does not mean that the right to hearing within a reasonable time is not accorded to persons who are subject to disciplinary proceedings. That this is so is evident from the provisions of s 18(9) of the Constitution.

The next question, therefore, concerns the appropriate procedural mechanism for invoking the right to a hearing within a reasonable time, in administrative proceedings. It seems to me, that a similar procedure to the one provided for in s 24(2) has to be followed. In other words, a disciplinary tribunal established by law is competent to resolve the question as to whether an application for referral to the Supreme Court is to be declined on the grounds that it is frivolous and vexatious. It must, of course, in the first instance decide whether the administrative proceedings involve a determination of civil rights and obligations. No doubt if the adjudicating authority decided to refer the question to the Supreme Court, then the disciplinary proceedings

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are stayed, depending on the resolution of the question by the Supreme Court.

The next question that arises, that was not raised by the respondent's counsel, is whether an appeal lies against the refusal to refer the question of the alleged delay to the Supreme Court.

Section 24(3) of the Constitution reads as follows:

> "Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)."

It is clear from the wording of this provision that the correctness of the ruling by the disciplinary committee can only be challenged on appeal. The

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Health Professions Act provides for an appeal to the High Court against the decision of the Disciplinary Committee. See *S* v *Mbire* 1997 (1) ZLR 579 (S) where Gubbay CJ stated thus as pp 581-2:

> "It is clear from the wording of this provision that where referral has been refused by the High Court or by any court subordinate to it, albeit the opinion that the raising of the constitutional question was merely frivolous or vexatious was manifestly erroneous, there is to be no interruption in the proceedings. They are to continue to the stage of determination, which in a criminal case is when the accused is convicted and the final sentence delivered. See *R* v *Mhosva* 1980 ZLR 74 (G) at 75C; *S* v *Morrisby* 1995 (2) ZLR 270 (S) at 271 (C). Thereafter, the right to raise the constitutional question as a ground of appeal against such determination becomes permissible."

It follows therefore, that the appeal has not been properly enrolled and is accordingly struck off the roll. As neither party took this point, there will be no order as to costs.

CHIDYAUSIKU JP: I agree.

Jumo Mushoko & Partners, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

GEORGIAS & ANOR v ZDB FINANCIAL SERVICES LTD 2000 (2) ZLR 447 (HC)

Citation	2000 (2) ZLR 447 (HC)
Case No	Judgment No. HH-235-00
Court	High Court, Harare
Judge	Chatikobo J
Heard	October 19, 2000
Judgment	December 6, 2000

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Counsel G C Chikumbirike, for the applicants
F Girach, for the respondent

Annotations None

Civil application

Flynote

Contract - validity - mistake - claim that money paid in error - condictio indebiti - proof of error required

Interest - when payable - money paid in error - whether debtor must be placed in mora - interest thereon

Headnote

Where a person claims repayment of money paid in error he must establish that the money was paid in error. If the claim is brought under the *condictio indebiti*, the claim will not succeed if the claimant was grossly negligent or if the error arises out of a fact concerning the claimant's own affairs, or a fact relating to another's affairs which is generally known. If the claimant fails to put evidence before the court which rebuts these factors, the court will have no way of knowing if these factors were present or not.

The general principle in our law is that interest is not payable on a debt unless the parties have agreed that interest is payable or unless the defendant is *in mora*. Interest is not payable by the recipient of money paid in error as the recipient is in the same position as a *bona fide* possessor of goods who is entitled to keep the fruits of that property. Money paid in error and received in good faith is not due and payable to the payer until it has been demanded, at which point the recipient is placed *in mora*.

Cases Considered

Cases cited:

Calder v *SA Mutual Life Assurance Soc* 1972 (2) RLR 46 (G)

Dilmitis v *Niland* 1965 RLR 695 (G); 1965 (3) SA 492 (SR)

Nkosi v *Totalisator Agency Bd (Transvaal)* 1980 (1) SA 122 (T)

Rahim v *Minister of Justice* 1964 (4) SA 630 (A)

Union Govt v *National Bank of SA Ltd* 1921 AD 121

Case Information

G C Chikumbirike, for the applicants

F Girach, for the respondent

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Judgment

Chatikobo J: On 17 December 1996, Smith J granted judgment against the applicants in case No. HC-4362-93. The plaintiff, in favour of whom judgment was granted, was the present respondent, then known as Standard Chartered Finance Zimbabwe Ltd. The judgment was granted with the consent of the parties. A subsequent attempt by the applicants to have the

CHATIKOBO J

judgment rescinded by the High Court was unsuccessful and so was the appeal which was noted to the Supreme Court against the High Court's refusal to rescind.

The process of execution then started. A writ of execution was issued on 30 November 1998. Property belonging to the applicants was attached on 18 January 1999 and the goods were to be removed on 17 February 1999. It is not clear on the papers if the goods were actually removed although the probability is high that they were removed because the sale of the attached property was subsequently scheduled for 23 April 1999. In an attempt to stop the sale of the property, representations were made to the respondent to stay the sale. The respondent was unwilling to stop the sale unless the applicants could provide an irrevocable bank guarantee for the applicants' full indebtedness. The following guarantee was given by the Commercial Bank of Zimbabwe (CBZ):

> "We the Commercial Bank of Zimbabwe Ltd do hereby irrevocably guarantee and bind ourselves jointly as well as severally, as sureties and co-principal debtors for the payment of $5 860 690.35 plus interest at 40% *per annum* from 15 April 1999 which Trinity Engineering (Pvt) Ltd owe the Zimbabwe Development Bank Financial Services in terms of the High Court Order No. 4362/93 dated 17 December 1996. We further undertake to settle the above amount together with the auctioneers' and deputy sheriff's wasted costs, legal costs, collection commission and bond's cancellation costs incurred (or) to be incurred by the Zimbabwe Development Bank in its effort to recover the amount owing.
>
> We renounce the "beneficiuum ordinis seu excusionis et divisionis" and declare that this guarantee is to be without prejudice to any securities now held on behalf of Trinity Engineering (Pvt) Ltd and shall remain in force as continuing covering security until settlement.
>
> The amount owing together with all costs as highlighted above will be paid not less than 60 (sixty) days from the date of this guarantee and cancellation of any existing security will be upon receipt of actual funds by Zimbabwe Development Bank who also undertake to pass on the deeds of Trinity Engineering (Pvt) Ltd's three properties to the Bank upon full settlement of outstanding debt and cancellation of securities."

It was signed by Mr Gideon Gono on behalf of CBZ on 16 April 1999.

The original judgment debt was for the sum of $4 351 269.77 and it accrued interest at the rate of 40% *per annum*.

The applicants contended that the sum of $5 860 690.35 reflected in the guarantee was inserted there in error because the amount which should have been guaranteed is the judgment debt, namely $4 351 269.77 plus the interest which had accrued to that date less any amounts paid before 15 April 1999. Although no specific figure is mentioned it is contended that such amount is less than $5 860 690.35. Consequently, so the contention goes, there has been an overpayment made in good faith under reasonable error which the applicants are entitled to

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claim under the *condictio indebiti*.

The first stage in the inquiry is to determine if there has been an error. When

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the notice of attachment was issued on 18 January 1999, the amount then outstanding was the sum of $6 302 765.90. If one deducts from this figure the sum of $1 450 423.26 which was paid on 28 February 1999, the resultant balance becomes $4 852 342.64. This amount would have continued to accrue interest until the date when the guarantee was executed. It must follow that the applicants' contention that the amount which should have been put in the guarantee was $3 351 269.77 cannot be correct because interest and other charges had since been added to the judgment debt. The amount of the writ had exceeded the original judgment debt and, in addition, there were other charges which were secured by the guarantee, such as auctioneer's fees. The exact amount which was due on 15 April 1999, which as I say was greater than the judgment debt, was agreed to be $5 860 690.35. How that figure was arrived at has not been explained. It is apparent that the deponent to the founding affidavit is mistaken when he states that there is an error in the guarantee in so far as the judgment debt is reflected as $5 860 690.35 instead of $4 351 269.77. The guarantee was sought and granted for the purpose of securing a stay of the impending sale of applicants' goods, which stay could only be acceded to if the full amount due under the writ was secured by a bank guarantee. In order to support the contention that there is an error in the guarantee, applicants should prove the full amount which was due under the writ as at 15 April 1999. If such amount is less than the amount reflected in the guarantee then there may be an argument about an overpayment.

The author of the guarantee, who is also the person who negotiated with respondent's representatives, accepted that the full amount payable was $5 860 690.35. He has not deposed to an affidavit in support of the applicants' contention. Without his evidence, one can only conclude that what the deponent to the founding papers states is no more than a series of deductions based on the initial assumption, which is wrong, that the figure which should have been inserted in the guarantee is the original judgment debt and not the amount due under the writ.

It has therefore not been established that there was an overpayment.

The same conclusion can be arrived at by testing the applicants' averments against the requisites of a *condictio indebiti*. The law lays down that if in error, payment has been made of a thing which was not due, the thing or its value can be recovered back from the recipient by the person who made the payment. Wessels *Law of Contract* 2 ed, para 3636 says:

> "As a general rule, if an owner hands over his property to another with intention that the latter is to become owner, he cannot afterwards recover back either the property or its value. But if he hands over the property under a wrong impression that he is bound to do so, it would be inequitable to allow the strict rule of law to prevail. If there exists no valid antecedent reason for the transfer - if the thing is not due - then although there is an apparent will to transfer, that will would not have existed if the true facts were known."

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The learned author (in para 3637) says that three things must concur before a payment can be recovered back under the *condictio indebiti*. These are that:

1. The sum paid or thing delivered must not have been due.

2. There must not have been a reasonable cause for the payment even if it was not due.

3. The person who pays must not know that the money or thing is not due.

The learned author expounds on these requirements in the paragraphs that follow (I quote only two paras) in these terms:

> "3642 ...
>
> (a) A payment is considered to be not due, not only if the *recipiens* had no claim to the debt, but also if a claim was thought to exist which after payment is discovered to have been null and void, and to have been extinguished (D.12.6.54; Pothier, *Cond, Ind.*, s 143). *Veluti si quid solutum sit ex testamento quod postea falsum, aut irritum, aut ruptum aut nullum apparuit* (Voet 12.6.1) - So also if in error I buy from you my own property (D.12.6.37).
>
> 3644(b) There is a *solutio indebiti* if the *solvens* can show that the apparent debt ought not to be admitted by a court of law either as a debt or as a natural obligation, and that he did not know of the flaw when he paid it (Pothier, *Cond, Indeb*., s 144). The Roman jurists expressed this by saying that if the *solvens* can plead a peremptory exception to the claim the payment is an *indebiti solutio* (D.12.6.26.3)). Thus, where an executor pays a promissory made by the testator, he can recover the amount so paid if he can show that the note was signed under duress (*Voet*, 12.6.1, 2 and 4)."

Commenting on these two passages in *Nkosi* v *Totalisator Agency Board (Transvaal)* 1980 (1) SA 122 (T) 129G, Myburgh J said:

> "In effect, Wessels expounds the same law as Voet. We can therefore say that if a person pays a sum of money in error, believing it to be due either as an enforceable obligation or as an unenforceable natural obligation, such payment in error can be recovered by the *condictio indebiti*, if in fact no such amount is due at all."

In the case of *Calder* v *South African Mutual Life Assurance Society* 1972 (2) RLR 46 (G) 49H Greenfield J said of a payment made in error:

> "The plaintiff's claim takes the form of a *condictio indebiti*, that is, a claim to recover money paid to the defendant by the plaintiff which the plaintiff did not owe to the defendant and which it paid in error. With regard to the last point, Lord De Villiers CJ, in the case *of Divisional Council of Aliwal North* v *De Wet* (1890) 7 SC 232 stated the law as follows (see p 234):
>
> > '... it is not every mistake of fact that will entitle a plaintiff to relief in the action known as *condictio indebiti*. The plaintiff's ignorance should not be, as stated by *Voet, supina aut affectata* (12.6.7), the meaning of which expression he explains in another passage (22.6.7) to be, that the ignorance should not be of a fact concerning the plaintiff's own affairs, or of a fact which, although concerning the affairs of others, is known to everybody except a few solitary individuals. But even in relation to facts relating to his own affairs his ignorance may sometimes be excusable, and the illustrations given by *Voet* justify the conclusion that if the plaintiff had been led into the mistake by the defendant himself he is entitled to relief'."

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The expression *supina aut affectata* has been translated to mean "negligent or studied". It has also been said that the ignorance relied upon for justifying relief under the *condictio indebiti* must be neither heedless nor far-fetched. See *Union Government* v *National Bank of SA Ltd* 1921 AD 121 at 126.

I refer finally in this regard to a passage in the judgment of van Blerk JA in *Rahim* v *Minister of Justice* 1964 (4) SA 630 (A) at 634:

> "It is however, not every ignorance of fact which gives rise to the *condictio indebiti*. *Gluck*, 12.6.827, states that the payment should have been made as the result of an excusable error, and says in para 834 that the error should not be based on gross negligence. He refers *inter alia* to Voet 12.6.7. where it is stated that the ignorance of fact should appear to be neither slack nor studied."

What emerges from these passages is that the mistake of fact which is relied on to justify relief in terms of the *condictio indebiti*, must neither be negligent, slack nor studied; it must not be grossly negligent nor must it involve the plaintiff's own affairs or the affairs of others that are generally known. The absence of these prohibitory factors in a claim based on the *condictio indebiti* is ultimately a matter of evidence. When a claimant fails to put before the court evidence which rebuts the existence of these factors the incidence of the onus becomes decisive against him. In context, the court has no way of knowing if there was negligence on the part of the applicants, or, if there was, whether such negligence was gross or studied and whether the applicants were in any way slack in the way they did or failed to ascertain the full extent of their liability. The only person who could have shed light on these matters was Gideon Gono, the author of the guarantee. He it is who negotiated the guarantee with respondent's representatives. The circumstances under which he accepted the figure of $5 860 690.35 as the amount owing have not been explained. Only he can say if there was an error and if so how such an error came about. The claim has thus not been substantiated.

The claim also contains a claim for interest at 40% *per annum*. In argument, Mr *Chikumbirike* restricted himself to a claim for *mora* interest. The general principle of our law is that interest is not recoverable unless the parties have agreed that interest is payable or unless the defendant is *in mora*. As Barry J held in *Baliol Investment Co (Pty) Ltd* v *Jacobs* 1946 TPD 269 and 274:

> "The weight of the authorities on Roman Dutch Law is in favour of the view that interest is not recoverable either under the *condictio causa data causa non secuta* or under the *condictio indebiti*."

According to the authorities interest is not payable because the recipient of money paid in error is in the same position as a *bona fide* possessor who is entitled to keep the fruits.

Additionally, money paid in error and received in good faith is not due and payable to the payer until it has been demanded, at which point the recipient

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is placed *in mora*. Even if the recipient invests the money and earns interest, he is allowed to keep the amount of the interest, seemingly because the risk of such investment lies with him.

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The rationale of this approach was also touched upon by Fieldsend J (as he then was) in *Dilmitis* v *Niland* 1965 (3) SA 492 (SR) 494H-495A:

> "It is, however, significant to note that there is no reported case to which I was referred where the *bona fide* possessor of property has been held accountable for his use and occupation of the property save where he has made a claim for improvements against which the value of use and occupation has been set off. Indeed, a *bona fide* possessor is not held accountable for fruits gathered before joinder of issue. Lee and Honore on *Obligations*, see p 715. Further, *Baliol Investment Co (Pty) Ltd* v *Jacobs* 1946 TPD 269 establishes that in a claim based on enrichment arising from the holding of money without cause, there must be an allegation that interest was received before any claim for the interest is allowable."

I do not understand the last sentence in this passage to mean that a claim for interest can be allowed if it is specially pleaded. *Wessels supra* at para 370S, who relies on the *Baliol* case, states that:

> "Voet is of the opinion that if the *recipiens* invests a capital sum of money which has been paid in error, he is entitled to the benefit of the interest derived from the investment on the ground that the risk of the investment lay with him."

The position appears to be that interest is only payable from the time the recipient is placed *in mora* and not before.

For the foregoing reasons, I have to hold that the applicants' claim has not been established.

The application is dismissed with costs.

Chikumbirike & Associates, applicants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

GALANTE v GALANTE 2000 (2) ZLR 453 (SC)

Citation	2000 (2) ZLR 453 (SC)
Case No	Judgment No. S-92-00
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA and Muchechetere JA
Heard	September 7, 2000
Judgment	December 7, 2000
Counsel	A P de Bourbon SC, for the appellant R Passaportis, for the respondent
Annotations	None

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Civil appeal

Flynote

Costs - contribution towards - divorce action - spouse's entitlement to

Family law - husband and wife - maintenance - pendente lite - assessment - principles - effect of change in cost of living - relevance of payer having income in foreign currency - contribution towards costs - spouse's entitlement to

Headnote

Maintenance *pendente lite* is intended to afford temporary relief. For that reason, a claim for such maintenance does not have to be presented with the same degree of precision as a claim for maintenance after divorce. The court will be prepared to adopt a more robust approach to assessment of maintenance *pendente lite* than it will in the case of maintenance after divorce. The court will try to arrive at a figure within the payer's means that will allow the continuation of a standard of living comparable with that formerly enjoyed. In arriving at this figure, the court will make an assessment based on its own experience, as well as on the information supplied by the parties. Before divorce, all other things being equal, the wife of a very rich man is entitled to be maintained on the basis that she is the wife of such a man, not as a person who had no means, or limited means, before she married him. Maintenance for a former spouse, on the other hand, may be subject to other considerations, namely, those set out in s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*]. An increase in the cost of living may be good cause for an increase in maintenance. When considering the payer's means, the court will, if the payer has an income in foreign currency, bear in mind a variation in the exchange rate between that currency and the currency of Zimbabwe.

A spouse is entitled to apply for a contribution towards the costs of a divorce or judicial separation. A wife should not be required to dispose of property in order to fund such litigation. If her husband can assist, she should be placed in a position to present her case adequately, relevant factors being the scale on which the husband is litigating and the scale on which the wife intends litigating.

Cases Considered

Cases cited:

Acutt v *Acutt* 1990 (2) ZLR 220 (S)

Barrass v *Barrass* 1978 RLR 384 (G)

Crone v *Crone* 2000 (1) ZLR 367 (S)

Glazer v *Glazer* 1959 (3) SA 928 (W)

Greenspan v *Greenspan* 2000 (2) SA 283 (C)

Hodgson v *Hodgson* S-190-92

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Lindsay v *Lindsay* 1993 (1) ZLR 195 (S)

Nicholson v *Nicholson* 1998 (1) SA 48 (W)

Case Information

A P de Bourbon SC, for the appellant

R Passaportis, for the respondent

Judgment

McNally JA: On 25 November 1999, the respondent (Mrs Galante) was awarded in the High Court, as maintenance *pendente lite*, the sum of $100 000 per month, plus a contribution towards costs of $50 000. She was also awarded the costs of the proceedings.

The appellant (Mr Galante) has appealed against all three of these awards.

MAINTENANCE *PENDENTE LITE*

Before considering the particular facts of this case, I think it may be useful to set out certain general considerations which a court takes into account in dealing with applications for maintenance *pendente lite*.

1. Maintenance *pendente lite* is intended to afford temporary relief; thus the courts do not insist on the claim being presented with the same degree of precision and exactitude as is afforded by detailed evidence (such as in a claim for maintenance after divorce): *Acutt* v *Acutt* 1990 (2) ZLR 220 (S) at 225C; *Hodgson* v *Hodgson* S-190-92.

2. The court must endeavour to arrive at a figure within the payer's means which will allow the continuation of a comparable standard of living to that formerly enjoyed: *Acutt supra* and *Barrass* v *Barrass* 1978 RLR 384 at 386B.

3. The court will make an assessment based on its own experience as well as on such information as is furnished by the parties. This exercise of discretion will not be interfered with on appeal unless the court has misdirected itself, or the assessment is grossly excessive or substantially inadequate: *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S) at 199B.

4. When the court is dealing with the wife of a very rich man it will take the view "that she is entitled to be maintained *pendente lite* upon the basis of being the wife of a very rich man, not as a person who had no means or possibly very limited means, before she married him": *Glazer* v *Glazer* 1959 (3) SA 928 (W) at 930F.

5. An increase in the cost of living may in itself be "good cause" for an increase in maintenance. We live in unusual times of very high inflation: *Crone* v *Crone* 2000 (1) ZLR 367 (S) at 369G; *Tyzer* v *Tyzer* HH-123-99 at p 6.

6. When considering the payer's means, as in point 2 above, the court will bear in mind,

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where the payer has an income in foreign currency, a

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variation in the rate of exchange between that currency and the Zimbabwe dollar: *Crone supra* at 370F-H.

7. Two things follow from the above considerations. First, that the court will be prepared to adopt a more robust approach to assessment of an appropriate level of maintenance *pendente lite* than it will in the case of maintenance after divorce. Second, that a wife prior to divorce is entitled, other things being equal, to continue to live in the style to which she has become accustomed; whereas maintenance for a former wife may be subject to other consideration, namely, those set out in s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*].

Turning then to the facts of this case, the court *a quo* found that there were many areas where the facts were in dispute, but accepted that the parties had had "a very high standard of living, way beyond that of almost the entire rest of Zimbabwean society". It noted that Mr Galante had very substantial inherited assets in the United States of America. It noted that he had himself, in a long and detailed letter to Mrs Galante dated 6 July 1998, proposed to send her monthly the sum of $77 600. He converted this into US$4 311.45. He explained this conversion by saying, elsewhere in the letter:

> "The Zimbabwean dollar amount will be based on the US dollar amount set forth below irrespective of the exchange rate, so as to protect you from further Zimbabwe dollar devaluation."

I pause to observe that at the present day exchange rate of 54:1, the Zimbabwe equivalent of US$4 311.45 would be $232 818 per month, a figure surprisingly close to the original monthly amount claimed, which was $227 054.67. I hasten to add that I agree with the learned judge that that claim was excessive.

The learned judge awarded her less than half the amount claimed. He allowed an increase on the simple basis that the purchasing power of money had fallen very considerably from the date of the letter - 6 July 1998 - to the date from which he allowed the increase - 1 December 1999. He allowed a 25% increase from $80 000 (approximately) per month to $100 000 per month. He declined to say that $80 000 was too little at the time Mr Galante offered it, and paid it, but allowed the increase to offset, at least partially the decline in the value of money.

Pendente lite - and I stress that different considerations might apply in considering maintenance after divorce - I cannot say there was any misdirection in the learned judge's approach.

CONTRIBUTION TOWARDS COSTS

A spouse is entitled, in terms of Order 35, r 274 of the High Court Rules, to

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apply for a contribution to the costs of a divorce or judicial separation. It is well established that a wife should not be required to dispose of property in order to fund such litigation: Hahlo *SA Law of Husband and Wife* 5 ed p 428. If her husband can assist, she should be "placed in a position adequately to present her case, relevant factors being the scale on which the respondent is litigating and the scale on which the applicant intends litigating": *Nicholson* v *Nicholson* 1998 (1) SA 48 (W) at 50D; *Greenspan* v *Greenspan* 2000 (2) SA 283 (C) at 290F.

These are South African cases, based on r 43 of the Uniform Rules of Court, but the principles are the same in Zimbabwe. See *Barrass supra* at 386-7.

Mrs Galante placed before the court evidence, in the form of fee invoices from her legal practitioners between 18 February 1999 to 12 October 1999, that she was required to pay them for services rendered in connection with her matrimonial dispute since 29 December 1998, a total sum of $132 362.13.

Even though $20 000 has already been paid as a contribution, and even though the question whether Mrs Galante had disposable assets was uncertain, I cannot hold that an order to pay a further $50 000 is in the circumstances unreasonable.

COSTS

Normally, the costs of an application for maintenance *pendente lite* are made costs in the cause of the main action, or are reserved for decision by the trial court, precisely because that court, having heard detailed evidence, is better able to assess whether the application was well-founded or not. See *Barrass supra* at 388D. There may be unusual circumstances in which costs are awarded against the husband - see *Lindsay supra* at 203B-C - but those circumstances do not exist here. The learned judge gave no reasons for making the unusual order he made and I am satisfied it was made in error.

As to the costs of appeal, the appellant has been successful only on the costs of the hearing, and even on that point he has achieved no more than a postponed decision. All in all, I would make no order as to the costs of appeal, leaving each party to bear its own costs.

Accordingly, the appeal is allowed in part, with no order as to the costs of appeal, to the extent that the order as to costs in the court *a quo* be set aside and in its place there will be an order that the question of costs is reserved.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I have read the judgment of my brother

MUCHECHETERE JA

McNally but respectfully disagree with his conclusion on the amount of maintenance *pendente lite* to be awarded to the respondent. Whilst I agree that the seven factors listed in para 3 of his judgment are pertinent to the issue I am, however, of the view that in this case the court ought

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to take into account whether or not maintenance being paid by Mr Galante was generally adequate in the parties' circumstances, that is, where the husband is very rich. Mr Galante swore that the maintenance he was paying was adequate. He indicated that, in addition to the $80 000 Mrs Galante was receiving a month, Mrs Galante also had rent free accommodation in a fully furnished house and the use of a number of luxury motor vehicles. All the expenses were met by Mr Galante and he also pays for the children's school fees. There are also other items besides those listed which are met by Mr Galante.

Against the above, Mr Galante accepts that she is paid far more than is necessary but contends that she is entitled to live in a spoilt and pampered life of luxury. She does not, however, indicate by how much and in what way the maintenance she is receiving falls short of keeping her in a "spoilt and pampered life of luxury". Her situation is different from that of Mrs Crone in the *Crone* v *Crone* case *supra*. In that case the respondent attempted to indicate in which way the maintenance she received fell short of what she expected to receive as a divorcee of leisure.

In the result, in this case, all Mrs Galante was saying is "give me an extra $20 000 per month because it could be that the maintenance you are already giving me has been eroded by the decline of the Zimbabwe dollar and the cost of living". I agree with Mr *de Bourbon*'s submission to the effect that a maintenance order, more particularly *pendente lite*, should not be for an amount greater than is reasonably required, albeit in the upper income bracket. In the circumstances, no evidence was adduced to the effect that the maintenance being paid was less than that reasonably required. I see no reason for awarding her more than what she is receiving presently.

I would therefore have upheld the appeal on this issue with costs. As for the rest of the case, I agree with the judgment and order of McNally JA..

Atherstone & Cook, appellant's legal practitioners

Wintertons, respondent's legal practitioners

GUGA v MOYO & ORS 2000 (2) ZLR 458 (SC)

Citation	2000 (2) ZLR 458 (SC)
Case No	Judgment No. S-130-00
Court	Supreme Court, Bulawayo
Judge	Gubbay CJ, McNally JA and Muchechetere JA
Heard	November 27, 2000
Judgment	December 7, 2000
Counsel	S Ndhlovu, for the appellant A Masawi, for the first respondent No appearance for the second and third respondents

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Annotations None

Civil appeal

Flynote

Sale - double sale of immovable property - transfer not passed - first purchaser should succeed unless special circumstances dictate otherwise - what may constitute such circumstances

Headnote

Where a seller fraudulently sells immovable property to two purchasers the court has to decide between two innocent buyers. Where transfer has not been passed to either party the basic rule in cases of double sales is that the first purchaser should succeed, in the absence of special circumstances. The first purchaser is treated as having the stronger claim and the second purchaser is left with a claim for damages against the seller.

In the present case, there were various circumstances which cumulatively amounted to special circumstances such as to justify ordering the transfer of the property to the second purchaser. The second purchaser had paid more money to the seller than the first purchaser. The second purchaser had taken possession of the property and had expended considerable sums on the house. The first purchaser had failed to take action to protect his interests by registering a caveat against the title deeds after he became aware that the seller was behaving dishonestly. Finally, a law firm was still holding for the seller monies payable to the seller from the second purchaser upon transfer and the court could compensate the first purchaser by ordering that this money be paid to the first purchaser instead of to the seller.

Cases Considered

Cases cited:

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

BP Southern Africa (Pty) Ltd v *Desden Properties (Pvt) Ltd* 1964 RLR 7 (G); 1964 (2) SA 21 (SR)

Charuma Blasting & Earthmoving Services (Pvt) Ltd v *Njainjai & Ors* 2000 (1) ZLR 85 (S)

Lindsay v *Matthews & Anor* 1972 (1) RLR 186 (G); 1972 (2) SA 133 (R)

Case Information

S Ndhlovu, for the appellant

A Masawi, for the first respondent

No appearance for the second and third respondents

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Judgment

McNally JA: This is another case of a double sale of an immovable property. The tragedy of such cases is that the court has to decide between two innocent purchasers. Both of them have been cheated by the second respondent, who has not even attempted to defend himself. The Registrar of Deeds

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presumably abides the judgment of the court. It is normal courtesy for him to file a notice to this effect, but he does not appear to have done so.

Mtungwazi sold his house, 27 Gifford Avenue, Northend, Bulawayo, to the first respondent (Moyo) on 4 November 1996 for $120 000. The (amended) arrangement was that she was to pay $15 000 down, which she did, $32 000 on 24 December 1997, which she did, leaving a balance which was paid by monthly instalments of $5 000. Eventually, only $14 000 remained outstanding, as at May 1997. We were advised that that amount has since been paid. Occupation was not to be taken until the full amount was paid, and apparently in any event, the house needed repair and was uninhabitable.

Moyo became aware in December 1997 that Mtungwazi was advertising the house for sale and she instructed her lawyers to write threatening an interdict. No reply was received, and unfortunately she did nothing more.

Meanwhile on 5 May 1998, Mtungwazi sold the house again, to the appellant, (Guga). The price was $250 000. She paid $150 000 and the balance was to be paid in monthly instalments of $5 556 per month. She was given occupation as from 1 June 1998 and immediately undertook repairs and renovations at a cost of $78 024.63. She bought the house in good faith, unaware of the previous sale to Moyo.

Moyo, on learning of this, obtained a provisional order from the High Court interdicting transfer to Guga and ordering transfer to herself on payment of $14 000. That provisional order was confirmed on 22 July 1999, with costs against Guga. The latter now appeals against that judgment.

The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually small comfort. But that rule applies only "in the absence of special circumstances affecting the balance of equities". See McKerron (1935) 4 *SA Law Times* 178, *Burchell* (1974) 91 *SALJ* 40. *Burchell* was of the view that "the balance of equities must weigh heavily in favour of the second purchaser" before the court could favour her over the first purchaser (p 41 *in fine* and note 31). And in *BP Southern Africa (Pty) Ltd* v *Desden Properties (Pvt) Ltd* 1964 RLR 7 (G), Macdonald J (as he then was) said:

> "In my view, the policy of the law will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view expressed by Professor McKerron that

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save in 'special circumstances' the first purchaser is to be preferred."

His Lordship expressed the opinion that it should not be seen as a special circumstance that the second purchaser stood to lose more than the first

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purchaser, though in fact he was not convinced that that was the true position. However, Beck J in *Lindsay* v *Matthews & Anor* 1972 (1) RLR 186 (G) at 195F seemed prepared to consider that argument, though he too found that on the facts it did not arise.

The broad principle as set out above was acknowledged to be our law in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) although that case turned on the fact that the second purchaser had knowledge of the first purchase. Similarly in *Charuma Blasting & Earthmoving Services (Pvt) Ltd* v *Njainjai & Ors* 2000 (1) ZLR 85 (S).

Mr *Ndlovu*'s contention is that there are special circumstances here. He lists these:

1. Guga has in good faith expended $78 024.63 on the house and is in occupation lawfully in terms of her agreement.

2. Moyo helped to create the problem by failing to record a caveat against the title deeds when she knew Mtungwazi was behaving dishonestly. To that extent, it is her fault that Guga became involved in a double sale situation. Perhaps it is fairer to say it is her legal advisor's fault, for which she must bear the consequences.

3. Guga stands to lose more because she has paid $150 000 plus the $78 024.63 whereas Moyo has paid only $106 000. (In fact, Moyo has apparently since, and perhaps unwisely, paid the remaining $14 000). There is still a financial balance of loss in favour of Guga.

It seems to us that there is a further equitable consideration. Mr *Ndlovu*'s firm still holds $100 000 in trust from Guga, ready to pay Mtungwazi against transfer. If we direct that that money be paid to Moyo as part refund to her of the price she paid Mtungwazi, then Guga will obtain full redress and Moyo will receive at least part redress.

As to whether we can interfere with the exercise of discretion by the High Court in favour of Moyo, we are of the view that we can. The learned judge, with respect, was quite wrong in finding, without any basis in evidence, that Guga had not paid for the repairs in the sum of $78 024.63. Similarly, there was no basis for the finding that "it was difficult to believe" that Guga was unaware of the previous sale.

In our view, the considerations set out above cumulatively amount to special circumstances. We will therefore allow the appeal.

It seems to us that the real wrongdoer in this case is Mtungwazi, who was served with notice of the hearing but who did not bother to come. We have already indicated our intention to order that the $100 000 held in trust by Mr *Ndlovu*'s firm be paid to Moyo. But in addition we think a

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special order as to costs is warranted. Both contesting parties, Guga and Moyo, are innocent. Mtungwazi is the person who caused the litigation. We propose to

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order that he pay the costs of both parties in both courts. If he fails to do so, each party will bear its own costs.

Accordingly, the order of the court is as follows:

1. The appeal is allowed.
2. The order of the court *a quo* in case No. HC-1954-98 is set aside.
3. The sum of $100 000 held in trust by Messrs Sibusiso Ndlovu on behalf of Audrey Guga, be paid to Christine Moyo, but be deemed to have been paid to Brian Mtungwazi against transfer of the disputed property from Brian Mtungwazi to Audrey Guga.
4. If the second respondent fails to sign the necessary documents to enable the property to be transferred to the appellant by 15 December 2000, the Deputy Sheriff is hereby authorised to do so on his behalf.
5. The costs of the appellant and of the first respondent, in this court and below, are to be paid by the second respondent.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Sibusiso Ndlovu, appellant's legal practitioners

S K Sibanda & Partners, first respondent's legal practitioners

TRUST INSURANCE BROKERS (PVT) LTD v MINISTER OF FINANCE & ANOR 2000 (2) ZLR 462 (SC)

Citation	2000 (2) ZLR 462 (SC)
Case No	Judgment No. S-133-00
Court	Supreme Court, Bulawayo
Judge	Gubbay CJ, McNally JA and Muchechetere JA
Heard	November 27, 2000
Judgment	December 11, 2000
Counsel	D M Campbell, for the appellant P Ncube, for the respondent

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Annotations None

Civil appeal

Flynote

Insurance - insurance broker - registration - cancellation of registration - grounds on which registration may be cancelled - public interest - broker having incurred debts some years previously but subsequently trading its way to liquidity - cancellation irrational - grounds on which registration may be refused

Professions and trades - insurance broker - registration - cancellation of registration - grounds on which registration may be cancelled - public interest - broker having incurred debts some years previously but subsequently trading its way to liquidity - cancellation irrational - grounds on which registration may be refused

Headnote

The appellant insurance broker had got into financial difficulties, but was allowed to trade itself out of debt, which it did successfully over a period of a few years. Subsequently, however, the Commissioner of Insurance cancelled the appellant's registration as a broker on the grounds that it had been conducting its business in a manner that warranted concern. The Commissioner relied on a provision in the legislation that allowed him to refuse to register a broker if it was not in the public interest to do so.

Held, that in terms of s 35(3) of the Insurance Act the Commissioner is obliged to register as a broker an applicant who meets the relevant qualifications and he has no discretion to refuse to register such an applicant. Once registered the Commissioner can cancel the registration of the broker in terms of s 38(1) of the Act if the broker ceases to possess any of the requisite qualifications.

Held, further, that the power given to the Commissioner to reject the application on the grounds of "public interest" relates to grounds unconnected with the applicant's qualifications and personal suitability, such as where there is over-trading within the profession of insurance brokers. As the appellant was qualified, there were no grounds for refusing to register it, or for cancelling its registration.

Held, further, that even assuming the Commissioner has power to cancel registration in "the public interest" on grounds relating to the personal suitability of the particular broker, there was no rational basis for finding that the public interest demanded the cancellation of the appellant's registration. The Act provided for the registration of rehabilitated insolvents. At the time the registration was cancelled, the appellant was in the same

situation as a rehabilitated insolvent, and there were no longer any grounds to cancel its registration. It was inherently irrational for the Commissioner to decide that for years the public interest had required that the appellant continue to be registered while it traded itself out of its financial difficulties but that after it had commendably done this, the same public interest

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demanded that it be de-registered.

Cases Considered

Cases cited:

Council of Civil Service Unions v *Min for the Public Svc* [1984] 3 All ER 935 (HL)

Hama v *NRZ* 1996 (1) ZLR 664 (S)

PF-ZAPU v *Min of Justice (2)* 1985 (1) ZLR 305 (S)

Legislation considered:

Insurance Act [*Chapter 24:07*], ss 35(3), 35(4), 38(1) & 71(1)

Insurance Regulations 1989 (SI 49 of 1989), ss 23(1) & 24

Legal Practitioners Act [*Chapter 27:07*], s 5(1)(f)

Case Information

D M Campbell, for the appellant

P Ncube, for the respondent

Judgment

Gubbay CJ: The appellant carries on the business of an insurance broker in Bulawayo. It was registered in terms of the provisions of Part VIII of the Insurance Act [*Chapter 24:07*] ("the Act") in August 1989.

On 12 March 1993, the second respondent, who is the Commissioner of Insurance ("the Commissioner"), received information from the insurance industry that the appellant was heavily indebted to a number of insurance companies. Investigations revealed it owed several million dollars. The appellant, through its managing director, Mr Clive Terry, admitted that there instances in which premiums collected from clients had not been paid to insurance companies for about nine months. A firm of auditors was appointed to examine and audit the appellant's books of account and report its findings to the insurance companies concerned, and to the Commissioner.

The future of the appellant was discussed in detail. Restructuring and judicial management were options considered, but not liquidation; at no time was any allegation made that the appellant had misappropriated trust monies, or had engaged in any form of dishonest activity. The cause of the appellant's financial difficulty was that it had exceeded the limits of credit with the insurance companies due to cash flow problems and the incurring of bad debts amounting to over two million dollars.

Upon the completion of their task, in which the appellant had co-operated fully, the auditors recommended that the appellant be allowed to continue operating in order to trade itself out of its debts. This was agreed to and the appellant resumed its operation without any close

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supervision. The

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directors of the appellant pledged their personal property as collateral security. Within a period of three years the appellant had succeeded in settling virtually all its indebtedness.

It seems that as early as December 1994 de-registration procedures were commenced against the appellant on account of its financial situation, but were not persisted in. Again, in July 1996, a somewhat half-hearted attempt to "close (the appellant) to new business" was not proceeded with. In February 1997, the Commissioner purported improperly to de-register the appellant for allegedly possessing no professional indemnity insurance or securities. Those proceedings were likewise abandoned.

On 2 April 1997, the Commissioner gave notice to the appellant in terms of s 38(1) of the Act and s 23 of the Insurance Regulations 1989, SI 49 of 1989, that he proposed to cancel its registration as an insurance broker on the ground that it had been conducting its business, particularly with regard to the remittance of insurance premiums to insurers, in a manner which warranted concern; and, furthermore, that the appellant had been operating without a valid licence, professional indemnity cover and bank guarantees, since January 1995.

Aggrieved by the proposal, the appellant requested the Commissioner, pursuant to s 71(1) of the Act, to submit its case to the first respondent, the Minister of Finance ("the Minister"), for review. On 26 June 1997, the Minister, without giving any reasons, approved the proposal of the Commissioner to cancel the appellant's registration as an insurance broker. Thereafter, on 11 July 1997, the Commissioner informed the appellant's legal practitioners in writing that:

> "in terms of s 24 of SI 49 of 1989 (Insurance Regulations) the Minister has reviewed your request and has subsequently approved the de-registration of Trust Insurance Brokers (Pvt) Ltd."

On 24 July 1997, the appellant instituted proceedings in the High Court seeking a review of the Minister's decision. It alleged, in the first place, that s 24 of the Insurance Regulations had no relevance to the cancellation of the registration of an insurance broker; and that the Minister had acted irregularly in having recourse to such provision in reaching his decision. Secondly, the appellant contended that none of the grounds relied upon for the Commissioner's proposal to cancel its registration as an insurance broker (as particularised in the letter of 2 April 1997) established that it would not be qualified from being so registered under s 35 of the Act as is required by s 38(1).

In his opposing affidavit, the Commissioner conceded that he had erroneously referred to s 24 of the Insurance Regulations in the letter of 11 July 1997 as the Minister, in fact, had acted under s 71 of the Act. (This averment was confirmed by the Minister in an affidavit deposed to two

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months later). He annexed a letter written by him on 29 July 1997 which provided the appellant with the reasons for the Minister's decision. The concluding paragraph of the affidavit, which detailed the basis of the resistance to the application, stated:

> "Section 38 of the Insurance Act empowers the Commissioner to de-register any insurance broker if he is satisfied that the applicant would be disqualified under s 35. Section 35(4) empowers the Commissioner not to register an insurance broker if he feels it would not be in the public interest to do so. The second respondent was therefore entitled to cancel the applicant's registration because it was in the public interest to do so."

The answering affidavit by the appellant s' deponent made the following telling rejoinder:

> "The applicant's financial difficulties had on the second respondent's own admission been long ago overcome and could not any longer be a relevant factor, nor had any fresh evidence been adduced to the second respondent of further financial difficulties. Both respondents appear to have relied upon the applicant's unspecified 'track record' but if the applicant did not present a threat to the public warranting de-registration when it *was* in financial difficulties why does it present such a threat now that it is financially secure?"

In dismissing the application with costs, the learned judge said this:

> "The fact that the applicant was given time (to), and did in fact, correct the wrongs that had occurred cannot be a bar to the second respondent taking action against the applicant.
>
> The Act permits the Commissioner to act at any time if he is of the opinion that the applicant would not be a suitable person if he was an applicant, and also in the interest of the public. It was therefore not wrong for the second respondent to allow the applicant to trade out of its problems before taking action to de-register it as this is allowed by the Act.
>
> ... There is nothing to show that there was any gross irregularity in the decision made. The applicant clearly concedes its wrongful failure to conduct its insurance business as was required.
>
> Both the first and the second respondents were entitled to make the decision they made in the interest of the public, and to protect the interest of policy holders. It is also clear that had the applicant been making an application, with these facts known to the second respondent, its registration would have been refused."

Before this court, Mr *Campbell*, who appeared for the appellant, attacked the reasoning of the learned judge on two fronts. The first was that he was in error in finding that the two respondents were justified in concluding that if the appellant "were an applicant for registration in terms of s 35 of the Act it would not be qualified for being so registered" as required by s 38(1).

Section 38(1) of the Act reads:

" 38. *Cancellation of registration of Insurance Brokers*

(1) The Commissioner shall notify a registered insurance broker in writing that he proposes to cancel his registration as an insurance broker and of his reasons for so doing if at any time he is satisfied that if the registered insurance broker were an applicant for registration in terms of section *thirty-five* he would not be qualified for being so registered."

GUBBAY CJ

The qualifications for registration of an insurance broker, as specified in s 35(3), are that the

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applicant:

(a) is not seeking to register under a name identical or similar to that of someone already registered;

(b) has not been adjudged insolvent or bankrupt and has not been rehabilitated or discharged, or made an assignment to or arrangement or compensation with creditors which has not been rescinded or set aside;

(c) has not been convicted by any court wheresoever situate of any offence involving dishonesty, or of an offence under this Act for which he was imprisoned without the option of a fine;

(d) has not agreed to preferential treatment of any particular insurer so as to impair his impartiality in placing insurance business;

(e) is authorised in certain circumstances to act as correspondent of other brokers.

If these qualifications have been satisfied then "the Commissioner *shall* register the applicant as an insurance broker and *shall* issue him a certificate of registration" (emphasis added). The Commissioner has no option. Any applicant who meets these criteria would be qualified for registration and entitled to insist upon being accorded that right. Unlike other professions, it is not even a qualification for registration as an insurance broker that the applicant be "a fit and proper person to be so registered" (compare, for example, s 5(1) of the Legal Practitioners Act [*Chapter 27:07*]). If, once registered, an insurance broker ceases to possess any of the requisite qualifications, the Commissioner is then at liberty to proceed under s 38(1) of the Act and notify him in writing that it is proposed to cancel his registration.

Nowhere in the papers filed in this matter was it suggested that the Minister or the Commissioner had satisfied themselves that the appellant would not have been qualified for registration as an insurance broker had it applied. Indeed, the question was not even considered by either of them. If it had been, then upon a proper application of s 35(3) they could have reached only one conclusion - that the appellant would have been so qualified.

It is true that s 35(4) provides that:

> "Notwithstanding anything contained in subsection (3), if the Commissioner is of the opinion that it would not be in the public interest to approve an application for registration as an insurance broker, he shall reject the application and notify the applicant in writing accordingly."

But, having regard to the imperative phrases "shall register" and "shall issue" in the preceding subsection, it is clear to my mind that the legislative intendment was that the discretion reposed in the Commissioner to reject an application because it would not be in the public interest to approve it, had to be related to grounds unconnected with the applicant's qualifications; to

cite an obvious example, where there is over-trading within the profession of insurance brokers.

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For, otherwise, "may" and not "shall" would have been used in the concluding sentence of subs (3); or, there would have been added thereto such wording as "unless he is of the opinion that it would not be in the public interest to do so". Put differently, the exercise of the discretion under s 35(4) is not concerned with matters of qualification; with the applicant's personal suitability to be registered as an insurance broker. That aspect must be adjudged under subs (3).

This conclusion effectively disposes of the appeal adversely to the respondents. Nonetheless, contrary to the view I hold, I am prepared to assume in their favour that public interest is a legitimate factor in the application of s 38(1) of the Act.

On this approach, the crucial issue to which the respondents had to apply their minds was whether in April and June 1997, public interest required that the appellant should be de-registered as an insurance broker.

In considering the public interest, account is to be taken of the safeguards already put in place by the lawmaker in enacting ss 35(3) and 36 of the Act. In particular, a rehabilitated insolvent or a discharged bankrupt is deemed qualified for registration as an insurance broker; as he is a person who, though strongly suspect of engaging in dishonest activities, has never been convicted of any such offence. If, therefore, matters of solvency, honesty and fiscal discipline falling short of the requirements of s 35 are valid factors in deciding whether an insurance broker's registration should be cancelled, then, as Mr *Campbell* correctly contended, they must be of immediate and compelling proportions so as to constitute a threat to the public interest.

I am satisfied that the situation of the appellant at the beginning of April 1997, when the Commissioner eventually acted against it, cannot be seen in this way. If any parallel is to be sought with the requirements of the Act, the appellant was at that time a rehabilitated solvent. Its financial circumstances were known to the Commissioner since March 1993. It was allowed to trade itself out of its difficulties, an opportunity which surely would have been denied it had there been any suggestion that its state of indebtedness was due to dishonesty. The Commissioner and his predecessors, guided by members of the insurance industry, resolved that in the interest of the public the *status quo* should be maintained. They turned a blind eye to any irregularities, even to the extent of permitting the appellant to operate without any close supervision, in the hope and expectation that it would recover. This the appellant did.

The learned judge appreciated that notwithstanding references made to inapposite sections of the Insurance Regulations, the respondents had purported to act on the appellant's "track record" and to the perceived need

to protect policy holders' funds. However, with due deference, he erred in two respects. First, in holding that the provisions of s 38(3) of the Act justified the respondents in ignoring the contemporary situation, which might be said to be the appellant's legitimate expectations and the complicity of the Commissioner therein. Section 38(3) was of no application. It deals with the position of an insurance broker who does not wish to practise any longer and requests the Commissioner to cancel his registration; as well as that of a registered insurance broker who

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has become insolvent and the liquidator, trustee or judicial manager makes the request.

The second mistake was in finding support for his decision in the Regulations. Since insurance brokers do not require licences, none of the sections of the Regulations, and especially s 23(1) cited by the learned judge, were of any relevance.

It is my view that the learned judge should have found that whatever warrant there was in 1993 to cancel the appellant's registration in the public interest, it had in the meantime honourably and commendably rehabilitated itself. Thus, the learned judge should have concluded that the decision of the respondents was one that "no sensible person who applied his mind to the question to be decided could have arrived at", *per* Lord Diplock in *Council of Civil Service Unions* v *Minister for the Public Service* [1984] 3 All ER 935 (HL) at 951a-b, as applied in *PF-ZAPU* v *Minister of Justice (2)* 1985 (1) ZLR 305 (S) at 326E-F, and *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-G. This is because of the inherent irrationality in such decision, that although for years the public interest required the applicant's name to remain on the register of insurance brokers while it traded itself out of its difficulties, now that it had done so the same public interest demanded that it be de-registered.

In the result, I would allow the appeal with costs to be paid by the respondents jointly and severally, and alter the order of the court *a quo* to read:

" (a) The decision of the first respondent to approve the proposal of the second respondent to cancel the applicant's registration as an insurance broker under the provisions of the Insurance Act [*Chapter 24:07*], having been reviewed, is hereby set aside;

(b) The costs of the application are to be borne by the respondents jointly and severally."

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners

Coghlan & Welsh, respondents' legal practitioners

COMMERCIAL FARMERS' UNION v MINISTER OF LANDS & ORS 2000 (2) ZLR 469 (SC)

Citation	2000 (2) ZLR 469 (SC)
Case No	Judgment No. S-132-00
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 6, 2000; November 7, 2000
Judgment	December 21, 2000
Counsel	A P de Bourbon SC, with him J B Colegrave and P Nherere, for the applicant B Patel, with him C Machaka and F Chatukuta, for the respondents

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Annotations None

Constitutional application

Flynote

Constitution of Zimbabwe 1980 - Declaration of Rights - s 16(1)(b) (protection from deprivation of property) - requirement for acquiring authority to give reasonable notice to affected person - legislation not specifying when such notice expires - such notice invalid - s 16A - acquisition of commercial farming land for resettlement - need for programme of land reform to exist - haphazard and unlawful invasions of farms not constituting such a programme - s 18 (protection of the law) - failure by police to give farmers and their employees the protection to which they were entitled against unlawful invasions of their farms - section contravened by such failure - s 21(right to freedom of assembly) - contravened by forcing persons to attend political party meetings - s 23 (protection against discrimination) - targetting farms for acquisition because farmer thought to support opposition party - allocation of acquired properties to supporters of ruling party - section contravened

Headnote

The applicant union sought a series of declaratory orders relating both to the legislation enacted by the Government in connection with the acquisition of commercial farming land for redistribution to peasants and to the methods in which the land acquisition process was being carried out. It was claimed that the land acquisition exercise was unconstitutional, in that it denied affected farmers the protection of the law and was discriminatory. Treatment meted out to farmers and their staff, forcing them to attend meetings organised by the ruling party, was contrary to the right to freedom of association. It was also claimed that the exercise did not constitute a "programme" of land reform. The union also sought an order that notices of acquisition and eviction notices were invalid. Finally, it sought an interdict against further land acquisition until the terms of a consent order issued in March 2000 had been obeyed and fulfilled.

The largely unchallenged evidence was that during the period 1980-1993 some 3.6 million hectares of land were acquired. The resettlement exercise was largely unsuccessful and much of the land was allocated to senior officials of the State and the ruling party. After a donors' conference held in 1998 to raise financial and other support for Zimbabwe's

resettlement objectives, a plan was drawn up for a programme of land acquisition. A policy framework document was produced by the Government, but was not implemented. The collapse of donor funding and the financial difficulties facing the Government meant that the plan became incapable of implementation. The Government subsequently designated over 2 300 farms for acquisition. In place of the plan agreed upon, there came what was called the "fast track" plan.

In respect of the designated farms, notices were given to the landowners of the Government's intention to acquire the land. Under the Land Acquisition Act [*Chapter 20:10*], before its amendment by Act 15 of 2000, a preliminary notice of intention to acquire land remained in

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force either until withdrawn or until the land was acquired. The period of notice to be given was a minimum of 30 days; and the acquiring authority had to acquire the land within one year of the notice being given. The amending Act provided that a preliminary notice remained in force either until withdrawn or until the land was acquired, without any outer time limit being specified.

Following a referendum in February 2000, large scale invasions of commercial farms took place, during which many serious common law crimes were committed. The police took little or no action in respect of these crimes. In March 2000, a court order was issued by consent, declaring the invasions to be unlawful and directing the police to ensure that the invaders vacated the farms. The order was not obeyed. A subsequent order, also by consent, was issued by the Supreme Court in November 2000. It was not obeyed fully, although there was some compliance with it.

Held, that the rule of law in the farming areas had been overthrown. Farmers and their employees were denied the protection of the law to which they were entitled under s 18 of the Constitution.

Held, further, that it was discriminatory to target farmers who were believed to be supporters of an opposition party and to award the spoils of expropriation to supporters of the ruling party.

Held, further, that the forced attendance by farmers and their employees at meetings organised by the ruling party was contrary to the right of freedom of association under s 21 of the Constitution.

Held, further, that under s 16A of the Constitution it was a prior requisite for the compulsory acquisition of land for resettlement that there should be a programme of land reform. A "programme" was a definite plan or scheme of any intended proceedings. In such an important matter, one would expect a programme to be in writing and in conformity with the law. The "Fast Track Plan" being carried out did not constitute a "programme": it lacked essential features such as manpower, facilities and finance. The settling of people on farms had been entirely haphazard and unlawful. The Government, while admitting in court that what was being done was unlawful, made untenable excuses as to why it did not enforce the law.

Held, further, that s 16(1) of the Constitution required reasonable notice be given of the intention to acquire a property for resettlement. The Land Acquisition Act no longer provided a deadline by which the acquiring authority had to decide whether or not to acquire the land. Such an open-ended period was unreasonable and unconstitutional. What the section aimed at achieving was the giving, to the party affected, of sufficient warning of the date by which the acquiring authority is to make up its mind to acquire the property. The outer limit was crucial, for it brought about certainty, and transformed intention into reality. Notices given since the amendment to the Act were thus unconstitutional; notices given before the amendment were valid, but subject to the one year limit.

Held, further, that an interdict should be granted, requiring the respondents to comply with the orders of the High Court and Supreme Court and prohibiting the respondents from taking any further steps in the acquisition of land for resettlement. The operation of the latter order would

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be postponed to enable the respondents to produce a workable programme of land reform and to satisfy the court that the rule of law had been restored in the commercial farming areas of Zimbabwe.

Cases Considered

Cases cited:

Commissioner of Police v *CFU* 2000 (1) ZLR 503 (H); 2000 (9) BCLR 956 (ZH)

Davies & Ors v *Min of Lands* 1996 (1) ZLR 681 (S); 1996 (9) BCLR 1209 (ZS)

Legislation considered:

Constitution of Zimbabwe 1980, ss 16(1), 16A, 18(1), 21 and 23

Land Acquisition Act [*Chapter 20:10*], s 5(4)

Case Information

A P de Bourbon SC, with him *J B Colegrave* and *P Nherere*, for the applicant

B Patel, with him *C Machaka* and *F Chatukuta*, for the respondents

Judgment

The Full Court:

I. INTRODUCTION

This is an application to the court sitting in its capacity as a constitutional court. The applicant ("the CFU") is an incorporated voluntary association which represents the interests of commercial farmers operating within Zimbabwe. The respondents are the four government ministers most closely involved with agricultural land reform, the Commissioner of Police, and the President of Zimbabwe in his official capacity as such. The first three ministers together comprise the "Land Task Force" appointed by the President to co-ordinate and oversee the land acquisition and land resettlement exercise. The Minister of Home Affairs is cited together with the Commissioner of Police as the two most senior persons responsible for the Zimbabwe Republic Police ("the ZRP"). The President is cited because one of the issues raised is the constitutional validity of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] and the regulations thereunder contained in SI 148A of 2000. He is also the "acquiring authority" as defined in the Land Acquisition Act, and has made significant pronouncements on the issues before the court.

II. LEGISLATIVE BACKGROUND

In order to understand the issues relating to legislation it is necessary briefly to describe the various enactments which are relevant.

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1. *The Presidential Powers (Temporary Measures) Act* [*Chapter 10:20*] was enacted in 1986. Its long title reads:

> "An Act to empower the President to make regulations dealing with situations that have arisen or are likely to arise and that require to be dealt with as a matter of urgency; and to provide for matters connected therewith or incidental thereto."

2. One such regulation was *The Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000*, which made fundamental alterations to the Land Acquisition Act [*Chapter 20:10*] in line with the amendments made to the Constitution of Zimbabwe by the Constitution of Zimbabwe Amendment (No. 16) Act No. 5 of 2000, which came into effect on 19 April 2000.

3. *The Land Acquisition Act* [*Chapter 20:10*] was introduced as Act No. 3 of 1992. It was intended to provide a mechanism, or rather, a better mechanism by which the State could set about acquiring land from the large-scale commercial white farmers and redistributing it to peasant farmers.

4. *The Constitution of Zimbabwe Amendment (No. 16) Act, 2000* was introduced, as indicated earlier, in order to overcome one of the problems which had bedevilled the implementation of the land acquisition programme, namely, lack of funds. It introduced s 16A into the Constitution. The essence of the section was contained in two statements at the end of subs (1), as follows:

> "(1) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and
>
> (2) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement."

5. Finally, and in order to circumvent any problem which might arise if a legal attack on the Presidential Powers (Temporary Measures) Act and Regulations were successful, the President and Parliament enacted an amendment to the Land Acquisition Act, which was Act No. 15 of 2000. It came into effect on 7 November 2000, which was the second and final day of argument in this court. The effect of the amendment was to incorporate into the main Act the provisions of the Presidential Powers Regulations. The amendments were backdated to the date (23 May 2000) on which the regulations were introduced. One or two significant changes were made.

   It seems to the court that this stratagem has been successful, to the extent at least that it is no longer necessary or relevant to the decision in this case to consider the constitutionality of the Presidential Powers (Temporary Measures) Act or of the regulations.

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III. THE RELIEF SOUGHT BY THE APPLICANT

The applicant seeks the following declaratory orders:

"It is declared that:

1. The amendments made to the Land Acquisition Act [*Chapter 20:10*] by the Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000, are invalid and do not constitute a valid law for the purposes of s 16 of the Constitution.

2. It is declared that the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] is invalid as being an improper delegation of the legislative function.

   Alternatively: the amendment of s 7 of the Land Acquisition Act [*Chapter 20:10*] by the Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000 by the insertion of subs (4a) was unconstitutional in that it restricts the constitutional protection against compulsory acquisition of land afforded by subs (4) of s 16 of the Constitution.

3. The provisions relating to compensation introduced into the Land Acquisition Act [*Chapter 20:10*] by the Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000 are invalid as being in breach of s 16(1) and 16A of the Constitution of Zimbabwe.

4. The land acquisition exercise incorporating the publication of preliminary notices and the service of acquisition orders and eviction notices has all been undertaken in an unconstitutional manner in that the subjects of all these notices and orders have been denied the protection of the law contrary to the provisions of s 18 of the Constitution and to the detriment of their rights to the protection of their lives and property.

5. The members of the applicant Union and their workers have been subjected to discriminatory treatment by the respondents and other holders of public office to their disadvantage because of the political opinions they are deemed to hold by the respondents to the advantage of those whose political opinions favour the respondents, all of which is contrary to the provisions of s 23 of the Constitution.

6. The members of the applicant Union and their workers have however been subjected to treatment that has been permitted and encouraged by the respondents which has hindered the rights of assembly and association granted to those members and workers by s 21 of the Constitution.

7. The land acquisition exercise that is presently being implemented by the respondents and their fellow public officers is not being undertaken 'in accordance with a programme of land reform' meeting the requirements of ss16 and 16A of the Constitution."

The applicant next seeks an order that:

" 1. All preliminary notices under s 5 of the Land Acquisition Act [*Chapter 20:10*], all acquisition orders under s 8 of that Act and all eviction notices in terms of s 9 of that Act issued since 23 May 2000 and, in each case published, made, served or in any way enforced, are hereby set aside as being invalid.

2. The respondents shall bear the costs of the application including the costs of three counsel."

The applicant finally seeks an order that:

"The respondents be and are hereby interdicted and restrained from taking any further steps

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in the acquisition of land for resettlement until all the terms of the consent order issued by the High Court on 17 March 2000 in case No. HC-3544-2000 have been obeyed and fulfilled."

IV. COMMENTARY ON THE RELIEF SOUGHT

1. For the reasons set out earlier, namely the enactment and backdating of the Land Acquisition Amendment Act 15 of 2000, the first declaration sought is no longer relevant. We are concerned now with the Land Acquisition Act as amended by Act 15 of 2000, and no longer with the Presidential Powers Regulations.

2. For the same reasons, the second declaration sought is irrelevant. The Presidential Powers (Temporary Measures) Act has no bearing on the case.

3. The third declaration sought, concerning the provisions relating to compensation, must be regarded as if it relates to the compensation provisions in the amending Act No. 15 of 2000. In fact, it is unnecessary to deal with this aspect, as will appear later.

4. The fourth declaration sought, as to the unconstitutional manner in which the land acquisition exercise has been carried out, has been essentially conceded by the first to fifth respondents, inclusive, in the consent order made in *Commercial Farmers Union* v *Minister of Lands, Agriculture and Rural Resettlement & Ors* case No. S-314-2000, albeit in the slightly different context of ss 16 and 17 of the Constitution, whereas this declaration is sought in relation to s 18 of the Constitution. The sixth respondent, the President of Zimbabwe, was not involved in case No. S-314-2000, but since the President's involvement in the present case is now, for the reasons indicated earlier, somewhat nominal, the fact that he was not involved in the consent order is of little if any significance. This will be dealt with under the heading "Protection of the Law".

5. The fifth declaration relates to the protection afforded under s 23 of the Constitution, and will be dealt with under the heading "Discrimination".

6. The sixth declaration sought relates to the protection afforded by s 21 of the Constitution and will be dealt with under the heading "Rights of Assembly and Association".

7. The seventh declaration sought relates to the provisions of ss 16 and 16A of the Constitution, and more specifically to the provision in s 16A(1) which sets out what may be done "in regard to the compulsory acquisition of agricultural land for the resettlement of people *in accordance with a*

programme of land reform". It will be dealt with under the heading "A programme of land reform?".

8. The eighth order sought is the setting aside as invalid of all notices and orders under ss 5, 8 and 9 of the Land Acquisition Act published, made, served or in any way enforced since 23 May 2000. This will be dealt with under the heading "Validity of

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Notices and Orders - Reasonable Notice" in terms of s 16(1)(b) of the Constitution.

9. The ninth order sought is an interdict against further land acquisition until the terms of the consent order made by Mr Justice Garwe in *Commercial Farmers Union* v *Commissioner of Police & Ors* case No. HC-3544-2000 have been obeyed and fulfilled. This will be dealt with under the heading "Interdict".

10. Finally, we will deal with the question of costs.

V. CONSIDERATION OF THE MERITS OF THE APPLICATION

We proceed therefore to deal with the merits under the following headings:

1. The historical background.
2. The affidavits.
3. Protection of the law.
4. Discrimination.
5. Rights of assembly and association.
6. A programme of land reform?
7. Validity of notices and orders - reasonable notice.
8. Interdict.
9. Costs.

1. THE HISTORICAL BACKGROUND

In so contentious an issue as land it is probably impossible to set out impartially the story of land rights in Zimbabwe. Suffice it to say that over one hundred years ago white settlers moved into what is now Zimbabwe bringing with them a concept of land ownership which was quite foreign to the local people. Over the years, they laid claim to extensive areas of agricultural land, moving the local people off as they did so. During the civil war of independence in the 1970s a great deal of stress was laid on the land question, and it was an issue at the Lancaster House Conference at which the Constitution of Zimbabwe was agreed. That Constitution made provision for land acquisition on a willing buyer-willing seller basis. Certain undertakings were given by the British Government to assist in a programme of land

reform. There is a dispute as to whether and to what extent those promises were fulfilled.

For ten years, the constitutional provisions as to land acquisition were immutable. From 1990, various amendments were made to s 16 of the Constitution (Protection from deprivation of property) with the object of making it easier for Government to acquire land. The Land

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Acquisition Act was introduced in 1992, and amended on 7 November 2000. The introduction of s 16A to the Constitution on 19 April 2000 constituted an assertion that:

" (a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;

and accordingly -

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement."

A certain amount of land reform took place between 1980 and 1983, the effectiveness of which is a matter of some debate. 2.7 million hectares of commercial farming land were purchased for resettlement in that period. Then, in about 1992-1993, a further 900 000 hectares were acquired. The resettlement exercise was largely unsuccessful because of lack of finance for the provision of infrastructure. According to Mr Hasluck, the CFU Director, "the co-operative system failed, much of the acquired land began to be underutilised, and Government began to parcel out land to senior officials and servants of the State and the governing party".

On 28 November 1997, against a background of growing economic hardship and political pressure for land reform, "a list of 1 471 commercial farms was published in the *Gazette* as preliminary notice of Government's intention to acquire such properties on a compulsory basis for resettlement purposes. Contrary to the practice in the early 1990s where properties for resettlement were usually identified and targeted for resettlement by Agritex officials in the Ministry of Lands and Agriculture, the properties listed in November 1997 were identified by the Governors of the various provinces with the help and participation of members of the ruling ZANU (PF) party" (*per* Hasluck).

Most farmers lodged objections, as provided for in the legislation. 512 farms were later withdrawn from the list.

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In September 1998, an International Donor Conference was held to raise financial and other support for the country's resettlement objectives. A policy framework document was produced by Government - the Land Reform and Resettlement Programme, Phase II; the conference issued a joint communiqué setting out the way forward; it was proposed to acquire initially a limited number of properties to test a variety of alternative resettlement models; a number of committees were to be established; and a chairman was appointed. After a short time, however, all further progress came to a stop.

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Instead, in November 1998 Government issued some 800 orders in terms of s 8 of the Land Acquisition Act, acquiring the properties remaining from the 1997 list although the objection proceedings had not been completed. This necessitated confirmation proceedings in the Administrative Court in terms of s 7(1)(b) of the Act. The Government was unable to comply with the procedures and the exercise came to a halt in February 1999 with the ruling in *Minister of Lands and Agriculture* v *Fick LA* 370-99. It must be recorded that the courts were blamed for these events although they came about as a result of Government's failure to comply with its own legislation.

To date, 2 345 properties have been listed for acquisition, covering more than 5 million hectares.

In February 2000, a referendum was held on a proposed new Constitution for Zimbabwe. The defeat of that proposal was followed "within a matter of days by the beginning of a series of land invasions. Although these began as a supposedly peaceful demonstration they quickly gathered such momentum that it became obvious that the exercise was actually being driven by or had been taken over by Government" (Hasluck).

The story of these demonstrations/invasions is set out in graphic detail in the CFU's papers, more particularly in Mr Hasluck's affidavits. Murders (in the early stages), serious assaults, trespass, arson, stock-theft, poaching and malicious injury to property became rife throughout the commercial farming areas. The reaction of the police was either nil or negligible, with isolated exceptions. War veterans, landless peasant farmers and unemployed youths moved onto farms, ferried in some cases in Government vehicles, encouraged by party politicians. Some were aggressive, forcing the farmers to flee, burning down workers' houses, forbidding the reaping or planting of crops. Others cut fences and cut down trees to make temporary shelters. Others again were more passive, simply making temporary shelters for themselves and leaving when the subsidy they were given ran out. The situation throughout the commercial farming areas remained, and remains, tense and volatile. The harassment continues and in many cases has intensified.

Meanwhile, endeavours were made to resolve the matter in the courts. Mr Justice Garwe made the order referred to above on Friday 17 March

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2000. In that matter, the CFU was the applicant. The respondents were Governor Border Gezi, war veterans' chairman Hunzvi, the Zimbabwe National Liberation War Veterans Association and the Commissioner of Police. The order was detailed and specific.

In brief summary, the order declared (by consent of all the parties) that the occupation of farms since 16 February 2000 by persons claiming a right to do so in pursuit of a right to demonstrate, was unlawful. All such persons were ordered to vacate within twenty-four hours. The Commissioner of Police was specifically ordered to direct his officers and members to enforce the law.

Despite the consent, the Commissioner applied within a few days to amend parts of the order.

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His application was heard by Chinhengo J on 10 April 2000. In a judgment handed down on 13 April 2000 *sub nom Commissioner of Police* v *Commercial Farmers Union*, reported in 2000 (1) ZLR 503 (H); 2000 (9) BCLR 956 (Z), the learned judge dismissed the application. There was talk of an appeal but nothing eventuated.

The order of the court was not obeyed. In some areas, the situation eased. Politicians urged further "demonstrations" and the police pleaded insufficiency of manpower and what might be termed "superior orders".

Finally, on the legal front - although actually this took place after the hearing of this application on 6 and 7 November 2000 - mention must be made of a further order by consent, this time made by this court on 10 November 2000. In case No. S-314-2000, the CFU was again the applicant. The respondents were the same four Ministers as in the present case, the Commissioner of Police and the eight Provincial Governors. The order again declared that the entry of uninvited persons on commercial farming properties was unlawful. It required the respondents, and those under their control, not to give sanction to the entry upon or continued occupation of farms by persons involved in resettlement until all legal requirements for such settlement had been fulfilled.

It appears there has been some compliance with this order, but also some open defiance of it. The fact that it was an order by consent seems simply to have been brushed aside.

2. THE AFFIDAVITS

The affidavits by Mr Hasluck are detailed, well documented and supported where necessary by affidavits from colleagues and members of the farming community. They set out a chilling picture of pervasive lawlessness largely, though not entirely, unchecked by the police. The lawlessness has been encouraged and supported by ruling party politicians. Farmers and farm workers have been unable to defend themselves, or to call on those whose

duty it is to protect them. This brief summary does scant justice to the story of some nine months of harassment on their own properties by invaders who pay no regard, not only to "the little law of trespass" as it has been described, but also to the law governing resettlement under the Land Acquisition Act, and to the criminal law generally.

The only respondent to file an affidavit has been the Commissioner of Police, who has filed two. The first respondent has been content to rely on affidavits from a public servant, the Acting Permanent Secretary in the Ministry of Lands, Agriculture and Resettlement, Dr Vincent Hungwe. The other respondents have said nothing.

By and large the respondents' affidavits have added little by way of information. They consist largely of denials or statements that "I am not aware of ..." Reference will be made to them where necessary in the detailed sections that follow.

3. PROTECTION OF THE LAW

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As indicated earlier, the applicant seeks to rely on s 18 of the Constitution which commences -

> "Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

There can be no doubt or dispute about the fact that the farmers and farm workers on the occupied farms have been denied the protection of the law. It is unnecessary to spell out the details. The Rule of Law in the commercial farming areas has been overthrown.

This unlawfulness has been admitted by all the relevant State representatives, first before Garwe J in the High Court in March, and then before this court on 10 November 2000.

There is no difficulty, therefore, in issuing a declaratory order that commercial farmers - and primarily white commercial farmers - have been, consistently since February 2000, denied the protection of the law. Indeed, the same can be said about farm workers. The question is - what relief should the court grant in consequence of this declaration? We will consider this later in the judgment.

4. DISCRIMINATION

The applicant complains of discrimination on three grounds. First, that the unlawful campaign is directed specifically at white farmers, thus discriminating against such persons on the ground of colour (or race, or place of origin). Second, that the land acquisition exercise involves discrimination

on the ground of political opinions. This is so because it has been frequently stated that only ZANU (PF) supporters will be allowed to participate in the resettlement exercise. This probability is supported by the fact that ZANU (PF) party officials are prominent among the committees organising the invasions of farm land. Third, discrimination is alleged against farm workers of Malawian, Mozambican or other foreign origin. This is not denied.

Section 23 of the Constitution clearly forbids the treatment of any person in a discriminatory manner on the grounds of, *inter alia*, race, place of origin, colour or political opinions.

We are not entirely convinced that the expropriation of white farmers, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination to target farmers who are believed to be supporters of an opposition party, and to award the spoils of expropriation primarily to ruling party adherents. If ZANU (PF) party branches or cells or officials are involved in the selection of settlers and the allocation of plots, the exercise degenerates from being an historical righting of wrongs into pure discrimination. It is equally wrong to discriminate against workers of foreign origin who are lawful permanent residents of Zimbabwe.

Accordingly, we find that the exercise as it is being implemented does involve discrimination on the grounds of place of origin and political opinions, contrary to the provisions of s 23 of the Constitution. Again, we propose to consider what relief should be granted at the end of this

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judgment.

5. RIGHTS OF ASSEMBLY AND ASSOCIATION

The contention is that the forced attendance of farmers and farm workers at meetings organised by the local ZANU (PF) branch is contrary to the right of freedom of association guaranteed by s 21 of the Constitution. The allegations are not denied. The contention is quite clearly right.

It is further contended that as a result of the illegal invasions, farmers and farm workers are being forced to associate with the invaders against their will. This contention is also correct.

6. A PROGRAMME OF LAND REFORM?

There is no dispute whatever that a programme of land reform is necessary and indeed essential for the future peace and prosperity of Zimbabwe.

In s 16A(1) of the Constitution, under the heading "Agricultural land acquired for resettlement", it is stated that:

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" (1) In regard to the compulsory acquisition of agricultural land for the resettlement of people *in accordance with a programme of land reform*, the following factors shall be regarded as of ultimate and overriding importance -

...

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people *in accordance with a programme of land reform*, the following factors shall be taken into account in the assessment of any compensation that may be payable -

..." (emphasis added).

It is clear, therefore, that it is a prior requisite for the compulsory acquisition of agricultural land for resettlement, that there must be a programme of land reform.

A programme is defined in the *Oxford English Dictionary* as "a definite plan or scheme of any intended proceedings; an outline or abstract of something to be done (whether in writing or not)". In a matter of national importance such as this, one would certainly expect the programme to be in writing. Inevitably, one must expect it to be in conformity with the law.

It will be evident from the historical portion of this judgment that the "Inception Phase Framework Plan, 1999 to 2000" ("the Plan"), described as "An Implementation Plan of the Land Reform and Re-settlement Programme - Phase 2", was based on the results of the Donor Conference in 1998. The Plan envisaged that 40% of the cost of the programme would be met by Government, 40% by donors, and 20% by the beneficiaries themselves - see Chapter 7, para 7.3 of the Plan. The collapse of the donor funding and the financial difficulties facing the Government have meant that this Plan became incapable of implementation.

In place of this plan, there came what was called the "Fast Track Plan". Dr Hungwe says at the

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beginning of his opposing affidavit:

> "After the Donor Conference no significant progress was made with respect to implementation of the resettlement programme. The expected donor support for the Inception Phase Framework Plan did not materialise. Government then proceeded to implement its resettlement models within the said Plan using the limited resources at its disposal. This involved the compulsory acquisition of the 804 properties which were gazetted on 2 June 2000. It also marked the beginning of the implementation of the Fast Track Programme. The UN Mission was expected to assist this programme, but this was not to be."

(It is remarkable that the reduction in funding was followed by a huge increase in acquisitions).

Dr Hungwe then goes on to define the Fast Track Plan (or Programme) as follows:

> "The Fast Track Plan is Government's intention to speed up land redistribution which is otherwise causing legitimate frustration among the people. It is being implemented as part of the existing Government approaches articulated in the Inception Phase Framework Plan

> as opposed to a separate 'stand alone' programme. Annexure M is merely a draft which is being revised. A final document will be released when it is ready."

So the Fast Track Plan is simply an "intention".

In his answering affidavit, Mr Hasluck takes issue with these contentions. It would make this judgment too bulky to quote all the relevant passages in his answering affidavit. We cite the most important extracts as follows:

> "The implication that he (Dr Hungwe) seeks to get this Honourable Court to accept is that the Fast Track Plan carries with it all the planning, all the support services, all the manpower and facilities and all the finance that Government itself has acknowledged in that document (the Inception Phase Framework Plan) to be essential elements of a resettlement programme.
>
> It is respectfully submitted, however, that this is just not so and that the Fast Track Plan is so lacking in these many essential features as to doom the plan to failure not only in the long run but also in the short term."

Mr Hasluck proceeds to highlight the inadequacies of the Fast Track Plan. The original plan had been to focus on the poor and those with a farming aptitude, including women; it was to be affordable, cost effective and consistent with economic and financial constraints. Yet when, in April 2000, mention began to be made of a Fast Track Plan:

> "it was clearly just an idea arising from the fact that Government found itself in the predicament of not being able to keep proper control of the land invasions without disenchanting the very people who were to spearhead the ruling party's election campaign."

Far from being restricted because of the lack of funds:

> "at the end of July the Fast Track Plan was extended to cover 5 million hectares of land. ... the programme is to cover some 3 040 farms ... To date, 2 345 properties have been listed covering in excess of 5 million hectares ...
>
> The selection process for settlers was not that envisaged in the IPFP. Instead it is largely determined by the Governor (in each province) and the party, with priority being given to war veterans and their followers who have occupied the commercial farms. In fact this has been a self-selection process by illegal occupants ... it is largely

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> unprovided for in the budget and certainly has not been part of a consultative process through the NCEF (National Consultative Economic Forum)."

There is really no answer to this analysis. Save perhaps for those farms whose owners have agreed to the takeover of their properties, the settling of people on farms has been entirely haphazard and unlawful. It has not been done in terms of a programme of land reform or in terms of the Act. A network of organisations, operating with complete disregard for the law, has been allowed to take over from Government. War veterans, villagers and unemployed townspeople have simply moved onto farms. They have been supported, encouraged, transported and financed by party officials, public servants, the CIO and the Army. It has undoubtedly been an outpouring of

reaction to years of frustration and economic hardship. Who is to blame for that frustration and economic hardship is another matter, and not one for the courts to determine.

The Government has adopted an approach to this problem which has not been helpful in finding a solution. Before the courts it has admitted that what is happening is unlawful. In the High Court before Garwe J, and in the Supreme Court in case No. S-314-2000, it has agreed that the settlement of persons on farms is illegal because the requirements of the Land Acquisition Act have not been complied with. Yet outside the courtroom, a variety of excuses for non-compliance with the very orders to which they have consented is put forward.

One argument is that they did not really consent. Consent was approved at "too low a level". This is frankly ridiculous. No disciplinary action appears to have been taken against the unknown culprits. If the error was made in March before Garwe J, how was it possible that it was made again in November in the Supreme Court? On so fundamentally important a matter, this excuse is untenable.

Another argument is that this is a political and not a legal question. Thus, in the application before Chinhengo J the Attorney-General submitted that the decision when and where to enforce court orders was:

> "not one for the courts, because it was a political affair falling outside the powers of the courts ..."

The Rule of Law, he said:

> "must be looked at from a political point of view."

And the Commissioner of Police himself said:

> "The problem is better solved politically. The solution to the land issue lies in the political domain and not (in) the courts."

Of course, it is fundamentally true that the land issue is a political question. It is equally true that the political method of resolving that question is by enacting laws. The Government has done so. It has enacted, and amended, the Land Acquisition Act. It has then failed to obey its own law. That is the point at which, with respect, the Attorney-General and the Commissioner have

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gone astray. The courts are doing no more than to insist that the State complies with the law. The procedures under the Land Acquisition Act have been flouted. The Act was not made by the courts. It was made by the State.

We must conclude, in the circumstances, that there is no programme of land reform. This makes it unnecessary to deal with the issue of compensation which was argued before us.

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7. VALIDITY OF NOTICES AND ORDERS: REASONABLE

NOTICE

Section 16(1)(b) of the Constitution "requires the acquiring authority to give *reasonable notice of the intention to acquire* the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition" (emphasis added).

Prior to the amendments effected by the Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000, now validated by s 24 of the Land Acquisition Amendment Act 15 of 2000, the Land Acquisition Act allowed the period of notice to be given to affected parties of an intention to acquire land, to be not less than thirty days after the date of the publication of the preliminary notice in the *Gazette* (see s 8(1)), and a maximum period of one year (see s 5(4)(a)).

The position before 23 May 2000 was, therefore, that the acquiring authority could identify rural land for resettlement and other purposes by means of the designation procedure without infringing s 16(1) of the Constitution. See *Davies & Ors* v *Minister of Lands, Agriculture and Water Development* 1996 (1) ZLR 681 (S); 1996 (9) BCLR 1209 (ZS). Once it had been decided that such land, whether designated or not, was to be acquired, a preliminary notice was published in the *Gazette* in terms of s 5(1) of the Land Acquisition Act. Not less than thirty days but not more than one year thereafter, the acquiring authority could acquire all or any of the land affected by order made in terms of s 8(1).

Under the amendment to s 5(4) of the Act, a preliminary notice remains in force until the acquiring authority either withdraws the notice in terms of s 7 or acquires the land in terms of s 8. The outer time limit of the preliminary notice has been removed. Thus, at any time after the expiry of thirty days the acquiring authority may acquire the land made subject to the preliminary notice; and until it does so by order the preliminary notice remains in force unless withdrawn by the acquiring authority. Even the ten-year maximum period under which rural land could be designated in terms of s 12(1)(c) no longer applies since Part IV of the Act (ss 12 to 15), which dealt with designation, has been repealed.

Moreover, consequent upon the publication of a preliminary notice, s 5(2) operates to prohibit, save for the permission in writing of the acquiring authority, any subdivision or disposal of the land or the construction of permanent improvements thereon. And under the new s 29B of the Act, compensation payable for improvements or the land, as the case may be, is to be assessed

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as at the date of the publication of the preliminary notice and not when the acquiring authority acquires the land by order issued pursuant to s 8(1) of the Act.

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Against this legislative background, it was argued on behalf of the applicant that the indeterminate duration of a preliminary notice, from the standpoint of the owner of the land and the holder of any other registered real right in that land offends the requirement of "reasonable notice" afforded to such persons by s 16(1)(b) of the Constitution. This is because the acquiring authority is given no deadline by which to make up his mind whether to acquire or not to acquire the land or to withdraw the preliminary notice. He may keep the party or parties affected by the publication of the preliminary notice "in limbo" as it were, with the consequent freezing of the rights specified in s 5(2) together with the prospect of being prohibited from undertaking any activity on such land as may be specified by the acquiring authority in terms of s 5(3) of the Act.

The respondents seek to meet the argument with the submission that the giving of "notice" in its ordinary connotation imparts the concept of making known or announcing a given thing or event before it occurs or eventuates. In the present context, the constitutional mandate of reasonable notice of the intention to acquire attaches to the sufficiency of such notice as a warning of the intended acquisition. In other words, s 16(1)(b) of the Constitution is concerned with the *minimum period* of a notice; the fact that a preliminary notice may subsist for a potentially indefinite period does not detract from the adequacy of that notice of the intention to acquire.

We do not agree that the *minimum period* of notice is to be looked to in the assessment of its reasonableness. What s 16(1)(b) is aimed at achieving is the giving, to the party to be affected, of sufficient warning of the date by which the acquiring authority is to make up its mind to acquire the property, interest or right. It is the outer limit that is the crucial factor, for it is that date that brings about certainty. It transforms the intention to acquire into reality. It provides the definition which an open-ended period of notice fails to do. It informs the affected party of the ultimate date when acquisition of the property, interest or right either will or will not pass to the acquiring authority. It is akin to the grant of an option to purchase, that has to be exercised by a certain date, thereby altering the status of the grantor to seller and that of grantee to purchaser. Its object is to require the grantee to decide whether to purchase or not and, thus, to free the grantor to retain the property for himself or to dispose of it on the open market.

The alternative submission advanced by counsel for the respondents was that if the amendment to s 5(4) was contrary to s 16(1)(b) of the Constitution, the provision was to be regarded as not having been amended at all since the purported amendment was null and void *ab initio*. This is clearly correct. But does it follow that the preliminary notices which were published in the *Gazette* and served after 23 May 2000 should be treated as valid notices

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subject to the maximum duration of one year in terms of the unamended provision?

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Section 5(1) of the Act in its amended form does not require the preliminary notice of compulsory acquisition to inform the owner, or occupier or any other person having an interest or right in the land, of the period during which it remains in force. All that the notice must direct the attention to are the matters referred to in subs (1)(a)(i), (ii), and (iii) of s 5. It is for the party affected to ascertain the duration of the notice by having regard to s 5(4) of the Act. There is no obligation on the part of the acquiring authority to indicate in the preliminary notice when it is deemed to lapse. The same situation applies to a notice served in terms of s 5(3) of the Act prohibiting any specified activity on the land.

It necessarily follows, in our view, that the invalidity of the open ended notice leaves unscathed the preliminary notices of acquisition which were published in the *Gazette* subsequent to 23 May 2000. However, they must all be deemed to be subject to the one year maximum duration provision.

8. INTERDICT

The CFU claims that the only appropriate relief, in the light of the wholesale unlawfulness of the way in which the land acquisition policy has been carried out, is an interdict. It asks the court to impose a ban which would prohibit the Government from taking any further steps in the acquisition of land for resettlement until all the terms of the consent order issued by Garwe J on 17 March 2000 have been obeyed and fulfilled.

It seems to us that this remedy should be suspended for a time to enable a solution to be reached. We consider that a distinction must be drawn between what has been done unlawfully in the past, on the one hand, and what has been done lawfully in the past and may be done lawfully in the future, on the other.

It is overwhelmingly obvious that the farm invasions are, have been, and continue to be, unlawful. Each Provincial Governor, each Minister in charge of a relevant Ministry, even the Commissioner of Police, has admitted it. They could do nothing else. Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government. The activities of the past nine months must be condemned.

But that does not mean that we can ignore the imperative of land reform. We cannot punish what is wrong by stopping what is right.

The reality is that the Government is unwilling to carry out a sustainable

programme of land reform in terms of its own law. The first thing to be done is to return to lawfulness.

A huge problem has been created. Thousands of people have been permitted and encouraged to invade properties unlawfully. They have no right to be there. That situation will not be easy to resolve, but it must be resolved. Either their presence must be legalised, or they must be

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removed.

We have already indicated that notices and orders, and in particular preliminary notices of acquisition which were published in the *Gazette* subsequent to 23 May 2000, remain valid, but subject to the one year expiry limitation. We believe that this leaves the way clear for Government to proceed lawfully. All the indications are that the Government has overreached itself in the number of farms listed, both from the point of view of the financial resources available and of the administrative capacity not only to handle the acquisition exercise, but also to cope with the very large burden that will be thrown upon the Administrative Court. In this regard, too, the Government will need to formulate a plan, because we do not accept that a plan exists.

9. COSTS

We find that the applicant is entitled to its costs.

Accordingly, the court makes the following orders:

1. *It is declared* that the rule of law has been persistently violated in the commercial farming areas of Zimbabwe since February 2000, and it is imperative that that situation be rectified forthwith.

2. *It is declared* that persons in the commercial farming areas have been denied the protection of the law, in contravention of s 18 of the Constitution; have suffered discrimination on the grounds of political opinions and place of origin in contravention of s 23 of the Constitution; and have had their rights of assembly and association infringed in contravention of s 21 of the Constitution.

3. *It is declared* that there is not in existence at the present time a programme of land reform as that phrase is used in section 16A of the Constitution.

4. *It is declared* that the purported amendment of s 5(4) of the Land Acquisition Act [*Chapter 20:10*] by s 3(b) of Act 15 of 2000 is null and void as being in conflict with the requirement of reasonable notice in s 16(1)(b) of the Constitution.

5. Accordingly, it is ordered -

   A. that the respondents comply immediately with the order of this court, made by consent of the parties thereto, on 10 November 2000

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in case No. S-314-2000, and with the order of the High Court (Garwe J) made on 17 March 2000.

   B. That an interdict prohibiting the first, second and third respondents from taking any further steps in the acquisition of land for resettlement is hereby granted, but its operation is postponed until 1 July 2001, to enable the first, second and third

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respondents to produce a workable programme of land reform, and to enable the fourth and fifth respondents to satisfy this court that the rule of law has been restored in the commercial farming areas of Zimbabwe.

7. Costs, including the costs of three counsel, are awarded to the applicant.

Coghlan, Welsh & Guest, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners

MANGWIZA v ZIUMBE NO & ANOR 2000 (2) ZLR 489 (SC)

Citation	2000 (2) ZLR 489 (SC)
Case No	Judgment No. S-141-00
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 9, 2000
Judgment	December 28, 2000
Counsel	Mrs J B Wood, for the appellant No appearance for the first respondent P Nherere, for the second respondent
Annotations	None

Civil appeal

Flynote

Cession - what constitutes - need for cedent to be divested of right of action - agreement between husband and wife that property acquired by husband be transferred into joint names - not a cession by husband of his right to sue seller of property

Practice and procedure - application proceedings - cause of action must be set out in founding affidavit - improper to raise new matters in answering affidavit

Headnote

The appellant's husband, the second respondent, had agreed to exchange immovable properties with another person. After he had transferred his property to her but before the other party could transfer her property to him, the other person died. Subsequently, the appellant and her husband agreed that the property should be transferred into their joint names. The appellant and her husband later agreed to divorce. Part of the agreement governing the disposition of the marital property was to the effect that the property should be transferred to the appellant.

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The deceased's executrix (the first respondent) refused to transfer the property into the joint names of the appellant and her husband. The appellant sought an order compelling the executrix to do so. The executrix and the husband opposed the granting of this order.

Held, that the appellant had no cause of action against the executrix. Only the appellant's husband had such a cause of action. The appellant was not party to the agreement between her husband and the deceased and did not derive any rights from that agreement. The appellant was not, as she claimed, her husband's agent and had no right to bring the application on behalf of her husband. The divorce agreement to transfer the property into their joint names did not constitute a cession by the husband. The husband did not transfer his rights to his wife and did not divest himself of his right to sue. Even if the agreement were to be interpreted as a cession, it could only be a partial cession since the property was to be jointly owned. Such a partial cession is legally invalid as the debtor's consent is required to cede part of a claim.

Held, further, that the agreement between the husband and the appellant to transfer the property to her was only enforceable by the appellant against her husband after the property had been transferred to him. This latter agreement was not enforceable against the executrix.

Held, further, that if the appellant was afraid that the executrix might transfer the property to the deceased's beneficiaries, she should have filed a court application seeking an interdict restraining the executrix from doing this.

Held, further, that in application proceedings the cause of action must be set out fully in the founding affidavit and new matters should not be raised in an answering affidavit.

Cases Considered

Cases cited:

Coffee, Tea and Chocolate Co Ltd v *Cape Trading Co* 1930 CPD 81

Case Information

Mrs *J B Wood*, for the appellant

No appearance for the first respondent

P Nherere, for the second respondent

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 directing the first respondent to transfer to the appellant certain immovable property in Avondale.

When the appeal came up for hearing, it was withdrawn in respect of the second respondent because the issues between the appellant and the second respondent had been resolved. In the circumstances, the only issue remaining for argument was whether the learned judge in the

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court *a quo* correctly ordered the appellant to pay the first respondent's costs.

The background facts are as follows. At the relevant time the appellant ("Perpetua") and the second respondent ("Godfrey") were husband and wife. They intended divorcing.

On 26 September 1990, Godfrey and the late Shingaidze Ruth Ruredzo ("the deceased") concluded an agreement in terms of which they were to exchange immovable properties. The deceased was to transfer her immovable property in Avondale ("the property") to Godfrey, in exchange for Godfrey's immovable property at Houghton Park ("the Houghton Park property"), In addition, the deceased was to pay the sum of $24 000 to Godfrey.

Thereafter, the Houghton Park property was transferred to the deceased, but the deceased died before she transferred her property to Godfrey. That property remains part of the deceased's estate, and the first respondent ("Ziumbe") is the executrix dative of that estate.

Subsequently, on 26 June 1995, Perpetua and Godfrey signed an agreement ("Annexure C") in terms of which the property was to be transferred into their joint names.

Then, on 16 March 1998, the two signed another agreement ("Annexure D") in an attempt to reach a settlement with regard to the division of the matrimonial property before the divorce action was heard. In terms of that agreement, the property in question and another property at Chitungwiza were to be transferred to Perpetua only.

Thereafter, Ziumbe declined to transfer the property to Perpetua, but

suggested that it should be transferred to the deceased's beneficiaries. Perpetua then filed a court application in the court *a quo* seeking an order directing Ziumbe to transfer the property to her. In her founding affidavit, she relied upon Annexure D, i.e. the agreement between her and Godfrey that the property was to be transferred to her. Both Ziumbe and Godfrey opposed the application.

When Perpetua filed her answering affidavit she amended her draft order. What she then sought was an order directing Ziumbe to transfer the property to her and Godfrey jointly. In that regard, she relied upon Annexure C, i.e. the agreement between her and Godfrey that the property be transferred into their joint names.

The learned judge in the court *a quo* dismissed the application with costs.

As already indicated, the only remaining issue to be determined in this appeal is whether the learned judge in the court *a quo* correctly ordered Perpetua to pay Ziumbe's costs. In order to determine that, it is necessary to consider whether Perpetua's application was properly dismissed. If it was, then Ziumbe was entitled to her costs.

In my opinion, the application was properly dismissed. I say so mainly because Perpetua had no cause of action against Ziumbe, the only party against whom the relief was sought.

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In terms of the agreement concluded on 26 September 1990, the deceased agreed to transfer her property to Godfrey. Unfortunately, she did not do so before she died. As a result, the property remained part of her estate. Ziumbe was the executrix dative of that estate.

Ziumbe refused to transfer the property to Perpetua because she had no obligation to do so. Her obligation as executrix was to transfer the property to the person to whom it ought to have been transferred by the deceased in terms of the agreement of 26 September 1990, i.e. Godfrey. Perpetua was not part of that agreement and did not derive any rights from that agreement. In addition, the agreement set out in Annexure D, in terms of which Godfrey agreed to transfer the property to Perpetua, had nothing to do with the agreement of 26 September 1990, and was not enforceable against Ziumbe, but against Godfrey as soon as the property was transferred to him.

If, as submitted on behalf of Perpetua, she was afraid that Ziumbe might transfer the property to the deceased's beneficiaries, she should have filed a court application seeking an interdict restraining Ziumbe from doing that. It appears that she was wrongly advised.

As already stated, when Perpetua filed an answering affidavit, she filed an amended draft order. What she sought was an order directing Ziumbe to transfer the property to her and Godfrey jointly. For that relief she relied upon Annexure C, the agreement between her and Godfrey that the

SANDURA JA

property be transferred into their joint names. On her behalf, it was argued that Annexure C effected a cession of part of Godfrey's rights in the property to her.

In this regard, a number of points should be made at this stage. The first point is that from the record it appears that no application was made for leave to amend the draft order, although the learned judge in the court *a quo* dealt with the application on the assumption that the relief sought by Perpetua was in terms of the amended draft order. Such an application ought to have been made.

The second point arises from the fact that in terms of the amended draft order the relief sought by Perpetua was that Ziumbe be directed to transfer the property to her (Perpetua) and Godfrey in equal undivided half-shares. In seeking that relief, Perpetua did not purport to act as Godfrey's duly authorised agent. In fact, we know that she was not Godfrey's agent because Godfrey opposed the granting of the order sought by her. In the circumstances, she did not have the right or *locus standi* to bring the application and seek the relief which she sought on behalf of Godfrey.

The third point is that in her answering affidavit Perpetua averred that Godfrey had ceded to her a half-share in the property in terms of Annexure C. That averment was not made in her founding affidavit. In my view, that was improper.

It is well established that in application proceedings the cause of action should be fully set out in the founding affidavit, and that new matters should not be raised in an answering affidavit. That

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principle was laid down many years ago in cases such as *Coffee, Tea and Chocolate Co Ltd* v *Cape Trading Company* 1930 CPD 81. At p 82, Gardiner JP said:

> "A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now these affidavits of Barnes, Turnbull, Lee, Gardner and Lang should in my opinion properly have been put in in support of the notice of motion. They are not a reply to what has been said by the respondent, and I am not prepared to allow them to be put in at this stage."

In the present case, the issue of cession was not raised by Perpetua in her founding affidavit and could not, therefore, be raised in the answering affidavit. No good reason was given by her for her failure to include in her founding affidavit the true basis of her claim against Ziumbe.

I now wish to consider whether Godfrey ceded any of his rights in the property to Perpetua. The document relied upon by Perpetua as constituting a cession of Godfrey's rights is Annexure C. The relevant part of the agreement set out in that document reads as follows:

SANDURA JA

> "... the property ... shall be regarded as the joint property of the parties and as soon as possible the property will be transferred into their joint names."

In my opinion, this does not constitute a cession of Godfrey's rights in the property.

In *The Law of Contract in South Africa* 3 ed, by Christie, the learned author describes cession at p 515 as follows:

> "... it involves the substitution of a new creditor (the cessionary) for the original creditor (the cedent), the debtor remaining the same. If the effect of the transaction is not to divest the cedent of his right to sue the debtor, it is not a cession, but a cedent may sue as agent for the cessionary."

In the present case, the transaction was not a cession. The parties merely agreed that the property would be registered in their joint names. There is nothing in Annexure C which indicates that any of the rights arising from the contract between the deceased and Godfrey had been transferred to Perpetua with the result that Perpetua had a right of action against Ziumbe.

However, even if the transaction set out in Annexure C were to be interpreted as a cession, it would be invalid because it could only be a partial cession (which is legally invalid) since the property was to be jointly owned. As Christie, *op cit*, states at p 520:

> "A restriction on the general power to cede is that part of a claim cannot validly be ceded without the debtor's consent. In *Spies* v *Hansford and Hansford Ltd* 1940 TPD 1 at 7-9, Schreiner J based this restriction on the historical origin of our cession of rights as a cession of actions, and the rule against multiplicity of actions, while recognising that this was only one manifestation of a wider rule that the creditor may not by cession without the debtor's consent increase the existing burden on the debtor ..."

The only exception to the principle that part of a claim cannot validly be ceded is that co-sureties who have been obliged to pay are each entitled to cession, from the creditor, of the

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portion of the debt paid. That exception does not apply in this case.

In the circumstances, Perpetua's claim against Ziumbe was properly dismissed and Ziumbe was entitled to her costs. As there was no appearance for Ziumbe in this court, there will be no order as to the costs of the appeal.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

Ziumbe & Mtambanengwe, first respondent's legal practitioners

Nyangulu & Associates, second respondent's legal practitioners

S v CHAUKE & ANORS 2000 (2) ZLR 494 (SC)

Citation	2000 (2) ZLR 494 (SC)
Case No	Judgment No. S-139-00
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA and Sandura JA
Heard	November 30, 2000
Judgment	December 28, 2000
Counsel	Miss W T Miles, for the appellants R K Tokwe, for the respondent
Annotations	None

Criminal appeal

Flynote

Criminal law (general principles) - degrees of participation - common purpose - members of a group of escaping prisoners - prison officer killed in exchange of gunfire - all members of group guilty of officer's murder

Headnote

The appellants were part of a group of four maximum security prisoners who took part in an escape. The four prisoners, acting in common purpose, disarmed two prison officers and used the weapons so obtained against them in order to overcome any resistance. They were prepared to shoot and kill any prison officer attempting to prevent them from escaping. During the course of the escape, a prison officer in an observation tower was killed in an exchange of

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gunfire. The appellants claimed that they did not shoot the officer and would not have joined the escape had they known that death might be caused.

Held, that the shooting fell within the common design of the group. Neither of the appellants attempted to dissociate himself from what was happening. It therefore did not matter which member of the group actually killed the officer. Even if the officer had been killed by a shot fired by another prison officer, the appellants must have foreseen that anyone involved in the escape could be killed in cross-fire.

Held, further, that there was no basis for interfering with the trial court's finding that there were no extenuating circumstances.

Cases Considered

Case cited:

S v *Nhlapo & Anor* 1981 (2) SA 744 (A)

Case Information

Miss *W T Miles*, for the appellants

R K Tokwe, for the respondent

Judgment

Sandura JA: The two appellants were charged with murder, the allegation being that on 18 August 1997 and at Chikurubi Maximum Security Prison in Harare, both of them or one or more of them acting in common purpose, unlawfully and intentionally shot and killed Samuel Mafuta ("the deceased"), a prison officer on duty at the time. They pleaded not guilty but were found guilty of murder with actual intent. No extenuating circumstances were found and they were sentenced to death. They have appealed against both conviction and sentence.

SANDURA JA

The background facts are as follows. At the relevant time, the appellants and two other persons (Musariri and Ngulube, who are now deceased) were serving prison sentences at Chikurubi Maximum Security Prison ("the prison"). The four were D class prisoners and were detained in the section of the prison reserved for the most dangerous criminals. The section was heavily guarded by armed prison officers.

On 18 August 1997, the four men escaped from the prison after disarming two prison officers. Before they escaped, there was an exchange of gunfire between the four prisoners and some prison officers in the course of which the deceased was killed.

Combined follow-up operations were immediately mounted by the police, army, airforce and the prison service. Ngulube was recaptured on the same day within the prison complex. He had sustained serious injuries in the process of sliding down a wall whilst attempting to escape. He

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was found dead in his cell on the following day. He must have died from the serious injuries he had sustained.

Musariri was shot and killed in the bush near the prison on the day of the escape.

On the same day, the first appellant ("Chauke") was recaptured in the vicinity of the prison; but the second appellant ("Chidhumo") managed to evade recapture and went to Mozambique. However, about a year later, he was arrested by the security forces in Mozambique and handed over to the Zimbabwean authorities.

When the matter came up for trial, a post-mortem report was produced. This showed that the cause of the deceased's death was:

> "Subdural haemorrhage secondary to fracture (of) skull due to fall from tower due (to) multiple gunshot wounds of thighs."

The doctor who carried out the post-mortem examination was called to testify. He said that the multiple gunshot wounds to the deceased's thighs would have caused the deceased to fall from the tower and fracture his skull when he landed on the floor. He added that the skull fracture could have been caused by a fall or by an assault with a blunt object, such as a rifle butt. He also said that if the deceased had not sustained the skull fracture, he would have bled to death as a result of the multiple gunshot wounds to the thighs.

The two appellants, whilst admitting that they and their colleagues, Musariri and Ngulube, had planned to escape from the prison, denied the allegation that the use of violence and firearms was part of that plan. They alleged that Musariri had assured them that there would be no violence because prison officers were prepared to facilitate the planned escape. They added that if they had known that the use of firearms would be required in the

escape, they would not have agreed to take part in it. Both alleged that it was Musariri who shot the deceased.

Chauke denied firing any shots during the escape. However, Chidhumo admitted firing one shot, not at the deceased, but at a prison officer called Mazise, and another shot to disperse a group of prison officers and prisoners in the prison grounds. The group was in the general direction of the escaping prisoners' planned exit from the prison complex.

Both appellants could not dispute the cause of death as set out in the post-mortem report, nor could they challenge the doctor's evidence that the skull fracture could have been caused by an assault with a blunt object, such as a rifle butt. In this regard, it is significant that Chidhumo admitted taking the deceased's rifle after the deceased had been shot.

The trial judge found the two appellants unreliable as witnesses. He rejected the contention that the appellants did not know that firearms would be used in the escape. In my view, that conclusion is unassailable.

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The two appellants and their colleagues were detained in a section of the prison reserved for the most dangerous criminals. The section was heavily guarded by armed prison officers. It must have been obvious to all the four prisoners that the escape could only succeed if firearms were used.

In my view, that is why the four first of all disarmed the prison officer manning tower No. 6 and took his rifle for their own use. Thereafter, one of them fired shots at the next armed prison officer on their chosen route of escape, who was manning tower No. 1. After going past tower No. 1, the four proceeded towards tower No. 2 where the deceased was. One of them exchanged gunfire with the deceased until the deceased was disabled. Chidhumo then took the deceased's rifle, and the four left the tower through the window. They used a number of jerseys to form a "rope", one end of which they tied to the window frame. Using this device, they slid down the wall one after the other and landed on the ground.

From the time the first prison officer was disarmed up to the time the four prisoners escaped from the prison, neither appellant said or did anything to dissociate himself from what was taking place. In fact, we know from the evidence that Chidhumo actively participated in the shooting. He fired a number of shots at the prison officers, one of whom was the deceased.

In my view, it is clear, beyond any doubt, that the four prisoners, acting in common purpose, disarmed the prison officers and used the weapons so obtained against them in order to overcome any resistance. They were prepared to shoot and kill any prison officer attempting to prevent them from escaping. I have no doubt in my mind that the prison officers were disarmed according to a plan agreed upon by the four prisoners, and that the use of firearms was part of the plan to escape from the prison.

SANDURA JA

In the circumstances, it does not matter which of the four men shot and killed the deceased. As Burchell states in *South African Criminal Law and Procedure* vol 1, 3 ed at p 307:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design."

In the present case, the shooting or killing of the deceased fell within the common design of the appellants and their two accomplices. The two appellants are, therefore, as guilty of the deceased's murder as the man who fired the fatal shots or struck the deceased's head with a rifle butt. The trial judge therefore, correctly found them guilty of murder with actual intent.

Counsel for the appellants submitted that the deceased was probably shot by a prison officer who intended shooting the escaping prisoners. In the circumstances, she submitted that the appellants should have been given the benefit of the doubt and acquitted.

Assuming for the moment that the deceased died as a result of shots fired by a prison officer, and not by one of the four prisoners, the appellants would not be entitled to an acquittal but would still be guilty of murder.

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I find support for that conclusion in *S* v *Nhlapo & Anor* 1981 (2) SA 744 (A). The facts in that case were as follows. One morning, three security guards arrived at certain business premises in order to collect the takings of that business. They were attacked by three robbers and a shooting affray ensued during which one security guard was killed by a shot fired during the shooting affray. It was accepted that the shot which caused the deceased's death might have been fired by one of the security guards. Nevertheless, the robbers were convicted of murder.

On appeal, the convictions were confirmed. In his judgment, van Heerden AJA said the following at 750H-751B:

> "... the robbers knew that they would have to attack and overpower guards who were armed for the specific purpose of using their firearms to thwart any attempted robbery. It may be conceded that they hoped to overpower the guards without a shot being fired by the latter, but they must have known that the guards would endeavour to use their firearms when attacked. It follows that they must have known that their attack on the guards could lead to a gun battle during which anybody, be it a guard, one of the robbers or an innocent bystander, might be killed in the envisaged cross-fire. Consequently, they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a person such as a staff member of Makro witnessing the attack. In sum, the only possible inference, in the absence of any negativing explanation by the appellants, is that they planned and executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility that anybody involved in the robbers' attack, or in the immediate vicinity of the scene, could be killed by cross-fire."

Those comments apply to the facts of the present case with equal force.

SANDURA JA

Finally, with regard to the finding that there were no extenuating circumstances, I can find no basis for interference.

In the circumstances, the appeal is dismissed.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Byron Venturas & Partners, first appellant's legal practitioners

Mugugu & Associates, second appellant's legal practitioners

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Endnotes

1 (Popup - Popup)

This decision was upheld on appeal. See *Lightfoot* v *Msasa Lodge (Pvt) Ltd* S-52-2001.

- *Editor.*

2 (Popup - Popup)

1st ed at p68.

3 (Popup - Popup)

3rd ed at p. 225.

4 (Popup - Popup)

Caney's *Law of Suretyship* 4ed; Forsythe & Pretorius Wille's *Mortgage & Pledge* 3 ed; *Scott & Scott Dawjee Co Ltd* v *MMME Sawjee & Co* 1930 TPD 240; *Cohen* v *Louis Blumberg (Pty) Ltd & Anor* 1949 (2) SA 849 (W); *Dowson Dobson Industrial Ltd* v *van der Werf & Ors* 1981 (4) SA 417 (C).

5 (Popup - Popup)

Caney's *op cit; Wille's op cit; Cohen* v *Louis Blumberg (Pty) Ltd & Anor supra; Wollach* v *Barclay National Bank Ltd* 1983 (2) SA 543 (A).

6 (Popup - Popup)

Pangbourne Properties Ltd v *Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W).

7 (Popup - Popup)

Per Berman J in *Aaron's Whale Rock Trust* v *Murray & Robert's Ltd & Anor* 1992 (1) SA 652 (C) at 655 *in fine.*

8 (Popup - Popup)

Per Stratford J in *Hersman* v *Shapiro* 1926 TPD 367, 379-80 see also *Monumental Art Co* v *Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118E and *Mkwanani* v *van der Merwe & Anor* 1970 (1) SA 609 (A) at 630.

9 (Popup - Popup)

Ebrahim v *Pittman NO* 1995 (1) ZLR 176 (H) 187-8.

10 (Popup - Popup)

See p 69 of this volume. -*Editor*.

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11 (Popup - Popup)

By s 22 of the Sexual Offences Act *[Chapter 9:21]*, the age below which a boy is deemed to be incapable of rape has been reduced to twelve. -*Editor.*

12 (Popup - Popup)

Universal Merchant Bank of Zimbabwe Ltd v The Zimbabwe Independent & Anor 2000 (1) ZLR 234 (H).

13 (Popup - Popup)

Per Plewman JA in *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) 402C-F.

14 (Popup - Popup)

Section 5 of the Privileges, Immunities and Power of Parliament Act *[Chapter 2:08].*

15 (Popup - Popup)

Or a committee chairman in terms of s 13 of [*Chapter 2:08*].

16 (Popup - Popup)

Cf 5(3) *Ibid.*

17 (Popup - Popup)

Subject possibly to due challenge in the jurisdictional facts upon which the certificate is based - compare *Smith v Mutasa NO* 1989 (3) ZLR 183 (S) and *Mutasa v Makombe NO* 1997 (1) ZLR 330 (G).

18 (Popup - Popup)

Cf RUMPFF JA in *Benson v Robinson & Co (Pty) Ltd & Anor* 1967 (1) SA 420 (A) 427E-F; Burchell *Law of Defamation*, 254 *et seq.*

19 (Popup - Popup)

Section 20 Constitution of Zimbabwe.

20 (Popup - Popup)

See eg, PLEWMAN JA in *Hix Networking* (*supra n2*) at 400B *et seq.*

21 (Popup - Popup)

See, for instance, *Mutasa v Makombe NO* (*supra n6*) at 338C-E.

22 (Popup - Popup)

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Burchell *op cit* 240.

23 (Popup - Popup)

As does Burchell *op cit* 240 *in fine.*

24 (Popup - Popup)

The application having been brought before the recent general election.

25 (Popup - Popup)

See p.143 of this volume. -*Editor*.

26 (Popup - Popup)

Delete inapplicable

27 (Popup - Popup)

Delete inapplicable

28 (Popup - Popup)

Delete inapplicable

29 (Popup - Popup)

Delete inapplicable

30 (Popup - Popup)

Reported at p 243 of this volume - *Editor.*

31 (Popup - Popup)

See p 245G of this volume - *Editor*.

32 (Popup - Popup)

Act 15 of 1996.

33 (Popup - Popup)

Mental Health Act, 1976, s 28.

34 (Popup - Popup)

Compare *Crow* v *Detained Mental Patients Special Board* 1985 (1) ZLR 202 (H).

35 (Popup - Popup)

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Mental Health Act, 1996, s 29(2).

36 (Popup - Popup)

Ibid para (c).

37 (Popup - Popup)

Ibid para (b).

38 (Popup - Popup)

Ibid para (a).

39 (Popup - Popup)

Ibid s 29(4)-(6); s 35.

40 (Popup - Popup)

High Court Act [*Chapter 7:06*], s 29(2)(b).

41 (Popup - Popup)

Section 29(9) and (10) Act 15 of 1996.

42 (Popup - Popup)

Chinhengo J. - *Editor.*

43 (Popup - Popup)

See *Trinity Engineering (Pvt) Ltd v Commercial Bank of Zimbabwe Ltd* 1999 (2) ZLR 417 (H).

44 (Popup - Popup)

See at p 422E *et.seq.*

45 (Popup - Popup)

See n 2 and also at 418C *et.seq.*

46 (Popup - Popup)

See n 2 and also at 418F *et.seq.*

47 (Popup - Popup)

At 422G.

48 (Popup - Popup)

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See *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 273F-277A; 277G; 278A; *Muringi v Air Zimbabwe Corp & Anor* 1997 (1) ZLR 357 (H) at 376D-377C; *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S) at 552G.

49 (Popup - Popup)

1996 (2) ZLR 420 (H).

50 (Popup - Popup)

Both on p 422.

51 (Popup - Popup)

Per LORD O'BRIEN CJ *R (Donoghue) v County Cork Justices* [1910] 2 IR 271 at 275.

52 (Popup - Popup)

As detailed by SMITH J in his judgment at 421-2.

53 (Popup - Popup)

See n 7 *supra*.

54 (Popup - Popup)

Rule 37, High Court Rules.

55 (Popup - Popup)

Per MACDONALD ACJ in *Timsecurity (Pvt) Ltd v Castle Hotel (Pvt) Ltd* 1972 (1) RLR 155 (A) at 160E.

56 (Popup - Popup)

Per BECK J (as he then was) in *Irvine v Serfontein; Irvine v De Villiers* 1979 RLR 273 (G) at 277D.

57 (Popup - Popup)

Op cit n 1 at 421B-C.

58 (Popup - Popup)

Even the judgment of SMITH J bears the wrong case number and was filed in the wrong file.

59 (Popup - Popup)

Delete the inapplicable.

60 (Popup - Popup)

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Delete the inapplicable.

61 (Popup - Popup)

Delete the inapplicable.

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