2001 [Part 2] ZLR
HUTCHISON & ANOR NNO v LOGAN
2001 (2) ZLR 1 (H)
Division: High Court, Harare
Judges: Adam J
Subject Area: Application for rescission of judgment
Date: 12 March & 10 June 19981
Judgment Number: HH-91-98

Practice and procedure — admissions — when admission may be deemed to be made in terms of rules — withdrawal of admission — when may be allowed — principles
Practice and procedure — default judgment — rescission — application — grounds for — wilful default — when may be a ground for refusing rescission — neglect of case by legal practitioner — not fatal
The applicants, who were executors of a deceased estate, sought rescission of default judgment entered against the estate. The litigation had begun some years before. The principal reason for the failure to defend the action was the fact that a great personal tragedy had befallen the applicants' legal practitioner, and his ability to handle his work had been seriously, but unpredictably, affected. He had neglected correspondence and had dealt with matters tardily. It was argued that good cause for rescission had been shown. It was also argued that a notice from the respondent, requesting further particulars, had not been properly served, as it had been placed in a letterbox and not served on the applicants' attorneys of record and that the default judgment had thus been obtained without strict compliance with the rules of court. The applicants also sought to withdraw certain admissions which the respondent said were deemed to have been made, a notice to admit facts having been served.
Held, that the factors that a court will take into account in determining whether an applicant for rescission has discharged the onus of proving good and sufficient cause are: (1) the reasonableness of the applicant's explanation; (2) the bona fides of the application; and (3) the bona fides of the defence on the merits of the case and the applicant's prospects of success. Where the default was "wilful", the indulgence of rescission will not be granted.
Held, further, that a wilful default occurs when a party, with the full knowledge of the service or set-down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing. The wilfulness of a default is seldom clear-cut. There is almost always an element of negligence, and the question arises whether it was such gross negligence as to amount to wilfulness. The expression relates to that extreme of circumstances where the applicant knowingly and deliberately refrained from opposing the relief sought.

However, even in a case of wilful default, if a satisfactory explanation can be given for the acquiescence in the judgment, and other circumstances, including the merits of the defence, justify such a conclusion, good and sufficient cause may be established.
Held, further, that process may be served by leaving it in a letterbox when the process server is unable, after diligent search at the address for service, to find a responsible person there. There was no good reason shown for the service as effected in this case, and

the court would on those grounds alone have the discretion to set the default judgment aside.
Held, further, that the respondent's attorney must have been aware of the extreme improbability that the applicants' attorney would not defend the action, and that, when no response was forthcoming from the latter, something was amiss.
Held, further, that when consent by one party to a request for extension of time is unreasonably withheld, that party risks being ordered to pay the costs of an application for extension. The court always has a discretion, and there a number of factors that must be balanced. Similarly, the court has a discretion to grant or refuse an amendment to pleadings. Generally, the greatest latitude will be shown, and the amendment will be allowed if it is necessary to enable the real issues between the parties to be resolved, and if allowing it would not result in an injustice that could not be compensated by an award of costs. This principle extends to the withdrawal of an admission.
Held, further, that admissions under r 186(1) of the High Court Rules may not be sought by one party until notice of the date of trial has been given. A notice requiring the other party to admit facts is ineffective where no date of trial has been given.
Held, further, that the applicants had shown good cause to set aside the default judgment, and that leave should be granted to withdraw the admissions of fact arguably deemed to have been made.
Cases cited:
A A Mutual Ins Assn Ltd v van Jaarsveld & Anor 1974 (4) SA 729 (A)
Barclays Bank of Zimbabwe Ltd v C C International (Pvt) Ltd & Anor S-16-86
Caxton Ltd & Ors v Reeva Forman (Pty) Ltd & Anor 1990 (3) SA 547 (A)
Chetty v Law Soc, Tvl 1985 (2) SA 756 (A)
Cropper v Smith (1884) LR 26 ChD 700 (CA)
Cross v Ferreira 1950 (3) SA 443 (C)
D D Tpt Ltd v Abbott 1988 (2) ZLR 92 (S)
Deweras Farm (Pvt) Ltd & Ors v Zimbank 1997 (2) ZLR 47 (H)
Deweras Farm (Pvt) Ltd & Ors v Zimbank 1998 (1) ZLR 368 (S)
Heeriah & Ors v Ramkissoon 1955 (3) SA 219 (N)
Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 198 (HL)
Krogman v van Reenen 1926 OPD 191
Maujean v Standard Bank of SA Ltd 1994 (3) SA 801 (C)
Min of Home Affairs & Ors v Jesse S-160-97
Moolman v Est Moolman & Anor 1927 CPD 27
Morgan & Anor v Cornelius & Anor (1910) 31 NLR 262
Myers v Abramson 1951 (3) SA 438 (C)
Neuman (Pvt) Ltd v Marks 1960 R & N 166; 1960 (2) SA 170 (SR)
Rishton v Rishton 1912 TPD 718
Robinson v Randfontein Ests GM Co Ltd 1921 AD 168
S A Steel Equipt Co (Pty) Ltd & Ors v Lurelk (Pty) Ltd 1951 (4) SA 167 (T)
Taona Invstms (Pvt) Ltd v Fire 'n Light Videographers (Pvt) Ltd & Anor 1998 (1) ZLR 494 (H)

Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pvt) Ltd & Anor 1967 (3) SA 632 (D)

United Plant Hire (Pty) Ltd v Hills & Ors 1976 (1) SA 717 (A)
Whittaker v Roos & Anor 1911 TPD 1092
Wilson v Afrikaanse Pers Publikasies (Edms) Bpk 1971 (3) SA 455 (T)
Zarug v Parvathie NO 1962 (3) SA 872 (D)
Zimbank v Masendeke 1995 (2) ZLR 400 (S)
Legislation considered:
High Court Rules 1974 (RGN 1074 of 1971), r 40, r 186(1), r 187(1)
J C Andersen SC, for the applicants
A P de Bourbon SC, for the respondent
ADAM J: In this matter, the applicants will be referred to as the defendants and the respondent as the plaintiff. The plaintiff commenced action against the late Raymond Hawkings in case No. HC 3993/90 in November 1990. That case was set down for hearing in January 1994 but was postponed and on 6 April 1994 at the commencement of the case the defendant filed a notice of amendment seeking certain amendments to the pleadings which substituted Malcolm Fraser in his capacity as curator bonis to represent Raymond Hawkings, but other amendments were opposed by the plaintiff. Smith J granted the amendments on 13 April 1994 (HH-64-94). The plaintiff's appeal on 1 September 1995 was dismissed by the Supreme Court (S-138-95). After the death of Raymond Hawkings on 22 July 1995, notice in terms of r 85A was served on 22 December 1996 by the plaintiff on the executors of the estate of the late Raymond Hawkings.
In this application of 11 December 1997, the defendants are seeking rescission of judgment in default and for leave to withdraw admission of facts deemed to have been made arising from the failure to respond in time to the plaintiff's notice to admit facts. On 2 July 1997, the plaintiff's request for particulars for trial was filed and received by the defendants' legal practitioners on 4 July 1997. On 6 August 1997, the plaintiff's court application compelling those particulars to be provided was filed and served on the defendants' legal practitioners on that day. On 21 August 1997, the plaintiff's notice to admit facts was filed and received by the defendants' legal practitioners on the same date. On 28 August 1997, a notice of set down of the court application was served on the defendants' legal practitioners. On 3 September 1997, as a result of an unopposed court application, Mungwira J ordered that the defendants file their response within 10 days of the service of her order. On 10 September 1997, that order was placed in a letter box at the residence of C F Hutchison, according to the Deputy Sheriff's return of service. A copy of

the same order was served on the defendants' legal practitioners on 19 September 1997. On 29 September 1997, the plaintiff's chamber application was filed seeking an order to strike out the defendants' plea and for judgment to be entered in favour of the plaintiff. On 3 November 1997, Mungwira J granted a default judgment.
It is not disputed that the first time that C F Hutchison became aware of the 3 September 1997 order was on 1 October 1997 on his return to Harare. On 2 October 1997, he gave the order to his co-executor, M C Atkinson, who attempted to contact the defendants' legal practitioners and on 6 October 1997 sent them that order addressed to Mr Eastwood's secretary; that on 5 November 1997 Hutchison made a complaint about the method of service in his letter to the plaintiff's legal practitioner, who did not reply; and

that 15 November 1997 was the first time he learnt about the default judgment of 3 November 1997 when subsequently he informed Atkinson.
The following facts are also not disputed. Mr Eastwood (who became the defendant's legal practitioner in 1983) first became involved with the late Raymond Hawkings in February 1991. Following upon the appointment of Malcolm Fraser as curator bonis to represent Raymond Hawkings he began to act in case No. HC 3993/90. In July 1996, tragedy befell Mr Eastwood which seriously affected him. In April 1997, the plaintiff's legal practitioners were expressly made aware of this. Mr Eastwood's workload was distributed amongst other partners who already were overburdened and obviously knew nothing of the background of the matter he was handling. During his absence, the file was temporarily handed to Mr Canaan Dube, who was not aware, prior to March 1997, of telephone conversations concerning a meeting to discuss a possible settlement. There was an exchange of correspondence between Mr Dube and the plaintiff's legal practitioners. The file was returned to Mr Eastwood, but since July 1997 his attendance at the defendants' legal practitioners office had been only occasional, when on one occasion Mr Dube mentioned to him that a pleading had been received that required his attention. Subsequently, various documents were delivered but he was not then aware that there were two matters to be dealt with. He saw the letter of 1 September 1997 (some days later — much later) which enquired whether the defendants were abandoning their defence by failure to respond to the notice to admit facts. He rather tardily responded to this on 29 September 1997. On 6 October 1997, his firm received an unsigned letter dated 3 October 1997 from the plaintiff's legal practitioners to the effect that the document had not been filed in terms of the Rules of Court. Nothing was said by the plaintiff's legal practitioners in their letters of 1 September 1997 and 3 October 1997 about the application for compelling particulars for trial or

the orders made by Mungwira J. The plaintiff's legal practitioners had confirmed, around 28 October 1998, that no default judgment by that date had been granted. This was according to the defendants' legal practitioners reply of 31 October 1997 to Atkinson, copied to the plaintiff's legal practitioners. In their letter of 12 November 1997 (received on 13 November 1997), the plaintiff's legal practitioners advised the defendants' legal practitioners default judgment given on 3 November 1997. On 27 November 1997 and 3 December 1997, the defendants' legal practitioners requested that the plaintiff's legal practitioners consent to rescission which was declined by them.
In his letter of 27 November 1997, Mr Eastwood indicated to the plaintiffs' legal practitioners that he was unaware, in about August or September 1997, that there were two separate matters and rather tardily because of his mental state he only addressed the notice to admit facts. He said that he was misled in that the plaintiff's legal practitioners' letter of 1 September 1997 made no mention of the court application to compel particulars for trial. In his letter of 10 December 1997, he pointed out that the order to 3 September 1997 was served on them on 19 September 1997 and their chamber application was lodged on 29 September 1997, which was premature, being less than 10 days. He further states that, what is not in dispute, is that at all times Raymond Hawkings had granted to the plaintiff a right of first refusal. What seemed clear to him and was in issue was that the price at which the plaintiff signed an agreement of sale was lower than the price that had been offered by a third party. What was in issue was whether Raymond

Hawkings approved a sale at such lower price to the plaintiff or was aware that it was being sold to him at such lower price or had the capacity to understand what was happening.

[The learned judge then summarised counsel's arguments and continued:]

In Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764-5, Miller JA had this to say about the application for rescission in terms of the common law:

"The appellant's claim for rescission of the judgment … must be considered in terms of the common law, which empowers the court to rescind a judgment obtained in default of appearance, provided sufficient cause therefor has been shown. (See De Wet & Ors v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank of SA Ltd 1924 OPD 163). The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many and various factors require to be considered (see Cairn's Executors v Gaarn 1912 AD 18 at 186 per Innes JA). But it is clear that in principle and in the long-standing practice of our courts two essential elements of 'sufficient cause' for rescission of judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

Page 6 of 2001 (2) ZLR 1 (H)

(ii) that on the merits such party has a bona fide defence, which, prima facie, carries some prospect of success. (De Wet's case supra at 1042, P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer & Anor; Smith NO v Brummer 1954 (3) SA 352 (O) at 357-8).

It is not sufficient if only one of these two requirements is met, for obvious reasons. A party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation for his default. And ordered judicial process would be negated if , on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

In considering r 63 of the rules of the High Court, what was said by Miller JA was accepted by Gubbay JA (as he then was) in Barclays Bank of Zimbabwe Ltd v C C International (Pvt) Ltd & Anor S-16-86 when he observed at pp 2-3:

"The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving 'good and sufficient cause', as required to be shown by r 63 of the High Court of Zimbabwe Rules 1971, have been discussed and applied in a number of decided cases in this country. They are: (i) the reasonableness of the applicant's explanation for the default; (ii) the bona fides of the application to rescind the judgment; and (iii) the bona fides of the defence on the merits of the case and the applicant's prospects of success. These factors must be taken into account cumulatively and in conjunction with one and another in deciding to grant the indulgence of rescission. See Du Preez v Hughes NO 1957 R & N 706 at 709B; Arab v Arab 1976 (2) RLR 166 (A) at 172F-173H; Mvaami (Pvt) Ltd v Standard Finance Ltd 1976 (2) RLR 257 (G) at 259B-E; G D Haulage (Pvt) Ltd v Mumurgwi Bus Services (Pvt) Ltd 1979 RLR 444 (A) at 455C; Munhira v Phiri S-52-84.

More recently, in Chetty v Law Society, Transvaal 1985 (2) SA 756 (A), Miller JA, after expressing the two essential elements of 'sufficient cause' as: (a) a reasonable and

acceptable explanation for the default; and (b) a bona fide defence on the merits which carries some prospect of success, went on to say at 765 D-E:
'It is not sufficient if only one of these two requirements is met … '
To state His Lordship's second proposition another way, where the default of the applicant may be classed wilful in the sense of deliberate acquiescence, the indulgence of rescission will not be granted."
In Neuman (Pvt) Ltd v Marks 1960 R & N 166 at 169; 1960 (2) SA 170 (SR) the question "when is default wilful" was dealt with by Murray CJ at 173:
"The true test, to my mind, is whether the default is a deliberate one — i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing. I can do no better than quote the following passage from the judgment of Bowen LJ in the case of In re Young and Harstons' Contract LR 31 ChD 174 at 175, a passage approved by Gardener JP in Hendricks v Allen 1928 CPD 519:
'The other word which is sought to define is "wilful" … It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free

agent. Now if that is all you can get out of the analysis of those words, it becomes plain that to endeavour to classify every conceivable contingency with a view to defining what will be or what will not be wilful default, would be idle'."
In Zimbank v Masendeke 1995 (2) ZLR 400 (S), the summons was served on the accountant of a smaller branch in Harare who sent it to the Head Office. At the General Manager's office for some unexplained and apparently inexplicable reason, it was filed away without the General Manager seeing it. No appearance to defend was entered. On appeal from the refusal of an application for rescission of the default judgment, McNally JA said at 402-3:
"It seemed to us, with respect, that the learned judge erred, both as to the concept of wilful default, and as to the fact that no explanation had been proffered.
Wilful default occurs when a party, with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing: Neuman (Pvt) Ltd v Marks 1960 R & N 166 (SR) at 169; 1960 (2) SA 170 (SR) at 173; Mdokwani v Shoniwa 1992 (1) ZLR 269 (S) at 271.
Here there was a mistake. It was clearly a mistake. Zimbank had no possible reason to allow the claim against it (which was for $50 000) to go by default. No-one, and in that term I include Mr Moyo of Chikumbirike and Associates who acted for Mr Masendeke, could reasonably have thought otherwise. The mistake was, like many mistakes where documents go astray in the filing system of an organisation, inexplicable. And one wonders how the court would benefit if a minute and detailed investigation were to reveal how the summons came to be filed without coming to the attention of the General Manager. The important explanation is that it was filed, and it did not come to his attention. It is a credible explanation precisely because of the point I made earlier — the extreme improbability that Zimbank, through its General Manager, would intentionally abstain from defending this claim.
…
The wilfulness of a default is seldom, if ever, clear-cut. There is almost always an element of negligence, and the question arises whether it was gross negligence and

whether it was so gross as to amount to wilfulness. And in coming to a conclusion there is a weighing of the balance between the extent of the negligence and the merits of the defence. See Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S); Stockil v Griffiths 1992 (1) ZLR 172 (S), and Mdokwani v Shoniwa supra.
…
Speaking for myself, I would say that a lawyer in Mr Moyo's position must have at least suspected, when no appearance was entered by Zimbank, that something had gone wrong. A telephone call to Zimbank's legal department would, as we can now see by hindsight, have saved a lot of trouble and expense. He did not do that. He obtained default judgment. But he must have at least half-expected that what did in fact happen, would happen. In future cases, we may have to consider awarding costs personally against legal practitioners who not only 'snatch at their judgments' but then stubbornly and unreasonably cling to them."
In Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk 1971 (3) SA 455 (T), the plaintiff requested a very large number of further particulars to which the defendant failed to respond, with the result that Rabie J on

application by the plaintiff, granted an order compelling the defendant to furnish them. The plaintiff was not satisfied with the replies given on the ground that the particulars had not been properly and fully furnished and so contended the defendant had not compiled with the order of Rabie J. He sought an order for the striking out of the defendant's defence. It was accepted that failure to answer two of the questions in the request for particulars was due to inadvertence and an oversight on the part of defendant's legal practitioner for which he took personal responsibility. The defendant desired to cure that oversight by supplying the information requested. Philips AJ said at 462-3:
" … it is perfectly clear that certain of the particulars ordered were not furnished in any literal sense. It was pointed out that the order granted by Rabie J was given in default of appearance by the defendant … but it is clear that such an order is an interlocutory judgment, not having the effect of a final judgment: Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A). It therefore does not say the final word on the subject and may be varied by the court — Bell v Bell 1908 TS 887. There can therefore be no question of that order being res judicata between the parties.
… Rule 21(6) of the Uniform Rules of Court in terms of which this application was brought … reads:
'If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereon the court may make such order as to it seems meet.'
On the face of it, there is nothing to indicate that the ultimate remedy of striking out of a defendant's defence is to be resorted to only where there is contumacy on the defendant's part to furnish particulars, but it seems to me that this must be so. The striking out of a defendant's defence is an extremely drastic step which has the consequence that the action goes forward to trial as an undefended matter — Langley v Williams 1907 TH 197.

In this case, if the order were granted, it would mean that a trial court would eventually hear this action without reference to the justification which the defendant has pleaded and which it might conceivably be in a position to establish by evidence. I am accordingly of the view that this very grave step will be resorted to only if the court considers that a defendant has deliberately and contemptuously disobeyed its order to furnish particulars."
In Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C), King J said at 803:
"In the first instance applicant's submission that his conduct was not wilful is without substance. 'Wilful' has several meanings: The Oxford English Dictionary gives no less than five. In the legal lexicon, two of these meanings are habitually employed; the one connotes consciousness and intention; the other has an additional ingredient, a perverseness or absence of regard to reason.
More specifically in the context of a default judgment, 'wilful' connotes deliberateness in the sense of knowledge of the action and of its consequence, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be — see in this connection
Page 9 of 2001 (2) ZLR 1 (H)
Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk 1987 (2) SA 414 (0) at 417 and authorities there cited."
In Deweras Farm (Pvt) Ltd & Ors v Zimbank 1997 (2) ZLR 47 (H), Gillespie J after referring to Zimbank v Masendeke supra, more particularly a passage from the judgment of McNally JA which suggested to him that in making the determination of whether a default is wilful, there is the discretionary weighing of competing considerations, said at 52-3 and 56-7:
"Where the default, however is wilful, then it is said rescission must be refused. I am obliged to enquire whether this perception of the law is correct …
It was therefore held that gross negligence itself was no ground for automatic refusal of relief without consideration of the other factors …
On the proper approach to the concept of wilful default in High Court matters, it should be seen that the expression refers to that extreme of circumstances where the explanation for default reveals that the applicant for rescission knowingly and deliberately refrained from opposing the relief sought. He acquiesced in the judgment being taken against him. In face of such prior acquiescence it is scarcely surprising that the courts may be inclined to deny him the opportunity to reconsider that decision without scrutiny of the supposed merits of the defence now belatedly proposed …
I therefore hold that in any application for rescission of a judgment given in default in the High Court, the wilful default of the applicant for rescission may well justify the court refusing rescission of judgment without further consideration of the matter. It will not necessarily always have this effect, however, since the grant of the indulgence is a discretion to be extended or refused according to all the circumstances and it is undesirable to impose any restrictions on that discretion. If, therefore, even in the case of a wilful default, satisfactory explanation for that acquiescence in a judgment can be given, and other circumstances including the merits of the defence justify such a conclusion, good and sufficient cause might in the proper case be established."
More recently on appeal in the above matter in Deweras Farm (Pvt) Ltd & Ors v Zimbank 1998 (1) ZLR 368 (S) at 369, McNally JA had this to say:

"The learned judge considered the three factors which are normally taken into account when considering an application for rescission of judgment — the explanation for the default, the bona fides of the applicant and the prima facie strength of the case. He noted that r 63 of the High Court Rules requires only good and sufficient cause as a basis for rescission of a judgment. He contrasted this with the specific reference to 'wilful default' in the Magistrates Court Rules. He considered that the superior courts should be slow to fetter the wide discretion inherent in the phrase 'good and sufficient cause' I agree. While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause."

He then favoured the definition "wilful default" given by King J in Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd, supra at 803.

Before turning to the merits of the application for rescission of the judgment of 3 November 1997, it must be observed that the order of

3 September 1997 compelling particulars to be provided which gave 10 days to respond was, according to the 10 September 1997 return from the Deputy Sheriff Harare "served by placing in a letter box at the given address of first respondent" (first respondent being C F Hutchison). In case No. HC 7513/97, Mungwira J queried why service was effected by placing it in the letterbox, as Kantor & Immerman were respondents' legal practitioners of record. There is nothing from that Deputy Sheriff in response to those queries but, in an astonishing reply of 15 October 1997 from the plaintiff's legal practitioners addressed to the Registrar, reference was made to r 40 of the High Court Rules. The letter stated that the Deputy Sheriff's service was in compliance with it and further the following was added:

> "3. Nevertheless, we do confirm that, as a formality, we did instruct the Deputy Sheriff Harare to serve the court order on Messrs Kantor & Immerman, in addition to the Deputy Sheriff's service on the first respondent. We attach the original return which we received from the Deputy Sheriff in this regard, indicating that the court order was served on Kantor & Immerman on 19 September 1997. The stipulated ten (10) day period in the court order has long lapsed, and it is respectfully submitted that the respondents are clearly in default."

It was after this, on 3 November 1997, that default judgment was given by Mungwira J on the chamber application filed on 29 September 1997. A fair reading of the above letter of 15 October 1997 would indicate that the service of the court order by placing it in the letter box was in compliance with r 40 and further the service on the defendants' legal practitioners on 19 September 1997 satisfied the order of 3 September 1997 compelling particulars to be provided.

Rule 40(b) of the High Court Rules state that where any process is to be served and the process server is unable, after diligent search at the residence, address of service, etc., to find the person to be served or a responsible person there, it shall be sufficient service to leave a copy of the process in a letter box. From the foregoing, there is nothing to show that the Deputy Sheriff had carried out a diligent search and as a result did not find a responsible person there. See Taona Invstms (Pvt) Ltd v Fire 'n Light Videographers (Pvt) Ltd & Anor 1998 (1) ZLR 494 (H) at 495-6. Looking at the service of 19 September

1997 on the defendants' legal practitioners, as correctly asserted by Mr Andersen, the chamber application seeking default judgment did not allow for the requisite 10 days (in other words it was a premature application). There is nothing to indicate that the plaintiff had made an application seeking condonation for this. Further, the request is not in terms of Form No. 13.

In the light of the above, it is difficult to reconcile on what basis the plaintiff's legal practitioners could submit that the Deputy Sheriff's service by placing the court order in the letter box compiled with r 40 and that the

10 day period had long since lapsed after service (when only about 6 days had lapsed) on the defendants' legal practitioners on 19 September 1997. It is trite that before this court will grant an order of the type issued on 3 November 1997 there must be strict compliance with the High Court Rules. Where a default judgment has been obtained without strict compliance with the Rules this court has discretion to set it aside.

If I am wrong about this, the requirements for rescission, according to the authorities can be summarised as laying down that "superior courts should be slow to fetter the wide discretion inherent in the phrase 'good and sufficient cause' in r 63", that "when there is 'wilful default' it cannot be said that 'there is no room for good and sufficient cause'. In determining 'good and sufficient cause', the factors normally to be taken into account are: the reasonableness of the explanation for the default; the bona fides of the applicant and the prima facie strength of the applicant's case (these factors to be considered cumulatively). 'Wilful default' connotes in this context deliberately and knowingly and contemptuously disregarding what was required to be done".

Mr de Bourbon on behalf of the plaintiff has not challenged the conduct of the defendants themselves but has emphasized the degrees of default on the part of their legal practitioners from which the defendant cannot escape — Minister of Home Affairs & Ors v Jesse S-160-97. For that reason, the indulgence of rescission could not be granted as public policy requires finality to litigation. He also submitted that the prospects of success do not favour the defendants. It must not be forgotten that it was the plaintiff who issued the notice in terms of r 85A to continue the proceedings against the executors of the estate of the late Raymond Hawkings. But in S-160-97, the Supreme Court agreed with the court below that the manner in which the matter had been handled by the appellant's legal practitioners was appalling and it found the explanation given in the supporting affidavit uncreditworthy and so it is clear that S-160-97 can be distinguished on the facts from the present matter.

On the other hand, Mr Andersen submitted on behalf of the defendants that the explanation proffered by Mr Eastwood concerned his conduct which was mainly due to the unpredictable nature of his condition. In addition, he plainly also thought (even if wrongly) that there was some prospect of settlement. Mr Andersen submitted that whatever the degree of Mr Eastwood's default, it was against his own clients that its consequences were serious and not against the plaintiff who suffered no prejudice. He also submitted that, contrary to the plaintiff's assertion, the defendants' prospects of success were not poor as appears from the judgment in S-138-95.

In this matter, Mr Eastwood has indicated that there was confusion

concerning two matters and various affidavits show why this was the case. It follows that neither the defendants themselves nor Mr Eastwood "had [any] possible reason to allow the claim" against the executors of the estate of the late Raymond Hawkings to go by default. No one, including Mr Middlemost of Gill, Godlonton & Gerrans, could reasonably have thought otherwise. The explanation given by Mr Eastwood "is a credible explanation precisely because of the point made earlier — the extreme improbability" that the defendants, through Mr Eastwood, "would intentionally abstain from defending this claim". What concerns this court is that a lawyer of Mr Middlemost's seniority must have known, when no response, was forthcoming from the defendant's legal practitioners, not only to his written request for particulars, but also to the court order compelling delivery of those particulars, that something was amiss. Being well aware of Mr Eastwood's condition, he could have telephoned any of the partners of Kantor & Immerman. But he did not do that: instead he obtained default judgment (on instructions it would appear). He has not indicated why the court order of 3 September 1997 was not served initially on the defendants' legal practitioners.

In this case, I find that the defendants have put forward a reasonable explanation for the default. Their application was bona fide and it has been shown that they have a prima facie defence to the plaintiff's claim. In other words, they have shown that their prospects of success are not poor. It follows that the defendants are entitled to the order of rescission they seek.

It further becomes necessary to indicate that often extension of time periods may be achieved by written agreement between the parties and that it is only when there is failure to do this that an application for condonation should be undertaken. Clearly, the objective of this is to avoid the need for such an application and to save costs. It follows that when consent is unreasonably withheld a party risks being ordered to pay the costs of such an application — AA Mutual Insurance Association Ltd v van Jaarsveld & Anor 1974 (4) SA 729 (A) at 731. As for applications for condonation, Holmes JA in United Plant Hire (Pvt) Ltd v Hills & Ors 1976 (1) SA 717 (A) at 720 said:

"It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success …, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

It is also trite that the grant or refusal of an amendment to any pleadings is in the discretion of the court — Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 243. However, in Cropper v Smith (1884) LR 26 ChD 700 (CA), Bowen LJ observed at 710-11:

"Moreover, every power of amendment given by the Judicature Act seems to me to be applicable to this kind of suit as well as to any other. Now, I think it is a well established principle that the object of the courts is to decide the rights of parties, and not to punish

them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. The courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right … In one sense, we should be taking away an advantage from them, but only an advantage which they have obtained by the mistake of the other side, contrary to the true bearing of the law on the rights of the parties.
The question seems to me to be this, Can you by imposition of any terms place the other side in as good a position for the purpose of having the question of right determined as they were in at the time when the mistake of judgment was committed? It does not seem to me to be material to consider whether the mistake of judgment was accidental or not, if not intended to overreach. There is no rule that only slips or accidental errors are to be corrected … I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine."
In Morgan & Anor v Cornelius & Anor (1910) 31 NCR 262 at 264, Bale CJ said:
"The court has very wide powers to effect a change in the pleadings at any stage of the action — it has been said, though not decided here, even after argument and before judgment."
Dove-Wilson J, in the same judgment said at 265:
"In my opinion, the court ought to allow all such amendments as may be necessary for the purpose of determining in an existing action or proceedings the real question between the parties. Personally, I see no objection to a new ground of action or defence being stated by way of amendment, nor should I in all the circumstances object to amendment merely because it goes to the length of changing the character of the action, where that is necessary to determine the real question between the parties."
In Whittaker v Roos & Anor 1911 TPD 1092 at 1102, Wessels J said:
"This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game

we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration, he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or of the misreading of a paragraph in pleadings by counsel,

litigants were mulcted in heavy costs. That would be a gross scandal. Therefore, the court will not look to technicalities, but will see what the real position is between the parties."
In Rishton v Rishton 1912 TPD 718 at 719-722, Wessels J said:
"There is, however, another principle in our practice, and that is to allow a party, up to the very last stage of the case, the full right to amend, so that the court may not be deceived or judgment may not be wrongly given against the party, and also to enable the court to know exactly the nature of the dispute and the facts of the dispute in a particular case. Now the old English practice was not very favourable to amending. But the practice which had been gradually adopted in English Courts, now crystallised by rules and orders, and which has been followed very largely in our courts, is to allow amendments to be made provided the other side is not in any way prejudiced by such amendments. In Tildesley v Harper (10 ChD 393), Lord Bramwell said (p 396):
'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise.'
Brett MR in Clarapede & Co v Commercial Union Association (32 WR 262) said the following (p 263):
'However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs … In judging whether it ought or ought not to grant an amendment, it is very necessary for the court to consider whether the admission contained in the pleading is exactly as the client would have wished the admission to have been made before the court.'
In the present case, I do not think that Mr Rishton intended the admission to be made quite in the manner in which it has been pleaded … I think it is the duty of the court to have recorded on the pleadings exactly what the parties estimate the facts to be and what they think are the defences that they ought to lay before the court. Under these circumstances, I think, whatever the consequences of such an amendment may be, that it is the duty of the court to allow the amendment, because it is the duty of the court to see that the facts are correctly represented before it and that it is not being deceived by some mere technicality … I am of the opinion that the plaintiff is in no way prejudiced by the granting of the amendment."
Curlewis J said at 722:
"I agree that the amendment must be allowed. When the application was made yesterday I personally felt, as I feel now, that the only question to consider was whether it was a bona fide application for amendment, and whether, if the amendment was allowed it would cause injustice to the other side. I still think, as I thought yesterday, that an amendment of this nature can be made at any time before judgment. If it had been applied for when the

case was called on or at any other time before the close of the defendant's case, I cannot see on what ground it would have been refused, saving, of course, the addition of such conditions as would have safeguarded the plaintiff in regard to costs, or in any other way necessary. If the plaintiff was put to additional expense by reason of the case having to be postponed, or would be in any other way prejudiced by the amendment, the court would

have to take that into consideration. If it is only a question of postponement, the costs of course would have to be borne by the defendant. But, as my brother Wessels J has pointed out, I do not see what injustice can be done to the plaintiff by allowing the amendment … But there were two other persons who are alleged to have witnessed this incident, Driscoll and Hughes. They could have been called … I cannot imagine that counsel or attorney for the plaintiff refrained from putting them into the witness box because of the admission made by the defendant in para 5 of the plea. I can only come to the conclusion that if Driscoll and Hughes are in the country, … they would have been called in the ordinary course."

In Moolman v Est Moolman & Anor 1927 CPD 27 at 29, Watermeyer J said:

"The question of amendment of pleadings has been considered in a number of English cases. See for example: Tilderley v Harper 10 ChD 393; Steward v North Metropolitan Tramways Co 16 QBD 556 and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such an amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purpose of justice in the same position as they were when the pleading which it is sought to amend was filed."

In Cross v Ferreira 1950 (3) SA 443 (C), van Winsen AJ said at 447:

"The South African courts have up to the present adopted a liberal attitude towards applications for amendment of the pleadings where the proposed amendments have had as their object the raising of the real issues between the parties. In Robinson v Randfontein Estate G M Co Ltd 1925 AD 173 at 198, Innes CJ states that:

'The object of pleading is to define the issues; and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry.

But within these limits the court has a wide discretion. For pleadings are made for the court and not the court for pleadings.'

This dictum was followed in Shill v Milner 1937 AD 101 at 105. A similar view has been taken by the Transvaal courts. See e.g., Rishton v Rishton 1912 TPD 718 at 310 where Wessels J adopts with approval Lord Bramwell's words:

'My practice has always been to give leave to amend unless I have been satisfied that the party applying was mala fide so that by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.'

… In the Orange Free State (e.g. Krogman v van Reenen 1926 OPD 191) and Natal (e.g. Naiker v Kerdachi 1933 NPD 599, the courts have taken the same liberal attitude towards application for amendment."

In S A Steel Equipment Co (Pty) Ltd & Ors v Lurelk (Pty) Ltd 1951 (4) SA 167 (T) at 175, Roper J said:

"I do not think it can be said in the present case that the delay of the applicant was in the circumstances unreasonable or was so grave that the court ought to refuse the application

for amendment. The modern practice of the courts in regard to the granting of amendment was considered by Greenberg J in Rosenberg v Bitcom 1935 WLD 115 at 117, the learned judge said:

'Although it has been stated that the granting of the amendment is an indulgence to the party asking for it seems to me that at any rate the modern tendency of the courts lies in

favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.'
Then the learned judge refers to Macduff & Co v Johannesburg Consolidated Investment Co Ltd 1923 TPD 309, and to extracts from two English judgments that were quoted in that case …
In this case, it seems to me that any hardship or inconvenience can be compensated by costs."
In Myers v Abramson 1951 (3) SA 438 (C), van Winsen AJ, when being confronted with the situation where he was seized with an application for absolution there was a counter-application for an amendment of the pleadings, observed at 446:
" … in my opinion no court would so interpret the rules, unless thereto compelled by the plain meaning thereof, as to create a situation wherein the court loses its power to allow such amendments to the pleadings as are designed to ensure that the real issue between the parties is determined. It may well be that to allow the interposition of an application for an amendment during the hearing of an application for absolution may deprive the party applying for absolution of a tactical advantage he might otherwise enjoy over his opponent, but I do not think that this can outweigh the major concern of the court to secure the expeditious and most direct determination of the real dispute between the parties. See Cropper v Smith 26 ChD 700 at 710. I am accordingly of the opinion that I am not precluded from granting the amendment in this case, because of the fact that it was applied for at a time when I was seized of an application for absolution."
In Heeriah & Ors v Ramkissoon 1955 (3) SA 219 (N), Broome JP said at 221-2:
"The effect of the South African cases, which are collected in Cross v Ferreira 1950 (3) SA 443 at p 447 (C), appears to be that bona fide applications to amend pleadings will almost always be granted, on terms appropriate to the circumstances. It is not suggested that the application in this case was not bona fide. There may of course be cases where no terms could overcome the prejudice which the amendment would cause to the other party, and it may well be that applications in such cases ought to be refused. This is not the position here. In the great majority of cases, an application to amend pleadings will resolve itself into a consideration of the appropriate terms."
In Zarug v Parvathie NO 1962 (3) SA 872 (D), the applicant sought deletion of an admission made in the plea. Henochsberg J after agreeing with what Wessels J had said in Whittaker v Roos & Anor supra, proceeded to state at 876-877 and 885:
" … I think that the following legal principles can be gathered from the decisions quoted to me:

1. That the court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.

2. With its large powers of allowing amendments the court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription which might bar the action.
3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a bona fide mistake.

An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay.
Of course, if the application to amend is mala fide or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted.
…
The modern practice is in favour of granting applications for leave to amend whenever the amendment facilitates the proper ventilation of the dispute between the parties: South African Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd 1951 (4) SA 167 (T).
… Applicants have shown a reasonable basis for having made the original mistake and admission and a reasonable basis why in their view the withdrawal ought now to be permitted …
The only question is whether … costs should include the costs of the opposition to the grant of the indulgence sought. Permission to amend a pleading and particularly to withdraw an admission previously made is not a matter of right. Respondent was perfectly entitled to place before the court the arguments that she did and she, and any other respondent in similar applications where the opposition is fair and reasonable, as it is here, ought not to be put into a position that they oppose the granting of an indulgence at their peril in the sense that if the amendment is granted they cannot recover their costs of opposition or they may even have to pay such costs as are occasioned by their opposition."
In Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd & Anor 1967 (3) SA 632 (D) at 637-41, Caney J said:
"The decision to grant or refuse an application to amend a pleading rests in the discretion of the court: Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 165 at 243. The principles by which that discretion is exercised are not, however, easy to define, in light of the multiplicity of reported cases, not entirely harmonious, on the subject.
…
The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.
…
It is only in this relation, it seems to me, that the applicant … is required to show it is bona fide and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect. Having already made his case in his pleading, if he wishes to change or add to this, he must explain

his reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation."

In Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189 (HL) at 203, Lord Keith said:

"Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles … The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in an injustice to the other party not capable of being compensated by an award of costs."

He then referred to what Brett MR said in Clarapede & Co v Commercial Union Association supra and continued:

"The sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject-matter of the proposed amendment at the proper time. If he would suffer no prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed."

In Caxton Ltd & Ors v Reeva Forman (Pty) Ltd & Anor 1990 (3) SA 547 (A) at 505, Corbett CJ said:

"Although the decision whether to grant or refuse an application to amend pleadings rests in the discretion of the court, this discretion must be exercised with due regard to certain basic principles. These principles are well summed up in the judgment of Caney J in Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd & Anor 1967 (3) SA 632 (D) at 640H-641C."

In D D Transport (Pvt) Ltd v Abbot 1988 (2) ZLR 92 (S) after referring to Zarug v Paravathie NO supra and Whittaker v Roos & Anor supra according to the headnote, Gubbay JA (as he then was) held:

"The effect of making a formal admission in pleadings is that the opposing party need not adduce evidence to prove the admitted fact, while it is incompetent for that party making the admission to adduce evidence to contradict it. Where an admission has been made in error, the court has a very wide discretion to relieve the party from the consequences of that error by granting an amendment of the pleading.

Such an amendment will not be granted for the asking, for it is an indulgence and not a right. The court will require a reasonable explanation of both the circumstances in which the admission was made and the reason why the party seeks to resile from it. If withdrawal of the admission will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate, the court will refuse the application. In this regard, the test to be applied is whether the other party would be placed in a worse position by the amendment being granted than he would have been had the pleading, in its amended form, been filed in the first instance. This might occur, for instance, if the only person who can give evidence about the facts that were erroneously admitted had since died or left the country and his whereabouts were unknown. The court must also be satisfied that the amendment sought is bona fide."

Next must be considered the merits of the application to withdraw the admissions deemed to have been made by the defendants. Rule 186(1) of the Rules provides as follows:
"A party may by notice in writing not less than ten days before the day for which notice of trial has been given —
(a) call on any other party to admit for the purposes of the cause, matter or issue only, the facts mentioned in such notice;
…"
Rule 187(1) provides as follows:
"In the case of failure to reply to the notice to admit any facts within 10 days of delivery, the party called upon therein shall be taken as having admitted all such facts for the purposes of the cause, matter or issue only.
…"
What r 186(1) and r 187(1) provide are that firstly, there must be a date for which notice for a trial has been given, secondly, there must be no less than 10 days before that date and thirdly, there must be a reply within 10 days. The combined effect of those Rules practically is that before any party can proceed under them the notice for trial date that is to be given must make allowance for at least one month. This is because there must at least be 10 days before the date of the trial and the party from whom the admission is sought must be given 10 days within which to make the admissions sought. There is little doubt that time is of the essence in rr 186(1) and 187(1). It is also true that this court has a discretion to vary the time periods in the Rules in appropriate circumstances. In view of this it follows that admissions under r 186(1) cannot be sought by a party until notice of the date of the trial has been given. A party that purports to seek an admission without notice of the date of the trial would not be making it under r 186(1). The purpose of r 186(1) is predicated on a trial taking place and in order to save the party seeking to adduce evidence at that trial to prove the facts for which admission is sought. It is an abuse of process to proceed under r 186(1) when the party is well aware that a trial date has not yet been given. It follows that before a party can seek to rely on r 187(1) there must be strict compliance with r 186(1).
Mr Andersen has correctly submitted that a date for the trial in case No. HC 3993/90 had not been given. Without notice of the day of the trial the notice to admit facts filed on 21 August 1997 (and served on the same date on the defendants) cannot be said to be in accordance with r 186(1). The plaintiff, therefore, cannot rely on the provisions of r 187(1) to the effect that defendants are deemed to have admitted the facts for which admission was sought.
In case I am wrong on this, the defendants' application to withdraw the admission deemed to have been made, although launched in the answering

affidavit, cannot be said to bar them from seeking relief from this court, as the plaintiff had been given an opportunity to file a further affidavit and he did do so. In that further affidavit he submits that the admissions sought and deemed to have been made were consistent with the facts reflected in his opposing affidavit in the matter in case No. HC 7556/95. If I have understood his averments correctly this must have meant that the facts he would be able to adduce through evidence at the trial in accordance with what was in his above-mentioned opposing affidavit would be consistent with the admissions sought by him. In that case, there would seem to be no need for him to insist on the admissions

to stand, as he could not be said to be prejudiced in any way, whereas the defendants would be precluded from adducing evidence to contradict it: D D Transport (Pvt) Ltd v Abbot supra.

It is also clear that the lateness of the application cannot in itself prevent this court from granting the relief sought by the defendants: Krogman v van Reenen supra at 193. The explanation given by Mr Eastwood seems to me to be adequate. The defendants appear to me to be bona fide in seeking to resile from the admissions deemed to have made by them. In the defendant's response to the plaintiff's notice to admit facts filed on 29 September 1997, it appears the defendants wish to raise triable issues. It seems to me that these issues need to be properly ventilated so that the dispute between the parties can be determined. It cannot be said that the true purpose of the defendants' application to withdraw the deemed admission was to harass the plaintiff by raising issues which have no foundation. The practical rule will always be to allow the amendment unless the application is mala fide or unless such an amendment would cause injustice to the plaintiff which cannot be compensated by costs. The application is not mala fide.

The plaintiff was entitled to place before this court the response and arguments that he did in this subsequent application in the answering affidavit and it could not be maintained that his opposition was not reasonable. For that reason, he ought not to be put into a position that he opposed the granting of an indulgence by this court at his peril. I trust that by means of the order as to costs (as it relates to that part of the application in the answering affidavit) which I propose to make will put back the plaintiff for the purpose of justice to his prior position. For the foregoing reasons I propose to allow the admissions deemed to have been made to be withdrawn.

In the result, I make the following order:

1. That the order of judgment in case No. HC 3993-90 in favour of the plaintiff granted in default in case No. HC 7513-97 be and is hereby set aside with costs to be paid by the plaintiff;
2. That the defendants are granted leave to file forthwith their reply to the

plaintiff's request for particulars for trial as contained in the draft attached to the supporting affidavit in this matter as Annexure H8A;

3. That condonation of the failure to reply timeously to the plaintiff's notice to admit facts be and is hereby granted;
4. That the defendants are granted leave to withdraw the deemed admission of facts arising from their failure in case No. HC 3993-90 to respond timeously to the plaintiff's notice to admit facts and that the costs of the application to withdraw the deemed admission be paid by the defendants.

Kantor & Immerman, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

MINISTER OF LANDS v PALIOURAS

MINISTER OF LANDS v WIGGILL

2001 (2) ZLR 22 (S)

Division: Supreme Court, Harare

Judges: Chidyausiku ACJ, McNally JA, Ebrahim JA, Muchechetere JA & Sandura JA

Subject Area: Civil Appeal

Date: 23 May and 2 July 2001
Judgment Number: S-55-01

Constitution of Zimbabwe, 1980 — Declaration of Rights — s 16A — acquisition of commercial farming land for resettlement purposes — whether land reform programme necessary before such land may be acquired before 1 July 2001 — whether such land may be acquired under s 16 or 16A of Constitution or under Land Acquisition Act [Chapter 20:10]
Expropriation — Land Acquisition Act [Chapter 20:10] — s 7(1)(b) — period within which application must be made for confirmation of contested acquisition of land — when period begins
These two appeals arose out the compulsory acquisition of the respondents' farms by the State following the Supreme Court's decision in CFU v Minister of Lands & Ors 2000 (2) ZLR 469. The appellant Minister's appeals, and the respondents' cross-appeals, against decisions of the Administrative Court raised three issues to be decided by the Supreme Court:

1. Is a land reform programme a prerequisite to the Minister's power to acquire land compulsorily under the Constitution and the Land Acquisition Act [Chapter 20:10]?
2. Was the interdict issued by the Supreme Court in the CFU case suspended until 1 July 2001?
3. Do the 30 days within which an application for confirmation of an acquisition order must be made in terms of s 7(1)(b) of the Land Acquisition Act run from the date on which the order is signed or from the date on which the order is served on the owner of the land?

Held, as to the first issue:

(a) per Chidyausiku ACJ, that the existence of a land reform programme is relevant to the issue of compensation in terms of s 16A of the Constitution for compulsorily acquired land, but such a programme is not a prerequisite to the compulsory acquisition of land in terms of s 16 of the Constitution.

(b) per McNally JA and Sandura JA, that agricultural land is acquired for resettlement

under provisions of the Land Acquisition Act which conform to both ss 16 and 16A of the Constitution. One cannot therefore speak meaningfully of compulsorily acquiring such land in line with s 16, as opposed to s 16A. Hence, as stated in the CFU case, a programme of land reform is a prerequisite for the compulsory acquisition of agricultural land for resettlement purposes in terms of the Land Acquisition Act.

(c) per Ebrahim JA, Muchechetere JA and Sandura JA, that since the interdict in the CFU case was suspended until 1 July 2001, the court had granted the State a moratorium to put its house in order. During that time, therefore, the State was not precluded from proceeding with its land reform exercise even though a programme of land reform was not yet in place.

Held, further, as to the second issue (i.e. whether the court's interdict in the CFU case was suspended) that the interdict was postponed to 1 July 2001 and would become operative only on that date.

Held, further, as to the third issue (i.e. the commencement of the 30-day time-limit for applying for confirmation of a contested acquisition) that since an order for the acquisition of land is made in terms of s 8 of the Land Acquisition Act when the order is signed and served on the landowner, an application for confirmation of a contested acquisition of land has to be made in terms of s 7 of the Land Acquisition Act within 30 days of the service of the acquisition order on the owner of the land concerned.
Quaere, per Chidyausiku ACJ, whether a court could interdict the responsible Minister from acquiring land for redistribution in accordance with explicit provisions of an Act of Parliament.
Case cited:
CFU v Minister of Lands & Ors 2000 (2) ZLR 469 (S)
Legislation considered:
Constitution of Zimbabwe, ss 16 & 16A
Land Acquisition Act [Chapter 20:10], ss 7(1) & (3), 8(1) & (3), 16 and 29C
B Patel, with him M Majuru, for the appellant
A P de Bourbon SC, for the respondents
CHIDYAUSIKU ACJ: This is an appeal involving two matters heard and determined separately in the Administrative Court. The legal issues raised on appeal in both matters are identical. Accordingly, it was agreed that the matters be combined on appeal. Single heads of argument have been filed.
The facts of the cases are briefly as follows. In both cases, the appellant sought to acquire farms belonging to the respondents in terms of the Land Acquisition Act [Chapter 20:10] (hereinafter referred to as the Act). The appellant issued a preliminary notice of his intention to acquire the respondents' farms in terms of s 5(1) of the Act. The respondents objected to the intended acquisition as is provided in s 5(1)(iii)(A) of the Act.
The appellant acquired the farms by signing and serving an acquisition order on the respondents in terms of s 8(1) of the Act. Thereafter, the appellant applied to the Administrative Court for confirmation of the acquisition in

terms of s 7(1)(b) of the Act. At the confirmation hearing, the respondents raised a number of legal issues in limine. These were determined by the Administrative Court and it is against these preliminary rulings that the parties have appealed and cross-appealed.
The first point taken by the respondents in the court a quo was that the appellant's acquisition of their farms was invalid because there was no land reform programme in place. The respondents argued that a land reform programme was a pre-requisite to any acquisition of land in terms of the Act by the appellant or any other acquiring authority. The case of CFU v Minister of Lands & Ors 2000 (2) ZLR 469 (S) was cited as authority for this proposition. I shall refer to this case hereinafter as the CFU case for convenience.
The second point taken was that an interdict issued by this court in the CFU case bars the appellant from acquiring land until the rule of law has been restored on the farms. In other words, it was contended that the interdict froze land acquisition by the appellant and the appellant cannot acquire any land while the interdict is operational.
The third point taken, and this was in respect of the farms belonging to Paliouras, was that the application for confirmation of the acquisition order to the Administrative Court was made out of time and therefore invalid. It was argued that the application was filed more than 30 days after the signing of the order. It is common cause that the order was

filed within 30 days of the service of the order on the respondent. The dispute is over whether the dies induciae run from the date of signing or from the date of service of the acquisition order.

In respect of the first issue, the court a quo ruled that a land reform programme was a pre-requisite to land acquisition by the appellant in terms of the Act and that in the absence of such a land reform programme the confirmation proceedings could not proceed. The court a quo postponed the matter sine die to enable the appellant to produce a land reform programme.

On the second issue, the court a quo determined that the interdict granted in the CFU case was not operative, having been suspended until 1 July 2001.

Finally, on the issue of whether or not the application for confirmation was made timeously the court a quo ruled that the date of service of the acquiring order on the respondent was the critical date, consequently the application had been made within the thirty days prescribed by the Act.

The appellant was dissatisfied with the ruling that a land reform programme was a pre-requisite for the exercise by the appellant of the power to acquire land in terms of the Act. The appellant now appeals against that part of the judgment. The respondents, on the other hand, were dissatisfied with the other two rulings and cross-appealed against those determinations.

On these premises, three issues fall for determination in this appeal:

1. Is a land reform programme a pre-requisite to the exercise by the appellant of his power to acquire land in terms of the Constitution and Land Acquisition Act?
2. Is the interdict issued by this court in the CFU case operative or suspended until 1 July 2001?
3. Do the thirty days within which an application for confirmation of the order in terms of s 7(1)(b) of the Act run from the date of signing or service of the acquisition order made in terms of s 8(1) of the Act on the owner of the land being acquired?

I will now proceed to deal with these issues in the order set out above.

LAND REFORM PROGRAMME

Is a land reform programme a pre-requisite to the exercise, by the appellant, of the power to acquire land, in terms of the provisions of the Constitution and the Land Acquisition Act? As I have already stated the court a quo concluded that a land reform programme was such a pre-requisite. In coming to this conclusion, the court a quo relied on the CFU case. In particular, the court a quo relied on an excerpt in that judgment to be found at 481B-C. It reads as follows:

"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."

The above remarks, standing on their own without regard to the context in which they were made, may lead to the conclusion, as indeed the court a quo concluded, that a land reform programme was a pre-requisite to the compulsory acquisition of land. A proper reading of the judgment reveals that the remarks were made in the context of the provisions of s 16A of the Constitution, a provision that is primarily concerned with compensation as opposed to acquisition of land. Section 16A of the Constitution provides as follows:

“ 16A Agricultural land acquired for resettlement

(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 —

(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.

(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 —

(a) the history of the ownership, use and occupation of the land;

(b) the price paid for the land when it was last acquired;

(c) the cost or value of improvements on the land;

(d) the current use to which the land and any improvements on it are being put;

(e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;

(f) the resources available to the acquiring authority in implementing the programme of land reform;

(g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and

(h) any other relevant factor that may be specified in an Act of Parliament.”

It is abundantly clear from the above that s 16A is specifically concerned with the compensation regime to be applied where agricultural land is compulsorily acquired for resettlement. That section does not prescribe the requisites for compulsory acquisition of land. The pre-requisites for the acquisition of property, including land, are to be found in s 16 of the Constitution. Section 16 of the Constitution provides as follows:

“ 16 Protection from deprivation of property

(1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that —

(a) requires —

(i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilisation of that or any other land —

A. for settlement for agricultural or other purposes; or

B. for purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or
C. for the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B;
or
(ii) in the case of any property, including land, or any interest or right

therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public;
and
(b) 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; and
(c) subject to the provisions of subsection (2), requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; and
(d) requires the acquiring authority, if the acquisition is contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and
(e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court; and
(f) enables any claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation and to appeal to the Supreme Court:
Provided that the law need not make such provision where —
(i) the property concerned is land or any interest or right therein; and
(ii) the land is substantially unused or is used wholly or mainly for agricultural purposes or for environmental conservation or the utilisation of wild life or other natural resources; and
(iii) the land or interest or right therein, as the case may be, is acquired for a purpose referred to in paragraph (a)(i).”

The rest of s 16 concerns itself with the derogations from subs (1).

It is also abundantly clear that s 16 prescribes the requisites for compulsory acquisition of property including the land. As Mr Patel correctly submitted, the land reform programme envisaged in s 16A of the Constitution does not impinge upon the power to expropriate land in terms of s 16 of the Constitution. The compulsory acquisition of land in accordance with the requirements of s 16 is not predicated upon the existence or otherwise of a land reform programme. The existence of a land reform programme would have been relevant if the court a quo were seized with the issue of compensation in terms of s 16A of the Constitution following the compulsory acquisition of the land. The court a quo was not seized with the issue of compensation, consequently the provisions of s 16A were irrelevant. It was seized with the issue of acquisition, therefore the provision of s 16 only were relevant.

It follows from what I have said that the general proposition in the CFU case (at p 18) to the effect that a land reform programme is a prior requisite

for compulsory acquisition of agricultural land overstates the position. The existence or otherwise of a land reform programme is relevant to the determination of the issue of compensation in terms of s 16A of the Constitution. That issue was not before the court a quo. The court therefore erred in coming to the conclusion it did. A land reform programme is not a pre-requisite to the acquisition of land in terms of s 16 of the Constitution.

Both counsel accept this proposition. At least I understood Mr de Bourbon to have accepted this proposition during his oral submissions although his heads of argument are to the contrary. In the heads of argument, he seems to maintain that a land reform programme is a pre-requisite to compulsory acquisition of land. I am unable to accept that submission for the above reasons.

THE INTERDICT ISSUED IN CFU CASE

The respondents contend that the appellant is interdicted from compulsorily acquiring land in terms of the CFU judgment. The appellant acknowledged the existence of the interdict but argued that the operation of the interdict has been suspended until 1 July 2001. It was argued for the appellant that the interdict will only start operating on 1 July 2001. The order of this court in the CFU case partly provides as follows:

"That an interdict prohibiting the first (present appellant) 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 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."

It is clear from the wording of the interdict that this court postponed the operation of the interdict to 1 July 2001. It will only become operative on that date. In the interim, the appellant and the other authorities are enjoined to produce a land reform programme.

In any event, it is quite apparent from the facts set out at the beginning of this judgment that what the appellant did or is doing in this case is patently lawful. He issued a preliminary notice in terms of s 5 of the Act; the respondents objected to the intended acquisition in terms of s 5 of the Act; the appellant issued an acquisition order in terms of s 8(1) of the Act; the appellant thereafter applied for confirmation of the acquisition order as is provided in s 7(1)(b) of the Act. The respondents' contention that the appellant is prohibited from exercising any of the above powers which he is expressly authorised by Parliament to exercise raises the fundamental issue of jurisdictional competence. Can a court interdict the appellant from

acquiring land for redistribution in accordance with explicit provisions of an Act of Parliament? Not only is this a debatable point, but the wisdom of such an interdict is questionable. The interdiction of patently lawful conduct can hardly further the rule of law. That issue however is not before the court and will have to await determination another day.

WHEN DOES THE THIRTY DAYS START TO RUN FOR THE PURPOSES OF SECTION 7(1)(I)(B) OF THE ACT?

The court a quo held that an acquisition order made in terms of s 8(1) of the Act did not come into force until it was served upon the land owner concerned and consequently the period of thirty days within which an application for confirmation must be made, as prescribed by s 7(1)(b) of the Act must run from the date when the order was served upon the land owner, rather than the date of its signature by the acquiring authority. The respondents argued then and on this appeal that the acquisition order comes into force upon the signing of the order by the acquiring authority and not upon its service on the land owner. If the submission by the respondents is correct, then the application for confirmation by the appellant was out of time.

Section 8 of the Act provides as follows:

"8(1) Subject to section seven, the acquiring authority may, not less than thirty days after the date of publication of the preliminary notice in the Gazette acquire, by order describing the nature and extent of the land affected and served on the owner of the land concerned, all or any of the land described in that notice …" (emphasis is mine).

Section 8(2) provides that upon the making of the order in terms of subs (1) the acquiring authority may exercise any right specified in the order except the eviction of the previous owner. Section 8(3) immediately vests the ownership of the land on the acquiring authority upon the making of the order. The making of an acquisition order affects the proprietary rights of the owner of the land. In particular, s 8(3) immediately vests ownership of the land on the acquiring authority. In this regard, I am persuaded by Mr Patel's submission that Parliament cannot have intended that by mere signature of an acquisition order, unbeknown to the land owner in question, the land be invested in the acquiring authority. The service of the acquisition order or some other appropriate notice of acquisition must have been intended to effect the transfer of ownership to the acquiring authority. The contrary view that ownership transfers upon signing and without the owner knowing is absurd and cannot have been the intention of the legislature.

Finally, when the acquiring authority has applied for confirmation of an acquisition order in terms of s 7(1)(b) of the Act the acquiring authority is required in terms of s 7(3) of the Act, to give notice of the application as soon

as is reasonably practical after the application has been lodged with the Administrative Court. The overall effect of these provisions is that within thirty days of the making of an acquisition order an application for confirmation has to be made. The making of an acquisition order consists of the signing and service of the order. Once the application for confirmation has been lodged with the Administrative Court, notice of that has to be given to the land owner as soon as possible.

In the result and in relation to both appeals, the court a quo erred in insisting upon the production of a land reform programme as a pre-requisite to the determination of applications made in terms of s 7 of the Land Acquisition Act.

As regards the cross-appeal, the court a quo correctly interpreted and applied the provisions and procedural requirements of s 7(1) and (3) of the Land Acquisition Act.

Accordingly, as the majority of my brothers agree with the above conclusion, the appeal is allowed and the cross-appeal is unanimously dismissed.

I am satisfied that this appeal is not frivolous. Accordingly, the acquiring authority is ordered to pay the costs in terms of s 46 of the Act.

McNALLY JA: I have had the advantage of reading the judgment prepared by the learned Acting Chief Justice. I agree with his conclusion in relation to the two points raised in the cross-appeals. I, too, would dismiss the cross-appeals.

In relation to the main appeal, however, I take a different view from His Lordship. I think there are two main points of divergence:

1. I do not believe that one can draw a line between s 16 and s 16A of the Constitution as the learned Acting Chief Justice has done;
2. I do not believe that one can separate the concepts of compulsory acquisition on the one hand and compensation on the other in the way that His Lordship has done.

The two respondents, Paliouras and Wiggill, opposed the acquisition of their farms by the Minister on the grounds that no land reform programme was in existence. This being so, their situation was (they claimed) governed by the dictum in the CFU case (2000 (2) ZLR 469 (S) at 481B-C which reads:

"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."

That argument was accepted by the learned Presidents of the Administrative Court, who properly considered themselves bound by the full bench decision of the Supreme Court.

On appeal, it has been contended that the dictum of this court, set out above, was overstated. The ruling, so it was argued, was made in the context of s 16A of the Constitution, which is primarily concerned with compensation rather than acquisition of land. It is this contention which has been adopted by the learned Acting Chief Justice, leading him to conclude that:

"a land reform programme is not a pre-requisite to the acquisition of land in terms of s 16 of the Constitution."

Two points of clarification should be made about this statement by the learned Acting Chief Justice. First, we are not concerned simply with "the acquisition of land" but with "the compulsory acquisition of agricultural land for resettlement purposes" as that phrase is used in the Land Acquisition Act [Chapter 20:10] as amended. This is clear from the words in the Ministers' affidavits, where they speak of "the acquisition of land … for resettlement for agricultural purposes … in accordance with the Government's Resettlement Programme." (See the Acting Minister's affidavit at p 74 of the Paliouras papers, Vol I; the Minister's affidavit at p 74 of the Paliouras papers, Vol II; and the Acting Minister's affidavit at p 43 of the Wiggill papers.)

Secondly, I think it is necessary, in order to avoid confusion, to distinguish between the Constitution and the Act. Land is acquired in terms of the Land Acquisition Act. Such acquisition must be in conformity with the Constitution. So acquisition is to be in terms of the Act and in conformity with the Constitution.

It is certainly true, as the learned Acting Chief Justice says, that when we said, in the CFU case, that:

"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."

we were speaking in the context of s 16A of the Constitution. But I do not believe the Minister can get out of the difficulty by saying, in effect: "Well, I won't proceed in terms of s 16A, I'll proceed in terms of s 16. That way I avoid the problem of not having a

programme of land reform." (I note that he has effectively admitted not having a programme of land reform in place at the relevant time at pp 92 of Vol I and 93 of Vol II in the Paliouras papers.)

The fact is that the Minister is not proceeding in terms of either of these sections of the Constitution. He is proceeding in terms of the Land Acquisition Act, as amended. And the important amendments to the Act were introduced to bring the Act into line with s 16A of the Constitution, with its new provision excusing the Minister from paying for the land which is compulsorily acquired.

If we look at the Act as amended, we see that the only substantive as opposed to procedural provisions governing the compulsory acquisition of

agricultural land for resettlement purposes are contained first in s 16 which sets out that "fair compensation shall be paid within a reasonable time"; second in s 2 which now defines "fair compensation" in relation to the acquisition of agricultural land required for resettlement purposes as "compensation fixed by the Compensation Committee in accordance with the provisions of section twenty nine C"; and third, in s 29C(1) which reads:

"In respect of the acquisition of agricultural land required for resettlement purposes, compensation shall only be payable for any improvements on or to the land in accordance with this section:

Provided that compensation shall be payable for the land or any interest or right therein where an adequate fund for that purpose is established in accordance with subsection (1) of section 16A of the Constitution."

In other words, the compulsory acquisition of agricultural land for resettlement purposes in terms of the Act can only be done in terms of those provisions of the Act which depend upon s 16A of the Constitution for their validity. Without s 16A of the Constitution these provisions of the Act would be unconstitutional, involving as they do the compulsory acquisition of land without compensation. Section 16 of the Constitution expressly forbids acquisition without compensation. The constitutionality of the Land Acquisition Act is saved only by the provisions of s 16A.

That is why, with the greatest respect, I cannot agree with the learned Acting Chief Justice when he says:

"a land reform programme is not a pre-requisite to the acquisition of land in terms of s 16 of the Constitution."

I say that there is no provision in the Land Acquisition Act whereby the Minister can compulsorily acquire agricultural land for resettlement "in terms of s 16 of the Constitution". And to reinforce the argument I point out that when s 16A of the Constitution was introduced, s 16 was amended by the introduction, at the beginning of the section, of the significant words "subject to the provisions of s 16A".

The learned Acting Chief Justice's next contention is that we are not concerned, at this stage, with the issue of compensation. We are dealing only with the procedural steps whereby the Minister acquires land compulsorily. He says:

"The court a quo was not seized with the issue of compensation, consequently the provisions of s 16A (of the Constitution) were irrelevant. It was seized with the issue of acquisition, therefore the provisions of s 16 (of the Constitution) only were relevant."

This contention, with respect, puts procedure above substance. It is true that procedurally the question of compensation does not arise at the stage at which the acquisition is confirmed in terms of s 7 of the Act. But substantively one cannot separate compulsory acquisition from compensation. They are

two sides of the same coin. Just as, in a different context, it used to be said "No taxation without representation", so our Constitution says "No compulsory acquisition without compensation" (albeit the watered-down compensation envisaged in s 16A).
If, as the learned Acting Chief Justice would have it, we are dealing with acquisition in terms of s 16 of the Constitution, it is as well to recall what s 16 says:
"Subject to s 16A, no property of any description … shall be compulsorily acquired, except under the authority of a law that … requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property …"
It cannot seriously be contended, and indeed is not contended, that the Minister is intending to pay compensation for the land belonging to Paliouras and Wiggill. The Minister is proceeding "under the authority of a law" namely the Land Acquisition Act which is framed in conformity with s 16A of the Constitution, as I have explained above. How then can it be contended that he is proceeding in terms of s 16? He is not.
This is confirmed if one looks at the amendment to the long title of the Land Acquisition Act. It has been amended by Act 15 of 2000 to state that one of its purposes is:
"To make special provision for the compensation payable for agricultural land required for resettlement purposes."
That "special provision" is embodied in the amended Land Acquisition Act as I have indicated earlier. Without s 16A of the Constitution the provisions of the amended Land Acquisition Act would be inconsistent with the Constitution in at least two respects:

1. No compensation is payable by the State for the value of the land itself;
2. The period within which, and the method by which compensation is payable in terms of s 29C(3) and (4) of the Act are prima facie inconsistent with the requirement in s 16 of the Constitution that payment be "within a reasonable time after acquiring the property".

The effect of this is that there is no longer any provision in the Land Acquisition Act for compensation for the compulsory acquisition of agricultural land for resettlement purposes other than in line with the provisions of s 16A of the Constitution and in terms of s 29A of the Act. It follows that one cannot meaningfully speak of compulsory acquisition of agricultural land for resettlement purposes in line with s 16 of the Constitution.
I conclude, therefore, that the learned Presidents of the Administrative Court were right in their interpretation of the passage at 481B-C of the CFU judgment, and were right to come to the conclusion that they reached.
I point out that the Administrative Court did not dismiss the Minister's applications. In the Paliouras case the learned President merely postponed

the applications sine die. In the Wiggill case, the learned President effectively did the same, by ruling that a programme of land reform was a prior requisite for the compulsory acquisition of agricultural land for resettlement.

The question whether it is this court or the Administrative Court which has to be satisfied as to the existence of such a programme was not raised and I will not say anything on the subject.
As regards the cross-appeals, I have at the beginning of this judgment indicated my agreement that they should be dismissed. But I would not wish it to be understood that I am in agreement with the dicta of the learned Acting Chief Justice, in relation to the wisdom of the issuing of the interdict in the CFU case. That, as His Lordship says, will have to await determination another day. Nor, as will be apparent from what I have said, am I able to agree that the dictum at 481B-C of the CFU judgment overstated the position, despite the fact that it did not expressly refer to s 16A of the Constitution.
I would accordingly dismiss both the appeals and the cross-appeals. For the reasons set out by the learned Acting Chief Justice the costs are to be paid by the appellant.
EBRAHIM and MUCHECHETERE JJA: We have read the opinion of the Acting Chief Justice and also taken note of the views expressed by our brother McNally.
We agree with their conclusion in relation to the two points raised in the cross-appeals.
As regards the main appeal, we agree with the reasoning of our brother McNally's judgment but we do not agree with the conclusion he has reached.
In our view in the CFU case, whilst we recognised the fact that the State was acquiring land unlawfully and that there was a need to grant the interdict sought, we nevertheless suspended the effect of it until 1 July 2001. It is therefore patently apparent that the State was given a moratorium to put its house in order. In the circumstances, it is our view that as from 2 July 2001 the State is obliged to comply with the full terms of the interdict sought by the CFU in the CFU case but in the meantime it has not been precluded from proceeding with its land reform exercise. We therefore consider that the order made by the Acting Chief Justice is, in the circumstances, correct.
We would add, however, that like our brother, McNally, we also do not wish it to be understood that we are in agreement with the dicta of the learned Acting Chief Justice in relation to the wisdom of the issuing of the interdict in the CFU case. That issue was not before this court in these proceedings and we see no point in saying anything further about it.

SANDURA JA: I have read the judgments prepared by Chidyausiku ACJ and McNally JA, as well as the comments made by Ebrahim and Muchechetere JJA.
I agree that there is no merit in the cross-appeals and that, accordingly, they should be dismissed.
In addition, I agree with Chidyausiku ACJ that the main appeals should be allowed, not for the reasons stated by him, but for the simple reason that the operation of the interdict granted by this court on 21 December 2000 in the CFU case was postponed until 1 July 2001. Until that date, it was clearly intended that the acquisition of agricultural land for resettlement purposes would continue without the need to produce a land reform programme.
The court, having concluded that it was a prior requisite for the compulsory acquisition of agricultural land for resettlement that there be a programme of land reform, appreciated the factual situation that the land acquisition exercise could not be stopped abruptly. It was, therefore, decided that the Minister of Lands, Agriculture and Rural Resettlement, and the other respondents, should be given a period of about six months within which to

formulate a land reform programme and attend to the other matters set out in the order. In the meantime, the acquisition of agricultural land for resettlement was allowed to continue.

It follows, therefore, that in each case the President of the Administrative Court should have heard and determined the appellant's application for an order confirming the acquisition of the property in question.

Having said that, I now proceed to examine the provisions of s 16 and s 16A of the Constitution of Zimbabwe ("the Constitution"). I do so because I respectfully disagree with the view expressed by Chidyausiku ACJ that the compulsory acquisition of agricultural land for resettlement purposes can be carried out in terms of s 16 of the Constitution. That view led him to the following conclusion:

"As Mr Patel correctly submitted, the land reform programme envisaged in s 16A of the Constitution does not impinge upon the power to expropriate land in terms of s 16 of the Constitution. The compulsory acquisition of land in accordance with the requirements of s 16 is not predicated upon the existence or otherwise of a land reform programme. The existence of a land reform programme would have been relevant if the court a quo were seized with the issue of compensation in terms of s 16A of the Constitution following the compulsory acquisition of the land. The court a quo was not seized with the issue of compensation, consequently the provisions of s 16A were irrelevant."

However, before examining the relevant provisions of s 16 and s 16A of the Constitution I wish to state that I am in complete agreement with the analysis and interpretation of the provisions of the two sections by McNally JA, set out in his judgment, although I respectfully disagree with the conclusion reached by him that the main appeals should be dismissed.

The relevant part of s 16 of the Constitution reads as follows:

" 16 Protection from deprivation of property

(1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that —

(a) …

(b) …

(c) … requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right;

…"

It is clear from the above provisions that no property, including agricultural land required for resettlement purposes, may be compulsorily acquired except under the authority of a law which requires the acquiring authority to pay fair compensation for the property acquired.

The next issue to consider is whether the Land Acquisition Act [Chapter 20:10] ("the Act"), in terms of which agricultural land required for resettlement purposes is being acquired, requires the acquiring authority to pay fair compensation for the land acquired. The answer to that question is to be found in ss 16 and 29C of the Act.

Section 16 of the Act reads as follows:

"16 Duty to pay compensation

Subject to this Part and Part VA, an acquiring authority shall pay fair compensation within a reasonable time —

(a) …
(b) to the owner of any agricultural land required for resettlement purposes and to any other person whose right or interest in the land has been acquired in terms of this Act."
However, the relevant part of s 29C of the Act, which falls under Part VA of the Act, to which s 16 of the Act is made subject, reads as follows:
" (1) In respect of the acquisition of agricultural land required for resettlement purposes, compensation shall only be payable for any improvements on or to the land, in accordance with this section:
Provided that compensation shall be payable for the land or any interest or right therein where an adequate fund for that purpose is established in accordance with subsection (1) of section 16A of the Constitution."
It is, therefore, quite clear that the Act does not require the acquiring authority to pay any compensation in respect of the compulsory acquisition of agricultural land required for resettlement purposes. It requires the acquiring authority to pay compensation only for the improvements on or to such land.
However, in terms of the proviso to s 29C(1) of the Act, compensation for the land or any interest or right therein is payable where an adequate fund for that purpose has been established in accordance with subs (1) of s 16A of the

Constitution. It follows that where such a fund has not been established, the Act does not require the acquiring authority to pay any compensation in respect of agricultural land compulsorily acquired for resettlement purposes.
Since there is no law requiring the acquiring authority to pay compensation in respect of the compulsory acquisition of agricultural land required for resettlement purposes, it follows that the acquiring authority cannot rely upon s 16 of the Constitution in order to acquire such land.
However, the acquiring authority can rely upon s 16A of the Constitution which reads as follows:
" 16A Agricultural land acquired for resettlement
(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 —
(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"
(the emphasis is mine).

Finally, as stated in the judgment of this court in the CFU case, in order for the acquiring authority to rely upon the provisions of s 16A in the compulsory acquisition of agricultural land required for resettlement purposes, it is necessary to show that there is in existence a programme of land reform. In my view, the formulation of such a programme must be relatively simple.

In the circumstances, I agree that the appeals should be allowed and that the cross-appeals should be dismissed. As far as the costs are concerned, I agree that they should be paid by the appellant.

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

Wintertons, respondents' legal practitioners

S v GOTORA

2001 (2) ZLR 38 (H)

Division: High Court, Harare

Judges: Gillespie J

Subject Area: Criminal review

Date: 4 July 2001

Judgment Number: HH-105-01

Criminal law — statutory offences — Miscellaneous Offences Act [Chapter 9:15] — s 12(2) — being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen —person may be convicted on this charge on his plea alone

If a person charged with being found in possession of goods with regard to which there is a reasonable suspicion that they were stolen pleads not guilty, evidence must be led of the facts giving rise to the necessary suspicion. It is not necessary for a conviction for this offence that the suspicion should have been in the mind of the arresting officer at the time of the arrest; the suspicion can arise at any time. It is enough that the court has the suspicion, based on proper evidence, and that an inadequate explanation is offered to the court.

Where the accused pleads guilty to such a charge, he may be convicted on his plea alone without evidence being led. There is no law prescribing that a plea of guilty to this charge cannot be accepted. The court must, though, be satisfied, by properly formulated questions, that the plea was genuine. To hold that a plea of guilty cannot be accepted would be to place a relatively venial charge in the same procedural category as a capital offence. It would also be absurd that a person can condemn himself on the more serious charge of theft, but that a thief, charged only with possession because there is no identifiable complainant, cannot knowingly confess his guilt and have his plea accepted.

S v Chiwondo 1999 (1) ZLR 407 (H) disapproved.

Cases cited:

S v Chitsinde 1982 (2) ZLR 91 (S)

S v Chiwondo 1999 (1) ZLR 407 (H)

S v Johnson 1973 (2) RLR 156 (G)

S v Kayimbanemoyo 1997 (1) ZLR 211 (H)

S v Ngwenya 1975 (1) RLR 351 (G)

Legislation considered:

Miscellaneous Offences Act [Chapter 9:15], s 12(2)(a)
GILLESPIE J: The accused was convicted on his plea of guilty of contravening s 12(2)(a) of the Miscellaneous Offences Act [Chapter 9:15], that of the offence of being found in possession of goods in circumstances giving rise to the reasonable suspicion that they had been stolen. The regional

magistrate has referred the proceedings to me querying the correctness of the conviction. This query is based upon the decision of Chinhengo J in S v Chiwondo 1999 (1) ZLR 407 (H).
The ratio decidendi of that judgment is that a conviction for the offence cannot properly be entered on a plea of guilty. The reasoning underlying this conclusion is that in order for a conviction for the offence to be proper, evidence of circumstances giving rise to the necessary suspicion must be —
"accurately observed, properly recorded and clearly presented to the court …"
This quotation is from a judgment by Georges JA (as he then was) in S v Chitsinde 1982 (2) ZLR 91 (S). Chinhengo J relied heavily on the decision in Chitsinde's case in formulating the ratio of his own decision in Chiwondo. In my respectful view, however, this reliance was misplaced.
The decision in Chitsinde addresses the fact, not infrequently expressed, that one of the essential elements of the particular offence is the formation of a reasonable suspicion that the goods in the accused's possession are stolen. This is undoubtedly a crucial fact of the charge and one upon which evidence, if the accused denies the charge, must be led. The dictum in Chitsinde's case, however, relates to a plea of not guilty and, in my view, cannot be applied to pleas of guilty so as to prevent the acceptance of a plea of guilty to charges of this nature. The same point was made by Adam J in S v Kayimbanemoyo 1997 (1) ZLR 211 (H).
A consideration weighing with Chinhengo J in reaching his conclusion was that the responsibility to give an explanation for his possession only falls upon the accused once a reasonable suspicion has arisen that the goods have been stolen. The learned judge stated that this suspicion must rise in the mind of the arresting person. From this, he concludes that the arresting person must give evidence of his suspicion before the accused can be called upon to explain his possession and, further, that this is inconsistent with proceedings on a plea of guilty. I am bound to say, with the greatest of respect, that I find this reasoning unpersuasive.
The enactment, as it was originally worded (as s 13A of the Miscellaneous Offences Act 1964) did not refer, as the present enactment does, to a suspicion arising —
"either at the time of the possession or at any time thereafter …"
The effect of the former was that, on a long line of authorities, a charge which alleged that at the time of the arrest there was a reasonable suspicion, rather than that there was a reasonable suspicion, is excipiable. See, for example, S v Johnson 1973 (2) RLR 156 (G) and S v Ngwenya 1975 (1) RLR 351 (G). The reasoning behind this principle was indistinguishable from that motivating Chinhengo J in this case, namely that it is not merely possession

which is penalised, but being found in possession of goods of a particular description, that is goods reasonably suspected to be stolen. The significance of the requirement that

the existence of the suspicion be averred in the past tense is that the power to require an explanation could only be exercised by an officer forming a suspicion on finding the accused in possession, and that the evidence of finding, of suspicion and of absence of explanation must come from that officer.

On the old formulation of the offence, therefore, the view of Chinhengo J might well have been valid. It is, however, a point which would never have arisen because the procedure on a plea of guilty in those days required in all cases the adduction of evidence verifying the plea. The present wording of the section, however, completely alters the situation. The suspicion, on the clear words of the section, might properly arise

"at the time of the possession or at any time thereafter …"

A suspicion existing in the mind of the arresting officer is, therefore, not required; nor is his evidence of that suspicion nor of the absence of satisfactory explanation. It is sufficient that the court can entertain the suspicion and that an inadequate explanation is offered to the court. This, therefore, undermines the basis of the finding of Chinhengo J.

I entertain a similar respectful disagreement with the decision of Chatikobo J, who concurred with Chinhengo J in Chiwondo's case. The learned judge, quite rightly in my respectful view, expressed the principle that an accused person's admissions of fact must be informed and unequivocal before they can be regarded as sufficient to confirm the plea. He observed that in many cases an admission that suspicion arose and was unreasonable cannot properly be held to be informed and unequivocal. I accept and agree with this properly cautious approach. What I am unable to agree with is the suggested necessary extension of this argument, that a plea of guilty to this charge can not be accepted and confirmed in terms of the Criminal Procedure and Evidence Act and that in all cases evidence must be led.

My own view is that there is not now and never has been any law prescribing that a plea of guilty to this charge cannot be accepted. As this charge was previously enacted, evidence of a suspicion entertained by an arresting detail was always required, on a plea of not guilty, because that was an essential element of the charge, and on a plea of guilty, because that was the accepted mode of confirming such a plea. After the section creating the offence was amended, evidence of circumstances giving rise to suspicion was required, with the difference, however, that the suspicion need not be in the mind of the arresting officer at the time, but rather the suspicion could arise at any time thereafter. The evidence that was required, therefore, was evidence of circumstances justifying suspicion and not of suspicion itself.

It is enough now if the court, after hearing of the circumstances, itself entertains the suspicion. The uniform practice, moreover, as I recall it from 1976 onwards , has always been to accept pleas on this charge provided they are advisedly given and that the procedure complies with whatever requirements are stipulated by law in any particular case.

I understand and respect that a consideration underlying the decision in Chiwondo may well have been one of policy; namely, an awareness that this particular offence is one which is susceptible to abuse by the police. Certainly, it is not unknown for police to abuse the power of arrest that is given by this section. So, however, is any police power comparably prone to abuse. The remedy for that lies not in disqualifying a person who wishes to admit the offence from doing so, but is carefully scrutinising charges brought

and pleas tendered. The accused who feels that he has been victimised by a policeman in such an offence must, in my view, be given the responsibility of pleading not guilty, if that is his choice, just as the same responsibility is given to persons charged with any other offence, other than a capital one. There is no need to place this miscellaneous and relatively venial charge in the same procedural category as a capital offence where pleas of not guilty are entered as the acceptable way of testing an accused's admission.
The decision in Chiwondo's case I respectfully regard as persuasive authority for the proposition that an accused's admissions, on the instant charge, that circumstances justify suspicion, that suspicion is reasonable, and that his explanation is inadequate, must all be carefully examined with a view to determining their genuiness. To say, however, that the plea cannot be accepted, that the use of the procedure prescribed by law is irregular, and that a trial must follow seems to me insupportable and contrary to the wording of the charge. It might be thought absurd that a person could condemn himself on the more serious charge of theft, whereas a thief, charged only with possession, there being no identifiable complainant, cannot knowingly confess his guilt to the lesser charge and have his plea accepted.
Properly formulated questions, as were put by the magistrate in this case, amply demonstrate that a plea can be adequately accepted and confirmed and that the procedure for doing so is entirely regular. So in this case, the accused was apprehended attempting to sell a mobile phone, a common, ready and difficult to trace target for thieves, for a fraction of its value, which value was beyond his means. These are circumstances giving rise to a reasonable suspicion that it was stolen. The accused gave an admittedly false explanation. He was asked these questions:

"Q. Do you admit being found in possession of the cellphone in question?

Q. Do you admit that the circumstances in which you were found in possession of the cellphone lead to a reasonable suspicion that it had been stolen?

Q. Do you admit failing to give a satisfactory explanation of your possession of the cellphone?"

To each of these, the accused answered "Yes". I am unable to venture any criticism of the procedure, nor do I entertain any doubt that the plea was genuine and has been duly confirmed. I cannot accept that the proceedings are irregular for failure to lend any evidence or to hold a trial.
In any event, as a final observation, even if the proceedings were irregular, which in my view they are not, the law enjoins a judge on automatic review not to interfere with proceedings on the grounds of irregularity unless a miscarriage of justice has actually occurred. There has been no miscarriage of justice here. The proceedings are accordingly confirmed.

CENTRAL AFRICA BUILDING SOCIETY v SHARIWA
2001 (2) ZLR 43 (H)
Division: High Court, Harare
Judges: Gillespie J
Subject Area: Chamber Application
Date: 4 July 2001
Judgment Number: HH-106-01

Practice and procedure — commission — collection commission — when mortgagee may claim collection commission in event of non-payment of debt secured by bond
Real rights — mortgage — recovery of arrear instalments — when collection commission may be claimed
The effect of the definition of "trade debt" in s 70(1) of the Law Society of Zimbabwe By-laws, 1982, is that if, upon the non-payment of a debt secured by a mortgage bond, the mortgagee claims only arrear instalments of the debt he may claim collection commission for the recovery of those instalments. If, however, the mortgagee enforces an acceleration clause in the bond in respect of the whole outstanding balance of the debt, he cannot claim collection commission even if he claims arrear instalments as well as the outstanding balance. CABS v Chirimuta 1999 (2) ZLR 288 (H), explained.
Case cited:
CABS v Chirimuta 1999 (2) ZLR 288 (H)
Legislation considered:
Law Society of Zimbabwe By-Laws, 1982 (SI 314/1982), s 70(1)
GILLESPIE J: The plaintiff sues on a mortgage bond which it has foreclosed for failure by the defendant to service the instalments as required. The claim for payment of the full balance outstanding and for an order declaring the mortgaged property specially executable is not contested. One unusual and imaginative aspect of the claim, however, requires special attention.
The plaintiff claims collection commission on that part of the indebtedness which constitutes arrears, although not on the balance which would not otherwise have been due but for the foreclosure. This approach reflects at least in part an acceptance of the authority of my decision in CABS v Chirimuta1. In that decision, I drew attention to the definition of "trade debt"

as that expression is defined for the purposes of the Law Society of Zimbabwe By-laws.2 This definition is such as to exclude from the definition moneys due under a mortgage bond hypothecating immovable property.
I say "acceptance in part" of the correctness of that decision because the plaintiff's claim necessarily carries with it the proposition that another part of that decision is incorrect. The point made is that it is not all claims for recovery of money due under a mortgage of immovable property that are excluded from the definition of "trade debt" but only those monies which are not in arrear at the time of the claim. This point is developed from a certain understanding of the definition, which it is convenient here to reproduce. In short, a trade debt does not include:
"any claim, other than a claim for arrear instalments only, for the recovery of moneys due under a mortgage bond hypothecating immovable property." 3
This wording, so the plaintiff submits, allows a building society foreclosing a mortgage to apportion the amount claimed as between arrears of instalments and the outstanding balance not being arrears and to claim collection commission on the former and costs, on the attorney and client scale (as provided in the bond) on the latter.
I am satisfied that this approach is incorrect. In CABS v Chirimuta, I wrote:
"A claim consequent upon foreclosure of a mortgage bond over immovables, or upon the cancellation of the sale of an immovable, is not a trade debt. A claim enforcing such a bond or agreement, for arrear instalments only, is a trade debt." 4

If this is correct, then it destroys the plaintiff's point. The plaintiff has attacked this reasoning stating:
"This is incorrect. The contract is not cancelled when a mortgagee forecloses on a mortgage bond. It remains valid and binding on the parties. Instalment arrears can be claimed without foreclosure anyway."
This submission is specious.
The second part of the submission, that arrears on a bond can be claimed without foreclosure, touches the point directly, but fails to see its significance. The crucial issue is that both on a mortgage bond, and on a deed of sale, arrear instalments can be claimed without foreclosure or cancellation, as the case may be. Where such a claim is made for arrear instalments without foreclosures or cancellation, then the agreement is being enforced directly and the claim is for arrear instalments only (the significance of the emphasis I will make clear), the loan advance and the house sale remaining intact.

Reference in the judgment to cancellation is no doubt inept. A claim for payment of the purchase price of immovable property or repayment of a loan advanced, whether it is restricted to a claim for arrears or enforces an acceleration clause in respect of the whole balance outstanding, constitutes an enforcement of the contract in the face of a breach and is not a cancellation, properly so-called, on the grounds of a breach. The breach gives the creditor the election to claim on the one hand the arrears only or, on the other, to enforce an acceleration clause and to claim the full outstanding balance.
It is my view, alluded to imperfectly in CABS v Chirimuta, and in no way altered by the submission here, that whether the claim constitutes a trade debt or not depends completely upon which of these elections the creditor has made. In terms of the by law, the claim is a trade debt if it is:
"a claim for arrear instalments only."
I consider that "only" to be crucial. As I have shown, an election not to enforce an acceleration clause or to foreclose gives rise to a claim for arrear instalments only. The other election gives rise to a claim for other than arrear instalments only.
Had it been the intention to permit an apportionment or division of the claim, such as is attempted here, and to treat part of the claim as a trade debt and part of it as not then the definition would properly have read thus:
"a trade debt shall not include:
any claim for the repayment of moneys due under a mortgage bond hypothecating movable property, save to the extent that the claim constitutes a claim for arrear instalments."
There is no way in which the existing definition can properly be understood in such a way.
There is, moreover, good reason why the definition should be read in the manner in which I read it. The plaintiff's supposed interpretation leads directly to a situation where on one claim, one summons, one cause of action, a creditor may recover both costs on an attorney and client scale and collection commission. This is anti-thematic to the purpose of the legislation.
In the result, the plaintiff is entitled to judgment but is not entitled to collection commission in any part of the judgment debt. Judgment with costs in the attorney and client scale is accordingly entered for the plaintiff in the sum of $109 534.35 together

with interest thereon at the scale of 32 percent per annum from 11 March 2001 compounded monthly in advance. Stand No. 813 Hatcliffe Township of Hatcliffe North is declared specially executable.
Wintertons, plaintiff's legal practitioners
S v SANGO
2001 (2) ZLR 46 (H)
Division: High Court, Harare
Judges: Omerjee J
Subject Area: Criminal review
Date: 4 July 2001
Judgment Number: HH-113-01

Criminal law — statutory offences — Firearms Act [Chapter 10:09] — s 4(1) — possession of firearms — pistol with firing pin broken and holes drilled in barrel — whether still a "firearm" in terms of section — evidence necessary — whether state of weapon can constitute "special reasons" for not imposing mandatory prison sentence
The accused was convicted of contravening s 4(1) of the Firearms Act [Chapter 10:09], having stolen a pistol from a friend. He was sentenced to the mandatory minimum sentence of five years' imprisonment. The weapon was found not to be functional, as the firing pin was broken and holes had been drilled in the barrel and cylinder. On review:
Held, that it had to be shown that the pistol was a firearm, as defined in s 2 of the Act. This meant that it had to be capable of discharging a bullet. Before the court could be so satisfied, it had to be clearly established that the holes drilled in the barrel had not resulted in the pistol being unable to discharge a bullet, or that they did have that result but could easily be repaired. The case would be remitted for evidence on this point to be taken.
Held, further, that even if the evidence was that the pistol was a firearm, as defined, the pistol's condition clearly constituted "special reasons" for not imposing the mandatory minium sentence.
Case cited:
S v Shazi 1980 (4) SA 494 (N)
Legislation considered:
Firearms Act [Chapter 10:09], ss 2, 4(1)
OMERJEE J: The accused was convicted on a charge of contravening s 4(1) of the Firearms Act [Chapter 10:09] ("the Act"). Upon conviction, he was sentenced to undergo the mandatory minimum sentence of five years' imprisonment.
The evidence reveals that the accused stole a .38 Albion revolver from a friend on 1 April 2001. On the following day, the accused was arrested by the police in possession of the said weapon. The police had acted on information given to them by a work colleague of the accused.

The weapon was examined by a firearms expert in the Ballistics Department of the Zimbabwe Republic Police (ZRP) and was found not to be functional as the firing pin was broken. Furthermore, holes had been drilled in the barrel and cylinder in an attempt to deactivate the weapon.

The record is silent as to whether or not the trial magistrate made any enquiry as to "special reasons" as he is required to do, pursuant to the provisions of s 4(2)(b)(i) of the Act.

It is clear from the report of the firearms examiner that the gun is not functional. In s 2 of the Act, the term "firearm" is defined as meaning:

"(a) any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or any other missile; or

(b) the barrel, bolt and chamber or any other essential component of any such weapon as aforesaid;"

Clearly, the gun found in the accused's possession does not satisfy the first qualification set out in para (a) above. Because the firing pin is broken a bullet cannot be discharged from the barrel. Does it satisfy the second qualification, namely that it can be adapted for the discharge of bullets from the barrel? The report from the firearms examiner does not clarify that aspect. He said that holes were drilled in the chamber and barrel in an attempt to de-activate the weapon. He did not indicate whether or not the holes had the effect of de-activating the weapon.

In S v Shazi 1980 (4) SA 494 (N), the court had to decide whether or not a home-made pistol was a firearm. At pp 495-6, Page J said:

"The nature of an 'arm' as contemplated by Act 75 of 1969 and the legislation which it replaced has been considered in several cases in relation to articles generally conforming in their design to recognised firearms, but being incapable of being used as such at the time of the alleged offence by reason of their having damaged or missing parts. In R v Ntsamai 1945 (1) PH H85, the court considered the case of an automatic pistol from which were missing the magazine, the hammer and the hammer spring. It was held that this article constituted an 'arm', not only because it incorporated the barrel of an arm, but also because it could, by 'the replacing or refitting of a part or two' to be rendered 'capable of discharging a shot'. Although the report appears to suffer from an omission which makes it difficult to deduce precisely what was said, it would appear that the court was of the view that the criterion was one of degree, inasmuch as a stage could be reached when the alterations and repairs required were so extensive that the article would no longer qualify as a firearm."

Then at p 499 the learned judge continued:

"In my view, when once it has been established that a weapon is capable of discharging a missile with sufficient velocity to render it adapted for use as a means of offence, it does not detract from its character as such that it is liable to malfunction, even if the likelihood of it so doing is 50 per cent or higher. It remains a source of danger of the kind the Act was designed to control and is properly regarded as falling within the definition of 'arm' as

employed in the Act. It follows that the magistrate was, in my view, correct in holding that the article found in the possession of the appellant was a firearm within the meaning of the Act."

Therefore, before the court can be satisfied that the weapon in question is a firearm, as defined in the Act, it must be proved that the holes drilled in the cylinder and the barrel have not resulted in the weapon being unable to discharge a bullet from the barrel or else

they have had that result but that damage can easily be repaired. This can only be established by further evidence from the firearms examiner. If the evidence shows that the weapon is incapable of firing bullets and the damaged parts cannot easily be repaired, the accused must be acquitted. If the evidence shows that the damaged parts can easily be repaired, the accused must be convicted. However, for the purposes of sentence, the condition of the weapon clearly constitutes "special reasons". In that case, a sentence of 12 months' imprisonment, with half suspended on condition of good conduct, would, in my opinion, be an appropriate sentence.

The conviction and sentence are accordingly set aside. The matter is remitted to the trial magistrate, so that the firearms examiner can be recalled and asked to testify as to whether or not the weapon has been de-activated and, if it has, whether damaged parts of the weapon can easily be repaired. If they can, and the accused is convicted, the magistrate must inquire into whether or not there are special reasons, in recording his findings, and then is to sentence the accused afresh.

The trial magistrate must deal with these issues as a matter of urgency.

Smith J agrees.

CIT-CHEM (PVT) LTD v CERES FARM (PVT) LTD

2001 (2) ZLR 49 (H)

Division: High Court, Harare

Judges: Smith J

Subject Area: Stated Case

Date: 4 July 2001

Judgment Number: HH-114-01

Compromise — contract of — when formed — tender of payment "in full settlement" — when can be regarded as offer of compromise

Interest — claim for — not necessary for amount to be specified and added into invoice or statement — interest claimable from date on which purchaser falls into mora

Interest — date from which runs — where date specified, runs from that date — if not specified, runs from date on which demand made

The plaintiff had issued summons claiming payment for goods sold and delivered, together with mora interest at the prescribed rate, even though the statement of account which plaintiff had sent defendant did not include interest. Following correspondence between the parties, the defendant tendered payment of an amount, but the plaintiff's legal practitioner wrote back to say it would be accepted without prejudice to plaintiff's claim for interest. On the same day that the plaintiff's legal practitioner wrote his reply to the tender, the defendant — unaware that he had done so — sent a cheque for the amount tendered, together with a letter stating that the cheque was in full and final settlement of the plaintiff's claim with interest and costs. The plaintiff banked the cheque but persisted with its claim.

The parties stated two issues for determination by the court:

1. If the rate of interest is not stated on an invoice or statement, can it be claimed?

2. Was the cheque a payment in full and final settlement and, by accepting it, was the plaintiff estopped from claiming interest?

Held, as to the first issue, that interest can be claimed even if an amount for interest does not appear on any invoice or statement sent by the creditor. Unless otherwise agreed between the parties, where a purchaser of goods does not pay the price on due date the seller is entitled to claim interest from the date that the purchaser falls into mora.
Held, as to the second issue, that when the defendant sent the cheque for the tendered amount it clearly stated that it was in full and final settlement of the plaintiff's claim, including interest and costs. By accepting the cheque, the plaintiff must be taken to have accepted the tender, and to have compromised its claim, including the claim for interest and costs.

Cases cited:
Andy's Electrical v Laurie Sykes (Pty) Ltd 1979 (3) SA 341 (N)
Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A)
Linton v Corser 1952 (3) SA 685 (A)
West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173
Miss M Moyo, for the plaintiff
A Pycroft, for the defendant
SMITH J: This is a stated case. The relevant facts are as follows. In March 1998, the plaintiff (hereinafter referred to as "Cit-Chem") issued summons against the defendant (hereinafter referred to as "Ceres") claiming payment of $214 166 for goods sold and delivered between May and December 1997, with interest thereon at 25 per cent per annum (case No. HC 3295/98). The action was abandoned and summons was then issued claiming payment of 86 272 South African Rand with interest thereon at the prescribed rate (case No. HC 3533/98). Following correspondence between the parties, on 17 April 1998, Ceres tendered payment of $227 501 in full and final settlement. Cit-Chem's legal practitioners advised Ceres that Cit-Chem would accept the $227 501 "without prejudice" to its claim for interest which had been erroneously omitted from the statement of account which had been sent to Ceres, due to the fact that some of the invoices were outstanding for more than 360 days. Ceres' legal practitioners then forwarded a cheque for $227 501 under cover of a letter in which it was stated that the cheque from Ceres was enclosed "in full and final settlement of your client's claim with interest and costs".
On 21 September 1998, Ceres filed its plea which was to the effect that it had made payment in full and settled its indebtedness. On 26 October, Ceres amended its plea to add, as an alternative, that the amount claimed by Cit-Chem was in the wrong currency and that it included the cost of goods which had not been delivered or which had been returned. At the pre-trial conference Cit-Chem withdrew the claim for payment in S.A. Rand. On 17 March 2000 it instituted the present proceedings, claiming interest at 3 per cent per month, in an aggregate amount of $66 674.42. Ceres filed its plea in which it denied that goods quoted on some of the invoices specified by Cit-Chem had been received and that there had been any agreement between the parties that interest would be due on overdue accounts. It also pleaded that it had made payment in full and final settlement of Cit-Chem's claim on 29 April 1998, which had been accepted on 7 May 1998.
The issues to be determined are as follows:

1. Is it a legal requirement that interest must be computed and added on any

invoice or statement and, if the rate of interest does not appear on the invoice or statement, can it be claimed by the seller?

2. Was the payment of $227 501 made by Ceres in full and final settlement of Cit-Chem's claim for interest and is Cit-Chem estopped from claiming interest?

ISSUE NO. 1

In West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 192 Kotzé JA said:

"In regard to the subject of interest, it must be borne in mind that the Roman-Dutch Law and the Civilians distinguish between the different ways in which interest became due. If it was due and payable by virtue of an express agreement (ex pacto vel conventione; aut in obligatione), interest was regarded as a principal matter and not as accessory; but if it was due ex mora or ex officio judicis, it was regarded as ancillary."

Centlivres CJ, in Linton v Corser 1952 (3) SA 685 (A) referred with approval to the above quotation and went on to say, at 695G-H:

"The old authorities regarded interest a tempore morae as 'poenaal ende oieus', vide Utrechtsche Consultatien, 3, 63, p 288. Such interest is not in these modern times regarded in that light. Today interest is the life-blood of finance, and there is no reason to distinguish between interest ex contractu and interest ex mora."

As soon as the debtor of a money debt falls in mora, the creditor is entitled to damages in the form of interest a tempore morae — see Joubert's General Principles of the Law of Contract at p 204. The basis for this entitlement was clearly described in Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A) at 1145D-G as follows:

"It may be accepted that the award of interest to a creditor, where his debtor is in mora in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date (Becker v Stusser 1910 CPD 289 at p 294). This loss is assessed on the basis of allowing interest on the capital sum owing over the period of mora (see Koch v Panovka 1943 NPD 776). Admittedly … there were differences of opinion among the writers on Roman-Dutch law on the question as to whether mora interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by Centlivres CJ in Linton v Corser 1952 (3) SA 685 (A), at p 695, interest is today the 'life-blood of finance' and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor."

Accordingly, the answer to the first issue is that it is not a requirement of

our law that interest must be computed and added in any invoice and statement and, if such amount for interest does not appear on the invoice or statement, it cannot be claimed by the seller. Unless otherwise agreed between the parties, where a purchaser of goods does not pay the purchase price on delivery of the goods the seller is entitled to claim interest from the date that the purchaser falls in mora. If the agreement between the

parties specifies the date on which the purchase price must be paid, then ordinarily the purchaser is in mora if he does not pay on due date. If, on the other hand, there is no agreement as to the date of payment, it is for the seller to demand payment within a reasonable time and, if the purchaser does not pay on the date demanded, he then falls in mora.

ISSUE NO. 2

After the issue of summons, the legal practitioners of Ceres wrote to Cit-Chem's legal practitioners. In their letter, dated 17 April 1998, they said that their client, Ceres, had "offered to settle the full balance outstanding in terms of the statement of account sent to him dated 21 March 1998 directly by your client totalling $227 501 in full by 30 April 1998". They asked whether the offer was acceptable. The legal practitioners of Cit-Chem, in a letter dated 22 April, responded, saying that the offer had been forwarded to Cit-Chem and noting that "their acceptance will be on the condition that your client pays all legal costs, interest charges and collection commission". The letter concluded by advising that they would "revert to you once we receive their further instructions". Then, in a letter dated 29 April 1998, they advised that Cit-Chem was prepared to accept Ceres' offer of $227 501 without prejudice to its claim for interest "which was erroneously omitted from the statement of account sent to your client due to the fact that some of the outstanding invoices are 360 days outstanding". However, Ceres sent Cit-Chem's legal practitioners a cheque in the sum of $227 501 under cover of a letter, also dated 29 April, from their legal practitioners in which it was stated that the payment was being made "in full and final settlement of your client's claim with interest and costs". Cit-Chem accepted the cheque without comment. It seems clear that it was a pure coincidence that both letters were written on the same date. In neither of the letters is it said that the letter is in response to the one of that same date from the other legal practitioner. To the contrary, the letter from Cit-Chem's legal practitioners refers to the letter dated 17 April from Ceres' legal practitioner, and the letter from Ceres' legal practitioner also refers to his earlier letter of 17 April. It seems clear, therefore, that when Ceres' legal practitioner sent the cheque in full and final settlement, he was not aware of the letter from Cit-Chem's

legal practitioner saying that Cit-Chem was prepared to accept the offer of $227 501 without prejudice for its claim for interest.

As stated in Christie's Business Law in Zimbabwe, a compromise is the settlement by agreement of a disputed obligation and replaces the disputed obligation by the obligations created by the agreement of compromise. The learned author, at p 112, points out:

"Difficulties frequently arise when a debtor sends his creditor a cheque for less than the amount claimed, expressly stating that the cheque is sent 'in full settlement'. On general principles of offer and acceptance, the creditor who cashes the cheque in these circumstances ought not to be held to have compromised his original claim unless it is clear that he intended to do so, as when he has expressly said so or the debtor has made it clear that he will interpret the cashing of the cheque as an acceptance of his offer of compromise."

The effect of describing a payment as being "in full settlement" was considered in Andy's Electrical v Laurie Sykes (Pty) Ltd 1979 (3) SA 341 (N). At pp 344-345, Didcott J said:

“The expression ‘in full settlement’ which one finds in the sentence had led to judicial disagreement. De Villiers JA had this to say in Harris v Pieters [1920 AD 644] at 654-5 —

‘Now the phrase “in full settlement” is ambiguous and may mean one of two things. A debtor, in offering a sum in full settlement, may intend to tender the amount unconditionally, only adding the words “in full settlement” by way of emphasising his contention that the amount tendered covers the whole of his liability. In that case, the offer is made animo solvendi. Or he may intend to offer the amount on condition that the creditor, by accepting it, should forego his claim for the balance. In the latter case, the offer is made for the purpose of entering into a new contract with the creditor, animo contrahendi therefore.’

Hathorn AJP thought the same in Briggs v Titlestad 1938 NPD 446 at 451. A different view, however, was taken by Solomon JA in Burt NO v National Bank of South Africa Ltd 1921 AD 59, when he said at 67:

‘It is true that in … Harris v Pieters, it was stated in one of the judgments that the words “in full settlement” are ambiguous … In my opinion, however, those words are perfectly plain and can have only one meaning. The tender is made for the purpose of settling the action, and neither the person who makes the offer nor the person who accepts it can possibly have any misconception as to its meaning.’

To similar effect, though less strongly put, was the following remark by Kennedy J in Cecil Jacobs (Pty) Ltd v Macleod and Sons [1966 (4) SA 41 (N) at 46B]:

‘There can be no doubt but that the expression “in full settlement” when embodied in a tender or offer, imports in its ordinary grammatical meaning a condition that the creditor to whom it is made should abandon the balance of his claim.’

Kennedy J then added at 46C-D:

‘The context in which these words are used, however, or evidence of the surrounding circumstances, may show that the words were not intended to do more than emphasise the tenderer’s view that the amount offered represents the full extent of his liability; but, unless it appears that this is the meaning, an offer or tender in full settlement does incorporate such a condition, even though liability to the extent of the tender may be admitted.’

The significance of all this, of course, is that real ambiguity on the point defeats the debtor in a case like the present. He has not made himself plain, and his intention to compromise is in doubt. His language is then construed contra proferentem.”

Then, at p 346, the learned judge went on to say:

“Once it is evident that the payment’s real purpose is the settlement of the whole dispute, the product is an offer of compromise, not the mere discharge of an acknowledged liability, and the condition characterising it as such is its very essence, which the creditor disregards at his peril. In fairness to Mr Gordon, I should add that some of the judgments on the topic, especially that of Innes CJ in Harris v Pieters (supra at 649-50) contain passages which, unless they are closely examined, tend to confuse the reader and may be thought to support counsel’s proposition. As I understand these, however, all they really mean is the following. A payment’s description as one ‘in full settlement’ is not necessarily decisive. The circumstances may show that, despite the description, the payment is intended to satisfy nothing more than an admitted debt. If that is its true

rating, the words ‘in full settlement’ are of no further consequence and may safely be ignored. The same goes for the contention or assertion which, according to their correct interpretation, the debtor had in mind when he used them. Ex hypothesi that, whatever it was, did not go the length of an intention to compromise. The payment’s classification would have been wrong if it had.”

When Ceres sent the cheque for $227 501 to Cit-Chem’s legal practitioner, it was stated that the offer of compromise was in full and final settlement of Cit-Chem’s claim with interest and costs. Even though Cit-Chem’s legal practitioner had written on the same date saying that Cit-Chem would accept Ceres’ offer without prejudice to its claim for interest, that conditional acceptance was not made when the cheque was sent. When Ceres made the offer it was clearly stated that it was in full and final settlement of Cit-Chem’s claim, including interest and costs. By accepting the cheque, Cit-Chem is taken to have accepted the offer. Therefore its claim, including the claim for interest and costs, has been compromised.

Accordingly, the answer to the second issue is that Cit-Chem is estopped from claiming any interest or costs.

Coghlan, Welsh & Guest, plaintiff’s legal practitioners

Wintertons, defendant’s legal practitioners

ZIMBABWE BANKING CORP LTD & ANOR v EFFICIENT SECURITY (PVT) LTD & ANOR

2001 (2) ZLR 55 (H)

Division: High Court, Harare

Judges: Blackie J

Subject Area: Civil Application

Date: 11 July 2001

Judgment Number: HH-117-01

Practice and procedure — parties — substitution of — effect on cause of action

Prescription — period of — when period begins to run — substitution of claimants through cession — whether affects date from which prescriptive period begins to run

The first applicant had issued summons against the respondents for the repayment of a loan, then ceded its right to recover the loan to the second applicant. When, more than three years later, the applicants sought to have the second applicant substituted as plaintiff in the action, the respondents opposed the application on the ground that although the summons had been issued within three years after the first applicant’s cause of action arose, the application for substitution was being made after that three-year period had expired, and so the second applicant’s claim against them had prescribed.

Held, that an application to substitute a party to an action affects the party, not the cause of action. When the second respondent took over the debt as cessionary, the running of prescription had already been interrupted by the service of a summons, and the action was still pending. The second respondent’s claim had not therefore prescribed.

Cases cited:

Contr of C&E v Guiffre 1971 (1) RLR 91 (G)

Friedman v Woolfson 1970 (3) SA 521 (D)

Standard Bank of SA Ltd v Oneanate Invstms (Pty) Ltd (in liq) 1998 (1) SA 811 (SCA)

Syfin Hldgs Ltd v Pickering 1982 (1) ZLR 10 (S)

Zimbank & Anor v Consol Pipe & Fittings (Pvt) Ltd & Anor HH-119-2000
Zimbank & Anor v Shiku Distributors (Pvt) Ltd & Ors 2000 (2) ZLR 11 (H)
Legislation considered:
Prescription Act [Chapter 8:11], s 19(2)
A P de Bourbon SC, for the applicants
A B Chinake, for the resppondents
Page 56 of 2001 (2) ZLR 55 (H)
BLACKIE J: On 6 September 1996, the first applicant (Zimbank) issued summons in case No. HC-7696-99 against the first and second respondents (Efficient Security and Pasipamire respectively) claiming that they were jointly and severally liable to it for money lent and advanced to Efficient Security and guaranteed, with renunciation of benefits, by Pasipamire. That action is opposed by Efficient Security and Pasipamire.
On 30 September 1996, Zimbank ceded and transferred to the second applicant (Climax) the debt alleged to be due to it by Efficient Security and Pasipamire, together with the securities for that debt. At that time, Climax was called Climax Super Investments (Pvt) Ltd but it has since changed its name to Climax Investments (Pvt) Ltd.
On 22 May 2000, Zimbank and Climax brought this application to substitute Climax for Zimbank as the plaintiff in case No. HC 7696/96. The substitution sought by Climax is permissible, in principle, provided that there is no prejudice to the defendants in the action by the substitution: Zimbank & Anor v Consol Pipe and Fittings (Pvt) Ltd & Anor HH-119-00; Zimbank & Anor v Shiku Distributors (Pvt) Ltd & Ors 2000 (2) ZLR 11 (H). However, both Efficient Security and Pasipamire oppose the application. The sole ground of opposition is that because Climax did not apply for its substitution on account of the cession from Zimbank within three years of the date that the debt arose for Zimbank, its claim against them is prescribed. No claim of prejudice is raised.
The cause of action in any claim is the entire set of facts which, if proved, will enable a person to obtain judgment on his claim: Syfin Hldgs Ltd v Pickering 1982 (1) ZLR 10 (S); Contr of C & E v Guiffre 1971 (1) RLR 91 (G) at 94. The facts that gave rise to the cause of action in this matter are the withdrawals made by Efficient Security from its account with Zimbank: Standard Bank of South Africa Ltd v Oneanate Invsts (Pty) Ltd (in liq) 1998 (1) SA 811 (SCA) at pp 826-827.
The summons in this matter was issued and served on Efficient Security and Pasipamire within the period of prescription for that cause of action. Prescription does not apply to the action and has not been pleaded.
A cause of action is different to the person who is entitled to prosecute that cause of action and the one is separable from the other. The substitution of a party to proceedings in an action affects the party to the action, not the cause of action. It is a matter of procedure and not of merit. In this respect, an application to substitute a cessionary for a cedent is no different from an application for substitution of a plaintiff in cases involving the death, insolvency or liquidation of the original plaintiff or the appointment of a curator to that plaintiff.
Page 57 of 2001 (2) ZLR 55 (H)
When Climax took over the debt owed by Efficient Security and Pasapamire to Zimbank, it took over a cause of action that was already encapsulated in case No. HC-7696-99. In terms of s 19(2) of the Prescription Act [Chapter 8:11], the running of prescription in respect of that cause of action had already been interrupted by the institution of those

proceedings and service of the summons on Efficient Security and Pasipamire. That action is still pending. Prescription has not been pleaded in it and has no relevance to it provided that the matter is prosecuted to finality.
On the question of costs, Zimbank and Climax concede that they are responsible for the cost of bringing the application (see Friedman v Woolfson 1970 (3) SA 521 (D) at 527). However, they claim the costs of the argument on prescription. They have been successful in that respect and are entitled to the costs that they claim.
In the result, the application is granted and it is ordered that:

1. Climax Investments (Pvt) Ltd is substituted as the plaintiff in place of the Zimbank in case No. 7696/99;

2. The costs of this application are to be paid in the following manner:

(a) The applicants are to pay the costs of preparation and serving of the application.
(b) The respondents are to pay the costs of the opposing and answering affidavits, the heads of argument and the opposition hearing of this matter.

Gill, Godlonton & Gerrans, applicants' legal practitioners
Kantor & Immerman, defendants' legal practitioners

HOFRHO (PVT) LTD & ANOR v UDC LTD
2001 (2) ZLR 58 (S)
Division: Supreme Court, Harare
Judges: McNally JA, Ebrahim JA & Sandura JA
Subject Area: Civil Appeal
Date: 12 March and 12 July 2001
Judgment Number: S-62-01

Hire-Purchase — Hire-Purchase Act [Chapter 14:09] — s 29(2) — effect — need to construe section so as to validate use of excessive rates to calculate purchase prices in hire-purchase agreements — interest rates chargeable under Act — obscurity of Act — need for revision
Interpretation of statutes — Golden Rule — departure from to give effect to clear intention of legislature
Section 29(2) of the Hire-Purchase Act [Chapter 14:09] is very badly worded but its intention is clear, namely to validate the use of rates higher than 25 per cent to calculate purchase prices in hire-purchase agreements at a time when 25 per cent was the maximum rate that could be used for that purpose. Even though it is a strained construction, the section must be construed in that way in order to give effect to the legislature's clear intention. So construed, the section applies only to agreements which subsisted during the period from 1 April 1990 to 20 January 1995, and does not allow the use of rates in excess of those set out, expressly or impliedly, in the agreements themselves.
The provisions of the Hire-Purchase Act regarding the maximum rate of interest chargeable under a contract are obscure and apply only to contracts where the purchase price is $3 000 or less. For contracts where the purchase price exceeds $3 000, interest on overdue instalments must be charged at the rate specified in the agreement concerned or, if no rate is specified in the agreement, at the rate prescribed under the Prescribed Rate of Interest Act [Chapter 8:10].

The Hire-Purchase Act is in a deplorable state and lamentably fails to protect the borrowing public. It needs urgent attention and clarification by the legislature.
Cases cited:
Holland & Ors v Minister of Public Service 1997 (1) ZLR 186 (S)
MDC & Anor v Chinamasa NO & Anor 2001 (1) ZLR 69 (S)
Pyramid Products (Pvt) Ltd v Stanbic Finance Zimbabwe Ltd 1998 (2) ZLR 526 (S)
Standard Chartered Finance Zimbabwe Ltd v K M Edwards (Pvt) Ltd & Ors 2001 (1) ZLR 179 (H)
Standard Chartered Finance Zimbabwe Ltd v Marongwe Tpt (Pvt) Ltd 1998 (2) ZLR 317 (H)
Taikoo Farm (Pvt) Ltd v UDC Ltd HH-190-2000
Page 59 of 2001 (2) ZLR 58 (S)
Legislation considered:
Hire-Purchase Act [Chapter 14:09], ss 7, 8(2), 28 & 29(2)
J C Andersen SC, for the appellants
E W W Morris, for the repspondent
McNALLY JA: There is a long-running dispute between hire-purchase finance companies (finance houses) on the one hand, and their customers on the other. The dispute relates to the meaning and effect of ss 28 and 29 of the Hire-Purchase Act [Chapter 14:09] of the Statute Law of Zimbabwe.
The sections read as follows:

"28 Control over purchase price

(1) The Minister shall, for all classes of agreements and goods, by notice in a statutory instrument, fix the maximum amount, to be determined by reference to the rate per centum per annum referred to in subsection (2), by which the purchase price under an agreement may exceed the cash price.

(2) The rate per centum per annum to which subsection (1) relates shall be a rate per centum per annum, specified by the Minister in the notice referred to in that subsection, of the balance of the cash price remaining unpaid before the due date of each instalment.

(3) In fixing the maximum amount for the purposes of subsection (1), the Minister may make different provision for different classes of agreements, and different classes of goods.

(4) 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.

PART IV
MISCELLANEOUS

29 Exemptions

(1) The Minister may, by notice in a statutory instrument, order that any agreement or class of agreements entered into by any body corporate established directly by any law or enactment in force in Zimbabwe shall be exempted from any of the provisions of this Act.

(2) For the purposes of calculating any amount owing under a financial lease or 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 of (or?) hire-purchase agreement during that period."

Prior to the publication of the Revised Edition of the Statutes in 1996, these two sections had been numbered 27 and 28 respectively. Subsection (2) of s 29 was added by the General Laws Amendment Act, No. 20 of 1994, which came into effect on 20 January 1995. The notice referred to in s 28(1), at the time relevant to this case, was SI 277 of 1992 — the Hire-Purchase (Finance Charges) Notice, 1992, whose clause 2 reads as follows:

"For any agreement, the purchase price shall not exceed the cash price by more than an amount which, together with the accountancy costs, credit control and collection expenses and all other administrative costs connected with the agreement, other than the sums excluded from the purchase price by the definition of that term in subsection (1) of section 2 of the Act —

(a) in respect of goods, other than goods referred to in paragraph (b), is an amount calculated actuarially at the rate of twenty-five per centum per annum of the balance of (the) cash price remaining unpaid before the due date of each instalment; or

(b) in respect of goods sold under an agreement by an institution specified in the Schedule, is an amount calculated actuarially at the rate of seventy per centum per annum of the balance of the cash price remaining unpaid before the due date of each instalment."

These tortured and tortuous legal provisions have a complex and unsatisfactory history. That history appears from the judgment of Garwe J in Taikoo Farm (Pvt) Ltd v UDC Ltd HH-190-00, handed down on 4 October 2000, the same date, coincidentally, as the judgment with which we are here concerned.

His Lordship summed up the historical aspect of the evidence of the chairman of the Finance Houses Association as follows:

"He told the court during the period 1992-1995 interest rates started to rise dramatically. At that stage, members of the Association were charging interest at 16.5 per cent in terms of SI 58 of 1990. That rate was not viable for the industry as the cost of the funds to finance houses and bank minimum lending rates had risen above 16.5 per cent per annum. Rates were then increased by SI 64 of 1992 to 25 per cent per annum in respect of goods not sold by the institution and by SI 177 of 1992 to 40 per cent in respect of goods sold by the institution. In 1995, SI 203 of 1995 introduced a rate of 70 per cent if the goods were ceded to a finance institution. He told the court he was involved in the discussions that led to the promulgation of the current section 29 of the Act. It had become clear that finance houses could no longer continue to operate on the old fixed rate. In 1995, Presidential powers had to be invoked to give relief to the industry. This was later regularised by an enactment."

His Lordship later concluded that "the evidence led by the defendant has established that the Reserve Bank and the Ministry of Finance regulated the amounts that could be charged by way of finance charges on the understanding that the legislation would 'catch up' with the practice".

Up to the present time, there have been five decisions in the High Court on this issue. In chronological order, they are:

1. Pyramid Products (Pvt) Ltd v Stanbic Finance Zimbabwe Ltd, a December 1997 judgment of the High Court confirmed on appeal at 1998 (2) ZLR 526.
2. Standard Chartered Finance Zimbabwe Ltd v Marongwe Transport (Pvt) Ltd 1998 (2) ZLR 317 (H).
3. Taikoo Farms (Pvt) Ltd v UDC Ltd supra.
4. The present case.

5. Standard Chartered Finance Zimbabwe Ltd v K M Edwards (Pvt) Ltd & Ors 2001 (1) ZLR 179 (H).

In each of those cases, the judgment in principle has gone in favour of the finance house. In the Edwards matter, two issues were set out in the stated case. They were:

"1. Whether the plaintiff (finance house) was entitled to utilise a rate of interest in excess of the maximum rate permitted under the Hire-Purchase (Finance Charges) Notice, 1992 in calculating the purchase price of the goods, or whether it was bound to apply an interest rate of 16.5 per cent in terms of the Notice.

2. Whether the plaintiff was in any event contractually bound to apply the rate of interest as set out in the Hire-Purchase (Finance Charges) Notice, 1992 in calculating the purchase price of the goods."

The answer to the first part of the first question was in effect "yes". That answer is consistent with the decisions in all the other cases. But the answer to the second question was also "yes", and that answer introduced a new element into the debate. That element was the provisions of the contract.

His Lordship answered the second question as follows:

"If, during the period specified in subsection (2) of section 29 of the Hire-Purchase Act [Chapter 14:09], any seller of goods, or any party to which the rights of the seller had been ceded, entered a contract to which a maximum finance charge enacted by a Finance Charge Notice was applicable, and in the contract provided for a charge not exceeding that permissible under any such notice in force at the time, then such a party may not charge or enforce a purchase price in excess of that provided in the contract, the provisions of subsection (2) of section 29 of the Act notwithstanding."

Both questions are inappropriately worded in their reference to "rates of interest". In fact, the "rate", or rather, the two rates in SI 277 of 1992, are not rates of interest at all. They are rates or per centages of a figure to be used in the calculation of an amount. The learned judge avoided this error in providing his answers. In regard to the second question it seems to me, with respect, that his answer is self-evidently correct. A finance house is bound by the terms of its contract, like anybody else. Section 29(2) of the Act is not a licence to ignore contractual terms. It is, at best for the finance houses, a licence to ignore some of the statutory limitations placed on contractual terms. But no more than that.

His Lordship then went on to say that this conclusion was inconsistent with that of the judge in the present case. I do not see that it is, although the reasoning is different. I turn now to consider the present case.*

The facts of the present case are that UDC financed the purchase of a used Nissan 8-tonne truck by Hofrho. The agreement was entered into on

22 February 1994, a date within the period specified in s 29(2). Hofrho then defaulted on its payments. UDC demanded payment of arrears with interest at 58 per cent, which was alleged to be "the maximum rate permitted under the Act" in terms of clause 3(b) of the Agreement.
Clause 3(b) of the Agreement seems at first quite clear. It provides:
"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 permissible under the Act as compensation or damages for breach of contract."
But as soon as one looks at the Act, the clarity disappears. The Act does make a provision about interest rates, but only for agreements involving three thousand dollars or less. There is no provision for a maximum rate of interest on overdue payments in respect of agreements where the purchase price is over three thousand dollars. In other words, there is no statutory limitation on the rate of interest chargeable by finance houses on overdue payments in respect of the vast bulk of hire-purchase agreements.
Even the provision made in respect of agreements under three thousand dollars is obscure. The provision is in Part II of the Act. Section 4 sets out the limitation to agreements where the purchase price is three thousand dollars or less. Section 7 requires the rate of interest to be set out in the agreement. It also limits the rate of interest chargeable upon an instalment in arrear to "the maximum rate of interest referred to subsection (2) of section eight".
One then looks to subs (2) of s 8. It provides:
"The maximum rate of interest chargeable under an agreement or an instalment in arrear shall be the rate per centum per annum specified by the Minister in fixing, in terms of section twenty-eight, the maximum amount by which the purchase price under agreements of the class in question may exceed the cash price, which was so specified at the date of the agreement."
To make confusion worse confounded, there were not one, but two "rates per centum per annum specified by the Minister" in the Statutory Instrument operative at the time, namely SI 277 of 1992.
Surely the public deserves better protection than this? I find it extraordinary that there is no clear provision, either in the contract or in the Act, regulating the rate of interest on instalments in arrear. This aspect of the Act, together with the provisions of s 29, need urgent attention and clarification by the legislature.
I turn then to consider the issues put before the learned judge a quo. They were as follows:
" 1. Whether the plaintiff was by law entitled to recover all payments on a purchase price calculated by using a finance charge per centage rate of more than 31.98 per cent per annum, or whether the appropriate finance charge rate is 25 per cent.

2. Whether the plaintiff is entitled to claim no interest on overdue payments, or interest at the rate of 25 per cent per annum, or interest at the rate calculated at the new business rate plus 2 per cent.
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."

The learned judge found for the plaintiff on the first, second and third issues. The fourth issue fell away, for reasons not disputed. We are concerned therefore with the first three issues.

1. The first issue

This issue relates to the calculation of the "purchase price" as defined in ss 3 and 28 of the Act and in the Hire-Purchase (Finance Charges) Notice, 1992, SI 277 of 1992. I note that in the Taikoo Farm case supra, the managing director of the plaintiff (which was UDC) told the court that:

"the actuarial method of calculation is not easy to understand unless one is an expert."

Certainly, I make no pretence at understanding it. I do not consider that that is a question of law. It is a question of fact — a question of actuarial calculation. But the question of law is as to the rate applicable in calculating the purchase price, and I shall deal with that aspect.

The purchase price is primarily defined in s 3 of the Act. It is in effect the cash price, i.e. the price at which the goods may be purchased outright for cash, plus finance charges. The object of s 28, as read with SI 277 of 1992, is to limit those finance charges, and thus to control the purchase price.

All this was relatively simple until about 1990 when the rate of inflation in Zimbabwe began to increase rapidly. The finance houses claimed they could not survive if they were to be governed by the provisions of s 28. It seems they were told — "Charge something more (perhaps the amount of the excess was informally agreed) and we will legitimise it later". The "legitimisation" came with the introduction, on 20 January 1995, of s 29(2), and later with the publication of SI 203 of 1995, on 1 September 1995.

I remarked in the Pyramid Products appeal supra that s 29(2) was a strange provision. That was an understatement. It was in fact a departure from the rule of law — a sort of informally controlled financial anarchy.

What seems to have happened is that finance houses began to calculate the "purchase price" by reference to a rate higher than the 16½ per cent laid down in the Hire-Purchase (Finance Charges) Notice 1990, SI 58 of 1990, published on 6 April 1990.

That rate was increased on 21 February 1992 by SI 64 of 1992. But the formula for calculating the "purchase price" was also changed. Now, the rate was set at 25 per cent, but "in respect of goods sold under an agreement by an institution (i.e. a finance house)" the rate was 40 per cent.

The phrase "in respect of goods sold under an agreement by an institution" was odd. Normally, as far as I am aware, finance houses do not sell goods under an agreement. A third party sells the goods, and then the finance house takes over the rights of the third party seller and becomes the owner. That, certainly, is what took place in the present agreement.

How is one to understand the changes brought about by SI 64 of 1992 and 277 of 1992? Previously, in SI 58 of 1990, the rate had been 16½ per cent for business transactions and 18 per cent for "all other goods for private use". But now the formula was changed. The higher rate (40 per cent) was applicable only in the case of goods sold under an

agreement by a finance house. All other hire-purchase transactions, whether involving finance houses or not, attracted the lower rate (25 per cent).
I join Smith J and Gillespie J in wondering whether the drafters of SI 64 of 1992 really meant what they said. The effect was to make the lower rate (25 per cent) apply to the bulk of the transactions of finance houses as well as to transactions by others in the hire purchase business. However, the meaning is clear, and cannot be avoided.
Next came SI 277 of 1992 on 11 September 1992. The lower rate remained the same (25 per cent) but the higher rate was raised to 70 per cent. The criteria were unchanged.
Only in SI 203 of 1995, on 1 September 1995, were the criteria changed. All hire-purchase transactions involving finance houses were covered by the higher rate, which remained at 70 per cent. All other hire-purchase transactions, involving hirers other than finance houses, attracted the lower (25 per cent) rate.
Again, one comes inescapably to the conclusion that this is what was meant all along, and that SIs 64 of 1992 and 277 of 1992 were drafted in error. However, it is not for the courts to delve into the minds of the drafters when what they have said is clear.
It follows, prima facie, that the present agreement, entered into on 22 February 1994 is governed by the provisions of SI 277 of 1992. Since it was not an agreement "in respect of goods sold under an agreement by an institution specified in the Schedule" the rate applicable was 25 per cent.
In other words, the rate to be used in calculating the purchase price in accordance with the formula set out in s 28 of the Act was 25 per cent.
But a higher rate was used, a rate prima facie unlawful. I now have to consider what the consequences were of the use of a higher rate.

A. Were the appellants statutorily protected?
On the face of s 28(1), the contract is unlawful, and thus void. But it is saved by s 28(4), which provides that, instead of being treated as void, the contract is to be treated as if the correct rate had been applied. The instalments payable are to be decreased accordingly.
That simple and comprehensible solution was shattered by the introduction, on 20 January 1995, of a new subs 29(2) of the Act. I have set it out at the beginning of this judgment and will not repeat it here. It clearly applies to the present agreement. It says that s 28(4) of the Act "shall be deemed not to have applied to such … hire-purchase agreement during that period (1 April 1990-20 January 1995)".
There are two contradicting interpretations of this phrase.
In Marongwe supra at 323G-H, Smith J says:
"In the case of goods sold under a hire-purchase agreement … which subsisted at any time between 1 April 1990 and 20 January 1995, whatever purchase price was fixed in the agreement may be claimed by the seller because the provisions of section 28(4) are suspended."
In Edwards supra, however, Gillespie J reasoned differently. He decided that s 28(4) was a validating clause. Without it, an agreement providing for a purchase price calculated by using an unlawfully high rate would simply be an unlawful agreement, incapable of enforcement. But s 28(4) saved the agreement, by deeming the excess rate to be of no effect. Thus it rewrote the agreement, applying the correct rate. Accordingly, he reasoned, if the validating clause is to be deemed inapplicable, the invalid agreement is not saved. It remains unlawful and unenforceable.

His Lordship then went on to make a penetrating analysis of the new s 29(2), which for convenience I set out again:

"(2) For the purposes of calculating any amount owing under a financial lease or 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."

He makes essentially the point that s 29(2) cannot possibly have been intended to have the effect of rendering invalid all hire-purchase contracts involving financial houses in which a rate above 25 per cent was used to calculate the purchase price. We know, if only from the brief explanation set out in Taikoo Farm supra, that that is the opposite of the intention. To support this, His Lordship refers to the opening phrase of the section — "For the purpose of calculating any amount …". If the agreement were to be invalid

and void, what need would there be to calculate any amount? He concludes therefore that the intention of the legislature, in inserting s 29(2) of the Act, must have been to validate purchase prices calculated by finance house by using rates in excess of 25 per cent.

I think this must be so. I approach the question as follows:

1. Before the introduction of s 29(2) the law did not permit finance houses to use a rate in excess of 25 per cent in calculating the purchase price of goods except in limited circumstances with which we are not concerned.
2. If they did use a higher rate, the law in effect rewrote the contract so as to calculate the purchase price using the correct rate.
3. In a period of rapid inflation, the legislature agreed that it would have to condone breaches of the prohibition of a rate in excess of 25 per cent and sought to do so by the introduction of s 29(2).
4. To suggest that s 29(2) was intended to invalidate all such agreements is inconsistent with part of its wording and contrary to the obvious intention of the legislature.
5. It cannot have been intended to enforce the maximum of 25 per cent, because the legislation as it stood already did that.
6. It must therefore have been intended to validate rates in excess of 25 per cent.

One is accordingly forced to the conclusion that this incompetently drafted s 29(2) must be read in such a way as to give effect to the intention to validate rates in excess of 25 per cent (but presumably not exceeding 40 per cent or 70 per cent, as the case may be) used in hire-purchase agreements involving specified finance houses either as seller or cessionary, which agreements subsisted between 1 April 1990 and 20 January 1995.

I do not think the court could, by interpretation, have sought to alter the meaning of SI 64 of 1992 or of SI 277 of 1992. This is because the wording of those statutory instruments is clear and unambiguous. The fact that one is morally certain that they do not reflect the real intention of the drafter is not enough to allow us to intervene, or to depart from the so-called "Golden Rule".

Section 29(2) of the Act, however, is a different matter. Its provisions are meaningless, but its intention is clear. In those circumstances, I agree with Gillespie J that some effort must be made to make sense of the section, despite the fact that I find it difficult to propose a form of words and then say "That is what the legislature meant". Had I been

drafting the amendment I think I would have made it a proviso to s 28(4) rather than an extra subsection of s 29.
Be that as it may, I conclude that s 29(2) of the Act must be interpreted so as to validate the use of a rate higher than 25 per cent in the calculation of the
Page 67 of 2001 (2) ZLR 58 (S)
purchase price in the hire-purchase agreement in question, provided that that rate did not exceed 40 per cent (or later, 70 per cent). Insofar as that is a "strained construction", I rely on the submissions and the cases cited in Bennion Statutory Interpretation under that heading, in ss 92-97 and 162 of that work. In Roman-Dutch law, the matter is dealt with Devenish Interpretation of Statutes at pp 93-99.
This interpretation is subject to two qualifications. First, it applies only to agreements which subsisted during the period 1 April 1990 to 20 January 1995. Second, the rate may not exceed the rate set out in the agreement, or calculable, where it is not set out, by working back from the purchase price to the cost price in order to establish what rate was used.
Thus, the argument that the appellants are statutorily protected from a rate higher than 25 per cent must be rejected.
B. Were the appellants contractually protected?
I have already indicated that I accept the proposition put forward in Edwards supra that if a finance house contracts to apply a particular maximum rate, then it is bound to adhere to that rate whatever the statute provides.
Mr Andersen argues that s 18 of the agreement provides such contractual protection. That section does not in terms set out the rate applicable (That would be too simple) I understand s 18 as follows:

1. Subsection (a) is a definition clause;
2. Subsection (b) deals with what happens when the Bank Rate is increased;
3. Subsection (c) is the operative section;
4. Subsection (d) is irrelevant.

Subsection 18(c) reads:
"Notwithstanding the foregoing, the charges shall not in any event be increased beyond the maximum prescribed in terms of s 27 of the Hire Purchase Act [Chapter 284]."
That subsection does not deal with the charges (and therefore with the rate) used in the agreement. It deals with subsequent increases in those charges. It is common cause, in the present case, that there were no such subsequent increases. Therefore, to my mind, s 18 of the agreement has no bearing on this matter.
In the result, I conclude that the parties contracted for a rate, which I am unable to calculate, but which the parties say was in the region of 31.98 per cent. That rate, as I understand it, has never been increased and therefore s 18(c) of the contract has never become applicable. There is thus no contractual protection for the appellants against the rate used in calculating the purchase price.
Page 68 of 2001 (2) ZLR 58 (S)
C. Are the appellants constitutionally protected?
The first submission was that the appellants' rights under s 18 of the Constitution were breached. The contention was that "if it is held that the amendment (i.e. s 29(2) of the Act) overrode the agreement, it is submitted that it thereby renounced (abrogated?) the civil rights to enforce it in the courts". This, it was alleged, was in breach of s 18. Mr

Andersen cited Holland & Ors v Minister of Public Service 1997 (1) ZLR 186 (S) at 190 and MDC & Anor v Chinamasa NO & Anor 2001 (1) ZLR 69 (S) at 78.
The answer to this is that the agreement was not overriden by the amendment to the Act contained in s 29(2). The agreement was for a rate higher than 25 per cent. The amendment did not change that. It simply legalised it. As I remarked earlier in this judgment, the amending section "is … not a licence to ignore contractual terms. It is, at best for the finance houses, a licence to ignore some of the statutory limitations placed on contractual terms. But no more than that".
The next contention was that s 16 of the Constitution was infringed because "if so construed, the statutory instrument would constitute a breach of s 16 of the Constitution as constituting the unjustified compulsory acquisition of the finance charges in excess of the agreement by the respondent, without compensation".
This submission falls away because the premise on which it is founded lies in the words "if so construed". As I have indicated, the statutory instrument (I think this should really read "the amending s 29(2)") is not being construed as overriding the agreement. So no question arises of compulsory acquisition without compensation.
There is thus no constitutional protection for the appellants against the rate used in calculating the purchase price.
I conclude therefore, though for different reasons, that His Lordship in the court a quo was right to decide this issue in favour of UDC.
2. The second issue
The learned judge treated the second and third issues as being the same. There is no distinction between overdue payments and overdue instalments. The question therefore is:
"What interest rate was to be lawfully applied to overdue payments?."
It seems to me wholly unsatisfactory that UDC should be permitted, as the learned judge concluded, to be "at large" on the question of the rate of interest. I agree, as I have said earlier, that there is no relevant maximum rate of interest specified in the Act. To that extent, clause 3(b) of the contract is

totally misleading. And since the clause is part of a standard form contract prepared by UDC, I do not think it is either just or justified that one should assume that UDC is entitled to charge interest "at the escalated rate of 58 per cent per annum" as asserted in para 7 of its particulars of claim.
In the absence of either statutory or contractual provision, it seems to me that UDC is in no better position than any other creditor whose debt has not been paid.
Section 4 of the Prescribed Rate of Interest Act [Chapter 8:10] reads:
"If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise."
The rate of interest on overdue payments under a hire-purchase agreement is not, as I have indicated, "governed by any other law". The relevant agreement has only a meaningless provision as to the rate of interest. No reliance is placed on any trade custom. Nor is it suggested in the Agreement that the rate is to be calculated in any other

manner. Accordingly, the proper rate is that prescribed by Statutory Instrument in terms of s 7 of the Prescribed Rate of Interest Act.
The second question is answered accordingly.
It must be said, in conclusion, that this case, and the others to which I have referred, show that the Hire-Purchase Act is in a deplorable state. It is an Act designed to protect the borrowing public. Yet it fails lamentably to do so. The two most important aspects of the Act, from the point of view of the borrowing public, are the controls over interest rates and finance charges. Yet, there is effectively no control over interest rates, and the limits on finance charges are now so loose and so obscure that they seem hardly to be limits at all.
The borrowing public ought to be able to know, in simple language, two basic things. The first is the rate of interest that will be charged on overdue payments. The second is the amount of the charges that may lawfully be added to the cash price to reach the figure known as the purchase price.
At present, the Act contains a whole part (Part II) which "protects" hire-purchasers in respect of agreements about goods worth $3 000 or less. This is useless and irrelevant. What of agreements about goods worth more than $3 000?
But even if the figure in s 4 of the Act were altered to $30 000 or $300 000 the problem would remain because the method of calculation is so obscure. Moreover, when one eventually works it out, the interest rate is so high as to

afford no protection at all. A simple method of calculation could surely be devised.
The Registrar is requested to send a copy of this judgment to the Deputy Chairperson of the Law Development Commission.
In the result, I would make the following order:

1. The appeal in relation to issue 1 is dismissed.
2. The appeal in relation to issues 2 and 3 is allowed. It is declared that the proper rate of interest in respect of overdue payments under the agreement is that prescribed by Statutory Instrument made under s 7 of the Prescribed Rate of Interest Act [Chapter 8:10].
3. The order as to costs in the court a quo is set aside and in its place there will be no order as to costs.
4. The appellant is awarded the costs of appeal.

EBRAHIM JA: I agree.
SANDURA JA: I agree.
Kantor & Immerman, appellants' legal practitioners
Wintertons, respondent's legal practitioners

SAUNGWEME v GANDIWA-MAGAYA & ANOR
2001 (2) ZLR 71 (S)
Division: Supreme Court, Harare
Judges: McNally JA, Ebrahim JA & Muchechetere JA
Subject Area: Civil appeal
Date: 26 June & 17 July 2001
Judgment Number: S-61-01

Contract — breach — what constitutes — undertaking to obtain loan to pay for house being sold — whether documentary proof of loan required before seller entitled to repudiate loan

The appellant and the first respondent entered into an agreement of sale, under which the first respondent agreed to sell a house to the appellant. One of the conditions of the agreement of sale was that the appellant would obtain a bank loan for the full amount of the purchase price within 30 days. The appellant was an employee of the bank in question. There was a general condition in the contract, in terms of which the seller was entitled to cancel the sale in the event of a breach of any term of the contract and failure to make good the breach within 14 days of being required to do so.

The appellant obtained a loan some days outside the 30 day period, but was not put on notice. No proof was given of his having obtained the loan, but matters proceeded as if he had done so. The conveyancing procedures were set in motion and the conveyancers tendered transfer of the property, on payment of the purchase price and the costs of the transfer. The conveyancers subsequently lodged the transfer with the Registrar of Deeds (the second respondent). The seller had, in the meantime, written to the appellant, giving him 14 days' notice of cancellation on the grounds that he had not produced written proof of having obtained the loan. The appellant sought to enforce the contract in the High Court. His action was dismissed. On appeal:

Held, that it was not reasonable to expect, and demand, that a formal letter of undertaking would be available within the 30 day period. As long as the appellant obtained the agreement of the bank to provide a letter of undertaking to the conveyancers on request, and obtained that agreement within the time limits stipulated in the agreement of sale, he had complied with the terms of the contract. Although he did not obtain the bank's agreement within 30 days, that was not fatal. He had to be put on terms; and even before he was put on terms, he complied. The seller was not entitled to cancel the contract.

Miss E Mushore, for the appellant

No appearance for the respondents

McNALLY JA: This is a dispute arising out of the cancellation of an agreement of sale of immovable property between the first respondent as seller and the appellant as buyer. The Registrar of Deeds has been cited and served in compliance with the provisions of s 79 of the Deeds Registries Act

[Chapter 20:05], but has taken no part in the proceedings. I will refer to the parties as "the seller" and "the purchaser", and to the subject of the dispute as "the property".

The seller and the purchaser entered into an agreement of sale in respect of the property on 28 December 1998. The price was $800 000. The only relevant terms of the agreement, for our purposes, are the following:

"1.A The sum of $800 000 to be paid in cash against transfer which amount will be made available to the purchaser by a 100 per cent Zimbank loan."

"Special Conditions 1

This sale is conditional upon the purchaser obtaining the loan as in Clause 1 above or such lesser amount as may be acceptable to him for same within thirty days of the date hereof which loan will be applied for by the purchaser on the signing hereof and accepted by him when offered."

"General Condition 7(b) Breach of Contract

In the event of the purchaser failing to pay the purchase price (or any instalment thereof) and any other sum payable in terms of this agreement or omitting to observe or perform any of the terms, conditions, stipulations or obligations herein and failing to make good such default or remedy such breach within fourteen days of the date of posting to or serving on the purchaser a written notice directed to the address denoted overleaf requiring the purchaser to do so then, notwithstanding any previous waiver, the seller shall be entitled without further notice to declare this agreement of sale cancelled …"

The purchaser says, and he is not contradicted, that he obtained a loan on 5 February 1999. It is to be noted that he is an employee of Zimbank, from whom the loan was to be obtained. This was some days outside the thirty day period stipulated, but he remedied the breach without being put on notice.

Although he advances no proof of having obtained the loan on that date, it seems that matters proceeded as if he had done so. The seller nominated her conveyancers, Messrs Kantor & Immerman, on 24 February 1999.

Then, on 4 March 1999, the seller wrote to the purchaser giving fourteen days' notice of cancellation on the grounds that:

"you are now in breach of contract as you have failed to produce documentary evidence that you have been granted a loan for the full purchase price of the property from your employer within the stipulated period of thirty days as per our agreement."

She then wrote cancelling the agreement on 21 April 1999, although strictly speaking a further letter was unnecessary. In the letter of 4 March, she had urged him to:

"make right your position within fourteen days of this notice, failure (sic) which this agreement is cancelled without further notice to yourself."

Meanwhile, however, the conveyancing procedures had been set in motion. On 16 March, Kantor & Immerman had written to the purchaser tendering transfer of the property. They required him, "within not more than fourteen

days from the date hereof", to pay the costs of transfer and the purchase price or furnish a suitable letter of undertaking. (It should be noted that this time limit was not a notice of cancellation in terms of clause 7(b) of the agreement). He says, again without contradiction, that he paid the costs of transfer on 30 March. The letter of undertaking, however, was dated 6 April and was received by Kantor & Immerman on 8 April. The conveyancers then proceeded with the transfer, which was lodged with the Registrar of Deeds during the week 19-23 April. This was done before they received a copy of the seller's letter of cancellation dated 21 April.

Kantor & Immerman warned the seller that she would have to give them specific instructions to withdraw the papers from the Deeds Office (assuming the transfer had not already been registered, which in fact it had not), and that such action might lay her open to an action by the purchaser. Nevertheless she persisted. The purchaser then approached the High Court by way of application to compel the seller to sell. He lost, and now appeals.

The two main grounds of appeal, if I may paraphrase them, are —

1. The alleged breach of contract was not in fact a breach.
2. The learned judge relied for her conclusion on a ground not pleaded or raised by the seller.

I will deal with them in turn.

The first point taken on behalf of the purchaser is that the contract did not require him to produce documentary evidence that he had been granted a loan for the full purchase price of the property. It required him only to "obtain a loan" in the form of "a 100 percent Zimbank loan".
He says he did obtain such a loan on 5 February 1999. He does not, unfortunately, elaborate. But, as I remarked earlier, his statement is not denied. Nor was he put to the proof of his averment.
The difficulty, I think, is that each of them has put a different interpretation on the phrase "obtain a loan". The seller was anxious to have a piece of paper. It appears from her affidavits that she wanted a document she could use as security for her to raise money for some other purposes. So for her, "obtaining a loan" meant "securing a letter of undertaking from Zimbank to pay $800 000".
The purchaser, on the other hand, understood the phrase differently. He, as an employee of Zimbank, familiar with its policy regarding housing loans, would have made an application to the relevant branch of Zimbank and would have been advised that his application was approved. The actual letter of undertaking, however, would only be given when transfer was tendered.
It seems to me that his interpretation is the more reasonable. If there is ambiguity, the contra preferentem rule would favour him. In other words, I

conclude that the seller was wrong to expect, and demand, that a formal letter of undertaking be available within the thirty days. So long as he obtained the agreement of Zimbank to provide the letter of undertaking when requested by the conveyancers, and he obtained that agreement within thirty days, he complied with the terms of the agreement. In fact, of course, he did not obtain it within the thirty days. But that was not fatal. Before the agreement could be cancelled, he had to be put on terms. And even before he was put on terms, he complied.
It follows therefore that the ultimatum of 4 March was based on a false premise, and was of no force or effect.
The learned judge in the court a quo did not deal with this aspect of the case. Her Ladyship disposed of the dispute by reference to a ground which had not been relied upon by the seller at all. This ground was the alleged inadequacy of the letter of undertaking.
The letter of undertaking from Zimbank was certainly curiously worded. The relevant part read as follows:
"We hold at your disposal the undermentioned sum, which amount will be paid to you on the conditions enumerated below.
Amount payable: $332 550.22 less interest at the rate of 25 per cent per annum on the amount of $467 449.78 calculated from 1 March 1999 to date of receipt of payment, both dates inclusive."
Her Ladyship took the view that this was not a letter of undertaking to pay $800 000, and on this view decided the case in favour of the seller.
I consider with respect that this was wrong. In the first place, it was not a point which had been raised in the papers. The purchaser had therefore had no opportunity to deal with it. It was not the basis upon which the seller had purported to cancel the agreement. For that reason alone, it seems to me, the decision was wrong.

In the second place, if counsel had made the effort to ascertain the true facts from a practitioner involved in conveyancing, I suspect that an explanation would have been forthcoming. It is noteworthy that Kantor & Immerman, who represented the interests of the seller, accepted the letter of undertaking without hesitation.

It seems very probable that the reason for the curious wording was that there was an existing bond over the property in the sum of $467 449.78, which had to be cancelled, and upon which interest accrued at the rate of 25 per cent per annum. Hence, the seller's equitable interest, or net interest, in the property was as stated in the letter. No doubt there was another letter of undertaking addressed to the bondholder in respect of the sum of $467 449.78 plus interest.

The legal practitioners involved should have researched the facts. Had they

done so, and put the result of their investigations before the court, I am sure that Her Ladyship would have come to a different conclusion.

In the result, therefore, I agree with the advice given to the seller by her legal practitioners. She was not entitled to cancel the agreement. The purchaser is entitled to enforce it.

I now have to consider why there was no appearance for the respondent (the seller) at the hearing of this appeal. We have proof that the notice of hearing was served on the respondent's legal practitioners, Madzivanzira & Partners, at 11.20 am on 6 June 2001. I am advised that the registrar of the Court was in touch with that firm by telephone about their failure to file heads of argument, and was told that they were considering renouncing agency. No notice of renunciation of agency is on record, nor has leave to renounce agency been sought in terms of r 12A of the Supreme Court Rules.

No explanation has been forthcoming as to why, despite the suggestion of the registrar, there was no appearance at the hearing even to explain why they were not able to represent their client.

In the circumstances, the court proposes to make an order that the legal practitioner concerned should personally pay the costs of the appeal which would otherwise be payable by his client. However, in terms of r 12B(3) the legal practitioner will be given an opportunity to make representations as to whether or not the order should be made.

It is ordered therefore as follows:

1. The appeal is allowed, with costs.
2. The question as to who is to be liable for the said costs will stand over for one month from the date of this judgment, at which time a final order as to costs will be made.*
3. The order of the High Court dismissing the application with costs is set aside.
4. In its place the following order is made:

(a) The first respondent shall, within seven (7) days of service of this order upon her, instruct her legal practitioners take all necessary steps to effect transfer of the immovable property, namely Stand No. 1915 Mabelreign Township situate in the district of Salisbury, commonly known as 3 Durweston Avenue, Cotswold Hills, Harare, to the applicant, against payment of the purchase price and costs of transfer by the latter.

(b) In the event of the first respondent failing to comply with para (a) hereof, the Deputy Sheriff is hereby authorised to sign all necessary

documents required by the second respondent to effect transfer of the property to the applicant.

(c) The first respondent shall pay the costs of this application.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

VAN BUUREN v MINISTER OF TRANSPORT

2001 (2) ZLR 77 (S)

Division: Supreme Court, Harare

Judges: Chidyausiku ACJ, McNally JA & Sandura JA

Subject Area: Civil appeal

Date: 3 & 19 July 2001

Judgment Number: S-63-01

Aviation — aerodrome — owner of aerodrome — liability to users of aerodrome — whether Minister liable to maintain aerodrome created for public use

Delict — liability — owner of aerodrome — liability of owner to users of aerodrome — duty to users of aerodrome — notice prohibiting taxiing of aircraft on grass — owner not liable to aircraft owner taxiing on grass and suffering damage to his aircraft

The appellant, an aircraft owner, was taxiing his aircraft in preparation for take-off from Charles Prince Airport, Harare. Between the taxiway and the runway being used there was no paved link, and to reach the runway it was necessary to taxi over an area of grass. When the appellant did so, the nose-wheel of his aircraft fell into a hole in the grass and the propeller and engine were damaged. The appellant taxied his aircraft across the grass in conformity with the standard practice among pilots at Charles Prince whenever using that runway, although there was in effect a notice issued by the civil aviation authorities that taxiing on the grass was prohibited at Charles Prince Airport. The airport authority employed a person whose duty it was to mow the grass around the runways, remove stones and fill in holes. The hole in question had, on the evidence, been there for some time.

The appellant sued the Minister for damages. He lost in the High Court and appealed.

Held, that it is the common law of delictual liability for acts of omission that governed this matter, there being no statutory basis on which the aerodrome authority's liability might be considered. The delictual liability of an aerodrome owner could be summarised thus:

1. The Minister, as responsible authority, had a duty of care towards users of the aerodrome.

2. That duty included a duty to keep the aerodrome in a reasonable state of repair, so as to avoid reasonably foreseeable harm befalling aerodrome users.

3. The duty may arise out of a "mere" omission, and one should not try to define categories of omissions which do, or do not, give rise to culpability.

4. The extent of the duty is not so wide as to convert every reasonably perceived ethical or moral obligation into a legal one. An omission would only be culpable when the legal convictions of the community demand that the omission ought to be regarded as unlawful. In this regard, the courts should be careful not to equate

personal and possibly idiosyncratic perceptions as to what the community's convictions ought to be with the actually prevailing perceptions of that community.
Page 78 of 2001 (2) ZLR 77 (S)
Held, further, that the evidence suggested the existence of a duty of care and of negligence in carrying out that duty. However, because there was a prohibition against taxiing on the grass, it would be unfair to force on the aerodrome authority a responsibility which the authority has expressly, in writing, and to the knowledge of the claimant, renounced.
Held, further, that the silence or inaction of the aerodrome authorities could not be reasonably construed as a willingness to accept a duty of care in respect of the grassy area. Silence could only give rise to estoppel when there was a duty to speak; and there was no duty to warn pilots of what they already knew, namely, that taxiing on the grass was prohibited. In law, pilots did so at their own risk.
Cases cited:
Bennetto v Vryburg Municipality 1980 (2) SA 84 (NC)
Butters v Cape Town Municipality 1993 (3) SA 521 (C)
Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA)
Fourie v Malmesbury Municipality 1983 (2) SA 748 (C)
Jones & Ors v Trust Bank of Africa Ltd & Ors 1993 (4) SA 415 (C)
Martin v de Kock 1948 (2) SA 719 (A)
Min of Police v Ewels 1975 (3) SA 590 (A)
Moulang v Port Elizabeth Municipality 1958 (2) SA 518 (A)
R Y Phillips, for the appellant
Y Dondo, for the respondent
McNALLY JA: On the afternoon of 26 February 1999, the plaintiff (vanBuuren) was preparing to take off in his Cessna 210 aircraft from Charles Prince Aerodrome in Harare. Because of the wind conditions he was instructed to use runway 32. There is an official holding area for that runway, but it is an inconvenient one. It is not at the end of the runway, but adjacent to the runway almost half-way down its length. Because of this, pilots tend to wait for take-off at a point on an access road close to the end of the runway. That is what van Buuren did. He used the "unofficial" holding area.
On receiving permission to take off, he taxied his aircraft across a stretch of mown grass about 30-50 metres in width, towards the end of the runway. Unhappily there was a hole in the grass. His nose wheel fell into the hole. Thepropeller hit the ground. It was damaged, with consequential damage to the engine. The cost of repairs was agreed at the figure of $613 082.17. Hesued the respondent authority (the Minister) for damages in that amount. He lost in the High Court* and now appeals.
A great deal of legal argument has been expended on the general question of the liability of public authorities to maintain facilities which they have created for public use. The point has been made that the provisions of s 6 of
Page 79 of 2001 (2) ZLR 77 (S)
the Aviation Act [Chapter 13:03] (now replaced by the Civil Aviation Act [Chapter 13:16], but then in force) are permissive rather than mandatory. The Act states:
"The Minister may … establish and maintain aerodromes and provide and maintain roads and approaches thereto …"

In my view, however, it has long been established that public authorities, and indeed others, who create facilities for the public, have an obligation to maintain those facilities so that they are reasonably safe for those persons who use them. It is not a question of statutory liability, but of common law delictual liability. In this respect, Zimbabwe differs from South Africa where the Air Navigation Regulations of 1963 (which were still apparently in force in 1979 — see (1979) 96 SALJ 465 at 466**) provide specifically:
"It is the responsibility of the (aerodrome) license holder to ensure that —

(1) the aerodrome is maintained in a serviceable condition;

…

(8) unserviceable areas on the landing terrain are appropriately marked."

I can find no equivalent provision in our Aviation (Aerodromes) Regulations 1974, as amended, or in our Aviation (Rules of the Air and Air Traffic Control) Regulations 1971, as amended.
It follows, therefore, that in Zimbabwe we must look to the common law of delictual liability for acts of omission, since there is no statutory basis on which the aerodrome authority's liability may be considered.
The learned judge in the court a quo seems to have been referred to a line of cases, culminating with the decision of the Appellate Division in Moulang v Port Elizabeth Municipality 1958 (2) SA 518. At that time the courts were still struggling to come to terms with the concept of liability for "mere acts of omission", particularly in regard to the responsibility of municipalities and similar public bodies.
However, since that time the general principle has been expanded by the decision in Minister of Police v Ewels 1975 (3) SA 590 (A) at pp 596-7 (seethe translation volume for 1975 SALR p 683), that:
"in certain circumstances there is a legal duty on a person to prevent harm to another. If he fails to comply with that duty there is an unlawful omission which can give rise to a claim for damages … It appears that the stage has been reached where an omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful, and that the loss suffered be compensated by the person who failed to act positively."

After that, there were a number of provincial division cases dealing with the liability of municipalities for "mere" omissions, culminating with the judgment of Thring J in Butters v Cape Town Municipality 1993 (3) SA 521 (C) at 528H-J, where he says:
"… the doctrine that municipalities are not liable for mere omissions on their part to construct, maintain or repair roads and streets, unless they have introduced a new source of danger into the roadway concerned (see for example, Moulang v Port Elizabeth Municipality 1958 (2) SA 518 (A)) no longer forms part of our law, and the same principles of the common law of delict apply to municipalities in this regard as apply to individuals."
That decision, and others like it, finally received the accolade of the Supreme Court of Appeal in Cape Town Municipality v Bakkerud 2000 (3) SA 1049. The judgment of Marais JA in that matter sets out brilliantly, if I may say so with respect, the modern approach to delictual liability by municipalities in regard to the maintenance of public

facilities. It must now be the starting point for our approach to all such cases, including the present one.

Of course, there are also a number of cases in the law reports which deal with the specific liability of aerodrome authorities for the safety of pilots in a variety of situations. They may be found listed in Boberg The Law of Derelict Vol I at p 375 and in an article by Louis Weyers in (1979) 96 SALJ at 465. One, in particular, Bennetto v Vryburg Municipality 1980 (2) SA 84 (NC) deals with the liability of an aerodrome licensee in a situation in which a pilot, taxiing on grass, ran his nose wheel into a meerkat hole, and suffered damage to his aircraft as a result. (He succeeded). Another, Fourie v Municipality of Malmesbury 1983 (2) 748 (C) involved a Cessna 210 whose nose wheel fell into an erosion hole adjacent to the runway. (Hefailed).

I propose therefore to determine the liability of the Minister in this case by applying the criteria which I distil as follows from Cape Town Municipality v Bakkerud supra:

(1) The Minister, in his capacity as responsible authority for the aerodrome in question, has a duty of care towards persons using the aerodrome, such as van Buuren.

(2) That duty includes a duty to keep the aerodrome in a reasonable state of repair, so as to avoid reasonably foreseeable harm befalling such persons.

(3) The duty may arise out of a “mere” omission, and one should not try to define categories of omissions which do, as those which do not, give rise to culpability.

(4) The extent of that duty is not so wide as to convert every reasonably perceived ethical or moral obligation to act, into an obligation or duty imposed by law.

(5) The best test to apply is a flexible and loose one. An omission will be culpable only “when the legal convictions of the community demand that the omission ought to be regarded as unlawful”.

(6) The courts, given such a broad criterion, must be careful not to equate personal and possibly idiosyncratic perceptions as to what the community’s convictions ought to be, with the actually prevailing perceptions of that community.

I now proceed to set out the relevant facts to which these legal criteria are to be applied. They are the following:

1. The air traffic controllers at Charles Prince Airport operate from a control tower designed to give them a clear view of the runways. They can see both the official and the unofficial holding areas for runway 32.

2. They can see that most of the pilots of the smaller aircraft use the unofficial holding area and, when given permission to take off, taxi across the grass to the start of the runway.

3. The controller who gave evidence was disbelieved when he said that on each occasion the pilot was warned that he taxied across the grass at his own risk.

4. The commercial flights instructor who gave evidence for van Buuren said it was the standard practice for smaller aircraft to taxi across the grass to runway 32. He had been using Charles Prince as an instructor for some ten years and had never been told that he used the grass at his own risk.

5. The airport authority employed a person whose duty it was to mow the grass around the runways, to remove stones and other obstacles, and to fill in holes. He was not called to give evidence.

6. The grass in the relevant area had recently been mowed (I note that in February grass would need regular mowing) and the evidence of van Buuren was that grass was growing from the bottom of the hole which had reached sufficiently high to have been mowed. So the mower must have passed over the hole. This suggests that the hole had been there for some time.

7. The airport authority had regularly sought financial provision for the construction of a tarmac holding area on this grassy area, but the money had not been provided. It was the natural place for a holding area for runway 32.

All this evidence suggests the existence of a duty of care and of negligence in carrying out that duty. However, the most significant piece of evidence which supported the Minister's denial of liability was:

8. There is an Aeronautical Information Publication (AIP) with which pilots are required to be familiar, and with which both van Buuren and

his witness were familiar, dated 15 September 1994. It relates specifically to Charles Prince Airport. Paragraph 26(c) reads: "Taxiing on grass prohibited".

The argument for the Minister was simply that that prohibition had the effect of removing the duty of care from his shoulders in relation to persons like van Buuren who knowingly contravened the prohibition. (I pause to observe that the position might be different in relation to a pilot who used the grass because of a sudden emergency). But for one who freely and deliberately chose to use the grass for taxiing, knowing that there was a written prohibition, he had no responsibility. And if there is no duty of care, the question of negligence does not arise. Nor is it relevant that the air traffic controllers condoned the practice.

I must confess that my own (to use the words of Marais JA) "personal and possibly idiosyncratic perceptions" are that the community's convictions ought to be in favour of holding the Minister liable. It seems to me to be a bad example of bureaucratic obtuseness for an authority not to accept the duty to maintain the grass surface in those circumstances.

On the other hand, I recognise the argument that it is unfair that a responsibility should be forced on an authority which has expressly and in writing renounced that responsibility to the knowledge of the claimant. And one must recognise the fact that financial constraints were a factor in preventing the Minister from tarring the offending area (see the Bakkerud case supra at 1053E), and that grassy areas are notoriously difficult to keep free from holes, especially when those charged with their care are low grade staff.

In a letter written after the close of argument, Mr Phillips has raised the issue of estoppel, relying on P J Rabie LAWSA, First Reissue vol 9 para 455 where the learned author says:

"The law is to the effect that a person may be bound by a representation made by his conduct if he should reasonably have expected that the other party might be misled thereby, and if, at the same time, the other party acted reasonably in construing the representation in the sense that he did."

The difficulty I have with that submission on the facts of this case is that the silence or inaction of the airport authorities cannot reasonably be construed as indicating a willingness to accept a duty of a care in respect of the grassy area. Had they been asked they would undoubtedly have said "No,we let them use it at their own risk". And in any

event “silence can only give rise to estoppel when there is a duty to speak” per Tindall ACJ in Martin v de Kock 1948 (2) SA 719 (A) at 735. There was no duty to warn pilots of what they already knew, namely, that taxiing on the grass was prohibited. In law, therefore, they did so at their own risk. Compare Jones & Ors v Trust Bank of Africa Ltd & Ors 1993 (4) SA 415 (C) at 425C.
Page 83 of 2001 (2) ZLR 77 (S)
On balance, and with some regret, I do not feel able to differ from the conclusion reached by the learned judge of first instance.
The appeal is dismissed with costs.
EBRAHIM JA: I agree.
MUCHECHETERE JA: I agree.
Gill, Godlonton & Gerrans, appellant’s legal practitioners
Civil Division of the Attorney-General’s Office, respondent’s legal practitioners
S v NHANDO & ORS
2001 (2) ZLR 84 (S)
Division: Supreme Court, Harare
Judges: Chidyausiku ACJ, McNally JA & Muchechetere JA
Subject Area: Constitutional application
Date: 8 May and 19 July 2001
Judgment Number: S-65-01

Constitutional law — Constitution of Zimbabwe — s 18(2) — right to fair trial within a reasonable time — when violated — delay of 8½ years due largely to inefficiency of State — permanent stay of prosecution granted
The applicants were arrested in February 1992 for fraud committed in 1986. They were remanded 17 times to different courts and summonsed several more times. The reasons the State gave for the delay in bringing the applicants to trial were flimsy and suggested inefficiency and dereliction of duty. On two occasions, the case was allowed to go unattended for periods in excess of two years. Two of the applicants had asserted their right to a speedy trial, and all had been prejudiced. Finally, at the request of the applicants in November 2000 the matter was referred to the Supreme Court in terms of s 24 of the Constitution, so that they could seek an order for the permanent stay of their prosecution on the ground that their right to a fair hearing within a reasonable time had been violated by the delay in bringing them to trial.
Held, that this was a proper case for the grant of a permanent stay of prosecution. The 8 1_2 year delay was inordinate, the explanation by the State for the delay was inadequate, two of the applicants had asserted their right to a speedy trial, and the applicants were all prejudiced by the lengthy delay.
Cases cited:
Hungwe & Ors v AG S-50-94
Martin v AG & Anor S-53-93
Masendeke, In re 1992 (2) ZLR 5 (S)
Mlambo, In re 1991 (2) ZLR 339 (S)
S v Banga 1995 (2) ZLR 297 (S)
S v Marisa S-126-95
S v Matarutse S-101-94

S v Musvitisi & Anor S-229-93
W Ncube, for the first applicant
R M Fitches, for the second applicant
N J Mushangwe, for the State
CHIDYAUSIKU ACJ: The applicants in this case are seeking an order for the permanent stay of their prosecution for fraud. The applicants' case is that
Page 85 of 2001 (2) ZLR 84 (S)
their constitutional right to a fair hearing within a reasonable time has been violated by the respondent's inordinate delay in bringing them to trial. The said constitutional right is derived from s 18(2) of the Constitution of Zimbabwe, which confers on any person charged with a criminal offence the right to a fair hearing within a reasonable time. The matter is before this court as a result of a referral by the Gweru regional magistrates court at the request of the applicants in terms of s 24(2) of the Constitution of Zimbabwe. Section 24(2) of the Constitution of Zimbabwe provides that if in 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 party 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 regional magistrate, Mr Mawadze, in a very well reasoned and lucid judgment, fully analysed each of the relevant factors and concluded that the application for a referral to this court was not frivolous or vexatious. That conclusion cannot be faulted.
The facts of this case are briefly the following:
The applicants were arrested in or about February 1992 on charges of fraud. They were released on bail within a day or two of their arrest. Thereafter, between February 1992 and July 1994 they appeared on remand some eleven times at Chiredzi magistrates court. Some time in July 1994 the matter was transferred to Masvingo magistrates court, purportedly for commencement of the trial. The applicants appeared at Masvingo magistrates court for remand six times until some time in October 1995. In October 1995, the charges were withdrawn before plea.
For nearly three years between October 1995 and about 1998, nothing happened. The applicants were summoned to appear in court for trial in October 1998. The trial did not take place in October 1998. A spate of correspondence took place between the prosecutor and the various legal practitioners representing the three applicants. I shall refer to these later.
The applicants were next summoned to appear at Gweru magistrates court for trial on 31 July 2000. The trial did not proceed on that date and the matter was postponed to 6 November 2000. On that date, the applicants successfully made the application for the matter to be referred to this court.
This court has had occasion to deal with similar applications on a number of occasions. The following are some of the cases: In re Mlambo 1991 (2) ZLR 339 (S); S v Banga 1995 (2) ZLR 297 (S); Hungwe & Ors v Attorney-General S-50-94; S v Matarutse S-101-94; S v Marisa S-126-95; S v Musvitisi & Anor S-229-93; In re Masendeke 1992 (2) ZLR 5 (S); Martin v Attorney-General & Anor S-53-93. The above line of cases establish that
Page 86 of 2001 (2) ZLR 84 (S)
in determining an application such as this one the following factors are to be taken into account:

(a) the length of the delay;
(b) the reasons for the delay;
(c) the assertion by the accused of his or her right to a speedy trial;
(d) the prejudice to the accused caused by the delay.

I shall now proceed to consider how these factors apply to the facts of this case.

(a) The length of the delay

It is common cause that the applicants were arrested and placed on remand in or about February 1992 for offences that were allegedly committed in or about 1986. They were due for trial on 6 November 2000 when they applied to have their case referred to this court. Thus, a period of 8 1_2 years had elapsed since the initial remand. More than a decade had elapsed since the date of the alleged offences. I have no doubt in my mind that the delay in bringing the applicants in this case to trial was inordinate. It is a delay that is sufficient to trigger an enquiry into the constitutionality of the delay. The State concedes that the delay was long but contends that the reasons for such delay are adequate.

(b) The reasons for the delay

Mr Nyoka of the Attorney-General's Office dealt with this case. He filed an affidavit outlining the history of this case and the reasons for the delay. The applicants were placed on remand on 12 February 1992 at Chiredzi Magistrates court. They remained on remand until October 1994 when they were remanded to the regional court held at Masvingo for trial. Upon completion of investigations, the docket was sent to the Director of Public Prosecutions for directions. The docket was received at Masvingo from the Director of Public Prosecutions in February 1994. The Director of Public Prosecutions directed that the matter proceed before the regional magistrates court. Thus the delay from February 1994 to November 2000, a period in excess of six years, was due to a failure to arrange a trial date. I find the reasons given for the failure to arrange for a trial date for a period in excess of six years far from satisfactory. As I have said, the docket was received at the prosecutor's office, Masvingo, in February 1994. It sat there for over six months until it was set down for trial on 24 October. The State communicated with defence counsel about the October 24 trial date for the first time in or around August 1994. It is quite apparent from Mr Nyoka's affidavit and the correspondence between him and defence counsel that no consultation had taken place prior to the trial date being set and defence counsel had not received the relevant documents by August 1994. This is not an efficient way of setting down matters. In my view, the matter should have been set down immediately upon

the receipt of the docket from the Director of Public Prosecutions on an agreed date or, alternatively, on a date that allowed sufficient notice and service of documents on defence counsel. It is not surprising the trial did not commence on 24 October 1994 because defence counsel were not ready to proceed. The matter was postponed to 12 December 1994. Again, it is not clear whether this was an agreed date of trial or how much consultation over the new date of trial had taken place. Again, the trial failed to commence on 12 December 1994. The matter was next set down on 29 May 1995. On that occasion, the matter was further postponed at the request of defence counsel. The case was postponed to 17 July 1995. On 17 July 1995, the matter was further postponed to October 1995, again, at the request of defence counsel on the basis that the defence

papers had not been received and of inadequate notice to counsel. The matter was next set down on 15 June 1998. Some 2½ years had elapsed since the last attempt to have the matter tried. The reasons given for this 2½ years lapse are internal transfers, the restructuring of staff within the Attorney-General's Office and a recusal by one regional magistrate allocated to hear the matter. In my view, the reasons given do not justify the delay of over two years.

On 15 June 1998, the trial again failed to commence. One of the defence counsel was not available. The matter was postponed to October 1998. In October 1998, the trial again failed to take off. The reasons for the further postponement are not clear. The matter continued to be postponed for one reason or another until the year 2000. A trial date of 31 July 2000 was set but the trial did not take place. As of that date defence counsel of the first applicant had not received the warned and cautioned statements of his client and other documents necessary for the preparation of the defence. The correspondence between the State and some of the defence counsel indicates that requests for these documents were being made throughout this period of delay. Such documents were never provided by the State. All the parties eventually agreed on the trial date of 6 November 2000. On that date, the applicants applied for a referral.

The State is the dominus litis in this case, and was aware that it is enjoined by s 18(2) of the Constitution of Zimbabwe to bring the applicants to trial within a reasonable time. The State failed to do so for a period in excess of eight years. The reasons offered for such a long delay are flimsy and smack of inefficiency and dereliction of duty. Throughout this period the State would almost invariably summon the applicants to court and seek to liaise with counsel afterwards. Elementary common sense dictates that liaison should precede the set down on an agreed date. Alternatively, if the State chose to set down the matter without consultation it should have allowed sufficient time to ensure adequate notice to defence counsel. On no less than

two occasions, this matter was allowed to go unattended for periods in excess of two years. While I accept that on one or two occasions, the matter was postponed at the instance of one or more of the applicants, this is insufficient to absolve the respondent from its constitutional obligation to bring the applicants to trial within a reasonable time. This is not a case where the delay was due to the complexity of the matter and the investigation of necessity took a long time. The applicants were facing multiple counts and some sixteen witnesses were involved in this matter, but the investigations were complete before February 1994. From then on, the delay was due to the State's inability to set down the matter for trial. Six and a half years of attempting to set down a matter is simply inexcusable on the basis of reasons advanced by the State. It is quite obvious that the delay in this case was due to negligence and inefficiency. In my view, the delay was simply too long and the reasons for the delay totally inadequate to justify such a long delay.

(c) The assertion by the applicants of their right to a speedy trial

On the evidence on the record, the third applicant did very little to assert his right but the same cannot be said of the first and second applicants. Mr Davy, who represented both the first and second applicants until the second applicant changed counsel later on, complained of the delay in bringing his clients to trial for the first time within a year of the first date of remand. He repeated the same complaint on numerous occasions

throughout the period of the delay. Indeed, I did not understand the respondent to contend that the first and second applicants failed to assert their rights to a speedy trial. The two applicants consistently asserted their rights by asking the State to provide trial dates without success. The third applicant did very little to assert his right to a speedy trial. I, however, do not accept that his application can be separated from the other two. If he had been applying on his own he would have had some difficulty in this regard. On this basis, I am satisfied that the applicants did not just sit back but asserted their rights to a speedy trial.

(d) Was there prejudice to the applicants?

The delay in this case, as has been already stated, was for a period of 8½ years. There is no doubt that a long delay of this kind will cause some prejudice to the applicants. Indeed, the State did not argue in the court a quo and before us that the applicants were not prejudiced by the delay. The applicants gave evidence on the prejudice that they have suffered during the application for a referral. From that evidence, it is apparent that they have suffered the following prejudice as a result of the delay in their trial: The applicants lost their jobs and have not been paid their terminal benefits because this case has not been finalised. The one applicant is still unemployed, while the other two have since been employed at a salary much lower than they previously earned because of poor references. While the trial is pending the applicants cannot

get good references from their former employer. Without a good reference it has not been possible for any of them to get a good job.

From 1992 to 1995, the first and second applicants could not travel because the surrender of their passports was part of the bail conditions. The applicants also suffered financial prejudice in that they had to travel to attend about sixteen remands at Chiredzi, Masvingo and Gweru. The applicants were also prejudiced in that for the last eight years they could not properly plan their future while this matter was still pending.

In view of the duration of the delay, the probabilities are that some of the witnesses, both for the State and the defence, may no longer be available and those that are available are likely to have faded memories of events that occurred more than ten years ago. This is prejudicial to the applicants having a fair trial.

In the result, I am satisfied for the reasons set out above that this is a proper case for the granting of the relief sought. The delay was inordinate, 8 1_2 years, the explanation by the State for the delay is inadequate, the applicants, or at least two of them, asserted their rights to a speedy trial, and the applicants were prejudiced by the lengthy delay.

The application is granted and the prosecution of the three applicants is permanently stayed.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Cheda & Partners, first applicant's legal practitioners

Winterton, Holmes & Hill, second applicant's legal practitioners

S v MAPEKA & ANOR

2001 (2) ZLR 90 (H)

Division: High Court, Harare

Judges: Chinhengo J

Subject Area: Criminal review

Date: 1 August 2001
Judgment Number: HH-122-01

Criminal procedure (sentence) — common law offences — culpable homicide — motoring case — need on plea of guilty to establish degree of negligence — guidance to be obtained from sentences provided by Road Traffic Act for reckless or negligent driving

The two accused were tried, separately, on charges of culpable homicide arising out of accidents they had caused when driving passenger buses. They both admitted that they had been negligent as specified in the particulars of negligence, and were sentenced, although in neither case did the magistrate establish the accused persons' respective degrees of negligence.

Held, that where a person pleads guilty to a charge of culpable homicide arising out of a motor accident, the court should establish, before sentence is passed, what the degree of negligence is and pass sentence accordingly. In order to clarify the issues, the magistrate should ask questions that will assist him to establish the degree of negligence of the accused. It is not enough to say that the degree of negligence was "very high". The judicial officer should be more specific, and say whether there was ordinary negligence, gross negligence or recklessness.

Held, further, that where the vehicle being driven by the accused was a commuter bus or heavy vehicle, the court should be guided by the penalties provided in the Road Traffic Act [Chapter 13:11] for negligent driving, driving in a manner dangerous, and reckless driving.

Cases cited:
S v Chaita & Ors 1998 (1) ZLR 213 (H)
S v Duri 1989 (3) ZLR 111 (S)
S v Dzvatu 1984 (1) ZLR 136 (H)
R v Mahametsa 1941 AD 83
S v Mtizwa 1984 (1) ZLR 230 (H)
R v Swanepoel 1945 AD 444

Legislation considered:
Road Traffic Act [Chapter 13:11], ss 52(1), 53(2), 54, 55, 64(3) & 81(1)

CHINHENGO J: The record of proceedings in the above-mentioned matters were placed before me on review. In the first case, Patson Mapeka was convicted, on his plea of guilty, of four counts of culpable homicide.

He admitted the following facts as they appear in the outline of the State case.

On 29 August 2000, he was driving a Ford Spectrum motor vehicle then used as a commuter omnibus on the Chinhoyi-Chegutu Road. He had on board the motor vehicle eighteen fare paying passengers. He was near the 33 km peg on the said road when some of the passengers warned him that he was driving at an excessive speed. He ignored the warning and said that he wanted to catch up with another commuter omnibus which was in front on the same road. Shortly after he had been warned against driving at high speed, the motor vehicle's rear tyre burst. He lost control of the motor vehicle. It rolled over several times before it stopped, landing on its side. Three passengers died on the spot and

a fourth one died later in hospital. All the four passengers died from injuries sustained in the accident. Other passengers were also injured.
The accused admitted that he was travelling at a speed which was excessive in the circumstances, that he failed to stop or to act reasonably when the accident was imminent and that he failed to keep the motor vehicle under proper control. He admitted these particulars of negligence and attributed his negligence to excessive speed. He was sentenced on all the four counts to 20 months' imprisonment of which six months were conditionally suspended for three years. He was prohibited from driving all classes of motor vehicles for a period of 12 months and his driver's licence in respect of all classes of motor vehicles was cancelled.
In the second case, Patrick Sithole pleaded guilty to four counts of culpable homicide. The facts which he admitted were the following.
He was employed by Musasiwa Bus Company as a driver. On 18 February 2001, he was driving a Musasiwa bus on the Harare-Masvingo Road. At or near Ngezi Bridge and at the 90.5 km peg on the said road he encroached and drove the bus on the lane of oncoming traffic. His bus collided head on with a Nissan Sunny motor vehicle which was being driven towards Harare. Three passengers in the Nissan Sunny motor vehicle died instantly. The accused's bus overturned and one of its passengers died on the spot. Several other passengers were injured.
The accused admitted that he was negligent in that he was travelling at a speed excessive in the circumstances, that he drove the bus on the wrong side of the road, that he failed to stop or to act reasonably when the collision was imminent, that he failed to keep a proper look-out for other vehicles and that he failed to keep the bus under proper control.
He was sentenced to a fine of $2 000 on each count and in default of payment to three months' imprisonment. He was prohibited from driving all classes of motor vehicles for a period of six months.
In these cases, the trial courts accepted the pleas of guilty to the charges of

culpable homicide, which in essence meant that the court accepted the particulars of negligence alleged in the outline of the State cases. The essence of such pleas of guilty is what McNally JA explained in S v Duri 1989 (3) ZLR 111 (S) at 115C-D where he said:
"The whole basis of the case against the appellant was that he drove negligently. Particulars of negligence were alleged and were proved. His guilt in relation to culpable homicide was based squarely on that finding of negligent driving. He could not have been found guilty of culpable homicide unless he was first found guilty of negligent driving. Therefore, it must have considered, and did consider, that the convicted person would have been convicted of an offence in terms of the Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law."
In S v Chaita & Ors 1998 (1) ZLR 213 (H), I had occasion to state the following at 219E-G:
"It will be apparent that while negligence is the basis of a conviction of the accused for culpable homicide, that does not necessarily mean that the accused's conduct amounted to one of the more serious examples of driving conduct such as reckless driving … nor does it mean that it was not a less serious form of conduct. Negligence, for the purposes of a conviction for culpable homicide, is the minimum level of conduct that is required to

establish the offence. It has, however, various gradations which not only should be established at the plea stage or by evidence during a trial but should also be established for the purposes of sentence."

I went further to state that in terms of s 64(3) of the Road Traffic Act [Chapter 13:11] a trial magistrate is required to determine the degree of negligence and, depending on his findings, to approach the matter of sentence in terms of s 64(3) of the Road Traffic Act. I also suggested at 220F the proper formulation of the charge where an accused is charged with culpable homicide at common law arising from the driving of a motor vehicle on a road. In both these cases, the magistrates did not establish the accused persons' respective degrees of negligence and they could not have been properly guided in the matter of sentence. The failure by the magistrates to approach the cases in this way was a misdirection (see Chaita's case supra at 221A).

In the case of Patson Mapaka, one would have thought the magistrate was on the right track when he stated of the accused's manner of driving that:

"It is not in issue that along the 33 km peg, some of his passengers warned him against his high speed. He took no heed to (sic) the warning. Thereafter, he suffered a burst rear wheel tyre. He failed to control the motor vehicle and it veered off the road and rolled several times before landing on its side."

Had he pursued this line of analysis, the magistrate would have reached a decision on the degree of negligence of the accused person.

In Patrick Sithole's case, the magistrate was also on the right path when he stated in his reasons for sentence that:

Page 93 of 2001 (2) ZLR 90 (H)

"You drove on the wrong side of the lane (road) and you had a head on collision. The degree of negligence in this case is very high."

The accused persons pleaded guilty, thereby rendering it, in the ordinary case, unnecessary for the magistrate to inquire further into the matter. But it must come to the mind of a prudent judicial officer to want to know the details of the accident or collision, as the case may be. In order to clarify the issues, the magistrate should ask questions that will assist him to establish the degree of negligence of the accused. Some such questions should relate to the time of day, the visibility and the speed at which he was travelling. If the magistrate omits to ask these questions before he pronounces his verdict he should ask them before he passes sentence. If he does not do so even at this stage, he should then attempt to draw certain inferences from the admitted facts before he can pass sentence.

In S v Mtizwa 1984 (1) ZLR 230 (H), the facts were similar to those in the case of Patrick Sithole. At 235A, the learned judge said:

"From the facts established, it may be seen that it is not possible to come to any definite conclusion as to what actually occurred in view of the fact that the accused could not explain his vehicle being on the incorrect side of the road. Nor could he explain why it was that he did not see the deceased at any time before the collision. In the result, it is necessary to decide what inferences may be drawn from the proved facts. In my view, the only inferences that may be drawn are that the accused was —

(a) incapable of controlling his vehicle; or was

(b) deliberately, for some reason, travelling on the incorrect side of the road in the face of oncoming traffic; or was

(c) not looking where he was going for an appreciable period of time.

The inference most favourable to the accused is the last possibility, and it is only fair that neither of the more adverse inferences should be drawn against him. On the finding, which appears to have been the finding of the trial magistrate as well, it is my opinion that the accused's driving on this evening was grossly negligent."

Patrick Sithole, as the admitted facts reveal "drove his AVM Musasiwa bus negligently by changing from his lane to the Masvingo bound lane". He quite clearly drove on the wrong side of the road. From these facts the trial magistrate should, following upon the reasoning in Mutizwa's case supra, have determined that Patrick Sithole was grossly negligent. On the basis of this finding he should have sentenced the accused to a term of imprisonment (see S v Dzvatu 1984 (1) ZLR 136 (H)).

In Patson Mapeka's case, the admitted facts reveal that the accused was travelling at a high speed. His passengers protested but he did not pay any attention to them. Although the trial magistrate sentenced him to a term of imprisonment, that sentence was not based on a finding of the degree of negligence, for it is in cases where the accused is guilty of gross negligence or recklessness in the manner he drove that a sentence of imprisonment will be appropriate (Mtizwa's case supra at 232B-C and R v Mahametsa 1941 AD

83; R v Swanepoel 1945 AD 444 at 448 and S v Miller A-85-81). It is not sufficient to merely state that the degree of negligence was "very high". The judicial officer must be more specific than that.

In Mtizwa's case supra, the learned judge distinguished gross negligence and recklessness, one from the other. Of gross negligence he said that it is simply a very serious or aggravated form of ordinary negligence (at 233G). Of recklessness he said at 234A that:

"Recklessness, on the other hand, connotes not only a wilful disregard for the safety and rights of other road users, but also 'cases of indifference or rashness or inadvertence in which consciousness of consequences plays no part'. S v van Zyl supra at 558."

The manner of driving of Patson Mapeka properly analysed was reckless, to say the least. This is an inference which the trial magistrate could have very properly drawn from the facts admitted by the accused.

It will be apparent that in the one case Patrick Sithole caused the death of four people because he drove his vehicle with a high degree of negligence, i.e. gross negligence, and that in the other case Patrick Mapeka drove his motor vehicle with recklessness. Patrick Mapeka was sentenced to 20 months' imprisonment of which six months were suspended. Patson Sithole was sentenced to a fine of $2 000 on each count or in default of payment three months' imprisonment. Patrick Mapeka should, had the trial magistrate approached the matter correctly, have been sentenced to a term of imprisonment.

In S v Dzvatu (supra), the learned judge observed that it was possible, before the enactment of the Road Traffic Amendment Act 4 of 1986, which introduced s 64(3) of that Act, for a lighter sentence to be received on conviction for culpable homicide than would be imposed on a conviction for reckless or drunken driving arising from the same facts. The same situation exists now where a person convicted of culpable homicide at common law arising from a traffic accident may receive a lighter sentence than would be imposed on him on a conviction for negligent or reckless or drunken driving. The Road Traffic Act [Chapter 13:11] was amended by the Road Traffic Amendment Act 3 of 2000 which came into force on 1 November 2000. The penalty for negligent driving or for

driving at a speed or in a manner dangerous to the public under s 52(1) of the Road Traffic Act, as amended by Act No. 3 of 2000 is:

"(1) where the vehicle concerned was a commuter omnibus or a heavy vehicle, to a fine not exceeding twenty five thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; or

(2) in any other case, a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

Page 95 of 2001 (2) ZLR 90 (H)

The penalty for reckless driving under s 53(2) of the Road Traffic Act as amended by Act 3 of 2000 is:

"(a) subject to section eighty-eight A, where the vehicle concerned was a commuter omnibus or a heavy vehicle to imprisonment for a period not exceeding fifteen years and not less than two years; or

(b) in any other case, to a fine not exceeding fifty thousand dollars or to imprisonment not exceeding five years or to both such fine and such imprisonment."

The penalties for driving a motor vehicle with a prohibited concentration of alcohol or whilst under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle under ss 54 and 55 respectively of the Road Traffic Act have also been increased. Section 81(1), as amended by Act 3 of 2000, provides that a magistrate shall have jurisdiction to impose any minimum penalty prescribed by the Act for any offence. Thus, the jurisdiction of a magistrate has been increased for the purpose of imposing the minimum penalties prescribed by Act 3 of 2000. It seems to me axiomatic that a magistrate may impose a minimum penalty of two years in a conviction under s 53(2) of the Road Traffic Act but may not impose a similar sentence if the sentence is not a minimum penalty. Perhaps the legislature should consider increasing the jurisdiction of the magistrate for all contraventions of the Road Traffic Act.

In considering the sentences which the trial magistrates in Patson Mapeka and Patrick Sithole's cases should have imposed, it is clear that they should have been guided by the new penalty provisions in the Road Traffic Act. In both cases, the accused were commuter omnibus drivers. Patrick Sithole should have been sentenced to at least a term of imprisonment of one year and, taking a cue from the provisions of s 53(2) of the Road Traffic Act, Patson Mapeka should have been sentenced to at least two years' imprisonment.

The two criticisms I have made against the decisions in these two matters can be summarised as follows:

1. The trial magistrates in both cases failed (and therefore misdirected themselves) to establish the degree of negligence of each of the accused persons.

2. The trial magistrate:

(a) in Patson Mapeka's case, did not provide a proper basis on which to impose, as he did, a term of imprisonment. He should have established gross negligence as a minimum requirement in order to impose a sentence of imprisonment.

(b) in Patrick Sithole's case not only failed to establish the accused's degree of negligence but he also imposed a wholly inappropriate sentence.

Page 96 of 2001 (2) ZLR 90 (H)

3. The trial magistrates should have been guided by the provisions of the Road Traffic Act as amended by Act 3 of 2000 as to what the appropriate sentence was to be considering the increased penalties prescribed by the Act for commuter omnibus drivers.

4. The sentences imposed in both cases were unduly lenient and not in accordance with real and substantial justice.

For these reasons therefore, I decline to certify the proceedings in these two cases. The proceedings were not in accordance with real and substantial justice.

In conclusion, I would like to urge it upon the legislature to introduce legislation and bring into line the penalties for culpable homicide arising from the driving of motor vehicles with those for the contravention of ss 52, 53, 54 and 55 of the Road Traffic Act as amended by Act 3 of 2000. It is urged upon the legislature to approach this matter in the same way as it did with the Road Traffic Amendment Act 4 of 1986 following upon the decision in Dzvatu's case supra. This judgment is to be sent to the Attorney-General for his information.

Adam J agrees.

S v MURINDEZI & ANOR
2001 (2) ZLR 97 (H)
Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Criminal review
Date: 1 August 2001
Judgment Number: HH-126-01

Criminal procedure — compensation — order for — compensation not a condition of suspension of sentence — order deemed to have been made under Part XIX of Criminal Procedure and Evidence Act [Chapter 9:07]

Criminal procedure — compensation order — application for by prosecutor — court must assume that prosecutor acting on victim's instructions

The two accused persons, one of them a 15-year-old juvenile, were convicted by a magistrate of housebreaking and theft. The magistrate sentenced the first accused, an adult, to a fine and postponed the passing of sentence on the juvenile. The prosecutor having applied for a compensation order on the complainant's behalf, the magistrate ordered the accused to pay compensation in unequal shares, the first accused being required to pay a greater share than the juvenile. On review:

Held, that although the magistrate did not specify the statutory provision under which he made the compensation order, he could properly have made it under s 358 of the Criminal Procedure and Evidence Act [Chapter 9:07], which allows a sentence to be postponed on any condition, including a condition that the convicted person pays compensation to the victim of his crime.

Held, further, that when a prosecutor makes an application for compensation in terms of s 368 of the Act it must be assumed, unless the contrary is shown, that the prosecutor is acting on the victim's instructions.

Held, turther, that although it was permissible to postpone the passing of sentence on the condition of payment of compensation, where an order for compensation is made under Part XIX of the Act, it would not be part of the sentence.

Case cited:
S v Tivafire 1999 (1) ZLR 358 (H)
Legislation considered:
Criminal Procedure and Evidence Act [Chapter 9.07], ss 358(2) & (3), 368 and 371
CHINHENGO J: The accused persons in this case each pleaded guilty to a charge of housebreaking with intent to steal and theft. They were duly convicted and sentenced. It appears that both of them are first offenders.
Page 98 of 2001 (2) ZLR 97 (H)
They are young people aged 22 and 15 years, respectively. The property which they stole was valued at $8 350 and of this, property valued at $5 850 was recovered. The following sentence was imposed:
"Accused 1: $800 or 3 months' imprisonment with labour. Accused 2: Passing of sentence postponed for 5 years on condition accused is not convicted of having committed within that period any offence of which dishonesty is an element and for which sentenced to imprisonment without the option of a fine. Compensation is awarded to complainant in the sum of $2 500 to be paid as follows:
Accused 1: $2 000. Accused 2: $500. Accused 1 to pay $400 and accused 2 $200 today and accused 1 to pay $1 600 on or before 30.9.00 and accused 2 to pay $300 on or before 30.9.00 through Clerk of Court, Harare."
This sentence has been criticised by the scrutinising regional magistrate. First, he thought that it was lenient but he appears to have later been convinced by the trial magistrate that the sentence was appropriate. I think that the sentence cannot be impugned in its substance or in its intention. Second, the regional magistrate queried the correctness of the compensation order which, as is apparent, was not made a condition of suspension of a term of imprisonment. Third, he queried the correctness of ordering that the accused persons pay different amounts as compensation to the complainant without ascertaining the extent to which each of the accused benefited from the property which was not recovered.
I think that there is another point which arises for consideration in respect of the order of compensation made against the second accused. Having postponed the passing of sentence in respect of the second accused, was it correct for the trial magistrate to order him to pay compensation at all? The issue is whether an order to pay compensation is a sentence or part of a sentence made by the court.
The facts of this case are that the accused persons broke into the complainant's house by opening a door which was not locked. They stole a television set and two radios and sold them, but there is no mention of the amount for which they sold the property. The person to whom the accused had sold the radio was questioned as to where he had bought the radio. This led to the apprehension of the accused persons. During the plea proceedings and before conviction, the second accused gave as his reason for committing the crime that:
"I was influenced by accused 1 but I was not forced into helping him."
Although this response would appear to suggest that the second accused "assisted" the first accused, and that without ascertaining the nature of the assistance, it is not established whether his plea of guilty was informed, I am on the contrary satisfied, from the manner in which the elements of the offence were put to him, that the second

accused's plea was a genuine admission of guilt. In mitigation, the accused persons offered to pay

compensation to the complainant, although the second accused's mother said that she was unable to help the second accused pay the compensation. After the offer of compensation was made, the public prosecutor applied, on the complainant's behalf, for compensation. In sentencing the accused persons, the trial magistrate was satisfied that they were willing and able to pay the compensation. He was also satisfied that the second accused had been influenced by the first accused to commit the offence. He stated categorically that he was going to pass a stiffer punishment on the first accused.

1. THE ORDER OF COMPENSATION

Section 358(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] (the Code) provides that:

"(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may —

(a) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or

(b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order;"

Section 358(3) thereof provides that:

"(3) Conditions specified in terms of para (a) or (b) of subsection (1) may relate to any one or more of the following matters —

(a) good conduct;

(b) compensation for damage or pecuniary loss caused by the offence:

Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX."

The Code makes provision for the payment of compensation in two ways, either under s 358(3)(b) or under Part XIX. For a full discussion of this see S v Tivafire 1999 (1) ZLR 358 (H) whose headnote reads:

"Held, that compensation or restitution may be granted in two ways. The first is where the complainant requests it in terms of Part XIX of the Criminal Procedure and Evidence Act [Chapter 9:07]. Where the court orders compensation to be paid under this Part, the order is effectively a civil judgment which may be enforced as such. A person to whom an award has been so made has no further civil remedy. The second is where, in terms of s 358(3)(b) of the Act, payment of compensation is made a condition of suspension of sentence. The section allows a sentence to be suspended on condition of payment for 'damage or pecuniary loss caused by the offence'. The second course should only be followed where loss or damage is readily ascertainable, in such cases as theft or damage to property, as long as there has been evidence establishing the amount of compensation due. The amount of

compensation for personal injuries is not readily ascertainable, being 'damages' as opposed to 'damage'."

It is not quite clear which of the two courses the trial magistrate followed. In respect of the first accused it would appear that the magistrate proceeded in terms of Part XIX

following upon an application for compensation made in terms of s 368 of the Code by the prosecutor on the complainant's behalf. This must be so because the payment of compensation was not a condition of suspension of the whole or any part of the sentence and also because an application for compensation had been made. If he had proceeded in terms of s 358(2)(b) and (3) of the Code then he would have been required to make the payment of compensation a condition of suspension of a sentence or a part of a sentence.
In respect of the second accused, the same is true. Paragraph (a) of s 358(2) of the Code is different from para (b) of the same subsection. Paragraph (a) permits a court to postpone the passing of sentence and release the offender on any condition as the court may specify and the condition so specified may be that the accused pays compensation to the complainant. Paragraph (b) permits a court to order compensation as a condition of suspension of sentence. This paragraph is therefore more direct in so far as the ordering of the payment of compensation is concerned
Thus, s 358(3) of the Code permits a court to impose any condition, including a condition that the accused pays compensation even when the passing of sentence has been postponed. In the case of the second accused, therefore, the order that he pays compensation could have been made against him without recourse to Part XIX i.e. without an application for compensation being made. The first query by the regional magistrate — that the order of compensation "does not fall in any one of the … two categories" cannot be supported on the facts of the case. I am satisfied that once an application is made for compensation in terms of s 368 it must be assumed, unless the contrary is shown, that the prosecutor is acting on the instructions of the victim of the offence. And such order may be registered with the clerk of the court in terms of s 372 of the Code to convert it into a civil judgment.
2. PAYMENT OF DIFFERENT AMOUNTS BY ACCUSED PERSONS
The trial magistrate ordered that the first accused pay $2 000 and the second accused $500, which together reflect the outstanding prejudice to the complainant. The regional magistrate did not find any basis for the differentiation as to the amount to be paid by the accused persons. He said:
"I believe the magistrate erred in so doing because the extent to which each one of them benefited from the theft should determine the amount (he pays).

The facts are totally silent on the extent to which each benefited from the property still unrecovered."
In several review cases, it has been stated that, in ordering that co-accused persons pay compensation, it cannot be specified that their liability is joint and several. Each of the co-accused persons must pay an amount specified in relation to him. If it can be shown by what proportion of the total amount each of them benefited, the court must specify the sum each is to pay. But if it cannot be ascertained how much each of them benefited, then each of them must be required to pay a half or a third or some other portion depending on the number of the accused. In the present case, the magistrate did not proceed in terms of s 358 but in terms of Part XIX of the Code. Section 371, which appears in Part XIX, provides that:
"Where a court makes an award or order in terms of this Part against two or more convicted persons, their liability under the award or order shall be joint and several, unless in any particular case the court orders otherwise."

This provision is consonant with the fact that an order of compensation made in terms of Part XIX of the Code has the effect of a civil judgment where the judgment creditor is not concerned as to whether one or both convicted persons pay the money provided he is paid. But as is evident from s 371, the court may order that the liability of the convicted person shall not be joint and several. This is what the trial magistrate did. He was satisfied, on the undisputed evidence of the second accused, that at his age of 15 years, the second accused had been influenced by the older first accused who was 22 years old. If his order can be faulted it is only on the ground that he did not conclusively establish, by questioning the first accused, whether he had influenced the younger offender. But it stands to reason, without the need for cogent evidence, that the older offender must have influenced the younger. And thus, on a balance of probabilities, when the magistrate came to make an award of a civil nature his approach can hardly be faulted. I am satisfied therefore that the order by the magistrate was correct, even though he did not ascertain the extent of the benefit which accrued to each of the accused persons.

The issue which I raised mero motu i.e. whether an order of compensation made pursuant to s 358(2)(a) as read with s 358(3)(b) of the Code is part of the sentence of the court may be disposed of with an answer in the negative. On the facts of this case, an application was made by the prosecutor for the order of compensation. It was granted by the court in terms of Part XIX of the Code. The order was in the nature of a civil judgment. It could therefore not have been a part of the sentence of the court. No sentence had been passed because the passing of sentence was postponed. The complainant's remedies in the event that the second

accused fails to pay the compensation will derive from the civil law and not the criminal law.

The conviction and sentence in this case and also the proceedings in general are therefore confirmed.

MASHONGANYIKA v LENA NO & ANOR

2001 (2) ZLR 103 (H)

Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Civil application
Date: 4 July and 8 August 2001
Judgment Number: HH-127-01

Employment — code of conduct — reference to labour relations officer of disciplinary proceedings that have not been determined — powers of labour relations officer — right to decide which party should begin — need for procedures before labour relations officer to be flexible — when interlocutory decisions of labour relations officer may be reviewed

Labour Relations Act [Chapter 28:01] — s 101(6) — reference to labour relations officer of disciplinary proceedings that have not been determined — powers of labour relations officer to "determine" or "dispose of" matter — meaning

Review — interlocutory decision of administrative tribunal — when review permissible

The applicant's employer instituted disciplinary proceedings against her in terms of a registered code of conduct. More than 30 days later no decision had been reached in the matter, so the applicant referred it to a labour relations officer in terms of s 101(6) of the

Labour Relations Act [Chapter 28:01]. At the hearing before the labour relations officer, the officer ruled that she should present her case first. The applicant was aggrieved by this ruling so she had the hearing adjourned and applied to the High Court for a review of the officer's decision.

Held, that the flexibility which must characterise the proceedings of administrative tribunals means that an adjudicating authority (in this case, the labour relations officer) has a wide discretion to decide which party should begin. He will be guided by considerations of natural justice and by whether a party will be prejudiced by having to present his case first. But once the adjudicating authority has directed who should begin, the direction must be complied with.

Held, further, that the issues before the labour relations officer were the applicant's complaint of procedural irregularities in the disciplinary proceedings and her complaint that no decision had been reached in those proceedings. It was for her to begin, therefore, and state the grounds of her complaints.

Held, further, that an application of the test "he who asserts must prove" showed clearly that the applicant should begin: she was asserting that her employer had no cause to suspend or

dismiss her, and could quite properly and easily have stated the reasons for this. Noprejudice would have been occasioned her by beginning.

Held, further, that the labour relations officer's decision was purely interlocutory and for that reason was not subject to review. The High Court will not review an interlocutory decision, in civil or criminal proceedings, unless the irregularity complained of is gross and the decision will seriously prejudice the litigant's rights, or if the irregularity is such that justice might not by other means be attained.

Held, further, that that the proceedings before labour relations officers are supposed to be flexible and less formal than proceedings in a court of law. If litigants were allowed to nit-pick on every possible infraction of procedure or wrong decision before the termination of those proceedings, the hearings would be delayed to a point where the existence of labour relations officers as adjudicating authorities would be rendered nugatory.

Held, further, that a hearing before a labour relations officer on reference in terms of s 101(6) of the Labour Relations Act is always a fresh hearing, rather than a continuation of the uncompleted proceedings under the applicable code of conduct. On such a reference, the labour relations officer has only two options: he may "determine" the matter, i.e he may decide or settle the dispute after giving both parties an opportunity to submit representations; or he may "dispose" of it, i.e. he may deal with it, get rid of it or finish it by conciliation or mediation or by referring it to arbitration or to an appropriate workers committee, works council, trade union, employer's organisation or employment council.

Cases cited:

Association of Rhodesian Industries & Ors v Brookes & Anor (2) 1972 (1) RLR 338 (G)

Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd 1972 (3) SA 583 (W)

Ismail & Ors v Additional Magistrate Wynberg & Anor 1963 (1) SA 1 (A)

Jesse v Chioza 1996 (1) ZLR 341 (S)

Kadoma Magnesite (Pvt) Ltd v Acting Hearing Officer & Ors 1991 (1) ZLR 283 (H)

Masedza & Ors v Magistrate, Rusape & Anor 1998 (1) ZLR 36 (H)
Mwenye v Lonrho Zimbabwe Ltd 1999 (2) ZLR 429 (S)
RAN Mines (Pvt) Ltd v Minister of Labour & Social Relations & Anor HH-521-86
Tip Top Dry Cleaners (Pvt) Ltd v Karangura 1997 (2) ZLR 420 (S)
ZFC Ltd v Geza 1998 (1) ZLR 137 (S)
Legislation considered:
Labour Relations Act [Chapter 28:01], ss 93(1) & 101
Miss J Siveregi, for the applicant
No appearance for the first respondent
T Gumunyu, for the second respondent
CHINHENGO J: The applicant was employed by the second respondent* in 1995. She remained so employed until 23 March 2001, when she was suspended from employment without pay or other benefits. Her suspension was intended to open the way for a disciplinary hearing into certain allegations of misconduct against her. She instituted separate proceedings in case

No.HC11125/2000 to challenge the decision by the second respondent that her suspension was to be without pay or other benefits. The present application is concerned with a different complaint. It is an application for a review of the decision of the first respondent, a labour relations officer who, when the matter of the applicant's suspension was referred to her, decided that the applicant was to present her case first, that is to say, she was to lead evidence first. The applicant refused to begin because she believed that the first respondent's direction was grossly irregular. The first respondent then postponed the proceedings sine die until the applicant was prepared and ready to begin. In these review proceedings the applicant seeks the following order:

"1. That the first respondent be and is hereby directed to determine the disciplinary proceedings between the applicant and the second respondent, within two months from the date of this order.

2. That the second respondent be and is hereby directed to present its case as the complainant in the disciplinary proceedings.

3. That the first and second respondents are to bear the applicant's costs."

The factual background to this application is that after her suspension a hearing was held in terms of the second respondent's code of conduct which was applicable to the applicant. Certain irregularities occurred during this hearing. The second respondent acknowledged the irregularities and decided on 3 May 2000 that the hearing be held afresh by a different disciplinary panel. It wrote a letter (Annexure "A") to the applicant on 8 May 2000 and said:

"Following a meeting of the Disciplinary Committee on 3 May 2000 on your case, please be advised that it is being recommended that the case should be heard by a different panel due to a review of the previous minutes which indicate that the Industrial Relations Officer participated in the proceedings.

The hearing has been set for Monday, 15 May 2000 at 1000 hours in the Manager Ground Operations' office."

It seems that the second respondent's reason for directing that the hearing be held again was singularly that the Industrial Relations Officer had participated in the proceedings when it was not proper for him to have doneso.

The applicant objected to the disciplinary proceedings being held afresh before a different panel in terms of the code of conduct. This objection, it would appear, was based on the irregularities which the applicant alleged to have occurred and principally on the fact that no determination had been reached more than thirty days from the date of notification of the disciplinary proceedings. The applicant proposed that the matter be referred to a labour relations officer. Her legal practitioners referred the matter to a labour relations officer by letter dated 2 May 2000, (Annexure "B"). Indeed, in terms of s101(6) of the Labour Relations Act [Chapter 28 : 01] ("the Act"),

if a matter is not determined within thirty days of the date of notification of the disciplinary proceedings the employee or the employer may refer such matter to a labour relations officer who may determine or otherwise dispose of the matter in terms of s 93 of the Act. It is significant that the applicant's legal practitioner referred the matter to a labour relations officer on 2 May, some six days before the second respondent acknowledged that the first hearing was attended by an irregularity which it admitted in its letter of 8May.

The applicant's letter of reference which was written on her behalf by her legal practitioner reads as follows:

"We refer to the above matter in which we act on behalf of Miss T. Mashonganyika an employee of Air Zimbabwe.

On 22 March 2000, our client was notified that a disciplinary hearing would be conducted against her on various allegations as appears from Annexure "A" attached hereto.

A hearing was subsequently held on 27 March 2000. At which hearing several fundamental procedural irregularities occurred.

These are briefly as follows:

1. The Industrial Relations Officer whose duty it was to guide the proceedings substantively participated in the hearing and sat in the deliberating panel creating an unfair advantage on management representatives.

2. Management substituted one of their representatives mid-way through the hearing in spite of the alleged offender's objection.

3.1 There were two different recommendations made by management representatives on the one hand and by the workers' representatives on the other at the closure of the hearing.

3.2 As a result, the disciplinary committee which has invited our client to appear before it on 3 May 2000 has no jurisdiction as there was a split recommendation in the matter.

3.3 Meanwhile, the Chairman of the initial hearing has purported to reach a substantive decision on the matter as appears from Annexure "B" attached hereto which is outside the panel's powers as outlined in the Corporation's code of conduct.

Notably, the Corporation is purporting to re-suspend our client, without pay and benefits, which it is not permitted to do in terms of its Code of Conduct. Our client reserves the right to approach the High Court, on an urgent basis in respect of this issue should it not be addressed.

Further and in any event, no determination has been reached in this matter more than 30 days from the date of notification of the disciplinary process.

In the circumstances, for these and other reasons we hereby refer the matter to a labour relations officer for determination in terms of s 101(6) of the Labour Relations Act [Chapter 28 : 01]."

The contents of this letter became relevant to the arguments as to who of the parties had the duty to begin when the hearing commenced before the first respondent. The applicant contended that the matter had been referred to the labour relations officer for a hearing de novo because in terms of s 101(6) of the Act there had been no determination reached within thirty days. And

because the hearing was a fresh hearing the second respondent had to begin by laying the charges of misconduct and giving evidence and only then would the applicant also give evidence in rebuttal. The second respondent contended that in terms of the above-quoted letter of reference, the applicant had herself approached the labour relations officer and having outlined her complaints in the letter, she had to speak to these complaints first before the second respondent could defend itself. The duty to begin fell on her.

The first point I will deal with is whether the hearing before the labour relations officer was a fresh hearing which was necessitated only by the failure of the second respondent's disciplinary panel to reach a determination within thirty days, or was in a sense a continuation of the hearing in terms of the second respondent's code of conduct which had not been completed within the stipulated period. There is no authority on the question whether or not a hearing by a labour relations officer on reference to him in terms of s101(6) of the Act is invariably a fresh hearing. It seems to me, however, that such a hearing can only be a fresh hearing because in terms of s 101(5) a matter which is the subject of proceedings under a code of conduct or liable to be the subject pf proceedings under a code of conduct is not subject to intervention by a labour relations officer. The labour relations officer's power to determine such a matter is placed in abeyance for a period of thirty days: see Mwenye v Lonrho Zimbabwe Ltd 1999 (2) ZLR 429 (S) at 433G. And when a matter is referred to a labour relations officer in terms of s101(6), the labour relations officer would, as a general rule, be required to investigate the matter and conduct a hearing: see s3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985). The second respondent submitted that s101(6), which provides that:

"If a matter is not determined within thirty days of the date of the notification referred to in paragraph (e) of subsection (3), the employer or employee concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter in accordance with section ninety three"

means, on the basis of the portion I have emphasised, that the labour relations officer has a discretion either to determine the matter on the evidence already led and bring it to finality or to proceed in terms of s 93 of the Act where evidence would not have been led. I do not think that the second respondent has interpreted s101(6) correctly. The words which I have underlined must be interpreted in the following manner. A labour relations officer to whom a matter has been referred can do one thing only, which is to "determine or otherwise dispose of the matter." In terms of s 93 (1)(b) of the Act a labour relations officer determines a matter only after giving both parties an opportunity to submit representations orally or in writing. He however may

dispose of the matter in terms of s93(1)(a) of the Act by conciliation, mediation or by reference to arbitration or he may in terms of s 93(1)(c) refer the matter, as a disposal of it, to an appropriate workers committee, works council, trade union, employer's organisation or employment council. Theword "dispose" is used in s 93(4). This provision states that the labour relations officer "shall … dispose of every dispute or unfair labour practice as soon as practicable and, in any case, not later than twelve calendar months from the date when he is first seized of the dispute or unfair labour practice". The word "dispose" in the context of s 93(4) merely means "deal with", "get rid of" or "finish" with the dispute or unfair labour practice and "determine" means to decide or settle the dispute. I do not find that the words in s 101(6) which I have underlined are of any assistance to the second respondent on the question whether or not the hearing before a labour relations officer is a hearing de novo. Where the labour relations officer has to determine the dispute he must necessarily, as enjoined of him, give the parties an opportunity to submit representations orally or in writing. Where he "otherwise disposes" of the matter he would also be required to give the parties an opportunity to be heard, for he must always have due regard to the dictates of natural justice: RAN Mines Pvt Ltd v The Minister of Labour and Social Relations & Anor HH-521-86 at p 7 of the unreported case. I am inclined towards the view that any hearing before a labour relations officer is always a hearing de novo, especially where the officer has to make a determination of a dispute referred to him or her.

It was necessary for me to deal with the question of the nature of the hearing before a labour relations officer because submissions were made in that regard. My decision on that question, however, does not dispose of the issue before me. Neither does it advance the applicant's case in any way.

The duty to begin at the hearing before the labour relations officer may be examined from several angles. It may be examined on the basis of the nature of the issue placed before the labour relations officer. It may be examined from the perspective of the common law position as to the duty to begin. Itmay also be examined on the basis of statutory provisions, if any, impacting on the question. In respect of the last possible basis of examination, it is clear that there is no statutory provision in the Act which deals with the point. Whatis appreciated with regard to procedure at a hearing before a labour relations officer is what was said by Samatta J in RAN Mines supra at pp6-7 where he stated that the labour relations officer:

"was under no duty to follow any particular procedure in conducting the investigation into the allegation laid at the (employee's) door. I have no doubt that this contention is well-founded in law. Section 3(2) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, does not prescribe any procedure which

a labour relations officer must adopt in carrying out any investigation under the subsection. But it cannot be doubted that regardless of any procedure he adopts, the labour relations officer must have due regard to the dictates of natural justice."

Section 93 of the Act also does not prescribe the procedure which a labour relations officer must adopt. It however enjoins him to have regard to the principles of natural justice as is apparent from a reading of s 93(1)(b) which I have already referred to. Such

an approach to procedural matters is consistent with the general principles governing administrative tribunals of which Baxter in Administrative Law 1984 ed at p 249 says:
"The central principles governing the proceedings of administrative tribunals are flexibility and fairness. Both are emphasised at common law and they are usually also catered for (partially, at least) by the governing legislation. Without flexibility much of the advantage of employing tribunals instead of courts is lost. Without fair procedures their decisions will inspire no confidence and they will probably be unjust."
See also ZFC Ltd v Geza 1998 (1) ZLR 137 (S) at 142B-C.
The flexibility which must characterise the proceedings of administrative tribunals means that in matters of procedure, the adjudicating authority has a wide discretion to decide which party should begin. He will be guided however by certain considerations, some of which I have already mentioned. In addition he may be guided by a consideration whether any of the parties will be prejudiced if he were required to begin. And I think that once he has made his decision on such an interlocutory matter as who begins, his direction must be complied with. If it is not, then the flexibility and relative informality that must attend quasi-judicial proceedings will be jeopardised. The costs of having the matter laid to rest will inevitably and unnecessarily be increased as, no doubt, will be the case in this matter.
It is common cause that the initial hearing conducted under the second respondent's code of conduct was set aside or abandoned by the second respondent itself. When the matter was referred to the labour relations officer by the applicant, to which the second respondent had no option but to agree, the labour relations officer was to hear the dispute as a body or tribunal of first instance and was to conduct an investigation during which the parties would have been given an opportunity to submit representations orally or in writing.
Looking at the proceedings from the angle of what issue was before the labour relations officer, it is clear that what was before her was the applicant's complaint as contained in her letter of 2 May 2000. She had complained of procedural irregularities which had occurred at the initial hearing held on 27March 2000. She also had complained about the fact that the dispute between her and her employer had not been determined within thirty days. In my view, it was for her to begin and advise the labour relations of the causes of her approach to the adjudicating authority. It is true too that the issue for

determination by the labour relations officer was to be her suspension and dismissal. It was she who was challenging the second respondent's decision to suspend her. She furnished the information relied upon for the setting aside of the suspension. Not only was she bound by the grounds furnished in her application (Tip Top Dry Cleaners (Pvt) Ltd v Karangura 1997 (2) ZLR 420 (S) at 422F) but she was also expected to speak to those grounds. True too that the labour relations officer was to determine whether she was to be dismissed. That alone was not sufficient to place the duty to begin on the second respondent in the circumstances of this case. It was she who had a complaint to make and not vice versa.
Several tests as to who must begin have been invoked in many cases. In Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd 1972 (3) SA 583 (W), Colman J at 584A-E said the following with regard to the tests:

“It is not easy, however to isolate any general principle which clearly solves the problem. The incidence of the onus in a particular case is a matter of substantive law and it is based upon ‘broad and undefined reasons of experience and fairness’ (per Davis AJA in Pillay v Krishna & Anor 1946 AD 946 at p 954 quoting Wigmore on Evidence).
…
There are a number of criteria which have been invoked from time to time, but it seems to me that each of those tests, on close scrutiny, is either inherently unhelpful, because it begs the question, or subject to exceptions in circumstances whose limits have not been clearly defined.
A test which is sometimes propounded is this one: The onus rests, in respect of a particular issue, on the party who would fail if no evidence were laid before the court on that issue …
Another well-known test has been based on the proposition ‘he who asserts must prove’.”
Colman J did not find any of these tests to be very helpful in the case before him and had to rely on an analysis of the pleadings in the case and the general principles laid down in decided cases.
In Association of Rhodesian Industries & Ors v Brookes & Anor (2) 1972 (1) RLR 338 (G), Beck J was called upon to decide, on the ground of convenience, which party was to begin. He stated at 339E that:
“In terms of r 437(5) of the High Court (General Division) Rules, the court has a discretion to determine which party should begin if a dispute arises in this respect. Accordingly, its provisions are directory, as Mr Whitaker has correctly submitted, and not mandatory. Nevertheless, it does not seem to me that considerations of convenience necessarily require me to direct that the defendants should begin in this case.”
The important principle which emerges from this citation is that a court has the discretion to determine which party should begin. And if a court has such a discretion, equally the adjudicating authority of a tribunal must have that discretion as well, and more so as the proceedings before him or her must be flexible. The labour relations officer in the present case exercised her

discretion by directing that the applicant should begin. That direction should have been complied with.
Applying the test “he who asserts must prove” it is clear that the applicant was asserting that the second respondent had no cause to suspend her, let alone dismiss her. As I have already mentioned it was she who was challenging the decision of the second respondent. She could have quite properly and easily stated the reasons for her suspension and proposed dismissal, which reasons she was already familiar with. No prejudice would have been occasioned to her by beginning.
This brings me to the wider question whether the relief sought by the applicant is properly one that should be obtained in review proceedings. I think not. The decision of the labour relations officer that the applicant was to begin was purely interlocutory. It was not a decision that was decisive or definitive of the rights of the parties nor was it a decision that had the effect of disposing of the whole or at least a portion of the relief claimed by the applicant. It was in fact a direction as to the manner in which the hearing was to proceed. See Jesse v Chioza 1996 (1) ZLR 341 (S) at 344F.

The High Court's review powers specified in s 27 of the High Court Act [Chapter 7:06] are confined to cases where absence of jurisdiction, interest, bias, malice or corruption and gross irregularity are alleged. The applicant has alleged gross unreasonableness as the ground for review. Her application, based as it is on gross unreasonableness, can be attacked on two fronts. The one front is whether this was an error in the method of trial or hearing or whether it was an error of law: see Herbstein & Van Winsen Civil Practice of the Supreme Court of South Africa 4 ed at p 932. I have already stated that the determination of the question who in any proceedings is to begin is a question of substantive and not adjectival law. Aggrieved by the decision of the labour relations officer on a point of law the applicant should have based her review application on illegality and not on a generalised allegation of gross unreasonableness. ROBINSON J in Kadoma Magnesite (Pvt) Ltd v Acting Hearing Officer & Ors 1991 (1) ZLR 283 (H) at 285A-C said the following about legality as a ground of review:

"In Rose-Innes's Judicial Review of Administrative Tribunals in South Africa at p 35, one of the common law grounds of review listed is "if the administrative body or official disregarded the direct provisions of the statute;" Likewise in Secretary for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S) at p 20, KORSAH JA stated that administrative section is subject to control by judicial review under the head of, inter alia, illegality, 'where the decision-making authority has been guilty of an error in law'.

It accordingly follows that where a labour relations officer has been guilty of an error in law by disregarding the provisions of a statute, the aggrieved party is entitled to bring the matter on review to the High Court"

Page 112 of 2001 (2) ZLR 103 (H)

If I am correct, which I think I am, the applicant has not laid a proper ground upon which I can exercise this court's review powers for the reason that an incorrectness which is based on an erroneous view of the law does not constitute gross unreasonableness. I do not however wish to lay it down as a rule of law that where there has been an error in law by a labour relations officer a court may not entertain a review application based on gross unreasonableness when the proper ground for review is really illegality.

The second front on which the review application can be challenged is, as I have already pointed out, that the labour relations officer's ruling was on an interlocutory issue. This is really the basis on my decision. In Ismail & Ors v Additional Magistrate Wynberg & Anor 1963 (1) SA 1 (A) STEYN CJ at 5G-6A stated the following in respect of a superior court's power to intervene:

"It is not every failure of justice which would amount to a gross irregularity justifying intervention before conviction. As was pointed out in Walhaus & Ors v Additional Magistrate Johannesberg 1959 (3) SA 113 (A) at p 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities of errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A superior court should be slow to intervene in unterminated proceedings in a court below and should, generally speaking, confine the exercise of its powers to 'rare cases where

grave injustice would otherwise result or where justice might not by other means be attained' (Walhaus case supra at 120)."

This statement was made in respect of an interlocutory application in a criminal matter. The passage was quoted with approval by DEVITTIE J in Masedza & Ors v Magistrate, Rusape & Anor 1998 (1) ZLR 36 (H), also a criminal matter. DEVITTIE J held that the power of the High Court to review the proceedings in the magistrates court is exercisable even where the proceedings in question have not yet terminated but that it is only in exceptional circumstances that the court will review an interlocutory decision before the termination of the proceedings. He stated that the court will only do so if the irregularity is gross and if the decision will seriously prejudice the rights of the litigant or the irregularity is such that justice might not by other means be attained: see the headnote at p 36F.

The principle outlined in these criminal cases is, in my view, applicable to civil proceedings as well. The principle is sound. In the case of an application against the decision of a labour relations officer on a procedural point, as in the present application, this court must be even more reluctant and slower to entertain or grant it because the decision brought on review is merely interlocutory. The proceedings before labour relations officers are for good

reason supposed to be flexible and less formal than proceedings in a court of law. If litigants were allowed to nit-pick on every possible infraction of procedure or wrong decision before the termination of those proceedings, the hearings would be delayed to a point where the existence of labour relations officers as adjudicating authorities will be rendered nugatory because they will become a clog rather than facilitator in the administration of labour justice. This is even more so where the applicant for review is unable, as was the applicant herein, to show any real prejudice if she had complied with the decision of the labour relations officer.

I may summarise my view of this application by stating that nothing really turned on whether or not the hearing before the labour relations officer was a fresh hearing. The applicant referred the dispute between herself and her employer to the labour relations officer. She should herself have begun her case with the second respondent putting its case later. No prejudice would have been occasioned to her. The alleged error by the labour relations officer, if anything, was an error of law and it may well not have amounted to a grossly unreasonable direction, and on that basis it was not so grossly unreasonable to warrant a review by this court. The error, if such it was, was on an interlocutory procedural point which should not have been allowed to scuttle the proceedings and to require the court to intervene in uncompleted proceedings before a labour relations officer. The error was not so gross as to prejudice the ends of justice. I have no basis for interfering with the decision of the labour relations officer on a merely interlocutory ruling.

Accordingly and for these reasons, the application is dismissed with costs.

Dube, Manikai & Hwacha, applicant's legal practitioners

Sawyer & Mkushi, second respondent's legal practitioners

BHATTI & ANOR v CHIEF IMMIGRATION OFFICER & ANOR

2001 (2) ZLR 114 (H)

Division: High Court, Harare

Judges: Hlatshwayo J
Subject Area: Chamber application
Date: 3, 6 & 8 August 2001
Judgment Number: HH-136-01

Constitutional law — Constitution of Zimbabwe, 1980 — s 22 — right to reside in Zimbabwe — right of citizen to reside in Zimbabwe with alien spouse — when such right may be interfered with — onus of proving unreasonableness of restrictions on such right Immigration Act — prohibited persons — removal of — person married to Zimbabwean citizen — whether citizen's right to reside in Zimbabwe with alien spouse can override State's right to deport spouse — Ministerial certificate of non-disclosure of reasons for deportation — effect

The applicants were Zimbabwean citizens whose foreign husbands were declared to be prohibited persons in terms of s 14(1)(g) of the Immigration Act [Chapter 4:02] and issued with temporary permits allowing them to remain in Zimbabwe only long enough to wind up their affairs. The applicants sought to have their husbands' expulsion interdicted on two grounds: firstly, that their husbands could not be declared prohibited persons by virtue of s 15 of the Immigration Act; and, secondly, that the expulsions would infringe their own constitutionally guaranteed right to remain in Zimbabwe with their husbands. The responsible Minister had certified in terms of s 22(2) of the Act that it would not be in the public interest to disclose his reasons for declaring the two men prohibited persons, and the applicants neither requested those reasons nor alleged that there was no basis for their husbands' deportations.

Held, that s 15(2)(d) of the Immigration Act does not protect foreigners who are already married to Zimbabwean citizens from becoming prohibited persons under para (a), (d), (e), (f) or (g) of s 14(1) of the Act.

Held, further, that the constitutional right of a citizen spouse to reside permanently in Zimbabwe with his or her alien spouse is not an absolute one but is, where applicable, subject to the public-interest limitations stipulated in para (a) of s 22(3) of the Constitution, so long as those restrictions are reasonably justifiable in a democratic society — and the onus of proving that they are not lies on the party impugning their reasonableness.

Held, further, that where the Minister properly issues a certificate of non-disclosure in terms of s 22(2) of the Immigration Act and, in response, the person who is liable to deportation as a prohibited person chooses merely to hide behind a genuine marriage to a citizen, the court

is justified in preferring to believe the Minister as "the voice of the supreme power in the State" unless it is specifically alleged in the pleadings that the person knows no reasons justifying the proposed action or challenges the Minister to produce the reasons so that he may answer them.

Held, further, that because of the way the case was pleaded, the court should not seek a "judicial peep" at the Minister's reasons for declaring the applicants' spouses prohibited persons; any prejudice to the parties or the interests of justice caused by non-disclosure of the reasons was either self-inflicted or minimal.

Held, further, that the applicants had not even attempted to discharge the onus of proving that the restriction on their right to remain in Zimbabwe was not reasonably justifiable in a democratic society. Accordingly, the application had to be dismissed.
Cases cited:
Edwards v Chief Immigration Officer 2000 (1) ZLR 485 (S)
Hambly v Chief Immigration Officer (3) 1998 (2) ZLR 285 (S)
Kenderjian v Chief Immigration Officer 2000 (1) ZLR 697 (S)
Kohlhaas v Chief Immigration Officer & Anor 1997 (2) ZLR 441 (S)
Principal Immigration Officer & Anor v O'Hara & Anor 1993 (1) ZLR 69 (S)
Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S)
Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S)
Legislation considered:
Constitution of Zimbabwe, s 22
Immigration Act [Chapter 4:02], ss 14(1), 15(2) & 22(2)
D Matimba, for the applicants
Miss P Mwarewangepo and N Mutsonziwa, for the respondents
HLATSHWAYO J: The following timeless passage from the Christian Bible has inspired marriage vows and other solemn moments of mutual commitment across many faiths, beliefs and cultures:
"Do not urge me to desert you by turning from you; because wherever you go, there I will go; wherever you lodge I will lodge. Your people shall be my people and your God shall be my God; wherever you die I will die, and there I shall be buried. Thus, may God do to me and worse if anything but death separates you and me" (Ruth 1: 16-17).
Ruth, one of the widowed daughters-in-law of Naomi, uttered the above words in reply to her widowed mother-in-law's pleas to her and the other daughter-in-law, Orpah, not to depart from their country of Moab and accompany her back to her own people in Bethlehem, because they would be far from their own people and Naomi, who had lived in a foreign land knew how that felt.
This heart-rending scene of three widowed, childless and destitute women forlornly and bitterly contemplating an uncertain future goes to show the complexity and trauma involved in issues of establishing and maintaining a home where a foreign land and or foreign spouses are involved, even in this

Biblical setting of the ancient Middle East where the other spouses (the husbands) had long died and there were no children or any significant property for the surviving spouses to consider. In the modern global village, far from these complexities, uncertainties and conflicting interests having been eliminated, they are now multiplied a thousand-fold.
The Bible story, however, does have a happy ending, which no court or institution then or now could have foreseen or prescribed. Orpah heeded Naomi's pleas and stayed behind. But Ruth clung to her mother-in-law and settled with her in Bethlehem. She married Naomi's kinsman, Boaz, and had a son called Obed. In time, Obed had a son called Jesse. And Jesse had a son called David. David was to become King of Israel, a great man and father of the even greater and wiser philosopher-king, Solomon.
The applicants in this matter, Leonora Athea Bhatti (nee Mullin) and Laura Elizabeth Parvez (nee Kearns) are Zimbabwean citizens who contracted marriages in terms of the Marriage Act [Chapter 5:11] to Pakistani nationals, Shiraz Iqbal Bhatti and Umer Parvez

(hereinafter called "the husbands") on 27 May 1999 and 9 July 1999, respectively. The applicants have instituted these proceedings to interdict the respondents from expelling their husbands from Zimbabwe, pending the outcome of an application to be made to the Supreme Court by the wives seeking relief in terms of s 22(1) of the Constitution.

At the time of the marriages, both Pakistani nationals were residing in Zimbabwe on the basis of temporary residence permits issued to them in terms of the Immigration Act [Chapter 4:02] ("the Act") and which are due to expire on 11 August 2001. Both couples have lived together as husbands and wives since their respective marriages. The Parvez union was blessed with a baby child, Siyam Parvez, born on 6 April 2000. There have been no averments or allegations that the unions are not genuine marital ones, which, therefore, rules out any possible legal taint associated with marriages of convenience.

On 26 July 2001, both husbands were served with notices of immediate cancellation of their residence permits and issued instead with temporary permits allowing them to remain in the country only until 11 August 2001 for the purpose of "winding up (their) goods for departure". In addition to that, they were also served with notifications that they had been declared prohibited persons in terms of para (g) of s 14(1) of the Immigration Act.

The applicants responded by filing this urgent application, basing their prayer for restraining the respondents from carrying out the intended expulsions on two grounds: firstly, that the declaration of their husbands as prohibited persons violates the provisions of s 15 of the Immigration Act, and secondly, that the expulsions would infringe the applicants' constitutionally guaranteed

right to freedom of movement in that in order to secure and maintain their marriages they would have to leave the country together with their husbands.

The respondents opposed the relief sought as meant to frustrate a decision taken in the public interest and at the same time the Minister issued a certificate in terms of s 22(2) of the Act confirming that it was not in the public interest to reveal the reasons why the husbands had been declared undesirable immigrants or visitors, thus effectively preventing the inquiry by any court into the reasons for the expulsion or the adequacy of the grounds for the decision. It is noteworthy that neither the applicants, nor their husbands, have requested the disclosure of the reasons or made any averments that there is no basis for the proposed deportations.

The respondents' grounds of opposition are firstly that in terms of s 15(2)(d) as read with s 14(1) of the Act, the husbands fall within a class of persons that can be prohibited and that the effect of the declaration was that the prohibited persons have to leave the country on the prescribed date, i.e., 11 August 2001. Secondly, while properly conceding that the applicants do have the constitutional right of freedom of movement, the first respondent submitted that this right could "not be used to protect individuals who have come to adverse notice" and that "the rights of Zimbabweans as a whole should not be reduced so as to protect the rights of only one individual".

Counsel for respondent argued that the Constitution provides in s 22(3)(a) that a law can restrict the freedom of movement of persons or class of persons in the public interest and that the applicants' freedom of movement should be read in conjunction with provisions limiting such rights.

The interim and the final relief sought in this provisional order application are identical. In other words, there would be no substantially different set of arguments on the return day than the ones currently filed of record. Under such circumstances, it is appropriate to consider the merits of the whole matter and issue a final order. I expressed this view to the legal practitioners representing the parties and it was agreed to proceed accordingly. After receiving the heads of argument from both sides, including supplementary heads, I set down the case for hearing in open court essentially as an opposed matter.

Since the decision to grant or refuse the relief sought depended on the substantive rights alleged, it became absolutely necessary, or even well nigh unavoidable, to examine those rights notwithstanding that the Supreme Court was bound in due course to consider the same or similar issues. This is so because for the purposes of a provisional order, the applicants needed to establish at least a prima facie case. However, even though a "final" interdict is what was sought here, it still remains temporary relief pending the final disposition of the matter by the Supreme Court.

The applicants' first ground of objection is based on the provision of para (d) of s 15(2) of the Immigration Act, as amended by s 6 of Act 8 of 2000, which now reads as shown below. (Please note the repealed portions which, for ease of reference, I have set out in square brackets):

"(2) The following persons or classes of persons shall not be prohibited persons —

(a) a Zimbabwean citizen;

(b) [repealed]

(c) [repealed]

(d) any person who is proved to the satisfaction of an immigration officer or, in the event of an appeal to a magistrates court, to the satisfaction of the magistrate, to be the spouse or child [wife or child] of a person described in paragraph (a) [(a), (b) and (c)] if the spouse or child [wife or child], as the case may be, is not such a person as is described in paragraph (a), (d), (e), (f) or (g) of subsection (1) of section fourteen."

Prior to the Immigration Amendment Act, 2000 (No. 8 of 2000), only foreign wives and children of citizen husbands, and not foreign husbands and children of citizen wives, could benefit from the qualified protection afforded by s 15(2)(d). Needless to say, this was discriminatory of citizens on the grounds of sex. Accordingly, the legislature proceeded to repeal the portions in square brackets above [wife or child] and replaced them with "spouse or child". Thus, the effect of the amendment was to afford the same protection to Zimbabwean women that had hitherto been the preserve of their male counterparts.

The first point that falls for consideration, therefore, is whether, having been declared prohibited persons in terms of para (g) of s 14(1), the husbands can still, nonetheless, avail themselves of the protection of s 15 against such prohibition. Mr Matimba, for the applicants, disputed the contention that once one is declared a prohibited person and notwithstanding the protection afforded foreign spouses in s 15 that person is liable for deportation. He submitted instead that the legislature's intention in enacting s 15 (2)(d) as read with s 14(1) was to target only those non-citizens who after being declared prohibited persons enter into marriages with citizens and not those who legally enter the country, marry a citizen but subsequently fall foul of the s 14(1) provisions.

However, I was not persuaded by this argument for two reasons. Firstly, because the issue of marriages of convenience is adequately catered for by the stringent requirement of proof of marriage contained in s 15(2)(d) and there would have been no need for the legislature to make yet another elaborate provision to guard against the same mischief. Secondly, there is nothing in the provisions of the two sections that remotely suggests that interpretation. If anything, the circumstances, which may attract "adverse notice" in the relevant paragraphs of s 14(1), are of a continuing nature,
Page 119 of 2001 (2) ZLR 114 (H)
relating as they do to both past and future conduct or circumstances. For example, in terms of para (e) not only must the person have a relatively clean criminal record, but also future criminal conduct of a specified type would expose that person to the risk of being deported.
I also found unsustainable, and counsel did not press too hard either, the submission that once the respondents had granted a permit to the applicants' husbands, they could not later declare them prohibited persons, as they would be functus officio. It is quite clear to me, without going too deeply into this submission, that the whole field of immigration law is replete with provisions allowing officials to re-examine their decisions in the light of new information received. Reference in this regard can be had to the Act itself and the Regulations made there under, e.g. SI 195/98.
Now, I turn to the applicants' second ground of objection to the proposed deportation of their husbands. However, I would like first to point out that the amendments of the Act noted above were preceded by the fourteenth amendment to the Constitution in which a whole array of discriminatory provisions were swept away in one fell swoop so that this amendment may justifiably be dubbed "the equal rights amendment". In terms of the Constitution of Zimbabwe Amendment (No. 14) Act of 1996, alien female spouses' automatic entitlement to citizenship upon marriage to male citizens was taken away and all foreign spouses were treated equally, albeit, paradoxically, in that they all now enjoyed lesser rights than those previously enjoyed by the preferred group. Further, s 22(3)(d) of the Constitution was also amended to make it clear that marriage or other relationship to a citizen shall not prevent the state from imposing restrictions on the movement or residence within Zimbabwe of non-citizens.
In coming up with all these amendments to the Constitution and to the Act, the legislature was in fact recognising, synthesizing, formalising and incorporating into the statute book not only what had been lobbied for by wider society but also, and more importantly in this regard, what was decided in a series of ground-breaking cases beginning with Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S), followed by Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S), Kohlhaas v Chief Immigration Officer & Anor 1997 (2) ZLR 441 (S) and culminating in Hambly v Chief Immigration Officer (3) 1998 (2) ZLR 285 (S).
In these cases, the Supreme Court had declared that a female citizen of Zimbabwe, married to an alien, is entitled by virtue of the right of movement protected under subs (1) of s 22 of the Constitution, to reside permanently with her husband in any part of Zimbabwe. This is the basis of the applicants' second ground of objection to the proposed action.
In the context of these constitutional amendments, the Supreme Court had
Page 120 of 2001 (2) ZLR 114 (H)

occasion in the Kohlhaas case supra to assess their impact on the above principles that the court had itself ingeniously developed. This, in my humble opinion, should have been the occasion for the Supreme Court to stand back, take stock and indeed admire how its handiwork had catalysed a truly remarkable change in the law. The fact that the Supreme Court missed a deserved self-congratulatory moment is regrettable but its failure, in my respectful opinion, to seize the opportunity, given the legislature's demonstrated positive response, to lay the foundation for greater growth was indeed calamitous. For, in the passage below, the court, with the greatest of respects, seems to have opted for protecting what, in my view, had been gained in the past but no longer needed protection as it had already been incorporated into the statute book:

"Accordingly, it is my view that the recent amendment to para (d) to s 22(3) of the Constitution does not in any way impact upon, interfere with or diminish, the mobility rights of a citizen wife and, in particular, the right to have her alien husband reside with her permanently in Zimbabwe. The Rattigan and Salem decisions retain their authority. The effect of the amendment is merely to restate the law in relation to the rights of non-citizens. It leaves untouched the rights of citizen spouse. The addition of the concluding sentence to para (d) merely puts in express wording what was previously implicit, namely, that marriage to a citizen spouse or to a person who enjoys permanent residence in Zimbabwe, will not afford the alien partner protection against the imposition of restrictions on movement or residence in Zimbabwe or expulsion from Zimbabwe, under the authority of a law which makes such provision": per Gubbay CJ at p 444F-H.

The creative way in which the Supreme Court had extended rights to the fairer half of our society who were unjustifiably denied them had maximum value while those rights remained denied but, in my view, its perpetuation once those rights were conceded was bound to put a severe strain on the future development of the law. It is sincerely hoped that the Supreme Court will have occasion to address some of the conceptual and practical problems, which are attended to the Rattigan decisions.

Conceptually, it is unsatisfactory, I think, to premise the enjoyment of a fundamental right on purely procedural considerations resulting in the denial or granting of the right entirely on the identity of the spouse who has brought the application. Practically, the scheme puts the court in a difficult position where it has to make a decision on the entitlement of a citizen spouse when the fundamental facts for that concern a party, the foreign spouse, not before it. It is heartening, though, that recently, the Supreme Court has started to address some of the practical problems head-on by insisting that the rights safeguarded under s 22(1) "should only be sanctioned in well defined cases" in order to avoid frustrating the State's prerogative of prohibiting certain persons in the public interest. See Kenderjian infra at p 701E-F.

I have made the above comments purely as an expression of regret that an

acceptance that the 14th amendment had made substantive changes would have eliminated in one stroke most of these conceptual and practical problems. It would have opened an opportunity for the restrictions on all foreigners to be considered in terms of their constitutional justifiability in a democratic society, with the existence of any special relationship such as marriage being taken as a factor to be considered together with others. As the law stands now, it appears that only those foreigners with special relationships to citizens can vicariously enjoy constitutional rights while all the others,

the vast majority who probably forsaking their own families trek into this land, are excluded — a skewed and elitist approach that can only encourage the establishment or presentation of artificial relationships. However, I remain fully mindful that I am bound to follow the decision in Kohlhaas and all the other cases deriving their force from it and I shall do so.

Accordingly, I uphold the applicants' basic contention, but I am in full agreement with the submissions of respondents' counsel that the right of the citizen spouse to reside with his or her foreign spouse once established as has been done, is, nonetheless, still subject to the public interest limitations stipulated in para (a) of s 22(3) as long as such restrictions are reasonably justifiable in a democratic society – the onus of proof being on the party impugning the reasonableness of the restrictions.

This position is completely in line with what was clearly stated by Gubbay CJ, with McNally and Muchechetere JJA concurring, in the case of Kenderjian v Chief Immigration Officer 2000 (1) ZLR 697 (S) at 699F-H-700A-C and deserves quoting at some length:

"I did not understand counsel for the respondent to dispute that effecting the removal of Kenderjian under the authority of section 17(a) of the Act, will interfere with the applicant's entitlement guaranteed by section 22(1) of the Constitution, to reside permanently with him, as her husband, in any part of Zimbabwe. It will place her in the dilemma of having to decide whether to accompany Kenderjian to Lebanon and live there with their child as a family unit, or to exercise her afforded right to continue residing in Zimbabwe without his physical comfort and support. See Rattigan & Ors v Chief Immigration Officer & Anor supra at 60D-F; Kohlhaas v Chief Immigration Officer & Anor supra at 442E-F)" at 699F-G.

In other words, what is established above, which I will call the first stage of the inquiry, is the right as defined in the Rattigan line of cases, taking into account whether the marriage is one of convenience or not. What follows in the continuation of the quotation below is the second stage, the qualification of that right:

"On the other hand, I do not think it can be gainsaid that the limitations on the freedom of movement, which serve one or more of the legitimate five aims or exceptions listed in section 22(3)(a) of the Constitution are invalid [sic]. In casu, only public safety and public order may be posited as legitimate aims for the enactment of section 14(1)(e)(i) of the Act.

Page 122 of 2001 (2) ZLR 114 (H)

Undoubtedly, the removal of Kenderjian from this country, looked at in the light of the aggravating circumstances surrounding the very serious crime he committed, is manifestly aimed at ensuring the interests of public safety and public order in Zimbabwe. The interference at issue is, therefore, in line with the legitimate aims authorised by the Constitution" (at 699H-700A-B).

Finally, the learned Chief Justice addresses the issue of onus of proof at 700B-C:

"It follows that the crucial question to be decided is whether the applicant has been able to show that such interference, under the authority of s 17(a) of the Act, is not reasonably justifiable in a democratic society. See Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S) at 382 in fine - 383A; Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S) at 219F-G."

The above definitive statement of the law, in my view, must be construed to mean that the right of the citizen spouse to reside permanently in Zimbabwe with an alien spouse is not an absolute one, but is, where applicable, subject to public interest limitations in para (a) of s 22(3). The present application, which seeks to assert the applicants' rights without attempting to show that the public interest exception raised by respondents is not a justified interference reflects a misconception that the right is somehow an absolute one. This misconception seems to have arisen from the lack of appreciation that in the whole of the earlier Rattigan line of cases referred to above, the Supreme Court was never prayed to make a finding on the constitutional reasonableness or justifiability of any other specific provision, restriction or limitation of the Immigration Act except to grapple in general terms with the pervasive unequal treatment of citizen wives of alien husbands. In my view, the need to go beyond the first stage inquiry of establishing the right to the second stage qualification of the right did not arise in these early cases.

The preoccupation at the time by the Supreme Court with the issue of equal treatment of citizen spouses is borne out by academic and other critical comments on the cases in question. For example, University of Zimbabwe lecturer, Greg Linington, in an article entitled "Protection from discrimination" (1999) 2 Zimbabwe Human Rights Bulletin 145 at 150, makes the following observation:

"At the time of the Munhumeso and Rattigan decisions, s 11 of the Constitution stated that '… every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual … whatever his race, tribe, place of origin, political opinions, colour, creed or sex … ' (author's emphasis). Section 23 did not then cite sex or gender as being amongst the proscribed grounds of discrimination. In the Rattigan case supra, the issue before the Supreme Court was whether Zimbabwean women are entitled to reside in the country with their foreign spouses. All three applicants had applied to the Immigration Department for permits entitling their husbands to reside in Zimbabwe.

All of the applications were refused. Had the applicants been men applying for residence permits for their foreign wives, the permits would have been granted. In his judgment,

Gubbay CJ, writing for a unanimous bench, began by referring to the Dow case with approval and to s 11 of the Constitution. It appeared as if the Supreme Court was about to follow Dow and decide the case before it on the basis that s 11 prohibited sexual discrimination and that the effect of s 11 in that regard was not limited or restricted by the omission of the words "sex" and "gender" in s 23. Rather surprisingly however, after beginning to develop a line of reasoning along these lines, the learned Chief Justice dropped the issue of discrimination — left it hanging in the air in fact — and decided the case instead on the basis that a contravention of s 22 of the Constitution (the provision dealing with freedom of movement) had occurred."

Similar criticism of the Rattigan decision was made by another University of Zimbabwe law lecturer, Lovemore Madhuku, in an article entitled, "Magic and Constitutional Interpretation: Case Note on Rattigan & Ors v The Chief Immigration Officer & Ors" (1994) 6 Legal Forum no. 3 p 9 at 11-13.

In my opinion, that the above Supreme Court cases did not establish an unqualified right of citizen spouses to reside with their foreign spouses has increasingly become clearer as the Supreme Court started examining the reasonableness and justifiability of specific

restrictions imposed by the Immigration Act after the elimination of discriminatory provisions had been achieved. See Kenderjian supra and Edwards infra.
The Act now treats all citizen spouses equally in relation to their alien spouses. In certain respects, foreign spouses and children enjoy rights of citizens and cannot be deported. In other aspects, this right is qualified. For example, a foreign spouse cannot be deported from Zimbabwe on the basis that he is likely to become a public charge "by reason of infirmity of mind or body" or "insufficient means to support himself" and his dependants (s 14(1)(b)). However, a foreign spouse may be deported where, for example, she or he has been convicted in Zimbabwe or elsewhere of a serious offence such as treason, sedition, murder, public violence, etc (s14(1)(e)(i)).
To hold that aliens absolutely cannot be deported from Zimbabwe if they are married to, or are children of, citizens is to completely ignore the complex relationships and responsibilities that both national and international law impose on the aliens themselves, the States of origin and residence and the citizens of the State of residence, which one learned author has expressed thus:
"The admission of aliens into a State immediately calls into existence certain correlative rights and duties. The alien has rights to the protection of the local law. He owes a duty to observe that law and assumes a relationship towards the State of his residence sometimes referred to as 'temporary allegiance'.
The State has the right to expect that the alien shall observe its laws and that his conduct shall not be incompatible with the good order of the State and of the community in which he resides or sojourns. It has the obligation to give him that degree of protection for his person and property, which he and his State have the right to expect under local law, under

international law, and under treaties and conventions between his State and the State of residence. Failure of the alien or of the State to observe these requirements may give rise to responsibility in varying degrees, the alien being amenable to the local law or subject to expulsion from the State, or both, and the State being responsible to the alien or to the State of which he is a national": Hackworth, Digest of International Law (1943), vol 5, pp 471-472 quoted in Dixon & McCorquodale, Cases and Material on International Law, Blackstone Press Ltd, London, 1991 p 428.
In the Kenderjian case, the Supreme Court emphasised the need for the protected rights of individuals to be viewed in the light of public interest policies pursued by the host State, thus:
"The immediate obstacle that faces the applicant is to establish that the interference with the rights secured under s 22(1) of the Constitution is disproportionate to the threat to public safety and public order which Kenderjian's presence in Zimbabwe poses; for that, as I have said, is the legitimate aim pursued by the State.
In the one pan of the scales is to be placed the public interest in the removal of an individual who, by reason of his past criminal record, is justifiably seen by the authorities as a threat to the safety of persons and property. In the other pan is the certain disruption to the life of the applicant … " (at p 700C-D).
In Edwards v Chief Immigration Officer 2000 (1) ZLR 485 (S), the appellant had been convicted of remaining in Zimbabwe without a permit to do so. She therefore became a "prohibited person" in terms of s 14 of the Act. After attempts to remove her had been

made by immigration authorities, she married a Zimbabwean citizen. On appeal, it was argued that as the wife of a citizen, she could not be classified as a prohibited person and so could not be removed from Zimbabwe. It was held that neither her subsequent marriage nor the Minister's revocation of the prohibition order could cure her status as a prohibited person.

Gubbay CJ, with the concurrence of Muchechetere and Sandura JJA, made the following observation at 489:

"Furthermore, it is implicit that s 15(2) classifies persons or classes of persons who are not regarded as prohibited persons under s 14. Thus, the actuality of being a prohibited person at the date of her marriage to a citizen of Zimbabwe effectively disqualified the appellant from becoming a non-prohibited person under para (d) to s 15(2) of the Act. A contrary interpretation would give rise to the ability of a prohibited person to evade the restriction against entry or removal from Zimbawe by marriage to a Zimbabwean citizen. It would defeat the predominant purpose behind immigration laws, which is to protect the State in the interests of its citizens by the control and supervision of aliens who seek to enter and remain within the country. The point is underscored by the following illustrations. Suppose a foreign prostitute, who under para (f) to s 14(1) of the Act is a prohibited person, were to enter the country illegally and marry a citizen of Zimbabwe. It would be absurd to suggest that by such a marriage she would receive the protection of s 15(2)(d) against removal from the country" (my emphasis).

I am in respectful agreement with the learned Chief Justice's sentiments expressed above. Accordingly, and with respect, I doubt if the position

concerning the prostitute in the example given should be regarded as any less absurd if her citizen spouse were to be granted the right to reside permanently with her in Zimbabwe purely, simply and exclusively on the basis that her expulsion would violate his fundamental freedom of movement. It seems to me that the citizen's right to reside with such a foreign spouse must be balanced against the public interest considerations that dictated her expulsion in the first place. Again, Gubbay CJ in Kenderjian expresses the matter succinctly, thus:

"The removal of prohibited persons — which one can understand as being considered necessary in a situation as serious as this one — is a prerogative of the State. It is my belief that the restriction upon the use of such prerogative by the rights safeguarded under s 22 of the Constitution, should only be sanctioned in well defined cases. This is not one of them. A contrary decision by this court would set a dangerous precedent in which the existence of a genuine marriage to a citizen of Zimbabwe could be relied upon to place an alien guilty of committing the most serious of crimes beyond the reach of the immigration authorities" (at p 701E-F).

I must now apply the law as stated above to the present case. The applicants' husbands, being persons described in para (g) to s 14(1), are not protected by s 15(2)(d) from being classified as prohibited persons despite their marriage to Zimbabwean citizens. The circumstances under which foreign spouses of citizens may "come to adverse notice" in terms of paras (a), (d), (e) (f) and (g) of s 14(1) and thus lose the protection they enjoy under s 15(2)(d) are very serious public interest matters, covering the key areas of defence, public safety, public order, public morality and public health.

The fact that the Minister has, in the public interest, declined to disclose the reasons for the prohibition of applicants' husbands is an indication of the seriousness of the allegations against them, especially given that neither the applicants nor their husbands have requested those reasons or made any averments that there is no basis for the proposed deportations. The submission by the respondents that the allegations fall under para (a) of s 22(3) has not been disputed. Nothing has been placed before the court that casts any doubt on the bona fides of the decision made by the Minister.

Therefore, it is my considered view that where the Minister is constrained to act in terms of a properly issued certificate of non-disclosure and, in response, the foreign spouse chooses merely to hide behind a genuine marriage to a citizen, the court is justified in preferring to believe the Minister "as the voice of the supreme power in the State" (Principal Immigration Officer & Anor v O' Hara & Anor 1993 (1) ZLR 69 (S)), unless the foreign spouse steps forward or comes clean, that is to say, unless it is specifically alleged in the pleadings, which has not been done in this case, that there are no reasons known to the applicant justifying the proposed action and that if

there are any, the applicant challenges the Minister to produce the same in the manner most appropriate so that the applicant may answer them. Only then will a basis have been created for the court to look behind the certificate.

The non-disclosure of reasons by the Minister does cause some difficulties, but in appropriate cases the courts have insisted on having at least a judicial "peep". However, that too may raise problems of suspicion of possible judicial collusion with the executive. Furthermore, in cases such as the present one, the private judicial examination of the privileged information, however tempting to the judge's own curiosity, would only prejudice the applicant who has not demanded its production and cannot assist an applicant who needs the reasons (but is denied them because they involve sensitive information) in order to discharge the onus placed on him or her. However, because of the manner in which this case was pleaded I was satisfied that "any prejudice to the parties or to the interests of justice that might be caused by the non-disclosure" was either self-inflicted or minimal. See s 10(1) of the Civil Evidence Act [Chapter 8:01].

The respondents having raised the s 22(3)(a) exception to the assertion by applicants of their freedom of movement, the onus was now upon the applicants to prove, or at the very least indicate their readiness to do so, that the restriction in the circumstances was not reasonably justifiable in a democratic society. They have not even attempted to do that, apparently labouring under the misapprehension that the right to have their foreign spouses reside with them is absolute. Only the citizens themselves qua citizens have an unqualified right not to be expelled from Zimbabwe even when all the para (a) exceptions are proved to the highest degree against them. See s 22(4) of the Constitution.

Accordingly, I am left with no choice but to dismiss the application. Nevertheless, because the questions of law raised by the applicants were important ones on which the answers were not so obvious, I hereby order that each party should bear its own costs.

Finally, it is my hope that the Bhatti and Parvez families will find what comfort and inspiration they may in the Bible story I alluded to at the beginning as they reorganise their lives in the light of this or any other future decision in this matter.

Matimba & Muchengeti, applicants' legal practioners

Civil Division, Attorney-General's Office, respondents' legal practitioners

S v RWODZI
2001 (2) ZLR 127 (H)
Division: High Court, Harare
Judges: Adam J
Subject Area: Criminal review
Date: 22 August 2001
Judgment Number: HH-134-01

Criminal law — statutory offences — Infanticide Act [Chapter 9:12] — s 2(1) — need to show that accused caused death of child — evidence only of abandonment not sufficient
The accused pleaded guilty to contravening s 2(1) of the Infanticide Act [Chapter 9:12] and was sentenced to a partly suspended term of imprisonment. She admitted having given birth to a live baby, whom she took a few days after the birth, clothed and wrapped in a cloth, and put in a shallow pit not far from a road. When the police took her to the scene there was no sign of the baby, although the cloth was still there. There was thus no evidence of that the child had died or of the cause of death. She admitted that she wanted to do away with the child and that through her actions the child would eventually die of exposure.
Held, that the accused had undoubtedly abandoned her child, but the section under which she was charged spoke of unlawfully and intentionally causing the death of a child.
The essential elements are the same as murder. There was, though, no evidence that the child had died, so she should have been convicted only of attempted infanticide.
Cases cited:
R v Kruger 1943 OPD 111
R v Poteradzayi 1959 (1) R & N 31 (FS)
R v White (1871) LR 2 CCR 311
ADAM J: The accused was convicted on her guilty plea of the contravention of s 2(1) of the Infanticide Act [Chapter 9:12]. She was sentenced to two years' imprisonment of which nine months were suspended for five years on condition she did not within that period commit any offence involving the contravention of s 2(1) of that Act or s 2 of the Concealment of Birth Act [Chapter 9:04] for which she is sentenced to imprisonment without the option of a fine.
The accused admitted to the trial magistrate that she gave birth to a live baby boy whom she took a few days later clothed and wrapped in a cloth and put in a shallow pit in the bush not far from the road. She covered the pit with branches and returned to her home. This shallow pit was some 2 kilometres

away from the nearest homestead. A week after this when the police investigated the matter, the accused went back in their company to that spot. At the shallow pit, only the cloth in which the baby was wrapped was recovered. This was not torn and not blood stained and no bones and no clothing of the baby boy were found around the place. There were no signs there to suggest that the child had been killed. The accused thought that the child might have been dragged away by wild animals or dogs. But there was nothing to indicate this at the site. It follows that there was no evidence as to the cause of death. In answer to the trial magistrate's question, she said she did not have any lawful right to leave the child on its own and causing its death or disappearance.

She did not have any defence to offer. She admitted she wanted to do away with him and that through her actions the child was going to eventually die due to exposure.
In R v Kruger 1943 OPD 111 at 112, it was stated that "abandon" when used ordinarily envisages "a wilful omission on the part of the person legally bound to do so". In R v White (1871) LR 2 CCR 311 at 314, Blackburn J said:
"And when the child is left in a position of danger of which he knows and from which he has full power to remove it, and he neglects his duty of protection, and lets the child remain in danger, I think this is an … abandonment."
Clearly, the accused had doubtedly abandoned her child.
Section 2(1) of the Infanticide Act speaks of unlawfully and intentionally causing the death of the child. This means that for the statutory offence of infanticide, the essential elements, just like for murder, are unlawful, intentional killing of a live human person. In this case, there was evidence that the accused's act was unlawful in that she without any right to do so put her helpless child in the shallow pit. She admitted that she wanted to do away with her child because her mother had chased her away. This indicated that she (dolus directus) contemplated and expected that as a consequence of her putting her child in the shallow pit, death would ensue. If that is so, in any case, the accused (dolus eventualis) foresaw the reasonable possibility that her act in putting her child in the shallow pit involved the risk to life and was reckless as to whether or not such risk resulted in death — R v Poteradzayi 1959 (1) R & N 31 (FS) at 34. There was no evidence of the child being killed and so it cannot be said that the accused caused the death of her child since there was nothing at the site to indicate that the child had been killed. In this situation, the trial magistrate erred in convicting the accused of committing the offence of infanticide. The trial magistrate should have instead found her guilty of an attempt to commit such an offence.
Page 129 of 2001 (2) ZLR 127 (H)
Accordingly, the conviction is altered to one of attempt to commit the offence of infanticide.
Chinhengo J agrees
OCEANER (PVT) LTD & ANOR v UPPERCLASS ENTERPRISES (PVT) LTD & ANOR
2001 (2) ZLR 130 (H)
Division: High Court, Harare
Judges: Chiweshe J
Subject Area: Civil action
Date: 20 June & 22 August 2001
Judgment Number: HH-138-01

Contract — pactum commissorium — what is — illegality of — reasons for such contract being illegal
The plaintiffs undertook to pay certain sums to the first defendant, and as security for due payment, pledged a piece of immovable property. It was agreed that, in default of payment, the first defendant would be entitled to take transfer of the property. The agreed value of the property was slightly less than the sum due. When the plaintiffs defaulted, the first defendant took possession of the property and demanded transfer of it into its name, as well as payment of the balance outstanding. The plaintiffs sought an order

setting aside the agreement on the grounds of illegality, in that it sought to oust the jurisdiction of the court by allowing the defendant to resort to self-help.
Held, that this arrangement was a pactum commissorium and was unenforceable. The courts have always been reluctant to enforce such arrangements, because it can happen that things of the greatest value are surrendered in payment of a trifling debt, the debtor having agreed to onerous conditions in the forlorn hope that they would avoid the rigours of the agreement before the day of reckoning came. The fact that, in this case, the plaintiffs had agreed to the fair market value of the immovable property did not take way from the sound reasons behind the policy. Judgment would be entered for the sum owed, plus interest, but transfer would not be ordered.
Cases cited:
Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor 1994 (1) ZLR 320 (H)
Mapenduka v Ashington 1919 AD 343
van Rensburg v Weiblen 1916 OPD 247
No appearance for the plaintiffs
F Nyangani, for the first defendant
CHIWESHE J: At a pre-trial conference held on 11 July 2000 at which plaintiffs were in default, it was ordered that plaintiffs' claim be dismissed with costs and that the first defendant be given leave to enrol its counter-claim on the unopposed roll and to file its heads of argument in support of its claim that the agreement between it and the plaintiffs is valid and therefore enforceable.

In June 1998, the plaintiffs and the first defendant entered into a written agreement in respect of which plaintiffs sold to the first defendant air tickets for the sum of $321 600. In addition, the sum of $45 000 was paid by the plaintiffs on behalf of the defendant to the National Arts Council of Zimbabwe.
The material terms and conditions of the agreement were as follows:
The first plaintiff would pay the $321 600 on or before 27 June 1998 and the $45 000 on or before 29 June 1998. In default of payment, the amount due would attract interest at the rate of 36 per cent per annum.
As security for due payment of the amount, the first plaintiff "mortgaged" to first defendant his property, namely, an undivided 6.7 per cent share being No. 4 of Lot 2 of Lot 54A, Block A, Avondale in the District of Salisbury held under Deed of Transfer 4310/96 dated 31 May 1996. In default of payment by the first plaintiff, the defendants would be entitled to have the mortgaged property transferred to them at an agreed market value of $350 000 and thereafter the first plaintiff would still be liable to the first defendant for the balance of $16 000. The first plaintiff agreed to pay the first defendant's legal costs on a legal practitioner and client scale in respect of any legal action instituted against him by the first defendant to recover any amount or to enforce the agreement. The first plaintiff failed to pay the amount in terms of the agreement. The first defendant then took possession of the "mortgaged" property and demanded transfer of the same into its name and payment of $16 000.
At that stage, the plaintiffs issued summons in which they sought an order setting aside the agreement between them and the first defendant on the grounds that the agreement was illegal, in that it seeks to oust the jurisdiction of the court by allowing defendant to resort to self help and thereby defeating or obstructing the course of justice. They also

sought an order revising the quantum of the amounts owed by them. The first defendant entered an appearance to defend the plaintiffs' claim and filed a counter-claim in which it sought to compel the plaintiffs to transfer to it the property in question.
The plaintiffs resolved to proceed with their claim, and their defence to the counter-claim fizzled out at some stage during the pleadings. By the time the pre-trial conference was held, the plaintiffs had not made discovery, nor had they filed their summary of evidence. Indeed, they were in default at the pre-trial conference where it was ordered that their claim be dismissed with costs. The first defendant enrolled the matter on the unopposed roll and filed its heads of arguments on a point of law, namely, whether the agreement entered between it and the first plaintiff was valid and therefore enforceable.
Page 132 of 2001 (2) ZLR 130 (H)
An agreement of this nature, in which immovable property is surrendered to another in order to secure a debt, amounts to a pactum commissorium and is accordingly invalid and not enforceable. In van Rensburg v Weiblen 1916 OPD 247, a pactum commissorium is defined as "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt".
In Mapenduka v Ashington 1919 AD 343 de Villiers AJA, quoting Voet 20.1.25, discusses the reasons why the courts have been reluctant to enforce such agreements:
"Inasmuch as it might be agreed that when a debt is not paid within a certain time the creditor is to retain the thing pledged for the debt, things of the greatest importance and value would often be ceded in payment of a trifling debt; the debtor, needy and pressed by the strained condition of his pecuniary circumstances, readily submitting to the insertion of hard and inhuman conditions (in the bond) and holding out to himself the promise of better times and fortune before the arrival of a day fixed by the pactum commissorium, and hoping that the asperity of the pact will be averted by him by payment, a slippery and fallacious hope, however, to which the event not rarely fails to respond."
And in Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor 1994 (1) ZLR 320 (H), Mtambanengwe J refused to enforce a similar agreement saying:
"It is quite understandable, in those circumstances, that the defendants, their minds pre-occupied with avoiding the imminent disaster facing them, did submit to the onerous conditions enacted by the plaintiff in the forlorn hope that they would avert the rigours of the agreement before the day of reckoning came."
The applicants have argued that the present case should be treated as an exception to the general rule, because the fair market value of the property in question was agreed to and therefore no prejudice visits the debtor. However, the general rule, in my view, is based on sound considerations of public policy. The majority of the authorities favour this approach. To say that the debtor entered into the agreement willingly and voluntarily or that a fair evaluation of the property was agreed to is to miss the point altogether. The point is that the fairness and volition of the agreement is itself in doubt, considering the dire position in which the debtor often finds himself in cases of this nature. Accordingly, I am reluctant to hold the agreement valid and enforceable. In any event, the alternative remedy sought, that of a monetary judgment, will meet the justice of the case. If granted, the property in question becomes executable.

Accordingly, I order that judgment be entered in favour of the first defendant against the second plaintiff with costs on a legal practitioner and

client scale, in the sum of $366 600 together with interest at 36 per cent per annum from 29 June 1998 to date of full payment.
Mutezo & Partners, first and second plaintiffs' legal practitioners
I E G Musimbe & Partners, first defendant's legal practitioners

MUGADZA v MINISTER OF HOME AFFAIRS & ANOR
2001 (2) ZLR 134 (H)
Division: High Court, Harare
Judges: Gillespie J
Subject Area: Civil action
Date: 22 August 2001
Judgment Number: HH-140-01

Police — force — use of to preserve law and order — extent to which justified — need to use minimum force and to protect innocent bystanders — liability when force used indiscriminately or inadequate measures taken to protect innocent bystanders
The forces of law and order may use force, even potentially deadly force, to protect lives and property and preserve the peace, but the whole philosophy of the use of force in a democratic country is that where violence is required to meet an unlawful challenge to order and peace, only the minimum force required to quell that challenge may be used, and it must be used in a way that is reasonably calculated to avoid unnecessary harm, not only to wrongdoers but especially to innocent bystanders. This principle finds its application in any consideration of delictual liability, in the interlinked concepts of fault and wrongfulness. Fault, in the sense of foreseeability, is inevitable: the foreseeability of harm to innocent bystanders is obvious where firearms are used in an urban setting. Blameworthiness must follow where inadequate measures are taken to protect the public or resort is had to the unnecessary use of force.
The plaintiff sustained a serious gunshot wound as he was returning home one night through a riot-torn area of Harare. He alleged it was a policeman who fired the shot; the police denied that any police officer discharged a firearm at the place and time that the plaintiff was shot. The evidence given by the police was contradictory, however, and the evidence as a whole suggested that an inadequate force of policemen had been unable to prevent widespread rioting, and had resorted to an indiscriminate use of firearms. Although the police were engaged in sporadic running battles with rioters in the area, they had made no attempt to establish a cordon, nor had they set up road-blocks to keep innocent people out of the area.
Held, that the shot that injured the plaintiff was probably fired by a policeman, and in the premises the shooting was wrongful and culpable.
Case cited:
Musadzikwa v Minister of Home Affairs & Anor 2000 (1) ZLR 405 (H)
Mutenga for plaintiff
Mrs L Mutanda-Moyo, for defendants
GILLESPIE J: The plaintiff was shot during the course of riots. The riots occurred during independent civil unrest on 19 January 1998 and were, at the

time, referred to as the "food riots". The plaintiff had spent a long day at his place of employment, a restaurant in Newlands, Harare, and had left as early as he could after receiving a telephoned warning from his wife of disturbances in Kuwadzana, the high density township where he resides. Despite that, it was almost midnight before he arrived in the vicinity of the township.

It was obvious when he arrived that there was trouble afoot. The minibus in which he was travelling would not venture into the centre of the town, the main access road having been barricaded with the tumbledown remains of a shanty store. Exploring on foot beyond this point, walking towards his own house, the plaintiff encountered chaotic assemblies of people; rioters, passers-by and security forces, all milling amidst clouds of tear gas smoke, random gunshots punctuating the melee with added notes of menace. One of three shots struck the plaintiff, causing him serious abdominal injury. He staggered home, where he was eventually able to rouse his wife, who let him into their home and called for assistance. After a lengthy wait, with no ambulance service arriving and the plaintiff failing, the two made their own way to hospital, where appropriate treatment was eventually given.

The general account of the plaintiff's case is entirely uncontested. The only detail upon which any dispute exists is whether the gunshot was fired by a policeman. This is the plaintiff's case. It is based upon his own testimony, describing the manner of dress of the security forces seen, and the nature of the weapons with which they were armed. The description he gives suggests persuasively that the personnel attempting to combat the riot were police officers in riot dress armed with rifles or side-arms. This evidence is supported by the testimony of three other persons who witnessed varying degrees of rioting, and attempts at riot control, in that and nearby locations at various times.

The defence case is completely set out in the plea, which denies the averment that the shot was fired by a policeman. It avers that "No police officer discharged a firearm at that place and time". Unequivocal. The evidence for the plaintiff, however, was more than enough to put the defendants on their defence. Although there is no suggestion, much less proof, of who fired the shot, and although it was possible that it could have been fired by someone other than a policeman, for instance a shopkeeper possessed of a firearm, the testimony given, if accepted, would justify judgment for the plaintiff.

The evidence led for the defendant consists in the main of the testimony of Supt. Dumbure, the officer-in-charge of the Marimba police station. His command controlled the area in which occurred the riots affecting the plaintiff. He states with complete assurance that there were no police details armed with firearms on duty in the allegedly affected area. At midday on

19 January 1998, he says, he sent an assistant inspector and eight men with tear gas to guard five shopping centres in Mufakose — elsewhere than where the shooting of the plaintiff occurred. At 6 p.m. he asserts, he heard reports of cars being stoned on the Bulawayo road between Highfield and Dzivarasekwa, somewhat nearer the locality concerned but still not Kuwadzana by any means. This was dealt with by ZRP Dzivarasekwa. As for Kuwadzana, the only men in the area were two officers armed with batons on a routine patrol. He knew of no disturbances in the area save for anonymous

reports, at around 7 p.m. of disturbances in the area. Mobile patrols into the area at 4 a.m. on 20 January 1998, he claims, discovered the shopping centre already looted.
Support for this came from a constable — one of the two on the routine foot patrol referred to. He saw some looting in Kuwadzana, at section 2; not section 4, the venue of the alleged shooting. They reported and details from Marimba arrived to disperse rioters. They did not go to section 4 and cannot comment on section 4.
The most important feature of these two pieces of testimony is the divergence on whether men were sent into Kuwadzana to quell riots. Supt. Dumbure says not. Cst Phiri says so.
Also striking is the absence of any attempt to document the claims of the officer-in-charge. The only document produced was a scenes report opened on 28 January 1998 and closed as undetected by the Superintendent on 9 April 1998.
The date of opening was the date the plaintiff's wife made her complaint to the police, the day following the plaintiff's discharge from hospital. A reading of the investigation log reveals a pitiful inattentiveness to duty. The constable receiving the report recorded, without any foundation at all, his conclusion that the plaintiff had been looting when shot. Not until 12 February 1998 did a policeman do any investigation. And then he only went to interview the plaintiff. It took the investigating officer until 11 March 1998 to write a 16-line summary of the case and to forward it for closing. Closure was on 14 April 1998.
Disgraceful! This pathetic endeavour is so far removed from any tentative, not to mention serious, attempt to discover what had happened that one is tempted to conclude that the real purpose of the so-called investigation was to cover up an inappropriate use of firearms. At any rate, there was ample reason to order, as I did, the production of contemporaneous occurrence books and police armoury log sheets in order to determine whether Supt. Dumbure's words were reliable.
They are not. A perusal of a set of firearms record cards, a set which I am advised by both counsel is incomplete, shows that on 19 January 1998 at least one riot gun (firing tear gas) one rifle and three shotguns were on issue. One

of the persons to whom a shotgun was issued, a Cst Takura, testified that although he was issued with such a weapon, before he left the police station he returned it to the armoury — it being determined that tear gas alone would be used. One views this explanation with deep suspicion, given what Dumbure had already said. Further, it does not explain at least one other shotgun on issue on 19 January, which weapon was only returned to the Marimba armoury on 20 January 1998.
Moreover, the occurrence book produced tends to contradict Dumbure. This book was maintained at the Fontainbleu satellite post manned by the police at Marimba. Amongst other entries suggestive of car stoning and looting during the course of the evening is a complaint by one Peter Rupita that he had been shot in Kuwadzana 4. There is no entry to the effect that the army was operating in the area. The occurrence book at Marimba was not produced. It is claimed to be lost! One must, in the circumstances, be forgiven for disbelieving that.
I find the evidence for the plaintiff, particularly that of his wife, to be good and credible. I accept the evidence for the plaintiff that armed policemen could be seen in Kuwadzana battling rioters on 19 January and that the army was not seen there until 20 January. I am impressed by the evidence of a ballistics and firearms expert called by the plaintiff, Supt Haley. He has seen an X-ray of the plaintiff that shows lodged in his body the offending

projectile. He identifies it as a pellet of SSG buckshot fired from a shotgun such as is police issue. The conclusion that a police issue shotgun was discharged in a riotous affray, causing injury to the plaintiff, is fully available.
Such an inference gains important verification from the fact that at least three such shotguns were issued out of the armoury to policemen from Marimba on that day of the shooting and that at least one was only returned the following day.
The inference is such as to demand clear and documented rebuttal and explanation if it is to be avoided. Instead of that I find in the evidence of the police clear indications of lack of investigation; fragmentary and unprofessional documentation; inconsistent and unconvincing testimony; and the need to explain important divergences and departures within the police case.
In my judgment, the inference that favours the plaintiff's case must be regarded as the more probable and more compelling. I find that the injurious shot was probably fired by a policeman.
The police have made no effort whatsoever to claim that the shooting was justified. Despite this, I have borne in mind the possibility that the injury might have been caused reasonably and without wrongfulness. Careful

questioning from the Bench, however, discloses no reason to suppose that the injury was not caused wrongfully.
One must concede to the forces of law and order the power to use force, even potentially deadly force, in the course of protecting lives and property and preserving the peace. The whole philosophy of the use of force by police in a democratic country, however, is that where violence is required to meet any unlawful challenge to order and peace, only the minimum force required to quell that challenge may be used, and it must be used in a way reasonably calculated to avoid unnecessary harm, not only to perpetrators of wrong but a fortiori to the innocent bystander.
This principle finds its application in any consideration of delictual liability in the interlinked concepts of fault and wrongfulness. Causation, following my earlier finding, is given. Fault, in the sense of foreseeability, is inevitable. The foreseeability of harm to innocent bystanders is obvious where firearms are used in an urban setting.
Blameworthiness must follow where inadequate measures to protect the public are taken, or unnecessary use of force is resorted to. That wrongfulness exists in any given situation is, as has been shown by Chatikobo J in Musadzikwa v Minister of Home Affairs & Anor 2000 (1) ZLR 405 (H) at 415G et seq, a value judgment based upon what is acceptable to the community.
Law-abiding people expect police to put down a riot. They expect police to prevent rioters from damaging property, from looting and from breaking the peace. They will tolerate the use of force to the extent that such force is not incommensurate with the harm threatened. Where it is necessary, they expect the force to be administered decisively, timeously and precisely. And they expect the police to ensure that ordinary people are kept out of harm's way.
The description proffered in evidence suggests that an inadequate force of police was unable to prevent widespread, persistent rioting. Instead of a disciplined condoning of an area beset by trouble and the incursion into the condoned locality of a stout body of men trained and capable of subduing lawlessness, one perceives sporadic running battles

spreading from place to place, the ill-disciplined and indiscriminate use of tear gas and firearms and the absence of any attempt whatsoever to prevent the law-abiding from unwary and innocent involvement in the violence.
The very fact that the plaintiff and all his witnesses, and at least one other (the unfortunate Peter Rupita) were able to wander past and through the riotous affrays shows how little crowd control was adopted. There were no roadblocks, leading into the area of violence. There were no cordons of policemen keeping passers-by away. In the absence of any attempt to protect the public, what justification can there be for opening fire in a high-density

built-up area? If there were any such justification, not one policeman has stood up in court to testify to it. In the premises, I have no doubt in holding the shooting to be wrongful and culpable.
The claim, as amended, is for general damages in the sum of $102 000. The sum of $100 000 is in respect of pain and suffering, disability and loss of amenities. The $2 000 is for future medical expenses. There is no attempt properly to prove and quantify future medical expenses. I therefore prefer to treat the claim as a globular one.
Mr Haried, a surgeon, attended the plaintiff and in testimony produced his medical records and described his injury and its sequelae. The gunshot wound to the abdomen was life threatening. It required surgery, a bowel resection, and colostomy. Colostomy is frequently associated with distress and aversion on the part of the patient. There was further surgery for the removal of the bag. A twenty per cent risk exists of adhesions developing within the 10 years following the shooting.
The plaintiff and his wife testify to a not inconsiderable period of pain and of aversion to the bag. He experienced discomfort and humiliation from the wearing of the bag, and from its occasional overflowing. His appetite was badly affected, as was his ability to work. Although physically, he recovered he remained emotionally an invalid. His wife felt she had to work because his emotional state interfered with his employability. He lost weight and motivation and felt unmanned by his condition.
It seems to me that damages in the sum of $100 000 are reasonable. Judgment is accordingly entered for the plaintiff in the sum of $100 000 with interest at the prescribed rate from the date of judgment and costs of suit.
D A Matyszak, plaintiff's legal practitioners
Civil Divison of the Attorney-General's Office, defendant's legal practitioners

MITCHELL v PROVINCIAL MAGISTRATE, HARARE & ANOR
2001 (2) ZLR 140 (H)
Division: High Court, Harare
Judges: Hlatshwayo J
Subject Area: Chamber application
Date: 10 & 29 August 2001
Judgment Number: HH-142-01

Criminal procedure — bail — grant of — order comes into effect unless magistrate is immediately notified that Attorney-General intends to appeal against grant of bail — order not revoked by subsequent appeal by Attorney-General

The applicant, together with another person, were arrested on charges of fraud and taken to court. There, despite the State's opposition, bail was granted. They were not released immediately because the sum of money involved could not be obtained that day, but the next day their lawyer approached the clerk of court with a view to depositing the money. The clerk would not process the matter because the prosecutor had taken the file. Two days later, the clerk of court informed the lawyer that she had been instructed not to receipt the money, as there was a notice of appeal by the Attorney-General. An application was made to the High Court for the applicant's release.

Held, that where a magistrate grants bail, the order comes into effect and the accused person is entitled to release from custody on meeting the bail conditions. The accused remains in custody only if the prosecutor immediately notifies the magistrate that the Attorney-General intends to appeal. The subsequent noting of an appeal by the Attorney-General does not have the effect of revoking the bail, and so the applicant was entitled to her release.

Legislation considered:

Criminal Procedure and Evidence Act [Chapter 9:07], s 122(2)

J Samukange, for the applicant

E M Munyuki, for the respondents

HLATSHWAYO J: This is an application to compel the first and the second respondents to release on bail the applicant, Patricia Ann Mitchell, currently held in remand prison. The first respondent is the provincial magistrate, Harare, and is responsible for authorising the release of the applicant. The second respondent is the clerk of court, Harare, whose duties among others is to issue warrants of liberation to prisoners who have been granted bail by the court.

The facts of this matter appear in the founding affidavit deposed to on behalf on behalf of the applicant by her lawyer, Mr Samukange, and I have extracted the main points and summarised them as follow:

(1) the applicant was arrested together with one Peter Raymond Lotriet in connection with allegations of loss by the National Oil Company of Zimbabwe (NOCZIM), through fraud, of an amount of $146 million. They were both taken to court on 6 August 2001 where their application for bail was granted despite the State's opposition in the following terms:

(a) Each granted bail in the sum of $3 million;

(b) Each to put up surety worth $5 million immovable property;

(c) To report to CID Fraud Squad three times a week every Monday, Wednesday and Friday;

(d) Not to leave the 40 km radius from the main Post Office without the authority of the investigating officer;

(e) To reside at given addresses until the finalisation of the case; and

(f) Each to surrender all travel documents to the clerk of court.

(2) However, the applicant was unable to immediately raise the bail amount, considering the large sum involved and because the proceedings at the magistrates court had gone on until five o'clock in the evening. The following day, 7 August, the applicant's lawyer approached the clerk with a view to depositing the $3 million, surrendering the title deeds and the passport as stipulated in the bail conditions. The clerk

advised that she could not process his bail tender because the public prosecutor, Mr Katiyo, who could not be contacted that whole day, had taken the file on the matter.

(3) On 8 August, the lawyer met Katiyo who said that the record had been sent to the Attorney-General's office, and that the Attorney-General was considering appealing against the order granting bail. The clerk could not accept payment either on that day because of the absence of the record.

(4) On 9 August, the clerk informed the lawyer that she had received instructions from the magistrate not to receipt the money, as there was a notice of appeal. On being told that the notice of appeal did not bar her from receipting the money and releasing the applicant, the clerk referred the matter to the magistrate who advised her to receipt the money, take the passport and the title deeds but not to release the applicant.

(5) At midday on 10 August, the lawyer filed this application praying the immediate release of the applicant in terms of the bail order. Upon receiving the file, I set down the matter for hearing in chambers later that afternoon.

The real issue for resolution in this application is whether the bail had come

into effect when the notification of appeal was made on the following day after the prosecutor had consulted with the Attorney-General's office. Now, in terms of s 122(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] ("the Act"), if the magistrate immediately after the granting of bail is notified by the prosecutor that the Attorney-General's decision is to be sought as to whether to appeal, the accused must remain in custody until the lapse of seven days from the granting of bail, unless the Attorney-General sooner informs the magistrate that he does not intend to appeal or, if the Attorney-General does appeal, until the judge makes a decision in the matter.

In this case, had the notification to the magistrate been made immediately, the applicant would have been required to remain in custody until the expiration of seven days on 14 August, the three days in between not counting, being the long weekend of the Heroes Holiday, or for as long as it would have taken the judge to make a decision had the Attorney-General actually appealed.

If the magistrate is not advised immediately after the granting of bail that the Attorney-General's decision is to be sought, the bail order comes into effect and is not revoked by the Attorney-General subsequently appealing.

The agreed facts of this case are that bail was granted on 6 August despite opposition by the State and the proceedings were concluded without any indication being made that the Attorney-General's decision would be sought as to whether to appeal. The following day, the public prosecutor consulted the Attorney-General's office and a decision was reached to appeal against the bail order and notification to this effect was subsequently issued.

The wording of s 122(2) clearly shows that the intention of the lawmakers was to allow the prosecution, if dissatisfied with the magistrate's decision, to express its reservation, there and then, by indicating that an approach would be made to the Attorney-General for the final decision on whether to appeal. In other words, the reservations that are catered for are those of the prosecution as it listens to, or learns of, the decision, which reservations it must immediately express, but not those that the prosecution might entertain or confirm after consultation with the Attorney-General's office.

On these facts, it is my finding that the notification to the magistrate was not made immediately as required by s 122(2) of the Act and that, therefore, the bail order did

come into effect. Accordingly, I hereby direct the respondents to comply with the court order granted on CRB No. 9779/01 on 6 August 2001.
Byron Venturas & Partners, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practioners
IGUDU FARM (PVT) LTD v COMMISSIONER OF POLICE & ORS
2001 (2) ZLR 143 (H)
Division: High Court, Harare
Judges: Hlatshwayo J
Subject Area: Civil application
Date: 20, 22, 24 & 29 August 2001
Judgment Number: HH-143-01

Constitutional law — Declaration of Rights — s 16 — protection against compulsory acquisition of property — rights given to occupiers of land by Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26] — whether amount to compulsory acquisition of landowner's rights
Land — Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26] — occupation which is protected under Act — nature and extent — relationship between occupiers and landowners — nature — need for co-operation
The temporary restrictions which the Rural Land Occupiers (Protection from Eviction) Act imposes on landowners' rights of possession of their land, although constituting a deprivation, fall far short of an acquisition and therefore do not violate s 16 of the Constitution.
In the context in which it is used in s 16A of the Constitution, the word "programme" connotes more the meaning of "process" or "exercise" rather than "blueprint". The accent is on the purpose of acquisition of agricultural land, in order to distinguish land acquired for resettlement from land that may be acquired for other purposes.
For a person's occupation of rural land to be protected by the Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26], he need not occupy the whole area of the land; the test is whether there has been such use of a part or parts of the land as amounts, for practical purposes, to possession of the whole. Furthermore, the occupation need not be continuous, given the seasonal nature of farming.
The Rural Land Occupiers (Protection from Eviction) Act grants to protected occupiers rights that are equivalent to those of bona fide occupiers, and the relationship between them and the owners of the land they have occupied is nearest to one of joint possession. Although the interests of occupiers and landowners are divergent, the law has made them co-possessors and they have to co-operate and show utmost good faith towards each other. The Act requires for its successful operation full co-operation among the parties.
Cases cited:
Brighton v Clift 1970 (2) RLR 14 (G); 1970 (4) SA 247 (R)
CFU & Ors v Min of Lands & Ors 2000 (2) ZLR 469 (S)

Davies & Ors v Min of Lands 1996 (1) ZLR 681 (S)
Hewlett v Min of Finance & Anor 1981 ZLR 571 (S)
Min of Lands v Paliouras & Anor 2001 (2) ZLR 22 (S)
Nienaber v Stuckey 1946 AD 1049

Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)
Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)
S v R 1971 (3) SA 798 (T)
Southern Rhodesia, In re [1919] AC 211 (PC)
Legislation considered:
Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26], ss 3, 5 & 6
R M Passaportis, for the applicant
N Mutsonziwa, for the respondents
HLATSHWAYO J: In this urgent application, Igudu Farm (Pvt) Ltd, the registered owner of Igudu Farm in the District of Marandellas (Marondera) seeks an order:

(a) declaring that it is entitled together with its workers to remain on the farm and to carry on its normal farming operations and that the occupation by eighth to twelfth respondents ("the occupiers") since 2 March 2001 of Igudu Farm ("the farm") is unlawful;

(b) evicting all the occupiers from the farm;

(c) restraining the first to fifth respondents ("police and local government officials") and their employees, save for State officials in the lawful exercise of their duties, from causing, facilitating, participating in or giving sanction to entry upon the farm of any persons engaging in, promoting or publicising any activity relating to resettlement on the property, and

(d) enjoining the Commissioner of Police to instruct the Officer-in-Charge, Zimbabwe Republic Police, Marondera and all police officers to ensure that the terms of this order are implemented.

The above prayer was couched in the form of a provisional order with interim and final relief. However, there was so much overlap between the interim and the final relief sought that it appeared more convenient to examine the whole matter in full and issue a final order. I put this suggestion to both legal counsels who agreed to this manner of proceeding.

This urgent application was filed with the High Court on 15 August 2001 and the next day it was served together with the notice of the 20 August set down on the first to fifth respondents (the Commissioner of Police, the Governor of Mashonaland East, the Provincial Administrator for Mashonaland East and the District Administrator, Hwedza who is a member of the local Land Committee and in charge of overseeing and directing the resettlement

exercise in the Hwedza farming area and the Officer-in-Charge, Zimbabwe Republic Police, Marondera).

The first to fifth respondents are represented by Mr Mutsonziwa, who appeared together with Assistant Insp Nzombe from the Police General Headquarters and Insp Nyamatamba, Officer-in-Charge, Hwedza Police Station. The sixth to twelfth respondents are self-actors and were in default of appearance.

Personal service of both the application and set down notice were timeously served on the sixth respondent, Isaac Mreverwi, the leader of the war veterans, and a member of the Area Land Committee, the seventh respondent, Western Mugwala, a member of the Area Land Committee.

However, for the eighth to twelfth respondents, who are persons allegedly unlawfully occupying farm workers' houses, personal service was effected only on the eleventh respondent who accepted service for the other respondents. Although Mr Mutsonziwa objected to this manner of service, I ruled that the service had been regular in that sufficient notice through a responsible person had been given. However, the fact that the applicant's order also seeks to affect alleged unlawful occupiers who have neither been cited nor served is an irregularity that will have a bearing on the relevant order sought.
There are essentially three issues to be considered in this application:

(a) whether the occupation took place before or after 1 March 2001;

(b) the rights and responsibilities of the parties in the light of the Rural Land Occupiers (Protection From Eviction) Act [Chapter 20:26] ("the Act"); and

(c) finally, the nature of the alleged interferences on the farm and the relief available.

WHETHER THE OCCUPATION TOOK PLACE BEFORE OR AFTER 1 MARCH 2001

It is critical to establish when the occupation complained of took place because if it took place before 1 March 2001, the occupiers are protected by the Act and cannot be evicted, and remain protected until such land is acquired by the State or until the State revokes the notice of acquisition. However, if the occupation took place after the fixed date, then the occupiers would not be protected by the Act unless they are certified by the acquiring authority to have been protected occupiers at the fixed date who moved onto land identified for acquisition within six months of the coming into operation of the Act.
The facts as set out in the affidavits in this regard are as follows:

(a) The applicant is a private company and registered owner of Igudu Farm

and Robert Edgar, the deponent to the founding affidavit, is the managing director of the applicant. However, for convenience I shall refer to the deponent as the applicant or owner of Igudu Farm.

(b) Government published a preliminary notice of its intention to compulsorily acquire Igudu Farm in October 2000. An objection letter dated 2 November 2000 was prepared and served upon the Ministry of Lands, Agriculture and Rural Resettlement.

(c) The pegging on the farm by war veterans and landless peasants first commenced in August 2000 "without warning and without applicant's permission".

(d) On 5 June 2001, further pegging began, with war veterans leader and sixth respondent, Isaac Mvererwi, in charge, but also with the involvement of Agritex personnel this time. On 1 July, Agritex officials arrived to re-peg the farm.

Now, in terms of s 5 of the Act, if an acquiring authority certifies that a person was occupying land on the fixed date, it shall be presumed that the person concerned is a protected occupier, unless the contrary is proved. Mr Mutsonziwa, for the first to fifth respondents, had initially argued that since the Minister of Lands, Agriculture and Rural Resettlement had not been joined, he was not in a position to issue such a certificate, as he had not been made aware of the proceedings.
However, Mr Mutsonziwa did eventually produce the Ministerial certificate on 24 August, which confirmed that "the persons currently occupying Igudu Farm … were occupying the said land on the fixed date, in accordance with s 2 of the Act, and they

were still in occupation of the land at the date of commencement of this Act" and that they satisfied the other requirements of expectation of being resettled and qualification for resettlement.

In the meantime, the Acting Provincial Administrator ("PA") for Mashonaland East, Japhet Munakiro, in an affidavit deposed on behalf of the second, third and fourth respondents, had stated that "information received by the respondents is to the effect that the occupiers went onto the farm well before the 1 March 2001". Nevertheless, since the applicant has presented some evidence tending to contradict the Ministerial certificate and the PA's statement, such evidence must be examined.

The applicant submitted that the occupation occurred only on 5 June 2001, although he admits that some pegging by occupiers did occur in August 2000. The question, therefore, is what kind of occupation would be sufficient to entitle an occupier to the protection of the Act. Legal authorities that discuss the occupation necessary to establish possession for the purpose of acquisition of ownership may be of assistance in this regard.

It is noteworthy that these legal authorities do not require "actual occupation

or use of every square metre of an area, possession of which is claimed by occupatio" (Kleyn & Boraine's Silberberg & Schoeman's The Law of Property, 3 ed, Butterworth, Durban, 1992 p. 114 and the authorities cited therein), the test being "whether there was such use of a part or parts of the ground as amounts, for practical purposes, to possession of the whole".

Further, once possession has been acquired, continuous occupation or use is not necessary for the retention of such possession. Thus, in Nienaber v Stuckey 1946 AD 1049 it was held that since there was nothing that required the presence of the applicant or his workers or his implements on the land between ploughing and planting there was no reason why his absence should have affected the continuance of his occupation. It can be argued in this matter that the admitted activities of the pegging of the land by the occupiers in August 2000 did amount to occupation, which, given the seasonal nature of farming, may be taken to have remained effective to the current ploughing season.

Even if such a finding is not supportable, the applicant's averments to the contrary must be weighed against the earlier occupation that he admits and the PA's statement which, taken together, strengthen the presumption created by the certificate. At any rate after the production of the certificate, I did not gain the impression that the applicant was still persisting in regarding the occupiers as falling outside the ambit of the Act.

In my view, the implied concession on the status of the occupiers was rightly made because, in addition to what has been said above, the Act states that a person is a protected occupier of land if, within six months of the date of the commencement of this Act, such person, having been an occupier of "undesignated" land, occupies land in respect of which a preliminary notice of acquisition has been issued (s 5(a)(i) as read with s 4(b)).

The Act was published and came into operation on 5 June 2001. So, even if the applicant is correct in saying that occupation took place only on 5 June, this occupation would still have occurred right on the first day and thus well within the six months period of the coming into force of the Act and the occupiers would still be protected if they had been in occupation of some other land on the fixed day.

It must be noted in this regard that the occupation required under the Act is a statutorily defined type of occupation requiring the occupier to meet certain administratively defined criteria. The requirement that is most easily challengeable by the owner is that of physical presence on or occupation of his land. But the owner is not in a position to know whether the occupiers who move onto his "designated" land had been occupiers of some other land. From the State's point of view, this provision is absolutely essential in order to allow the State to move occupiers from non-designated to designated farms.
Page 148 of 2001 (2) ZLR 143 (H)
The evidence before me reveals that there was initial occupation of the farm in August 2000, that from 5 July 2001, the date of commencement of the Act, a sustained and continuous occupation took place and persists to this day. In the light of the certificate issued by the acquiring authority, and in the absence of sufficient proof to the contrary, it is my finding that the sixth to the twelfth respondents are indeed protected occupiers.
THE NATURE OF THE PROTECTION
According to s 3(2) of the Act a protected occupier may not be evicted from the land or ordered to pay damages "in respect of the occupation or trespass of such land" but the protection does not extend to occupation or trespass of buildings on the farm.
"Land" is defined so as to exclude "any building permanently attached to the land" i.e., the farmhouse and workers' quarters. So, what legal relationships does the Act create as between the owners of the farm and the protected occupiers with respect to the farmland?
To arrive at an approximation of the relative rights, it seems to me that the starting point should be the concept of ownership itself beginning with the so-called "bundle or rights", and from there move on to examine the public law restrictions that are imposed by, inter alia, the Constitution, the Land Acquisition Act and the Land Occupiers Act.
At common law, ownership embraces not only the power to use (ius utendi), to enjoy the fruits (ius fruendi), and to consume the thing (ius abutendi), but also the power to possess (ius possidendi), to dispose of (ius disponendi), to reclaim the thing from anyone who wrongfully withholds it or to resist any unlawful invasion of the thing (ius negandi). These powers are not exhaustive.
Thus, even if an owner has disposed or been deprived of all these powers he or she can still remain the owner of the thing because of the so-called "elasticity of ownership" or its "reversionary" or "residual" nature in that once the powers are restored, the ownership becomes unencumbered again. (See C G van der Merwe and M J de Waal, The Law of Things & Servitudes, Butterworth, Durban, 1993 para 105.)
The most important public law restriction on ownership in Roman-Dutch law was the idea that the state has dominium eminens or "overriding ownership" over the property of citizens. (See, e.g., Hlatshwayo, B
Page 149 of 2001 (2) ZLR 143 (H)
"Expropriation under Roman-Dutch Law" 1991-92 Zimbabwe Law Review, vols 9-10 pp. 96-109.)
Hugo Grotius in his Inleiding expresses the basis of the right of eminent domain as follows:
"Next, civil communities having come into existence, it was found necessary that the whole community should have a higher right over the property of citizens than the citizens themselves, not only because the members and everything belonging to the members must be applied to the body corporate, without which members cannot be

preserved, but also because experience of human failings taught that without further laws the peace of the citizens and the undisturbed possession of property could not long continue." 2

However, Roman-Dutch law authorities were fully aware of the need for control of the use of eminent domain powers. For example, Grotius cautioned:

"… we must note that recourse is had to the right of eminent domain, not indiscriminately, but only in so far as this is to the common advantage in a civil government, which even when regal, is not despotic." 3

Cornelius van Bynkershoek echoed Grotius in urging moderation in the exercise of eminent domain powers, thus:

"[T]he right of eminent domain must be exercised with prudence, not rashly abused, and it is an abuse of the right to use compulsion under it without adequate grounds or to take more than public necessity or utility absolutely requires. But if he (i.e. the ruler) appropriates upon adequate grounds, he will do so with the least possible harm to his subjects and upon payment of the price from the common treasury. He who convinces himself that he can act differently is a bandit rather than a prince." 4

Thus, the power of the state to limit the rights of ownership in the public interest exists as an integral feature of sovereign authority. This eminent domain power is not granted but merely regulated by the Constitution. Section 16 prohibits compulsory acquisition of property of any description or interest or right therein except in terms of a law that stipulates the public purpose for the acquisition and the compensation payable. The question then arises whether interferences with or deprivations of ownership rights, which fall short of outright acquisitions, nevertheless do constitute unlawful takings requiring compensation. It is the age-old distinction between expropriation, on the one hand and, on the other, the exercise of so-called state "police power" over property, i.e., the numerous measures whereby the state regulates economic activity, health, safety and general welfare of its subjects.

In the case of Davies & Ors v Minister of Lands 1996 (1) ZLR 681 (S), the Supreme Court not only confirmed the Roman-Dutch law position that individuals always hold property subject to the State's constitutionally regulated eminent domain powers, but went further to uphold the distinction first made by Fieldsend CJ in Hewlett v Minister of Finance & Anor 1981 ZLR 571 (S) between deprivation and compulsory acquisition of property and concluded that the designation of land while depriving the owner of certain rights did not amount to an act of acquisition or a compensable taking.

"In Hewlett v Minister of Finance, the traditional distinction between non-compensable deprivation of property and compensable compulsory acquisition of property was applied to the Zimbabwean property clause as if self-evident, even though the term 'deprivation' does not appear in the property clause. On the basis of this distinction, the Supreme Court confirmed that the Zimbabwean Constitution guarantees compensation only for compulsory acquisition of property and not for deprivation of property": AJ van der Walt "'Double' Property Guarantees: A Structural and Comparative Analysis" (1998) 14 SAJHR 560 at 581.

Gubbay CJ, who delivered the unanimous Full Bench decision at 690C, quoted with approval the following passage from an article by Professor Murphy, "Interpreting the

property clause in the Constitution Act of 1993", published in SA Public Law, 1995 at p 107:

"Similarly, rent control legislation usually deprives the landlord of the right to use the fruits of his or her asset as well as the right to occupy, but his or her title remains intact and the government appropriates nothing. Another example would be a statutory provision requiring institutional investors to invest in prescribed assets. These kinds of interventions are described as regulatory interferences or acts of police power. They differ from expropriation in that they do not involve a vesting of the appropriated resources in the state but limit the rights between citizens in relation to their property."

On the strength of the two above-mentioned Supreme Court decisions (Hewlett and Davies), I am of the firm view that the restrictions imposed on the rights of possession by the Rural Land Occupiers (Protection From Eviction) Act, although constituting a deprivation, fall far short of an acquisition and, therefore, do not violate the Constitution. I am further fortified in this view by the fact that these restrictions are temporary, pending the transfer of the occupiers onto designated lands or the approval of the acquisition of the designated farms.

In addition to this, s 6 of the same Act, after stipulating that the Act shall not bind the State, further states in subs (2) "for avoidance of doubt" that no person shall be a protected occupier of "any land held by or registered in the name of the State". This confirms that no property rights accrue to the State through the protection of occupiers, in as much as the State itself acquires no rights in a landlord's property by preventing eviction of tenants or squatters in terms of rent control or similar legislation.

Finally, the same argument can be applied to the post-designation but

pre-acquisition restrictions of s 5 of the Land Acquisition Act. Once a preliminary notice to acquire land has been issued and while it remains in force the owner may not dispose of the farm, subdivide it or construct permanent improvements thereon without the written permission of the acquiring authority. Further, the acquiring authority may on or after the publication of the preliminary notice prohibit on such land any activity that he may specify in writing. These s 5 restrictions affect the powers of use and disposal of the land, but do not transfer any rights to the State, and thus do not constitute acquisitions.

So, what kind of co-existence on the designated farms did the legislature envisage by enacting Chapter 20:26? Mr Passaportis argued that the principal object of the Act is to prevent the eviction of protected occupiers, as evidenced by its subtitle, but that the Act does not entitle occupiers to interfere with a farmer's normal business. He maintained that since the State itself did not acquire any rights through the Act, there was nothing it could pass on to the occupiers either (nemo dat qui non habet). On the other hand, Mr Mutsonziwa, for the respondents, submitted that the intention of the legislature was that protected occupiers are entitled to make use of the land, which use might interfere with the owner's normal farming activities — hence the provisions of s 3(2) which prohibits the issuing of ejectment or damages orders against protected occupiers in respect of their occupation of the land.

The fact that the State did not itself acquire any rights through the Act has already been accepted and on that basis the conclusion made that the Act does not violate the Constitution since it provides for regulation or deprivation which falls short of actual

acquisition of property. Thus, the critical issue that remains is assessing the mutual rights of the owner and occupiers of the farm.

There are two possible extremes in this scenario. Suppose a designated farm was being fully utilised by its owner and there was literally only standing room left, would the occupiers be protected merely where they stand with no rights of use, shelter and sustenance from the farm? Or, viewed from the converse side, suppose the occupiers had seized the whole farm and were utilising it in full on the fixed date, would the owner be restricted merely to the farmhouse with no rights to exploit the land? Either situation would be absurd if taken as the intention of the lawmaker. In order to ascertain the true intention of the legislature pertaining to the meaning to be ascribed to a particular provision, regard must be had to "the section itself, the context in which it is used, the object and purpose of the Act and the evil or defect which the legislature intended to remedy or guard against" (S v R 1971 (3) SA 798 (T) at 803E per Joubert AJ).

The mischief, which the legislature intended to remedy through the Act,

is ably summarised in Mr Passaportis' supplementary heads of argument, thus:

"Act No. 13/2001 [i.e. Chapter 20:26] was promulgated at a time when Government had been thwarted in acquiring land having made numerous applications in terms of s 7 of the Land Acquisition Act to the Administrative Court. Government was keenly aware that the Land Resettlement exercise was taking too long and many lands had been unlawfully resettled. Government introduced the Act to protect these settlers from eviction."

In exploring possible solutions to this problem, I examined the possibilities of calling into aid the Roman and Roman-Dutch Law classifications and concepts of iustus and iniustus possessio, the distinctions between possessio civilis, possessio ad interdicta and possessio naturalis. However, eventually I did not find these "somewhat artificial distinctions" (Silberberg, p 123) helpful. The issue becomes simpler if one appreciates that underlying all these classifications was the desire to protect possession "in order to discourage self-help and disturbances of the peace" (Silberberg, p 123). This is the same objective that the legislature was pursuing in enacting the Act.

The Act grants the occupiers statutory protection that makes them lawful occupiers whose rights are equivalent to those of bona fide occupiers. Before the fixed date, the occupiers were mala fide possessors, i.e., persons exercising physical control with the intention of an owner, but aware of the fact that they were legally not owners. Hence, even the political articulation of that state was given as "peaceful demonstrations on farms to highlight the extent and intensity of land hunger". However, the relationship established on designated farms after the fixed date between the occupiers and the owner is nearest to one of joint possession.

Now, although it is accepted in law that more than one person can possess certain defined portions of the same thing, possession of undefined portions of the same thing is not possible, unless it be in abstract undivided shares in which case possession can be jointly exercised by, for example, a husband and wife or a business partnership. See, for example, Brighton v Clift 1970 (2) RLR 14 (G); 1970 (4) SA 247 (R) where it was held that the mere extra-judicial repudiation of a partnership by one partner does not prevent the repudiated partner from insisting on the preservation of his right as a partner to remain in possession of partnership assets until a liquidator is appointed.

Although the interests of landless peasants focused on repossessing the land are divergent from those of commercial farmers strenuously resisting acquisition, the law makes them co-possessors and they have to co-operate and show utmost good faith towards each other.
Regrettably, however, utmost good faith is the one attribute that has been singularly lacking in the manner in which the parties in this case seem to have conducted themselves.
Page 153 of 2001 (2) ZLR 143 (H)
While both parties have the necessary mental elements required for possession, viz., the intention of, and the belief that they are, the owners, i.e., both the animus domini and the opinio domini, this intention need not be expressed in an intolerant and violently exclusivist manner. The parties should patiently await the outcome of the confirmation proceedings.
The threatened eviction of the applicant and the workforce demonstrates impatience and intolerance on the part of the occupiers on the one hand. On the other hand, however, it must be pointed out that the way in which the applicant has reacted to the presence of occupiers on his farm is also not conducive to the spirit of utmost good faith. In para 30 of his founding affidavit, he states as follows:
"I am not prepared to vacate the farm. I am effectively the owner of Igudu Farm and I wish to enforce my rights as owner. It must also be said that applicant's labour, some of whom have been with the Applicant for many years, have nowhere to go. The acts of the Respondents and the occupiers are unlawful and I look to this Honourable Court for assistance."
The Rural Land Occupiers (Protection From Eviction) Act requires for its successful operation full co-operation among the parties. Such co-operation cannot be engendered if, as it appears, the applicant does not seem to have attended any of the meetings called on his farm to discuss issues of co-existence with the occupiers. When this matter was raised, counsel for the applicant replied that the meetings in question were not conducive to any meaningful discussions, being more of occasions used by the sixth and seventh respondents to issue instructions to the workforce. Further, the applicant pointed out in his founding affidavit that, together with other farmers in the area, he had tried, without success, to speak to the District Administrators, Hwedza and Marondera, with a view to restoring normality on the farms.
The fact that their pleas in this regard seem to have fallen on deaf ears is much to be regretted. It appears to me that much could be achieved if the local, district and provincial land committees worked closely with the occupiers and owners of designated farms. Where appropriate, agreements reached could then be incorporated into notices issued in terms of s 5 of the Land Acquisition Act. That way the respective rights of the parties would be clarified and disruption of agricultural production minimised.

Currently, the land reform exercise is stalled because of the interdict obtained in the Commercial Farmers' Union v Minister of Lands & Ors 2000 (2) ZLR 469 (S) pending the production of a "programme", and the Administrative Court is not hearing applications for authorisation or confirmation of land acquisitions. At the same time however, the identification
Page 154 of 2001 (2) ZLR 143 (H)

and designation of farms for acquisition is proceeding at an increased pace, leading to a serious logjam.

Now, in the context in which it is used in s 16A of the Constitution, the word "programme" seems to connote more the meaning of "process" or "exercise" rather than "blueprint". In other words, the accent is on the purpose of acquisition of agricultural land in order to distinguish land acquired for resettlement from land that may be expropriated for other purposes, say, dam construction. It would seem to me that the word "programme" is used in s 16A to indicate that the former colonial power is expected to contribute as a matter of colonial responsibility to the former purpose but not necessarily to the latter one.

I do not think that the Supreme Court in the Commercial Farmers' Union v Minister of Lands & Ors case was addressed fully on the import of the word "programme". At any rate, the word only came to be introduced for the first time in the history of Zimbabwe's property clauses when the issue of the liability of the former colonial power was brought up by the sixteenth amendment to the Constitution.

To reach a different conclusion, in my view, would be to lay oneself open to a charge of pandering to "the austerity of tabulated legalism" — a thoroughly discredited interpretive approach from which the Supreme Court has consistently distanced itself from as far back as 1981. See the remarks of Fieldsend CJ in Hewlett v Minister of Finance & Anor supra at 595F and Gubbay CJ in Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S) at 57-58.

None of the great reform programmes in history could have succeeded had their commencement been conditional upon the production of a detailed blueprint. The famed post-World War II Marshall Plan was based on a general policy thrust and framework, viz., "a scheme to fight hunger, poverty, desperation and chaos in Europe". Not even the process of creation as narrated in the Book of Genesis was based on any detailed prototype, but God, from a general idea, created heaven and earth and its inhabitants, seeing for the first time in stages that what He had accomplished "was good" and proceeding accordingly right up to the sixth day when "God saw everything that He had made, and, behold, it was very good" or in some Bible versions, "excellent, indeed". Had the production of a prior detailed programme been required, the six days might have been expended doing just that, that is, requiring and producing the programme!

Nearer home, the forceful removal of indigenous people from their land and appropriation of the same land by colonial settlers was a programme in every respect although there was no blue print that was produced before the commencement of the exercise. On 19 December 1893, Cecil John Rhodes

simply announced the broad policy parameters that the white settlers shall be entitled to the fertile, choice prime land, that there shall be reserves for the dispossessed indigenous population and the rest of the land shall be State land:

"It is agreed that the High Commissioner and myself should discuss the whole of the future mode of settlement to be hereinafter decided upon. There will be what I might call public land, so that you will be the first entitled to select land … There will be thus native reserves, free grants to yourselves, and the balance of Crown land, not to be sold under 3s. per morgen …"

That programme was given judicial recognition by the Privy Council in the case of In Re Southern Rhodesia [1919] AC 211 at p. 234:

"According to the argument the natives before 1893 were the owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council."

However, even if the word "programme" were interpreted to mean a "blueprint", it is my respectful view that the key elements of such a programme are a legal framework and participatory processes which are very much in place. The Constitution, the Land Acquisition Act and now the Rural Land Occupiers Act do constitute an adequate legal framework. As far as processes are concerned, the exercise is truly participatory and "bottom up" with local land, district and provincial land committees involved in the identification of land and settlement of the people. These processes have been articulated in official government policy documents, the targets and strategies have been debated and presented on several official platforms. Had these facts been adequately argued before the Supreme Court, I believe there could have been a different outcome to the CFU interdict case, for, the mind boggles as to what more needs to be done for the process to be deemed to qualify as a programme.

Whether it is the Administrative Court or the Supreme Court which has to be satisfied as to the existence of such a programme has been left open according to McNally JA at p. 20 of cyclostyled judgment in Minister of Lands v Paliouras & Anor S-55-2001 and Sandura JA has opined that "the formulation of such a programme must be relatively simple" (at p 27).*

However, when all is said and done, the legitimate concern of the courts remains that of due process. The one and truly competent judge of the wisdom

of any administrative programme is the electorate, as was clearly articulated by Gubbay CJ in the case of Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S) at 9H-10C:

"I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the Judiciary to appreciate what is to the public benefit. In implementing social and economic policies, a government's assessment as to whether a particular service or programme it intends to establish will promote the interest of the public, is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation, unless convinced that the assessment is manifestly without reasonable foundation."

In the same vein, I am in respectful agreement with the dictum of Chidyausiku ACJ (as he then was) in Minister of Lands v Paliouras & Anor supra at p. 10+:

"The respondent's contention that the appellant is prohibited from exercising any of the powers which he is expressly authorised by Parliament to exercise raises the fundamental issue of jurisdictional competence. Can a court interdict the appellant from acquiring land for redistribution in accordance with explicit provisions of an Act of Parliament? Not

only is this a debatable point but the wisdom of such an interdict is questionable. The interdiction of patently lawful conduct can hardly further the rule of law."

Finally, the legitimate expectations of any owner of designated land, or protected occupier thereof, are for the Administrative Court to proceed with exercise of consideration of land acquisition confirmations or authorisations, so that there is finality in the matter; so that the uneasy state of co-possession comes to an end. In terms of s 7(4) of the Land Acquisition Act the factors which the Administrative Court needs to take into account in considering applications for authorisation or confirmation of compulsory acquisitions are clearly spelt out and have absolutely nothing to do with the existence or otherwise of a land reform programme.

All that the Administrative Court is called upon to do is to ascertain whether the acquisition is for the stated objective, thus:

"(4) The Administrative Court shall not grant an order referred to in subsection (1) unless it is satisfied —

(a) that the acquisition of the land is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public; or

(b) where the acquisition relates to rural land, that the acquisition is reasonably necessary for the utilisation of that or any other land —

(i) for settlement for agricultural or other purposes; or

(ii) for purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or

Page 157 of 2001 (2) ZLR 143 (H)

(iii) for the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph (i) or (ii);

(c) where the acquisition relates to only part of a piece of land, that the acquisition will not render the remainder of that piece of land unsuitable for the purpose for which it was being used or was bona fide intended to be used immediately before the acquisition."

THE ACTIVITIES COMPLAINED OF

Several activities allegedly sanctioned or carried out by one or more of the respondents are complained of in this application:

(a) Eviction of the applicant's labourers from their villages and occupation of workers' quarters: It is alleged that on 12 July, 138 workers were forced to move from the labour compound to the barn complex and the eighth to twelfth respondents occupied the farmhouses without applicant's consent. The applicant then concludes: "I ask this Honourable Court for an order evicting eighth to twelfth respondents respectively and also those other persons whose names are not known to me but who are unlawfully occupying the workers' houses".

The eviction order against eighth to twelfth respondents can be granted since the protection from eviction relates only to land and not buildings. However, it is not competent to issue an order against unnamed persons who are not party to these proceedings. A related complaint is that a group of occupiers living in four of the workers' houses (presumably, eighth to twelfth respondents) took control of the beer hall on the farm and are now running the beer hall as a commercial concern without the owner's consent.

(b) Interference with farming operation: It is alleged that on various dates in July and August, the sixth and seventh respondent respondents, both members of the Area Land Committee, addressed farm workers and said all farming operations were to cease, that the workers should not water the tobacco seed beds or the 4 hectare orchard of olives, that all of the applicant's 370 head of cattle should be removed from the farm by 23 July as new owners were moving in, that the workers should confine their movements to the barn complex and that nobody should drive around the farm. All that can be said here is that such instructions, in the absence of an agreement between the parties, would be unlawful, unless they are made pursuant to written orders issued in terms of s 5 of the Land Acquisition Act.

(c) Eviction from farm of applicant and farm workers: The applicant complains that on August 4, the sixth respondent held another meeting with the labour force and issued an order that the farm owner and the

workers should move out of the farm by 15 August 2001. The alleged threats of evictions would be unlawful, unless done in terms of s 9 of the Land Acquisition Act.

(d) Theft of bales of tobacco and damage to plastic coverings of paprika and tobacco seedbeds: The applicant complains that despite reports having been made to the police of these events, the police have done nothing. In my view, these are clearly criminal matters and should be dealt with by the law enforcers accordingly. The Act does not protect occupiers against criminal charges.

THE RELIEF AVAILABLE TO THE APPLICANT

The main relief sought by the applicant is a declaration that it is entitled, together with its workers, to carry on its normal farming operations without hindrance or obstruction. In this regard, the applicant states in the founding affidavit that its "intention is to plant crops of tobacco (50 hectares), paprika (25 hectares), Rhodes grass (35 hectares) and maize (23 hectares)". However, it is not possible for this court to order the carrying on of "normal farming activities" in the light of the presence on the farm of protected occupiers who are also entitled to the use of the land. If, for example, a given landowner's "normal farming activities" involve the utilisation of all or most of the available arable land, then such an order would leave the protected occupiers with no means of supporting their own livelihood. As I have already pointed out, it seems to me that the intention of the legislature when enacting the law protective of otherwise illegal occupiers was to enforce co-existence between the landowner and the occupiers leaving it to both parties to establish a modus vivendi. If the spirit of the law is to be upheld, then it is incumbent on the landowner and the occupiers to co-operate with each other and peacefully coexist. As far as the prayer for the eviction of occupiers is concerned, no court may order the eviction of protected occupiers under the new Act. However, as already pointed out above, the threatened eviction of the farm owner and his workers can be interdicted.

A related relief sought by the applicant is the interdicting of first to fifth respondents (police and local government officials) and their employees from causing, facilitating, participating in or giving sanction to entry upon the farm of any persons engaging in, promoting or publicising any activity relating to resettlement on the property. Now, in terms of s 5(a)(i) as read with s 4(b) of the Act, protected occupiers may be moved onto

farms, like Igudu, in respect of which preliminary notices have been issued for up to six months after the promulgation of the Act, that is up to the end of the year. For this

purpose, the police and local government officials and their employees would be expected to carry out the precise functions that the applicant seeks to interdict.
In my view, such assistance rendered by law enforcers and administrators is not only perfectly lawful, but is also vital for the orderly achievement of the resettlement objective. Therefore, provided the functionaries act in pursuance of the objectives of the new legislation, they should not be prevented from doing so. The point was raised but not pursued that the involvement of the police in the resettlement exercise might be in violation of the Police Act. I did not deem it necessary for me to go into this question in order to arrive at the decision that I have made.
Finally, as far as enjoining the police to carry out the terms of this order, the position of the court as stated in a number of rulings is that such an injunction is unnecessary since it goes without saying that all orders of the court are enforced by the sheriff with the help of the police where necessary or required.
On the issue of costs, the successes and failures scored by each party even out, so that an order as to costs is not warranted.
Accordingly, I hereby make the following final order:

1. It is declared that in terms of the Rural Land Occupiers (Protection From Eviction) Act [Chapter 20:26], the eighth to twelfth respondents are presently entitled to occupy Igudu Farm in the District of Marandellas (Marondera).
2. It is ordered that, save as may be provided in any notice issued in terms of the Land Acquisition Act [Chapter 20:10] or any lawful order, no steps shall be taken by any of the respondents to evict from Igudu Farm, Mr Robert Edgar, his farm workers or their families.
3. The eighth to the twelfth respondents are hereby ordered to vacate any of the permanent buildings not erected by them that they are currently occupying on the farm.
4. That there shall be no order as to costs.

Wintertons, legal practitioners for the applicant
Civil Division, Attorney-General's Office, first to fifth respondents' legal practitioners

SHENJE v SHENJE
2001 (2) ZLR 160 (H)
Division: High Court, Harare
Judges: Gillespie J
Subject Area: Divorce action
Date: 29 August 2001
Judgment Number: HH-145-01

Family law — divorce — division of property following divorce — inquiry not limited to respective financial contributions made by the spouses — factors to be considered — wide discretion given to court
In deciding what is reasonable, practical and just in any division of property following divorce, the court is enjoined to have regard to all the circumstances. A number of the more important, and more usual, circumstances are listed in s 7(4) of the Matrimonial

Causes Act [Chapter 5:13], which identifies the fundamentally correct approach to any property division order. The first four of these are: (1) the income earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future; (2) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future; (3) the standard of living in the family, including the manner in which each child was being educated or trained or expected to be educated or trained; and (4) the age and physical condition of each spouse and child.

The first two considerations deal with the parties' and children's needs; the third and fourth advance into their expectations. The matter of contributions made to the family is only the fifth listed, although it is the one that often receives exclusive consideration. The prime purpose of stating this factor is not to provide that in the absence of contribution there can be no division, but to show that contribution is not a consideration that can be limited or overstated. All contributions are important: material or otherwise, direct or not, tangible or beyond definition. The assessment of contributions follows once the existing and future resources have been identified and the competing needs and then the expectations of the family members are addressed. If existing resources remain to be divided, they may be fairly divided in a manner reflecting the nature and extent of the respective contributions of the parties. The other factors listed by the legislation are the value to any of the family members of any benefit which will be lost as a result of the dissolution of the marriage; and the duration of the marriage.

All in all, the legislation gives the courts a very broad discretion to achieve the fairest possible settlement. There are only a few limits on the court's power to distribute property, not only between the spouses but of the spouses: a child might share in the apportionment.

Legislation considered:

Matrimonial Causes Act [Chapter 5:13], s 7(4)

L M Kadandara, for the plaintiff

Mrs J Tomana, for the defendant

Page 161 of 2001 (2) ZLR 160 (H)

GILLESPIE J: The parties were married to each other in 1975. Their children are now adult; they are well into middle age; and they find that their marriage has irretrievably broken down. The many issues that were dividing them at the commencement of this litigation have rationalised themselves into two — concerning the amount of a capital settlement that should be made by the plaintiff upon the defendant, his wife; and her maintenance after a divorce.

The manner in which the defendant has assessed and pleaded her claim to a settlement is rather individual and not a little misguided. The history of the marriage reveals that the parties acquired, in 1982, a residence in Colne Valley. It was bought upon the sale of a house in Houghton Park, the first house that they had bought and in which they had lived for the first part of their marriage. The Colne Valley house was kept until 1995 when it was attached in execution of a judgment debt. The plaintiff was able to stave off execution and eventually sold the property privately in 1997. The purchase price was $1 300 000. The amount actually disbursed to the plaintiff, after various deductions, was $711 844.44. The parties moved into rented accommodation and, the following year, the

plaintiff instituted these proceedings and, a few months later, deserted the defendant. Her claim was formulated as half the purchase price of the house in Colne Valley.
This claim was amended so as to introduce to the lists consideration of two other properties. These are a property in Hogerty Hill and a subdivision in a development in Mt Pleasant. The first of these is held in the name of Munjongandi Enterprises (Pvt) Ltd, a company in which the plaintiff claims to share an interest with his nephew. The second is in the name of the seller, the developer, and is being brought by the plaintiff on a deed of sale. The full purchase price is not yet paid and transfer to the plaintiff is not due.
The amended claim is stated as being for half the value of all three properties, or half of the purchase price of the Colne Valley property, whichever is the greater. In addition there is a claim for maintenance in the sum of $20 000 per month.
The theme of the evidence may be represented by an oft-repeated statement of the defendant: "This was a planned divorce." The whole tenor of the plaintiff's case is that, after a career as a financial officer, he retired on grounds of ill-health. His meagre savings, his terminal benefits and his investments have all been consumed in maintaining the family. He faces an old age of some hardship. His only real wealth is his interest in the Mt Pleasant development, the financing of which remains uncertain. He produced no financial records and revealed nothing of his own wealth or otherwise.
The defendant, however, has gone to considerable lengths to prove her

assertion that the plaintiff has attempted to liquidate his assets, and to hide his wealth, so as to defeat any division of property she might claim. Her attorney, Mrs Tomana, has undertaken the sort of preparation that would once have been regarded as normally competent and professional but in my experience in this court is now very much the unusual exception. A fairly full set of the plaintiff's bank statements and investment records since 1997 has been produced. Detailed reference to these is unnecessary, but an intelligent overview of them reveals a summary which I put thus.
A moderately respectable current account balance for the time received a sudden inflow coinciding with the sale of the house in Colne Valley. This was transferred immediately, first to savings and shortly afterwards to investment in treasury bonds. Thereafter, a distinct pattern emerges showing the consumption of greater or lesser quantities of the earnings on the investments and reinvestment of all or most of the capital. Increasing sophistication is shown in the investments, the initial choice of treasury bonds evolving to a preference for bills of exchange and negotiable certificates of deposit. Further wealth has accumulated on receipt of his terminal package of over $1 million in 1999. Between 1997 and 2000, considerable sums of money came into and out of his account, amounts that cannot be explained by the plaintiff's absurd claim to earn a few thousand dollars every month as a vendor. The amounts of money that have been expended are themselves by no means inconsiderable, but the plaintiff admits to owning no assets other than a light commercial vehicle, in addition to his interest in the Mt Pleasant development. This is inconsistent with the wealth he has accumulated and consumed.
The plaintiff's evidence, too, is most unimpressive. He is evasive and unbelievable. He has given statements and explanations rebutted by the documents. It is therefore entirely unsafe to accept his testimony unless it is supported by independent evidence. I am therefore unable to accept that he is anything other than a man of some wealth. I cannot believe that his business interests, one with his nephew and one other, give him no

income or access to wealth. I will not accept that he has expended all his wealth on maintenance of his family and is left with no means of support. I have no doubt, although I have no way of assessing his exact, or even his approximate, wealth that he has access to no less than $1 million of the amount of nearly $2 million in capital that has come his way since mid-1997.

The defendant is an impressive witness. If she seems shrill, strident or emotional, I have no doubt she has ample provocation for such sentiments. I accept her postulation that the plaintiff has purposefully attempted to ensure his own control of the wealth of the family and to conceal it from obvious view for the purposes of the divorce. Her brief account of her married life

leaves me in no doubt that he has excluded her from, not only decision making, but also knowledge itself, in respect of the family finances. No doubt he has earned more than her throughout the marriage, but she has always been in employment, has contributed such as she can in money to the home, and has raised a family.

The task of assessing a fair division of property can be difficult enough when appropriate evidence is led of the wealth, assets and means of the parties. It is potentially much more difficult when a party seeks to conceal his circumstances. The various suggested approaches to a division (a "one-third rule" or a "his, hers, theirs" approach) are rendered useless where one does not have any clear idea of what is available for distribution. This, incidentally, also shows the dangers of relying upon any such approach without due advertance to the considerations specified in the Act. For it is to s 7(4) of the Matrimonial Causes Act [Chapter 5:13] that one must turn to identify the fundamentally correct approach to any property division order.

This approach, as the section cited shows, is to endeavour —

"to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses."

This might seem a paradoxical objective, given that the marriage relationship will not continue and that some circumstances, such as joint property ownership or continued dependence may, but need not necessarily, be inconsistent with the newly sundered relationship. The paradox, however, disappears when one considers the corollary of the objective, which is to ensure that neither party suffers a loss or any prejudice in consequence of the divorce that can reasonably and fairly be avoided.

In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieved a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantages, to the extent they are not inevitable, of becoming divorced.

The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four

listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognise

that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met rather than that their contributions are recouped. Thus, the first consideration listed is:
"the income earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future."
This clearly emphasises the resources the parties have to draw on now, with a view to determining how to supplement them, if necessary, rather than for any other reason. This can fairly be regarded as the primary consideration. Does each spouse, and each child, have sufficient resources to ensure that each is not unduly prejudiced by the termination of the marriage but has as much benefit as can properly be afforded and that each would have enjoyed had the marriage continued?
The second consideration is the logical extension of the first enquiry:
"the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future."
Thus, what does each spouse and child have? And what will each need? This is where the investigation into property division order should start.
Third mentioned is:
"the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained."
This advances the enquiry beyond the basic resources versus needs conflict, and brings into consideration the expectations of all affected persons. The clear message is: do not be satisfied to ensure that the parties', and the children's, basic needs are fulfilled — provided the resources are there, address their expectations too! The reasonableness of the stated expectations is to be gauged in the light of the standard of living of the family during the course of the marriage.
Fourthly, special consideration must be given to:
"the age and physical condition of each spouse and child."
Their needs and expectations may well be increased by peculiar circumstances and special requirements flowing from the physical or mental state of one or more family members. A property division order must provide for such unusual conditions.
Fifth is the aspect which often receives exclusive consideration — that of the respective contributions. The purpose of stating this consideration is not to provide that, in the absence of contribution, there can be no division. Quite the contrary. Its prime purpose is to show that contribution is not a consideration that can be limited or overstated — all contributions are important: material or otherwise, direct or not, tangible or beyond definition. Second, the

formulation shows how assessment of contributions factors into the formulation of the property division order. Once the existing and future resources, including income earning capacity, have been identified ensure that first the competing needs, and then the expectations, of the family members are addressed. If existing resources remain to be divided, they may fairly be divided in a manner reflecting the nature and extent of the respective contributions of the parties.

Next to mention is —

"the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage."

It might be thought that the item need not be specifically mentioned since it could be said to be included under the first consideration. Certainly, on the synthesis I have offered here — that of assessing resources, needs and expectations — this item is an "expectation". In fact, however, the prospective benefit brought by this paragraph into consideration is certainly such as to widen the enquiry beyond that embraced by the first three mentioned factors. "[A]ny benefit which [a party] will lose as a result of the dissolution of the marriage" is a very wide concept indeed. It includes specifically a pension or a gratuity which may not fall due for years. It includes necessarily a hope of inheritance from a spouse. The express mention of so broad an item shows how all inclusive should be the manner of assessment of a property division order. It also shows the correctness of my analysis of the necessary enquiry.

The final paragraph of the subsection makes specific reference to:

"the duration of the marriage."

This is a factor which can have a profound effect upon the assessment of the division. It will not normally, of course, alter the needs of a spouse. It must, however, inevitably affect a spouse's legitimate expectations upon a divorce and also the extent to which the other spouse might fairly be called upon to meet those needs and expectations.

All in all, therefore, the Act advisedly reposes in the court having jurisdiction a very broad discretion to achieve the fairest possible settlement. Not only that, but it reinforces that discretion with the power to enforce that discretion in the manner best advised to achieve justice. Thus, by s 7(1) and (2) of the Act, it can divide, apportion or distribute the property of the spouses. Note that this potential power of distribution does not limit itself to distributing property between the spouses. The wording allows distribution of the property of the spouses (my emphasis). For instance, nothing prevents the court ordering, if that be desirable, that a child share in an apportionment. Note also that it is irrelevant who might own the property in law vis-à-vis third parties. Between themselves, for the purposes of a property distribution

order, legal ownership is immaterial. The property of one can be transferred by court order to the other. The power to order maintenance payments for spouse or child is similarly widely expressed and is restricted only by the fair exercise of the judicial discretion. The only limit upon the court's power to divide property is the exclusion from that power of inherited property, property held according to custom; or property of particular sentimental value to a spouse.

It is therefore a mistake to limit the enquiry to a facile apportionment of respective contributions. It is a failure for the court to content itself with a simplistic universal sale of the property of the marriage and the division of the proceeds according to the assessed ratio of contributions. That might be appropriate where the contributions can properly be quantified and where the proceeds of the sale in terms of the order will be sufficient to meet the needs and expectations of all parties and children. In any other case, it renders all parties homeless; destroys their capital base; and compromises their income-earning capacity.

In this case, there are no children to consider. The plaintiff has, by his secretiveness and deviousness, made it impossible to make an accurate assessment of the resources available for division. As to his needs, he is retired and has had a measure of ill-health and obviously needs to provide for his old age. His major obligation appears to relate to payment for the subdivision he has bought and the development he plans for it. His expectations are wholly unrealistic and entirely selfish. He would deny the defendant access to his properties and his wealth; offering her only an inadequate maintenance payment and settlement — albeit one which, if his presentation of his wealth were correct, he could not begin to afford. All the while, he insists that she has never contributed anything of substance to the marriage; that she is far better off, and enjoys the greater income earning capacity, than he.

The defendant has worked all her life as a nurse. She is about to retire. She lives in a rented cottage and has no savings. Her pension will be insufficient to maintain her. She clearly needs either capital or income supplement or both. She expects sufficient capital to enable her to purchase property and looks for maintenance for support herself when she retires. She has been married to the plaintiff for twenty-six years and has throughout that time worked as a nurse and in the house as a mother. She has invested all of herself in the marriage and has sought to secure her, and her family's, future in it. Had she remained married she would have expected to live in a house of her husband's providing and to which she would contribute. She would have shared in the windfall of his considerable gratuity and would be living, with him, comfortably off interest from their investments.

The fact that he has failed to disclose his true circumstances to the court cannot be allowed to benefit the plaintiff. It is a principle of justice, and of the law, that no person should be permitted to gain an advantage from his own wrongdoing. In this case, I find merit and justice to be heavily weighted on the defendant's side. Although there is no clear indication that the plaintiff at this minute has the means to afford it, I propose to order in her favour a substantial capital settlement and maintenance for a limited period until that settlement is paid in full. The justification for doing so is that the plaintiff has, until relatively recently, had access to funds sufficient to meet the amount. It is, moreover, my conviction that he retains these funds hidden elsewhere than in the amounts disclosed. A man who has displayed such careful and productive husbandry of his wealth, in sharp contrast to his neglectful husbandry of his wife, could not have dissipated the amounts of up to $2 million dollars, which were fairly recently under his control. The amount I order can be paid even if the plaintiff must sell his truck to raise it.

In the result, it is ordered that:

1. A decree of divorce shall issue.
2. The plaintiff shall settle upon the defendant the sum of $750 000.
3. The plaintiff shall contribute to the maintenance of the defendant by payment to her of the sum of $20 000 monthly in advance with effect from 1 September 2001 until the amount of $750 000 mentioned in clause 2 hereof shall have been paid in full.
4. The costs of this action shall be borne by the plaintiff.

Kadandara & Co, plaintiff's legal practitioners

Ziumbe & Mtambanengwe, defendant's legal practitioners

ATTORNEY-GENERAL v LOTRIET & ANOR
2001 (2) ZLR 168 (H)
Division: High Court, Harare
Judges: Hlatshwayo J
Subject Area: Bail appeal
Date: 3 & 4 September 2001
Judgment Number: HH-153-01

Criminal procedure — bail — appeal — against grant of — when discretion of court a quo may be interfered with — no further appeal to Supreme Court against High Court judge's decision on bail appeal from magistrates court

In an appeal to a judge of the High Court against a magistrate's decision on a bail application, the judge is entitled to substitute his own discretion for that of the magistrate, though he must give due weight to the magistrate's findings. In the case of an appeal to the Supreme Court against a decision of a judge of the High Court in a bail application, on the other hand, the Supreme Court can interfere only if there has been a misdirection or irregularity in the High Court or if the judge exercised his discretion in a manner that was so unreasonable as to vitiate his decision.

There is no further appeal from the High Court to the Supreme Court for bail applications originating from the magistrates court, and this is so whether the initial appeal was instituted by the accused or the prosecution.

Cases cited:
Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)
S v Dzawo 1998 (1) ZLR 536 (S)
Legislation considered:
Criminal Procedure and Evidence Act [Chapter 9:07], s 121(8)
J Mabeza, for the appellant
J Samkange, for the respondents

HLATSHWAYO J: This is an appeal by the Attorney-General against the magistrates court order granting respondents bail on 6 August 2001 at the Harare magistrates court. The respondents, Peter Raymond Lotriet, aged 54 years, and Patricia Ann Mitchell, 55, face a charge of fraud involving an amount of over Z$146 million and were granted bail on the following conditions:

1. Each granted bail in the sum of $3 million;
2. Each to put surety worth $5 million immovable property;

3. To report to CID Fraud Squad three times a week every Monday, Wednesday and Friday;
4. Not to leave the 40 km radius from the main Post Office without the authority of the investigating officer;
5. To reside at given address until finalisation of the case; and
6. Each to surrender all travelling documents to the clerk of court.

The grounds of appeal are the following:

(a) That the magistrate failed to give due weight to the investigating officer's fears that the respondents might abscond to avoid trial of granted bail, and

(b) That the respondents are likely to interfere with evidence since investigations are still at their infancy and appellants' foreign accounts are yet to be investigated.

The facts of this case as outlined in the Request for Remand Form 242 are as follows:

1. On 5 February 2001, the accused persons (repondents in this matter) Peter Raymond Lotriet and Patricia Ann Mitchell approached the National Oil Company of Zimbabwe ("NOCZIM") in the company of one M J Azziz ("Azziz"), purportedly a director of a company styled Eastpac International PLC ("Eastpac") based in the United Arab Emirates. The two respondents were introduced to officials of NOCZIM as directors of a Zimbabwean company called Quenora Investments (Pvt) Ltd ("Quenora") which was going to act as agents for Eastpac in a fuel procurement financing deal.

2. Discussions concerned the fuel procurement financing deal were then conducted between the two respondents, Azziz and officials of NOCZIM. Eastpac, represented by Azziz, proposed a US$20 million fuel procurement financing provided that as part of the deal NOCZIM had to pay them an amount of US$1.3 million in arrangement fees. It was agreed that the US$1.3 was to be paid through the respondents who were supposed to forward it to Eastpac.

3. Due to the prevailing foreign currency shortages in the country, NOCZIM failed to secure the US$1.3 million and then proposed an arrangement where they would pay Quenora an equivalent amount in local currency leaving it to the respondents to source the required foreign currency for onwards transmission to Eastpac. The respondents agreed and NOCZIM issued out a cheque for ZW$74 002 500, favour of Quenora which the respondents took. The respondents later returned to NOCZIM and requested for more money on the basis that the US$1.3 equivalent they had received had not been sufficient to raise the required amount because of the exchange rate at which they were sourcing the foreign currency. They were then given two other cheques which then boosted the total to ZW$146 900 000.

4. NOCZIM then realised that they could not afford to proceed to pay out that amount of money for the purchase of US$1.3 million only. They managed to source the required US$1.3 on their own and then suggested to the repondents and Azziz that they should accept the US$1.3 million and reimburse NOCZIM the $146 900 000. The respondents misrepresented to NOCZIM that such a solution was possible since they were still in possession of the $146 900 000 and that the reimbursement would be affected immediately upon receipt of the US$1.3 million by Eastpac.

5. When the respondents and Azziz agreed to the proposal they knew very well that the $146 900 000 had already been withdrawn from the Quenora account and that they were not in a position of reimburse NOCZIM that money. They then proceeded to

issue out cheques on several occasions against the Quenora account knowing full well that they were not going to be honoured as there was no money. The respondents knew that they had used part of the money to pay off their company's own debts. When NOCZIM continued to demand their money back, the respondents vacated their usual business address and they could not be located until their arrest. Nothing has been recovered.

The respondents' version of the transactions is not materially different from that of the investigating officer spelt out above. Mr Samkange for the respondents stated in the court a quo and repeated the same during the hearing in chambers that the first respondent admits receiving $146 900 000 from NOCZIM for the purpose of purchasing US$1.3 million's worth of foreign currency for onward transmission to Eastpac as its arrangement fee in a proposed US$20 million fuel procurement financing scheme. However, he alleges that after the money had been sent to Eastpac, Azziz came to Zimbabwe, held discussions with NOCZIM, and was paid the US$1.3 million in foreign currency.

Now, it is not immediately obvious why Eastpac was being paid twice for the same service. However, the first respondent alleges that NOCZIM officials then demanded back the $146 900 000 they had paid on the basis that the rate at which the foreign currency had been sourced had been too high. The first respondent agreed to refund NOCZIM the $146 900 000 but only upon receipt of US$1.3 million from Azziz. Azziz has not remitted the amount in issue but has allegedly confirmed both the NOCZIM and to the respondents that he is currently in South Africa and is on his way to settle the amount.

If indeed the facts are as the respondents allege, then it is quite strange why Azziz is taking such an awful lot of time to come and settle a liability that he purportedly acknowledges.

It is even stranger why, in the first place, he accepted the second payment when to his knowledge the respondents had already remitted the arrangement fees to Eastpac. It is not for the court to make a finding on the relative persuasiveness of the two versions of events or on the guilt or innocence of the accused persons at this stage. It suffices for the purposes of this bail appeal to note that the facts connecting the respondents to the commission of the alleged offence are not in dispute. Thus, in my opinion, the State appears to have made quite a strong prima facie case. This indeed, was also the view of the magistrate when he placed the respondents on remand:

"The accused have submitted that this is a civil case which should be settled civilly without resort to criminal courts. The court here on (sic) finds that the first set of three cheques which were signed could properly be linked to the reimbursement as agreed. The investigating officer testified that according to the evidence he has gathered so far there is suggestion that accused 1 informed NOCZIM not to present the cheques because there was

no money. If one links that to the allegation that the accused had indicated that they had the $146 million to reimburse, a reasonable suspicion is properly founded. At this stage the State only needs to put a reasonable nexus between the accused persons and the alleged offence. The State, through the investigating officer, has shown that both accused persons were involved in these transactions and hence they will be placed on remand."

It his heads of argument filed on behalf of the respondents, Mr Samkange submitted that in order for this court to interfere with the decision of the lower court, it must first be satisfied that the decision of the court a quo was unreasonable. However, the correct position is quite different from Mr Samkange's submission, and it is to the effect that a High Court judge is entitled to substitute his own discretion for that of the magistrate. The limitations referred to by Mr Samkange apply only to appeals from the High Court to

the Supreme Court where the Supreme Court can only interfere if there had been a misdirection or irregularity in the High Court or if the judge had exercised his discretion in a manner that was so unreasonable as to vitiate the decision reached. See Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S).

Although a High Court judge is entitled to substitute his own discretion for that of the magistrate, I am of the view that the judge must give due weight to the findings of the magistrate. In dismissing the State's fear that the respondents will abscond, the magistrate pointed our that the respondents had not attempted to flee despite knowing for more than a week that they were being investigated: "They had their passports. Accused 1 was arrested at this premises. I find that there is no sufficient evidence to indicate a desire to abscond". In respondents' favour is also the fact that the second respondent has been out on bail since 10 August, while the first respondent has remained in remand prison, apparently unable to raise the amount required for bail.

However, the above favourable factors must be weighed against the negative ones. The investigating officer testified that when the complainant, NOCZIM, continued to demand their money back, the respondents apparently vacated their known business address and could not be located until their arrest. Mr Samkange, however, proffered a reasonable explanation to the effect that this was a normal business translocation away from the city centre.

Nevertheless, the sudden change of the place of business under the circumstances and the lack of openness concerning the new business location and the fact that their business' local bank accounts no longer hold any cash — all this does create a reasonable suspicion that the respondents intended to wind up their business and abscond. The fact that they had not made other preparations for actually leaving the country such as purchasing tickets, etc., may have been because they had not anticipated their actual arrest to be that imminent, which might also explain the alleged desperate attempt by the first respondent to hide in a toilet at the time of his arrest.

Be all that as it may, the fear or respondents failing to attend trial must be addressed comprehensively. The factors to be taken into account in assessing the risk were spelt out in Aitken & Anor supra at 254:

"In judging this risk, the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case, the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial."

Mr Mabeza, for the appellant, has pointed out that the court a quo failed to take into consideration the following aspects when considering risk of abscondment:

1. The nature of the charges and the severity of the punishment likely to be imposed on the respondents upon their conviction.
2. The apparent strength or weakness of the State case;
3. The accused persons' abilities to reach another country or presence of extradition facilities;
4. The evidence and location of assets held the accused and the accused's means of travel, and

5. Whether the accused could afford to forfeit bail.

With regards to the seriousness of the offence, Mr Mabeza noted that "huge sums of public funds are unaccounted for in this case, the public has to be reassured that the justice system works and is seen to be working". Mr Samkange conceded that the respondents are indeed facing a very serious offence, but countered by saying that alone should not disentitle them to bail. I am of the considered view that the self-evident seriousness of the offence and the apparent strength of the case against them may well induce the respondents to abscond.

The missing funds have already been remitted outside the country. The first respondent has foreign accounts in Botswana and South Africa, which hold substantial credit balances. The failure by the first respondent to raise the bail amount may be due to the fact that his business' local bank accounts have been cleared of all cash or to his disinclination to utilise externally held funds — factors which strengthen rather than weaken the State's fears of a likehood of abscondment. The court a quo also failed to take full account that one of the accomplices, Azziz, is a foreigner based in the United Arab Emirates, with connections and resources to adequately facilitate the respondents making good their escape. Although it has been said in rebuttal that Azziz might have too valuable business interests in this country to jeopardise them by assisting the respondents' escape, nothing has been presented to show that respondents themselves have enduring business interests in this country.

The court a quo also considered the likelihood of the respondents

interfering with investigations and concluded: "It has not been shown how the accused can tamper with those investigations. An appropriate court order can address those fears." However, in setting the six-point bail conditions, the magistrate did not address those fears. Nonetheless, at the end of his record there appears a seventh condition, which was not incorporated into the bail terms and seems to have been meant to address the issue of foreign accounts, thus:

"The accused persons are barred from transferring or conducting any business on their foreign accounts, i.e., South African and Botswana accounts until the matter is finalised or with the authority of the court."

Mr Mabeza submitted that the State was still in the process of investigating the foreign bank accounts held by Quenora Investments in banks in South Africa and Botswana and their relationship with, and authenticity of, Eastpack plc.

Although the investigating officer had initially indicated that a month would be sufficient to complete the investigations, Mr Mabeza has indicated that more time would be needed as plans were underway for investigators to proceed with the probe abroad. Although Mr Samkange has challenged the necessity of investigating the Botswana and South African accounts "the court is bound to place reliance and trust in the opinion of the Attorney-General" (Aitken & Anor supra at253). In the premises, I am satisfied that the fears by the State of the respondents absconding and/or interfering with investigations are well founded and the respondents have failed to show that it is in the interests of justice for them to be out of bail.

It is perhaps pertinent to point out that as was held in S v Dzawo 1998 (1) ZLR 536 (S) that in terms of s 121(8) of the Criminal Procedure and Evidence Act [Chapter 9:07]

there is no further appeal from the High Court to the Supreme Court for bail applications originating from the magistrates court:

"In sum, the change brought about by the amendments to s 121 has removed the right of the person concerned who had appealed to a judge of the High Court against the decision of a magistrate in relation to bail, to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court": per Gubbay CJ at p 539.

Although the Supreme Court was concerned with a person who was aggrieved initially by the decision of the magistrates court and subsequently by that of the High Court, and stated that "the aggrieved person is entitled to a single appeal", the decision, in my respectful view, confirms that the legislature created a two-stage approach to bail litigation, that is, commencing either at the magistrates court with a final appeal to the High Court or at the High Court with an appeal with leave lying to the Supreme Court. This two-stage approach, in my considered view, applies whether or not the appellant was the aggrieved party at the initial stage. Thus, as in the case,

Page 174 of 2001 (2) ZLR 168 (H)

the two-state limit applies even though the aggrieved party was the Attorney-General who appealed against the magistrate's ruling and the respondents have not themselves appealed. The statement that "the aggrieved person is entitled to a single appeal" must be interpreted to import an entitlement to participate in a single appeal or, to put it another way, to participate in hearings or considerations of their bail application by, at most, two courts of different jurisdictional levels, otherwise the mischief of interminable bail proceedings that the legislature intended to cure will remain.

Accordingly, the appeal succeeds and I hereby set aside the magistrate's order granted on CRB No. 9778-9/01 on 6 August 2001 and refuse the admission of first and second respondents to bail.

Upon my handing down the above decision, Mr Samkange applied for leave to appeal to the Supreme Court but I ruled that in terms of s 121(8) of the Criminal Procedure and Evidence Act [Chapter 9:07] no appeal lies against this decision to the Supreme Court. The Supreme Court in S v Dzawo supra upheld this interpretation even though in this case the Supreme Court was of the opinion that bail should have been granted. Were it not for this provision I would have granted the leave applied for since bail applications entail the consideration of an accused person's possible future conduct, matters upon which another court may well reach a different conclusion.

Civil Division, Attorney-General's Office, appellant's legal practitioners

Byron Venturas & Partners, respondents' legal practitioners

LOGAN v TAXING OFFICER & ORS NNO

2001 (2) ZLR 175 (H)

Division: High Court, Harare

Judges: Gillespie J

Subject Area: Review of taxation

Date: 14 March 2000 and 5 September 2001

Judgment Number: HH-147-2001

Costs — advocate's fees — need for tariff applicable to advocates at de facto bar

Costs — costs incurred before commencement of proceedings — when allowable

Costs — sales tax — whether recoverable as party and party cost

In this review of a taxation, objection was taken to various decisions by the taxing officer, including his decision to allow the costs of communications between the parties' legal practitioners before the institution of proceedings, his assessment of counsel's fees and his decision that sales tax chargeable on legal fees should be included in the party and party costs.

Held, that the rule that party and party costs commence with the issue of summons should not be applied inflexibly so as to exclude as a matter of course all costs incurred before then. The taxing officer had a discretion to include such items as communications between the parties' legal practitioners in which the successful party's practitioner sought clarification of whether, and the basis upon which, default judgment had been entered against his client.

Held, further, that although advocates at the de facto bar should not be tied to a tariff regulated by time, as is the case with other legal practitioners, they should work to some realistic and up to date tariff, for example of maximum and minimum fees.

Held, further, that sales tax levied on legal practitioners' fees is not a legal cost as between party and party, and cannot be recovered as such.

Cases cited:

ICL Zimbabwe v Taxing Master & Ors S-45-99

Williams v Taxing Master 1979 RLR 222 (G)

The applicant in person

Mujeyi, for first respondent

Miss J McNally, for second respondent

GILLESPIE J: This matter comes before me as a review of the decision of the taxing officer. In the matter C F Hutchison & M C Atkinson in their capacity as executors of the estate of the late Hawkings v Logan HH-91-98,* Adam J dealt with a number of issues flowing from an action instituted by Logan against Hawkings. In short, the learned judge rescinded a default judgment given in Logan's favour; he allowed the withdrawal of admissions deemed to have been made by Hawkings or his executors; and he gave the executors leave to respond out of time to a request for particularity. In doing so, he made an order of costs which went to taxation and which is now under review. I deal with the views of dispute item by item.

ITEM 1 — 11 ATTENDANCES PROCEEDING THE APPLICATION FOR RESCISSION.

The first 11 items on the bill are attacked as not relating to the application for rescission. They comprise communications between the parties' attorneys seeking clarification of whether, and the basis upon which, default judgment was entered. Although they precede the institution of proceedings, I consider that the exercise of a discretion to treat them as costs of the application is fair. In Williams v Taxing Master 1979 RLR 222 (G), it was held that the rule that party and party costs commence with the issue of summons is not inflexible. It certainly should not, in my view, be applied to exclude as a matter of course items such as this which are fairly subject to a discretion. This objection is dismissed.

[The learned judge then dealt with other items and continued:]

ITEM 14 — COUNSEL'S FEE

This is contested on three bases. One, that it reflects no apportionment between issues where costs were awarded and where they were not. Two, that it is excessive. Three, that

it includes sales, or services, tax and is duplicated in the sales tax recovered by the attorney.
On the last point, the objector is incorrect. By directive given by the Commissioner of Taxes, an advocate, who maintains no trust account and is instructed and paid by another lawyers, does not recover tax himself. It is recovered and paid by the attorney.
On the second point, that it is excessive, I have some sympathy for the objector. No matter the eminence of counsel, the fee seems considerable

for the time spent in argument and preparation. I would normally respect the taxing officer's discretion but in this case I note that he has already overemphasised the supposed legal novelty and complexity of the case. He may have allowed this view to influence his decision on this point.
I note also that advocates at the de facto bar do not work to a tariff. It is undesirable that these lawyers should be tied to a tariff regulated by time. This would usually lead to fees considerably in excess of those charged. (This was certainly the case when I was in practice.) These should, however, be some tariff, for example of maximum and minimum fees for various work, that is kept up to date and realistic.
McNally JA in ICL Zimbabwe v The Taxing Master & Ors S-45-99, commented on the desirability of a tariff of recommented fees for advocates, and I respectfully echo his view. In the absence of such a tariff, the advocate might find himself, or herself, increasingly called upon by the taxing officer to justify a fee. These comments made, however, I see no basis to regard any part of this fee as excessive.
The first ground of objection I uphold. This fee, like others, must be apportioned in the manner I directed in item 3. To this extent only, I uphold the objection.
ITEM 15 — SALES TAX
The objector contends that the sales and services tax which the service provider, the attorney, is obliged by law to recover from the customer, his client, is an attorney and client charge. The executors' only response is that they, as the successful parties, are entitled to:
"be fully indemnified by having the burden of sales tax passed on to the other party."
The taxing officer holds that:
"the purpose of an award of costs is to enable the successful party to recover the expenses to which he has been put …"
These are both true observations, as far as they go. They do, however, beg the question as to whether these taxes are items properly recoverable as party and party costs. It is trite that not all expenses are recoverable and it is therefore misleading to suggest that the successful party enjoys a complete indemnity.
I consider that it is fundamentally unsound to treat this tax as just another item of legal costs. It is not a legal cost. It is a tax. It is a tax levied upon persons who employ various services. It is a tax collectable by the service provider. It may be an expense associated with litigation but it is not a fee raised by a lawyer for any professional work done by him, any more than collection

commission is a fee for professional services rendered — in fact it is much less such a fee than collection commission is.

A tax on a lawyer's services is not a legal cost as between party and party, it is an impost as between a taxpayer and the fiscus, involving the service provider who is the mandatory collector of the tax. I hold that in the absence of specific legislation in terms of the Sales Tax Act affecting the situation, the taxpayer has no right to assign his obligation to any other party and the collector of the tax has no right to recover it from any party other than the person to whom he provided the service.
I therefore uphold the objection.
[The remainder of the judgment is not material to this report. — Editor.]
Kantor & Immerman, second respondent's legal practitioners
MUDZENGI & ORS v HUNGWE & ANOR
2001 (2) ZLR 179 (H)
Division: High Court, Harare
Judges: Hlatshwayo J
Subject Area: Civil application
Date: 29 March & 12 September 2001
Judgment Number: HH-158-01

Associations — voluntary association — constitution — interpretation — approach to be taken to — reasonable and commonsense approach rather than a narrow and close one
Practice and procedure — application — respondent raising preliminary procedural points, as well as having a defence on the merits — should file affidavit setting out defence on the merits without waiting for court's ruling on preliminary matters
Practice and procedure — application — urgent application — interdict sought as provisional relief — requirements for an interlocutory interdict must be established
Practice and procedure — parties — locus standi — applicant citing parties as respondents — not competent to object to respondents' capacity to appear
For an application for an interlocutory interdict to succeed, the applicant must establish a prima facie right, that irreparable harm is likely to result if the remedy is not granted, that the balance of convenience is in favour of granting the remedy and that there is no other satisfactory remedy available. Where an urgent application seeks an interdict as interim relief, all the requirements for an interlocutory interdict must be established.
An applicant who cites a party lacking legal capacity cannot rely on that incapacity to have the matter resolved in his favour. Instead, if the applicant knowingly cites a party lacking locus standi, the matter will not be properly before the court and it would have to be dismissed with costs on the higher scale. Ordinarily, it would be the respondents who would raise their own lack of capacity, or indeed the applicants' lack of capacity, as a defence in limine.
Where the respondent raises preliminary points, but also has a defence on the merits, he may not postpone the filing of an affidavit setting out his defence on the merits pending the court's decision on the preliminary matters.
In interpreting the constitution of a voluntary association, the court should adopt a practical, commonsense approach to the matter, bearing in mind that the persons who are called on to administer such a constitution are usually lay people, unversed in the ways of the law. The court should not approach the matter in a fault-finding spirit that seeks to exact the most

meticulous compliance with every trifling detail, however unimportant or unnecessary. Such an approach would be calamitous, as it would result in every disappointed member being encouraged to drag his society into court for every trivial failure to observe the exact letter of every regulation. The courts should also lean towards supporting democratic processes based on the legitimate structures of voluntary organisations, rather than give succour to rebellious initiatives bent on undermining the constitution, unless it is shown that rights or legitimate expectations have been violated or are threatened within the framework of such organisations. Administrative law principles and procedures should supplement, not supplant, the democratic and political controls of the exercise of administrative power.

Cases cited:

Christian Youth Fellowship Council v Mkwakwami & Ors HH-91-97

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

Garment Workers' Union v de Vries & Ors 1948 (1) SA 1110 (W)

Gideon v Ngumo 1973 (2) RLR 197 (G)

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Motaung v Mothiba 1975 (1) SA 618 (O)

Musara v Zimbabwe National Traditional Healers Assn 1992 (1) ZLR 9 (H)

Mushayakarara & Anor v Chidyausiku NO & Ors 2000 (1) ZLR 227 (H)

Nyazorwe v Guta & Ors HH-234-88

Stevenson v Minister of Local Govt 2001 (1) ZLR 321 (H)

Legislation considered:

High Court Rules 1971 (RGN 1047 of 1971), rr 226(2), 246(2), 259

T Hondora, for the applicants

J O'Brien, for the respondents

HLATSHWAYO J: On 29 March 2001, the five applicants, who are members and councillors of the Zimbabwe Farmers Union (ZFU), filed, under a certificate of urgency, an application for an order to interdict the first respondent (the president of the ZFU cited in his official capacity) and the second respondent (the ZFU, hereinafter called "the union") from utilising a new constitution in the administration and management of the affairs of the union, pending the declaration of its nullity on the ground that the constitution was improperly adopted. However, the respondents' legal practitioner, in an affidavit filed on 11 April 2001, objected to the application on a number of grounds, including that it was not an urgent matter and that the nature and intention of the application was unclear.1

LOCUS STANDI

At the initial chamber hearing, the applicant raised issues pertaining to the authorisation of the respondents to defend the application. In his affidavit objecting to the application, the respondents' legal practitioner had not explicitly indicated that the respondents, as the cited party, were aware of, and, accordingly, opposing, the application. He had merely stated the following:

"I am a Legal Practitioner of the High Court of Zimbabwe, duly registered as such in 1989, and carrying on practice as a partner in the partnership of Wickwar & Chitiyo, the

respondent's Legal Practitioners of record. The facts contained herein are within my personal knowledge."

He had then proceeded to deal with the grounds for objecting. But, since the above averments did not make it clear that the respondents were aware of, and had authorised the opposition to, the application, I ordered that this oversight be rectified which was duly done through an affidavit of first respondent filed on 22 May 2001.

Nevertheless, Mr Hondora, for the applicants, in heads of argument filed on 28 May, insisted that their objection still remained unanswered since, according to him, it pertained to the lack of authorisation of first and second respondents by the union to oppose the application. He argued that according to both the previous (1997) and current or disputed (2000) constitution of the union, the power to institute or defend litigation on behalf of the union and its officers vests in the National Council; that the union cannot, without specific or general delegation of authority by the National Council, initiate or defend any litigation, and that therefore the purported opposition to the application should be dismissed and the relief prayed for granted.

I found this to be a rather startling and unusual objection, coming as it did from a party that had itself cited the respondents in the first place as having the necessary locus standi to defend the application. Surely, an applicant who cites a party lacking in legal capacity cannot rely on that incapacity to have the matter resolved in his favour. Rather, if the applicant knowingly cites a party lacking locus standi, then the matter will not be properly before the court and it must be dismissed with costs on a higher scale.

Ordinarily, it is the respondents who should raise their own lack of capacity, if at all, and indeed the applicants' lack of capacity too, as a defence in limine, and never the applicants, for the mind boggles as to the sense of employing such a self-defeating stratagem in the case of the latter party.

The case that the applicants sought to rely on, Stevenson v Minister of Local Government 2001 (1) ZLR 321 (H), in support of this unusual proposition, dealt with the locus standi of an applicant who, among other things, had not produced any proof of authorisation by her political party nor by the municipal voters to institute the proceedings on their behalf. But the Stevenson case is clearly distinguishable from the present one, in the sense that the respondents here are the farmers' union itself and its president and the lack of standing is being raised by a party who cited them in the first instance!

Now, if the applicants knew from the very start that the respondents could not defend the application without obtaining the authority of the union's National Council, which meets quarterly, then at the very least they should not have proceeded by way of an urgent application.

I would like to note, in passing, though that ordinarily an organisation such as second respondent, viz., a universitas, can sue and defend actions through its officials, such as first respondent, subject to the specific provisions of its constitution. Both the 1997 and the 2000 constitutions clearly state that the union is a body corporate capable of suing and being sued, and, indeed, the applicants correctly cite it as such.

I doubt whether the same constitution can be interpreted as having gone on to whittle down, to the extent suggested by the applicants, this legal capacity, which is critical not only for the union itself but also for third parties intending to sue it. For the benefit of the applicants, however, I assumed, and would have proceeded on the basis, that the

respondents did have locus standi, either on the basis of ostensible authority subject to ratification as argued by Mr O'Brien or actual authority on a proper construction of the union's constitution; otherwise I would have been obliged to dismiss the application with costs on an admonitory scale.

However, on the basis of the averments in the first respondent's affidavit filed on 4 July, I do not have to proceed on the above assumption, for he has clearly stated, and that has not been disputed, that he has the necessary authority, thus:

"I have authority herein on behalf of the second respondent, such authority having been granted to me by Resolution of the second respondent's Council on 24 May 2001. I confirm that at the same time the Council ratified my prior actions in respect of this matter."

It is surprising that the applicants have not sought to avail themselves of the opportunity given to them to respond to the above statement especially given that the applicants had argued strongly, though wrongly as I have shown already, in their answering affidavit of 24 May that the first respondent had no mandate to defend the action, and that even if he sought the National Council's ratification of his actions, the ratification will not be granted.

URGENCY

This matter was initially brought as an urgent chamber application in December 2000 (HC 12769/2000), but Mungwira J ordered that the matter should proceed by way of court application. The applicants then withdrew the application and tendered wasted costs. The reason they give for withdrawing the earlier application is that they realised that they had not established "a strong enough case to succeed on the allegations that we are making".

However, as Mr O'Brien pertinently observes, the same application is now again being brought by the same applicants against the same respondents in

respect of the same subject matter (the 2000 constitution and perusal of books of accounts) and seeks a similar order on an urgent basis. But for the delays already indicated above (footnote 1), I would have been inclined to dismiss the application as not urgent.

Other preliminary procedural issues arose during the consideration of this matter, which require some comments. The question of delays in the finalisation of this matter has already been averted to. According to r 244, a judge must consider "forthwith", chamber applications accompanied by a certificate of urgency. However, this does not mean that a decision would necessarily be arrived at "forthwith" even if there were outstanding procedural matters in the way, for example, unsettled costs of a previous application or pleadings that are necessary or remained unanswered, as was the case here.

At the very first hearing, I advised the legal practitioner for the respondent to next come prepared to address both the preliminary points that he had raised as well as the merits of the case. More than a month later, the respondents' lawyer, having taken the position that he is entitled to await the court's decision on the objections, had not filed any affidavit answering to the applicants' founding one.

However, this position is incorrect, as Herbstein and van Winsen Civil Practice of the Supreme Court of South Africa 4 ed at 355-356, quoting ample authority, aptly observe:

"When the respondent raises preliminary issues but also has a defence on the merits he may not postpone the filing of an affidavit setting out his defence on the merits pending the court's decision on the preliminary issues."

All the same, in the interest of having the issues more fully ventilated but bearing in mind the urgency of the matter, I consented to Mr O'Brien's request, against the protestations of Mr Hondora, to file the respondents' defence on the merits but required that this should be done within two working days and that the applicants would be allowed to file any reply thereto within a similar period. As it turned out, the respondent filed the affidavit within five days, a delay of three days, which under the circumstances I considered to be excusable, especially given that the applicants seem to have accepted the apology and excuse extended to them in respondents' memorandum dated 6 July.

NATURE OF THE APPLICATION

Mr O'Brien raised the objection right from the outset that the application as currently formulated is uncertain as to its intention, but, in regard to its overall intention, it appears to be an application for review. But since it

appears to have been brought out of time and no condonation for its late filing has been sought, he argued, it has prescribed and, therefore, must be dismissed.

According to r 259 of the High Court Rules 1971, review proceedings must be instituted "within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred".

Now, the allegedly unlawful adoption of the union's new constitution occurred on 3 August 2000. The complainants did nothing about it for four months. The reason given for this inaction is that they were under the impression that the adoption of the new constitution had not in fact taken place and only became aware that the respondents were now acting in terms of the new constitution in November 2000 when the applicants sought to exercise their right to inspect the union's books of account. This raises the question as to when the prescriptive period of eight weeks should be reckoned from: upon the termination of the illegal proceedings or upon the coming into light of the irregularities?

It appears that the proper approach should be to reckon the prescriptive period from the termination of the irregular proceedings. In the special circumstances where the fact of the irregularity only comes to light at a later stage, then the complainant must apply to have the time extended, as provided in the Rules. No such application has been made in this case. Therefore, relief by way of review is not available to the applicants.

Mr Hondora has argued that the application should be treated as one for an interdict. Now, for an application for an interlocutory interdict to succeed, the applicant must establish a prima facie right and show that irreparable harm is likely to result if the remedy is not granted, that the balance of convenience is in favour of granting the remedy, and that there is no other satisfactory remedy available. See Gideon v Ngumo 1973 (2) RLR 197 (G), where Davies J quotes with approval Holmes JA's dictum in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Anor 1973 (3) SA 685 (A) at 691.

However, according to r 246(2), in an application for a provisional order the judge needs only be satisfied that the papers establish a prima facie case for him to issue the order in terms of the draft or as varied. On the other hand, r 246(2), in my view, should be read in

conjunction with r 226(2)(c) which states that an application shall not be made as a chamber application unless "the relief sought is procedural or for a provisional order where no interim relief is sought only" (my italics; the word "only" appears superfluous). Thus, r 246(2) appears to have been drafted on the assumption of an application for a provisional order with no interim relief. Where an urgent

application seeks an interdict as interim relief, I am of the considered view that all the requirements for an interlocutory interdict, and not just a prima facie case, must be established otherwise the provisional order should be granted without interim relief.
In order to better appreciate the nature of this application, it is appropriate to reproduce in full herein the terms of the order sought:
"TERMS OF FINAL ORDER SOUGHT
That you show cause to this Honourable Court why a final order should not be made in the following terms:

(a) That the Zimbabwe Farmers Union Constitutional amendments of year 2000 be and are hereby declared to be of no force and effect;

(b) That the applicants, in their capacities as councilors in the National Council of the Zimbabwe Farmers Union be and are hereby authorised to inspect the Union's books of accounts in terms of clause 8.5 of the constitution, and

(c) The respondents be and are hereby ordered to pay costs of suit.

INTERIM RELIEF GRANTED
IT IS ORDERED THAT:

1. Pending an application or action to set aside the Zimbabwe Farmers Union Constitutional amendments of year 2000, the respondents be and are hereby interdicted from utilising the Zimbabwe Farmers Union Constitution as amended in year 2000.

2. That the application or action to set aside the year 2000 constitutional amendments shall be made within ten (10) days of the granting of this provisional order."

Now, the interim relief sought in this application is the prohibition of the union from utilising the new amendments to the constitution pending the filing, within ten days, of an application to set aside the amendments. Ordinarily, one would have expected the provisional order to be a prayer for a temporary interdict pending its confirmation on the return date.
However, the terms of the final order do not relate to such a provisional interdict, are not about confirmation of an interdict, but rather, relate to a declaration! There is nothing intrinsically wrong in seeking an interdict pending a declaration, but, as will be shown immediately below, some difficulties do arise where a temporary interdict is sought under circumstances where its granting amounts to final relief. See Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H) at 193A-C per Chatikobo J.
Assuming that this court was to grant the provisional order, as presently couched, with the interim relief sought, it is not certain what the next stage of the proceedings would be. The applicants could choose to institute an action or application for the setting aside of the amendments, in which case the provisional interdict would act as a confirmed interlocutory interdict when no confirmation proceedings would have taken place. If the respondents were minded to challenge the confirmation of the provisional interdict, they would not be in a position to do so, because, on the return date, in terms of

the final order sought, the issue would be one for a declaration. It is also possible that the respondents might find themselves faced with a dual action of a declaration on the return date and a separate application for the setting aside of the amendments — both anchored by an interim interdict obtained, if the traditional approach were followed, on the mere showing of a prima facie case.

In the premises, the objection that this application is uncertain as to its intentions is well founded. I am also of the opinion that more than a prima facie case must be established to justify the granting of the interim relief sought, i.e., the other requirements for an interlocutory interdict must be shown. However, as will be argued later on, the facts of this case do not support the granting of such an order.

In para 46.1 of their founding affidavit, the applicants make a bald statement that "[t]his is an application for a declaration". They go on to state that they seek "a declaration that the respondents are not permitted to use the 2000 amendments to the constitution in the running of the affairs of the ZFU — and that the constitution as amended in 1997 is still valid and applicable".

They further seek a declaration of their entitlement to inspect the union's books of account. In their affidavit of 28 May, the applicants state their case as follows:

"The urgent application is not an application for review, but an application for an interdict pending an application for a declaration that all amendments to the 1997 Zimbabwe Farmer's Union Constitution be declared null and void."

However, Mr O'Brien has pointed out that the main part of the application is not in the form of a declaration, but that of a review. The essence of the applicants' contentions, Mr O'Brien argues, is that wrong procedures were used in respect of the decision to adopt amendments to the new constitution, and, in the final relief, they seek the setting aside of the union's congressional decision as having been procedurally incorrect. While this has all the hallmark of a review, in appears that relief by way of a declaration is not necessarily precluded.

In Musara v Zimbabwe National Traditional Healers Association 1992 (1) ZLR 9 (H) at 13, the late Robinson J expressed the view that a court should readily consider granting a declaratory order "where, on the papers before it — the more so where those papers seek a declaratory order — an act of glaring invalidity is … staring the court straight in the face", and concluded:

"For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void ab initio on some technical ground would be to ignore the court's fundamental duty to see that justice is done which, after all, is the duty which the layman expects the courts to discharge."

Alive to the above opinion, which implies that in certain circumstances a matter may be treated as a declarator and not a review, Mr O'Brien sought to distinguish the present case from the Musara one by pointing out that the decision of the union is not void and that the balance of convenience does not favour such a declaration, thus:

"Most importantly, even if the application was one for a Declarator, and even if the Draft Order was amended for that purpose and granted, the effect would be that, at the instance of four individuals' complaints, the entire Congress of Second Respondent would be reversed."

A PRIMA FACIE CASE?

In terms of r 246(2), before granting a provisional order in terms of the draft order or as varied, the judge must be satisfied that the papers establish a prima facie case. However, as already noted above, where an interlocutory interdict is sought, other requirements such as the balance of convenience, and so forth, must be established. I now turn to considering whether a prima facie case for the granting of the provisional order has been shown on the papers.

The gist of the respondents' complaints is the allegedly irregular manner in which amendments to the union's constitution were adopted. In Annex "CC" of the applicants' founding affidavit, a Mr Josef Herman Elisabeth Martens, an economic adviser to the first respondent, states as follows in this regard:

"I confirm that the issue of the amendments was never discussed until on the last day when the congress had been officially closed, I rushed to the president (first respondent) and reminded him of the item which he had omitted. He waived it at the remaining delegates in the Hall and asked what should be done about it whereupon one of the vice presidents who was already at the door shouted that since it had been sent to provincial headquarters, it should be adopted. There was no vote for the amendments (nor) any debate of any sort."

The applicants further allege that the National Council did not send out to members the 90 days' formal notice of proposed amendments as required by the constitution, that the amendments were not debated, that the 50% attendance quorum was not ascertained prior to voting, that the required majority for adoption could not be ascertained and that at any rate the amendments are prejudicial to the applicants in that they take away their rights as members to directly inspect the union's accounts and that they take away preferential representation of women in the Council.

However, the first respondent strongly disputes these allegations in his affidavit of 4 July 2001, which incorporates by reference the grounds for objection filed of record on 13 December 2000 in respect of withdrawn case No. HC 12769/2000, ("former or earlier affidavit") thus:

"As per my former Affidavit, the consultations in respect of all the ZFU's branches and members were wide-ranging and inclusive. During the course of these consultations, notice was given to all members, through their representatives, as to the proposed amendment and the nature of the amendment. The members of the Second respondent's Congress were well acquainted with the proposed amendment … I deny that the Congress was closed at the time that the vote was taken to amend the Constitution and I abide by my former Affidavit in this regard … I confirm that opportunity was given for debate. No debate was instituted by any delegate because they were well aware of the amendment prior to the Congress and were happy to agree to it."

The first respondent's version of the adoption process is as follows:

"I introduced the issue of the 2000 Constitution. My Vice-President, Mr Mashingaidze, then took the stand. He sought confirmation from the Congress as to whether they had had the opportunity to be consulted with and respond to the 2000 Constitution. The Congress unanimously agreed that they had. Mr Mashingaidze sought confirmation from the delegates present as to whether they had received the opportunity to state their views and whether their views had been incorporated within the Constitution. The Congress agreed that they had and stated so. No delegate raised any objection or initiated any

debate. On the contrary, the Congress stated that there was no need for further debate. At this point, I then stood up, held a copy of the 2000 Constitution up in my hands and asked if the Congress could please notify its approval for the new Constitution. Without exception, all the delegates indicated that the accepted the 2000 Constitution and they approved it" (paras. 16-18 of his earlier affidavit).

In trying to resolve the above disputes, I sought guidance from the background to the union's constitutional changes extracted from the affidavits of the applicants and the respondents, which is as follows:

i. Following the 1997 amendment to the union's constitution, the ZFU membership called for more amendments and a Constitutional Committee was tasked with drafting an amended constitution;

ii. The Constitutional Committee embarked on a country-wide consultative process that culminated in the production of the Draft Constitution of 2000. Mr Martens states in his affidavit that he was instrumental in the drafting of the amendments, in the circulation of the agenda for the congress and the distribution of the amendments to the delegates.

iii. All the applicants were participants in the provincial consultations which culminated in the presentation of the draft constitution to the National Council on 6 July 2000, which all the applicants attended and at which meeting the draft constitution was unanimously adopted.

Given the above background, it would appear that Mr Martens and the applicants were so keen to have the 2000 amendments adopted that they made sure that the item was not overlooked at the conference. If the preparatory stages, at which Mr Martens and the applicants seem to have played key roles, were in any way defective, then they had the opportunity to object to the tabling of the motion for adoption. All the applicants were

present at the congress, but none of them opposed the adoption of the constitution or the manner in which the adoption had been done.

So, in the light of the above averments and counter statements, could it be said that the alleged departures from the constitutional requirements establish a prima facie case sufficient for the granting of a provisional order, with or without interim relief? In dealing with constitutions of voluntary associations, such as the second respondent, it has been held that the approach to be taken must be a "benevolent", "practical" and "commonsense" one. Steyn J in Motaung v Mothiba NO 1975 (1) SA 618 (O) at 626H-627A, quoted with approval by Chinhengo J in an unreported judgment, Christian Youth Fellowship Council v Mkwakwami & 4 Ors HH-81-97 at 15, states the approach as follows:

"In considering whether there has been a material breach of the constitutional provisions of a voluntary association, a court of law should not, however, view the matter as if under a strong magnifying glass and should not carpingly ferret out and unduly enlarge every minor deviation from the strict letter of the constitutional provision being examined. Much rather should it adopt a practical, commonsense approach to the matter, constantly bearing in mind that the persons called upon to administer such a constitution are usually laymen who are unversed in the ways of the law."

See also Price J in Garment Workers' Union v de Vries & Ors 1948 (1) SA 1110 (W) at 1129 who articulated the approach thus:

"In considering questions concerning the administration of a lay society governed by rules, it seems to me that a court must look at the matter broadly and benevolently and not in a carping, critical and narrow way. A court should not lay down a standard of observance that would make it always unnecessarily difficult — and sometimes impossible — to carry out the constitution. I think that one should approach such inquiries as the present in a reasonable and commonsense way, and not in the fault-finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary. If such a narrow and close attention to the rules of the constitution [is] demanded, a very large number of administrative acts done by lay bodies could be upset by the courts. Such a state of affairs would be in the highest degree calamitous — for every disappointed member would be encouraged to drag his society into court for every trifling failure to observe the exact letter of every regulation."

In Mushayakarara & Anor v Chidyausiku NO & Ors 2000 (1) ZLR 227 (H) at 233D-F, Bartlett J considered the objection by 24 out of 400 commissioners to the adoption of a draft constitution by acclamation and concluded:

"I am not satisfied that the applicants have established sufficient a prima facie case or that the balance of convenience requires such an order. Accordingly, the application for the provisional order sought by the applicants is dismissed with costs."

On a strict interpretation of the union's constitution, one could come to the conclusion that the applicants did establish a prima facie case, even though the precise facts are in dispute. However, on the basis of the benevolent and

commonsense approach outlined above and which I adopt, I am not persuaded that, ex facie, a breach of the union's constitution, necessitating legal intervention, occurred in the manner in which the 2000 amendments were adopted. The first respondent seems to have bona fide moved the motion for the adoption of the amendments in circumstances where there was substantial compliance with the constitution and no one perceived or complained of any immediate prejudice.

I am further fortified in this conclusion by the fact that the complaints about the manner in which the 2000 Constitution was adopted seem not to be bona fide, but appear to have arisen in the context of the operations of a committee calling itself "the Coordinating Committee for the Rescue of the ZFU: Mashonaland West Initiative", which is not a constitutional organ of the union. Rather, it appears to be a mutant of an ad hoc commission of inquiry set up in 1999 whose mandate was later terminated by the National Council, but which commission then unilaterally continued to carry out its own "private investigations".

It is significant that in its "Report on the Zimbabwe Farmers' Union: Mashonaland West Initiative", dated 27 September (presumably, 2000) and annexed as "FF" of the applicants' founding affidavit, this so-called "ZFU Crisis Coordinating Committee", which comprises, among others, the third, fourth and fifth applicants, does not at all mention the allegedly unlawful adoption of the 2000 constitution among its catalogue of problems supposedly afflicting the union.

This "crisis or rescue committee" seems to have been concerned with the otherwise laudable issues pertaining to the restructuring of the union and the combating of

perceived corruption and lack of transparency within the union. But, in doing so, it seems to have been prepared to disregard the existing structures of the union.
When it sought to inspect the union's accounts, this was denied on the basis that in terms of the 2000 amendments only the official structures such as the National Council or the Councillors may do so — hence this litigation. However, councillors such as the first applicant do have a right, in that capacity, to inspect the books. They can inspect the books and share the information with the "crisis committee". They can also raise with the National Council some of the allegedly unsatisfactory features of the 2000 amendments to the union's constitution. In other words, there are alternative remedies open to the applicants instead of the extraordinary one of an interdict that they seek.
It is my considered view that, apart from adopting a benevolent approach to the interpretation of the constitutions of voluntary associations, the courts should also lean towards supporting democratic processes based on the

legitimate structures of voluntary organisations rather than give succour to rebellious initiatives bent on undermining the constitution, however well-meaning they may be, unless it is shown that rights or legitimate expectations have been violated or are threatened within the constitutional framework of such organisations. In other words, the approach I am advocating is the "amber-light" attitude towards administrative power in the traffic-light metaphor of "red", "amber" and "green" theories, that is to say, administrative law principles and procedures should supplement and not supplant the democratic and political controls of the exercise of administrative power (see Harlow & Rawlings Law and Administration (1984)).
CONFLICT OF FACT
Even if I am wrong in the conclusion I have reached that no prima facie case has been shown, there is still the issue of conflict of fact to take into account. I am of the considered view that the applicants should not have proceeded by way of notice of motion when it was not only obvious that a substantial dispute of fact would arise, but having been specifically warned, in para 35.7 of respondent's earlier affidavit, of a severe conflict of fact pertaining to their interpretation and the respondent's interpretation of the manner in which the union's 2000 constitution was debated and adopted, the applicants make no reference to this point and introduce nothing further to rebut the observation made. Compare Nyazorwe v Guta & Ors HH-234-88 where an application on notice of motion was dismissed with costs because a material dispute of fact was foreseeable and inevitable. In this case, I consider the prayer for costs on a higher scale as justified.
SUMMARY
It has been show above that a prima facie case for the intervention of the court through the issuing of a provisional order has not been established, much less the requirements for the granting of an interlocutory interdict with such a provisional order. When all this is combined with the serious conflict of fact, which was not only foreseeable but about which the applicants were specifically warned, but nonetheless persisted regardless, and the uncertainties as to the intention of the application noted earlier, I am persuaded that the application should be dismissed and that the respondents are well justified in seeking costs on a higher scale. However, the respondents are not entitled to the costs of, and relating to, the affidavit filed on 4 July 2001, because, as already noted, that affidavit should have been filed together with the respondents' exception.

Page 193 of 2001 (2) ZLR 179 (H)
Accordingly, the application is dismissed with costs on the legal practitioner and client scale, excluding the costs of, and pertaining to, the respondents' affidavit filed on 4 July 2001.
Kantor & Immerman, applicants' legal practitioners
Wickwar & Chitiyo, respondents' legal pratitioners
BRIMPTON (PVT) LTD v COMMERCIAL BANK OF ZIMBABWE LTD
2001 (2) ZLR 194 (H)
Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Civil action
Date: 5-7, 11 & 14 June; 12 September 2001
Judgment Number: HH-160-01

Bank — commercial credit — letter of credit — banker's duty under standard conditions to ensure that documents conform with terms of letter of credit — banker failing to do so — payment being made when should not have been — a breach of contract — buyer receiving goods — quantum of damages to be assessed in light of benefit received by buyer
Contract — breach — damages — assessment — principles — damages to be assessed in light of loss actually suffered — benefit received in spite of breach to be taken into account
The plaintiff company was buying goods from a supplier in India, and obtained an irrevocable letter of credit from the defendant bank. It was a condition of the letter of credit that the goods would be despatched and would conform to laid down specifications. The bank caused some payments to be made, even though the documents received by it did not conform with the conditions of the letter of credit. The plaintiff knew of these discrepancies and waived them. In respect of some of the goods, the plaintiff did not accept the discrepancies. The bank, however, failed to advise the supplier of the discrepancies timeously, and the seller insisted on payment. Payment was made and the plaintiff's account debited.
The plaintiff claimed from the bank a sum representing the unauthorised debits, plus interest, bank charges and a sum which it claimed it would have earned from interest from investing surplus funds. The bank, in its plea, claimed that the plaintiff had, by its conduct, waived the discrepancies and thereby authorised payment. It argued that it was never in the parties' contemplation that, in the event of the company's account being in credit, the credit balance would have been invested and a return obtained at the prevailing market rates. Further, it argued, the company had received the goods and thus had not suffered any damages. The bank counterclaimed for payment of the overdraft plus interest.
Held, that although documentary credits are separate transactions from the underlying and antecedent contracts, and the issuing bank is not concerned with or bound by such contracts, it has a duty to examine the documents with reasonable care to ascertain that the documents appear on their face to be in conformity with the conditions of credit. If they
Page 195 of 2001 (2) ZLR 194 (H)

are not in conformity with the letter of credit, the bank must determine, on the basis of the documents alone, that payment is not to be effected.
Held, further, that the relationship between the issuing bank and the customer, the buyer, is governed by the ordinary rules of contract, which must be considered in conjunction with the relevant international rules on documentary credits. There was an absolute requirement under the rules for the bank to act within seven banking days if it were to refuse to take up the documents or to seek a waiver of any discrepancies and to inform the beneficiary's bank accordingly. It did not do so, and thus the bank had failed to observe the rules of documentary credits. There had therefore been a breach of the contract between the company and the bank. The bank should not have paid the beneficiary or debited the plaintiff's account.
Held, further, however, that the company had received the goods and profited from them. Even though the bank could not rely on the law relating to unjust enrichment, in an award of damages for breach of contract the aim is to place the sufferer from the breach in the position he would have been in had the contract been properly performed, as far as that can be done by the payment of money and without undue hardship to the defaulting party. The benefit the plaintiff had received had to be taken into account in assessing the quantum of damages.
Held, further, that there was no evidence of how much money was available to the company for investment or that it was in the contemplation of the parties that, should such funds have been available, they would have been invested in high yielding investments.
Cases cited:
Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976 (CA)
Everett & Anor v Marian Heights (Pty) Ltd 1970 (1) SA 198 (C)
R D Harbottle (Mercantile) Ltd & Anor v National WestminsterBank Ltd & Ors [1977] 2 All ER 862 (QBD)
Industrial Equity v Walker 1996 (1) ZLR 269 (H)
Infraco Ltd v Notis Shipping Corp [1981] 2 Lloyd's Rep 256 (CA)
Loomcraft Fabrics CC v Nedbank Ltd & Anor 1996 (1) SA 813 (A)
Power Curber Intl Ltd v National Bank of Kuwait SAK [1981] 3 All ER 607 (CA)
F Girach, for the plaintiff
R Y Phillips, for the defendant
CHINHENGO J:
INTRODUCTION
The plaintiff is a company engaged in the clothing manufacturing business in Zimbabwe. It imported fabrics from India. It held two accounts with the defendant, a commercial bank. One was a current account and the other a call account. This case is concerned with transactions on its current account.
In 1996, the plaintiff entered into a contract with an Indian supplier of acrylic/synthetic fabrics which it intended to import into Zimbabwe. In

international transactions of this kind, the supplier would generally be unwilling or reluctant to dispatch the goods in reliance only upon the buyer's personal credit. The supplier may not even know the buyer and, even if he knew him, he may still be

uncertain about the buyer's credit. Equally, the buyer may not be sure about the supplier's reliability and so he would also be unwilling to part with his money before he is certain that the goods are on their way.
These uncertainties are settled by what are known as commercial credits. In terms of such credits, the buyer/importer agrees in a contract of sale to procure the opening of a commercial credit by a reliable bank in his own country in favour of the seller/exporter so that the seller is assured that when he dispatches the goods and tenders shipment documents to the bank, he will be paid the purchase price by the bank. The buyer on the other hand, is enabled to postpone payment until he knows that the goods have been dispatched.
A banker's credit is predicated upon an antecedent underlying contract for the sale of goods in which it is agreed that the price will be exchanged by means of a banker's letter of credit. The conditions on which the banks are prepared to issue and to act on commercial credits have been standardized over the years. They are now codified in the Uniform Customs Practice for Commercial Documentary Credits (1983 Revision): International Chamber of Commerce Publication 500 [hereinafter referred to as "the UCP 500 Rules"] which are of universal application. For an indepth appreciation of what I have outlined in this introductory part reference can be made to Penn, Shea and Arora's The Law and Practice of International Banking: Banking Law vol 2 at pp 290ff. There are many kinds of commercial credits. Here, I am concerned with an irrevocable letter of credit (documentary credit) issued by the defendant on application by the plaintiff. In this judgment, I will refer to the plaintiff as "the buyer", the supplier/exporter as "the beneficiary" and the defendant as "the issuing bank".
THE PLEADINGS: (A) UNCONTESTED FACTS
On 9 April 1996, the buyer applied to the issuing bank for the issue of an irrevocable documentary credit also known as an irrevocable letter of credit. The amount applied for was US$345 234.80. The application was made on the issuing bank's standard application form. Some of the terms of this standard application form which are relevant to this case are that the buyer authorised the issuing bank to debit any of the buyer's accounts with all the payments made to the beneficiary and with all charges and disbursements in connection with the letter of credit. The application form required the buyer

to acknowledge that the letter of credit agreement was governed by the UCP 500 Rules. The buyer also agreed to pay costs, in the event of litigation, on a legal practitioner and client scale. The application form, duly completed by the buyer was submitted as an exhibit and was part of the bundle of documents submitted by the plaintiff.
On 11 April 1996, the issuing bank issued the letter of credit in favour of the beneficiary. The letter of credit stipulated, in the usual manner, the amount of the credit and the tenor terms were that the amount or any part of it would be paid at 150 days from sight of all documents in conformity therewith. It specified the kind of goods covered by the letter of credit and the fabric specifications. It described the fabric by name, width, length, weight, order, size, price, the terms of shipment and other details relating to shipment documents. The letter of credit was telefaxed to the confirming bank, Citibank of New York. It was later amended but no issue arises from the amendment.
(B) BUYER'S CLAIM AGAINST ISSUING BANK

The buyer's claim against the issuing bank is detailed in the declaration attached to the summons. The buyer alleged, and correctly so, that the terms and conditions of the letter of credit included, inter alia, the term that the goods would be dispatched together with documents which conformed to the buyer's order No. BRIM/MID 2/96 dated 29 March 1996. The specifications of the goods in the order were the same as those contained in the letter of credit. The buyer further alleged that in terms of the letter of credit the issuing bank undertook to negotiate the letter of credit or cause payment to be effected upon the production of the following documents: a certificate guaranteeing that the goods were in exact accordance with the order and in perfect condition; a clean certificate of finding issued by Nilesh Patel (the buyer's representative) or Pintu Patel; two out of three sets of clean shipped on board through bills of lading made out to order and endorsed in blank and marked "freight prepaid" and a certificate confirming that Zimnat Insurance Co. Ltd were advised of the shipping details by fax. The terms and conditions of the letter of credit are on p 2 of that letter.

The buyer alleged that the issuing bank caused payment to be made, notwithstanding that the documents received by it were not in conformity with the terms of the letter of credit and notwithstanding that some documents were not produced. It alleged that the issuing bank then debited its current account with the amounts so paid. The buyer claimed from the issuing bank the sum of $1 533 225.90 in respect of the unauthorised debits; the sum of $885 121.17 (later reduced by an amendment at the trial to $15 086.64) being

bank charges and interest wrongfully charged to its account and the sum of $523 442.03 (which was increased by an amendment also at the trial to $3 943 082) being the amount which, had its account not have been wrongfully debited, the buyer would have realised on investment of the surplus funds in its account on the lucrative money market. The buyer claimed interest on all these amounts at the market rate for bills of acceptance or, alternatively, at the prescribed rate of interest with effect from 1 August 1999 on the first two amounts and with effect from 1 April 2001 on the last amount. The buyer alleged that the unauthorised debits arose when the issuing bank paid for goods reflected on invoices No. 216-223 when it should not have paid because the documents relative thereto had not been produced or were discrepant. The buyer's cause of action is essentially based on the issuing bank's alleged failure to act in terms of the letter of credit agreement. It is essentially based on a breach of contract entered into in relation to the letter of credit (see paras 8 and 10 of the declaration).

(C) THE ISSUING BANK'S PLEA

In its plea, the issuing bank admitted that the documents received by it relative to invoice Nos. 216-223 did not conform to the terms and conditions of the letter of credit. It pleaded that since the buyer had the right to waive the discrepancies, it had approached it and the buyer, by its conduct, had waived the discrepancies thereby authorising the payment and that consequently, in terms of the conditions in the application form, it was authorised to debit the buyer's account and to raise the bank charges and interest which it also debited to the account. The issuing bank denied that the buyer had suffered any damages and, by a further amendment, it alleged that in fact the buyer had been enriched by the transaction, in that it had received the goods and used or sold them despite that the documents did not conform to the terms and conditions of the credit. In respect of the buyer's claim for $3 943 882, again the issuing bank denied liability stating that it was

never in the contemplation of the parties that in the event of the buyer's account being in credit, the buyer would have invested the amount thereof and obtained a return at the prevailing market rates. It stated that it had no knowledge as to what the buyer would have done with any funds standing to its credit in its current account. The issuing bank therefore denied that any debits it effected to the buyer's account resulted in the buyer being unable to invest any monies. The issuing bank also denied that the bank and interest charges it had raised were not lawful.

(D) THE ISSUING BANK'S COUNTERCLAIM

The issuing bank initially counterclaimed for the payment of $747 075.82 plus interest thereon at the rate of 71.5 per cent per annum with effect from 30 September 1999. It amended its counterclaim to $1 532 893.98 plus interest at the penalty rate of interest charged by it on unauthorised overdrafts from time to time. It alleged that this claim arose from the fact that after being advised about the discrepancies in the documents and having waived those discrepancies, it (the bank) had effected payment in terms of the letter of credit and had debited the buyer's account with each payment and with bank charges and interest including penalty interest. It alleged that at the time of payment the buyer's account did not have adequate funds and thus the account was overdrawn. It stated that any deposits which the buyer had made to its account were debited to interest, bank charges and to the reduction of the capital amount in that order. The amount of its counterclaim therefore represented an unauthorised overdraft inclusive of bank charges and interest on the buyer's account occasioned by the payment which it had made, even though the buyer's account was overdrawn.

(E) THE BUYER'S PLEA TO THE COUNTERCLAIM

The buyer pleaded to the counterclaim by acknowledging that it had received notification of discrepant documents relative to invoice Nos. 211-215 only and not with respect to documents relative to invoice Nos. 216-223. It is true that such notification was given (see Annexures E1-E3 of Exhibit 1). It appears that the issuing bank prepared written notification of discrepancies in the documents relating to invoice Nos. 216-223 (Annexures E4-E8) but was not careful enough to ensure that those letters were timeously dispatched. The buyer stated that the letters of notification in respect of invoice Nos. 216-223 were only given to it after demand for them was made during the first week of August 1996. It therefore denied that it authorised the payment of the purchase price on invoice Nos. 216-223. It stated that when it was availed of the letters of notification of discrepancies, it was prepared to authorise only a part payment of the amount on certain invoices and did not generally authorise the payment of the total invoice values.

The buyer's plea is a total denial that by its conduct it waived the discrepancies in the documents or otherwise authorised the payment related to those documents. It also pleaded that the issuing bank was not entitled to debit its account for unauthorised payments or to debit its account with bank charges or interest arising from the unauthorised payments. It in effect pleaded that its account was not overdrawn but for the unauthorised debits.

3. THE CONTESTED FACTS

The pleadings show that certain facts are in contention between the parties. It is in contention whether or not the issuing bank timeously notified the banker about all the

discrepant documents. It is in contention whether or not the buyer's account being in credit the buyer would have invested the amount thereof and made a handsome return on it. It is in contention whether or not the buyer by its conduct waived the discrepancies in the documents.

It must be apparent that in terms of the pleadings, the issuing bank's defence and its cause of action on its counterclaim is dependent on the validity of its assertion that the buyer, by conduct, waived the discrepancies in the documents. On both scores, therefore, if the issuing bank is to succeed it must adduce evidence to prove that in fact the buyer waived the discrepancies and authorised the payment of the purchase price of the goods. I have deliberately referred to the pleadings in some detail as they have a strong bearing on the decision which I will reach in view of the evidence led by the parties.

4. THE EVIDENCE

[His Lordship considered the evidence in detail and continued:]

5. SUMMARY OF THE FACTS

From the evidence before me, I can make the following findings of fact:

(a) The buyer successfully applied for a letter of credit after entering into a contract of the sale of acrylic/synthetic fabric with an Indian supplier.

(b) The documents evidencing the shipment of various consignments in respect of invoice Nos. 211-215 were received by the issuing bank and the buyer. The buyer used its set of documents to clear the goods through customs so as to reduce storage and other charges. The issuing bank on receipt of these documents advised the buyer that the documents were not in conformity with the letter of credit and it asked the buyer to waive the discrepancies. The buyer did so in writing and authorised payment.

(c) The buyer received other documents relating to invoice Nos. 216-223 and again, it used its set of documents to take possession of the goods. The issuing bank also received its own set of documents. These documents were not in conformity with the terms of letter of credit and were subject to rejection by the issuing bank unless the buyer accepted them, that is to say, unless the buyer waived the discrepancies therein.

(d) The issuing bank did not timeously advise the buyer that the documents

relating to invoice Nos. 216-223 were discrepant. Though letters to the buyer to this effect were drafted the issuing bank did not adduce evidence to prove that these letters were in fact dispatched to the buyer and in all probability received by it. I am satisfied that the buyer only received these letters when its representatives personally called at the offices of the issuing bank in early August 1996 and collected them.

(e) The buyer did not, as it had done with documents relative to invoice Nos. 211-215, accept the documents relating to invoice Nos. 216-223. The buyer in fact refused to waive the discrepancies. It only authorised a part payment for the goods which conformed to its order. It was not possible for the issuing bank to act on this partial authorisation to pay.

(f) The issuing bank did not timeously advise the beneficiary's bank as it was required to do by the UCP 500 Rules i.e. within seven days of receipt of documents not in conformity with the letter of credit. The issuing bank thus neglected its obligations under the UCP 500 Rules with the result that the beneficiary considered that the documents were in conformity with the letter of credit terms and insisted on being paid in full in terms of the letter of credit.

(g) Whereas the issuing bank on receipt of discrepant documents was entitled to refuse to make payment unless authorised thereto by the buyer, it nonetheless effected payment.

(h) Some of the goods supplied to the buyer as on invoice Nos. 216-223 were not consistent with the buyer's order specifications let alone being in conformity with the terms of the letter of credit.

(i) After effecting payment, the issuing bank debited the buyer's account with the amount of the payments it made.

(j) The buyer was not able to show that if the issuing bank had not debited its account wrongfully, it would have invested in high yielding investments the amount standing to its credit in its current account. No evidence was led by the buyer to show how much excess funds were actually to its credit on its current account. The buyer took the position that the amount debited to its account was the amount it would have invested as surplus funds. That is a non-sequitur as it is quite possible that at the time that its account was debited with the payments to the beneficiary, the account was not in the black, and quite possible too that the buyer may still not have decided to invest all or a part of the surplus funds in high yielding investments.

THE LAW APPLICABLE TO THE FACTS

From the introductory part of this judgment, it must be clear that documentary credits are separate transactions from the underlying and antecedent contracts and that the issuing bank is not concerned with or bound by such contracts. The issuing bank has the duty to examine the documents with reasonable care to ascertain that the documents appear on their face to be in conformity with the conditions of the credit. The payment against documents which appear on their face to conform to the letter of credit binds the buyer to take up the documents and reimburse the issuing bank which has made the payment. If the documents are not in conformity with the letter of credit the issuing bank must determine on the basis of the documents alone that payment is not to be effected.

The UCP 500 Rules provide the following on matters relevant to this case:

Article 9(a)

"An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented … to the issuing bank and that the terms and conditions of the credit are complied with."

Article 13(a) and (b)

"(a) Banks must examine all documents stipulated in the credit with reasonable care to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the credit …

(b) The issuing bank … shall (…) have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly."

Article 14(b), (c) and (e)

"(b) Upon receipt of the documents the issuing bank … must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the credit. If the documents appear on their face not to

be in compliance with the terms and conditions of the credit such (bank) may refuse to take up the documents.

(c) If the issuing bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the credit, it may in its sole judgment approach the applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-article 13(b).

(e) If the issuing bank, fails to act in accordance with the provisions of this article and/or fails to hold the documents at the disposal of, or return them to the presenter, the issuing bank … shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the credit."

These provisions of the UCP 500 Rules are quite clear. They need not be explained. But it is worthwhile to quote from Loomcraft Fabrics CC v Nedbank Ltd & Anor 1996 (1) SA 813 (A) to drive home the import of the

UCP 500 Rules. Loomcraft's case was one in which an application was made for an interdict restraining Nedbank from making payment in terms of a documentary credit. That relief was refused both in the court of first instance and on appeal. At 815G-J, Scott AJA said the following:

"The system of irrevocable documentary credits is widely used for international trade both in this country and abroad. Its essential feature is the establishment of a contractual obligation on the part of a bank to pay the beneficiary under the credit (the seller) which is wholly independent of the underlying contract of sale between the buyer and the seller and which assures the seller of payment of the purchase price before he parts with the goods forming the subject matter of the sale. The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or, for that matter, even the existence of the underlying contract, by issuing or confirming the credit the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary."

The learned judge referred to many English cases in which the importance of documentary credits in international commerce was stressed: R D Harbottle (Mercantile) Ltd & Anor v National Westminister Bank Ltd & Ors [1977] 2 All ER 862 (QBD) at 870D; Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976 (CA) at 983; Infraco Ltd v Notis Shipping Corporation (The Bhoja Trader) [1981] 2 Lloyd's Rep 256 (CA) and Power Curber International Ltd v National Bank of Kuwait SAK [1981] 3 All ER 607 at 613b among other cases.

The above authorities, with which I am in full agreement, make it quite clear that the issuing bank in the present case was obliged to pay the beneficiary. Thus, where an issuing bank fails to meet its obligations in terms of a letter of credit as in the present case by not dealing with shipment documents in terms of the UCP 500 Rules this court would have no basis for finding in its favour in the event that the beneficiary sued for payment

or in favour of the buyer if the buyer moved the court to stop the issuing bank from making payment to the beneficiary.
Now, where the issuing bank has, in the context of its relationship with the buyer, wrongfully paid the beneficiary and thereby wrongfully debited the buyer's account as in the present case, the law is not quite clear as to whether the buyer may refuse to reimburse the issuing bank in whole or in part. This is the question to be answered in the present proceedings. The court must be careful always not to harm international commerce or reduce somewhat the confidence which traders within and outside Zimbabwe must maintain in

the system of documentary credits by the decision it reaches in any suit before it. In my view, however, the relationship between the issuing bank and the beneficiary is quite distinct from the relationship between the issuing bank and its customer, the buyer. The latter relationship is governed by the ordinary rules of contract which must, no doubt, be considered in conjunction with the relevant international rules on documentary credits, whereas the former is governed by the international rules which must be given full effect in the interests of international trade and also to maintain Zimbabwe's credibility therein. The present case is not one, as was Loomcraft Fabrics supra, where the buyer sought to stop the issuing bank from making payment. If the decision in that case had been otherwise, quite obviously the interests of international commerce would have been harmed. In the present case, the issuing bank has paid the beneficiary when it should not have done so by reference to its contract with the buyer. By debiting the buyer's account, the issuing bank has so to speak been reimbursed, or more correctly, it has reimbursed itself, albeit without the buyer's consent. It seems to me that the interests of international commerce will not be harmed, prejudiced or otherwise compromised by applying the law of contract in regard to the breach. It is, to my mind, one thing to say that the issuing bank is not entitled to reimbursement by the buyer for the sum which it has paid to the beneficiary where the documents it has accepted were discrepant, and quite another to say that where the issuing bank has been reimbursed in one way or another, or reimbursed itself as in the present case, the buyer who sues in contract for the breach thereof is entitled to a full refund despite any advantages he may have derived from the breach. But if the buyer is to be refunded in full, it must show that it is so entitled by establishing not only the not so clear general right not to reimburse the issuing bank but also and in particular that it has suffered prejudice equal to or exceeding the amount paid by the issuing bank to the beneficiary. In other words, the buyer must show how the breach has adversely affected it.
In the present case, it seems to me that the issuing bank was quite unclear as to its obligations under the irrevocable letter of credit which it issued in favour of the buyer. In particular, it seems that the issuing bank was unaware of the absolute necessity in terms of UCP 500 Rules to act within seven banking days if it would refuse to take up the documents. It was also quite unclear that, were it to decide to seek a waiver of any discrepancies by the buyer, it would have to act swiftly so as to act within the specified period of seven banking days and inform the beneficiary's bank if it was taking up or refusing the documents. It did not ensure that the buyer was timeously informed about the discrepancies in the documents it had received. It did not

timeously communicate to the beneficiary's bank the discrepancies in the documents. In a rather confused fashion, it made approaches to both the buyer and the beneficiary with a view to resolving the issue of discrepancies one way or the other and, to its detriment, allowed the seven days to expire without formally advising the beneficiary about the discrepancies. When it eventually did, it was too late because its liability to pay could no longer be shirked.

Its allegation that the buyer waived the discrepancies was not established on the evidence. Whilst in the pleadings, it alleged waiver by conduct, the evidence it adduced during the trial did not establish waiver by conduct. The attempt to show that the clearance of the goods through customs by the buyer and the buyer's taking possession of the goods was proof of waiver was ill advised. It is accepted that the issuing bank acts only on the basis of the documents presented to it and nothing else. The acceptance of the goods by the buyer, even where the documents are discrepant, is irrelevant to the issuing bank's obligation to either take up or refuse the documents. Mr Phillips, for the issuing bank, conceded that the bank had failed to establish waiver by conduct which it had alleged in its pleadings. This concession was merited and, beyond it, it became quite clear that the issuing bank failed to establish any kind of waiver of the discrepancies by the buyer. The issuing bank should therefore not have caused payment to be effected in the first place. It had, in the event, to effect payment because it failed to observe the rules of documentary credits. It was neglectful of its obligations under the letter of credit. It should therefore not have debited the buyer's account with the payments or raised charges relative to such debits. As stated in The Law and Practice of International Banking op cit at p 320:

"(1) If the issuing bank is to be entitled to reimbursement by its customer for the sum paid to the beneficiary under the credit; the documents it accepts must conform strictly to the terms of his instruction reflected in the letter of credit.

(2) The documents must be in proper order so that if the goods or other subject matter financed by the credit are non-existent, destroyed, lost or damaged, the bank and its customer would have documents which they could rely on to found claims against the responsible parties (e.g., the carrier who has issued the bill of lading, airways bill, etc.)."

It will therefore be clear that the bank is only concerned with the delivery of documents in conformity with the letter of credit and with the rejection of those documents if they do not so conform. If it pays when it otherwise should not have paid as in this case then it is not entitled to seek reimbursement from the buyer or its customer. Having said this I do not think that this is quite the end of the matter. I have already indicated how it cannot be the end of the matter. I distinguish between the bank's obligations under international trade

law and the law of documentary credits in particular and its rights and obligations vis-à-vis the buyer. The issuing bank's relationship with the buyer, its customer, is contractual. If it makes a payment when it should not have made it because the documents it received were not in conformity with the terms of the letter of credit, then it is in breach of its contract with the buyer. Such a breach can seriously prejudice the buyer. It is not quite the end of the matter because, as Mr Phillips contended, conceding as he did that the issuing bank had failed to prove waiver and that it paid against discrepant documents, it would in the circumstances of this case be unjust to require the issuing bank to refund the

buyer for the full amount. He submitted that the buyer would be unjustly enriched at the expense of the issuing bank: he will receive a double benefit, in that having received the goods and used them to its own account and the issuing bank having paid the beneficiary, a refund would clearly result in a double benefit for the buyer. Mr Phillips relied on the case of Industrial Equity v Walker 1996 (1) ZLR 269 (H) wherein Bartlett J recognised the existence of a general action of unjust enrichment. The learned judge outlined the principal prerequisites for a general action on enrichment as stated by Scholtens in the 1996 Annual Survey of South African Law 150 at 152 as being that:

"(a) the defendant must be enriched; (b) the enrichment must be at the expense of another (i.e. the plaintiff must be impoverished and there must be a causal connection between enrichment and impoverishment); (e) the enrichment must be unjustified; (d) the case should not come under the scope of one of the classical enrichment actions; (e) there should be no positive rule of law which refuses an action to the impoverished person. Obviously, these requirements can only be fulfilled if in any given case the action is based on a defined set of circumstances."

Bartlett J then said at 299A that:

"… I am in agreement with Mr Gillespie, that it is appropriate that the limits of the general enrichment action should be based on the court exercising its discretion according to the general sense of justice of the community and the legal convictions of society as to liability in the circumstances."

The issuing bank's case does not satisfy the test to be applied. In particular it does not meet the requirements that the enrichment must be unjustified and that there should not be any positive law which refuses an action to the impoverished person. There is positive law that denies the issuing bank an action of unjust enrichment in the circumstances i.e. the law relating to documentary credits and the obligations of the issuing bank in terms of UCP 500 Rules. It cannot also be argued that the enrichment in this case is unjustified. I am satisfied that it would be inappropriate to rely on an enrichment action for any relief in this matter. There is no need to substantiate this conclusion further. The case speaks for itself. The fulfilment of the prerequisites of an enrichment action is well-nigh impossible. If some relief

must be gained by the issuing bank it can only be based on breach of contract and the remedies available to the parties in that event.

There is no doubt in my mind that in substance this is a case of breach of contract as between the issuing bank and the buyer. That also is what the buyer's declaration states. The issuing bank breached the agreement as contained in the application for credit and the letter of credit itself. It is also quite clear therefore that the buyer's action is for damages for breach of contract.

In his written submissions filed of record on 14 June 2001, Mr Girach, for the buyer, was at pains to remove the buyer's claim from the regime of damages for breach of contract. He stated at paras 2 and 3 of the submissions that:

"2. The defendant (issuing bank) has sought to present and attack the plaintiff's case (buyer's case) on the basis that it is a claim for damages. This with respect, is not the position.

3. It is plaintiff's case that monies were removed from its account with (sic) (without) its authority. The plaintiff complains that there were certain terms and

conditions upon which payment could be effected. It is common cause that those conditions were not fulfilled and there being no waiver of the terms and conditions, defendant was simply not entitled to effect payment. If defendant was not entitled to effect payment and therefore debit the plaintiff's account, plaintiff is entitled to a reversal of those debits which means a repayment of the account in question."

There cannot be a clearer shying away from the substance of the thing here. This is evident from Mr Girach's para 4 where he says:

"Accordingly, to examine the issue of damages in the fashion that has been submitted by the defendant cannot, with respect, be sustained. There was a breach of an instruction and flowing directly from that breach monies were appropriated without authority. Had the breach not occurred, then plaintiff would have been in the position where it would have had its money and the question of what payment, if any, should have been effected in respect of the goods would be a matter purely for the plaintiff and the supplier to sort out" (the emphasis is mine).

The italicised part of this paragraph is an admission that there was a breach of a contractual term which had certain consequences. The alternative submission which Mr Girach went on to make is based on an admission that there was a breach of contract. I am satisfied that Mr Phillips was correct that a breach of contract is involved here. Mr Girach's written submissions were made in response to Mr Phillips' written submissions filed of record on 11 June 2001. The point he made therein is that where a breach of contract has occurred, the damages claimed must take into account the benefits conferred by such breach upon the plaintiff, that is to say "in calculating the loss of the injured party cognisance must be taken of beneficial side effects of the breach (lucra cum damno) which serve to diminish the loss unless these compensating advantages may properly be regarded as res inter alios

acta" (Wille's Principles of South African Law 8 ed at p 526). He referred to LAWSA vol VII para 35 which is to the same effect and to Everett & Anor v Marian Heights (Pty) Ltd 1970 (1) SA 198 (C) in which Corbett J (as he then was) said at 205B that:

"The basic aim of an award of damages for breach of contract is to place the sufferer from such breach in the position he would have occupied had the contract been properly performed so far as that can be done by the payment of money and without undue hardship to the defaulting party … It follows that both the detrimental and the beneficial results of the breach of contract must show that he actually suffered damage — the mere fact that there has been a breach will not entitle him to damages."

Mr Girach did not find any difficulty in accepting as correct the principle of law in Everett & Anor v Marian Heights (Pty) Ltd supra. The correctness of this principle is also evident from what Christie on The Law of Contract in South Africa 3 ed says at pp 612-613 and also at p 610 in reference to mitigation of damages.

In this case, the buyer not only received goods which were not to order but it also received goods which were to order and in respect of which it was prepared to pay though that would have been only a part payment. What is clear, however, is that the goods which were to order would have been paid for in any case even though that payment would have been made by the buyer. And if the issuing bank paid for these goods in breach of the contract with the buyer, as was the case, and has to reimburse the buyer's account with the amount of that payment, the buyer would have benefited doubly from

the event. It would have obtained a benefit from the breach. That benefit must be taken into account in assessing the quantum of damages payable to it. The buyer was prepared to authorise the payment of US$72 336.96 which was in respect of goods it had bargained for (see document at p 37 of Exhibit 2). This amount translates to 54.9 percent of US$131 714.93 of which the buyer complains and which sum it claimed as having been wrongfully paid. The equivalent in Zimbabwe currency of 54.9 percent is the sum of $841 756 which must therefore be deducted from the buyer's claim of $1 533 225.90 leaving a balance of $691 469.90. It is apparent from the evidence that the buyer received other goods which were either reject, under weight or short length. There was also an over-supply of some goods. These goods also were a compensating advantage to the buyer. But it is more difficult for me to deal fairly with these goods or the compensating advantage deriving from them. No evidence was led to assist me in determining their value and I shall not, for that reason, take them into account in determining the quantum of damages payable to the buyer. The difficulty is reflected in what Mr Girach said in his written submissions at para 10 where he states, but in support of a contrary argument, that:

"What must be taken into account is that the plaintiff (buyer) did not receive the quantities of goods it required and ordered nor did it receive goods in accordance with its order. This would have impacted not only in affecting plaintiff's operations but also would give rise to, at the very least, a claim against the supplier for loss of revenue occasioned by a short supply of goods."

And at para 11:

"… There are too many unknown elements in so far as the position between the plaintiff and its supplier are concerned."

I agree and because of the lack of evidence on this would-be-compensating advantage I shall discard or disregard it for purposes of computing the compensating advantage of the breach to the buyer. I will therefore grant to the buyer the sum of $691 469.90.

It must be apparent that the failure, as I have adjudged it to be, of the issuing bank to prove a waiver means that its counter-claim cannot succeed. Mr Phillips conceded as much. In addition, it would not be possible for me to determine on the evidence how much of the amount counter-claimed by the issuing bank should be aligned to the reduction of the buyer's claim as I have determined it. In any case, I do not think that the issuing bank should benefit from its own breach of contract and be awarded an amount that it would not have been entitled to but for its wrongful debiting of the buyer's account. This reasoning also extends to the bank charges and interest which the issuing bank levied. The buyer is entitled to a refund of same.

In regard to the buyer's claim arising from its alleged failure to invest surplus funds as a result of the wrongful debiting of its account, I have already shown that there was no evidence to indicate how much money was available for such investment or to show that it was in the contemplation of the parties that should such funds have been available they would have been invested in high yielding investments as the buyer now seeks to persuade the court. Before concluding, I must also mention that the defendant amended its pleadings in order to rely on an indemnity clause in the standard application form which the buyer completed. I found no relevance at all of the provisions of that indemnity clause to the issues in these proceedings.

Judgment must therefore be entered in favour of the buyer to the extent I have outlined and the issuing bank's claim in reconvention must be dismissed. The plaintiff has not satisfied me as to the basis of applying a rate of interest other than the prescribed rate of interest. It is accordingly ordered that:

1. Judgment with costs be and is hereby entered for the buyer (plaintiff) in the sums of $691 469.90 and $15 086.64, together with interest on each such sum at the prescribed rate of interest from 1 August 1999 to the date of payment in full.

2. The issuing bank (defendant)'s claim in reconvention is dismissed with costs.

Wintertons, plaintiff's legal practitioners
Dube, Manikai & Hwacha, defendant's legal practitioners

ZIMBABWE REINSURANCE CO LTD v MUSARURWA
2001 (2) ZLR 211 (H)
Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Civil application
Date: 12 & 19 September 2001
Judgment Number: HH-141-01

Contract — penalty clause — validity — term whereby seller of immovable property entitled to retain portion of purchase price if buyer failed to pay full amount — a penalty clause

The applicant sold to the respondent an immovable property. In terms of the contract, the respondent was obliged to pay an initial deposit and the balance on registration of the property in her name. She paid the deposit, but when she defaulted in paying the balance, the applicant sought to cancel the contract and to retain a portion of the money already paid as "liquidated damages".

Held, that the sale was not an instalment sale of land as defined in Contractual Penalties Act [Chapter 8:04], because the method of payment was an initial deposit and one other payment. The provision in the contract under which the deposit was forfeited was a penalty stipulation in terms of s 2 of the Act, even though it was described as "liquidated damages". It was necessary for the applicant to file an affidavit to show that the penalty was reasonable.

Case cited:
UDC Ltd v Kenward Entprs (Pvt) Ltd & Ors HH-139-01
Legislation considered:
Contractual Penalties Act [Chapter 8:04], ss 2 and 9
G E Mandizha, for the applicant
Respondent in default

CHINHENGO J: The papers in this application were served by the Deputy Sheriff on the respondent on 27 July 2001 by leaving them at the respondent's place of residence, which was locked at the time. In the application, the applicant seeks an order cancelling an agreement of sale of an undivided share in stand No. 21445, Marlborough Township, Lot 4 of Marlborough also known as Westview Mansion, Civic Centre, Marlborough, entered into between the parties on 1 September 1999. The applicant also seeks an order

authorising it to retain the sum of $100 000 paid to it by the respondent, as liquidated damages.
In terms of the agreement of sale, the respondent agreed to pay for the undivided share sold to her the sum of $1 000 000. She was required to pay a cash deposit of $300 000 and the balance of $700 000 upon registration of the undivided share in her favour. The respondent paid the deposit but, according to the applicant, she defaulted in respect of the balance of the purchase price.
A letter was written by the applicant's legal practitioner to the respondent on 20 March 2001. In that letter, the balance outstanding on the purchase price was given as $500 000. It is alleged in the letter that the respondent failed to pay this amount when "transfer was tendered" to her. The letter then goes on to state that:
"We are instructed to give notice to you, as we hereby do, in terms of section 8(1) as read with section 8(2) of the Contractual Penalties Act [Chapter 8:04] that you have breached the Agreement of Sale, the nature of the breach is your failure to pay up the balance of the purchase price when transfer was tendered to you.
We hereby call upon you to remedy this breach within thirty (30) days of this letter or in any event by 30 April 2001. In the event of your failure to remedy the breach as demanded, our client will institute proceedings for the cancellation of the Agreement of Sale without further notice to you."
The respondent did not respond to this letter of demand nor did she, upon being served with the court application, oppose it. Thus, the applicant enrolled this matter on the unopposed roll for 12 September 2001. After hearing Mr Mandizha for the applicant, I reserved judgment.
In reserving judgment, I was not concerned so much with whether the respondent was in breach of the agreement of sale as with whether the applicant was entitled to retain the whole of the sum of $100 000 or any part of it. The applicant relied for its contention on the third paragraph of clause 16 of the agreement of sale which provides that:
"Such rights of sale and cession shall be without prejudice to any other right of action or remedy of the seller for the recovery of any balance due to the seller or any other loss or damage arising out of the purchaser's breach of this Agreement including the right of the seller to summarily cancel this Agreement and enter into and regain possession of the subject of the undivided share being purchased in this agreement and the seller shall be entitled to retain as liquidated damages, an amount of $100 000 from any amounts paid prior to date of cancellation."
The Contractual Penalties Act [Chapter 8:04] ("the Act") defines two terms which are relevant to this case: "land" includes an undivided share in any land which is coupled with an exclusive right of occupation, such as is referred to in s 27 of the Deeds Registries Act [Chapter 20:05] and "instalment sale of land" means:

"a contract for the sale of land whereby payment is required to be made —

(a) in three or more instalments; or

(b) by way of a deposit and two or more instalments;

and ownership of the land is not transferred until payment is completed."
The Act, in Part III thereof, makes provision in respect of instalment sales of land. Section 9 thereof deals with the situation where, upon cancellation or termination of an

instalment sale of land, the purchaser is required, in terms of the contract to forfeit any instalment or deposit which he has paid to the seller and it empowers the court, if it appears to it that such forfeiture is out of proportion to the prejudice suffered by the seller, to grant such relief as it considers will be fair and just to the parties, including the relief that the seller should make a refund to the purchaser of the whole or a part of any instalment or deposit which the purchaser has paid.

Mr Mandizha submitted that the agreement between the parties to this case was not covered by s 9 of the Act, because it is not an instalment sale of land as defined in s 2 of the Act, because in terms of the agreement of sale a deposit and one other payment were agreed as the payment method. The definition of instalment sale agreement requires that payment should be made in three or more instalments or by way of a deposit and two or more instalments.

I agree that the agreement of sale between the parties to this case does not qualify as an instalment sale of land contract. Section 3 of the Act, however, provides that the Act shall apply to all penalty stipulations. "Penalty stipulation" is defined in s 2 of the Act as meaning:

"a contract or provision in a contract under which a person is liable —

(a) to pay any money; or

(b) to do or perform anything; or

(c) to forfeit any money, right, benefit or thing;

as a result or in respect of —

(i) an act or omission in conflict with a contractual obligation; or

(ii) the withdrawal of any person from a contract;

whether the liability is expressed to be by way of a penalty, liquidated damages or otherwise."

"Penalty" is also defined in s 2 of the Act to mean any money which a person is liable to pay or anything which he is liable to do or perform or any money, right, benefit or thing which a person is liable to forfeit under any penalty stipulation.

In submitting as he did, Mr Mandizha was of the view that the transaction between the parties was not covered by the provisions of the Act as a whole. When I reserved judgment I directed Mr Mandizha to file written submissions on his contention. He later came into my chambers and conceded that, upon further reflection, he did not think that his submissions were correct. I did not then insist that he should file the written submissions. By this time, I had

produced a draft of this judgment. I was of the view that the issue arising in this application was of sufficient public importance to warrant a written judgment and so, despite Mr Mandizha's concession, I proceeded to finalise this judgment.

Whilst it is true that Part III of the Act does not apply to the transaction which the parties entered into, the same cannot be said of the other provisions of the Act. Section 3(1) of the Act provides that:

"This Act shall apply in respect of —

(a) all penalty stipulations; and

(b) all instalment sales of land;

entered into on or after 19 November 1973."

Clearly, therefore, the Act applies to all penalty stipulations. The question may be asked as to why different and specific provisions were made in respect of instalment sales of land in Part III of the Act. The answer is simple. Sections 7 and 8 of the Act, which are in Part III, provide that instalment sales of land shall be reduced to writing and that if such contract has not been reduced to writing the onus of proving the existence of the contract shall lie on the person alleging its existence. Section 8(1) is concerned with the issuance of a notice to a party in breach before any penalty stipulation is enforced, or the contract is terminated or proceedings for damages are claimed. The period of notice is 30 days and the manner in which it is given is specified in subss (2) and (3) of s 8 of the Act. The specific provisions on instalment sales of land were inserted in the Act to cater for these matters and not with a view to provide that other sales of land contracts which contain penalty stipulations may not be covered by the Act. The rule expressio unius est exclusio alterius simply does not apply in the interpretation of the Act.

The letter by the applicant's legal practitioners may have inadvertently created the confusion which led to the submissions made on the applicant's behalf. The legal practitioners gave 30 days' notice of their intention to institute proceedings. That was not necessary, as the transaction was not an instalment sale of land contract as defined in the Act.

I have to decide what I should do about this application — dismiss it or give directions as to the way forward. I think I should do the latter. Mr Mandizha had submitted that the damages claimed were liquidated and so no further evidence was necessary. He conceded that he was wrong as clearly, in terms of the definition of "penalty stipulation" in s 2 of the Act, it does not matter that the penalty is described as liquidated damages or by any other name. It is therefore necessary that the applicant should file a supplementary affidavit to deal with the sufficiency or otherwise of the penalty to be levied on the respondent. In UDC Ltd v Kenward Enterprises (Pvt) Ltd & Ors HH-139-01, Gillespie J said:

Page 215 of 2001 (2) ZLR 211 (H)

"It may be that the penalty is reasonably commensurate with the damages suffered. That, however, is a factual inquiry. It is one involving an onus of proof that can only be discharged by the adduction of evidence. The proof of the enforceability of the penalty, therefore, is proof of an illiquid claim. It should accordingly be pursued by a court application supported by a proper affidavit, or sets of affidavits, of evidence and quantum of loss."

This statement is apposite. Accordingly, I refuse judgment on this application and direct that the applicant files a supplementary affidavit adducing such evidence as to liability and quantum as will enable this court to decide on the application.

Zamchiya Costa, applicant's legal practitioners

CHAGUMA v KONDANANI

2001 (2) ZLR 216 (H)

Division: High Court, Harare

Judges: Smith J

Subject Area: Civil action

Date: 23-25 July & 19 September 2001

Judgment Number: HH-152-01

Delict — negligence — motoring case — driver losing control after tread stripped off tyre — not negligent — sudden emergency doctrine — not applicable

The plaintiff, who was a passenger in a commuter bus, was seriously injured when a car coming from the other direction, and driven by the defendant, struck the bus. The evidence showed that a tread had unexpectedly stripped off a rear tyre of the car, causing the car to swerve to one side then the other. The defendant tried to bring the car under control, but was unable to do so before it hit the bus. He had travelled for a mere 50 metres, and for only a few seconds, after the tread stripped.

Held, that the defendant could not be held to be negligent, and his failure to bring the car under control before it struck the bus was in the circumstances not unreasonable. The doctrine of sudden emergency only applied where the party's conduct is prima facie negligent, which was not the case here.

Cases cited:

Brasser v Friedman 1942 WLD 21

Chikosa v Wright 1996 (2) ZLR 607 (S)

Goode v S A Mutual Fire & General Ins Co Ltd 1979 (4) SA 301 (W)

N Machingaute, for the plaintiff

R Harvey, for the defendant

SMITH J: The plaintiff (hereinafter referred to as "Chaguma") was a passenger in a commuter omnibus which was involved in an accident on 24 December 1997 with a Mazda that was being driven by the defendant (hereinafter, referred to as "Kondanani"). Chaguma suffered serious injuries. He issued summons claiming damages in respect of past and future medical expenses, pain and suffering, shock, disability and loss of amenities. The quantum of the damages claimed is $409 000. Kondanani does not dispute the quantum but he denies liability.

Chaguma gave evidence as follows. The omnibus was travelling from Marondera to Harare. He was sitting near the front of the bus. When the bus

was going down a slope, near Melfort, he saw a Mazda pick-up about 500 metres away coming towards the bus. It veered across the road and hit the side of the bus just behind the front wheel. There was a loud bang and the bus rose in the air. He lost consciousness. At the time of the accident, which was about 5.30 p.m., visibility was good and he could see clearly what was happening. The road was straight. The Mazda was belching black smoke. The bus was on its correct side of the road when it was hit. The Mazda was swerving from side to side before it crossed the bridge. It crossed the bridge on the extreme left hand side of the road and then swerved right across its lane and hit into the bus. The bus was not travelling very fast. The driver of the bus could not have avoided being hit by the Mazda. He was driving on the correct side of the road. Kondanani should have controlled the Mazda. There was no other traffic on that part of the road. If Kondanani had reduced speed the accident would not have happened.

Under cross-examination, Chaguma made the following responses. In his statement to the police, he had said that he first saw the Mazda when it was 100 metres away but in fact it was about 500 metres away. The Mazda was near the yellow line on the left hand side of the road but not off the tarred surface. He did not know how far the bus travelled after it was hit because he lost consciousness. He did not know where the smoke that he saw came from. The bus was going fast at the time of the accident. He confirmed that in the

statement he made to the police in July 1998 he said: he was sitting in the front seat just behind the driver; he saw the Mazda when it was about 100 metres away; it was veering from side to side; it was encroaching onto the wrong lane; the driver of the bus was not taking any evasive action, even though the Mazda was coming to them.
The next witness was Change Samatanda, who was also a passenger on the first seat of the bus. He testified as follows. He saw the Mazda coming towards the bus. He saw smoke coming from it, as though a tyre had burst. The Mazda was more than 100 metres from the bus when he saw the smoke. The Mazda was tilting onto its left side. It then suddenly veered across the road and collided with the bus. The bus was travelling at about 80 kilometres per hour. The bus left the road after the impact and rolled over.
Kondanani then testified as follows. He was going to Headlands, on 24 December 1998, with his family. He had his car, which was a Mazda pick-up, checked just before he left Harare. Near Melfort he crossed a bridge and then he heard a bang and a flapping sound. He checked his rear view mirror and saw nothing. He also applied the brakes and found that the car was not stable; it swerved to the left. He tried to control the car. He had been taught not to apply the brakes sharply because the car could turn over. He applied

the brakes gradually. There was a steep down-gradient off the left side of the road. He had to maintain control and stop the car slowly. The car swerved to the left and then to the right. As it slowed down the rim of the wheel cut into the tar. The left back wheel had gone off the tarred surface and then returned onto the tar. The car then turned sharply to the right and hit the bus that was coming down the slope. The bus was travelling at about 120 km/h and the Mazda at about 80 km/h when the accident happened. The tyres on the two back wheels were retreads which he had bought two months before the accident. The tread stripped off one of the tyres and it burst. The tyres, when he left Harare, looked as good as new. Smoke was generated when the tread stripped off and the tube burst. On the road just after the tyre burst, there were gouge marks where the heat generated by the rim melted the tar. When the recovery vehicle came to tow his car to the nearest garage, one of the front wheels had to be put on the left back axle before the Mazda could be towed. Neither of the front wheels had been damaged by the impact with the bus. Kondanani said he stopped the Mazda soon after the impact. The bus travelled some distance along the road, then it left the road, travelled up an embankment and rolled over onto its side.
He referred to the sketch plan which had been drawn by Cst Mutadza. He said that the distance from the point where the tyre burst to the point of impact was 47.2 metres. There were marks on the tarred surface for the whole distance. The point of impact was near the centre of the road in the lane in which the bus was travelling. The bus travelled about 80 metres from the point of impact to its final resting place. He was about 20 metres from the bus when he first saw it. He swerved to his left in order to avoid it and then he had a real problem trying to control his car. It felt as though the back of the car was doing its own thing when the left back wheel left the road. The car then swerved to the right. He had to control the car. The back of the car pulled it to the left and he swerved to the right to counteract it. There was a swaying motion at the back of the car. When the tyre burst the bus was some distance away, then suddenly it was close and danger was imminent. When the tyre burst, the distance between the two vehicles was about 80 to 100 metres. About two seconds elapsed until the two vehicles collided. The bus must have been travelling fast. He did his best to avoid the accident. The Mazda hit the bus a glancing

blow and then stopped, still facing the way it had been travelling. There was a big drop, like a gorge, on the left side of the road.
Kondanani was subjected to a rigorous cross-examination, in the course of which he made the following responses. When the Mazda moved across the road to the right he swerved to the left; if he had not done so he would have collided head on with the bus. Everything happened very fast after the tyre burst. He had done a defensive driving course where he was taught not to

apply brakes fiercely. He was unable to control the car after the back wheel left the road.
The last witness was Cst Mushawatu, who had been the investigating officer for the accident. He had taken the tyre on the left back wheel of the Mazda to the Forensic Department. It was confirmed that part of the tread had peeled off. There was some tar from the road imbedded in the rim. He had seen the gouge marks made by the rim of the wheel on the road.
Photographs of the wheel of the Mazda were produced. They showed that the tyre had a tread which was very little worn and that a large section of the tread had peeled off.
Mr Machingaute submitted that it was common cause that the Mazda had swerved across the road and collided with the bus which was travelling on the correct side of the road. Kondanani had been negligent. He failed to exercise the degree of care that the circumstances demanded. He owed a duty to the people in the bus not to encroach onto the lane in which the bus was travelling. He accepted that Kondanani had been faced with a sudden emergency, as was the case in Goode v S A Mutual Fire and General Insurance Co Ltd 1979 (4) SA 301 (W). At p 306, the learned judge, King J, said that a driver, faced with a sudden emergency, would not be held to have been negligent if his conduct was reasonable in the circumstances. In this case, Kondanani had not acted reasonably. He should have braked and brought his car to an immediate stop. Instead, he travelled for about 50 metres and only applied the brakes gradually.
Mr Harvey said that there was no evidence that Kondanani was travelling at an excessive speed. He travelled for less than 50 metres after the tyre burst, before he could stop. The distance between the vehicles when the tyre burst was approximately 70 metres. It must have been less than four seconds thereafter, when the two vehicles collided. Kondanani did not act unreasonably in the circumstances. The stripping of the tread on the tyre was completely unexpected. Kondanani did his best to try to control the vehicle. He was faced with a dilemma. He could not swerve to the left because of the ditch on the side of the road. He tried to brake and slow down gently. That exacerbated the swerving of the car. Had he applied the brakes fiercely, the swerving would have been worse. Mr Harvey referred the court to Brasser v Friedman 1942 WLD 21 and Chikosa v Wright 1996 (2) ZLR 607 (S). In the former, the scenario was similar: a back tyre had burst; the court found that the driver had not been negligent. He argued that in Goode's case supra, it was held that the burden of proof remained with the plaintiff, he had to establish that the defendant had not acted reasonably. He submitted that Kondanani had acted reasonably in the circumstances and had not been negligent.

In Goode's case, supra, at p 306G-307A, King J said:
"The doctrine of sudden emergency was stated as follows in Thornton v Fismer 1928 AD 398 at 412:

‘A person who, by reason of another’s want of care or some unforeseen external contingency, finds himself in a position of imminent danger cannot be guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.’

There are limitations to this doctrine. Firstly, the doctrine of sudden emergency applies only when a party’s conduct has been prima facie negligent (vide van Staden v Stocks 1936 AD 18). In this matter, the defendant has relied on sudden emergency. In consequence, the defendant has, in effect, conceded negligence, but has pleaded that the judgment exercised by the driver of the insured vehicle was an error of judgment in the agony of the moment, or his conduct was reasonable and justifiable.

The other qualification to the rule is that the conduct of the person setting it up must, of course, be reasonable, for the principle that a person in the agony of a moment is not expected to act with the same judgment and skill as in normal circumstances must not be extended to excuse conduct which, even in a critical situation, is not reasonable (vide van Staden v May 1940 WLD 198). It is not, therefore, every error of judgment which is excusable as not amounting to negligence, but only one which a reasonable, careful and skilled driver of a vehicle might commit. There can only be a moment of agony if the person whose conduct is in question had neither the time nor the opportunity to weigh the pros and cons of the situation in which he found himself.”

In Chikosa’s case supra, at 608G-609, Korsah JA, after referring to the formulation of the doctrine of sudden emergency in Goode’s case supra, said:

“See also S v Mauwa 1990 (1) ZLR 235 (S) at 241B where this court expressed the view that:

‘Where a person … is placed in danger by the wrongful act of another, that person is not negligent, if in the agony of the moment, he exercised such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is placed. He is not to blame if he does not do quite the right thing in the circumstances … But each case must depend on its own facts.’

I am in absolute agreement with Mr Paul that whilst one is mindful of the fact that one should be sympathetic towards a person who is placed in a sudden emergency, there is a requirement ‘that those engaged in many activities shall have such natural aptitude or special training as to give them the ability to cope with those dangerous situations which are likely to arise in the course of such activities’.”

Then at 609E-F, the learned Judge of Appeal continued:

“The respondent was placed in a position of sudden emergency by being unexpectedly jolted from the rear. Although she was travelling between 20 and 30 km/h, the effect of the impact was to propel her vehicle in a direction other than she was travelling. In such circumstances, it is not unreasonable for her to try and correct the direction of travel of her vehicle. She testified that she tried desperately to control her vehicle. The fact that her vehicle collided with the appellant’s vehicle which was twenty paces from the first accident rather than some other vehicle does not, in my opinion, in the agony of the moment, support a finding of negligence on the part of the respondent. I cannot envisage

any natural aptitude or special training which would give an ordinary driver the ability to cope with such a dangerous situation, other than luck.”

In my opinion, Kondanani was placed in a position similar to that in which Mrs Wright found herself. The only difference is that she was placed in a position of sudden emergency because of the want of care on the part of a third party, whereas Kondanani was placed in such a position because of the bursting of a tyre due to the tread stripping. There was no indication that the tyre was defective. There was no warning that the tread was about to strip or that the tyre was about to burst. The accident was very unfortunate in that it caused the death of the driver of the bus and four passengers therein and caused serious injuries to Chagoma. However, I am of the opinion that Chagoma has not established that Kondanani acted unreasonably in the circumstances. He did his best to stop the Mazda and keep it under control. The fact that he was unable to stop the car before it collided with the bus and that he was unable to control it after it suddenly started to swerve across the road does not, in my opinion, support a finding of negligence on his part. Events happened very quickly and Kondonani had only a few seconds in which to try to bring his car under control. I am not satisfied that he failed to act reasonably in the circumstances.

The plaintiff's claim is dismissed with costs.

Honey & Blanckenberg, plaintiff's legal practitioners

Granger & Harvey, defendant's legal practitioners

CHIMUTEPA v GWENZI

2001 (2) ZLR 222 (H)

Division: High Court, Harare

Judges: Smith J

Subject Area: Civil action

Date: 12 July and 19 September 2001

Judgment Number: HH-161-01

Damages — death — of child — when damages claimable — reform of law — desirability of

The parents of a child who is killed have no claim for compensation or damages for the death itself, though they may have a claim for damages under the following headings: loss of support, if they were dependent on the child at the time of his or her death; medical and funeral expenses, if any were incurred; and emotional shock, if that was reasonably foreseeable and was relatively serious. The main basis of the action for damages in respect of the death of a person is pecuniary or economic loss, and if none arises no compensation can be awarded. Although the death of a child can occasion great distress, the general law is not sentimental about it.

The Law Development Commission's suggestions, contained in its report No. 66 of 1998, for the creation of a right to damages for bereavement along the lines of traditional customary law, should be implemented.

Cases cited:

Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A)

Union Govt v Warneke 1911 AD 657

Miss J Pasi, for the plaintiff

C Mukwesha, for the defendant

SMITH J: The plaintiff (hereinafter referred to as "Memory"), together with her deceased child, were fare-paying passengers in a Toyota Hiace commuter omnibus that

belonged to, and was being driven by, the defendant (hereinafter referred to as "Gwenzi") on 27 December 1998 on the road from Harare to Bindura. One of the tyres of the vehicle burst and the driver, Gwenzi, lost control. The bus overturned. Three of the passengers died at the scene and 16 others were injured. Memory issued summons claiming damages. She claimed that the accident was caused solely by the negligence of Gwenzi, in that he drove without due care and attention or he was speeding or both. As a result of the accident, her four-year old son was killed and she suffered various injuries. She was taken to hospital and remained in hospital for 40 days after

the accident. An orthopaedic surgeon assessed her disability as being 16 per cent. She claimed damages in the sum of $200 168.40 being made up as follows: loss of life of her minor child, $100 000; medical expenses, $6 168.40; pain and suffering, loss of amenities and disability, $100 000.
Gwenzi denied liability. He denied that he drove negligently. He claimed that he was driving at a safe speed when two tyres burst; he tried to control the bus but was unable to do so; the bursting of the tyres was the sole cause of the accident.
[The learned judge then considered the evidence and found that the defendant Gwenzi had driven negligently and was responsible for the accident. Having dealt with the plaintiff's claim for damages for medical expenses, pain, suffering, loss of amenities and disability, he turned to her claim for damages for the death of her four-year-old son.]
As regards the claim for $100 000 for the loss of her son, as Memory has not suffered any patrimonial loss she cannot be awarded any damages under our law as it stands at present. The parents of a child that is killed have no claim for compensation or damages for the death itself, though they would have a claim for damages under the following headings: loss of support, if they were dependent on the deceased person at the time of the accident; medical expenses, if any were incurred; funeral expenses, if any were incurred; emotional shock, if that was reasonably foreseeable and was relatively serious. In the case of a young child who had not yet left school or was not working, the parents would not be able to show that they were dependent on the child for support at the time of the accident, so would not be able to claim any compensation under the heading. As is said at p 111 of Feltoe's Guide to Zimbabwean Law of Delict:
"Heirs cannot … claim damages for disappointed expectations based upon arguments that if the deceased had lived longer they would have inherited more."
Thus Memory cannot claim compensation on the basis that if her son had not been killed he would have supported her in her old age. Her son was killed outright at the scene of the accident and so no medical expenses were incurred. She could have claimed for any funeral expenses that were incurred but she has not done so. As regards emotional shock following from the death of her son, damages would only be awarded if she had suffered "shock or psychiatrical injury with consequent indisposition" but not if she had merely suffered an "emotional shock of short duration, which has no substantial effect on health": see Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A): see also Neethling, Potgieter & Visser Law of Delict at 243-246.

The reason why there is no compensation available under the general law for bereavement stems from the fact that the main basis of the action for damages in respect of the death of a person is pecuniary or economic loss. If none arises, no compensation

can be awarded. There can be no doubt that the loss of a child can occasion great distress but the general law is not sentimental about this. Speaking on this subject, Lord de Villiers CJ in Union Govt v Warneke 1911 AD 657 said:
"It is a deprivation which in many cases transcends, in the grief, distress and discomfort which it occasions, any other loss which a man can sustain, but it is not a loss which, for purposes of compensation, as distinct from retribution, is capable of being calculated in money."
The Law Development Commission of Zimbabwe, in its Report No. 66, dated April 1998, dealt with the subject of compensation for the death of a child or spouse. In its report, it set out the state of the present law and what it perceived to be the shortcomings and pointed out the need to amend the law. It said that under traditional customary law, there is provision for penal and compensatory damages to be awarded to the guardian or family of a person unlawfully killed by another but in most cases of this nature customary law is not applicable. The Commission recommended that the law be amended to confer a right of action for bereavement subject to a number of qualifications that are set out in the report. It attached to the report a draft Bill which would give effect to its recommendations. I support the recommendations of the Law Development Commission and suggest that they be implemented.
[The remainder of the judgment is not material to this report. — Editor.]
Wickwar & Chitiyo, plaintiff's legal practitioners
Mtombeni, Mukwesha & Associates, defendant's legal practitioners

S v LOTRIET & ANOR
2001 (2) ZLR 225 (H)
Division: High Court, Harare
Judges: Blackie J
Subject Area: Bail application
Date: 14, 15 & 19 September 2001
Judgment Number: HH-164-01

Criminal procedure — bail — grant of — multiple accused involved in same offence — one accused being granted bail and others not — no clear ground for distinction — no reason not to grant bail to others
It is vital in the administration of justice that there does not appear to be any form of discrimination, particularly where the liberty of a person is involved. Where a number of persons involved in the same offence apply for bail, it is not proper for one of them to be released on bail and others kept in custody unless good and sufficient reason is shown for a distinction to be made.
J Samkange, for the applicants
Mabeza, for the State
BLACKIE J: This is an application for the applicants to be released on bail pending trial. The Attorney-General opposed the application.
At the first hearing of this application, counsel appearing for the Attorney-General complained that the application had been served on him at short notice and that he had not had an opportunity to research the allegations made in the application. He requested a postponement for time to check the facts, to consider applicants' submissions and to respond to them in writing. The matter was postponed to enable him to do so. The date

and time fixed for the resumed hearing was that by which the Attorney-General's counsel said he would be able to respond adequately to the allegations. When the hearing resumed, a different counsel, Mr Mabeza, appeared for the Attorney-General. The written heads of opposition were filed signed by Mr Mabeza.

At the end of the postponed hearing, the applicants were admitted to bail on the following terms:

(a) The applicants will each:

1. Deposit Z$3 million with the Registrar of the High Court, Harare.
2. Provide a surety Z$5 million in immovable property.
3. Report to the Headquarters of the CID Fraud Squad every Monday, Wednesday and Friday between 6 a.m. and 6 p.m.

4. Remain within a 40 kilometre radius of the Harare Post Office unless authorised to go outside that area by the Investigating Officer of this case.
5. Surrender all travel documents to the Registrar of the High Court Harare.
6. Refrain from conducting any business on or transferring any sums from their bank accounts in South Africa and Botswana.

(b) Until this matter is finalised, Pieter Raymond Lotriet is to reside at 4 Dorset Road, Avondale, Harare and Patricia Anne Mitchell, at 21 Cornwall Road, Avondale West, Harare.

I undertook to give my reasons for admitting the applicants to bail later. This judgment contains my reasons.

The history of this matter is that the applicants were arrested in connection with an alleged fraud on the National Oil Company of Zimbabwe (Noczim). Also arrested in connection with this case (although possibly to be charged with another offence) was a man called Mr Ndlovu, employed by Noczim. The applicants were charged with fraud. The facts alleged by the State against the applicants are fully set out in the judgment of Hlatshwayo J in judgment No. HH-153-01*. For the purposes of this application, they can be summarised very simply. Noczim paid to a company, of which the applicants were directors and shareholders, the Zimbabwe dollar equivalent of US$1.3 million for transmission in foreign currency to a foreign national as an arrangement fee for fuel procurement for Zimbabwe. Noczim, subsequently finding that it could source the foreign currency more cheaply than the applicants, paid the arrangement fee itself to the foreign national and asked for the return of the money paid to the applicants' company. The applicants said the company would repay the money and provided cheques to cover the amount of the debt. However, the applicants, according to the State, knew that they had already withdrawn the money from the company's account for the payment of other debts due by the company and knew that the company could not repay the money. The money has not been repaid.

After arrest, the applicants were granted bail pending trial by the court of the magistrate. The conditions of bail were stringent. With the exception of condition 6, which was not included in the magistrate's conditions of bail, the applicants were required to comply with the conditions set out earlier in this judgment. The Attorney-General appealed against that order. The appeal was heard in this court before Hlatshwayo J. The appeal was allowed. The magistrate's order granting bail to the applicants was set aside, the

applicants were refused admission to bail. Mr Lotriet, who had not been able to satisfy the bail conditions, remained in custody. Mrs Mitchell was returned to custody.
In this application, the applicants reapply for admission to bail.
The Attorney-General objected, in limine, to the hearing of the application. He submitted that it offends against proviso (ii) to s 116(1) of the Criminal Procedure and Evidence [Chapter 9:07]. That section states that, after an application for bail has been refused, a further application for bail "may only be made … if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination". This application, he submitted contains, no such new facts.
The applicants allege a number of new facts since the last hearing of their applications. The facts alleged by them are set out in para 6 of their application. Only one of those facts needs to be considered here. I am satisfied that the other facts alleged were known and dealt with at the previous hearing of the matter.
The remaining fact is expressed in this way:

"(f) The other accomplice was granted bail in the sum of $50 000 and to keep the applicants in custody whilst the other has been granted bail constitutes a form of discrimination and this court should not been seen to condone discrimination in (this) form"

and

" (g) There (is) no justification as to why the applicants should be denied bail whilst the other accomplice should be admitted to bail on lesser conditions."

The question of Mr Ndlovu's release on bail and the effect that that may have on any application for admission to bail by the applicants has not been previously argued or considered. Neither the heads of argument in the appeal before Hlatshwayo J nor the judgment of Hlatshwayo J contain any reference to the point. Mr Mabeza, who appeared for the Attorney-General in the appeal before Hlatshwayo J, did not suggest that the point was raised or dealt with in that appeal. Accordingly, the point in limine failed and the application proceeded on the merits.
In argument, the applicants' allegations contained in the general propositions (f) and (g) in the application were clarified and expanded. The discrimination alleged was said to take two forms. Firstly, it took the form of discrimination in the administration of justice by the Attorney-General. The applicants and Mr Ndlovu were said to be both involved in the one offence. They were all released on bail by the same magistrate. The applicants' conditions of bail were more onerous than those allowed to Mr Ndlovu. The Attorney-General appealed against the applicants' release on bail. He did not appeal against

Mr Ndlovu's release. He opposes this application. He permits Mr Ndlovu to remain at large. Secondly, and even if no overt discrimination on the part of the Attorney-General can be shown, it is submitted that there is discrimination in the treatment of persons involved in one basic offence. The submission is that is unconscionable in such a situation that one accused be admitted to bail and the others refused bail unless good and sufficient reasons exist for the distinction to be made between the accused. In this case, it is submitted, no such good reasons exist. If an offence has been committed here, Mr Ndlovu was as much involved in that offence as the applicants. If the applicants face imprisonment and are therefore likely to abscond so to does Mr Ndlovu and he is just as

likely to abscond for that reason as the applicants. Mr Ndlovu, as an employee of Noczim, had greater, if different, opportunities to tamper with evidence than the applicants.

When the matter was postponed at the request of the Attorney-General, it was specifically postponed so that he could deal with the points raised by the applicants. At the resumed hearing his answer to the allegations was that Mr Ndlovu "has not been charged with fraud — but with [contravening] the Prevention of Corruption Act. Hence each matter is dealt with according to its own facts and merits". That bald and general response by the Attorney-General provides no answer to detailed allegations made by the applicants. The absence of a proper response is particularily disturbing in the light of the fact that the hearing of this application was delayed to give the Attorney-General the opportunity to reply to the allegations made by the applicants.

In the result, therefore, while even if it is not it is not possible to make positive findings on the allegations made by the applicants, those allegations remain unanswered or, at best, inadequately answered by the Attorney-General. In an application for bail pending trial, the initial onus is on the State to prove the necessity for keeping the applicants in custody. It is not necessary for the applicants to prove that they are to be released on bail. The response of the Attorney-General does not discharge that onus.

"It is not enough for a prosecutor to make bald assertions that a particular ground for refusing bail exists: S v Hussey 1991 (2) ZLR 187 (S). He must show that his assertion is well grounded and based on full information."

See Reid Rowland Criminal Procedure in Zimbabwe p 6-7.

No adequate reason in response to the allegations made in this application has been advanced to satisfy the court that the applicants should be kept in custody pending trial. Even if the applicants have satisfied the court that they are entitled to bail in respect of the allegations made by then in this application, the grant of bail remains a matter in the discretion of the court. The points made by the applicants in this application must be weighed with all the other factors in the

matter including those considered by Hlatshwayo J in the appeal against the magistrate's decision to admit the applicants to bail.

Notwithstanding the significance of the other factors in this case, the applicants are entitled to bail. They are so entitled because of two principles of fundamental importance: the right of the individual to liberty and the perception that justice is evenly administered. It is vital that in the administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved. On the papers before me, neither of these principles appears to have been adequately considered and both have been inadequately observed.

Accordingly, the applicants were admitted to bail on the conditions set out at the beginning of this judgment.

Byron Venturas & Partners, applicants' legal practitioners

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

MOVEMENT FOR DEMOCRATIC CHANGE & ANOR v REGISTRAR-GENERAL & ORS

2001 (2) ZLR 230 (H)

Division: High Court, Bulawayo

Judges: Kamocha J
Subject Area: Urgent application
Date: 20 July & 20 September 2001
Judgment Number: HB-45-01

Elections — notice of — minimum period between notice of election and polling — mandatory nature of — not permissible for shorter notice to be given — not a formal defect capable of condonation

The first respondent gave notice of council elections to be held in Matabeleland North. There were only 18 days between the publication of the notice and the announced election date. The first respondent realised his error and published a second notice. This time he gave 25 days' notice of the election. The applicants applied for the election to be set aside and for fresh nominations and elections to be held. The respondents argued that, although there had not been compliance with the relevant provisions of the legislation, the non-compliance was not fatal and was not in violation of the principles laid down in the Act.

Held, that s 103L of the Electoral Act requires that a minimum of 28 days' notice must be given of an election, and anything less would fall short of the intention of the legislature. It would not be proper for a public servant like the first respondent to change the procedure as he pleased, particularly as there was no good reason why he could not comply with the provisions of the Act. The defect was not a formal one: it was a substantive defect, and the order sought would be granted.

Legislation considered:

Electoral Act [Chapter 2:01], ss 103L & 149

J Tshuma, for the applicants

S Mazibisa, for the respondents

KAMOCHA J: The first applicant is a duly registered political party known as Movement for Democratic Change ("the MDC") while the second applicant was its candidate in the council elections for ward 7 in Matabeleland North. The two applicants sought for the following order.

"It is ordered that:

(a) the election notice published in The Chronicle newspaper of 17 April 2001 and further amended by the publication of 27 April 2001 be and is hereby declared null and void;

(b) the nomination proceedings conducted on 27 April 2001 be and is hereby set aside;

(c) the declaration of third respondent as the duly nominated councillor for ward 7 Matabeleland North be and is hereby set aside;

(d) first respondent be and is hereby directed to call for fresh nominations for the office of councillor of ward 7 Matabeleland North, before proceeding to hold an election for the office;

(e) fourth respondent be and is hereby directed to provide adequate security to applicants to enable them to effectively hold meetings to process the nomination of their candidate and to submit the nomination papers to the nomination court; and

(f) first respondent pays the costs of this application."

The circumstances which gave rise to this application were these. On 17 April 2000, the Registrar-General (the "first respondent") published in The Chronicle newspaper polling dates for the elections of councillors in vacant wards in Matabeleland North Province which inter alia included ward 7.

The notice stipulated that the nomination court was to sit on 27 April 2001 and the elections were to be held on 5 and 6 May 2001. That notice did not comply with the provisions of s 103L of the Electoral Act [Chapter 2:01] (which was inserted by the Local Authorities Election Laws Amendment Act 21 of 1997) in that the period between the publication of the notice and the polling day was 18 days, when the law stipulates a period not more than 66 or not less than 28 days.

The first respondent realised his mistake and sought to cure the defect by amending the dates of the elections to 12 and 13 May 2001 by publishing another notice on 27 April 2001. However, this second notice also failed to remedy the defect, as it gave the period between publication and polling day as 25 days instead of the minimum period of 28 days.

The first respondent conceded that in terms of s 103L(1) of the Electoral Act there should have been at least 28 days between the date of publication of the notice of any election and the polling date instead of only 25 days. It was further conceded there was no strict compliance with the provisions of s 103L mentioned supra.

It was, however, argued by the respondents that such non-compliance was not fatal to the electoral process as it was not in violation of the "principles laid down in the Act" and did not in addition have any effect on the result of the election as envisaged in s 149 of the Act which lays down the only basis upon which an election may be set aside.

It was further submitted that this mistake or non-compliance amounted to a mere formal defect which should be overlooked or condoned in view of the facts of the case, coupled with the spirit and letter of s 149 of the Electoral Act.

It was also the respondent's contention that the failure by the applicants to file their nomination papers was not occasioned by the fact that there were

25 days instead of 28 days between the date of publication of the election notice and the polling date, but because applicants wanted to hold a public meeting and get signatures for their candidates. The respondents felt that this procedure was unnecessary. They concluded that the applicants' failure to file their nomination papers amounted to wilful default of appearance at the nomination court.

It was the view of the respondents that the strict compliance argument raised by the respondent was not sustainable in the light of the provisions of s 103L(2) of the Act, which enjoins the first respondent to alter election dates, and also in the light of s 149 of the Act. They contend that this section was specifically calculated and designed to stop frivolous technical arguments being raised to set aside an election.

It is important to set out the relevant provisions of the law on which this application hinges. Section 103L of theElectoral Act provides as follows:

"Notice of Election and Nomination Day

(1) Not more than sixty-six or less than twenty-eight days before the day appointed for any election, the Registrar-General shall, by notice published in a newspaper and posted at his office —

(a) in the case of a by-election to fill a casual vacancy or a special vacancy, state the number of vacancies to be filled and, where appropriate, the wards in which the vacancies have occurred; and

(b) fix a place or places within the Council area at which, and a day or days not less than seven or more than twenty-one days after the publication of the notice in the newspaper, on which a nomination court will sit in terms of section forty-six to receive nominations of candidates for election as councillor or mayor, as the case may be; and

(c) fix a day or days, not less than fourteen or more than forty-five days after the nomination day or last nomination day, as the case may be, fixed in terms of paragraph (b) on which a poll shall be taken if a poll becomes necessary; and

(d) fix a day on which the voters roll shall be regarded as closed for the purpose of accepting the enrolment of voters who may vote at the election, which day may be on or after the day of publication of the notice or not more than thirty-one days before that day.

(2) Subject to this Part, the Registrar-General may, by further notice, alter any place or day fixed in terms of subsection (1) and the place or day as so altered shall be deemed to have been fixed in terms of that subsection."

Section 149 of the Electoral Act [Chapter 2:01] is couched in the following terms:

"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

Page 233 of 2001 (2) ZLR 230 (H)

(b) such mistake or non-compliance did affect the result of the election."

In my view, s 103L above is specific, in that it lays down a definite time frame between the date of publication of the notice of election date and the polling date. It should not be more 66 days and not less than 28 days. Quite clearly, there should be at least 28 days between the date of publication and the polling date. Anything less than the 28 clear days would fall short of the intention of the legislature. Was it proper for the Registrar-General to change what the legislature has laid down? Public policy demands that when there are laws directing all citizens how things should be conducted, it would not be proper for one civil servant like the Registrar-General to change the procedure laid down as he pleases. In this particular case, there was no good reason why the Registrar-General could not comply with the provisions of the law.

After issuing the first notice, he realised that it violated the provisions of s 103L and purported to cure the defect by issuing a second notice. The second notice, however, was also in breach of the same section. It seems to me that no effort whatsoever was made to comply with the provisions of the law. No explanation was given why the first respondent could not comply with the law. Instead, there seems to have been a deliberate decision not to comply with s 103L. The section was in fact contravened.

Can the contravention of the section be regarded as a mere formal defect which should be condoned? It seems to me that it cannot. My view is that it is a substantive one, as I feel that calling the contravention of the law "a mere formal defect" would make a mockery of the provisions of s 103L.

It is true that the first respondent is entitled to amend the polling date but that should be done within the framework of the provisions of s 103L(1).
The amendment should not be in contravention of the section.
Similarly, it seems to me that s 149 of the Electoral Act was not designed to condone or encourage contravention of electoral laws. In my view, where a substantive defect exists, the section does not apply.
In the result, the applicants succeed and are granted the order they seek in terms of the draft supra.
Webb, Low & Barry, applicants' legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners
S v HUMBARUME & ANOR
2001 (2) ZLR 234 (H)
Division: High Court, Harare
Judges: Gillespie J
Subject Area: Criminal review
Date: 26 September 2001
Judgment Number: HH-148-01

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 18 — right to equal protection of the law — prosecution of some persons but not others accused of similar offences — such a breach of section
Criminal procedure — prosecution — at public instance — duty of prosecuting authorities to act impartially — injustice of selective prosecutions
The accused were convicted of extortion, having attempted, with the assistance of a gang of people, to coerce the first accused's former employers to pay large sums allegedly, but in fact not, due to him after his employment had ceased. The accused and the gang barged through doors, uttering political slogans. The circumstances were such as to make all concerned at the company believe that this invasion was one carried out with the approval of persons in high places and thus one against which resistance would be dangerous.
The management surrendered to the threats on that occasion, but when, a month later, an attempt was made to extort a sum about 10 times as large as was previously paid, the police were called. The accused were arrested and after a trial were sentenced to a wholly suspended term of imprisonment, plus community service.
Held, that this sentence was seriously inadequate. The offence was a serious one, being a cynical attempt to take advantage of a dangerous escalation of violence, occasioned by an effective renunciation by the executive of its commitment to the rule of law.
Held, further, that the proceedings were a discreditable instance of selective prosecution. The Executive had over the last few years attempted to compromise the independence of the judiciary and sway the rule of law, by defiance of court orders, attacks upon the integrity of judges, racist attacks on non-black judges; and defamatory diatribes against judges who showed some degree of judicial independence. Threats were made in the press and by "war veterans". The Chief Justice had retired in circumstances of no little intimidation and unlawful pressure. Manipulation of the court rolls, selective prosecution and the packing of the bench of the superior courts were techniques which provide a government with the opportunity to subvert the law.

Held, further, that selective prosecution is a serious threat to the administration of justice and would also be a breach of the Constitution, as it denies all the equal protection of the law. A person whose criminal wrongdoer is, for politically inspired motives, not subjected to prosecution for his misdeeds is not being afforded the protection of the law. A person who
Page 235 of 2001 (2) ZLR 234 (H)
commits an offence and is prosecuted, while others who commit the same offence have official support and encouragement extended to them, as well as immunity from prosecution, is not receiving equal treatment at the hands of the law. A judge who finds he has to administer the law only against opponents of the government and not against its supporters faces the challenge to his conscience: whether he can still sit as an independent judge in an impartial court. There was good reason to believe that persons known to be government supporters and involved in continuing acts of violence and intimidation were being left at liberty, to wreak havoc unchecked. That a person such as the accused should be prosecuted and the others not involves an unequal and partial application of the law. It might well be that this prosecution involved an unequal and partial application of the law, making the trial by definition an unfair one.
Held, further, that while such conditions existed, it would be difficult, if not impossible, for a judicial officer to sit as an independent and effective member of the Bench.
GILLESPIE J: The accused have been charged with, and convicted of, extortion. He is one of those who has sought to take advantage of the increasing breakdown of the rule of law engineered by the Executive. His mistake is that he was acting as indepently for his own benefit rather than under an approved scheme of intimidation.
He was formerly employed by a company in Harare and in 1998 was dismissed on the grounds of misconduct from his occupation. The dismissal was accomplished lawfully. The accused nevertheless remained aggrieved, believing in particular that he was entitled to more than the meagre terminal benefits paid to him. In the early part of this year, he saw his opportunity to recover that which he considered to be his due.
In April 2001, the irregular militant grouping calling themselves “war veterans”, sought to gain influence in the labour movement in the urban areas of Zimbabwe. Under the guise of addressing unresolved grievances of workers, these militants occupied business premises, threatened management personnel, and demanded various benefits for allegedly vicitimsed persons, including many whose disputes had been properly resolved by government agencies years beforehand. Under threat of abduction, assault and interruption of business, and in the absence of any attempt by police to enforce the law or to maintain the peace, numerous persons and institutions succumbed to extortionate demands and paid sums of money in supposed settlement of such demands.
On 23 April, the accused, supported by a large gang of people entered the offices of the foundry where he had formerly been employed. He barged through doors uttering political slogans and saying he had come “to take the white man”, a reference to the white manager of the company, “to ZANU-PF”, a reference to the political party in government and believed to be controlling similar acts of violence and intimdation throughout the country. His air of self-confidence, his gang of supporters,
Page 236 of 2001 (2) ZLR 234 (H)
and the notoriety of similar events in recent days caused all concerned at the company to believe that this invasion was one carried with the approval of government and therefore

one against which resistance was potentially dangerous. After an attempt at appeasement, the manager under threat simply surrendered to the threats of violence and paid the accused the sum he was demanding, $15 046.09.

There he thought the matter rested until 26 May. On this day, the accused again came down upon the business premises full of threat and demands. He had by now discovered that his true dues were not the $15 000 previously paid in full settlement but apparently ten times that amount. $156 000 was now said to be the sum required in order to avert the threat of mob justice being administered to the manager. On this occasion, however, whether because the manager saw through the pretense of official sanction or for some other reason, a report was made to the police. Upon their attendance, the accused was arrested and in due course brought before a magistrate.

The conviction is entirely in order. I nevertheless have certain criticisms to make of the proceedings. The first of these relates to the sentence imposed. This was imprisonment for 20 months of which 12 were suspended on condition of performance of 420 hours of community service and a further 8 suspended on conditions of good behaviour, that is that he would not commit a similar offence of extortion within the next 5 years. There was no effective imprisonment; no fine; no order of the restitution of the amount extorted.

I consider this sentence to be seriously inadequate. While I understand the concern of the magistrate to give a first offender a second chance, this was entirely the wrong case for such a course. The offence was a serious one. It was not undertaken with any degree of good faith, as is clear from the fact that proper procedures were invoked in the initial dismissal and from the fact of the second attempt at extortion. It was a cynical attempt to take advantage of an extremely dangerous escalation of violence and intimidation within the city reminiscent of, but much less exacerbated than, political violence that had already been fostered in the rural areas. It was a symptom of the breakdown to mob rule that the rule of law seeks to avoid but which is the inevitable consequence when the government of the day by its actions, no matter what words it uses, effectively renounces its commitment to the rule of law.

It is not within the powers of this court on review to increase the sentence imposed upon an offender by the court of first instance. Its disapproval of a sentence is traditionally demonstrated by the withholding by the reviewing court of its certificate, the issue of which is the purpose of review proceedings, that the trial proceedings were in accordance with real and substantial justice.

I consider the inadequacy of the sentence to be good cause for withholding my certificate. There is a second reason that might well be thought sufficient in itself to justify the same course. This reason reflects a perception that the proceedings are a discreditable instance of selective prosecution. One cannot have sat on the Bench of this court for the last two years and more and not have become increasingly concerned at the manner in which the Executive has attempted, and succeeded, in compromising the independence of the Judiciary and the sway of the rule of law.

It has accomplished this by means of outright defiance of court orders; by attacks upon the integrity of the High Court and Supreme Court Judges collectively; by racist attacks on non-black members of those Benches; and by defamatory diatribes against any judge who shows some degree of judicial independence. The vilification of judges in the press

has not stopped short of the uttering of threats against judges. The judges have been threatened publicly by war veterans with attacks upon and occupation of their homes and "informed sources" have commented upon the likelihood of certain judges facing investigation and disciplinary conduct for alleged misconduct.
The overt campaign against Judges reached its climax with the retirement, in circumstances of no little intimdation and unlawful pressure, of the former Chief Justice. This event, clearing the way for the appointment of a new Chief Justice in whose power would lie the convening of any board of inquiry into a Judge's conduct, imparted a considerable cogency to the threats of alleged discipnary action current at the time, particularly since attention was immediately turned from the Chief Justice to other members of the Supreme Court Bench.
Although this public attack upon the judiciary has now abated, there is reasonable cause upon which to believe that there has throughout been a more subtle manipulation of the administration of justice. Electoral petitions following the 2000 elections, required by law to be dealt with as a matter of urgency, were not attended to and were delayed for up to a year, and many still remain incomplete. Frequent reports appear concerning the politicisation of the police force; these are buttressed by reports of police inaction in the face of unlawful conduct against the political opponents of the government, contrasted with zealous response to allegations of wrongful conduct by supposed political opponents of the government. Regrettably, even judicial appointments nowadays are attended by perceptions of Bench-packing.
The manipulation of court rolls, selective prosecution and the packing of the Bench of the superior courts provides a government determined to do so with the opportunity to subvert the law while at the same time appearing to respect its institutions. It is a mark of the damage that has been done to the

Judiciary that there are those who believe that this has been accomplished in Zimbabwe.
I hold the belief that this prosecution is an instance of selective prosecution. I do not suggest that the magistrate was party to it. He simply dealt with a case brought before him, and through what I regard as an erronious but genuine exercise of discretion imposed an inappropriate sentence. The question of whom, or whom not, to prosecute, is a decision vested in the Attorney-General. The question of what cases to investigate, and what dockets to refer to the Attorney-General, is a matter within the control of the police. It is possible, but would be entirely improper, for either of these institutions, either separately or together, to prevent certain prosecutions from coming to court while expediting others.
Selective prosecution is a serious threat to the administration of justice and would also be a breach of the Constitution. This provides that all persons are entitled to the equal treatment of the law. It provides that all are entitled to the protection of the law and that all are entitled to a resolution of their grievances before an impartial court. No matter how independent and impartial the court, a person whose criminal wrongdoer is not prosecuted for politically inspired motives, is not being afforded the protection of the law. A person who commits an offence and is prosecuted, where others committing the same offence have extended to them official support and encouragement in their wrongdoing, is not receiving the equal treatment as his fellow at the hands of the law. A judge, finally, which finds himself in the position where he is called upon to administer

the law only as against political opponents of the government and not in against government supporters faces the profound challenge to his conscience: that is whether he can still consider himself to sit as an independent judge in an impartial court.
Although there is no evidence before me that there has been selective prosecution in this case, I am sufficiently aware of reports in the media that similar offences have been perpetrated by persons claiming and apparently being afforded government support. I have read of a person calling himself a leader of war veterans, on remand out of custody for charges of attempted murder, whose photograph appears regularly in the press in connection with acts of violence and intimidation on farms and in businesses. That such a person, facing such charges, can nevertheless continue to act with such freedom and not have his liberty revoked pending his trial, and not be arrested for the continuing acts of violence, leaves it impossible for me to conclude that he and his actions do not enjoy the full backing of the Executive.
That a person such as the accused, who commits similar acts on a much lesser scale, should be exposed to prosecution while the other is not, involves an unequal and impartial application of the law between the two people.

It may well be that a trial in such circumstances is by definition an unfair trial and one that cannot be allowed to stand. It may well be most unsatisfactory that a person such as the accused should not be called to justice, but it is even more unsatisfactory and subversive of the rule of law and of justice that he should be singled out for prosecution while the instrument of government terror is able to wreak his havoc unchecked.
I have no doubt that prosecutions instituted so selectively can not be proceedings that are in accordance with real and substantial justice. I have therefore decided on this ground too to withhold my certificate.
I have also reached the conclusion that for as long as there prevail the conditions such as I have described in this judgment, I cannot sit as an effective and independent member of this Bench. I believe that other judges are similarly troubled by this, and by the many other respects in which our office has been improperly assailed. They have taken the decision to remain in office, or to take office, with a view towards persevering, despite the difficulties in doing so, in an attempt to uphold the principles to which they have given their oaths. I respect this point of view and would not wish the fact that I have come to a contrary conclusion to be taken as a reflection upon those judges such as I have mentioned. For myself, however, I have considered it necessary to resign my office and to allow this judgment to illustrate my reasons for doing so.

HEALTH PROFESSIONS COUNCIL v TURNER
2001 (2) ZLR 240 (S)
Division: Supreme Court, Harare
Judges: McNally, Muchechetere & Sandura JJA
Subject Area: Civil appeal
Date: 3 & 27 September 2001
Judgment Number: S-77-01

Appeal — against decision of Health Professions Council — nature of appeal — not a review

Medicine — medical practitioner — discipline — disgraceful conduct — treating patients otherwise than in accordance with general and approved practice — conducting unauthorised clinical trials — when may constitute disgraceful conduct

The respondent injected patients with povidone iodine, a medicine normally used for topical application, in an attempt to cure them of AIDS. He conceived the idea after reading an article about some research carried out in the United States. Some of his patients showed signs of improvement. None were said to have died as a result of the treatment. However, the Medical Research Council advised him twice to discontinue the treatment. The Drugs Control Council also required him to stop conducting clinical trials.

The Executive Committee of the Health Professions Council instituted an inquiry, held by the Council's Disciplinary Committee, into allegations of improper or disgraceful conduct. The respondent was found guilty of disgraceful conduct by the Disciplinary Committee, which recommended the cancellation of his registration as a medical practitioner. He appealed to the High Court against that finding, and was successful. The Council appealed against the High Court's decision.

On appeal, it was argued by the Council that the appeal was more in the nature of a review, denying the court any right to interfere with the Council's discretion.

Held, that an appeal against a decision of the Health Professions Council is a full appeal on the record, entitling the Supreme Court to intervene if satisfied that the Council was wrong. However, it is for the Council, as guardian of professional standards in the medical profession, to determine what is or is not disgraceful conduct. It has a discretion, which will not be interfered with if properly exercised.

Held, further, that the Medical Research Council acted entirely properly in conveying to the respondent its concern about injecting patients with povidone iodine. However, that did not mean that his failure to follow the Council's advice was improper or disgraceful conduct. His conduct itself had to be improper or disgraceful. There was no evidence of medical negligence; at worst it could be said that he did not act in accordance with general and approved practice. Treating patients otherwise than in accordance with general and approved practice is not disgraceful conduct where, as here: (a) there was a not unreasonable scientific basis for thinking the treatment might be effective; (b) there was a reasonable

basis for thinking the treatment would not cause serious harm; (c) there was no other effective form of treatment; and (d) the treatment was applied primarily with the well-being of the patient in mind.

Held, further, that what the respondent did constituted a "clinical trial" in terms of the Drugs and Allied Substances Control Act [Chapter 15:03]. A series of experimental treatments with a drug becomes a clinical trial when the person conducting them does so in order to establish the efficacy of or to discover or verify the effects or adverse reactions of drugs. The respondent had two objectives: one to help his patients and the other to establish the efficacy of povidone iodine as a treatment for AIDS. In doing this without the prior written authorisation of the Drugs Control Council, he committed an offence. However, it was a very technical offence, and his conduct was improper rather than disgraceful. In view of this, and in view of the time lapse since the treatment was administered (nearly 10 years), a censure would be an appropriate penalty.

Cases cited:

de la Rouviere v SA Medical & Dental Council 1977 (1) SA 85 (N)
Groenewald v SA Medical Council 1934 TPD 404
Hunter v Hanley [1955] SC 200
Kozeluhova v Health Professions Council 1989 (1) ZLR 5 (H)
Mitchell v Estate Agents Council 1996 (1) ZLR 222 (S)
Rosenberg v SA Pharmacy Bd 1981 (1) SA 22 (A)
Sidaway v Governors of Bethlehem Royal Hospital [1985] 1 All ER 643; [1985] 2 WLR 480 (HL)
Tikly & Ors v Johannes NO & Ors 1963 (2) SA 588 (T)
Legislation considered:
Health Professions Council Act [Chapter 27:08], s 60
G V Mamvura, for the appellant
A P de Bourbon SC, for the respondent
McNALLY JA: The Health Professions Council (HPC) is established in terms of s 3 of the Medical, Dental and Allied Professions Act [Chapter 27:08] (formerly Chapter 224). It seems clear that it is intended to be the governing body of the health profession in Zimbabwe, in that it controls the registration and deregistration of practitioners. We are concerned, in this case, with its disciplinary functions.
The Act provides that the Executive Committee of the HPC may refer cases to the Disciplinary Committee where an allegation is brought to its notice which might be the subject of inquiry by that Committee (s 58(1)). The Executive Committee, after investigation, did so in the present case.
On 2 November 1995, Dr Turner (the doctor) was given notice, in terms of what was then s 40(2) of Chapter 224, that there was to be an inquiry before the Disciplinary Committee of the HPC into allegations of "improper conduct, or disgraceful conduct or conduct which, when regard is had to your profession or calling, is improper or disgraceful".

The allegations against him were set out in the notice. I quote them as they appear from that document. I do not find them entirely easy to follow:
"The allegations against you are that between 25 November 1991 and 1 December 1993 you treated fourteen patients by injecting them intravenously with povidone iodine, a preparation for topical application. Ten of the said patients were HIV positive, one was a tuberculous patient, one diabetic and the others cancer patients. On 30 March 1993 and again on 14 May 1993, the Medical Research Council of Zimbabwe advised you to discontinue such treatment involving the use of povidone iodine. On 29 July 1993, the Drugs Control Council required you to stop conducting clinical trials with povidone iodine, such trials being in contravention of section 15A of the Drugs and Allied Substances Control Act [Chapter 320]. Notwithstanding the aforesaid communication on 5 April 1993 and on 19 May 1993, you treated A Finaughty intravenously with povidone iodine. Thereafter, from 24 November 1993 daily until 1 December 1993 you treated C Matizamhuka intravenously with povidone iodine."
As I understand this passage, it contains two separate allegations. The first is that he injected fourteen patients intravenously with povidone iodine when that preparation was for topical (i.e. superficial) application. And that he continued to do so after being advised by the Medical Research Council to discontinue such treatment.

The second is that he was carrying out clinical trials with povidone iodine and continued to do so after being told on 29 July 1993 by the Drugs Control Council to stop doing so. He was found guilty of disgraceful conduct on both counts by the Disciplinary Committee, who further found that his conduct warranted the cancellation of his registration as a medical practitioner. Accordingly the Committee referred the matter to the HPC for the removal of his name from the register, and suspended him pending the final decision.

The doctor appealed against that finding in terms of s 45(1) of the former Act, to the High Court. On 28 June 2000, the High Court reversed the finding of the Disciplinary Committee, set aside the decision to remove the doctor's name from the register, and ordered the HPC to pay the costs*. The HPC then appealed to this court.

At the outset, we need to decide what kind of appeal we are dealing with. Is it more in the nature of a review, denying the court any right to interfere with the discretion of the HPC, or a full appeal on the record, or a complete re-hearing? The HPC argues for the first and the doctor for the second of these alternatives.

It seems to us that the matter has been clearly settled by authority. While in the early days the tendency was to treat it as a review — see e.g. Groenewald v SA Medical Council 1934 TPD 404 — the reason for that approach lay in

the wording of the statute. The right of the accused practitioner was set out in these terms:

"An application may be made to any provincial or local division of the Supreme Court by any person aggrieved …" (my emphasis).

The court held that the use of the word "application" rather than "appeal" was conclusive. It was a review only.

But by the time the Natal Provincial Division heard De la Rouviere v SA Medical and Dental Council 1977 (1) SA 85, the wording had changed. Now an accused practitioner:

"may … appeal to the provincial or local division of the Supreme Court of South Africa … against such decision" (my emphasis).

The court was satisfied that the change of expression indicated an actual change of intention. It concluded that the right was in the second category defined in Tikly & Ors v Johannes NO & Ors 1963 (2) SA 588 (T) at 590. Thus, it was:

"an appeal in the ordinary strict sense, that is, a re-hearing on the merits, but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong."

That approach was endorsed by the South African Appellate Division in Rosenberg v SA Pharmacy Board 1981 (1) SA 22 (A). The court ruled, at 33F, that:

"… the court, as in all cases where an appeal on facts is before it, will not lightly interfere with such factual findings bearing in mind that the members of the Board had the opportunity of seeing and hearing the witnesses, but it will interfere if it is of the firm opinion that the Board was wrong."

Later, at 33G-H, and dealing with a situation where the Board did not give reasons, the court said:

"it would still interfere if it is satisfied that the Board was wrong in finding such facts to be established, or if, not knowing what facts the Board found, it is satisfied that the facts essential to a finding of guilt were not established."

That decision has been followed in our courts: see Kozeluhova v Health Professions Council 1989 (1) ZLR 5 (H). Our Act, in s 45(1) of Chapter 224, and s 60 of Chapter 27:08, speaks clearly of an "appeal", and it empowers the High Court to:

> "(a) confirm, vary or set aside any findings or penalty of the Council … or
> (b) remit the matter … for further consideration."

I am satisfied that we are concerned with an appeal, not a review, and that while the expertise of the HPC must be respected, the court must have the power to intervene where it is satisfied that the HPC was wrong. I derogate in no way from what I said in Mitchell v Estate Agents Council 1996 (1) ZLR 222 (S) at 231B-C, namely:

Page 244 of 2001 (2) ZLR 240 (S)

"It is for the Council, as guardian of the professional standards of estate agents, to determine what is or is not disgraceful conduct. It has a discretion in this regard, and so long as this discretion is properly exercised the court will not interfere."

The point is always whether the discretion is properly exercised.

Accordingly, I conclude that the learned judge in the court a quo approached the matter correctly as an appeal on the record.

THE FIRST ALLEGATION

The facts upon which this allegation is based are not in dispute. They have never been in dispute. Nor has the doctor attempted to conceal them. He was a general practitioner in Marondera trying, in 1991, to cope with the early horrors of the AIDS pandemic. There was then, as there is now, no cure for this disease. He conceived the idea, based on an article he had read about some research in Massachusetts, USA, that it might be possible to kill the virus by injecting povidone iodine (commonly sold as Betadine), intravenously. He did so in the case of fourteen patients, having first carried out experiments on a pig and two dogs to determine the safety level of the dosage. Since all three animals died, it is not clear to me how he satisfied himself in this regard. However, none of his fourteen patients suffered serious ill effects from the dosage he decided upon, so one must conclude that it was safe.

The first patient he treated, a Mrs M, showed remarkable improvement within four days and indeed she was alive and well (and supportive of the doctor) at the appeal hearing. Others showed improvement and easing of symptoms although they died. There is no suggestion that any of them died as a result of the treatment. Nor indeed is there any charge to this effect. They were all terminally ill patients. Their suffering was mitigated.

The intravenous injection of iodine (and iodine is the dangerous element of povidone-iodine) is not something new. Substances containing iodine have been injected to enable X-rays to show up better. And it has been injected in other circumstances. I do not consider that the doctor acted improperly merely because the manufacturer stated on the package "for topical use only". At best, it put the practitioner on notice. If something went wrong, he would have been in difficulty. But nothing went wrong.

What then is the doctor alleged to have done wrong? Much was made of the fact that the Medical Research Council advised him to discontinue the treatment, as it did on 30 March 1993 and on 14 May 1993. One begins, therefore, by looking at the authority of the Medical Research Council (MRC).

The MRC was set up on 1 July 1974 in terms of RGN 225 of 1974. It was

Page 245 of 2001 (2) ZLR 240 (S)

established under the Research Act 1959, now the Research Act [Chapter 10:22]. Its functions, duties and powers are set out in Part III of its Constitution, which is a schedule to RGN 225 of 1974, and, in particular, its powers are those set out in the schedule to the Act, Chapter 10:22. Nowhere is it given any authority over individual medical practitioners. It is not a disciplinary authority. It cannot give directives to practitioners. It is purely a research organisation.

In saying this, I must make it clear that I do not wish in any way to belittle the Medical Research Council of Zimbabwe. Nor do I suggest that it had no right or authority to give advice to Dr Turner. It acted entirely properly in doing so. All I am saying is that I do not consider that it can be said to be improper or disgraceful conduct on the part of Dr Turner not to follow the advice of the MRC.

Of course, if what the doctor was doing was in itself improper or disgraceful, then he would be guilty, obviously, of improper or disgraceful conduct. That would be so whether or not he was advised by the MRC in relation to that conduct. I must then turn to consider whether it was medically improper or disgraceful conduct to inject patients with povidone iodine. Note that I am not yet dealing with the question whether this amounted to a clinical trial. That is a different matter. My present enquiry is limited to whether it is wrong to treat patients therapeutically in this fashion.

It was certainly clear that the HPC members, and others whom they consulted, were very skeptical about this treatment. They did not have any better ideas themselves. How could they? There is no cure, and no financially affordable way of alleviating the symptoms. But they were certainly of the view that the treatment was ineffective — despite the evidence to the contrary. Some thought it potentially dangerous — a comment weakened by the fact that none of the fourteen suffered any but minor side-effects.

It was not alleged that what the doctor did amounted to negligence. Moreover, if the offence is to be categorised as medical negligence, then none of the essential features of negligence have been established. There was no complaint from any patient, most of whom signed forms of consent, and there was no evidence, indeed no suggestion, of damage. See generally Powers & Harris Medical Negligence para 20.17 p 422. The one allegation that in one case he delayed treating the patient for TB was not actually charged and should not have been taken into account.

At best for the Disciplinary Committee, it could be said that the doctor did not act "in accordance with general and approved practice". See the discussion on this subject in Professional Negligence by Jackson & Powell 2 ed p 302 paras 6.25 et seq. I rely in particular on the comment of Lord Clyde in Hunter v Hanley [1955] SC 200:

"Such a deviation (from ordinary professional practice) is not necessarily evidence of negligence. Indeed, it would be disastrous if this were so, for all inducement to progress in medical science would be destroyed."

I must confess that, as a layman, I find it difficult to understand what is improper or disgraceful in the actions of a doctor who treats a patient, for whose ailment there is no known cure, by injecting a substance which he has some reason to believe might be beneficial, and which he is reasonably certain can do no harm.

In an article in the Central African Journal of Medicine (which is undated but included in the papers) Mr T J Nyapadi, a senior law lecturer and member of the HPC representing the legal profession, wrote:

“Therapeutic research concerns procedures experimental in nature but which it is hoped will benefit the subject of the research, the patient. What this means is that the medical researcher engaged in therapeutic research will be combining care of the patients with the conduct of the experiment. This is based on the premises that in the treatment of the sick person, the doctor must be free to use a new diagnostic and therapeutic measure, if in his or her judgment it offers hope of saving life, re-establishing health or alleviating suffering.”

It seems to me that what the doctor did in the present case fits precisely into that description. In Sidaway v Governors of Bethlehem Royal Hospital [1985] 2 WLR 480 (HL) at 498, Lord Diplock said:

“Those members of the public who seek medical or surgical aid would be badly served by the adoption of any legal principle that would confine the doctor to some long-established well-tried method of treatment only, although its past record of success might be small, if he wanted to be confident that he would not run the risk of being held liable in negligence simply because he tried some more modern treatment, and by some unavoidable mischance it failed to heal but did some harm to the patient.”

The position here, of course, is even stronger, because no harm was caused.

Insofar, therefore, as the allegation against the doctor may be characterised as “treating his patients otherwise than in accordance with general and approved practice”, I would venture to suggest that the following criteria should be applied:

1. Is there some not unreasonable medical or scientific basis for thinking that the treatment might be effective?
2. Is there some reasonable basis for thinking that the treatment will not cause serious harm to the patient?
3. Is there some other form of treatment, which is in accordance with general and approved practice, and which would probably have been effective had it been applied?
4. Can it be positively said that the treatment was not applied primarily with the well-being of the patient in mind, even though there may have been an additional experimental motivation?

In my view, the doctor in this case passed each one of these tests.

I conclude that, although the facts alleged in the “charge” were proved, those facts, as we would say in law, failed to disclose an offence. I agree with the reasoning of the learned judge a quo in coming to the same conclusion.

THE SECOND ALLEGATION

This concerns the conducting of a “clinical trial”. There can be no dispute at all that:

“No person shall conduct a clinical trial of any drug without the prior written authorisation of the Council (i.e. the Drugs Control Council), granted with the approval of the Secretary (for Health).”

Those are the words of s 15A of the Drugs and Allied Substances Control Act, Chapter 320, now s 16 of Chapter 15:03.

The word “drug” is so widely defined that it includes povidone iodine.

The phrase “clinical trial” is defined in the Act as meaning:

“a systematic study in human beings or animals in order to establish the efficacy of, or to discover or verify the effects or adverse reactions of drugs, and includes a study of the absorption, distribution, metabolism and excretion of drugs.”
The simple question is: Did the doctor conduct a clinical trial? I have a great deal of sympathy with the conclusion of the learned judge a quo that he did not. The difficulty I have, however, is that the definition in the Act is very largely a subjective one. A series of experimental treatments with a drug becomes a “clinical trial” when the person conducting them does so “in order to establish the efficacy of … or to discover or verify the effects or adverse reactions of … drugs …”
The doctor in this case clearly had two objectives in mind when he carried out these experimental treatments. Primarily, I accept, he was concerned to help his patients. But inevitably, given that he was and is a man with an enquiring mind, he was equally intent on “establishing the efficacy of, or discovering the effects or adverse reactions of, povidone iodine”. To that extent, it seems to me, it could be said that he was carrying out a clinical trial. Indeed he himself must have used the phrase. In the MRC letter of 30 March 1993, addressed to him it is said:
“Thank you for submitting notes on clinical trials of a cocktail treatment for AIDS.”
In his letter of 24 January 1994 to the MRC Chairman, he says:
“Further to my re-submitted protocols of 13 July 1994 [I think the date is wrong] I have heard no more from Council. Another copy is enclosed.”
In the letter of 29 July 1993 from the Drugs Control Council, after referring him to s 15A of the Act, the Registrar of Drugs said:
Page 248 of 2001 (2) ZLR 240 (S)
“Please note that it is an offence to conduct a clinical trial without approval, hence you are required to stop the trial forthwith.”
He did not reply denying that he was conducting such trials.
Had he stopped at once on receipt of the letter from the Drugs Control Council, I very much doubt if he would have been charged with unlawfully conducting a clinical trial in respect of what he did prior to receiving the letter. As to what he did after the receipt of the letter — i.e. finalising the course of treatment for Mr F and treating Mr C M — I would accept his explanation that this was not a continuation of the trial but therapeutic treatment only. I say this because, again, it was what was in his mind that was important. The intent to continue the clinical trial was not proved.
I conclude therefore that the doctor was in fact conducting clinical trials of the intravenous use of povidone iodine. In doing so without the prior written authorisation of the Drugs Control Council, he committed an offence. However, in my view, it was a very technical offence. Had he been more astute in describing his work, or had he been more conscious of the dangerous ground on which he was treading, he could probably have avoided trouble by saying to the Drugs Control Council on his first approach:
“I have treated a series of patients on an experimental therapeutic basis with intravenous injections of povidone iodine. The results have been encouraging (see notes attached). I seek your written authorisation to carry out a clinical trial in this regard.”
Had he then been refused authorisation, the matter would probably have ended there. It is his characterisation of those experimental therapeutic treatments as a clinical trial which has landed him in trouble.

I would therefore, with some regret, differ with the learned judge a quo on the second count, and would reinstate the finding of the Disciplinary Committee on this count, but categorising his conduct as improper rather than disgraceful.

THE PENALTY

Clearly, a finding that the doctor is not guilty on the first charge and only somewhat technically guilty on the second charge warrants a reappraisal of the sentence imposed. It is remarkable that the Committee does not seem even to have considered any of the lesser penalties available under the Act.

The evidence makes it clear that the doctor is a caring and compassionate general practitioner.

His colleagues, Dr Abson and Dr Martin, supported him. His nursing staff obviously thought very highly of him. And, understandably, his surviving patient, Mrs M, had absolute faith in him, as had the mother of one of the patients who died. He has been entirely open and candid throughout as to

what he was doing. His fault lies in failing to understand the provisions of s 16 of the Drugs and Allied Substances Control Act [Chapter 15:03].

In the circumstances, the removal of his name from the medical register is a wholly inappropriate penalty. In terms of s 59(2) of the Act, the appropriate penalty would be either a censure (in terms of s 59(2)(e)) or a caution and postponement for a period of any further action (in terms of s 59(2)(f)). In view of the time lapse since 1991, it is important not to allow the matter to drag on. And since his offence was, in my view, somewhat technical, a censure would be appropriate. However, since the HPC was quite justified in instituting the inquiry, he should also be required, in terms of s 59(2)(d) of the Act, to pay the costs and expenses of and incidental to the inquiry.

If this verdict had been handed down in the High Court, it would have represented substantial success for the doctor, and he should be entitled to his costs in that court. By the same token, the HPC has succeeded significantly on appeal, and that success should carry costs.

Accordingly, the appeal is allowed, with costs, to the extent that the finding on the second count is reinstated as guilty of improper conduct, and the penalty is altered to that of a censure and an order that the doctor pay the costs and expenses of and incidental to the inquiry. The award of costs in the High Court will stand.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

C S Kavanagh, Sakala & Co, respondent's legal practitioners

MAENZANISE v RATCLIFFE NO & ANOR

2001 (2) ZLR 250 (H)

Division: High Court, Harare

Judges: Chinhengo J

Subject Area: Civil action

Date: 25, 26 & 27 September 2001

Judgment Number: HH-173-01

Customary law — application — matrimonial property rights — nature of marriage — relevance
Family law — husband and wife — property rights — tacit universal partnership — when established
Partnership — tacit universal partnership — husband and wife — when established
The plaintiff contracted an unregistered customary-law marriage with a man of British extraction and lived with him in Harare until his death 25 years later. During that time the man earned a modest income from employment, and the plaintiff supplemented it with a comparable income from activities such as knitting, tailoring, cross-border trade and liquor sales. She obtained loans from her relatives and applied them towards the purchase of some furniture and equipment for the joint household. She also contributed towards the purchase of their matrimonial home, which however was registered in the man's name. Overall, her contribution towards the acquisition of the assets that constituted the man's deceased estate was about equal to his. She claimed half the estate on the ground that she and the man had entered into a tacit universal partnership in which they had pooled their resources for their mutual benefit.
Held, that although the concept of universal partnership is a general-law concept and unknown to customary law, the way of life of the plaintiff and her husband indicated that, in terms of s 3 of the Customary Law and Local Courts Act [Chapter 7:05], the general law should apply to the case. The fact that he had paid roora did not alter the position.
Held, further, that while a marriage relationship should not be recklessly converted into a business partnership ex post facto, if a wife makes a substantial financial contribution or regularly renders services exceeding those ordinarily expected of a wife, a court may be persuaded to imply a partnership agreement. This was one of those cases.
Cases cited:
Chapendama v Chapendama 1998 (2) ZLR 18 (H)
Chapeyama v Matende & Anor 2000 (2) ZLR 356 (S)
Jengwa v Jengwa 1999 (2) ZLR 121 (H)
Mashingaidze v Mashingaidze 1995 (1) ZLR 219 (H)
Matibiri v Kumire 2000 (1) ZLR 492 (H)
Muhlmann v Muhlmann 1981 (4) SA 632 (W)

Legislation considered:
Customary Law and Local Courts Act [Chapter 7:05], s 3
J K Muganhu, for the plaintiff
T Nyahwanza, for the first defendant
CHINHENGO J: This is an unusual trial action in which evidence on the matters in issue was given almost exclusively by the plaintiff and her witness whilst the first defendant, the executor, was only able to give evidence from the information he gathered in the performance of his duties as executor dative.
The plaintiff fell in love with John Popple, a male of British extraction who was living in Zimbabwe. His status in Zimbabwe was not disclosed to the court. It is therefore not possible for me to determine if he was a resident or citizen of Zimbabwe. He died on 19 October 1999 in Zimbabwe. It appears that from 1974 when he fell in love with the plaintiff until his death he did not visit the United Kingdom, nor did any of his relatives,

who are said to be in the United Kingdom ever visit him in Zimbabwe. It is alleged that he has a brother and a sister living in the United Kingdom.
The late John Popple lived with the plaintiff as husband and wife in a customary law relationship which was not formally registered as a marriage. I will refer to their relationship as a customary law union.
After his death, the plaintiff approached the first defendant, a specialist in the administration of deceased estates, and informed him of the death of John Popple. She requested the first defendant to attend to the administration of the estate. She signed a document giving her consent to the appointment of the first defendant as the executor of the estate. The document is in the form of a letter to the Master of the High Court (Exhibit 2) and it is dated 11 April 1999. It reads:
"Re: Estate late John Popple
I, the undersigned, being the customary law wife of the late Mr John Popple and, as such, the beneficiary in his Estate, hereby consent to the appointment of Mr Colin Arthur Ratcliffe, in his capacity as General Manager for the time being of Harare Board of Executors (Pvt) Ltd, as Executor Dative in the Estate.
I also waive the need for security insofar as my interests in the Estate are concerned."
After some further contact between her and the first defendant, the plaintiff received a letter from the first defendant (Exhibit 4) advising her that the first defendant was unable to accept her status as the widow of the late John Popple. The letter reads:
"RE: ESTATE LATE JOHN POPPLE
At the request of John Popple's brother and sister in England and through their Solicitors there we gathered as much information from as many people and organisations

in Zimbabwe as possible regarding the possibility of your having been married to the late Mr John Popple including representations we received from friends of the late Mr Popple's whose names and addresses had been supplied to us by yourself.
John's brother and sister have given very deep and careful consideration to the matter which they have discussed with their Solicitors and regret to advise that they feel that, on the information which we have obtained and in the absence of any prior knowledge by either of them of yourself, we are unable to admit your status as being the widow of the late Mr John Popple. They have, therefore, asked us to proceed on the basis of the Laws of Intestate Succession of Zimbabwe for an unmarried person which means that the brother and sister in the United Kingdom would be the Joint Beneficiaries in John's Estate in equal shares.
Our instructions, therefore, are to liquidate the assets in the Estate being the house and its contents and prepare our Estate Accounts on the basis that the Estate will be awarded to the brother and sister in equal shares or in cash. The brother and sister in England, however, have indicated to us through their Solicitor that, once they know the exact value of the assets in Zimbabwe which they stand to inherit, they may possibly give consideration to making an ex gratia payment to yourself in recognition of your friendship with their late brother over the years. In the circumstances, we must respectfully ask you to vacate the premises and surrender the keys to our offices. We are most anxious that you be given a reasonable period in which to do so however and, since the writer is going to be on leave from Good Friday until 9 May 2000, it is suggested that you be permitted to take at least until 9 May 2000 in order to enable you to remove your

own possessions out of the house and surrender the keys to our offices. If you reasonably require a longer period of time for this purpose, please be so good as to let me know and I am sure that we will be quite reasonable in the circumstances. Please advise the gardener that we would wish him to remain on the premises to continue looking after the garden, but that he will in future be required to come to our offices for payment of his monthly wages for which purpose he should bring his ID Card.

I thank you sincerely for your assistance and co-operation in this matter. Should you wish to vacate the premises prior to my return from leave, you may leave the house keys with my Secretary, Mrs J Pearson.

Finally, there is one other matter on which the English Solicitor have requested clarification. We received a letter from the Cancer Centre which stated that you lived in John's house, together with your children. Since the late Mr Popple did not have any children, the Solicitors have asked for confirmation as to whether these were in fact your own children or whether they were for distant relatives of yours or the children of friends of yours."

The plaintiff then issued summons against the first defendant and the Master of the High Court. The Master has not defended the action nor has he filed any report for the court's consideration. I will assume that the Master is prepared to be bound by whatever decision this court reaches.

The plaintiff prayed the court to award to her fifty per centum (50%) of the value of the Estate of the late John Popple and costs of suit. She alleged in her declaration that in 1976 she and the late John Popple entered into a tacit universal partnership in terms of which they pooled their resources for their mutual benefit. During the existence of the partnership they acquired

movable property listed in para 5 of the declaration and an immovable property known as House No. 9 Melrose Drive, Marlborough, Harare. She alleged that the property was acquired through the joint effort, dedication, skill and industry of both of them with each party making a contribution. She also alleged that upon his death all the assets acquired by them were registered in the estate of the late John Popple in their entirety, thereby totally excluding her.

In his plea, the first defendant denied that the plaintiff and the late John Popple entered into a universal partnership, whether tacit or otherwise. He averred that the plaintiff was in fact employed as a domestic worker by the late John Popple and that she was duly and adequately compensated for all the services she rendered in that regard. He averred further that all the property particularised by the plaintiff in her declaration was acquired or purchased solely by the late John Popple without any contribution, monetary of otherwise, from the plaintiff. The immovable property was registered in the name of the late John Popple and that constituted prima facie proof of sole and absolute ownership of that property.

The first defendant pleaded in the alternative that, in the event that the court found that a tacit universal partnership existed, the plaintiff's contribution to the acquisition of the property was not sufficient to warrant the division of the property in terms of the plaintiff's prayer and that, in any event, the tacit universal partnership did not go so far as to cover the immovable property, which is explained by the fact that it was registered in John Popple's name only.

After all the evidence was heard, the first defendant's legal practitioner conceded during his final address that the plaintiff was indeed a customary law wife of the late John Popple. Evidence as to the payment of roora had been given in a credible manner by the plaintiff and her witness, one Jameson Manenji Chimani, who was the go-between (munyai) in the marriage transaction between John Popple and the plaintiff's family. It will therefore be unnecessary for me to recount the evidence on the relationship between the plaintiff and the late John Popple. The concession by the first defendant's legal practitioner directly or by implication means that the following facts, which are consistent with the plaintiff's evidence, are established:

— that the plaintiff and the late John Popple fell in love in 1974

— that the late John Popple entered into a roora contract with the plaintiff's father and paid part of the roora in 1976.

— that the plaintiff and the late John Popple lived together from 1976 until his death on 19 October 1999 as husband and wife in an unregistered customary law union.

— that, as was common cause, the plaintiff remained in the matrimonial home after the death of her husband.

— that the plaintiff made a contribution, at least indirectly, which any married woman would do to the welfare of the family and the accumulation of the assets now registered in the late John Popple's name.

It therefore remains for me to deal only with the question of her entitlement to fifty per cent of the assets acquired during the subsistence of the customary law union. The late John Popple and the plaintiff did not have any children whether as between themselves as husband and wife or as between each one of them and any other person. They seem to have had a limited circle of friends. The evidence as to what actually transpired during the subsistence of their customary law union was solely that of the plaintiff.

The absence of friends or children in their life (or their absence to testify as to what actually transpired in the relationship) is understandable if viewed against the racial realities in this country, especially during the pre-independence period. This society was sharply divided along racial lines. There was in existence a palpable and state-sanctioned societal intolerance of marriages across the colour line. Shorn of the state sanction, that intolerance persisted in the years after independence. The plaintiff narrated some of the difficulties which she and her husband had to confront because of the racial attitudes in this society. It would seem to me that whilst other persons in similar situations dared, the Popples did not and hence the evident absence of friends and progeny in their life.

The plaintiff's evidence was the following. She fell in love with the late John Popple in 1974 when they met at her sister's house in Ardbennie, Harare. At that time, the plaintiff was self-employed — knitting and tailoring. The late John Popple came to her sister's place to repair damaged sewer pipes. He was then employed by a plumbing company. He lived in a flat at Fife Avenue and Third Street in the Avenues. After he paid roora they moved into a house in Southerton and resided there until 1978. They moved to reside at Sabina Court in the Avenues and later in 1981 they purchased the house at No. 9 Melrose Drive, Marlborough. Upon moving to reside with the late John Popple the plaintiff took with her pots, dishes, curtaining material, bed sheets, blankets, a sewing machine and a table. Some of this property was given to her by her relatives, especially by her aunties in

the customary fashion after roora has been paid and the African bride moves in to live with the new husband. The late John Popple had as his major possessions a dressing table, a bed and a chest of drawers. The plaintiff was by this time employed and receiving $150 per week as wages. John Popple was still employed at the plumbing company, Central Plumbers, at a monthly wage of $1 000. He would also make extra income when called-up for military duties. The plaintiff said that although she was formerly employed, when she moved in to live with the late John Popple she continued to knit and sew clothes for

sale. She also made cakes for sale. She raised between $300 and $700 per month from these activities. They bought "a bar", being a piece of furniture, and she contributed $120 to the purchase price. They sold the bed and dressing table which belonged to John Popple and bought another bed and dressing table. The plaintiff made a contribution of $80 to the purchase price of the new dressing table. They later sold the bed again and bought another and the plaintiff contributed $100 to the purchase price of $600. When they moved from Southerton to the Avenues they bought a black and white television set and a small stove. The plaintiff paid for the stove. When they moved into the Marlborough house they bought a colour television set for $5 000 to which the plaintiff made a contribution of $2 000. By this time, the late John Popple was employed by Mcdonald Plumbers. The plaintiff had terminated her formal employment and was engaged in the business of buying and selling goods which she imported from South Africa. She said that from this cross-border activity she raised about $2 000 monthly. The plaintiff said that she bought the deep freezer from funds she raised from a savings club of which she and her sisters were members. She said that she also bought from her own income the garden tools. After they moved into their new house in Marlborough in 1981, they bought a lounge suite, a dining room suite, a stove and a black and white television set. She said that she borrowed $30 000 from her brother, now deceased, and used a part of that money to buy the lounge suite.

The plaintiff said that the house at No. 9 Melrose Drive cost them about $15 000. She paid the sum of about $3 000 by way of a deposit and John Popple obtained a loan of $11 000 from Founders Building Society. Throughout their marriage it was John Popple who made the mortgage repayments. Of the amount of $30 000 which she borrowed from her brother, she also used part of it to pay the house helper and the gardener and to purchase a knitting machine. The plaintiff said that she received a large amount of $66 000 as an inheritance from her brother who had died. Of this amount, $10 000 was paid to her in 1981 and the balance in about 1982. She said she also borrowed a further sum of $30 000 from her younger sister and used a part of this loan to put up burglar bars in the house as well as pay for the re-wiring of the electricals of the house. She said that a part of the loans she obtained from her relatives was used to sink a borehole at the matrimonial home.

It was apparent that the plaintiff could more clearly recollect the amount of her contribution and not the cost of the various movable assets acquired by them. This was pointed out to her during cross-examination. It was also pointed out to her that the figures of her borrowings and income were inflated so as to bolster her assertion that she made a significant contribution to the

acquisition of the matrimonial assets. I tend to agree that she inflated quite considerably the amounts which she earned or borrowed from her relatives or inherited. She did not produce any documentary proof of these borrowings or earnings. Her evidence tended to be general in nature. That she exaggerated the amount of money available to her during the subsistence of the customary law union does not by itself mean that she was untruthful in substance. The exaggeration is the kind of untruth which is told by a witness who, in her naivety, is anxious to persuade the court to accept the fact of her having made a substantial contribution in a marriage relationship. It is a notorious fact in cases of this kind that documentary proof is difficult to come by and the woman or man, for that matter, is hard put to prove that she or he made a significant contribution to the well-being of the family and to the acquisition of matrimonial assets. It is a notorious fact that in a marriage relationship the parties do not keep records of all their purchases. They least anticipate a divorce or an untimely death of one of them and litigation at the end of it all. Thus, I think, the court must be more generous and accept the verbal evidence adduced by persons in this situation, provided that that evidence is credible and the probabilities of their circumstances admit of its veracity.

The plaintiff explained that it was not possible for the matrimonial house to be registered in both their names. They did not have a marriage certificate and that made it even more difficult for them. What however seems to be persuasive that the plaintiff is being largely truthful is that she did not mention large sums of money as having been her contribution to the purchase of the movables. She could easily have done so in the knowledge that no one could contradict her. A further factor in her favour is that the late John Popple was a man of below modest means. He was employed by companies in the plumbing business most of his life. At his death in 1999, he was employed at John Sisk (Pvt) Ltd and his net pay was about $10 000. The plaintiff said it was $9 000 but the second defendant said it was about $10 000: see Exhibit 7. This was a modest income by any standards.

The plaintiff also said that from 1994 until the death of John Popple she was leasing a bottle store outside Harare and was making, on average, an income of between $10 000 and $12 000 per month.

It seems to me that the following can be said in favour of the plaintiff. She was involved in income generating activities such as knitting, tailoring, cake sales, cross border trade and liquor sales. She made such income as compared favourably to that of the late John Popple who was all the time formally employed and in receipt of a very modest wage. The plaintiff obtained loans from her brother and sister and used them to the benefit of herself and the late John Popple and to purchase some of the movable property acquired by them. Her evidence established, to my mind, that her

contribution to the assets over the 25 years during which she lived with the late John Popple as husband and wife was equal to that of the late John Popple. There is no evidence to suggest otherwise. The plaintiff and John Popple seem to have worked for everything they acquired with no outside assistance except the loans from the plaintiff's family side. I adjudge their contribution to the acquisition of the assets now registered in John Popple's estate to have been equal.

The next issue that arises in order to finally determine this case is whether the plaintiff has proved her case as set out in her pleadings. Has she established the existence of a tacit universal partnership? In order to answer this question, it must be recalled that a universal

partnership is a general law concept (Mashingaidze v Mashingaidze 1995 (1) ZLR 219 (H); Chapendama v Chapendama 1998 (2) ZLR 18 (H)) and a foundation must be laid for its application.

The plaintiff and the late John Popple contracted a customary law marriage. Prima facie, they accepted to be bound by customary law. Their union was governed by the principles of customary law. However, the Customary Law and Local Courts Act [Chapter 7:05] provides in s 3(1) that:

"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 it should apply; or

(iii) ...

(b) the general law of Zimbabwe shall apply in all other cases."

In two as yet unreported cases, this provision of the Customary Law and Local Courts Act has been considered by our courts: see Matibiri v Kumire HH-80-00* and Chapeyama v Matende & Anor S-109-00†; see also Jengwa v Jengwa 1999 (2) ZLR 121 (H). The provision enjoins the court to make a choice of the law to apply in any such case before it — a choice between applying customary law or the general law. The "justice of the case" is the guiding factor. Chatikobo J in Matibiri supra at p 9** had this to say about the phrase "unless the justice of the case requires":

"In my view, the only logical construction to place on the phrase 'unless the justice of the case otherwise requires' is that if the application of customary law does not conduce to the attainment of justice then the common law should apply. This was precisely the case in Chikosi v Chikosi (1) 1973 (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 ... What emerges is that for 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."

At p 14 in Matibiri supra* Chatikobo J referred to Gillespie J's observations in Jengwa's case supra and said:

"I would say not only must it be shown that customary law applies to the dispute; it must be just and proper that customary law applies, otherwise the general law must apply."

In the present case, the late John Popple was a white man of British extraction. The plaintiff was a black woman. Although they contracted a customary law union, there is no other indication that customary law applied to their daily lives. From the evidence before me, they lived in Harare throughout the duration of their relationship right up to the time that John Popple died. They were formally employed in the city and the plaintiff engaged in business activities to raise money for the family. There is no indication that they lived with other members of their families, which means they did not have, as it is often the case with African couples who are childless, an extended family. They acquired property

suitable for their urban existence, no cattle, no goats or such other rural based assets. They bought their own dwelling house in Marlborough and lived a fairly secluded life. The late John Popple does not appear to have ever visited his relations in the United Kingdom. I am satisfied that their mode of life was such that they considered themselves to be divorced from customary law and instead bound by the general law in all respects except the roora contract. There is nothing magical about the payment of roora where a man marries an African woman in Zimbabwe. He would normally have to pay roora even if he does not intend to remain in Zimbabwe or to be bound by customary law in all other respects. Thus the situation of the Popples is no different, to my mind, from the situation where any person of European extraction marries a black Zimbabwean woman, pays roora and emigrates to his European country of origin. To argue that in such a situation, the customary law of Zimbabwe would apply to such a couple upon the death of one of them or upon divorce does not make sense. I am therefore satisfied that the general law should apply in this case.

Reverting to the question whether or not the plaintiff has established the existence of a tacit universal partnership I think that I must have regard to

the requisites of a partnership as outlined in Muhlmann v Muhlmann 1981 (4) SA 632 (W) where at 634G-H McCreath J said:

"In the situation where one has to do with a relationship between spouses and there is no express agreement between the parties, the court must be careful to ensure that there is indeed an animus contrahendi and that the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation."

In Matibiri supra, Chatikobo J quoted the above statement and also quoted from Hahlo's South African Law of Husband and Wife 4 ed at p 290 the following:

"However, there must be something to indicate that the parties intended to operate as a partnership, the mere fact that the wife worked in her husband's business without pay is not sufficient. Unless it can be shown that she made a substantial financial contribution or regularly rendered services going beyond those ordinarily expected of a wife in her situation, the courts will not be readily persuaded to imply a partnership agreement."

I agree entirely with these sentiments. It is the duty of the court not to recklessly convert a marriage relationship into a business partnership ex post facto. It would be a sad day when a marriage relationship is reduced to a mere commercial relationship just because there is a need for the division of property acquired during the relationship. It will be sad indeed if any impression is created in every such case that a marriage relationship of whatever type is a commercial or business partnership. I do not intend to create that impression at all. Muhlmann supra and Hahlo op cit, however, recognise that there are cases in which, if a wife makes a substantial financial contribution or regularly renders services exceeding those ordinarily expected of a wife, the court may be persuaded to imply a partnership agreement. I am persuaded that I can imply a partnership agreement in the relationship between the plaintiff and the late John Popple.

The plaintiff gave evidence to show that she made a substantial contribution beyond what a wife in her circumstances would have been expected to do. The couple had no children. The husband was gainfully employed and there seems to have been no real reason why the plaintiff would have engaged in so much activity to bring income into the joint estate

except that they were pooling their resources for their greater mutual benefit. A wife in her situation, with no children of her own and no children of the husband to care for, and no extended family members in her household, could easily have survived and perhaps lived reasonably comfortably without having to engage in all the activities she did. I have not accepted her ipse dixit in this regard. I was quite conscious of the need to exercise caution where evidence is given by a single witness against a deceased estate. I was satisfied that the plaintiff and the late John Popple exerted themselves and that through their joint

effort, dedication, skill and industry they acquired the property in question jointly.

I was not addressed on the question of costs but I am satisfied that it would be fair and just that the costs be paid by the estate.

Judgment is therefore entered for the plaintiff as prayed in the summons. The costs of suit are to be paid by the estate.

Musunga & Associates, plaintiff's legal practitioners

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

S v NDHLOVU

2001 (2) ZLR 261 (H)

Division: High Court, Harare

Judges: Ndou J

Subject Area: Bail application

Date: 27 September 2001

Judgment Number: HH-177-01

Criminal procedure — bail — application for — principles to be observed — factors to be taken into account in assessing whether accused should be admitted to bail — evidence in bail application — not necessary to be in affidavit form

The primary question to be considered in deciding whether the accused should be admitted to bail is whether he will stand trial or abscond. It is equally important to consider whether he will influence the fairness of the trial by intimidating witnesses or tampering with the evidence. A further consideration is whether, if released, he will endanger the public or commit further offences.

In bail applications, the court has to strike a balance between the interests of society (which are that the accused should stand trial and that there should be no interference with the administration of justice) and the liberty of the accused (who is presumed to be innocent). Grounds for refusal of bail should be reasonably substantiated. The court should always grant bail where possible and should lean in favour of the liberty of the subject, provided the interests of justice will not be prejudiced.

Once the police have made credible allegations against the accused, which could provide grounds for refusing bail, the onus is then on the accused to prove on the balance of probability that the court should exercise its discretion in favour of granting him bail. He must show that it is likely that he will stand trial and that he will not otherwise interfere with the administration of justice or commit an offence.

In deciding whether there is a risk of the accused absconding, the court should consider such factors as the seriousness of the offence, the likely sentence and the incentive to abscond, the accused's mobility and access to cross-border travel, and the strength of the

prosecution case. It may be desirable for the accused to disclose his defence and not merely make a bald statement that he is not guilty of the offence. Such a defence is of great, and often of decisive, importance in the exercise of the court's discretion.
The accused's personal circumstances, such as financial position and business interests, are of little value in assessing the risk of absconding. They may, in some cases, be used to facilitate abscondment.
The fact that the accused surrendered to the police should normally be a factor in his favour, though if he surrendered under a false name with the intention of deceiving the police, it would not count in his favour.
The court is specifically empowered to refuse bail where it considers it likely that if the applicant is admitted to bail he would commit an offence. Where the accused has given every indication that he is an incorrigible and unrepentant criminal, it would be irresponsible and

mischievous for a judicial officer to grant bail. The court should remember, though, that this is a sort of preventive detention, and that the refusal of bail should not be used as a means of deterring the offender.
The attitude of the Attorney-General is a relevant but not a decisive factor. His opinion commands respect because of his experience and the responsibility of his office, unless it is evident that he is no better informed than the court. However, his ipse dixit cannot be substituted for the court's discretion.
The evidence in a bail application does not have to be in affidavit form. In most cases, ex parte statements are made by both sides, without formality. There are advantages and disadvantages in this easy-going system.
Cases cited:
A-G v Phiri 1987 (2) ZLR 33 (H); 1988 (2) SA 696 (ZH)
de Jager v A-G, Natal 1967 (4) SA 143 (D)
Mbeli v Prokureur-Generaal 1966 (2) PH H272 (T)
S v Baker 1965 (1) SA 821 (W)
S v Bennett 1976 (3) SA 652 (C)
S v Chidoipa & Anor HH-60-84
S v Chimone HH-327-83
S v Dumani HB-64-82
S v Essack 1965 (2) SA 161 (D)
R v Gentry (1956) Crim LR 120 (CCA)
R v Grigoriou 1953 (1) SA 479 (T)
S v Hartman 1968 (1) SA 278 (T)
S v Hlongwa 1979 (4) SA 112 (D)
S v Ho 1979 (3) SA 734 (W)
S v Hudson 1980 (4) SA 145 (D)
S v Kantor 1964 (3) SA 376 (W)
S v Lulane 1976 (2) SA 204 (N)
R v McCarthy 1906 TS 657
S v Mhlawli & Anor 1963 (3) SA 795 (C)
S v Nichas 1977 (1) SA 257 (C)
S v Smith 1969 (4) SA 175 (N)

S v Vankathathnam 1972 (2) PH H139 (N)
S v Zuze GS-261-81
Legislation considered:
Criminal Procedure and Evidence Act [Chapter 9:07], s 116(7)(c)
J Samkange, for the applicant
R Gwatidzo, for the respondent
NDOU J: The applicant and three others jointly stand accused of a charge of armed robbery and another of attempted armed robbery involving luxury vehicles. Both robberies are alleged to have occurred in Harare. The value of the vehicle forming subject matter of the first charge is $4 million. The vehicle was recovered at the Chirundu border post when one of the applicant's co-accused tried to export it to Zambia. The stolen vehicle is
Page 263 of 2001 (2) ZLR 261 (H)
registered in Zimbabwe. At the stage of recovery, the vehicle bore false South African registration No. KNY287 GP. The allegation against the applicant is that he was travelling with his co-accused from Harare to Zambia to sell the stolen vehicle. The applicant is alleged to have crossed the border into Zambia earlier at the time his co-accused was still in the process of clearing the vehicle with the Chirundu customs authorities. His co-accused was arrested and the applicant realised this and absconded. It is alleged that the applicant re-entered Zimbabwe using a fake South African passport in the name of Senzo Themba Mncube. Bail is opposed because it is alleged that at the time of his arrest the applicant was using a false South African passport, and that he stayed in that country for a long time. In such circumstances, the State believes that he is likely to abscond and hide his true identity to avoid detection. It is further alleged that because the firearms used in commission of these offences were not recovered there is a likelihood of the applicant using them in the commission of other similar offences. It is further alleged that in view of the seriousness of the offence the applicant is unlikely to stand trial for fear of a possible lengthy prison term.
In support of the opposition, the respondent filed an affidavit of the investigating officer, one Detective Sgt Mutasa. The applicant, in support of his application, indicates that he has no reason to abscond as he has a fixed abode in Zimbabwe. He owns a house in Bulawayo and is married with children. He is a businessman (the nature of his business is unstated). He is of the view that the case against him is very weak as it is solely dependent on the evidence of Mthethwa who has now filed an "affidavit" denying ever implicating the applicant. The minute drafted by Phillemon Neshali Mthethwa is not an affidavit in the true sense. In such applications, documents are acceptable even if they are not in affidavit form.
The picture that emerges from the facts is that the offences that the applicant is facing are very serious. Firearms were used to rob motor vehicle. Fake passports were used. The applicant has not disputed the testimony of the investigating officer that he used a fake South African passport. Fake South African registration number plates were fitted onto a vehicle stolen in Harare during a robbery commonly known as car hijacking. Fitted with such fake numbers, an attempt was made to export this vehicle to Zambia using Mthethwa, who is a South African passport holder. It is common cause that the vehicle was heading for Zambia for sale as stated by Mthethwa. The applicant, upon his arrest, is said to have conceded that he drove the stolen vehicle to the house of another co-accused

named Todd Nyamhunga. The applicant has not disputed driving the vehicle. He has not disputed using fake passports. The allegations reveal cross border criminality involving the use of fake car registration plates, fake passports, use of inside information

for clearance at border and mobility of stolen property from one country into another. The allegations reveal circumstances that make detection of crime extremely difficult. Thorough prior planning has gone into the alleged offences.

APPLICABLE BAIL PRINCIPLES

The primary question to be considered is whether the applicant will stand trial or abscond. Of equal importance is whether he will influence the fairness of the trial by intimidating witnesses or tampering with evidence. A further consideration is whether the applicant, if released, will endanger the public or commit an offence.

In bail applications, the court has to strike a balance between the interest of society (the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused (who, pending the outcome of his trial, is presumed to be innocent) — Attorney-General, Zimbabwe v Phiri 1987 (2) ZLR 33 (H); 1988 (2) SA 696 (ZH), R v McCarthy 1906 TS 657 and S v Mhlawli & Anor 1963 (3) SA 795 (C) at 796B.

Grounds for refusal of bail should be reasonably substantiated — Mbele v Prokureur-Generaal 1966 (2) PH H272 (T). The court should always grant bail where possible and should lean in favour of the liberty of the applicant provided that the interests of justice will not be prejudiced — S v Smith 1969 (4) SA 175 (N); S v Bennett 1976 (3) SA 652 (C); S v Hlongwa 1979 (4) SA 112 (D).

The presumption of innocence — in favorem vitae libertatis et innocentiae omnia praesumuntur — is in favour of the applicant: S v Essack 1965 (2) SA 161 (D).

Once the police have made credible allegations against the accused which could provide grounds for refusing bail, the onus is upon the applicant to prove on a balance of probability that the court should exercise its discretion in favour of granting him bail. In discharging this burden, the applicant must show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial and that he will not otherwise interfere with the administration of justice and that he will not commit an offence — de Jager v Attorney-General, Natal 1967 (4) SA 143 (D) and s 116(7)(c) of the Criminal Procedure and Evidence Act [Chapter 9:07].

(a) Risk of absconding

The respondent has raised the issue of the risk of the applicant absconding. There are factors which may, either on their own or on a cumulative basis, assist the court in making a proper assessment of the risk.

The respondent has alleged that the seriousness of the offence charged and likelihood of a severe sentence being imposed as inducement for applicant to abscond. In this case, if the applicant is convicted there is a likelihood of lengthy prison terms imposed thus tempting the applicant to abscond — S v Hudson 1980 (4) SA 145 (D) and S v Ho 1979 (3) 734 (W) 740B. Robbery that involves the use of firearms is viewed in a very serious light by our courts and invariably attracts long custodial sentences — see S v Zuze GS-261-81; S v Dumani HB-64-82; S v Chimone HH-327-83 and S v Chidoipa & Anor HH-60-84.

(b) Mobility of applicant and access to cross-border travel

Mobility of the accused and access to cross-border travel and connections beyond our borders is also a factor. In this case, the applicant has lived outside the country and he travels using different foreign passports and different names. He is in a much better position than the average citizen to abscond even though his passport has been impounded by the police. He has already demonstrated an ability to do so according to the allegations in this matter. This factor is relevant in assessing bail applications — see S v Hudson supra and S v Nichas 1977 (1) SA 257 (C).

(c) Strength of prosecution case

The strength of the respondent's case and the probability of conviction has to be considered. From the allegations of the respondent, it unlikely that they will rely solely on the testimony of Mthethwa to implicate the applicant. The respondent has not stated its intention to rely solely on evidence of Mthethwa. The fact that Mthethwa is applicant's co-accused seems to point in the direction of the respondent relying on other evidence to implicate the applicant. It is, however, accepted that the strength of the State's case and the probability of conviction is a factor in bail applications. If the statement of Mthethwa weakens the strength of the prosecution case this should count in favour of the applicant. In this case, it does not seem that what Mthethwa says will affect the prosecution case as he is not a prosecution witness but the applicant's co-accused — S v Lulame 1976 (2) SA 204 (N) and S v Hartman 1968 (1) SA 278 (T) at 281. It is, therefore, desirable for the applicant to disclose his defence and not merely make a bald statement that he is not guilty of the charge. Such defence is of great, and often of decisive, importance in the exercise of the court's discretion — S v Baker 1965 (1) SA 821 (W) and R v Grigoriou 1953 (1) SA 479 (T). In the present matter, the applicant has not disclosed his defence. Assuming that the allegations of the respondent are true i.e. that he drove the stolen vehicle subject of the robbery to Budiriro suburb in Harare and also that he drove

in it from Harare en route to Zambia, the respondent's case cannot be categorised as weak. If it is assumed that the respondent has evidence to show that the applicant told the police that he was going to sell the stolen vehicle in Zambia on behalf of persons known as Kennedy Hakunandaba and Collen Chigwedere then the case cannot be said to be weak.

(d) Risk of commission of further crimes

According to s 116(7)(c) of the Criminal Procedure and Evidence Act [Chapter 9:07], the court is specifically empowered to refuse bail in instances where the court considers it likely that if the applicant is admitted to bail he would commit an offence. A propensity to commit similar crimes is a factor that may be taken into account. In Attorney-General - Zimbabwe v Phiri supra at 39-40, Reynolds J stated as follows: "The test, in my view, should be one of deciding whether or not there is a real danger, or a reasonable possibility that the due administration of justice will be prejudiced if the accused is admitted to bail. If this real possibility exists, then the public is entitled to protection from the depredations of the accused, and bail should be denied to him. In the absence of exceptional circumstances, I believe that it would be irresponsible and mischievous for a judicial officer to allow bail to a person who has given every indication that he is an incorrigible and unrepentant criminal."

In terms of s 116(7), the court is further empowered to refuse applicant bail for any other reason which seems good and sufficient.

Likelihood of repetition should be considered in such applications as it is inadvisable to grant bail to an applicant in circumstances where there such a likelihood. This is a concept of preventive detention — R v Gentry (1956) Crim LR 120 (CCA). Sight must, however, not be lost of the fact that the orthodox means of dissuading those of criminal propensities from their inclination is not by prior confinement but by the threat of detection and punishment. The refusal of bail should not be used as a means of deterring the offender — S v Visser 1975 (2) SA 342 (C). Bail is non-penal in character.

The investigating officer opines that the applicant is likely to commit further crimes. His opinion is based on two factors, namely, (a) that the firearms used in the two charges have not been recovered by the police, and (b) that a co-accused is still at large. The court may hesitate to grant bail in a case where the accused was not acting alone, but in association with others still at large — S v Vankathathnam 1972 (2) PH H139 (N). The applicant, however, disputes the alleged association with the alleged co-accused. It would seem that in the circumstances the applicant has the means to facilitate commission of further crimes if released on bail.

(e) Personal circumstances of the applicant

In paras 1 and 8(b) and (c) of his bail statement, the applicant states his personal circumstances which should be considered. Generally, such personal circumstances as financial position and business interests are of little value in assessing the risk of absconding — R v Gcora 1943 EDL 74 and R v Grigoriou 1953 (1) SA 479 (T). Financial position and business interests may, in such cases, actually be used to facilitate abscondment.

(f) Surrendering to the police

The applicant alleges that he surrendered himself to police when he heard that they were looking for him. This resulted in his arrest. This, in my view, is a factor that should be taken in his favour. What is not clear, however, is whether he surrendered himself as Dumisani Ndlovu or as Senzo Themba Mncube i.e. in terms of his assumed South African identity when he re-entered Zimbabwe from South Africa. If he surrendered himself in accordance with his "fake" identity then such surrendering will have been done with an intention of deceiving the police and will, therefore, not count in his favour. If he surrendered himself as Dumisani Ndlovu this should count in his favour. This aspect was not dealt with in his bail statement. The onus is upon the applicant to prove on a balance of probability that the court should exercise its discretion in favour of granting bail — S v Hlongwa supra and de Jager v Attorney-General, Natal supra.

In the circumstances, one would have expected a prudent applicant to have dealt with this damaging piece of evidence in the affidavit of the investigating officer.

(g) Opinion of the Attorney-General

The attitude of the respondent is stated as follows: "The applicant uses various aliases and has several travel documents in different names. The applicant is resident in South Africa and involved in the cross border movement of stolen motor vehicles." Generally, the attitude of the Attorney-General (respondent) is a relevant consideration regarding the issue of bail — S v Lulane supra and S v Kantor 1964 (3) SA 376 (W). The opinion of the Attorney-General commands respect because of his

experience and the responsibility of his office but once it is evident that he is no better informed than the court, then his attitude will not carry weight. It should be emphasised, however, that the Attorney-General's ipse dixit cannot be substituted for the court's discretion. The attitude of the Attorney-General is not sufficient reason to refuse bail, it is only one of the factors which should be considered. The court should not allow the Attorney-General to usurp the function of the court — see S v Bennett supra at 654H-655A.

The opinion of the respondent in this case brings into question the genuineness of the surrendering of the applicant. The respondent fears that a man of "many names" in the applicant's shoes who uses several passports is likely to abscond. It is unlikely that the applicant is innocently using aliases. He is likely to be using these names and passports in pursuit of criminal activities. Assuming that his use of several names and passports has nothing to do with criminality, still it will be difficult to trace him if he absconds.

I have considered the totality of the facts in this matter. Earlier on I remarked in passing on whether the statement by Mthethwa is properly in affidavit form. For the purposes of this application, it is not required to be in affidavit form. In S v Nichas supra, Diemont J remarked as follows:

"It is a notorious fact that in a majority of cases ex parte statements are made both by the defence and by the public prosecutor who intimates what the police objections are. There are no formalities; no evidence is led, no affidavits are placed before the court and the record is so meagre that there may be little or nothing to place before the Superior Courts if the matter is taken on appeal. This easy-going procedure has both advantages and drawbacks."

In the circumstances, I am prepared to consider the statement of Mthethwa in this application. The contents of this document seem to contradict what applicant told the police.

Looking at the totality of the facts revealed by documents before me I am of the view that the applicant failed to show on a balance of probabilities that, if admitted to bail he will:

(a) not abscond and leave the country as he appears to have access to many different passports and may leave and live outside the country, and/or

(b) not commit further offences.

Based on the facts placed before me the applicant is not a suitable candidate for bail. The application for bail is dismissed.

Byron Venturas & Partners, applicant's legal practitioners

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

S v CHAMBOKO

2001 (2) ZLR 269 (H)

Division: High Court, Harare

Judges: Blackie J & Guvava J

Subject Area: Criminal appeal

Date: 6 September and 3 October 2001

Judgment Number: HH-171-01

Criminal procedure — plea of guilty — accused revealing defence to charge after being convicted on plea of guilty — duty of court

The appellant pleaded guilty in a magistrates court to possessing a firearm without a certificate, and the magistrate convicted him on his plea. The appellant then said he had found the firearm at his place of work and wanted to take it to the police station. When the magistrate asked him to make submissions on special circumstances so as to prevent the imposition of a mandatory prison sentence, the appellant repeated that he had found the firearm at his work and was taking it to the police station. At no point did the prosecutor challenge the appellant's statements, and the magistrate did not comment on them. Instead, he imposed the mandatory prison sentence. On appeal:

Held, that the appellant's statements contained the elements of a defence to the charge, and it was very wrong of the prosecutor and the magistrate to ignore them. The State must be taken to have admitted the statements in the absence of a challenge by the prosecutor, and if the magistrate had any reason to doubt them he should have questioned the appellant himself. He should not have rejected the statements without being satisfied that they could not reasonably be true, and if he considered they could reasonably be true he should have stopped the trial and referred the matter for review so that the proceedings could be set aside and the trial commenced afresh.

Cases cited:

S v Glendenning HB-67-89

S v Mapurisa HB-95-93

Appellant in person

M Nemadire, for the State

BLACKIE J: The appellant appeared before the court of the magistrate in Norton. He was charged with one count of contravening s 4(2)(b) of the Firearms Act [Chapter 10:09] (being in possession of a firearm without being the holder of a valid certificate for that firearm) and one count of contravening s 9(b), as read with s 19(1) of the Dangerous Drugs Act [Chapter 15:02] (being in unlawful possession of prepared Indian hemp).

The appellant was unrepresented. He pleaded guilty to both the charges and

was found guilty of them. He was sentenced to serve five years' imprisonment in respect of the firearms charge and to pay a fine of $20, or in default of payment to serve 20 days' imprisonment, in respect of the drugs charge.

This appeal concerns only the charge concerning the contravention of the Firearms Act. The appellant has appealed against both his conviction and the sentence imposed of him in respect of that charge.

At the end of the appeal, we set aside the appellant's conviction and sentence and ordered the release of the appellant from prison. We undertook to give our reasons later, and this judgment contains our reasons.

The appellant pleaded guilty to the charge. Before finding the appellant guilty, the trial magistrate correctly took him through the essential elements of the offence. The appellant admitted all the elements. The trial magistrate then convicted the appellant. At that point, the appellant said that he had found the firearm at his work and wanted to take it to the police station. The prosecutor did not challenge this statement and the trial magistrate ignored it. He asked the appellant to make submissions on special circumstances so as to prevent the imposition of the mandatory minimum sentence of five years. In reply, the appellant repeated that he had found the firearm at his work and was taking it to the police station. Once again, the prosecutor did not challenge this statement. The trial

magistrate made no comment on it and made no recorded finding on whether or not any special circumstances existed. He must, however, have decided that there were no special circumstances because he instructed the appellant to proceed to mitigation and, when the appellant had made his submissions on this point, he sentenced the appellant to the mandatory minimum sentence.
The magistrate has unfortunately gravely erred in his conduct of this case.
The statements made by the appellant after he had been convicted and in relation to special circumstances prima facie contained the elements of a defence to the charge he was facing. It was very wrong of both the prosecutor and the trial magistrate to ignore what the accused said. If the prosecutor disputed the statements he should have challenged the appellant on them. In the absence of a challenge by the prosecutor, the State is taken to have admitted what was said. Notwithstanding the appellant's plea of guilty and his admission of the essential elements of the offence, the trial magistrate should not have proceeded with the trial without acknowledging the appellant's statements and dealing with them. Even if the prosecutor did not challenge the statements, if the trial magistrate had any reason to doubt them, he should have questioned the appellant himself and investigated the statements. He should not have rejected them without being satisfied that what the appellant said could not reasonably be true. If the trial magistrate, after challenge by the prosecutor or investigation by himself, came to the conclusion

that there was no possibility of truth in the appellant's statements he should have told the appellant that he could not accept the statements: see S v Glendenning HB-67-89 and S v Mapurisa HB-95-93. If the trial magistrate considered that what the appellant said could reasonably be true, he should have stopped the trial and referred the matter for review so that the proceedings could be set aside and the trial commence de novo.
In the light of the unchallenged and unexamined prima facie defence to the charge raised by the appellant and the procedural irregularities which occurred in this trial in relation to the charge that the appellant faced under the Firearms Act, the conviction and sentence in respect of that charge cannot be sustained. For that reason, the appeal was accordingly allowed and the conviction and sentence of the accused on that charge was set aside.
Guvava J agrees.

NICHOLAS v FRASER ALEXANDER ZIMBABWE (PVT) LTD
2001 (2) ZLR 272 (H)
Division: High Court, Harare
Judges: Blackie J
Subject Area: Application for review
Date: 3 October 2001
Judgment Number: HH-175-01

Employment — suspension pending application to dismiss — whether subject to review
Practice and procedure — review — subject matter — suspension pending application to dismiss — whether subject to review
The applicant, who was employed by the respondent, was suspended without pay or benefits in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, pending an application for his dismissal

for an alleged disciplinary offence. He brought the suspension on review, arguing that the decision was grossly unreasonable, irrational, and made in bad faith. The respondent argued that the matter of suspension could not be brought on review; and on the merits, that the suspension was warranted.

Held, that suspension of an employee pending an application to terminate his employment is not merely a matter of a contractual relationship between the parties. It is specifically regulated by legislation, and thus is of sufficiently public character to be said to have an administrative law element and so can be brought on review. However, the court has a discretion as to whether or not to receive the case. Factors which militate against the court receiving the case include: (1) whether domestic remedies were still available; (2) the fact that suspension is in the nature of a provisional or interlocutory order; (3) the fact that an application for review would essentially involve an inquiry into the merits rather than one into the procedure. In this case, domestic remedies were available, and no good reason had been shown why they had not been exhausted. Further, even on the applicant's own case, the facts showed that the respondent would have been entitled to suspend him.

Cases cited:

Chikonye & Anor v Peterhouse 1999 (2) ZLR 329 (S)

Girjac Svcs (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Machiya v BP Shell Mktg Svc (Pvt) Ltd 1997 (2) ZLR 473 (H)

Munyira v Sec for Education & Anor S-214-98

T Hondora, for the applicant

L Mazonde, for the respondent

BLACKIE J: The respondent employs the applicant. It suspended him from work "without pay or benefits in terms of SI 371 of 1985, s 3(1)(a) or (b), for the commission of acts inconsistent with (his) duties and/or disobedience to a lawful instruction", pending an application in terms of the regulations for his dismissal.

In this application, the applicant seeks a review of the respondent's decision to suspend him. That decision he says is grossly unreasonable, irrational and made in bad faith. The respondent opposes the application both in limine and on the merits. The objection in limine is that the decision to suspend the applicant is not a matter capable of being brought on review. The objection on the merits is that the suspension was warranted, even on the applicant's version of the facts.

Section 27 of the High Court Act [Chapter 7:06] provides the grounds upon which any proceedings or decision of inferior courts, tribunals or administrative decisions may be brought on review as:

(a) absence of jurisdiction on the part of the court, tribunal or authority concerned;

(b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court of tribunal concerned or on the part of the authority concerned, as the case may be;

(c) gross irregularity in the proceedings or the decision.

The respondent's objection in limine is that the respondent was not acting as an inferior court or tribunal nor was the respondent pursuing any public administrative function.

If this was a matter only of a contractual relationship between an employee and employer, it would be questionable whether the suspension could be brought on review: Machiya v BP Shell Marketing Service (Pvt) Ltd 1997 (2) ZLR 473 (H).
However, this is not a purely contractual matter. The Labour Relations Act [Chapter 28:01] (the Act) governs all employers and employees not provided for under the Constitution. The suspension and dismissal of employees is specifically regulated in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985) ("the termination regulations"). Since the suspension was in terms of the termination regulations, the relationship between the parties was of a sufficiently public character to be said to have an administrative law element.
However, even if the court has jurisdiction to receive a case such as this on review, it has a discretion whether or not to receive it. It will not normally do so where there are domestic remedies available.
"It is accepted that the High Court has a discretion, to be exercised, of course, judicially. There is no statutory ouster of the court's jurisdiction pending exhaustion of domestic

remedies. This has been noted in such cases as Tutani v Minister of Labour & Ors 1987 (2) ZLR 88 (H) at 95D; Musundu v Chairperson of Cresta Lodge Disciplinary & Grievance Committee HH-115-94; Zikiti v United Bottlers 1998 (1) ZLR 389 (H) at 392F; Mudakureva v Grain Marketing Board S-15-98 at p 3; Nhidza v Unifreight Ltd S-27-99; and Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)."
See Chikonye & Anor v Peterhouse 1999 (2) ZLR 329 (S) at 330.
Further, the onus is on the applicant to show good reason to by-pass a domestic procedure. In Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S), it was said that a litigant should exhaust his domestic remedies unless there are good reasons for approaching the court. Also in this court, it has been said that "domestic tribunals" should not be by-passed without good reason. See Munyira v Secretary for Education & Anor S-214-98 (not reported), which relied for the proposition on Baxter Administrative Law pp 720-721. See Chikonye's case supra at 330.
The applicant has the domestic procedures provided in terms of the Act and termination regulations available to him. These procedures are specifically designed and set up to deal with employer/employee matters. Those procedures have not been shown to be inadequate for the applicant's purposes. The applicant has not put forward any good reason for this court to receive the matter rather than for him to pursue his domestic remedies. He appears to have approached the court believing that he could do so as a matter of right.
In addition, the following factors against this court exercising its discretion in the applicant's favour apply: (a) the order, which the applicant wants to have set aside, is a not a final order. It is in the nature of a provisional or interlocutory order; (b) the application essentially involves a decision on the merits of the suspension order and not the procedure by which it was effected; (c) there are factual issues involved in this case which cannot be resolved on these papers and which should be dealt with by evidence; (d) on the merits, and even on the applicant's case, it can be shown that he disobeyed a lawful order, which would entitle the respondent to suspend him.
In the result, the application for review is refused with costs.

Honey & Blanckenberg, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitoners
MUTARE CITY COUNCIL v WILDLIFE SOCIETY OF ZIMBABWE
2001 (2) ZLR 275 (S)
Division: Supreme Court, Harare
Judges: McNally JA, Sandura JA & Malaba JA
Subject Area: Civil appeal
Date: 11 September & 4 October 2001
Judgment Number: S-79-01

Town and country planning — master plan — prohibition against development in nature reserve — whether prohibition absolute or only against commercial, industrial or residential development — application for building permit — when public notice must be given of application

The master plan for the City of Mutare prohibited "development" in the Cecil Kop Nature Reserve, which was situated within the City's boundaries. The Society, which had leased the Reserve for a lengthy period, applied for permission to construct dormitories, of a fairly spartan nature, to accommodate groups of children and their teachers making educational visits to the reserve. The Society also proposed to offer accommodation to tourists when there were no bookings for school children. The Mutare City Council declined to approve the proposal, and issued a prohibition order. No public notice of the application was given.

The Society appealed to the Administrative Court, which decided in its favour. The court held that the term "development" included any building operations, but that the proposed dormitories would not alter the character of the use of the Reserve, provided they were used only to accommodate students and teachers on educational visits. Accordingly, the Administrative Court held, the building of the dormitories did not constitute "development" and was not prohibited. The Council appealed, and the Society cross-appealed, against the court's conclusions. It was argued for the Council that the Administrative Court was not entitled to simply reverse the Council's decision; the matter had to be referred back to the Council for proper consideration and public notice of the Society's application had to be given, to allow for objections.

Held, that the Administrative Court's reasoning was fundamentally illogical. What the Act stated was that it is not "development" to change the use of land, or of a building, as long as the old use and the new use fall within the same prescribed group of land uses. However, to construct a building on a piece of land is not simply a use of the land. It is development.

Held, further, that the master plan did not impose an absolute prohibition against any development in the reserve. As long as human beings were allowed into the area — and town planning is for the benefit of human beings — there must be such things as footpaths, railings, toilets and so on. What the plan prohibited was commercial, industrial or residential development out of keeping with the character of a nature reserve. Development would be permitted as long as it was ancillary to or incidental to the main purpose of preserving the area as a nature reserve.

Held, further, on the question of whether public notice of the Society's application for a building permit had to be given, that the master plan did not require special consent or special consideration for such an application. The development was of "conforming use", which would not have an adverse effect or important impact on the locality or area. Public notice was thus not required, and the Administrative Court was entitled to make the order it did.

Cases cited:

Chidyausiku v Nyakabambo 1987 (2) ZLR 119 (S)

Hingeston v Lightfoot 2000 (2) ZLR 247 (S)

Holden v City of Harare 1989 (3) ZLR 134 (S)

Leadership Education & Advancement Foundation v Cape Town Municipality 1994 (1) SA 825 (C)

Vainona Ests Ltd & Ors v Anderson & Anor 1960 R & N 382; 1960 (2) SA 825 (FS)

Legislation considered:

Regional, Town and Country Planning Act [Chapter 29:19], ss 22 and 26(3)

L T Biti, for the appellant

Mrs J B Wood, for the respondent

McNALLY JA: This is a town planning appeal from the Administrative Court. The City of Mutare (the City) is dissatisfied with a decision by the court allowing the respondent (the Society) to construct dormitories in the Cecil Kop Nature Reserve. The Society has cross-appealed on three aspects of the judgment, as follows:

1. Against the reasoning of the court in coming to a decision in its favour;
2. Against a restriction imposed by the court, limiting the use of the dormitories to persons visiting the Nature Reserve for educational purposes;
3. Against the failure of the court to award it its costs, save for certain wasted costs.

The Society negotiated a lease with the City on 23 June 1993. The area leased is a large (approximately 1180 hectares) area known as the Cecil Kop Nature Reserve. The period of the lease is 99 years from 1 January 1992. The purpose of the lease is set out in Clause 2c, in which the Society covenants:

"to use the land as a wildlife sanctuary to which the public may have access and to maintain and preserve the land in a suitable condition therefor, to provide game-viewing facilities and generally to use the land for the consideration of flora and fauna."

The rent was fixed at a nominal $20 per annum and the full amount was paid in advance. The land, which is largely mountainous in character, is in the North-East corner of the municipal area. Its eastern boundary is the Mozambique border, its western boundary is the Christmas Pass Road. Suburbs lie to the south, and the municipal boundary is to the north.

The Society conceived the idea of constructing three blocks of rooms to accommodate groups of school children, with their teachers, who might wish to make educational visits to the Nature Reserve. The intention was to provide accommodation, of a fairly spartan nature, for about 75 persons at any one time. There would be no dining facilities, but only outdoor cooking facilities and an ablution block. The funding was to come from a friendly embassy. In order to make the project self-sustaining, they proposed to offer

accommodation to tourists or back-packers when there were no bookings for school children.

When the Society was ready to start, its representative, Mr Hitschmann went to the City Council and spoke to the relevant official. He was advised that he could go ahead on the basis of a temporary building permit if he was prepared to take the risk that the Council might refuse the permit and order him to demolish the structures. Otherwise, he would have to wait for formal approval. The committee of the Society decided to go ahead, not expecting that there would be any problems. But there were. The City declined, in April 1999, to approve the proposal. It issued an enforcement order to discontinue the construction, and, on 4 May 1999, a prohibition order.

The Society then appealed to the Administrative Court. That court decided in its favour (save for a limitation as to occupancy referred to below). But the court's reasoning has been criticised by both parties in this appeal, and it is necessary to examine that reasoning closely.

The court first came to the conclusion that the Master Plan for the City of Mutare, approved by the appropriate Minister (see GN 260 of 1993 in the Gazette of 7 May 1993) prohibited development in the Cecil Kop Nature Reserve. "Development" is defined in s 22 of the Regional, Town and Country Planning Act [Chapter 29:12] (the Act) in such a way as to include any building operations. Therefore any building is prohibited.

Then, however, the court went on to consider whether the situation was any different by reason of the provisions of s 22(1)(b)(i) of the Act.

The section provides as follows:

"Any reference in this Part to development, in relation to any land or building, means any of the following —

(a) …

(b) the altering of the character of the use of any land or building, other than —

(i) where the existing use and the proposed use both fall within the same prescribed group of land or building uses;"

The court then went on to decide that:

1. the proposed dormitories would not alter the character of the use of Cecil Kop Nature Reserve; and

2. the existing use as a Nature Reserve and the proposed use for the

construction of dormitories to accommodate students on educational visits both fall within the same prescribed group of land or building uses.

However, if the proposed dormitories were to be used for tourists or back-packers not on educational visits to the Nature Reserve there would be both an alteration of the character of the use and a use falling outside the prescribed group of land or building uses.

Accordingly, the court prohibited the use of the dormitories for persons other than students and accompanying teachers on educational visits.

In short, the court concluded that the building of the dormitories for the purpose indicated was not development and therefore was not prohibited.

Mr Biti, for the City, contended that once there was a finding that the Master Plan prohibited "development", that was the end of the matter. What the Act said was

irrelevant because it was the Master Plan that governed the situation — see Part IV of the Act.

Mrs Wood, for the Society, was inclined to agree that what the Act said was irrelevant, but she argued that the court had been wrong to conclude that the Master Plan prohibited "development" in the sense used in the Act. It prohibited commercial, industrial or residential development, but not development consistent with, and ancillary or incidental to, the prescribed use of the area as a Nature Park.

Section 61 of the Act provides that, notwithstanding the provisions of s 19 of the Administrative Court Act [Chapter 7:01], an appeal to the Supreme Court in a matter arising from a decision under the Act shall be only on a matter of law. (There are certain other grounds but they are not relevant here). I am satisfied that the issue before us is an issue of law as to the interpretation of the Master Plan, and is thus appealable.

I have no quarrel with the proposition that if there is an absolute prohibition in a Master Plan or in an approved town planning scheme, that prohibition cannot be overridden either by the local authority or on appeal by the court. That has been established as the law at least since Vainona Estates Ltd & Ors v Anderson & Anderson 1960 R&N 382 (S) at 388D-E. It was re-stated in Holden v City of Harare 1989 (3) ZLR 134 (S).

I do, however, quarrel with the proposition that there is, in the Master Plan, an absolute prohibition of any kind of building or construction in the Cecil Kop Nature Reserve. I agree with Mrs Wood's contention that what is clearly intended is a prohibition on commercial, industrial or residential development.

I appreciate that there are clear words in the Master Plan indicating opposition to development in areas such as the Cecil Kop Nature Reserve. Among them are the following:

1. At p 15 "Objectives — a, Ensure that land considered unsuitable for development is restricted against development."

2. At p 29 "Proposals — d, Cecil Kop Cross Kopje, Murahwa Hill and Thompson Vlei Nature Reserve should be preserved and new nature reserves developed on land south of Fern Hill."

3. At p 30 "Land and Environment. Proposals — (f) Zone the areas along the Dangamvura Hills, Cecil Kop and all river valleys as land protected against development (LI)."

These words, however, are entirely consistent with the interpretation that the development disapproved of is commercial, industrial or residential development out of keeping with the character of a nature reserve. Indeed, there could never have been an intention absolutely to prohibit all development. As long as human beings are allowed into the area — and town planning is for the benefit of human beings — there must at least be footpaths, railings in dangerous places, toilets, accommodation for game rangers and other staff, storerooms, entrance gates, etc. Most of those things are there already. So much for an absolute prohibition.

Almost every national park one can think of in Zimbabwe has accommodation for visitors staying overnight. Harare's McIlwaine National Park has a facility for educational camps.

I conclude, therefore, that the Master Plan does not absolutely prohibit building and construction in the Cecil Kop Nature Reserve. It may be permitted, to the extent that it is

ancillary or incidental to the main purpose of preserving the area as a nature reserve. I am satisfied that the proposed dormitories may be said to fall into that category.
Mr Biti's second contention was this. If he is unsuccessful in defending the court's finding that the Master Plan absolutely prohibits development, then the building of these dormitories is development. It is not excluded from being defined as development by the provisions of s 22(1)(b)(i) of the Act.
I think this argument must be right. And indeed there is a fundamental illogicality in the decision of the court. It begins by finding that the building of the dormitories is not development by reason of the provisions of s 22(1)(b)(i) of the Act. It then goes on to say that it is development, but not prohibited development, and orders the City to grant a development permit.
The real meaning of s 22(1)(b)(i) of the Act is to be found by separating the concepts of "land", on the one hand, and "building" on the other. Thus, it is not "development" when one changes the use of land, so long as the new use and the old use both fall within the same prescribed group of land uses. Nor is it "development" when one changes the use of a building in the same circumstances. Compare Leadership Education & Advancement Foundation v Cape Town Municipality 1994 (1) SA 825 (C) at 834C et seq.
But to construct a building on land cannot be described simply as a use of

the land. It is more than that. It is construction. It is development. It is not covered by the subsection.
Mr Biti's next submission was that the court was not empowered simply to reverse the City's decision. In terms of s 26, it was necessary for the matter to be referred back to the City for proper consideration of the application for a building permit, and for public notice to be given in terms of s 26(3), to allow for objections.
Mrs Wood's counter to this was that public notice is necessary only where certain circumstances exist. The City did not find that those circumstances existed. It did not require public notice to be given. Therefore the court was entitled to substitute its own decision. In any event, the court did recognise the role of the City by requiring the Society to have its building plans approved by the City.
Section 26(3) sets out the circumstances in which the local planning authority (the City) must require public notice to be given. Those circumstances are:

1. Where the application, in terms of the Master Plan or local plan or an approved scheme, requires special consideration of the circumstances, or special consent;
2. Where the application relates to development which does not conform to the development existing or normally permitted in the area;
3. Where the application relates to development which could, in the opinion of the local planning authority, have an adverse effect or important impact on the locality or the area generally;
4. Where the application relates to development 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.

I deal with the relevance of these four considerations as follows:

1. There is no suggestion that the Master Plan, or any local plan or approved scheme requires special consideration or special consent.

2. If the order of the Administrative Court had allowed use of the accommodation by tourists or back-packers I think that might well have been categorised as a non-conforming development. However, the use which was allowed can fairly be described as a conforming use.

3. Similarly, had the nature reserve been allowed to compete with local hotels and hostels in providing accommodation for tourists and back-packers there might have been an argument for public notice to allow objectors to express their views. But in view of the limitation imposed this problem does not arise.

4. This does not arise.

Page 281 of 2001 (2) ZLR 275 (S)

I conclude therefore, that Mrs Wood's argument has force, and that the court was entitled to make the order that it did.

In the circumstances, the appeal must be dismissed with costs.

I turn then to consider the cross-appeal.

The first ground of the cross-appeal was an attack on the reasoning of the court. We have made it clear in Chidyausiku v Nyakabambo 1987 (2) ZLR 119 at 124C-F that an appeal must be lodged against an order, and may not be lodged merely against the reasons for that order. I find nothing in Hingeston v Lightfoot 2000 (2) ZLR 247 (S), to contradict this. In any event, of course, the point raised has succeeded. It was not necessary to make it a ground of cross-appeal.

The second ground of cross-appeal was that the court should not have restricted the use of the dormitories to persons visiting the Nature Reserve for educational purposes. Assuming this to be an appeal on a point of law, I find it to be a bad point.

To use the dormitories to accommodate back-packers passing through Mutare would, in my view, offend against the restriction in the Master Plan. Such persons would not be using the dormitories as part of their visit to the Nature Reserve, but simply as accommodation. It would be a residential use.

As to the award of costs by the court a quo, such awards are covered by the provisions of s 60 of the Act, which, rather curiously, overrides s 11 of the Administrative Court Act [Chapter 7:01]. The relevant proviso to the section states:

"no order as to costs shall be made against any person unless the Administrative Court considers that that person has behaved unreasonably."

The court ordered the City to pay the wasted costs of one day, which was wasted because a city employee who was to give evidence failed to appear. The Society considered that, having won the case, it should have been awarded its costs in full.

I do not think, in the light of the proviso quoted, that that argument can be sustained. There are allegations that the City was mala fide in its opposition to the application, but they were no more than allegations. Nor was it argued that the word "person" in the proviso should be interpreted to mean "person other than a planning authority".

In this court, however, the City's appeal has failed, and that failure should carry costs. The Society's cross-appeal has also failed, but overall the main success has gone to the Society. A special order as to costs will be appropriate.

Accordingly, the order of the court is as follows:

1. The appeal is dismissed.

Page 282 of 2001 (2) ZLR 275 (S)

2. The cross-appeal is dismissed.

3. The appellant is to pay 80 per cent of the respondent's (cross-appellant's) costs of appeal.

SANDURA JA: I agree.

MALABA JA: I agree.

Bere Brothers, appellant's legal practitioners

Henning Lock Donagher & Winter, respondent's legal practitioners

S v SHUMBA

2001 (2) ZLR 283 (H)

Division: High Court, Harare

Judges: Chinhengo J

Subject Area: Criminal review

Date: 10 October 2001

Judgment Number: HH-176-01

Criminal procedure — charge — theft — averment as to ownership — owner of stolen property unknown — incorrect to allege property owned by State

Criminal procedure (sentence) — suspended sentence — conditions of suspension — compensation — owner of stolen property unknown — person to whom compensation payable

The accused killed an ox and took its meat, knowing that the ox was a stray which one V had kept openly as part of his herd for the previous two years. He was convicted of stock theft on a charge sheet alleging that the ox was the property of the State. In sentencing him, the magistrate ordered him to pay compensation to the State. On review:

Held, that since V was known to the public prosecutor to have been the bona fide possessor of the ox, the charge sheet should have averred that the ox was in the possession of V. Obviously, the State neither owned nor possessed it.

Held, further, that the magistrate should have ordered that compensation be paid to V, who would have been obliged to inform the authorities about the ox; they would have been expected to advertise the stray ox so that, if the owner came forward, the compensation could be paid to him.

Case cited:

S v Machokoto 1996 (2) ZLR 190 (H)

CHINHENGO J: The charge to which the accused pleaded guilty in the proceedings herein under review reads:

"Stock Theft: In that on 22 April 2000 and at village Hogo, Chief Jahana, Gokwe, accused unlawfully and intentionally took one stray ox the property of the State."

The charge is defective. The facts on which the charge was based are that during the years 1998 to 2000 one Amos Velenyama kept a stray ox at his homestead. Naturally this stray ox would go grazing with the said Amos Velenyama's herd. On 22 April 2000, Amos Velenyama's son was out on the veld grazing the cattle when the accused holding a rope and axe came by, tied the ox to a tree and killed it. He skinned the ox and took only the hind legs

and left for his home with the meat. The accused knew that among Velenyama's cattle was this stray ox.

He pleaded guilty to the charge of theft of stock and was sentenced to 36 months' imprisonment of which nine months were suspended on condition of good behaviour and a further nine months were suspended on condition that he paid compensation in the sum of $8 000 to the State.

The charge framed as it was in these proceedings was the subject of my criticism in S v Machokoto 1996 (2) ZLR 190 (H) where at 194H-195A, I said:

"A person may be convicted of theft of property of a person unknown to the public prosecutor, but it is an essential element of the crime that there be an owner or possessor of such property, even though the owner or possessor cannot be identified by the State."

And at 200C-D:

"The animals were not the property of the State. As I have already mentioned, the first animal could only have been the property of some person to the State unknown. The last part of the charge should have read 'the property of a person to the State unknown'. The attention of those who draft charges is accordingly drawn to this observation so that a charge relating to the theft of property whose owner or lawful possessor is unknown should at least read correctly."

See also the remarks of Gillespie J at 202B-C in the same case and at 204G-H where the learned judge said that: "… the charge averring property to inhere in the State is fatally defective …"

In the present case, Amos Velenyama was known to the public prosecutor or the State as the bona fide possessor of the ox. As to when a person is a bona fide possessor, see Machokoto supra at 198-199 and 204B. The charge sheet should have averred that the ox was in the possession of Amos Velenyama. The result of averring that the ox was the property of the State was that when the trial magistrate made an order of compensation as a condition of suspension of a portion of the sentence, he ordered that the amount of compensation should be paid to the State. Quite obviously, the State was not the owner of the stray ox nor its lawful possessor. There must have been an owner: see Machokoto supra at 195A-C and there was a lawful bona fide possessor of the ox.

The order of compensation should have directed that compensation be paid to the possessor of the ox who had the obligation to inform the authorities about the stray ox. The authorities would also have been expected to advertise the stray ox so that if the owner came forward, he would have had the ox returned to him or, as the matter now stands, the amount of compensation paid out to him. If no one turned up to claim the ox or now the money, then the bona fide possessor, Amos Velenyama, would in good time be lawfully possessed of the cash and become entitled to use it for his own benefit.

There is no justification for the State to retain the amount of the compensation which the accused may pay. Similarly, the meat which was abandoned by the accused and held as an exhibit should be returned to Amos Velenyama.

I am satisfied that although the charge was defective, the accused was not prejudiced by that defect. It will be sufficient therefore to alter the charge so that it is made abundantly clear that the stray ox was not the property of the State and consequently that the amount of compensation would have to be paid to Amos Velenyama, the bona fide possessor of the ox. I must observe that the defectiveness of the charge in this case is distinguishable in its effect from that in Machokoto's case supra. In the present case the defectiveness of the charge does not prejudice the accused because, whether or not that defect existed, the

accused nonetheless stole the ox. He could therefore not have raised any of the defences which would have been available to Amos Velenyama had he been the one charged with the theft.
It will be apparent that I have no other criticism of the proceedings. I considered whether the accused's knowledge that the ox was a stray animal within Amos Velenyama's herd served to reduce his moral blameworthiness and I am satisfied that it did not. He had absolutely no right to act in the manner he did with respect to the ox which was apparently in the lawful custody of Amos Velenyama. In my view, the conviction was proper and so also was the sentence in so far as its quantum or magnitude was concerned.
Accordingly the sentence is altered to read:
"36 months' imprisonment of which 9 months' imprisonment is suspended for 5 years on condition that during that period the accused does not commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.
A further 9 months' imprisonment is suspended on condition that the accused pays compensation to Amos Velenyama in the sum of $8 000 on or before 13 December 2001 such payment to be made through the Clerk of Court at Gokwe magistrates court."
Hungwe J agrees.

X v HEALTH PROFESSIONS COUNCIL OF ZIMBABWE
2001 (2) ZLR 286 (H)
Division: High Court, Harare
Judges: Smith J & Paradza J
Subject Area: Civil appeal
Date: 25 September and 10 October 2001
Judgment Number: HH-178-01

Appeal — record — defects in — effect
Medicine — Health Professions Council — disciplinary inquiries — delay in holding inquiry — undesirability of — need for persons presiding at inquiry to maintain judicial attitude
The appellant was charged with four counts of improper or disgraceful conduct in his practice as a specialist dermatologist, in that on four occasions he had improperly conducted vaginal examinations on female patients or had made improper suggestions to them. The respondent Council's disciplinary committee held an inquiry into the charges some two and a half years after the complaints that gave rise to the charges had been made to the Council. The charges were framed so as to allege vaguely a pattern of practice on the appellant's part, and at the inquiry members of the disciplinary committee questioned the appellant about other instances in which female patients had complained about his conduct. In a very brief judgment, and without analysing the evidence or the issues, the committee found the appellant guilty on "the three charges", apparently forgetting there were four. The appellant appealed to the High Court against the committee's finding, but the appeal took another two and a half years to be heard, mainly because of delays in preparing the record. The appeal record was defective, omitting altogether the evidence of two important witnesses and containing errors and omissions in regard to the evidence given by other witnesses.
Held, that the appeal should be allowed and the appellant's conviction set aside for the following reasons:

1. The delay in holding the inquiry was highly improper. If the respondent Council considers that a complaint against a practitioner, if proved, would show the practitioner to be guilty of improper or disgraceful conduct, the Council should hold an inquiry as soon as possible.

2. While it does not automatically follow that omissions or defects in an appeal record will result in the conviction being set aside, in this case the missing evidence appeared to have been material.

3. Although the appellant was entitled to full reasons for judgment, the committee's judgment in this case was extremely brief and did not disclose the committee's findings, if any, on disputed issues.

4. The committee was probably influenced by inferences and statements made throughout the inquiry concerning other complaints that had been made about the appellant's propensity to conduct unnecessary vaginal examinations.

5. Some of the questions asked by members of the committee indicated bias against the appellant, and a lack of appreciation of the judicial attitude which is proper to an inquiry by such a committee.

Cases cited:

Health Professions Council v Turner 2001 (2) ZLR 240 (S)
Kozeluhova v Health Professions Council 1989 (1) ZLR 5 (H)
Mitchell v Estate Agents Council 1996 (1) ZLR 222 (S)
R v Nortje 1950 (4) SA 725 (E)
Rosenberg v SA Pharmacy Board 1981 (1) SA 22 (A)
S v Collier 1976 (2) SA 378 (C)
S v Manera 1989 (3) ZLR 92 (S)
S v Marais 1966 (2) SA 514 (T)
SA Medical & Dental Council v Lipron 1949 (3) SA 277 (A)

T A Cherry, for the appellant
L Mazonde, for the respondent

SMITH J: This is an appeal in terms of s 60(1) of the Medical, Dental and Allied Professions Act [Chapter 29:08] (hereinafter referred to as "the Act") from a decision of the respondent (hereinafter referred to as "the Council"). It is an appeal on the record — see Health Professions Council v Turner S-77-01.* The appellant is a specialist dermatologist who is registered with the Council. In December 1998, he was advised that the Disciplinary Committee of the Council would be holding an inquiry into charges of improper or disgraceful conduct. The charges were brought in terms of s 58(2) of the Act. The allegations against him were that:

"This pattern of practice does not promote and safeguard the interests of the public nor does it enhance the good standing and reputation of the medical profession more particularly in that:

2.1 on or about 16 January and 24 February 1996, at Bulawayo, you carried out a vaginal examination of Arlene, with a diagnosis of lichen planus, a clinical procedure which is not routine in such a condition (the first charge);

2.2 on or about 29 March 1996 at Bulawayo, you made obscene demonstrations during the examination of Mrs K, a patient (the second charge); and

2.3 in or around June 1996 at Bulawayo, you carried (sic) a vaginal examination unprofessionally on, and engaged in an unprofessional conversation with Mrs C in that you asked her how she had sex and what part of a woman men should play with to make them feel sexy and demonstrated before her how other people performed acts of sexual intercourse (the third charge)."

Page 288 of 2001 (2) ZLR 286 (H)

Then, by letter dated 5 January 1999, the appellant was advised that the notice of inquiry that had been attached to the letter dated 18 December 1998 required correction and a fourth allegation was added. The name of Mrs C was deleted from the third charge and that of Mrs K substituted, thus in both the second and the third charges the complainant was Mrs K. The additional allegation was that:

"2.4 on a date unknown to the Council you carried out a vaginal examination on Mrs C unprofessionally (the fourth charge)."

The appellant's responses to the charges were as follows. In relation to the first charge, his examinations of Arlene were proper and necessary and he would produce textbook evidence to support his contentions. In relation to the second and third charges, his examination of Mrs K was entirely proper, and the results of such examination bear out that fact, and he never spoke to Mrs K in the manner alleged or at all nor did he make obscene demonstrations during his consultations with her. In relation to the third charge, he has no record of attending to Mrs C, does not recall ever doing so and will produce evidence from the Public Services Medical Aid Society (PSMAS) to the effect that no claims were ever made by him for her attendances at his rooms.

It was only after he had responded to the charges that the third charge was amended and the fourth charge added.

[The learned judge then dealt with the evidence led at the inquiry and continued:]

The appellant was asked questions by members of the Disciplinary Committee which I consider to have been undesirable. The Chairman asked if he had had any complaints from other female patients about "happenings in the sexual area". The appellant said that one patient in Mpilo Hospital had complained and the Chairman elaborated by saying that there had been an earlier case of a female complaining to the Council. He then asked the appellant why female patients complained against him whereas male patients did not. That led to another member of the Disciplinary Committee saying:

"Can't you learn from the previous case you had which was mentioned by the Chairman that the practice you are doing now is similar to what happened with that one case because it seems you are repeating the same problem. We have never heard a male patient coming say well, he was tampering you know, playing with my penis."

When the appellant protested that in the earlier case nothing was proved and he had been found not guilty, the member who had asked him the question said:

Page 289 of 2001 (2) ZLR 286 (H)

"I am afraid you are not answering the question. I am saying can't you learn from the previous case that this thing should not be done."

Another member of the Disciplinary Committee said to the appellant:

"For your information, mucous membrane lichen planus, especially in the vagina, is very rare in blacks. It's not common in blacks. It's rare you see and there was no reason for you to do that."

There is no indication of the qualification of the member to make such a statement and he does not say whether he is speaking from experience or from what he has read somewhere.
The response by the appellant was, that in order to establish whether a patient has got vaginal lichen planus, the doctor must examine the vagina visually. However, where the patient has been taking steroids for four to five months, there is a possibility that she may have candida vaginitis and, as Arlene had lesions on the lower lip and complained of her abdominal pains, he considered it necessary to insert a swab and have it sent to the laboratory for analysis.
The Disciplinary Committee found the appellant guilty on all three charges although there were four. With regard to Arlene, the Disciplinary Committee found that there was "a lot of imprudence or ignorance and also lack of reliability" on the part of the appellant, no reasons were given for that finding. It found that Mrs K was a reliable witness. With regard to Mrs C, the conclusion was that "there was competence here. It is not an incompetent rendering" (whatever that may mean). Generally, it concluded that there was disgraceful conduct on the part of the appellant. His behaviour, "which seems to be established as a pattern" is disgraceful. In imposing sentence, the Disciplinary Committee said that there was a need to send a very clear message that female patients should not be exploited by the medical practitioner. It ordered that he be suspended from practice of six months and, on his return to practice, he be attached to a gynaecology service for three months in order that he might know how to conduct himself in examining female patients.
[The learned judge then set out the submissions of counsel, and continued:]
The complaints against the appellant surfaced in the first half of 1996. He was notified of the complaints made by Arlene and Mrs K in June 1996 and asked to comment. He responded towards the end of July 1996. The first notice he had of the fourth charge, which is the complaint by Mrs C, was when he received the charge on 23 December 1998. However, the actual complaint by Mrs C was not correctly stated in the first notice he was given. It was in

a letter dated 5 January 1999 that the charge was correctly framed. The inquiry commenced on 15 January and so the appellant had no opportunity to comment in writing on the charge.
There is no explanation why it took the Council two and a half years to have the inquiry held. Such a delay is, in my opinion, highly improper. The judgment in Turner's case, supra, was handed down on 27 September 2001. At p 18 of the cyclostyled judgment, McNally JA said "In view of the time lapse since 1991 it is important not to allow the matter to drag on".* Obviously in that case, the Council also acted in a very leisurely manner. If the Council considers that the complaint, if proved, would show that the practitioner is guilty of improper or disgraceful conduct, surely it should hold an inquiry as soon as possible. It is wrong to let the practitioner carry on committing acts which are disgraceful or unethical for two and a half years whilst the Council is trying to get its act together. During that long period, the practitioner would quite rightly be very concerned about what is going to happen in relation to the charges levelled against him and he can only wait and see. Furthermore, with such a long delay, the recollections of the complainants and other witnesses are not going to be as good as they would be shortly

after the events occurred. It is not in the interests of anyone to have a delay of two and a half years before the inquiry is held.
The position is exacerbated when it takes another two and a half years before the appeal is heard. It seems that the major cause of the delay in hearing the appeal has been the failure to have the record prepared expeditiously. Not only has it taken a long time to have the record prepared, but the quality of the record is not good. The evidence given by two witnesses has not been recorded. Furthermore, the record of the evidence given by the appellant is littered with instances of cases where the transcriber has indicated that he cannot make out the word or words said. Furthermore there was obviously no check of the record, because there are many instances where the wrong word has been typed. For instance, in Arlene's evidence mention is frequently made of a "rush" instead of a "rash" on her back and legs and there are two references to a "pulp", instead of a "pap", test.
The charge against the appellant is not very clear. The allegation is that he is guilty of improper or disgraceful conduct or conduct which, when regard is had to his profession or calling, is improper or disgraceful in that his pattern of practice does not promote and safeguard the interests of the public, nor does it enhance the good standing and reputation of the medical profession more particularly in that:

2.1 on or about 16 January and 24 February 1986 (sic), at Bulawayo, you
Page 291 of 2001 (2) ZLR 286 (H)
carried out a vaginal examination of Eirlene (sic), with a diagnosis of a lichen planas (sic), as a clinical procedure which is not routine in such a condition;

2.2 on or about 29 March 1996 at Bulawayo you made obscene demonstrations during the examination of Mrs K a patient;

2.3 in or around June 1996 at Bulawayo you carried a vaginal examination professionally or, and engaged in an unprofessional conversation with Mrs K (the alleged conversation is then mentioned) and demonstrated before her how other people performed acts of sexual intercourse; and

2.4 on a date unknown to the Council you carried out a vaginal examination on Mrs C unprofessionally.

It is clear that the gist of the complaint against the appellant is his pattern of practice. It is not just one or two isolated cases that are being complained of. In the first charge, it is alleged that he carried out the vaginal examination on two occasions. However, Arlene never said that that had happened on two separate visits and all the evidence was to the effect that such an examination had been carried out only on her second visit. Similarly, in the second and third charges it is alleged that on the one visit by Mrs K the appellant had made obscene demonstrations and on a separate occasion, more than a month later, he had carried out a vaginal examination unprofessionally and engaged in an unprofessional conversation. However, Mrs K had never said that the obscene demonstration had taken place during one visit and the unprofessional conversation during another. All the evidence was to the effect that the alleged demonstration and conversation had taken place at the same time. Despite these contradictions, the Disciplinary Committee found the appellant guilty on all the charges, which means that he was found guilty of undesirable practices on four occasions, not only on two.
Furthermore, during the course of the inquiry the appellant was asked about the previous occasion on which he had appeared before the Council or the Disciplinary Committee, and a member of the Disciplinary Committee asked him why there were so many

complaints from his female patients and not from the males. It seems clear that the admission of this evidence about complaints other than the ones being investigated prejudiced the appellant.

With regard to the first charge, the record of the evidence given is incomplete. The evidence from Arlene's mother is missing in its entirety and the major part of the evidence from Dr Marowa, who is also a dermatologist, is also missing. In S v Marais 1966 (2) SA 514 (T), Claassen J at p 516G-H said:

Page 292 of 2001 (2) ZLR 286 (H)

"The appellant has been seriously frustrated and prejudiced owing to a fault on the part of the State's servants. She is entitled to an appeal as of right. She is entitled to receive a copy certified as correct. This cannot be achieved. She has been frustrated in a basic right. She has been deprived of this through no fault of her own."

Then at p 517A-B he continued:

"If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

Those views expressed by Claassen J were approved of, and followed, in S v Manera 1989 (3) ZLR 92 (S) when at p 93 Gubbay JA (as he then was) said:

"There is, however, a serious defect in the record of the proceedings. The evidence was not recorded mechanically but manually by the magistrate. Regrettably, it is incomplete. There is missing from the record what can only be the major portion of the appellant's testimony while under cross-examination (for the long-hand note reflects merely nine perfunctory questions and answers) and what he may have said in re-examination, as well as the entire evidence of the witness called by the defence … "

In the above-mentioned cases, the convictions and sentences were set aside. However, it does not automatically follow that if part of a record is missing then the conviction must be set aside. In S v Collier 1976 (2) SA 378 (C) at 378H-379A, Burger J said:

"I am in respectful agreement with the practice that where the whole record or a very material part thereof has been lost prior to review or the appeal being concluded, the proceedings and sentence should be set aside. In such cases, the court of appeal or review is clearly unable to consider the case. But it seems to me wrong that the same result should follow where only some answers of a witness on matters which are apparently not of vital importance are not recorded. It would lead to an absurd result. In practice, the records of criminal cases as a true reflection as to what happened at the trial vary considerably."

In this case, the evidence that is missing appears to me to have been material. That of Arlene's mother might have corroborated the evidence given by Arlene but, on the other hand, it might have shown up inconsistencies between what she said during the inquiry and what she had told her mother at the time. After all, the inquiry was held some two and a half years after the incident complained of. Dr N, when giving evidence, said that Arlene's mother had phoned him and said that repeated internal examinations had been done. That was hearsay evidence. As her evidence is not part of the record the court

cannot tell what she told the Disciplinary Committee. In relation to the evidence of Dr Marowa, it would have been very material.
Page 293 of 2001 (2) ZLR 286 (H)
The allegation against the appellant was not that he had carried out a vaginal examination in an improper manner but that the examination he had carried out was not routine where the patient is diagnosed as having a lichen planus infection. The expert evidence of Dr Marowa would have been crucial on the question of whether or not such an examination would be routine in the circumstances. The evidence of Dr M and Dr F as to whether or not a nurse or other third person should have been present when the examination was carried out is irrelevant. The method used by the appellant in carrying out the examination was not called in question in the charge levelled against him. The issue was whether or not the original examination was routine or called for. It would appear, however, that the Disciplinary Committee was concerned about the evidence as to the manner in which the appellant carried out the examinations because it ordered that after his return to practice he be attached to a gynaecology service for three months "in order that he might know how to conduct himself in examining female patients".
In Rook, Wilkinson & Ebling Textbook of Dermatology 5 ed, edited by Ruth Champion, J L Burton and F J G Ebling at p 285O it is said:
"Lichen Planus
the vestibule and inner surfaces of the labia minora are most frequently affected. Erosions and desquamations of the vaginal epithelium, with or without other signs of more generalised lichen planus, has been described under the title desquamative vaginitis."
Then in Colour Atlas & Text of Obstetric and Gynaecologic Dermatology, by Martin M Black, Marilynne McKay and Peter Braude at p 126, the learned authors say:
"It is generally believed that patients with erosive lichen planus will develop erosive lesions at vulvar, vaginal and gingival sites, at some stage in the course of their disease, though all three sites may not be concurrently affected. The site of the presenting symptom determines the referring physician: gynaecologist, dermatologist, or oral specialist …
One half to two-thirds of patients with erosive lichen planus have vaginal involvement during the course of the disease."
It seems clear from the above that lichen planus manifests itself in the mucous membranes of the mouth and of the vagina. Therefore, in the case of a patient with such a complaint, it would appear that a vaginal examination would not be untoward. In addition, in the case of Arlene, the appellant said that, on her second visit, she had complained of a sore or ulcerated mouth and lower abdominal pains. Because she had been taking steroids for some months, he suspected that she might have contracted candida vaginitis and that is why he took a swab specimen which he sent to the laboratory for testing. Dr N did say that in his opinion, with the symptoms Arlene presented, there were no indications that a vaginal examination was necessary. However, he did go on to say that lichen planus could affect the bowel cavity and the
Page 294 of 2001 (2) ZLR 286 (H)
vulva and vaginal region and that, for a thorough examination for lichen planus, he would expect that a vaginal examination could be carried out. He personally would not carry out such an examination if the patient had been diagnosed as having lichen planus, unless she complained of a rash and itchiness in that area. Under cross-examination, Dr N agreed

that if Arlene had complained of a sore lip, with ulceration, then a vaginal examination would have been expected because lichen planus affects the mucous membranes. He also agreed that such an examination would be called for if the patient was suspected to have thrush or candida vaginitis. With this evidence by Dr N, it is difficult to see how the Disciplinary Committee came to the conclusion that the vaginal examination was not routine in the circumstances.

With regard to the second and third charges, I have already pointed out that the incident complained of took place in June, during a single visit. Therefore it was wrong to have levelled two charges against the appellant in respect of the complaint by Mrs K. As I have mentioned earlier, much of the evidence given by her is not available to the court because it has not been translated into English. An attempt should have been made to reconstruct the record: see R v Nortje 1950 (4) SA 725 (E). It is unfortunate that no such attempt was made. The lack of such evidence means that the court is not able to assess her evidence accurately. It is clear, however, that some two and a half years after the incident complained of, her recollection was not very good. She could not remember how many times she visited the appellant's rooms. He says she came 11 or 12 times whereas initially, she said it was only two or three times but later she conceded it may have been more. What is also clear from the evidence is that she was not upset, for herself, by the alleged conversation. Her complaint was that if the complainant spoke to her in the way he did, he might do the same with younger patients or with patients with loose morals, which could lead to undesirable consequences. She admitted that she was amused by his conversation and, in fact, laughed at what he said.

Mrs K deposed to what the appellant said but her evidence as to what constituted the "obscene demonstration" is not very specific. The appellant denied having acted or talked as she alleged. The only corroboration of Mrs K's evidence is the evidence of Dr M. It is clear that it was Dr M who persuaded Mrs K to put her complaint in writing and send it to the Council. Unfortunately, from the record, it appears that Dr M was not an impartial observer. She referred more than once to other cases of persons who had complained to her about the appellant's conduct. She was the one who induced Mrs K and Mrs C to complain to the Council. She said that another of her patients had complained about the appellant but unfortunately she had

died before she could commit her complaint to paper. The information about the vaginal examination was not volunteered initially but was obtained from a specified question by Dr M. Mrs K described symptoms to the appellant that she had not mentioned to Dr M and so Dr M's statement that she "thought probably that there was no need for a vaginal examination" was not based on a full knowledge of the circumstances. She did agree, however, that a vaginal examination might be justified where a patient complained of lower abdominal pains. In cross-examination, Dr M displayed a marked degree of arrogance, refusing to answer questions that she thought were not appropriate or relevant. In giving its judgment, the Disciplinary Committee said in relation to Dr M, "but we do agree with the defence that she was not telling the truth". That being the case, no reliance can be placed on her evidence, which means that there is no corroboration of the evidence given by Mrs K. Having regard to the fact that Mrs K was induced by Dr M to complain to the Council, the quality of the evidence given by Mrs K and the fact that two charges

were preferred, I consider that it cannot be found that the conviction of the appellant on the second and third charges is justified.
With regard to the fourth charge, Mrs C could not remember when she visited the appellant. However, she was adamant that she visited his rooms in Galen House and she could visualize where his rooms were in the building. However, it was not disputed that the appellant moved out of Galen House to the Medical Centre in June 1993. That means that Mrs C was mistaken when she said that she had been to his rooms in Galen House in 1996. Her letter setting out her complaint is dated 27 October 1997. She did not mention, in her letter, the date she visited the appellant. However, it is hardly likely that she would have submitted a complaint in 1997 about what had happened more than four years earlier. The charge was that the appellant carried out the vaginal examination unprofessionally. It is not clear whether the description of unprofessionally refers to the manner in which the examination was carried out or that the examination was carried out when it was not necessary. Mrs C had been referred to the appellant by Dr M and it was Dr M who had induced her to put her complaint in writing. Dr M could not remember whether she had referred Mrs C in 1996 or 1997. Dr M kept referring to the many complaints she had received from female patients. However, the Disciplinary Council came to the conclusion that Dr M was not telling the truth. Mrs C's complaint was that she did not consider the vaginal examination to have been necessary in the circumstances. The appellant's defence is that he could not have seen Mrs C during the period July 1993 to 1997 when she complained, because he did not have his rooms in Galen House during that period. Moreover, he produced a letter from PSMAS which indicated that no claim had been

received from Mrs C for any visit to the appellant in the period 1994 to 1998. In the absence of any corroboration of Mrs C's complaint, since Dr M cannot be believed, and in view of her uncertainty as to when she visited the appellant, I consider that the conviction of the appellant on the fourth charge cannot be upheld.
In Kozeluhova v Health Professions Council 1989 (1) ZLR 5 (H), it was held that the appellant was entitled to full reasons for judgment, but the judgment in this case is extremely brief, especially considering that the record of the evidence and documentary exhibits exceeds 300 pages. The Disciplinary Committee found that the three complainants were credible witnesses whose evidence could be accepted and therefore the conduct of the appellant was disgraceful. It said "Patients should go to a practitioner with confidence and the behaviour, which seems to be established as a pattern in this practitioner, is disgraceful" and it therefore concluded that "on the three counts the appellant is guilty". In fact, there were four charges, not three. No reasons were given for the finding that the vaginal examination of Arlene was not routine when she had a diagnosis of lichen planus.
It is difficult to avoid the conclusion that the Disciplinary Committee was influenced by the many inferences and statements throughout the inquiry that many complaints had been made about the appellant's propensity to conduct vaginal examinations when they were not necessary. In the charge put to the appellant, the main thrust is the pattern of practice of the appellant. Therefore, if the appellant had been found guilty on only one of the charges, it could not be said that a pattern of practice had been established.
In Mitchell v Estate Agents Council 1996 (1) ZLR 222 (S) McNally JA at 231B-C said:

“It is for the Council, as guardian of the professional standards of estate agents, to determine what is or what is not disgraceful conduct. It has a discretion in this regard, and so long as this discretion is properly exercised, the courts will not interfere.”
The principle so enunciated applies to all professional bodies. Similar sentiments were expressed in Rosenberg v S A Pharmacy Board 1981 (1) SA 22 (A) at 33F:
“ … the court, as in all cases where an appeal on facts is before it, will not lightly interfere with such factual findings, bearing in mind that the members of the Board had the opportunity of seeing and hearing the witnesses, but it will interfere if it is of the firm opinion that the Board was wrong.”
Later, at 33G-H, and dealing with a situation where the Board did not give reasons, the court said:
‘it will still interfere if it is satisfied that the Board was wrong in finding such facts to have been established, or if, not knowing what facts the Board found, it is satisfied that the facts essential to a finding of guilt were not established’.”
Page 297 of 2001 (2) ZLR 286 (H)
In closing, I would just comment that some of the questions asked by members of the Disciplinary Committee tended to show bias against the appellant. In S A Medical & Dental Council v Lipron 1949 (3) SA 277 (A) at p 285, Hoexter JA said:
“some of the questions asked by some of the members of the Disciplinary Committee show a lack of appreciation of the judicial attitude which is proper to an enquiry by such a Committee.”
That remark applies equally to some of the questions asked in this case.
For the reasons set out above, the appeal must be upheld. Accordingly the conviction and sentence imposed are set aside.
PARADZA J: I concur.
Ben Baron & Partners, appellant’s legal practitioners
Dube, Manikai & Partners, respondent’s legal practitioners
DANDAZI v WANKIE COLLIERY CO LTD
2001 (2) ZLR 298 (H)
Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Opposed application
Date: 20 March & 10 October 2001
Judgment Number: HH-180-01

Practice and procedure — application — review — requirement to state grounds for review in application itself — not sufficient to state them in founding affidavit
Review — application — grounds for — grounds not relied on in appeal procedure under employment code of conduct — not permissible to rely on such grounds — what may be taken on review — whether applicant must have exhausted his domestic remedies first
The applicant was dismissed from his employment with the respondent after proceedings in terms of the respondent’s code of conduct on allegations of misconduct. The proceedings had begun before a hearing panel. Dissatisfied with the panel’s decision, the applicant appealed to an appeal panel on three grounds. The appeal failed and the applicant sought to bring the decision of the hearing panel on review on six grounds, which included those submitted before the appeal panel.

Held, that the application was not strictly before the court. Rule 257 of the High Court Rules required that the court application itself should state the grounds for review shortly and clearly. It is not sufficient to state numerous grounds in the founding affidavit and leave it to the court to try to determine what they are. However, because the significance of the rule has not been brought to the attention of practitioners with enough force, and because the respondent was not prejudiced, the lack of compliance would be condoned.
Held, further, that where a person has appealed to an internal appeal panel, thereby exhausting his domestic remedies, the decision which that person takes on review is not merely that of the lower tribunal, but also that of the appeal panel. In challenging the decision on review, reference must be made to the findings and decision of the appeal panel. It would be inappropriate to place before the reviewing court grounds which were not raised on appeal to the appeal panel. Only those grounds raised before the appeal panel could be considered on review.
Held, further that in an appropriate case an applicant is not precluded from taking the decision of a lower tribunal on review on procedural grounds only before exhausting his domestic remedies, although where he is challenging the decision of the body a quo on both the merits and the procedure it would be preferable to exhaust his domestic remedies first.
Cases cited:
Bindura Town Mgmt Bd v Desai & Co 1953 (1) SA 358 (A)
Page 299 of 2001 (2) ZLR 298 (H)
Mashava v PSC HH-150-01
Welkom Village Mgmt Bd v Leteno 1958 (1) SA 490 (A)
Legislation considered:
High Court Rules 1971 (RGN 1047 of 1971), r 257
D T Mwonzora, for the applicant
E W W Morris, for the respondent
CHINHENGO J: The applicant was employed by the respondent as a "sectional engineer". He was dismissed from employment on 4 May 2000 on charges of misconduct. The proceedings which resulted in his dismissal were conducted in terms of the respondent's code of conduct (hereinafter, called "the code"). The applicant instituted the present proceedings and sought an order declaring his dismissal to be null and void and that he be reinstated with "full benefits". In clause 3 of the draft order, the applicant prayed that:
"Should either party deem reinstatement to be inappropriate, the Respondent be and is hereby ordered to pay the applicant damages in lieu of reinstatement, the quantum of which shall be determined by the court in a trial set specifically for quantification of damages."
This part of the relief sought is, in my view, as unusual as it is designed to delay the finalisation of this matter. Where an applicant prays, in the alternative, for damages for unlawful termination of an employment contract, that applicant should ordinarily place before the court such evidence as will enable the court, upon finding in his favour, to determine the amount of damages to be paid to him. This will avoid the bringing of many suits to the same court.

At this stage, I wish to make an observation which is relevant to many review applications that are brought to the High Court. In terms of Order 33 r 257, it is a requirement that:

"The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for."

This is not an idle requirement. It was inserted in the Rules of the Court so that an applicant for review may apply his mind to the grounds upon which he seeks a review and be able to state them clearly and in brief form. Often, in review applications, all sorts of grounds are lumped together in the body of the founding affidavit, making it very difficult for the presiding judicial officer to determine the grounds upon which the matter is to be reviewed. If, as in the present case, the grounds are based on bias and gross irregularity in the proceedings, then those grounds must be stated in the application.

A failure to do so, as was the case in this application, is a failure to comply with Order 33 r 257. The consequence of that failure is that the matter is not properly before the court and the applicant must not be heard. It is

important, therefore, that legal practitioners should comply with r 257 in every case if they are to avoid the embarrassment of the matter being struck off for failure to comply with the rules of this court. See the warning given in Minister of Labour & Ors v PEN Transport (Pvt) Ltd 1989 (1) ZLR 293 (S) at 295G-296D. The applicant in casu did not comply with r 257. I condoned the failure to comply with the rule because the significance of the rule has not been brought to the attention of legal practitioners with sufficient force. Also the respondent was not prejudiced by the failure to comply with the rule. It did not demur.

In the absence of a précis of the grounds upon which the review was brought, I have endeavoured to determine what those grounds are from the applicant's founding affidavit. They are these:

Whereas:

(1) the code requires that an investigation into allegations of misconduct should be carried out by the offending employee's immediate supervisor, the investigations were carried by a person other than the applicant's immediate supervisor.

(2) the code requires that the immediate supervisor should formally and in writing file a complaint against the offending employee before a letter of suspension is crafted, the letter of suspension was written to the applicant before the formal complainant had been filed against him.

(3) the letter of suspension charged the applicant with only one act of misconduct, after the investigation into his conduct he faced five charges of misconduct.

(4) upon receiving the charges of misconduct, the applicant requested for further particulars on the charges, the particulars were denied him.

(5) the code stipulates that the proceedings should be completed within 14 days, the proceedings were not completed until after the period of 14 days had expired.

(6) the applicant protested that the chairman of the disciplinary hearing panel, Mr Murdoch-Eaton, was biased against him and should not have presided, the said Mr Murdoch-Eaton sat nonetheless.

It is important to note that the code provides for an appeal from the decision of the disciplinary hearing panel. The appeal lies to the disciplinary appeal panel of the respondent, which is appointed by the managing director. The applicant was dissatisfied with the decision of the disciplinary hearing panel and appealed against that decision on three grounds only: that the chairman of the disciplinary hearing panel was biased against him and should have recused himself; that the hearing was heard outside the 14 day period prescribed by the code; and that the applicant was refused particulars of the charges. His appeal was dismissed.

The applicant did not challenge directly the decision of the disciplinary appeal panel but that of the lower body only. It seems to me that a registered code of conduct does not only create a quasi-judicial body and establish a mechanism for dispute resolution but it also clothes that quasi-judicial body with a certain legal standing which cannot be ignored — see s 101 of the Labour Relations Act [Chapter 28:01]. Where a person has appealed to an internal appeal panel, the decision which that person takes on review is also that of the appeal panel and not that of the body of first instance only. In challenging the decision on review, reference must be made to the findings and decision of the appeal panel. In this case, as I have already mentioned, the applicant appealed against the decision of the disciplinary hearing panel to the disciplinary appeal panel. He does not show how or why the latter body's decision should be set aside. His grounds of appeal were three in number and not six. If, therefore, the applicant was content to appeal against the decision of the lower body on three grounds only, he cannot, in my view, bring on review other grounds which he did not appeal against to the internal appellate body. Even if he was entitled to do so, he would not in any case succeed, because he did not make an issue of them at the hearing and in respect of the allegation that he later faced more charges than stated in the letter of suspension, the reasoning in Forestry Commission v Zimunya S-48-2001 would not apply as the factual situation is distinguishable.
The three grounds on which the applicant appealed to the disciplinary appeal panel are stated by the applicant himself at p 77 of the record as follows:
" 1. object (to) the hearing officer as he is an interested person;
2. The hearing was heard out of time i.e. well after the 14 days as per company's code of conduct's requirements;
3. I did not get any particulars of the charges, for example, audit report nor any witnesses reports. Therefore the hearing was more of an instruction to me as read from the said report."
It is my view that, of the grounds upon which the applicant now seeks a review, only those I have numbered 4 to 6 were placed before the disciplinary appeal panel and should be considered on review. The applicant's failure to raise the other grounds must therefore be construed as a waiver of those grounds. A review deals only with procedural matters and not with the merits of the matter. As such, therefore, if a person wishes to challenge on review proceedings under a code of conduct, he must not only show that the proceedings were attended by an irregularity or irregularities, but also that the internal appeal panel which he must have hoped would resolve the matter complained of failed to do so. Thus, the applicant in this case must challenge not only the decision of the disciplinary hearing panel but that of the

disciplinary appeal panel as well. And it is inappropriate for such person to place before the reviewing court grounds which he did not challenge on appeal to the internal appeal panel. The result is that I will examine only the three grounds on which the applicant appealed to the disciplinary appeal panel of the respondent and not those grounds which are raised for the first time in his founding affidavit. It is appropriate, in my judgment, to take this approach because, where a person has exhausted the domestic remedies available to him, which is what he generally must do, then on bringing the entire proceedings on review he must stick to the case which he placed before the domestic appellate body. This, however, is not to say that there may not be cases where grounds which did not form the subject matter of the appeal may not be placed before a reviewing court. There may well be cases where this may be appropriate but the present is not one such case.

I do not wish to enter the debate as to when review proceedings should be brought to the High Court in the case where a person is aggrieved by the decision of the domestic tribunal of first instance — the debate being whether the applicant should in every case exhaust his domestic remedies first or whether he can approach the High Court where reviewable issues have arisen without necessarily having to exhaust the domestic remedies first. The latter view seems to me to be more preferable: see Bindura Town Management Board v Desai & Co 1953 (1) SA 358 (A) and Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) at 502C. Where the person is challenging the decision of the body a quo on both the merits and procedure it would be preferable to exhaust the domestic remedies first. But where the challenge is on procedural grounds only, I would venture to say that review proceedings can be instituted without the need to exhaust domestic remedies. However, the mere fact that an appeal to the domestic body was gone through does not mean that a review may not be instituted after the appeal has been heard or determined against the appellant. This was the case here, where, after the appeal process was completed under the code, the applicant instituted these review proceedings.

I will now examine the applicant's challenge to the respondent's decision.

1. RECUSAL OF MR MURDOCH-EATON

At both hearings under the code, the applicant protested that Mr Murdoch-Eaton should not have been a member of the disciplinary hearing panel. His main basis for the objection was that Mr Murdoch-Eaton was the one who initially alleged that the applicant was carrying on private work with the company's resources (being the first charge he faced) and he was the one who closed the workshop pending the conduct of investigations.

Mr Murdoch-Eaton was the respondent's General Manager, Operation, and there would be nothing untoward in him taking the first steps in the matter. That, in my view, could not disqualify him from being a member of the disciplinary committee. The applicant also averred that Mr Murdoch-Eaton had a long history of animosity towards him, spanning the ten years during which the applicant was employed by the respondent. The applicant submitted a document titled "Victimisation Tendencies by a Mr Murdoch-Eaton" in which he related the history of the animosity between them. The document is not dated and the impression is created that it was written after the causes of his dismissal

arose. The period during which he worked with Mr Murdoch-Eaton, long as it is, would suggest that no such victimisation existed for it should earlier have been the subject of his protestation. There is no evidence to suggest that Mr Murdoch-Eaton showed any bias against the applicant. It is apparent from the record of the proceedings that the applicant conceded during the hearing presided over by Mr Murdoch-Eaton that he might have been guilty of some omission. This suggests that the finding by the disciplinary hearing panel was fair. In addition, the disciplinary proceedings were held after an investigation was conducted to establish the facts. Mr Murdoch-Eaton was not a party to the investigations, which were conducted by the human resources department of the respondent and by its auditors. I am satisfied that any allegations of bias against Mr Murdoch-Eaton were unfounded. I therefore reach the same conclusion as the disciplinary appeal panel on this issue.

2. THE HEARING HELD OUTSIDE THE PRESCRIBED PERIOD

Clause 5.8 of the code provides that:

"The industrial relations section shall ensure that proceedings commenced against an employee who has committed a misconduct or breach of rules are completed within fourteen (14) days from the date of their commencement."

Relying on this clause, the applicant contended that the proceedings took more than fourteen days to complete. He was suspended in January, formally charged in March and the decision to dismiss him taken in April and confirmed in May. It seems to me that whilst the above cited clause states that "proceedings commenced against an employee … are completed within fourteen (14) days from the date of their commencement", the proceedings referred to are the hearing and not the entire proceedings as may be reckoned from the time of suspension. Clause 5.8 falls under clause 5 which is titled "Hearing" and as such it must be construed to mean that the hearing should be commenced and completed within fourteen days. It seems illogical to me that the code would have required that the proceedings as recorded from

suspension should be completed within fourteen days. Investigations may have to be carried out in some cases and such investigations may take more than fourteen days to complete. I am satisfied that clause 5.8 of the code applies to the hearing proper and not to antecedent proceedings. The hearing was conducted on 25 April and the decision handed down on 27 April. I must also say that the applicant was not prejudiced by the delay, part of which he himself caused as he went on leave for a few days, because he was on full pay. I am satisfied, therefore, that the respondent interpreted clause 5.8 of the code correctly and correctly found that the appellant had no cause for complaint on this score.

3. THE REQUEST FOR PARTICULARS

A request for further particulars must be honoured if the charge is vague and imprecise (see Mashava v PSC HH-150-01 per Chidyausiku JP (as he then was) at pp 8-9 of the cyclostyled judgment). Where the charge is clear and is such that the person charged is apprised fully of the basis of the charge against him, no further particulars need be furnished. In the present case, the charges were quite clear. The applicant was afforded the opportunity to read through the auditor's report on which the charges were based. He did not avail himself of that opportunity. The hearing took about five hours and it seems to me that the applicant must have received any clarification on the charges which he

reasonably would have sought. In any event, the record of proceeding does not indicate that the applicant persisted with his request for further particulars at the hearing. In addition, it appears from the findings of the disciplinary appeal panel that the applicant had commented on the auditors' report in writing, which report formed the basis of the charges against him. Again, I am satisfied that the applicant has failed to establish any irregularity on this aspect of the matter.

In the result, I am satisfied that there were no irregularities in the proceedings under review. The hearings under the code were conducted properly. The application is accordingly dismissed with costs.

Mwonzora & Associates, applicant's legal practitioners

Ziweni & Co, respondent's legal practitioners

CHINDORI-CHININGA v NATIONAL COUNCIL FOR NEGRO WOMEN

2001 (2) ZLR 305 (H)

Division: High Court, Harare

Judges: Smith J

Subject Area: Application for summary judgment

Date: 10 & 17 October 2001

Judgment Number: HH-181-01

Practice and procedure — judgment — summary judgment — application for — what should be alleged by applicant

The applicant claimed a sum of money from the respondent, with whom, she said, she had entered into a consultancy agreement. The agreement, she alleged, was partly written and partly oral, and specified a monthly salary. She claimed that for a six-month period she had not been paid. The respondent opposed the claim, averring that the agreement was entirely oral; that there had been no agreement on the terms of the consultancy; that the applicant had not performed the tasks assigned to her; and that she was not entitled to the fees claimed. The respondent counter-claimed for the return of a motor vehicle it had provided to the applicant. No answering affidavit was filed by the applicant.

The applicant sought summary judgment, alleging that the respondent had entered appearance to defend purely for the purposes of delay. The respondent, opposing the application, pointed out what it said were a number of deficiencies in the applicant's founding affidavit, including lack of particularity, and averred that there were conflicts of fact arising from the pleadings and raising triable issues. It also pointed out a lack of zeal on the part of the applicant in pursuing her claim.

Held, that in an application for summary judgment, the applicant should show that there is not even a mere possibility of success in any defence raised, that there is no triable issue and that there is no possibility that an injustice might be done if the application is granted. If the respondent raises any defence, which the respondent in this case had done, the applicant should show that there is no merit or substance in the defence or defences raised. She did not do so. Her allegation that the respondent did not dispute the claim was incredible. Her application constituted an abuse of the legal process and should be dismissed with costs on the higher scale.

Cases referred to:

De Aguiar v De Almeida 1989 (2) ZLR 165 (H)

Dube v Medical Svcs Intl Ltd 1989 (2) ZLR 280 (S)

Fawcett Security Ops (Pvt) Ltd v Dir of C & E & Ors 1993 (2) ZLR 121 (S)
Jena v Nechipote 1984 (1) ZLR 29 (S)
Nedlaw Invstms & Trust Corp Ltd v Zimbabwe Development Corp S-5-00
D A Machingura, for the applicant
J C Andersen SC, for the respondent
Page 306 of 2001 (2) ZLR 305 (H)
SMITH J: This is an application for summary judgment. In August 1999, the applicant issued summons, claiming US$16 250 from the respondent. In her summons she made the following allegations. On 4 June 1998, the parties entered into a partly written and partly oral agreement of consultancy. A copy of the written part of the agreement, which was typed on the letterhead of the applicant's business, Joyland Associates, was annexed to the summons. The agreement, which was not signed, specified a salary of US$2 500 a month, the period of the consultancy, which was 1 December 1997 to 31 May 1999, and that no "company perks" were offered. She claimed that the respondent had failed to pay her the salary due for the period 30 November 1998 to 31 May 1999. The respondent opposed the applicant's claim. It agreed that the parties had entered into a consultancy agreement, but claimed that the agreement was entirely oral and not partly written.
Each party had submitted a draft proposed agreement to the other but neither had accepted the proposals of the other. The respondent, in its opposing plea, set out what it alleged were the terms of the oral agreement and alleged that she failed to complete all the tasks assigned to her. The tasks that were allegedly not performed adequately were listed. As the respondent had had to engage other personnel to complete some of the tasks, and do others that had been assigned to the applicant, the latter was not entitled to the fees claimed.
The respondent also filed a counter-claim for the return of the motor vehicle which the respondent had provided for use by the applicant during the consultancy. The response by the applicant was that she had been expressly authorised by the respondent to retain the vehicle pending payment of the fees due to her.
In her founding affidavit, the applicant claimed that the respondent had entered appearance to defend purely for the purposes of delay and that it did not have a bona fide defence to her claim. In support of her claim, she annexed to her affidavit a letter dated 4 June 1999 in which the respondent agreed to forward the full consultancy fees due to her by the end of the week commencing 7 June 1999. The respondent opposed the application for summary judgment, denying that it had entered appearance to defend purely for the purposes of delay and that it had no bona fide defence. It alleged that the agreement between the parties was wholly oral, the terms of which are set out in the respondent's plea to the summons. It admitted that it had not paid the applicant since November 1998 and said that that was because the applicant had breached the terms of the agreement by way of failure to perform or complete the tasks agreed. As regards the letter dated 4 June 1999, the respondent said that the applicant's legal practitioners wrote directly to it, and not to its legal practitioners in Harare, demanding various payments,
Page 307 of 2001 (2) ZLR 305 (H)
threatening to sue and demanding a response within two days. The respondent believed that the applicant had completed all her tasks successfully and was unaware that the applicant had continued to retain possession of and to use, the motor vehicle, even though the consultancy agreement had terminated. At no stage was it agreed that the applicant

could retain the motor vehicle and use it pending payment of the fees. The respondent is informed and believes that the applicant is using the vehicle constantly and regularly.
Mr Machingura submitted that the principles applicable in an application for summary judgment are well established. See Nedlaw Investments & Trust Corporation Ltd v Zimbabwe Development Corporation S-5-2000. The respondent acknowledged its indebtedness to the applicant and unconditionally undertook to pay her the fees due. The letter of demand from the applicant's legal practitioners can hardly be regarded as a threat which induced the undertaking to pay.
Mr Andersen argued that summary judgment is an extraordinary remedy that is only granted where the applicant can show that there is not even a mere possibility of success in the defence raised, with no triable issue and no possibility that an injustice may be done. See Jena v Nechipote 1984 (1) ZLR 29 (S). He pointed out the deficiencies in the founding affidavit: the applicant failed to set out her version of the terms of the consultancy agreement; who was the person who represented the respondent; what was required of her; the standard of her performance; details of her version of the arrangements for her to keep the motor vehicle. These issues, which arise from the pleadings, demonstrate the falsity of her allegations that the respondent does not dispute the fact that payment is due and that there is absolutely no indication as to why, and on what basis, funds which had been promised had not been released to her. The letter of 4 June 1999 was overtaken by events. The appellant's credibility is very much in issue, having regard to her failure to provide any supporting evidence to substantiate the averment that the unsigned document attached to her founding affidavit formed the basis of the consultancy agreement. The allegations by the applicant in her founding affidavit are bald statements which are lacking in detail. The conflicts of fact arising from the pleadings cannot possibly be resolved in her favour. They raise triable issues, with at least a possibility of success on the part of the respondent. Mr Andersen also pointed to the lack of zeal on the part of the applicant in pressing her claim. Summons was filed in August 1999 and the respondent's plea and claim in reconvention were filed in December 1999. The response from the applicant was filed on 9 February 2000. Then the respondent requested particulars in March 2000 which the applicant failed to provide. This application for summary judgment was then filed in August 2000, some six months after the

pleadings closed. After the respondent's opposing affidavit was filed in September 2000, the applicant did not file an answering affidavit. Accordingly, those issues that were not denied are taken to have been admitted.
Mr Andersen submitted that the delays on the part of the applicant, her refusal to provide the particulars requested or to respond in any way to the request, and the bald statements in her affidavits all point to an abuse of the legal process. Accordingly, he moved that the application be dismissed with costs on the higher scale.
After hearing counsel, I dismissed the application with costs on the legal practitioner and client scale. I intimated that the reasons for such order would be handed down later. These are they.
In Jena's case supra at p 30, Gubbay JA (as he then was) said:
"All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of his success', 'he has a

plausible case'; 'there is a triable issue'; or, 'there is a reasonable possibility that an injustice may be done if summary judgment is granted'. These tests have been laid down in many cases …"

It is obvious that the respondent has, in the papers that it has filed, raised a number of triable issues. Furthermore, as pointed out by Mr Andersen, the allegations by the application in the papers she has filed are noteworthy for their brevity and the lack of detail. The applicant's claim is based on the consultancy agreement between the parties. In the summons she issued, the applicant alleged that the agreement was partly written and partly oral, yet in her founding affidavit she said:

"Very simply, the fact is that the respondents (sic) engaged me as a Consultant. A copy of the agreement is annexed marked 'A'."

The annexed agreement is on the letterhead of her business but it is not signed by either party. She does not explain why it has not been signed. She then goes on to say, in her founding affidavit:

"It is not as if the respondents (sic) dispute the fact that payment is due to me at all."

She supports this statement by annexing a copy of the letter dated 4 June 1999. However, the plea entered by the respondent to her summons establishes beyond any shadow of a doubt that the respondent does dispute the fact that any payment is due to her. The case made by the applicant in her papers is completely lacking in detail. Furthermore, when the respondent filed its plea in opposition, setting out the reasons why it considered that payment was not due to the applicant, she did not file an answering affidavit.

As McNally JA said in Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors 1993 (2) ZLR 121 (S) at 127F:

Page 309 of 2001 (2) ZLR 305 (H)

"The simple rule of law is that what is not denied in affidavits must be taken to be admitted. Therefore, Customs have in effect conceded that they were asked by Fawcetts whether all was well."

Therefore, the applicant must be taken to have conceded the validity of the allegations made by the respondent in its opposing plea.

In De Aguiar v De Almeida 1989 (2) ZLR 165 (H), which was an application for summary judgment, the plaintiff had filed a lengthy affidavit in which he anticipated the defendant's possible defence and commented thereon. He also attached documents which he alleged showed that there was no substance in the defence. The defendant's legal practitioner attacked the nature of the affidavit and urged that it should be struck out as it was it too voluminous and adduced evidence. Muchechetere J (as he then was) at p 168C-E said:

"However, I agree with Mr Denbury's submission that the Rules involve not only the verification of the plaintiff's cause of action, but also a belief that there is no bona fide defence to the action. I also agree that it is now accepted that a copy of the contract upon which the action is based can be attached to the plaintiff's affidavit and further that in Zimbabwe it is also permissible to attach other documents, such as letters, to the affidavit which, although evidential, prove or disprove the defendant's bona fides. In this connection see Beresford Land Plan (Pvt) Ltd v Urquhart 1975 (1) RLR 260 at 268-269; 1975 (3) SA 619 (RA) at 624, where MacDonald ACJ said:

'In a large number of cases, it would indeed be sufficient for the plaintiff to do no more than refer to the facts alleged in the declaration or particulars of to the summons (this will

often be the position where the declaration or particulars to the summons have been amplified by further particulars). But it is possible to think of cases where it is most desirable for the plaintiff, in his pursuit of summary judgment, to swear to the truth of facts other than those alleged in the declaration or particulars of summons. A simple example which occurs commonly in practice will illustrate this. The plaintiff in his declaration may, for example, rely upon a written contract and may or may not annex a copy of it to his declaration. Whether or not he does so, he is unquestionably entitled, in verifying his cause of action, to annex to his affidavit an original contract.
There is certainly nothing in the wording of the rule which suggests that the best method of verifying is prohibited on pain of having the annexure struck out with costs. Nor is it possible to think of any reason why the rule should contain such a prohibition'."
That is what should have been done in this case. The applicant, in her founding affidavit, should have referred to the defences raised by the respondent in her opposing plea and endeavoured to establish that there was no merit or substance in them. That was not done. It is therefore not possible to uphold the contention of the applicant that the respondent does not have a bona fide defence.
In Nedlaw's case supra at p 6 of the cyclostyled judgment, Ebrahim JA said:
"The principles applicable in a summary judgment application have been well documented. The quintessence of this drastic remedy is that a plaintiff, whose belief it is that the
Page 310 of 2001 (2) ZLR 305 (H)
defendant's defence is not bona fide and entered solely for dilatory purposes, should be granted immediate relief without the expense and delay of a trial."
Having regard to the fact that the summons was issued in August 1999 and the applicant appears to have done very little to expedite the matter and have it brought to trial, she can hardly accuse the respondent of filing its opposition solely for dilatory purposes.
I am satisfied that there is a reasonable possibility that an injustice will be done if summary judgment is granted — see Dube v Medical Services International Ltd 1989 (2) ZLR 280 (S).
As regards costs, I agree that this application does constitute an abuse of the legal process. The claims made by the applicant that the respondent does not dispute that payment is due to her is absolutely incredible in the circumstances.
If the applicant wishes to pursue her claim, I would recommend that she provides the further particulars requested by the respondent as soon as possible and then apply for the holding of a pre-trial conference.
Dube, Manikai & Hwacha, plaintiff's legal practitioners
B W Kahari, defendant's legal practitioners
MASHAKADA v MASTER OF THE HIGH COURT & ANOR
2001 (2) ZLR 311 (H)
Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Civil application
Date: 4 September and 17 October 2001
Judgment Number: HH-182-01

Succession — Wills Act [Chapter 6:06] — s 8(5) — recognition of informally-executed document as will — retrospective effect of provision
Succession — family arrangement — agreement that estate should be distributed in accordance with invalid will — validity of agreement
In 1995 and 1998, the applicant's father executed two documents which he intended to be his will, and lodged them with his bank. He died in June 1998. In September of that year, the Master of the High Court correctly refused to accept the documents as a will on the ground that they were signed only by the deceased, and that he had not even initialled the individual pages. The deceased's widow and adult children, beneficiaries under the purported will, then agreed in writing that the deceased estate should be according to the "will". Subsequent discord between the beneficiaries led most of them to resile from this agreement so the applicant, a son of the deceased, applied to the High Court for an order that the "will" should form the basis for the distribution of the deceased estate.
Held, that in terms of s 8(5) of the Wills Act [Chapter 6:06], as amended by Act No. 21 of 1998 (which came into force after the Master had refused to accept the documents), the documents could have been accepted as a will because the deceased undoubtedly intended them to be his will and there was not the least suspicion of any impropriety; the question of forgery or falsification or fraud or peculation did not arise at all. The amendment applied to all wills, whether made before or after the Act was amended, so the two documents in this case could therefore be recognised as the deceased's will for the purposes of the Administration of Estates Act.
Held, further, that the agreement between the beneficiaries was legal: they were adopting the contents of the deceased's invalid will as the terms of their own contract, and were not seeking to validate or seek the validation of the "will".
Cases cited:
Janda v Janda 1995 (1) ZLR 375 (S)
Logue & Anor v The Master & Ors 1995 (1) SA 199 (N)
Philip & Anor v The Master & Ors 1980 (2) SA 934 (D)
Smee v Bryer (1848) 6 Moore PC 404; 13 ER 739
Legislation considered:
Wills Act [Chapter 6:06], s 8(5)
Page 312 of 2001 (2) ZLR 311 (H)
K S Rensva, for the applicant
M Mandikumba, for the second respondent
CHINHENGO J: This application is concerned with the estate of the late Alfred Pirimuka Rice (hereinafter called "the deceased"). He died on 21 June 1998 at Beitbridge. He was survived by his wife (hereinafter referred to as "the widow") who subsequently died on 15 August 2000 and six children, one grown-up son and five grown-up daughters. The applicant is the son. He described himself as "the only legitimate son" of the deceased. The second respondent is one of the deceased's daughters who was, on 10 November 1998, appointed the executrix dative of the estate. I will refer to the widow and the children as "the beneficiaries" of the estate and to the daughters as the "applicant's sisters" as the context requires.
It appears that the deceased was a man of some means. From the documents which he executed in the belief that he was executing a will and from the Final Liquidation and Distribution Account lodged with the first respondent by the second respondent, he

owned a house at stand No. 182 Impala Drive, Beitbridge, a building at stand No. 989 Beitbridge where he operated a bottle store and a grocery shop. He had two motor vehicles, an Isuzu KB 250 truck and a non-runner Datsun pick-up truck, cash in the bank amounting to some $153 000 and many valuable items of household goods and effects. The applicant said in his answering affidavit that the second respondent had in fact undervalued the assets in the estate.

Before he died the deceased executed, on 14 November 1995, a document believing that it would be his last will and testament. He amended or supplemented it on 19 January 1998 by another document. He lodged the two documents in sealed envelopes with his bankers, Barclays Bank, on 17 November 1995 and 19 January 1998 respectively. On 15 August 1998, which obviously was after his death, the two sealed envelopes were handed over to the beneficiaries all in the presence of each other. They were opened and the documents were read out. The beneficiaries lodged the documents with the first respondent on 8 August 1998. The first respondent declined to accept the documents for want of compliance with s 8(1) of the Wills Act [Chapter 6:06]. The beneficiaries, however, agreed with each other that the estate was to be distributed as directed in the documents. They thus agreed to adopt the documents as the deceased's "Will" and to give effect to the directions therein.

I have been careful to refer to the deceased's purported will as a document, because that is precisely what it was. It was not a will properly executed in terms of the Wills Act ("the Act"). The documents were signed by the deceased only. They were not witnessed. The deceased did not himself even

initial the individual pages of those documents. The documents clearly fall foul of the provisions of s 8(1) of the Act.

Pursuant to their agreement, which it would appear they entered into in September of 1998, five of the beneficiaries filed with the first respondent a joint affidavit which reads:

"We the undersigned would like our late father's estate to be distributed according to his written will."

The widow and one of the daughters, who were not present when the other beneficiaries signed the affidavit, deposed to similar affidavits and these were also filed with the first respondent. The widow then died on 15 August 2000 before the estate was finally wound up.

On 4 October 2000, the applicant's sisters, all of them, notified the first respondent that they no longer considered themselves bound by the agreement of September 1998. They filed another affidavit which reads:

"We the undersigned being beneficiaries to the Estate of the late A.P. Rice wish to rescind the signatures we made earlier (1998) agreeing to use the will of our late father as a distribution plan since it had been declared as invalid by the Master of the High Court. We now wish to have the distribution done, according to the law of the country that governs such estates. At the time of signing, soon after our father's death we were ignorant of a lot of things and inheritance laws of the country and what they meant. We should stand by the court's ruling that the will is invalid."

It is quite evident that the affidavits were drawn up by lay persons. What the applicant's sisters meant in their affidavit was that they were resiling from the agreement of September 1998, hence the use of the words "rescind the signatures made earlier". There

was no court ruling that the deceased's "Will" was invalid. The only pronouncement made at that time on the validity or otherwise of the "Will" was that of the first respondent who had refused to accept it as valid. Then, in terms of s 11 of the Administration of Estates Act [Chapter 6:01], all questions as to the validity and legal effect of every deed purporting to be a will was reserved and remained for the decision of the court. The agreement itself could not, therefore, have sought or resulted in the deceased's will being declared valid. I shall indicate how this could not have happened later on in this judgment.

All that I have recounted so far is common cause. The dispute if I understand it well, which I think I do, between the applicant and his sisters and, in particular, between the applicant and the second respondent is whether the "Will" can be declared valid by this court or, if it cannot be so declared, whether it can nonetheless form the basis of the distribution of the estate pursuant to the beneficiaries' agreement.

The applicant averred in his affidavit that as from the time that his mother and sisters agreed with him that the estate would be distributed in terms of the

deceased's "Will" he sat back in the belief that the second respondent would act in terms of that "Will" and draw up a distribution account in terms thereof. He averred that on 5 October 2000 he went to the offices of the first respondent and discovered that the first respondent had not accepted the "Will" as valid. On 23 October 2000, he had again gone back to the first respondent's offices and discovered that the second respondent had lodged a final liquidation and distribution account in total disregard of the provisions of the "Will". He averred that it is then that he discovered that his sisters had filed the affidavit notifying the first respondent that they were no longer bound by the agreement of September 1998.

The applicant averred that the two documents written by the deceased, as they were, were intended to be his will. He had written them in his own handwriting, placed them in sealed envelopes and lodged them with his bankers. The applicant averred that since the Wills Act was designed to reduce or eliminate the possibility of fraud, there was no possibility whatsoever that a fraud could have been perpetrated in this case. That the deceased had executed the "Will" was not disputed by any of the parties. So even though the letter of the law was not complied with in the making of the "Will", the two documents should nonetheless be accepted as his will. He pointed out that his sisters did not dispute that their father had made the "Will" or that he had done so freely and voluntarily. It was for these reasons, therefore, that the applicant sought an order that:

" 1. The two documents executed by the deceased on 14 November 1995 and 19 January 1998, forming Annexures 'A' and 'C' to the applicant's founding affidavit should be deemed to be the deceased's will for the purpose of the Administration of Estates Act.

2. The second respondent is hereby directed to comply with the provisions of the Annexures 'A' and 'C' in drawing up the Estate's Final Liquidation and Distribution Account."

It is necessary to analyse the substance of the relief sought by the applicant. Though in the body of his affidavit and elsewhere he used the terminology that the "'Will' should be declared to be valid", which terminology is liable to confuse the substance of the relief which he sought, a proper understanding of his draft order reveals that he is asking the

court to "deem" as opposed to "declare as valid" the deceased's "Will" for the purpose of the Administration of Estates Act. The difference between the two is easier to appreciate than to articulate. My understanding of the draft order is that the applicant prays to the court that it declare, not that the "Will" is valid, but that it shall form the basis for the distribution of the estate, firstly because it expresses the intention of the deceased as accepted by all the beneficiaries and, secondly, because the beneficiaries agreed that it shall be so. If I am wrong in my understanding of the relief sought by the applicant or in drawing out the

difference between "deem" and "declare" in context, that error, I think, would be irrelevant to the decision which I will reach in this matter. It seems to me that on a careful reading of the second respondent's opposing papers, she also appreciated the substance of the relief sought by the applicant in the matter I did.
The second respondent did not take issue with any of the matters which I have adjudged to be common cause. Materially, she confirmed the agreement entered into by the deceased's beneficiaries. She stated in para 2.9 of her affidavit that:
"In or about September 1998, the widow, Tendai Mugozhi, Susan Kambarami, Catherine Ndebele, Tadziripa Mashakada, the applicant and myself entered into a contract that despite first respondent's ruling on the validity of the deceased's will, we wanted the distribution to go according to the deceased's wishes as stated in the documents which he had executed. (I beg leave to refer to annexures 'D'. 'E' and 'F' to applicant's supporting affidavit."
She confirmed that on 4 October 2000, she and her sisters "withdrew" from the contract and that she as the executrix dative proceeded to wind up the estate on an intestate basis until she received the court application in this case. She disputed that the applicant only learnt on 5 October 2000 that the first respondent had not accepted the "Will" as valid. She averred that the applicant had known about this as early as March 2000, when she had not only told him about it but when she had also written to him in a letter, which is Annexure 'B' to her affidavit. It seems to me from a reading of this Annexure 'B' and the applicant's answering affidavit that the applicant knew as at March 2000 that the first respondent had refused to accepted the "Will" as valid.

The second respondent explained why she and the other girls withdrew from the contract or agreement of September 1998. She averred that the contract was partly written and partly verbal; that it was an express or, alternatively, an implied term of the contract that she would wind up the estate without undue interference from any of the beneficiaries; that it was an express or, alternatively, an implied term of the contract that "the residue of the property of the deceased will be properly distributed in accordance with the will(s) of the deceased and in accordance with the distribution account approved by the first respondent". She averred that the applicant breached the express or implied terms of the contract by interfering with the proper winding up of the estate and by refusing to await the proper distribution of the estate assets before he could help himself to any of them. She gave the details of the applicant's alleged breach of the terms of the contract that the applicant forcibly took from the widow a motor vehicle which all the beneficiaries had agreed the widow would use; that he wrote threatening and

abusive letters to the widow (such as Annexure 'C' to second respondent's affidavit); that he threatened to cancel the lease of the shop, thereby endangering the only source of income for the estate; that he behaved towards the other beneficiaries in a manner likely to cause a breach of the peace; and that he threatened to take sole occupation of the deceased and the widow's matrimonial home. The second respondent averred that in desperation and frustration she wrote a letter to the applicant to express her and her sisters' concern at applicant's behaviour. The second respondent stated that when the applicant breached the contract the other beneficiaries considered that they were no longer bound by it and that, the contract having thus fallen away, the deceased's estate was to be wound up in terms of the law of intestate succession. She stated that as the deceased's "Will" was in any case invalid, his estate could only have been properly wound up without reference to it. She also alleged that there were many "serious disputes of fact" arising in this application such that this application should never have been instituted by way of motion. She did not however outline in her affidavit the disputes of fact which she alleged.

In the answering affidavit, the applicant again confused the substance of the relief he was seeking by stating in para 11 that:

"My understanding was that, from the time the memoranda accepting the will were signed, then the will was accepted. I, in my ignorance, verily believed that our signatures made up for the minor imperfections that had made the first respondent not to accept it. I therefore verily believed the will would be adopted in distributing the estate assets."

He was also quite emphatic that the court should disregard what he called the will's cosmetic and minor imperfections and declare it to be valid.

It is appropriate at this stage to refer to the first respondent's report which he filed as required by r 248 of the Rules of this court. He stated that he did not accept the "Will" because it did not comply with s 8(1)(c) and (d) of the Act. He stated that on learning that the "Will" had not been accepted, the beneficiaries entered into an agreement to uphold and implement it and that later they had, with the exception of the applicant, had a change of heart and wanted the estate distributed according to the law governing intestate succession. The first respondent, who accepted to be bound by the decision of the court, however said:

"… in the light of the affidavit from Barclays Bank included in the court papers confirming that the deceased deposited the Will himself, that the Honourable court must now decide whether the omission on the part of the testator to have his signature on the Will witnessed as required by the Act would render same invalid or whether circumstances dictate that same is valid and that I must accept it."

The first respondent was quite clearly looking to the court declaring the "Will" to be either valid or invalid much in the same way as the applicant.

In answering further to the second respondent's opposing affidavits, the applicant denied that the contract was partly written and partly verbal. He averred that the contract was in writing only and that it contained no express or implied terms as mentioned by the second respondent. He said that at the time that they entered into the contract they could not have anticipated any undue interference in the administration of the estate by any of them so as to include non-interference as an express or implied term of the contract. He also took issue with the fact that whereas the "Will" dealt with the assets in the estate as they were,

the second respondent intended to distribute only the residue of the estate. To him, the contract did not imply such an understanding.
The applicant flatly denied that he breached the contract in any manner whatsoever, because no terms that could be breached were part of the contract and because in any case he did not conduct himself in the manner alleged by the second respondent. He however admitted threatening to cancel the lease on the shop but he explained that he had had good reason to do so and that when the lessor's legal practitioners protested he kept his peace. In any case, he said, the second respondent had other remedies such as reporting him to the police or interdicting him if she thought that he was unduly interfering with the administration of the estate. She had not taken advantage of these other remedies.
From the foregoing I make the following findings:

1. that the deceased executed a will which was not valid;
2. that the beneficiaries became aware of the invalidity of the deceased's will when the first respondent refused to accept it as a valid will.
3. that the beneficiaries entered into a contract in terms of which they agreed that the deceased's assets should be distributed in terms of the invalid will or on the basis thereof.
4. that after the death of one of the parties to the agreement, their mother, the applicant's sisters sought to resile from the agreement alleging that the applicant had breached its terms. In this regard I may point out that the applicant's sisters' reasons for resiling from the agreement are not at all clear. In their affidavit to the first respondent, they gave their reason as ignorance of the laws of succession, and in the second respondent's opposing affidavit the reason is that the applicant had breached the terms of the contract. I also do not think that it is necessary to make a firm finding as to whether any terms of the contract were expressed or implied. Non-interference in the administration of the estate is implied by law, for example.
5. that without advising the applicant that they had withdrawn from the contract (and there is no evidence to show that they informed the

applicant about their new posture) the second respondent, taking advantage of her position as the executrix, proceeded to wind up the deceased's estate without regard to the agreement and on the basis of intestate succession. I must in this regard note that the second respondent, who was not appointed as executor in their late mother's estate, wrongly purported to deal with her estate together with that of their father.

It seems to me that two issues arise for decision in this application. The first is whether the "Will" is valid or whether it can be deemed to be valid for the purposes of the Administration of Estates Act, that being the relief which I think the applicant seeks in terms of the first paragraph of his draft order. The second issue, which is raised more directly by the second respondent based on her understanding of the relief sought by the applicant and which is also indirectly raised by the applicant in the second paragraph of the draft order, is whether the contract entered into by the beneficiaries should be enforced.
The applicant has clearly conceived that the "Will's" validity is founded on the contract which made good the imperfections, cosmetic and minor as he finds them to be, of the

contract. This raises the ancillary question as to whether an invalid will can be validated by the agreement of all the beneficiaries.

To deal with the applicant's first paragraph of the relief sought, it must be recalled that the Act in the relevant part of s 8 provided, before its amendment by the Wills Amendment Act, 1998 (No. 21 of 1998) which came into force on 15 January 1999, that:

" (1) Subject to subsection (3), a will shall not be valid unless —

(a) it is in writing; and

(b) the testator, or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing on the page concerned; and

(c) each signature referred to in paragraph (b) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time; and

(d) each competent witness either —

(i) signs each page of the will; or

(ii) acknowledges his signature on each page of the will;

in the presence of the testator and of the other witness."

This section is clear and needs no explanation.

The Supreme Court had occasion to deal with s 8(1) of the Act in Janda v Janda 1995 (1) ZLR 375 (S). Gubbay CJ (as he then was) began his judgment by stating the following at p 376:

"This is a distressing appeal.

In accordance with the recognised tendency to uphold a will rather than declare it invalid

for want of execution, this court feels a strong inclination to sustain the validity of the will in dispute before it. It is a will to which there is not the slightest suspicion of any impropriety. It was made bona fide by the testator, as he believed, pursuant to law.

But under the Wills Act 1987, the legislature has prescribed certain formalities pertaining to the making of a will of this type which are necessary to be complied with. The manifest purpose behind these formalities is to eliminate, as far as possible, the perpetration of fraud and speculation; for when the validity of his will is challenged, the testator will have died and the witnesses may no longer be alive to reveal what occurred when the will was executed. This legislative policy overrides the equities of any particular case. See The Leprosy Mission & Ors v Master of the Supreme Court & Anor NO 1972 (4) SA 173 (C) at 185 A; Mellvill & Anor NNO v The Master & Ors 1984 (3) SA 387 (C) at 395H-396B. It is not, therefore, for this court to strain the language of these peremptory formalities in order to accommodate what is believed to be a genuine case for relief" (emphasis is my own).

In Janda's case supra, the only failure to comply with the formalities prescribed by s 8 of the Act was that the testator's witnesses had, instead of signing each page of the will, only initialed some of the pages. The Supreme Court declared that the will was invalid for failure to comply with s 8 of the Wills Act. The court stated at 378 A that:

"The intendment of the lawmaker that it will not suffice for a witness to merely initial each page of a will, is underscored by the following features"

which the learned Chief Justice then outlined.

It has been said that hard cases make bad law. The decision of the Supreme Court in Janda's case supra, was a hard case which led to the amendment of the Wills Act. The learned Chief Justice emphasised the point he was making at 379C-D where he stated:

"Be this as it may be, for the reasons aforegoing, I am compelled to conclude that the testator's will was correctly declared to be invalid due to the witnesses having affixed their initials to the first and second pages. I do so with much regret because the effect of this judgment is to defeat the real intention of the testator. But intention is not the criterion. What had to be determined objectively was whether the formalities prescribed by the Act, in order to give legal and binding effect to that intention, had been complied with. They had not" (emphasis added).

In the present case, as in Janda's case supra, "there is not the least suspicion of any impropriety". The element of forgery or falsification or fraud or speculation does not arise at all. The deceased's "Will" however did not at all attempt to comply with s 8 of the Act. It was not witnessed. It was not signed on each page even by the testator himself. It simply was not a will executed in terms of the law. I am in agreement with the sentiments expressed by Gubbay CJ in Janda's case supra. The rationale of those sentiments is that this court cannot, in construing an Act of Parliament, stretch the simple meaning of words or be so astute as to place a special construction on particular occasions for the purpose of avoiding the rule as prescribed by the

legislature where its application may seem to defeat or frustrate the testator's intention in the particular case. As stated in Smee v Bryer (1848) 6 Moore PC 404 at 411-2; 13 ER 739 at 742:

"We must act according to the rule as expressed by the Legislature, founded on the principle, that it is more important to maintain the integrity of the general rule, than to give effect to a particular will, at the risk of acting contrary to the intention of the Legislature and depriving the public of benefit which was intended to be produced by the generality of the rule."

(Smee's case was cited with approval in Philip & Anor v The Master & Ors 1980 (2) SA 934 (D) at 936).

On these authorities, I am quite satisfied that there would have been no possibility that the deceased's "Will" would have been declared valid as the law stood then. The law which was correctly expounded by the then Chief Justice in Janda's case provided the legislature with the opportunity to revisit it. They introduced the Wills Amendment Act, 1998 which amended subs (1) of s 8 of the Act and inserted new provisions, ss (5) and (6) which read:

"(5) Where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will … even though it does not comply with the formalities for —

(a) the execution of wills referred to in subsection (1) or (2); or

(b) the amendment of wills referred to in subsection (2), (3) or (4) of section nine.

(6) Any person who is aggrieved by a decision of the Master may appeal to an appropriate court within thirty days of being notified of the decision of the Master."

This amendment was no doubt occasioned by the decision in Janda's case supra. In South Africa, an amendment to similar effect was made by the Law of Succession Amendment Act 43 of 1992 and was given the stamp of judicial approval in Logue & Anor v The Master & Ors 1995 (1) SA 199 (N) where the learned Booysen J said at 202E-F that:

"It is unfortunately so that the peremptory provisions of s 2(1) could have led to a spurious document being given effect to as if it were the genuine will of the deceased because it, on the face of it, complied with all the formalities, whereas a document established to have been a genuine will of the deceased in the sense that it expressed his intention, would be held to be invalid for want of compliance with the formalities. In reality, the requirement of the will being witnessed constituted little guarantee that the will was not a fraudulent one. The presence of witnesses is often no guarantee against fraud."

Much the same can be said of the peremptory provisions of s 8 of the Act before its amendment. In my view the Wills Amendment Act, 1998, applies to all wills whether made before or after the amendment. The second respondent refused to accept the deceased's will before the amendment came into force. He was correct in his view of the law as it then was. But, as I must

emphasise, the amendment altered the position so that now if the maker's intention is clear that he intended the document which he wrote to be his will, the Master may accept it as a will (and not as a valid will) for the purposes of the Administration of Estates Act. The deceased's will is before me and there would be no purpose served by remitting it to the first respondent to make a finding which I am also able to make: the facts are so clear that the deceased intended his documents to be his will. Those documents can therefore be recognised as his will for the purposes of the Administration of Estates Act. But for the Wills Amendment Act, the deceased's documents could not have been recognised as his will for any purpose. In the result I find for the applicant in respect of the relief which he sought in terms of para 1 of his draft order.

However, assuming that I am wrong in the above conclusion, I will briefly deal with the second issue which I have said arises in this application. That issue is really res nova. The beneficiaries agreed to be bound by the provisions of their deceased father's invalid will. Thus they entered into a contract that their late father's estate would be distributed in terms of the documents which he had signed believing that he was making a valid will. Such an agreement cannot in my view be vitiated on the basis of illegality — the argument being that as the law then was (i.e. before the Wills Amendment Act, 1998), it was peremptory that an invalid will was just that and not recognisable under any circumstances. I think that the proper construction to be placed on the beneficiaries' contract in this case is that they merely adopted, for the purpose of their contract, the contents of their father's invalid will as the terms of their own contract. They were not at all attempting to validate or seek validation of the will by entering into the contract. Nor could they do so. This seems to me to be a reasonable construction of the contract bearing in mind that the "Will" constituted the beneficiaries into legatees and therefore, by agreeing on the "Will's" provisions, each of the beneficiaries was accepting what, had the "Will" been valid, would have been his or her legacy. They contracted on that basis. There would be nothing wrong with recognising such a contract.

The second respondent gave conflicting reasons for the withdrawal by her and her sisters from the contract. These reasons were contained in the document lodged with the first respondent at the time of withdrawal and in the second respondent's opposing affidavit. I am not persuaded that her reasons should be accepted. There is therefore no real good reason why they resiled from the contract which they had freely entered into and in the

full knowledge that their father's "Will" was invalid. I am persuaded to this conclusion also by the fact that not only did the applicant's sisters not notify the applicant about their withdrawal but because they also sought to withdraw
Page 322 of 2001 (2) ZLR 311 (H)
from the contract when one of the parties to it, their mother, had died. For this last reason alone, I think that their withdrawal cannot be sanctioned by the court. I therefore, find no reason why the contract should not be enforced.
Before I conclude, I must state that it is necessary for an executor to be appointed in the mother's estate and that that estate be dealt with separately from that of the deceased.
The applicant did not pray for costs either in his affidavits or in the heads of argument filed on his behalf. The second respondent however prayed for costs in the event that the application was dismissed. I think in all fairness the costs must follow the cause.
In the result, an order in terms of the draft order is hereby issued. The second respondent shall pay the costs of suit.
Tizirai-Chapwanya & Partners, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, second respondent's legal practitioners
S v CURLE
2001 (2) ZLR 323 (H)
Division: High Court, Harare
Judges: Blackie J & Hungwe J
Subject Area: Criminal review
Date: 17 October 2001
Judgment Number: HH-183-01

Criminal procedure — review — review at instance of accused — material deficiency in record — effect
The accused had been convicted and sentenced in the regional court on two counts of sodomy. He brought an application for review before the hearing of the appeal he had noted. A number of grounds of review were raised, one of which was the failure by the State to provide a completed and certified copy of the record for the purposes of the appeal. Evidence and some documents, including the medical report, were missing from the record. These documents either did not exist or were not recoverable. The missing documents reflected on the credibility of the complainant and other State witnesses. The evidence and submissions in mitigation and aggravation were also missing.
Held, that the accused was entitled to have has case considered on review or appeal and for that purpose was entitled to a copy of the record that is certified as correct. If he did not receive that, he would be frustrated in his basic right of appeal or review. The absence of the evidence and addresses meant that there was a material deficiency in the record, and the effect of such a deficiency was that the proceedings must be set aside. The accused would otherwise be seriously prejudiced through no fault of his own.
Cases cited:
S v Collier 1976 (2) SA 378 (C)
S v Manera 1989 (3) ZLR 92 (S)
S v Marais 1966 (2) SA 514 (T)
R v Neto 1965 RLR 656 (A)
Chipato, for the accused

M Nemadire, for the State
BLACKIE J: The accused was convicted in the court of the regional magistrate of two counts of sodomy and sentenced to 10 years' imprisonment, with two years suspended on condition of good behaviour. The accused has noted an appeal to this court against his conviction and the sentence imposed on him.
This is an application for a review of the proceedings in the regional court prior to the hearing of the appeal noted by the accused. The application for review is brought in terms of s 27(1)(c) of the High Court Act [Chapter 7:06],

("the Act") on the ground of gross irregularity in the proceedings and decision of the convicting court.
The application raises two points in limine.
The first point concerns the delay in filing this application. The accused was represented at his trial. He was convicted on 20 January 2000 and sentenced the next day. This application of review was filed with the High Court on 30 April 2001.
The reasons given for the delay in filing this application are a change of practitioners by the accused after his conviction, the need for the very long record of these proceedings to be transcribed and the discovery of the main ground for this review only after the record had been prepared for the appeal.
The second point concerns the lawfulness or propriety of proceeding with this review after the accused has noted his appeal and before that appeal has been heard.
The State does not challenge the right of the accused to bring this application for review after the delay that has been set out and supports his application to have this matter heard on review before (and possibly instead of) his appeal. Mr Nemadire, who appears for the State, has carefully considered and presented the concessions made by the State. He further concedes that there will be no prejudice to the State if the case proceeds as proposed.
I am satisfied that the concessions made by the State have been correctly made and that the court should act on them.
The accused raises a number of allegations of gross irregularity in the proceedings under review. For the purposes of the review, it is only necessary to deal with one of the grounds raised. The absence of any comment on the other allegations made by the accused does not mean that they are without merit. What has happened here is that the one ground is decisive of the matter.
The ground that is decisive in this matter is the failure of the State to provide a completed and certified copy of the record for the purposes of appeal.
The State concedes that the record is incomplete. The State further concedes that the evidence and documents missing from the record either do not exist or are not recoverable.
The documents that do not exist are, firstly, police reports on the allegations of sodomy made against the accused by the complainant and that were said to have led to the consequent reports of medical examinations on the complainant, dated 19 February and 20 September 1999, for the purpose of establishing that the complainant had been sodomised and to corroborate his evidence of sodomy on him, and, secondly, the report of the medical examination said to have been conducted on the complainant on 19 February 1999 concerning any sign of sodomy having been committed on him.

The non-existence of the police reports reflects upon the credibility of the complainant and certain other of the State witnesses. The non-existence of the medical report is crucial. It formed an important part of the evidence of corroboration of the complainant's allegation against the accused. The trial magistrate appears to have confused what was a medical report dated 19 February 1999 concerning an allegation of assault on the complainant by the family of a State witness with what was said to be the medical report on the complainant concerning the allegations of sodomy on him by the accused.
The evidence missing from the record is the entire evidence and submissions in mitigation and aggravation. The absence of such evidence and addresses means that there is, in principle, a material deficiency in the record, more especially so where, as in this case, the accused is appealing against sentence.
" … all pleas of mitigation, where defending counsel outline the facts to the court, these pleas must form part of the record, and they must be transcribed by official shorthand writers and included in the record should the case subsequently come on appeal."
See R v Neto 1965 RLR 656 (A).
The effect of a material deficiency in the record is that the proceedings must be set aside. The accused is seriously prejudiced through no fault of his own. He is entitled to have his case considered on appeal or review and for that purpose he is entitled to a copy of the record certified as correct. If he does not receive that he is frustrated in his basic right of appeal or review. See S v Marais 1966 (2) SA 514 (T) at 516G-H and 517A-B; S v Manera 1989 (3) ZLR 92 (S) at 93.
In S v Collier 1976 (2) SA 378 (C) at 379, Burger J said:
"I am in respectful agreement with the practice that where the whole of the record or a very material part thereof has been lost prior to review or appeal being concluded, the proceedings should be set aside. In such cases, the court of appeal is clearly unable to consider the case" (emphasis added).
In this case, there is a material deficiency in the record. The State cannot rectify the deficiency. It has not been caused by any fault on the part of the accused. The conviction and sentence of the accused must be set aside. It is ordered accordingly.
HUNGWE J: I agree.

MWENEZI ELECTION PETITION
2001 (2) ZLR 326 (H)
Division: High Court, Harare
Judges: Makarau J
Subject Area: Election petition
Date: 19 October 2001
Judgment Number: HH-4-02

Elections — election petition — corrupt practice — proof beyond doubt necessary before election will be set aside on ground of corrupt practice
Elections — Electoral Act [Chapter 2:01] — s 105 — undue influence — what constitutes — purpose of undue influence narrowly defined in section — need for undue influence to be directed at particular person
Although the trial of an election petition cannot in itself result in a person being convicted of the offences which are grouped in Part XX of the Electoral Act [Chapter

2:01] under the heading of corrupt practices, the weight of evidence necessary to declare an election void by reason of a corrupt practice cannot be less than that required for a conviction of the offence after a criminal prosecution.
Section 105 of the Electoral Act [Chapter 2:01], which defines the offence of undue influence, is widely cast in that it prohibits every conceivable act of undue influence that might be brought to bear upon a person. It is narrowly cast, on the other hand, when defining the purpose and target of the undue influence. The influence must be directed at compelling or inducing a person to sign or refrain from signing a nomination paper, or compelling a person to vote or refrain from voting; or it must be brought to bear on a person on account of his having signed a nomination paper or having voted, or having refrained from doing so. Moreover, the influence must be directed at a particular person rather than the electorate at large; in other words, the intended target must be a particular person capable of being identified, not the general populace in a given area.
The petitioner, an unsuccessful candidate in a parliamentary election, sought to have the election set aside on account of undue influence on the part of the successful candidate and supporters of his party. This undue influence took the form of assaults and random acts of violence committed by supporters of the successful candidate's party and roadblocks mounted by them at which they would search for the petitioner's supporters. The petitioner called only three witnesses to support her allegations. Other witnesses she had subpoenaed refused to attend court, but the petitioner declined to have them brought to court by warrant simce she feared they would lie if compelled to testify.
Held, that the petitioner had not shown that the assaults, violence and roadblocks were directed at one or other of the objects prohibited by s 105 of the Electoral Act. She had not proved beyond reasonable doubt, therefore, that the successful candidate had been guilty of the offence of undue influence as defined in that section.
Page 327 of 2001 (2) ZLR 326 (H)
Held, further, that although s 138 of the Electoral Act [Chapter 2:02] gives the court wide powers to examine any witness who may assist in the determination of an election petition, the court may exercise its powers to secure the attendance of witnesses by warrant only where the party concerned has not expressed reluctance for the power to be used.
Cases cited:
De Villiers v Louw 1931 AD 241
Makamure v Mutongwizo & Ors 1998 (2) ZLR 154 (H)
Miss M Gwaunza, for petitioner
A Matika, for respondent
MAKARAU J: This is the judgment in the election petition of Lucia Masekesa of the Movement for Democratic Change ("MDC"), the petitioner, against the Member of Parliament for the Mwenezi Constituency, Isaiah Shumba, of the Zimbabwe African National Union (Patriotic Front), ("Zanu-PF"), the respondent.
The petition has been brought in terms of s 132 of the Electoral Act [Chapter 2.01] ("The Act"). The petitioner brings the petition in her capacity as one of the candidates in the general elections that were held in the constituency on 24 and 25 June 2000. In the election, the petitioner polled 1 881 votes against 22 219 cast for the respondent.
In the petition, the petitioner complained of certain corrupt and illegal practices on the part of the respondent and other named persons. The alleged corrupt practices include the

alleged confiscation of identity cards of members of her party, alleged widespread intimidation and random acts of violence within the constituency, the alleged barring of members of the MDC from voting at one polling station and the alleged barring of the MDC from holding campaign rallies in the constituency. As illegal practices, the petitioner complained that known Zanu-PF sympathisers who assisted illiterate voters without any supervision from neutral organisations manned many of the polling stations. She also alleged that at one polling station, the voters' roll arrived late and at some polling stations, the ultra-violet scanner was allegedly out of order. The petitioner also complained that she and other polling agents were not given adequate notice of the sealing of the ballot boxes and the subsequent transportation of the boxes to the counting venue.

On the basis of the above allegations, the petitioner prayed that the election of the respondent be declared void, and that she be declared the duly elected Member of Parliament for the constituency. The petitioner also prayed that the respondent be declared, for a period of five years from the date of the order, to be incapable of being registered as a voter and of holding any public

office in the country. In addition to praying for costs against the respondent on the higher scale, the petitioner concluded by praying for the order to be served upon the respondent, to be advertised in the Gazette and to be transmitted by the Registrar of the High Court to the Registrar-General of Elections.

The petition was opposed. In his opposing affidavit, the respondent took preliminary issue with certain procedural irregularities concerning the service of the petition. He also opposed the petition on the merits. I will mention at this stage that the procedural irregularities relating to the service of the petition were not taken in limine at the commencement of the trial nor at any time thereafter. I therefore take it that these preliminary issues were abandoned.

In support of her petition, the petitioner called three witnesses before she gave evidence. The petitioner first called Abel Runesu, who gave the following evidence. He resides in Rutenga, Mwenezi. He is the District Youth Chairman of the MDC. At the time of the general elections, his function was to move around all the wards in the constituency, campaigning for his party. He was also responsible for distributing campaign material in the form of pamphlets and T-shirts.

On 8 April 2000, he went to Maranda Business Centre with the petitioner. At the business centre, a rally was held and he managed to sell 200 party cards. On their way back, around 5 pm, their vehicle was pursued by a motor vehicle bearing the words "Zanu-PF" on its side panels. Amongst the people riding in this vehicle, he managed to identify one Mapfacha, a popular Zanu-PF supporter in the area. The pursuing motor vehicle overtook theirs and then blocked their further passage. The witness and the other occupants of the vehicle including the petitioner, who was driving the vehicle, did not manage to alight and flee from the vehicle before the people from the Zanu-PF vehicle approached them. The witness and one Sibanda were wearing T-shirts bearing the MDC logo. The people from the Zanu-PF vehicle got hold of them and tried to force off the T-shirts. The witness then saw the petitioner being struck on the face with an open hand by a lady from the other group. A firearm was then taken from one of the vehicles. A discussion ensued on whether or not to use the firearm on the petitioner. The firearm was however not used and

the witness and his group was freed to go after being ordered not to have anything to do with the MDC in the constituency. The incident was reported at Rutenga Police Base. The respondent was not present when the petitioner was assaulted. It was on this day that the respondent was elected as the Zanu-PF candidate for the constituency. The witness, however, recognised the assailants as part of respondent's campaign team.
Page 329 of 2001 (2) ZLR 326 (H)
On 29 April, a rally was held to introduce the respondent as the candidate for the constituency. In addressing the gathering, the respondent urged all his supporters to assault members of the MDC and to stop them from holding rallies in the constituency. After 6 May 2000, the campaign rallies for the MDC were hindered by the supporters of Zanu-PF who would mount roadblocks looking for known supporters of the MDC. At the roadblocks, Zanu-PF supporters would stop buses and search for anything to do with MDC. The atmosphere was dangerous for MDC members. The witness spent most of his time away from home in fear.
While in the main the witness gave his evidence well and was not shaken in cross-examination, there were some inconsistencies in his evidence that I will highlight. He indicated that it was only after the assault upon the petitioner on 6 May 2000 that the MDC could not campaign in the constituency. This then waters down the veracity of and/or the weight to be given to the remarks allegedly made by the respondent on 29 April that the MDC should be stopped from holding rallies in the constituency. His version of the pursuit of their vehicle by the Zanu-PF vehicle is slightly different from that of the petitioner. I however do not put much score on this difference as it can be attributed to lapse of memory.
The petitioner then called as her second witness Zivanayi Wanyara who gave the evidence that follows. He resides in Sarahuro, Mwenezi. He is not employed. He is a member of the MDC where he holds the post of Vice Secretary for the youth wing. During the general elections of June 2000, he assisted in campaigning for the petitioner. He did not find his task in this regard easy as he received threats of violence against his person. Members of his party who were found wearing party T-shirts were harassed or assaulted. On the eve of a rally to be addressed by the president of his party in May 2000, he and a colleague were pursued by a group of Zanu-PF supporters who were chanting slogans. They were at Muzenda's place when they were so pursued. He was struck by a stone on the head and fell to the ground. He was then struck with more stones and sticks and was kicked with booted feet. After being so assaulted, he was then taken to Neshuro School and along the way was further assaulted. At the school, he was thrown into a ditch and covered with tree branches and left for dead. He managed to identify two of his assailants. These were Jimmy Chikepe and Charles Tshuma, both supporters of Zanu-PF. After this incident, he could not campaign. Zanu-PF supporters would mount road blocks were they would stop all vehicles and search for MDC members.
The witness was not shaken in cross-examination and I will accept his testimony.
Page 330 of 2001 (2) ZLR 326 (H)
The petitioner then called Paradzai Mawire who gave the following evidence. He resides in Masvingo. During the run-up to the general elections of June 2000, he resided in Sarahuro Township in Mwenezi. He is a member of the MDC.
On 12 May 2000, he was in a bottle-store drinking with friends when they received a report that the security situation outside had deteriorated and they should leave. He was

the last one to leave the bottle-store. At the gate, he was grabbed by one Hove, a former freedom fighter, who cuffed him. Following this, he was assaulted by other people in Hove's company who ordered him to proceed to a base where a Zanu-PF flag had been hoisted. At the base, he was ordered to sit down, which he did. One Jimmy Chikepe then kicked him on the mouth with a booted foot. Five men accompanied his wife, who was also at the base, to their residence to retrieve his MDC membership card and T-shirt. When the material was brought back to the base, he was ordered to lie on the ground to receive his 25 strokes as a penalty. He was thereafter released.

The witness gave his evidence well and remained credible after cross-examination. I shall accept his testimony.

The petitioner then gave the evidence that follows. She is unemployed. She resides in Rutenga, Mwenezi. She was the MDC candidate for Mwenezi in the June 2000 general elections. Before she became the MDC candidate in the elections, she was the organising secretary for her party and as her duties, she was responsible for recruiting members. At one stage her party had 10 000 members. Before the day on which she was assaulted, she managed to campaign peacefully. After that event she was unable to campaign at all.

It was on 8 April when she was assaulted. She was coming from a rally at Maranda Business Centre when she saw a red vehicle trailing her. Although she indicated that it was safe for the vehicle to pass her, it did not. She then pulled off the road and stopped. The passengers in the other vehicle accused her of insulting them. She got back into her vehicle and drove off. The other vehicle pursued her and along the Rutenga-Sarahuro Road, it overtook her and then blocked her passage. About 15 people alighted from the vehicle and one of them removed the ZCTU cap that she was wearing. She was then assaulted. One of the occupants of the pursuing vehicle came holding a firearm and pointed it at her head. Someone shouted that she should not be shot. The assailants then left after taking with them campaign material that the petitioner had.

After this incident, the petitioner and her party had problems with roadblocks. Due to these roadblocks, she could not access other parts of the constituency for purposes of campaigning. She did come across a roadblock along the Rutenga-Sarahuro Road and made an about turn before she got to it. She did

not manage to identify any of the people manning the roadblock. She did not hold any further rallies until the poll.

During the polling days, some agents reported that the ultra violet scanner was not functioning. Kraal-heads manned the entrance to some polling stations ticking the names of those who presented themselves to vote. Due to these occurrences, she concluded that the election in her constituency was not conducted fairly.

After the poll result was announced, the petitioner was approached by a number of people who swore to affidavits stating that they were not pleased with the outcome. She gave the names of 12 people who expressed a willingness to testify on her behalf. When the matter was called, some of the witnesses declined to attend court. The petitioner declined to have the subpoenaed witnesses brought to court by warrants, as she feared that they would lie if compelled to testify. On that note, the petitioner closed her case.

At this stage, I wish to mention that the legislature regards the trial of election petitions as very important and has accordingly granted the court wide powers to examine any witness who may assist in the determination of the proceedings before it.1 This is in

addition to the inherent powers vested in the court to safeguard the integrity of its proceedings by, where necessary and appropriate, bringing witnesses to court under warrant. However, in proceedings which are essentially adversarial in nature such as the proceedings before me, it is my view that the court may only exercise its powers to secure the attendance of witnesses by warrant where the litigant concerned has not expressed a reluctance for such power to be used.

I find that the petitioner gave her evidence well and was not shaken in cross-examination. I will accept her testimony as credible. I have already alluded to the slight variation between her evidence and that of the first witness concerning the sequence of events when the vehicle bearing Zanu-PF supporters pursued them.

The respondent then took the stand and gave the following evidence. He is the Deputy Minister of Education and the Member of Parliament for Mwenezi, which is a vast rural constituency. His method of campaigning included a clear manifesto, which he distributed to the electorate. He also held several rallies at various points in the constituency. He held meetings with teachers and the seven chiefs in the constituency. At the meetings he held, he did not urge anyone to beat up members of the MDC.

He was not aware of any base set up by Zanu-PF supporters in the constituency. He was also not aware of any roadblocks mounted by his supporters in the constituency. All vehicles were moving freely according to

his knowledge. He was not aware of the incident of 8 May 2000 when the petitioner was assaulted. He was not aware of the alleged intimidation of petitioner's witnesses.

The respondent was subjected to very perfunctory cross-examination that left his evidence credible.

The respondent then called Joel Mapfacha whose testimony was to the effect that he was in Bikita on 8 May when the petitioner was allegedly assaulted. He did not know the petitioner in person until the trial of the petition. He is a member of Zanu-PF and during the year 2000, he was the political commissar for the province. He further denied that he forced people to attend a rally at which the respondent was introduced as the Zanu-PF candidate nor that he was part of the group that mounted any roadblock in the constituency.

The respondent called two other witnesses, namely Shepherd Komani and Jimmy Chikepe. They gave almost similar evidence. They are members of Zanu-PF. They were not part of the respondent's campaign team and they did not participate in the mounting of roadblocks in the constituency. They both denied assaulting members of the MDC as alleged against them.

The respondent then closed his case.

On the basis of the evidence before me, I now have to determine whether or not the petitioner has made a case for the relief she seeks. In so doing, I must first seek and define the legal principle or principles that ought to guide me.

It is trite that the law regarding elections to public office is not known to Roman-Dutch Law that forms the basis of the common law in Zimbabwe.2 Elections and election petitions are a creature of the common law of England. The law regarding elections and election petitions has been introduced into our jurisprudence through the provisions of the Electoral Act, which is cast along the lines of its English counterpart.3 In my view, it

follows therefore that whatever legal principle ought to guide me has to find its basis within the provisions of the Act.
The petitioner approached this court under the provisions of s 132 of the Act. In her affidavit, she alleged that the election of the respondent was rendered void by reason of corrupt practices and electoral irregularities. During trial, evidence was led on alleged acts of corrupt practices. Counsel for the petitioner advised in her address that she was abandoning the other ground based on alleged irregularities. The allegation that some members of the MDC had their identity documents confiscated before the poll was similarly abandoned.

Corrupt practices are defined in Part XX of the Act. It is worth noting that this part of the Act creates five offences that are referred to as corrupt practices. These are: treating, undue influence, bribery, personation and the illegal transportation of voters. The part concludes by providing for the penalties to be imposed on persons convicted of the offences.
Section 132 of the Act provides that a petition complaining of an undue return or an undue election of a Member of Parliament by reason of want of qualification, disqualification, corrupt practice, irregularity or any other cause whatsoever, may be presented to the High Court. In my view, where an election petition has been brought in terms of this section, complaining of an undue election by reason of corrupt practices, the onus is on the petitioner to prove that an offence as defined in Part XX of the Act has been committed. Proof of the commission of the offence may either be in the form of proof of conviction by the High Court after due prosecution, (where the accused has been convicted before the election petition is filed), or proof beyond reasonable doubt of the fact that the offence was committed although no prosecution has ensued. Needless to say, the burden on the petitioner where there has been no prior prosecution is most onerous. It is akin to and cannot be less than the burden borne by the State in criminal prosecutions. That this was the intention of the lawmaker is borne out by the provisions of s 137 of the Act, which provide that:
"If the High Court states in the report on the trial of an election petition that any person has or may have been guilty of a corrupt practice or illegal practice or that there is reason to believe that corrupt practices or illegal practices have extensively prevailed at the election to which the petition refers —

(a) that statement, with the evidence taken at the trial, shall be transmitted by the registrar of the High Court to the Attorney-General with a view to the institution of any prosecution proper to be instituted in the circumstances; and

(b) the report shall, so far as it concerns any such person, be transmitted by the registrar of the High Court to the Registrar-General."

It is clear in my view that although the trial of an election petition cannot in itself result in a person being convicted of the offences grouped under corrupt practices, the weight of evidence necessary to declare an election void by reason of such corrupt practices cannot be less than that required for a conviction of the offence after proper prosecution. This, to me, appears to be the legal principle that ought to guide me in assessing the evidence before me.
Having defined what the guiding legal principle is, I now turn to define the essential elements of the offence that the respondent stands accused of. This is so because the

evidence led by the petitioner has to be sufficient to show that beyond reasonable doubt the respondent committed acts that constitute the essential elements of the offence.
The petitioner complained that she was assaulted and was prevented from

campaigning for her party by Zanu-PF supporters who mounted roadblocks along the main roads in the constituency. She also alleged that some members of her party were assaulted in random acts of violence before the general election.
In my view, the totality of the petitioner's factual allegations is an accusation that the respondent is guilty of the offence of undue influence. This then is the offence whose essential elements I must define. The offence is defined in s 105 of the Act as follows:
" (1) Any person who, directly or indirectly, by himself or by any other person —
(a) makes use of or threatens to make use of any force, violence or restraint or any unnatural means whatsoever upon or against any person; or
(b) inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm or loss upon or against any person; or
(c) does or threatens to do anything to the disadvantage of any person;
in order to induce or compel that person —
(i) to sign a nomination paper or refrain from signing a nomination paper; or
(ii) to vote or refrain from voting;
shall be guilty of the offence of undue influence.
(2) Any person who, directly or indirectly, by himself or by any other person —
(a) makes use of or threatens to make use of any force, violence or restraint upon or against any person; or
(b) inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm or loss upon or against any person; or
(c) does or threatens to do anything to the disadvantage of any person;
on account of that person —
(i) having signed or refrained from signing a nomination paper; or
(ii) having voted or refrained from voting at any election;
shall be guilty of the offence of undue influence.
(3) Any person who by abduction, duress, threats to invoke any unnatural means whatsoever or references to such unnatural means or by fraudulent device or connivance —
(a) impedes or prevents the exercise of his vote by a voter; or
(b) compels, induces or prevails upon a voter to either vote or to refrain from voting at an election;
shall be guilty of the offence of undue influence."
In my view, the section is widely cast in cataloguing the acts of undue influence that a respondent and/or his agents may employ to induce or compel a voter to sign a nomination paper, to vote or to refrain from so doing and to prevent or impede a voter from exercising their right to vote. In other words, every conceivable act of undue influence that might be brought to bear upon any person, including the use of unnatural means, is prohibited. The section is however narrowly cast when defining the target and purpose of the undue influence. The respondent and/or his agent must commit any of the

prohibited acts with the intention of compelling or inducing the person to sign or refrain from signing a nomination paper, to vote or refrain from voting
Page 335 of 2001 (2) ZLR 326 (H)
or on account of that person having done or refrained from doing the listed acts. The offence is committed if the undue influence is brought to bear on the particular person with the intention of influencing them as specified in the section even if the person is not so influenced.
I am of the further view that the section limits its operation to the influencing of a particular person and not the electorate at large because the section makes reference to "that particular person" in defining the offence. In other words, when the undue influence is exerted, the intended target must have been identified. The target cannot be the general populace in a given area. It has to be a particular person capable of being identified.
The petitioner complains of random acts of violence in the constituency and of the assault upon her of 8 May. She further complains of the fact that her party was barred from campaigning in the constituency due to illegal roadblocks mounted by members of Zanu-PF.
I will start with the last complaint, that of the illegal roadblocks. Evidence was led to the effect that supporters of Zanu-PF would stop all traffic and search for members of the MDC. No evidence was led as to what the purpose of flushing out the members of the MDC was.
I am not persuaded that the conduct complained of, even if the respondent was responsible for it, is undue influence as defined in s 105 of the Act. I am further not persuaded that the mounting of illegal roadblocks was directed at any particular person to "induce or compel that person from signing or refraining from signing a nomination paper or to vote or refrain from voting" nor on account of that person having signed or refrained from signing a nomination paper or having voted or refrained from voting. In my view, the roadblocks were illegal acts that ought to have been dealt with in terms of the common law.
I now turn to the assault on the petitioner on 6 May 2000. I have accepted that the petitioner was assaulted as alleged. I have also accepted that the petitioner was assaulted by members of Zanu-PF. I, however, am not satisfied that the petitioner has led sufficient evidence to prove beyond reasonable doubt that the purpose of the assault was to exert any undue influence upon her as defined in s 105 of the Act. In her testimony, she stated that the occupants of the red truck that pursued her alleged that she had insulted them, hence the assault. It was not part of her evidence that the assailants warned her in any manner against conducting herself at the polls as she wished. In other words, the purpose of the assault was not to compel or induce her to act as provided for in the section. On this basis, I cannot find that there is evidence beyond reasonable doubt that the assault upon the petitioner was such as to amount to the use of force that is prohibited by s 105. In my view, it remained a common assault for which relief ought to have been
Page 336 of 2001 (2) ZLR 326 (H)
found under some other provisions of the law.
Apart from the evidence on the assault on the petitioner, there is evidence of the assault on Zivanayi Wanyara and on Paradzai Mawire. I have accepted that these witnesses were assaulted as alleged. It is on the basis of these assaults that the petitioner alleged there

was random violence within the constituency that led to the undue election of the respondent.
In my view, the evidence led by the petitioner regarding these assaults falls short of the evidence that would secure a conviction for the offence of undue influence as defined in s 105 of the Act.
The motive for the assault on Zivanayi Wanyara was not given in evidence. He stated that a group that was chanting slogans he did not understand pursued him. They caught up with him and assaulted him, leaving him for dead. The assault on him was a cowardly act by people who identified neither themselves nor what their cause was.
The assault on Paradzai Mawire was on account of his having been found in possession of MDC material. He received 25 strokes as his penalty. Again, this assault was unlawful. Zimbabweans are granted and guaranteed the right to belong to a party of their choice by the Constitution. Conversion from one party to the other ought to be through persuasion and campaigning rather than by the use of violence and force. That is the way of multi-partyism.
While the assaults upon the two witnesses cannot be excused, they are however not such as to be the basis of setting aside the election of the respondent as the Member of Parliament for the Mwenezi Constituency in terms of the provisions of the Act. I have indicated above that in my view, the provisions of s 105 are very narrow in the target and purpose of the undue influence that it seeks to punish. It is not all acts of violence that will lead to an annulment of an election. The purpose of the violence must fall within the four squares of the provisions of s 105 and where this is not achieved, the act of violence remains an unlawful act for which relief has to be sought in terms of other provisions of our law.
On the basis of the foregoing, I find that the petitioner has failed to lead evidence sufficient to discharge the onus on her. It has not been proved beyond reasonable doubt that the respondent, directly or indirectly, is guilty of the offence of undue influence. Accordingly, the election petition is dismissed with costs. In accordance with the provisions of s 136(3) of the Electoral Act, I declare that the respondent is the duly elected Member of Parliament for Mwenezi.
Wintertons, petitioner's legal practitioners
Mucharehwa & Partners, respondent's legal practitioners

MAVHUNDISE v UDC LTD & ORS
2001 (2) ZLR 337 (H)
Division: High Court, Harare
Judges: Smith J
Subject Area: Civil application
Date: 26 September & 24 October 2001
Judgment Number: HH-188-01

Property and real rights — immovable property — personal right in respect of immovable property — not a real right in the property — such right regarded as movable property — may be sold in execution without formalities attaching to sale of immovable property
The applicant had been settled on a piece of land owned by a consortium of landowners under a land settlement scheme. The scheme provided for the financing of the purchase

of the land by the applicant, his obligations in regard to growing of sugar cane, the payment by the consortium for the cane produced, and other matters. The agreement between the applicant and the consortium provided that the piece of land was sold to the applicant and that freehold title would be granted to the applicant when all moneys owed by the applicant to the Agricultural Finance Corporation and to the consortium had been paid.

Default judgment was taken against the applicant by the first respondent, a finance company, and the applicant's rights and interests in the piece of land were sold in execution to the second respondent. The applicant was evicted. By the time of the sale, the applicant had not paid the moneys owed by him in connection with the piece of land. He had thus not become the registered owner of the piece of land, which remained registered in the consortium's name.

The applicant contended that the sale was invalid, being a sale of immovable property and not conducted in accordance with the relevant rules of court. He sought an order setting aside the sale and restoring the piece of land to his possession. He also sought an order for the payment to him of the proceeds of the sugar cane grown since his eviction.

Held, that ownership of immovable property can only be acquired by transfer of ownership, such transfer being registered in the Deeds Office. Until title deeds were issued in the name of the applicant, the consortium remained the registered owner of the land, and all that the applicant could acquire were rights and interests in the land. Such rights were personal rights only, and were regarded as movable property. They could be lawfully sold in execution.

Cases cited:

Grantully (Pvt) Ltd v C C Sales (Pvt) Ltd & Anor S-18-00

Grantully (Pvt) Ltd & Anor v UDC Ltd 2000 (1) ZLR 361 (S)

X-trend-a-Home (Pvt) Ltd v Hoselaw Invstms (Pvt) Ltd 2000 (2) ZLR 348 (S)

Page 338 of 2001 (2) ZLR 337 (H)

W Mutezo, for the applicant

R M Fitches, for the first, second, third, fourth, fifth and seventh respondents

No appearance for the sixth respondent

SMITH J: The fourth and fifth respondents (hereinafter referred to as "the Consortium") own a piece of land in Mkwasine, on which they have established a land settlement scheme. The applicant was one of the planters settled under the scheme for growing sugar-cane. The Consortium entered into an agreement with the applicant in terms of which he bought a certain piece of land in the scheme. The agreement provided for the financing of the purchase of the land by the applicant, his obligations in regard to the growing of sugar cane and the payments by the Consortium for the sugar cane he produced, the supply of water and other ancillary matters. Paragraph 3(a) of the agreement provides:

"The Consortium hereby sells the Holding to the Planter selected and approved by the Land Settlement Board who hereby purchases the said Holding on the terms and conditions herein contained."

The "holding" is defined in clause 2(d) of the agreement as meaning:

"the individual piece of land allocated to a Planter for the purpose of cultivating sugar cane in pursuance of the Settlement Scheme, together with the designated area where the dwelling is situated."

The holding allocated to the applicant was plot 216, Mkwasine Estate.
The first respondent (hereinafter referred to as "UDC") obtained default judgment against the applicant in the sum of $551 555.62 plus costs which brought the amount owed to $568 550.96. On 19 February 1999, the seventh respondent (hereinafter referred to as "the messenger of court") sold plot 216 in execution to the second respondent (hereinafter referred to as "the purchaser"). The applicant was given a cheque for $155 000, being the residue after his obligations were paid, which he paid to the third respondent (hereinafter referred to as "Toyota") because the cheque that was used to pay for plot 216 had been drawn by Toyota.
The applicant claims that there were a number of irregularities with regard to the purported sale of plot 216. Firstly, the sale was actually conducted on 12 February, when the notice advertising the sale stated that it would be conducted on 19 February. Secondly, as it was a sale of immovable property, the messenger of court should have deposited the proceeds of the sale with the clerk of court and only paid them out on transfer of the property by the purchaser. Thirdly, in terms of Order 26 r 7(7) of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), the messenger of court should have notified the Ministry of Lands and Agriculture of the intended sale and obtained its consent to the sale in execution, which he failed to do. Fourthly,

in terms of r 7(15), the magistrate or his representative should have been present at the sale and neither was present.
In the light of the alleged irregularities, the applicant seeks an order setting aside the sale in execution of plot 216 and restoring him into possession thereof. The applicant also claims that he is entitled to all proceeds derived from the sale of sugar cane grown on plot 216 since he was evicted. He is therefore also seeking an order that the Consortium pay him all such proceeds.
All the respondents, other than the sixth respondent, filed opposing papers.
In its opposing affidavit, UDC made the following assertions. After default judgment was obtained against the applicant his movable property was seized and sold in execution. Thereafter, a nulla bona return was issued. It was then ascertained that the applicant had certain rights and interests in plot 216 and so the messenger of court was instructed to attach them. Both the applicant and the general manager of the Consortium were advised of the attachment. Initially the sale of the applicant's rights and interests in plot 216 were to be sold on 12 February 1999 but, because of problems that arose, the sale was postponed to 19 February. The gross realisation from the sale was $750 000. $514 670.89 was paid to UDC's legal practitioners and the residue of $160 194.11 was paid to the applicant. The applicant was not the owner of plot 216; it was only his rights and interests in the property that were attached and sold. The attachment and sale were conducted in accordance with the provisions of Order 26 rules 6 and 7 of the Magistrates Court Rules. As the sale was not one of immovable property, it was not necessary for a magistrate to be present or for the other requirements relating to the sale of immovable property to be satisfied.
In his opposing affidavit, the purchaser made the following assertions. He bought the applicant's rights and interests in plot 216 on 19 February 1999. There has been no transfer of the ownership of plot 216 to him, because the applicant did not have title deeds for the property.

In its opposing affidavit the third respondent (hereinafter referred to as "Toyota") made the following assertions. In the summons, it is wrongly cited as Toyota Zimbabwe Ltd. The company which trades as South East Toyota is Peppy Motors (Pvt) Ltd, not Toyota Zimbabwe Ltd. Both the applicant and the purchaser are known to the managing director of the company. He is aware that the applicant's rights and interests in plot 216 were sold in execution on 19 February 1999 to the purchaser for $750 000. In fact, he had lent the purchaser $750 000 to enable the latter to pay the purchase price. The purchaser has since repaid the loan. The loan was a personal loan from the general manager and the company had nothing to do with it. Peppy Motors did receive $155 000 from the applicant but that was in part payment

of a debt owed by the applicant. Peppy Motors had issued summons in 1998 claiming payment in the sum of $342 005.78 from the applicant. When the payment was made the applicant instructed that it was to go towards payment of his debt.

In his replying affidavit, the applicant maintained that the purchaser was being used as a front by either Toyota or its managing director. There would have been no reason for either of them to have loaned such a large amount to the purchaser, unless it had an interest in acquiring plot 216 "through the back door in order to evade the strict requirement that the settlement scheme was strictly for black farmers". The applicant also said "I want this Honourable Court to note that third respondent has failed to explain its receipt of the monies, which it received from me and receipted." Clearly, the applicant is endeavouring to introduce racism into the proceedings. He does not attempt to introduce any extrinsic evidence to prove his allegation nor does he give any valid grounds for his belief. He says that there is no reason why Toyota should lend the purchaser such a large amount. How does he know that? Moreover, Toyota did explain why it received the money from the applicant. The applicant owed Toyota substantially more than the $155 000 he paid it. The applicant maintained that he refunded $155 000 to Toyota because, having been chased off his plot, he had to use the other $5 229.20 to relocate his family. That sounds ridiculous. He then said that he would not have paid the $155 000 to cover a debt when he was destitute. It is significant that he does not dispute the debt. The applicant said that he paid the $155 000 on the understanding with the managing director of Toyota that he would get his plot back. It is difficult to see how the managing director would have agreed to that if he had paid $750 000 for the plot, as alleged by the applicant.

In its opposing affidavit, then Consortium made the following assertions. The applicant did enter into an agreement with it, in terms of which he acquired certain rights, title and interests in plot 216. At the time the agreement was entered into, plot 216 was not a subdivided piece of land. Its precise extent was not known, but it was anticipated that, on subdivision, it would measure approximately 10.5 hectares. The Mkwasine Settlement Scheme consists of 191 plots on which sugar cane is grown. The land is registered in the name of the Consortium. When the applicant's rights and interests in plot 216 were sold to the purchaser the messenger of court advised them of that fact and an appropriate entry of the cession of the applicant's rights to the purchaser was made in its records. Although the agreements entered into with the various planters do refer to the Land Settlement Board, it is not clear what role that board plays. The Consortium has been responsible for the entire management of the scheme since its

inception, and there has been no contact with that board. The sale in execution of the applicant's rights and interests in plot 216 was not initiated by the Consortium but, being a judicial sale in execution, it was binding as far as the Consortium was concerned. The sale took place on 19 February 1999. It was the applicant's rights and interests in plot 216 that were sold. The land is still owned by the Consortium. The plots have not yet been sub-divided.

In his opposing affidavit, the messenger of court made the following assertions. The purchaser did not buy immovable property at the sale in execution; he bought the applicant's rights, title and interests in plot 216. The sale was originally advertised to be held on 12 February 1999 but, because the advertisement was not published timeously, the sale could not be conducted on that day. It was therefore postponed to 19 February. As the applicant did not own plot 216, because there were no title deeds for that plot, it was only his rights, title and interests therein that were sold. The day after the sale the applicant approached him and collected the residue from the sale. The sale was conducted in accordance with the relevant rules of court. He invited the provincial magistrate to attend the sale but was told to go ahead with it as the provincial magistrate was too busy to attend.

Mr Mutezo submitted that in terms of the agreement between the applicant and the Consortium the approval of the State was necessary for the establishment of the settlement scheme, the selection of planters to purchase the various holdings and the conclusion of the sale of each plot. Although transfer of plot 216 to the applicant has not been effected, he acquired a vested right to title and to transfer in terms of the agreement upon payment of the purchase price. Neither the State nor the Consortium had agreed to the sale to the purchaser. The applicant had purchased plot 216, not merely an interest therein. Therefore the sale in execution was the sale of immovable property and not of movable property. Therefore, the sale must be set aside and the income received by the purchaser from sugar cane produced on plot 216 and sold to the Consortium must be refunded to the applicant.

The submissions by Mr Fitches were as follows. The various plots which make up the settlement scheme have not been subdivided. As no permit has been obtained in terms of s 29 of the Regional, Town and Country Planning Act [Chapter 29:12], the agreements of sale relating to each plot are illegal. See X-trend-a-Home v Hoselaw Investments (Pvt) Ltd 2000 (2) ZLR 348 (S). All real rights over immovable things are themselves immovable, whereas real rights over movable things are movable. See Joubert Law of South Africa vol. 27 para 35. As the land covered by the settlement scheme, which includes plot 216, is registered in the name of the Consortium

and all that the applicant had at the time of the sale was a personal right to plot 216, his rights title and interest therein constituted movable property. Accordingly, the correct procedure was adopted at the sale in execution. Even if that were not the case, the court should not come to the applicant's aid. The sale in execution occurred in February 1999 and the applicant waited until June 2000 before he took any action. It is essential that, in matters such as judicial proceedings, the rights to the parties arising therefrom are crystallised and immutable within a short space of time. See Grantully (Pvt) Ltd & Anor v UDC Ltd 2000 (1) ZLR 361 (S) and Grantully (Pvt) Ltd v C C Sales & Anor S-18-00.

Furthermore, the applicant made no attempt to have the matter set down for hearing. It was the respondents who did so, after filing their heads of argument.
As regards Toyota, Mr Fitches said that although no substantive order was sought against it, since the applicant sought an order of costs against it, it felt it was called upon to file opposing papers. The applicant's story that he paid Toyota $155 000 because it was that company's cheque which paid the purchase price for plot 216 is so obviously mendacious that it amounts to an insult to expect anyone to believe it. Toyota's averment that the applicant paid the money in part settlement of a debt is much more credible.
The allegation by the applicant that either Toyota or the managing director of the company were conspiring with the purchaser to use him as a front for the acquisition of plot 216 is fanciful in the extreme and not based on any corroborating evidence. As there was no reason to join Toyota, and in view of the obvious untruths in the applicant's replying affidavit, Toyota should be awarded its costs on the higher scale.
The crux of this case is whether the rights, title and interests of the applicant in plot 216 constituted movable property or immovable property. It is not disputed that plot 216 has not been subdivided and therefore there are no title deeds for the plot. Even though the agreement between the Consortium and the applicant provides that the plot is sold to the applicant and that freehold title shall be granted to the applicant when all moneys owed to the Agricultural Finance Corporation and the Consortium have been repaid in full, such title had not been granted at the time of the sale. Therefore, the applicant had not acquired ownership of plot 216. Ownership of land can only be acquired by transfer of the ownership from the previous owner and such transfer must be registered in the Deeds Registry. Until such time as title deeds are issued in respect of plot 216 and ownership thereof is registered in the Deeds Registry in the name of a particular planter, all that the applicant and the purchaser can acquire are rights and interests in the plot. Such rights are personal to the holder thereof; they are not real rights. In Joubert loc. cit, the learned authors state:

"Thus all real rights over immovable things are themselves to be classified as immovable property; whereas all real rights over movables and all personal rights are regarded as movable even if the performance concerned consists, for example in the transfer of immovable property."
In this case, the rights of the applicant in plot 216 were personal rights. In para 9 of Joubert loc cit, the learned authors deal with the absolute character of real rights. They state, inter alia, that:
"The absolute nature of ownership presupposes that, with the exception of co-ownership and trust ownership, no two persons may acquire full ownership of one and the same thing simultaneously."
Plot 216 and all the other plots in the settlement scheme have not been subdivided. They are all still registered in the name of the Consortium and therefore the Consortium is the owner of all the land. Consequently, the applicant never acquired any real right in plot 216 as he did not become the registered owner. His right was only a personal right to require the Consortium to transfer ownership to him once the relevant conditions were fulfilled.
The agreement of sale between the Consortium and the applicant provides that planters who participate in the scheme will be selected and approved by the Land Settlement

Board. That provision might be relevant when the Consortium terminates, or wishes to terminate, an agreement with a particular planter. However, such provision cannot prevent a sale in execution. Such sales are conducted by operation of law. It is clear that in this case the Consortium initially objected to the sale in execution of the applicant's interests and rights in plot 216. After obtaining legal advice it withdrew its objections, and rightly so.

In the circumstances, I consider that the applicant's interests and rights in plot 216 were lawfully sold to the purchaser. The sale was conducted in accordance with the relevant rules of court. Even if there had been some minor irregularities, the applicant would not be able to rely on them for setting aside the sale, because of the delay of some fifteen months before he filed his application.

As regards costs, the respondents who opposed the application are clearly entitled to be reimbursed their party and party costs, in view of their success. It seems to me, however, that Toyota is entitled to be paid its costs on the higher scale. There is no good reason for it being made a party to the case. The allegations made by the applicant in his replying affidavit are fanciful in the extreme. No basis is laid for the assertions he made. It seems clear that he was trying to introduce an element of racism in order to win sympathy for his case. The court must show its strong disapproval of his conduct.

The application is dismissed with costs. It is ordered that the applicant pay the costs of the third respondent on the legal practitioner and client scale and the costs of the other respondents on a party and party scale.

Mutezo and Partners, applicant's legal practitioners
Wintertons, first, third, fourth and fifth respondents' legal practitioners
Kusemwa Wedu & Partners, second and seventh respondents' legal practitioners
Civil Division of the Attorney-General's Office, sixth respondent's legal practitioners

ROPER TRUST v DISTRICT ADMINISTRATOR, HURUNGWE & ORS

2001 (2) ZLR 345 (H)
Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Civil application
Date: 25 & 26 October 2001
Judgment Number: HH-192-01

Practice and procedure — application — provisional order — prima facie case for order — what amounts to — application for eviction of occupiers of rural land — effect of Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26]

Property — Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26] — burden imposed by Act on persons who seek eviction of occupiers of rural land — need to interpret Act in accordance with intention of legislature

To decide whether an applicant for an urgent provisional order has established a prima facie case, the judge must have regard to the evidence disclosed on affidavit and in oral submissions made at the hearing. That evidence must be such as will enable the judge to form the opinion that there is evidence available which may, at the confirmation proceedings or on the return day, enable the applicant to obtain the final relief sought. The applicant is in a position akin to that of a defendant in a summary judgment

application, who must establish a prima facie defence. The applicant must adduce sufficient evidence which in the eyes of the law will induce a reasonable man to act on it, that is to say, it must be evidence which in the absence of any rebutting evidence is sufficient to prove a given fact. In general terms, it must be evidence that calls for a reply from the other party.

The Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26] imposes a heavy burden on a person who seeks a provisional order for the eviction of persons occupying rural land, because he must establish a prima facie case that the occupiers do not fall within any of the categories of occupiers protected by the Act. To do this, he must allege that the occupiers came onto the land after 1 March 2001 (the fixed date) and, in addition, that before the fixed date they were not occupying any other land which was the subject of a preliminary notice or acquisition order under the Land Acquisition Act [Chapter 20:10]. The court must interpret the Act in the light of its clear intention, whatever the equities of the case.

Cases cited:

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Jena v Nechipote 1986 (1) ZLR 29 (S)

Page 346 of 2001 (2) ZLR 345 (H)

Legislation considered:

Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26], ss 3 & 4

A P de Bourbon SC, for the applicant

E Munyuki, for the first, seventh and eighth respondents

CHINHENGO J: In this application, I will refer to the person who deposed to the founding affidavit as "the applicant". The applicant seeks a provisional order in the following terms:

"Terms Of The Final Order Made

That you show cause to this Honourable Court why a final order should not be made in the following terms —

It is ordered:

1. That the occupation since 5 July 2001 of Peveril Farm, Karoi by the second to sixth respondents and all other persons claiming right title and interest through one or more of them (the others) be and is hereby declared unlawful.

2. That the respondents and others be and are hereby ordered to vacate Peveril Farm forthwith.

3. That the Deputy Sheriff be and is hereby empowered to enlist the assistance of the Zimbabwe Republic Police, Karoi if this is considered necessary to enforce the eviction order.

4. That the first respondent be and is hereby directed to instruct the Officer-in-Charge, ZR Police, Karoi and all Police Officers to take all lawful measures to ensure that the terms of this order are implemented.

5. That the respondents and every officer/or employee under their control be and is hereby interdicted from, in any way or form —

5.1 causing

5.2 facilitating

5.3 participating in; or

5.4 giving sanction to;

entry upon Peveril Farm, Karoi by any person or group of persons engaging in, prompting of publicising any activity relating to resettlement or the laying out of any housing or plots on the farm.

6. That first respondent be and is hereby ordered to use all means and authority available to him, upon complaint to him or upon him becoming aware of the occurrence of any unlawful entry upon Peveril Farm or the likelihood of such occurring, to ensure that no breach of the peace shall occur or that the terms of this order are contravened, and that all persons found to have unlawfully entered or conducted themselves upon such property in contravention of this Order shall be immediately removed therefrom and dealt with according to law.

7. That the costs of this application be paid by the respondents, jointly and severally, the one paying the others to be absolved.

Interim order

That pending the confirmation or discharge of this provisional order the applicant is granted the following relief:

1. The applicant and its employees be and are hereby entitled forthwith to continue, without hindrance or obstruction, their farming operations on Peveril Farm, Karoi.

2. The Deputy Sheriff be and is hereby empowered to enlist the assistance of the Zimbabwe Republic Police, Karoi if this is considered necessary, to enforce the terms of para 1 of this Interim Order.

3. That the second to sixth respondents inclusive and others are precluded from carrying out any farming operations, development and/or steps preparatory thereto on the farm.

Service of the provisional order

The Deputy Sheriff shall serve this order upon the respondents."

In this application, I am called upon to consider the granting of the above cited provisional order together with the interim relief. Two questions are accordingly to be decided in this regard — the one is whether I should grant the provisional order at all and the other is whether I should grant it with the interim relief prayed for.

This application was placed before me on 18 October 2001 with a request that it be heard urgently. I directed the applicant to serve the court application on the respondents and set down the matter for a hearing on Monday 22 October at 9.00 a.m. Two difficulties arose which militated against the hearing. The first respondent was served with the court application on the morning of Monday, the date of hearing. He is in Karoi, which is quite a distance from the court. It would have been impossible for the first respondent to have attended the proceedings even with the best intentions. The Deputy Sheriff had not succeeded in personally serving the second to sixth respondents because, as per his return, they "refused acceptance and unidentifiable". So as a result of the Deputy Sheriff's inability to identify the second to sixth respondents, he served the court application and the notice of set down by "placing it on a tree". I was not satisfied that this was good service in view of the Deputy Sheriff's failure to identify the respondents. I directed that the hearing be postponed to Thursday 25 October and I granted leave to the applicant to serve the court application and the notice of set down for the hearing on Thursday on the second to sixth respondents by service on the first respondent, who it

was expected would serve the papers on the second to sixth respondents. I required the first respondent to report to the court what he would have done about the service on the second to sixth respondents. This last direction was given on the understanding, as intimated by the applicant, that the first respondent knew and could identify the second to sixth respondents.

In the meantime, the applicant considered it necessary to join the seventh and eighth respondents, being respectively the Minister of Lands, Agriculture and Rural Resettlement and the Minister of Local Government, Public Works and National Housing. The court application and the notice of set down were served on them.

At the hearing on Thursday 25 October, Mr Munyuki appeared for the first, seventh and eighth respondents. He filed an affidavit from the first respondent to the effect that he (the first respondent) had looked for the second to sixth respondents and could not find them. He said he did not know them personally and that even though he had sought the assistance of the police, that too had not helped to identify the respondents and effect service on them. Despite conflicting submissions as to whether or not the first respondent had visited Peveril Farm, I had to accept that no personal service had been effected on the respondents nor had any sufficient service been made in view of the failure by anybody to identify the second to sixth respondents.

The applicant's founding affidavit related the applicant's tribulations at Peveril Farm since March 2000. It related how on 20 September, following an invasion of his farm (to use current terminology) by war veterans and other persons, he had been attacked and severely assaulted and injured in the scuffles that ensued. He attached a photograph of himself which appeared in a local daily newspaper to show the injuries which he had sustained as a result of the attack on his person and to show that he had indeed been attacked on that day. I will not dwell on the details as given by the applicant on the attack and his injuries as these details are not directly relevant to this application. The applicant's affidavit also related how as a consequence of the scuffle on 20 September 2000, four of his workers were arrested by the police and were acquitted on the charges they faced at the close of the prosecution case at their trial. Again, I will not dwell on the applicant's other averments in this regard as they also are not directly relevant to my decision.

The applicant averred that upon the occurrence of the incident in which he was badly assaulted and injured, the war veterans and the other persons who had occupied Peveril Farm as at 20 September 2000 vacated the farm on their own initiative.

For a period until 5 July 2001, he remained in undisturbed occupation of the farm. But on that, date following the issue of a letter by the first respondent the farm was pegged and numerous persons moved onto or "invaded" the farm. The letter by the first respondent which triggered the new "invasion" reads:

"To Whom it may Concern

Re: Planning and Dermarcation Teams in the Fast
Tract Resettlement Programme Hurungwe District

The following are members of staff of the Department of AGRITEX who have been assigned to plan farm Peveril Place.

It is expected that they will carry out their assigned task without any interference.

If you have any queries, please be referred to the D.A. Hurungwe at 064-6896 or 064-6247 or the Provincial Governor Mashonaland West at 076-22006.
We urge all concerned to co-operate."
Page 349 of 2001 (2) ZLR 345 (H)
The applicant alleged that on 27 July and 15 August 2001 new groups of persons moved onto the farm and randomly settled themselves. On 30 July 2001, war veterans visited the farm and advised the applicant's manager that all farming operations were to immediately cease, including the ongoing tobacco seedbed preparation and cattle farming, because the farm had been "taken over". He averred that the group which moved onto the farm on 15 August had been advised to do so by a Mr Matinere with the authority of the first respondent. A physical confrontation had occurred between this group and the applicant's workers. He averred further that on 30 August forty-one houses and/or kitchens were burnt down by war veterans and other persons. The matter was reported to the police and the said Mr Matinere and two other persons were arrested and are now on remand.
The applicant said that because of these disturbances the police and the army established a permanent presence on Peveril Farm and although they endeavour to arbitrate and resolve issues, they do not address the fundamental problem of having people on the farm with no right or entitlement to be there. The applicant said that he met and spoke to the first respondent about the problems he was having on the farm and in particular that he could not proceed with tobacco seedbed preparation and the irrigation of his coffee crop. The meeting was not fruitful as, according to him, the first respondent said that all the problems were his fault.
The applicant said that on 3 October another meeting was held with the first respondent. In attendance at this meeting were certain named war veterans and a large group of other people. The first respondent had called the meeting. He advised those in attendance, including the applicant, that as Peveril Farm was the subject of a preliminary notice of acquisition only (issued in terms of s 5 of the Land Acquisition Act [Chapter 20:10]) the applicant was still the legal owner of the farm and that the farm had not yet been purchased by the State. He also confirmed that the farm had been "fast-tracked and settlers allocated plots" and that those on the farm had to co-exist and reach an agreement which he (the first respondent) would endorse. The applicant said that after the meeting closed the settlers shouted that he had to immediately leave the farm. A Mr John Dangiro, who the applicant said was a ruling party official in the area, informed him that he would never farm again. The said Mr Dangiro had left together with the first respondent. Shortly, after the meeting the applicant's irrigation piping was broken. He repaired it and resumed his irrigation activity. The applicant said that his workers were ordered by the war veterans to leave the farm. He said that he has started planting tobacco despite work stoppages, threats and disturbances and the destruction of tobacco seedlings by the persons occupying the farm. In the final paragraph of his affidavit, the applicant states the following —
Page 350 of 2001 (2) ZLR 345 (H)
"The recent Abuja Agreement heralded a new dawn for Zimbabwe. Regrettably 'on the ground' the terms thereof are not being implemented. I am not prepared to give in to the threats and demands that have been made of me and my labour. Accordingly, I pray for the issue of an order in terms of the draft order hereto as Annexure 'C' (which I have recited above)."

The submissions made on behalf of the applicant and the first, seventh and eighth respondents by their respective counsel revolved mainly around the application of the Rural Land Occupiers (Protection From Eviction) Act [Chapter 20:26] (Act No. 13 of 2001) and certain provisions of the Land Acquisition Act [Chapter 20:10] (as amended by Act No. 15 of 2000 and Act No. 14 of 2001).

It is trite that this court will issue a provisional order with interim relief if the applicant has established a prima facie case and the interim protection he seeks is merited: see Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H) at 193B. Order 32 r 246(2) of the High Court, 1971, provides that:

"Where in an application for a provisional order the judge is satisfied that the papers establish a prima facie case he shall grant a provisional order either in terms of the draft order filed or as varied."

Where therefore a prima facie case has been established, a judge has no discretion whether to grant or not to grant the provisional order sought. On being satisfied that a prima facie case has been established he must ("shall") grant the order. The question in every such case is whether a prima facie case has been established.

The test as to whether as prima facie case has been established is not the test applied at the end of the State case in a criminal trial where an application is made for the discharge of the accused. It is not, in my view, the test applied at the end of the plaintiff's case in a civil trial where absolution from the instance is sought. The test, to my mind, is closer to the latter, but not quite the same, because at the end of the plaintiff's case in a civil trial the court will have heard oral evidence during which the plaintiff's witnesses will have been cross-examined. This is to say that the decision whether a prima facie case has been made in an application for absolution from the instance an adversarial proceeding will have taken place. In an urgent application for a provisional order, the only papers before the court are ordinarily the court application and the applicant's founding affidavit. The respondent ordinarily appears through his/her legal practitioners to whom he would have given certain instructions. Therefore, an adversarial proceeding will not have taken place before the judge is called upon to decide whether or not a prima facie case has been established. Thus, the judge will not have before him any evidence which has been sufficiently tested by cross-examination. So to decide whether a prima facie case has been established, the judge will have

to have regard to the evidence disclosed on affidavit and in the oral submission made at the hearing. That evidence must however be such as will enable the judge to form the opinion that there is evidence available which may, at the confirmation proceedings or on the return day, enable the applicant to obtain the final relief he has sought. To establish a prima facie case on this less stringent standard, the applicant would probably be in the position not dissimilar to that of a respondent in a summary judgment application who must establish a prima facie defence, which in Jena v Nechipote 1986 (1) ZLR 29 (S) at 30D-F was described severally as "a plausible case", "a triable issue" or "the mere possibility of success". In my view, an applicant who is required to establish a prima facie case must adduce sufficient evidence which in the eyes of the law will induce a reasonable man to act on it, that is to say, it must be evidence which in the absence of any rebutting evidence is sufficient to prove a given fact. In general terms, it must be evidence that calls for a reply from the other party. In this case, therefore, in order for

him to establish a prima facie case, the applicant must establish a presumption of law in his favour which, until rebutted, establishes his case, and the relief he seeks must be granted unless the respondents can rebut that presumption. Once the applicant has established a prima facie case, the respondents assume immediately the duty to adduce evidence to combat the prima facie case. The inquiry here will be whether the applicant has passed this test.

The application of the test as to the establishment of a prima facie case where a statute is involved, as in the present case, becomes a little more complicated. The legislature enacted the Rural Land Occupiers (Protection From Eviction) Act (hereinafter referred to as "the Act", for the purpose of protecting certain occupiers of rural land from eviction. The Act provides in s 3(1) and (2) that:

"3. Restraint on eviction, etc. of certain occupiers of rural land

(1) A person occupying rural land who, but for this Act, would be subjected to any legal proceedings for an order referred to in subs (2), shall be a protected occupier of rural land for the period referred to in section four, if —

(a) he was occupying the land on the fixed date and is still occupying the land at the date of commencement of this Act; and

(b) he occupied such land in anticipation of being resettled by an acquiring authority on that or any other land for agricultural purposes in terms of the Land Acquisition Act [Chapter 20:10]; and

(c) he qualifies for settlement on that or any other land in accordance with the relevant administrative criteria fixed by an acquiring authority for the resettlement of persons for agricultural purposes.

(2) Notwithstanding anything to the contrary in any other law, but subject to this Act, no court shall issue any order for the recovery of possession from a protected occupier of any rural land or the ejectment therefrom of a protected

occupier, or the payment of damages by such protected occupier in respect of the occupation or trespass of such land during any period referred to in section four" (emphasis is mine).

The applicant has on his papers been able to show that the second to sixth respondents and their relatives occupied Peveril Farm between July and August 2001, which is quite obviously after the fixed date of 1 March 2000. He did not raise issue as to whether the requirements of s 3(1)(b) and (c) of the Act are not satisfied. On this basis, the occupiers would be subject to eviction, and not subject to protection, under the Act. So far, there would be no impediment to the relief that the applicant sought in this application, and he may be said to have established a prima facie case. The general thrust of this approach to the matter is that the applicant must, in order to establish a prima facie case, show that the occupiers are not any of the categories of occupiers protected under the Act.

The serious hurdle which the applicant must overcome in order to establish a prima facie case on the papers and arguments as presented to me are the provisions of s 4 of the Act. That section provides:

"4. Period of protected occupation

The period during which a person shall be a protected occupier of rural land —

(a) in relation to which a preliminary notice identifying such land as being required for resettlement purposes or an acquisition order was issued on or before the date of commencement of this Act, shall be —

(i) the period during which such preliminary notice is in force in terms of the Land Acquisition Act [Chapter 20:10]; or

(ii) the period during which such acquisition order is pending before the Administrative Court for confirmation in terms of the Land Acquisition Act [Chapter 20:10]; or

(iii) if the Administrative Court refuses to grant an order authorising or confirming the acquisition of the land, a period of six months after the date of such refusal; or

(iv) a period of six months after such preliminary notice or acquisition order is withdrawn or revoked in terms of the Land Acquisition Act [Chapter 20:10], unless, within that period, a fresh preliminary notice or acquisition order is issued in respect of the same land;

as the case may be; or

(b) in relation to which no preliminary notice identifying such land as being required for resettlement purposes has been issued at the date of commencement of this Act, shall be a period of six months from the date of commencement of this Act:

Provided that —

(i) if within that period an acquiring authority issues such notice in respect of that land, the provisions of paragraph (a) shall apply;

(ii) if a person who is a protected occupier of land referred to in this paragraph subsequently occupies land referred to in paragraph (a) before

the expiry of a period of six months from the date of commencement of this Act, such person shall be deemed to be a protected occupier of that land in terms of that paragraph."

Section 4 of the Act, to my mind, does not only deal with the period during which a person shall be a protected occupier of rural land but it also establishes another or other categories of protected rural land occupiers. The categories of protected rural land occupiers in terms of the Act are the following:

(a) those referred to in s 3 as read with s 4(a) of the Act — the persons who were in occupation of any land which is the subject of a preliminary notice of acquisition before the fixed date in anticipation of being resettled and who qualified for settlement in accordance with the relevant administrative criteria fixed by the acquiring authority.

(b) those referred to in s 3 as read with s 4(b) of the Act — who occupied any land which was not the subject of a preliminary notice of acquisition as of 5 June 2001 (the date of commencement of the Act) who shall be protected occupiers for six months from that date; and

(c) those referred to in s 3 as read with s 4(b) proviso (ii) of the Act — who occupied any land which was not subject of a preliminary notice of acquisition but have since 5 June 2001 occupied land which is the subject of a preliminary notice of acquisition.

The applicant's farm is the subject of a preliminary notice of acquisition and the second to sixth respondents occupied that farm within six months of the commencement of the Act.

The issue that arises is really one of the onus to be discharged. The onus on the applicant is to establish a prima facie case. In order to do so he must aver such facts as will shift the burden of proving certain facts to the occupiers of rural land. If the applicant seeks the eviction of occupiers simply on the basis that they occupied his land after the fixed date then his averment to that effect is sufficient to shift the burden onto the occupiers to show that they in fact occupied the applicant's land before the fixed date and they are therefore protected occupiers under the Act. Equally, where the applicant seeks to evict occupiers referred to in s 4(b) proviso (ii) he must, in order to shift the burden to the occupiers, allege that the occupiers moved onto his land when they were not protected occupiers on some other rural land. This averment is necessary in my opinion to shift the burden onto the occupiers to show that they were protected occupiers on some other rural land. The failure by the applicant to make a general averment that the occupiers on his land were not protected occupiers on some other rural land before they occupied his land is fatal to his ability to establish a prima facie case.

Mr de Bourbon submitted that it is well nigh impossible for any applicant

to know where the new occupiers may have originated from. That may be so, but the escape route for the applicant would still be for him to at least allege baldly that the occupiers on his land were not protected occupiers elsewhere. This is what the applicant failed to do in this case.

The Act is quite explicit in s 3(2) that:

"… no court shall issue any order for the recovery of possession from a protected occupier of any rural land, or the ejectment therefrom of a protected occupier, or the payment of damages by such protected occupier in respect of the occupation or trespass of such land during any period referred to in section four."

This provision emphasises the point I have endeavoured to make, that the person who it is sought to eject from any land or from whom it is intended to "recover possession" of the land must not be a protected occupier. Once he is a protected occupier then the court has no power to issue any order for his ejectment, etc. It must be accepted that the Act is a tight piece of legislation whose main purpose or general design is to ensure that those who have occupied rural land before 15 December 2001 are protected and that their removal from the land they have occupied is made very difficult to effect or procure. Section 5 of the Act empowers the acquiring authority to issue a certificate to the effect that certain occupiers are protected. Upon the issuance of that certificate, the burden to show that the person is not protected shifts to the applicant. That burden in practical terms is very difficult to discharge.

It is clear that the Act imposes on the owner of the land an onus which is difficult for him to discharge. But I think the court can do no better than interpret the law as enacted by Parliament. It is not the right thing to do for any court, because of its own perception that an enactment places a heavy burden on one group of persons, to strain the interpretation of that statute in order to defeat what clearly appears to be the intention of Parliament. It should not intrude into the function of Parliament and defeat its intention until such time

as the enactment is either amended in recognition of the hardships it has created or is otherwise declared unconsitutional by a court of competent jurisdiction.
In view of the decision I have come to, it will not be necessary for me to deal with the other submissions made on behalf of the applicant in relation to the activities authorised by the first respondent which may be challenged by reference to the provisions of s 9(4) and (5) of the Land Acquisition Act. It will also not be necessary for me to deal with the fact of the second to sixth respondents' absence at the hearing. It is apposite for me, however, to make a few observations necessitated by what transpired in this matter.
First, I think that persons who conduct themselves in any manner which gives cause to other persons to challenge their conduct in a court of law must have the moral and political courage of their convictions to defend their
Page 355 of 2001 (2) ZLR 345 (H)
conduct in the courts. That will enhance the observance of due process in this country. It would be most inappropriate if the second and sixth respondents hid behind the inability of the applicant or the Deputy Sheriff or the first respondent to identify them. They should have come openly and accepted the court process and appear at the hearing to put across their side of the story.
Second, the Civil Division of the Attorney-General's Office must take a serious view of all cases especially those with wider significance for the country. It is insufficient and totally unacceptable for the Civil Division of the Attorney-General's Office to be content with making an appearance only and fail, as was the case here, to show that they understand the complexity of the matters involved. The officers of the Division must assiduously prepare themselves and put up an informed and competent defence of the position adopted by their clients. It is always frustrating to the judicial officer that the task of determining issues of law which arise in any application is largely left to him or her to perform without any meaningful real assistance from that Division. The Attorney-General is encouraged to assign serious cases of public importance to experienced, hard-working and competent officers in his department so that the court is properly guided before reading its decision.
Third, the Act was enacted to protect occupiers of rural land in the aftermath of countrywide "invasions" beginning in about March 2000. It is the duty of this court to act according to the law as expressed by Parliament in the full appreciation that that law overrides the equities of any particular case. This court cannot strain that law if clearly expressed, to suit or accommodate what may appear to be a genuine case for relief. Its role is to determine objectively the intention of Parliament and give legal and binding effect to that intention. It is in the light of this consideration that I am satisfied that the Act imposes on the applicant the onus to establish a prima facie case that the persons whom it seeks to eject from Peveril Farm are not protected occupiers. I have emphasised that it was necessary for the applicant to aver in his affidavit at least that the persons concerned are not protected persons in terms of s 4(b) of the Act. In the circumstances of this case, I am therefore satisfied that the applicant has failed to establish a prima facie case for the relief he sought. The provisional order sought cannot therefore be granted.
Each party is to bear its own costs.
KOMBAYI v REGISTRAR-GENERAL
2001 (2) ZLR 356 (S)
Division: Supreme Court, Harare

Judges: McNally JA, Sandura JA & Malaba JA
Subject Area: Civil appeal
Date: 16 & 29 October 2001
Judgment Number: S-88-01

Constitutional law — Declaration of Rights — s 23 (protection against discrimination) — educational qualifications prescribed for candidates for election as mayor — whether discriminate against people who lack education
Constitutional law — public officer — executive mayor of municipality — whether public officer for purposes of Constitution
Elections — constituency registrar — independence of when sitting as nomination court — power of Registrar-General to seek review of constituency registrar's decision
Elections — urban council election — mayoral election — candidate — qualifications required for — candidate not holding such qualifications — nomination a nullity
A constituency registrar accepted the appellant's nomination as a candidate for election as executive mayor of Gweru, but the High Court, on the application of the Registrar-General, subsequently declared the nomination void on the ground that the appellant lacked the necessary educational qualifications set out in s 103H of the Electoral Act [Chapter 2:01]. That section requires candidates to have passes in at least five subjects at "O" Level, together with passes in at least two subjects at "A" Level or a post-"O" Level qualification in any profession or calling obtained after at least two years of study. The appellant had a Standard 6 pass, a two-year primary teacher's certificate, and a locomotive drivers (steam) certificate obtained after five years of apprenticeship.
The appellant appealed against the High Court's decision on the following grounds amongst others: that the Registrar-General had no locus standi to bring the nomination on review to the High Court since he was functus officio; that the High Court had no jurisdiction to set aside the nomination; that he (the appellant) had the necessary educational qualifications for election; that the educational requirements infringed s 23 of the Constitution, which prohibits discrimination; and, finally, that the office of executive mayor is not a public office in terms of the Constitution.
Held, that when the constituency registrar accepted the appellant's nomination he was performing a function which the Electoral Act vested in him in his own right, not as a

subordinate of the Registrar-General. Hence, the Registrar-General had locus standi to take the constituency registrar's decision on review, indeed he had a duty to do so under s 46(15)(d) of the Act.
Held, further, that the High Court has an inherent power of review, both under the common law and under the High Court Act, to review decisions of all tribunals and administrative authorities in Zimbabwe. This was a decision eminently suitable for correction on review.
Held, further, that since the appellant did not have "O" Level he fell at the first hurdle. Without that he could not obtain the post-"O" Level qualifications required by s 103H of the Electoral Act.
Held, further, that the educational requirements set out in s 103H of the Electoral Act did not contravene s 23 of the Constitution, which does not prohibit discrimination on the ground of lack of education. In any event s 23(3)(d) specifically permits qualifications to

be imposed for service with any body corporate established directly by an Act of Parliament for a public purpose. The City of Gweru was such a body, by virtue of the provisions of the City of Gweru (Private) Act [Chapter 29:03].
Held, further, that the office of executive mayor is not a public office in terms of the Constitution.
Case cited:
Mining Commissioner of Johannesburg v Getz 1915 TPD 323
Legislation considered:
City of Gweru (Private) Act [Chapter 29:03]
Constitution of Zimbabwe 1980, s 23
Electoral Act [Chapter 2:01], s 103H
E T Matinenga, for the appellant
N Mutsonziwa, for the respondent
McNALLY JA: Mr Kombayi wanted to stand for the post of executive mayor of Gweru in August 1999. He lodged his nomination papers in terms of the provisions of Part XIII of the Electoral Act [Chapter 2:01] (the Act). That Part, although headed "Nomination of Candidates for election as Members of Parliament", is extended to cover this type of election by the amendment to s 2 of the Act contained in s 2 of Act 21 of 1997.
His nomination papers were accepted by the constituency registrar, sitting as a nomination court. But shortly thereafter, the Registrar-General received information that Mr Kombayi lacked the necessary educational qualifications. In terms of s 46(15) of the Act, a candidate shall not be regarded as duly nominated if, inter alia, he is not qualified for election at that election.
The Registrar-General took the matter on review before the High Court, which upheld his application and declared the nomination null and void. Mr Kombayi now appeals on six separate grounds, as follows:

1. The Registrar-General had no locus standi since he had performed his function and was functus officio;
2. The learned judge had no jurisdiction;
3. The learned judge erred in finding that the educational qualifications were insufficient, particularly without hearing oral evidence on the matter;
4. The learned judge had no jurisdiction to hear an application by the Registrar-General to overrule his own decision (This seems to be a combination of grounds 1 and 2);
5. The requirements for qualifications infringed s 23 of the Constitution of Zimbabwe;
6. The office of executive mayor was not a public office in terms of the Constitution.

I will deal with these grounds in turn.
1. The Registrar-General lacked locus standi
It seems to me that this grounds exhibits a failure to appreciate the nature of the juridical persons involved in this matter. Normally, if one wishes to make a legal claim against a person acting in the course of his duties as a public servant, one sues the Minister. It does not matter that the Minister knows nothing of the facts of the case. The Minister represents the Ministry. Thus, s 3 of the State Liabilities Act [Chapter 8:14] provides that

anyone claiming against the State "may make the Minister … nominal defendant or respondent". The permissive "may" is used presumably because this will not always be the case.

When a particular public servant is given, either by the provisions of the Constitution or in terms of an Act, specific powers, then that public servant may be made a party to litigation, in the name of his office. This is why in the present case the Registrar-General was the applicant. Nobody objected that it should have been the Minister. It is the Registrar-General who exercise various important functions under the Act, as appears from s 15.

The constituency registrar also performs certain statutory functions under the Act. The long title of the Act states that it is:

"An Act to … provide for a Registrar-General of Elections and constituency registrars …"

The terms "constituency registrar" is defined in s 2 of the Act. His functions are set out in s 16. Subsection (3) of that section gives the Registrar-General powers of "general supervision and direction" over constituency registrars, but they exercise their functions otherwise independently. In particular, when it comes to nomination of candidates under s 46, the constituency registrar has a very specific rôle. He is required to "hold a public court", later

described as a "nomination court", for receiving the nomination of candidates. At the end of the nomination process, he must "in open court announce the name of every candidates who has been duly nominated". There is a provision in s 15(3)(a) of the Act that the Registrar-General may assume and exercise any function vested in a constituency registrar. If he had done so in this case, things might have been different. But he did not.

What is apparent from all this is that a constituency registrar, when carrying out the functions assigned to him by the Act, performs those functions in his own right as constituency registrar, not as a subordinate of the Registrar-General or, for that matter, of the Minister. He, as constituency registrar, presides over the nomination court. He does not represent the Registrar-General in the discharge of that function. Hence the decision in Mining Commissioner of Johannesburg v Getz 1915 TPD 323 is distinguishable.

I must record that Mr Mutsonziwa, who appeared for the Registrar-General, seemed unwilling to go along with this reasoning. Nonetheless, it seems to me to be correct. And it follows from that, that the Registrar-General was not functus officio. It was the constituency registrar who was functus officio. The Registrar-General had locus standi to take the constituency registrar's decision on review. Indeed, in view of the provisions of s 46(15)(d), to which I have referred earlier, he had a duty to do so.

2. The court lacked jurisdiction

The argument here was that the role of the court is limited to appeals under s 46(19) or election petitions in terms of Part XXIII.

I cannot accept this contention. The High Court of Zimbabwe has an inherent power of review, both under the common law and in terms of s 26 of the High Court Act, to review decision of all "inferior courts of justice, tribunals and administrative authorities within Zimbabwe". This was a decision eminently suitable for correction on review.

3. The adequacy of the educational qualifications

It must be noted that the educational qualifications required for a person standing for election as a mayor were introduced as recently as 14 November 1997. The educational standards are defined as follows in s 103H(1)(d):

"(1) Any person who — …

(d) holds academic or professional qualifications to at least the following levels —

(i) a general certificate of education with passes in at least five subjects, including English, at Ordinary Level; and

(ii) either —

A. a general certificate of education with passes in at least two subjects at Advanced Level; or

B. a post-Ordinary Level qualification in any profession or calling obtained after pursuing at least two years of studies; …

shall be qualified for election as mayor of a municipality."

Mr Kombayi does not have an Ordinary Level General Certificate of Education. He holds a Standard 6 pass, a two-year Primary Teachers (Lower) Certificate and a Locomotive Drivers (Steam) Certificate obtained after a five-years apprenticeship. His contention is that the Standard 6 pass plus a two-year Primary Teachers (Lower) Certificate fulfills the requirement of subs (i), and the Locomotive Drivers Certificate fulfills the requirements of (ii)B.

I cannot accept either of these contentions and must come to the same conclusion as the judge a quo did.

What the Act requires, in simple language, is secondary school academic qualification up to and including "O" Level (if I may use the commonly accepted abbreviation) plus the further qualification of "A" level or a post-"O" Level qualification in a profession or calling after at least two years of studies.

The appellant does not have "O" Level. His secondary schooling terminated two years short of that level. His teacher-training qualification was, strictly, not education but training. So he falls at the first hurdle. The first requirement is "O" Level. The second requirement is post-"O" Level education (i.e. "A" Level) or training. If the first requirement is not reached, then by definition the second cannot be reached. Without "O" Level he cannot study for post-"O" Level qualifications.

The qualification required are certainly high. That is not a matter for the court under this heading, though it may be relevant under the constitutional heading below. I do not know what would be the situation of a person with, say, a South African or Namibian matriculation pass plus a University degree. There may be an argument based on the equivalence of secondary and tertiary education. But I do not see any room for interpreting the section in such a way as to equate post-Standard 6 teacher training, with the achievement of an "O" Level pass. The starting point before one branches off into training is 5 "O" Levels including English. The appellant does not reach that starting point.

4. I have dealt with, and disposed of, this fourth submission under headings 1 and 1 above.

5. To require educational qualifications is an infringement of the individual's rights under s 23 of the Constitution

There are two reasons why this argument is fallacious.

The first is that s 23 of the Constitution protects the individual from discrimination on a number of grounds, but lack of education is not one of them. The types of discrimination that are prohibited are discrimination by "race, tribe, place of origin, political opinions, colour, creed or gender".
The second is that even if the first reason is wrong, then discrimination is specifically permitted by subsection 23(3)(d) in these circumstances. The subsection reads:
"Nothing contained in any law shall be held to be in contravention of subsection (1)(a) (i.e. unlawfully discriminatory) to the extent that the law in question relates to any of the following matters —

(a) …
(b) …
(c) …
(d) qualifications, not being qualifications specifically relating to race, tribe, place of origin, political opinions, colour, creed or gender, for service as a public officer … or for service with any public authority or any body corporate established directly by or under an Act of Parliament for a public purpose."

Mr Matinenga argues that the executive mayor of Gweru is a political officer, not a public officer. But cannot be so. He is elected to serve the ratepayers and residents of Gweru, regardless of their political views.
A better argument is that the interpretation section of the Constitution, s 113, contains a definition of "public office" as "a paid office in the service of the State" and "public officer" means "a person holding or acting in any public office". On that basis, the executive mayor of Gweru would not be a public officer. He works for the City, not for the State. In this, I respectfully differ from the finding of the court a quo. However, he is covered by the later phrase in s 23(3)(d) which speaks of "qualifications for … service with … any body corporate established directly by or under an Act of Parliament for a public purpose". The City of Gweru is such a body, by virtue of the provisions of the City of Gweru (Private) Act [Chapter 29:03].
I am satisfied therefore that it is not discriminatory, within the meaning of s 23 of the Constitution, for an Act to require educational qualifications for a candidate for the position of executive mayor of Gweru.
6. Is the office of executive mayor of Gweru a public office in terms of the Constitution?
I have already expressed the view that it is not, in the light of the definition in s 113 of the Constitution. However, this does not help the appellant, for reasons already explained.

In the circumstances, the appeal must be dismissed with costs.
SANDURA JA: I agree.
MALABA JA: I agree.
Takawira & Associates, appellant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners
Stumbles & Rowe, applicant's legal practitioners
Civil Division of the Attorney-General's Office, legal practitioners for the first, seventh and eighth respondents
KARIMAZONDO & ANOR v MINISTER OF HOME AFFAIRS
2001 (2) ZLR 363 (H)

Division: High Court, Harare
Judges: Mungwira J
Subject Area: Civil action
Date: 9, 11 & 31 October 2001
Judgment Number: HH-191-01

Damages — assessment — unlawful arrest and imprisonment, assault and defamation — torture of person arrested on criminal charge — long lasting physical and psychological effects — amount to be awarded — effect of decline in value of money

The plaintiffs were both arrested on allegations of murder. The charges were subsequently dropped. The second plaintiff was a serving police officer. The first plaintiff, his wife, was tortured while in custody and suffered long-lasting physical and psychological effects, full details of which were disclosed in medical reports.

Held, that the circumstances of the case were exceedingly grave and warranted a substantial award of damages. The actions of the police were in flagrant and reckless disregard of the rights of the plaintiffs. The fact of the detention in itself created a hardship. The brutality and callousness with which the assaults were perpetrated on the first plaintiff instilled in any right thinking person a sense of horror and shock. The unlawful and inhumane treatment to which the first plaintiff was subjected to was totally unnecessary, vindictive and malicious. The court would make an award which in money terms expressed its disapproval of the seriousness, brutality and humiliating effect of such treatment. The decline in the value of money in recent years would also be taken into account.

Cases cited:

Argus P & P Co Ltd v Inkatha Freedom Party 1992 (2) SA 579 (A)
Biti v Min of State Security 1999 (1) ZLR 165 (S)
Botha v Zvada & Anor 1997 (1) ZLR 415 (S)
Makorombedzi v Min of State Security 1986 (1) ZLR 73 (H)
Manamela v Min of Justice & Ors 1960 (2) SA 395 (A)
Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S)
Min of Home Affairs & Anor v Bangajena 2000 (1) ZLR 306 (S)
Mtetwa v Tenda Tpt (Pvt) Ltd HH-89-00
Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V)
Thandani v Min of Law & Order 1991 (1) SA 702 (E)
Whittaker v Roos & Bateman 1912 AD 92

M Motsi, for the plaintiffs
Mrs T Dondo, for the defendant

MUNGWIRA J: The first and second plaintiff are husband and wife. They were arrested on allegations of murder by police officers of the Zimbabwe Republic Police, Criminal Investigation Department (Homicide) on 16 and 17 March 1999 respectively.

The arrests were as a result of their having been implicated by one John Mita in the murder of the plaintiffs' domestic worker, one Juliet Fifteen.

After a period of detention in police cells, the plaintiffs were charged with the murder of Juliet Fifteen and were both remanded in custody. They were released on bail on 14 April 1999.

The defendant admits that the arrest and detention of both plaintiffs was unlawful. The defendant further admits that Joyce Karimazondo, the first plaintiff, was assaulted whilst in police custody and sustained certain injuries, as borne out by the medical report. It is not in dispute that the assault perpetrated on the first plaintiff was unlawful.
The defendant does not challenge the fact that as a result of the allegations there was publication in the media of the allegations. Despite the concessions by the defendant, it is common cause that no action has been taken against the officers who perpetrated the unlawful assault and further that no apology has been forthcoming from the police.
Liability having been admitted by the defendant, the only issue that remains for this court to determine is that of quantum.
Each plaintiff claims an amount of $1 500 000 in damages for —

> "(i) the malicious arrest and subsequent incarceration;
> (ii) assault perpetrated upon them (sic);
> (iii) the defamation which emanated from the publicity that the matter attracted."

The plaintiffs ought ideally to have apportioned the lump sum claimed to each cause of action. I am of the view, however, that despite the obviously inelegant manner of the pleadings, this is not fatal to the plaintiffs' case. Judging from the defendant's pleadings, the defendant was well aware of the case he had to meet and has suffered no embarrassment or prejudice. The causes of action are not inconsistent. The claims arise out of the same series of transactions and the particulars produced were set out in such a manner as enabled the defendant reasonably to assess the quantum of damages.
Evidence was led from both plaintiffs and a Mrs Priscilla Tandiwe Mbape, programme manager for the Amani Trust, the person responsible for the compilation of a psychological report on the first plaintiff.
Mrs Mbape is a state registered nurse. She interviewed the first plaintiff and conducted counselling sessions with the first plaintiff which lasted for several months until June 2000 when the first plaintiff relocated to Chivhu.
Mrs Mbape explained that the psychiatric instrument she used in making

an assessment was the SRQ-8 which was adopted for local use from the internationally recognised SRQ-20 instrument.
The report is comprehensive and for the major part self explanatory. It accords in substance with the evidence led from the plaintiff. It is, however, noted that in testifying the first plaintiff omitted to mention some of the details which are mentioned in the report. This does not in my view create a counterbalance in that the content of the psychological report Exhibit "1", which report was accepted by the defendant without reservation.
In order to obtain a full appreciation of the first plaintiff's case, it is necessary that I set out the full text of the psychological report adverted to above and also the medical report Exhibit "2". The contents of both documents are not in contention.

1. "Psychological Report
Examination requested by: Lawyer
Clinician's Name: Priscilla T. Mbape SRN, RMN, Fip. Add.
Programme Manager

AMANI Trust

Date of evaluation: 9/11/99 Duration of evaluation: 90 minutes

Name of Subject: Joyce Karimazondo Birth Date: 06/06/59

Reason for examination: Torture by Police Gender: Female

Informed Consent: Yes

Background Information:

Mrs Karimazondo is aged 40, married for 15 years with 6 children. She attended Primary School only and was employed as a store assistant till 3 years ago.

Allegations of Torture:

On 12 December 1998, her maid went missing from home after she had been sent to cook food. The matter was reported to St Mary's Police station where the matter was referred to the Town Centre Police post of Chitungwiza. Later she was referred to Makoni Police Station.

On 16 March 1999, Joyce was arrested by a Police Sergeant from Highlands Police Station accused of murdering the maid since she had not been found.

On 17 March 1999, she transferred to the Central Police Station. She was detained for 4 days at the Station, during which time she was beaten on body by baton sticks (sic), suspended on a plank, electricity passed through her body. She was made to remove her bra in front of them. Spread eagled and beaten on her private parts. Dragged from upstairs and thrown on the lawn outside. Legs shackled and handcuffed. Verbally abused using unprintable words.

Review of torture methods:

Blunt trauma: kicks, slaps to ears sticks, falling down on the lawn;

Positional torture: suspension on a plank with feet dangling, stretching limbs apart as in being spread eagled and private parts beaten;

Electric shock:electrical current applied to various parts of her body;

Crush injuries:smashing fingers and toes with boots;

Sexual:violence to genitals, being made to remove her bra in front of policemen;

Condition of detention: solitary confinement, forced nakedness;

Deprivations: medical care, manipulating brightness of the cell, lack of sleep;

Humiliation: verbal abuse with unprintable words, false accusations;

Threats: threats made about further torture.

Physical Symptoms and Disabilities:

- Headaches
- Dizziness
- Impaired concentration
- Impairment of hearing
- Pain in shoulders and arms
- Pains in legs and feet
- Backache
- Chest pains
- Pain in genitals
- Sleep disturbances [difficulty in falling asleep, early wakening, disturbed sleep]
- Itchy scars

- Inability to do daily chores
- Nightmares
- Inability to engage in sexual intercourse with husband

Psychological History/Examination:

Methods of assessment:

The following instruments were used in making an assessment.

- SRQ-8
* Score: 4/8
- Present Health Status Questionnaire
* Total score = 20
* Psychological score = 8
* Physical score = 12
- History of Violence
* Physical torture = 4
* Deprivation = 3
* Sensory over stimulation = 3
* Psychological torture and ill treatment = 4
- Clinician Administered PTSD Scale
* Frequency score = 33
* Intensity score = 26

Self reporting Questionnaire:

This is a psychiatric screening instrument that was developed in Zimbabwe. The instrument indicates the presence or absence of psychological disorder, and a score of 4 or more is indicative of a clinically significant psychological disorder.

Present State of Health Questionnaire [PHSQ]

This is a detailed assessment of current symptoms. As can be seen from the scores,

Mrs Karimazondo reports a very high number of symptoms overall, with both psychological and physical symptoms being reported. Very High scores are indicative of Somatisation Disorder since, according to international psychiatric diagnostic systems, persons reporting more than 12 symptoms on presentation are diagnosed as having Somatisation Disorder.

History of violence

This is a structured interview on the experience of violence reported. Four general areas are examined, and, as can be seen, Mrs Karimazondo reports experiencing a large number of different torture types.

Clinician Administered PTSD Scale [CAPS]

This is structured assessment for Post-Traumatic Stress Disorder, which is a frequent consequence of torture. As can be seen, the scores are both in excess of 21, which is the cut-off indicative of clinically significant symptoms.

Discussion:

From the interview and the assessments, the following has emerged:

1. According to the SRQ-8, Mrs Karimazondo has a clinically significant psychological disorder.

2. Mrs Karimazondo reports a very large number of physical and psychological symptoms.
3. Mrs Karimazondo reports experiencing a large number of different torture types.
4. According to the PHSQ and the CAPS, Mrs Karimazondo has both a Somatisation Disorder and Post-Traumatic Stress Disorder.

Taking all these findings together, it is clear that Mrs Karimazondo has a clinically significant psychological disorder, which is likely to be co-morbid Somatisation Disorder and Post-Traumatic Stress Disorder. These were most probably indicated by her torture experience, and the combination of these disorders is frequently found in torture survivors.

Mrs Karimazondo will require extensive psychotherapy in order to overcome her psychological disability, which will require at least six months of fortnightly sessions.

Clinician signature:

Date: 9-11-99

Place: AMANI offices"

The Obstetrics and Gynaecological Report dated 16 April 2000 reads:

2. "RE: MRS JOYCE KARIMAZONDO

I was requested by the AMANI Trust to examine this 40 year old woman who gave a history of having regular periods until she was arrested and assaulted by Police between 16 March and 20 March 1999. The history of assault included being spreadeagled on the floor and beaten with batons on the genitals. She was also slapped around the face and beaten on the back while hung from a beam. Her fingers and toes were stamped on and she was also kicked with boots. While she was hung suspended by her arms she had some sort of burning or electricution process to her back. She passed out on more than one occasion, but noticed afterwards that she was bleeding

per vaginam. She was released from custody after 2 weeks and was on bail for 6 months. In her previous history, she has had 6 normal vaginal deliveries and has had no surgery or any other medical condition of any note. Since March 1999 she has had no period and she has been unable to have sexual intercourse with her husband because of deep pain in the pelvis. She has also had difficulty working because of backache, cardiac palpitations and headaches.

On examination, I found her to be a tearful and distressed woman of 40 with multiple superficial scars on her back, buttocks and thighs. Her blood pressure was raised at 190/115. Her breast and abdominal examination were normal. On vaginal examination, the genital mucosa was atrophic and there was some cervical excitation tenderness. The uterus was bulky and there was bilateral pelvic side wall tenderness. I took an Ayres and Brush Smear which were negative and arranged hormonal screening which showed that she has become prematurely menopausal with a very low oestrogen level. I reviewed her in February and explained these findings to her. Her blood pressure was still raised. I have started her on hormone replacement therapy, Prempak-C, and I have also put her on Methyldopa, 250 mg 3 times a day for her hypertension. I have explained to her and her husband that the pelvic tenderness may respond partially to the hormone replacement therapy and I hope it does, but there may be residual pelvic tenderness secondary to the trauma of the assault in March 1999. These were my findings of 5 January 2000 and the follow-up visit on 8 February 2000.

Yours sincerely
(Sgd) Dr Ginny Iliff."

The first plaintiff in her testimony stated that, as a result of her arrest, there had been wide coverage of the matter by the media and that after her release she was shunned by fellow residents at the police camp where she resided and also in the suburb of Chitungwiza where the plaintiffs owned a residential property. Fellow residents, she stated, approached the person in charge of the police camp to have the plaintiffs evicted as they were murderers. The first plaintiff described how she, out of fear, been forced to take refuge behind the locked doors of her house.

She mentioned that she was to date unable to engage in intimate sexual relations with her husband due to the injury to her genitalia. A tear sustained in her genital region had not healed and caused her pain when urinating such that she was forced to apply salt to the area in order to alleviate the problem and gain relief. She was currently on medication for high blood pressure and headaches and suffered from a visual defect. Lack of finances had hindered her from continuing counselling sessions and obtaining more specialised medical care.

She expressed her hurt at the defendant's failure to tender an apology for the unlawful conduct of his officers and the fact that no investigation had been carried out with a view to bringing the perpetrators to book.

The second plaintiff stated that he was at the relevant time employed as a

constable in the Zimbabwe Republic Police. He is 43 years of age. He was arrested a day after his wife at Highlands Police Station, where he had taken food to the first plaintiff. After his arrest, he was taken to court where he was placed on remand from March to August 2001. He had been denied bail for the period extending from 17 March 2000 to 14 April 2000. The effect of his arrest and subsequent detention and the considerable publicity the matter attracted had been such that he felt unable to continue working in the police force, with the result that he had been obliged to make the decision to take early retirement. But for the arrest, detention and prosecution he had hoped to remain in employment until he reached official retirement age. He does not, as does his wife, complain of maltreatment by the police.

In Thandani v Minister of Law & Order 1991 (1) SA 702 (E) at 707 van Rensburg J stated:

"In considering quantum, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and rights of an individual. In the words of Broome JP in May v Union Government 1954 (3) SA 120 (N) at 130F:

'Our law has always regarded the deprivation of personal liberty as a serious injury'."

It is submitted by the defendant, relying on Minister of Defence & Anor v Jackson 1990 (2) ZLR 1 (S), that general damages are not a penalty but compensation and that the award is designed to compensate the victim and not punish the wrongdoer. Compensation, it is argued, must be assessed as to place the injured party in the position he would have occupied if the wrongful act had not been committed.

The defendant further submits that the fall in the value of money is a factor to be taken into account in terms of purchasing power but not with such adherence to mathematics as may lead to unreasonable results.
This court was referred by the defendant to:

1. Makorombedze v Minister of State Security 1986 (1) ZLR 73 (H), where the plaintiff was awarded $50 000 in general damages for unlawful detention for 20 months.
2. Botha v Zvada & Anor 1997 (1) ZLR 415 (S), where an award of $20 000 was made for a detention of 6 days.
3. Minister of Home Affairs & Anor v Bangajena 2000 (1) ZLR 306 (S), where the plaintiff was awarded $25 000 for a period of detention of 12 hours.

In light of these cases, in respect of the second plaintiff, an amount of $120 000 for unlawful detention and $5 000 for contumelia is tendered.
Page 370 of 2001 (2) ZLR 363 (H)
In the case of the first plaintiff, it is submitted that, in light of the decision in the case of Mtetwa v Tenda Transport (Pvt) Ltd HH-89-00, the seriousness of the injuries sustained and the effects thereof, an award of $200 000 would be appropriate and would not trigger an inflationary spiral in damages claims. A further award of $120 000 for unlawful detention and $15 000 for contumelia, would according to the defendant, be appropriate.
There can be no doubt that the amounts tendered by the defendant are reflective of an acceptance that the circumstances of this case are exceedingly grave and such as to warrant a substantial award. The concession confirms that the conduct complained of was by no means "a venial act to be condoned by payment of a few pounds" per Lord de Villiers CJ in Whittaker v Roos & Bateman 1912 AD 92 at 118, a case referred to with approval by Schreiner JA in Manamela v Min of Justice & Ors 1960 (2) SA 395 (A) at 401G.
The actions of the police in this case, and this I say with particular reference to and emphasis on the treatment meted out to the first plaintiff, were in flagrant and reckless disregard of the rights of the plaintiffs. The fact of the detention in itself created a hardship. The brutality and callousness with which the assaults were perpetrated on the first plaintiff instils in any right thinking person a sense of horror and shock. The unlawful and inhumane treatment to which the first plaintiff was subjected was, in my view, totally unnecessary, vindictive and malicious.
Not only did the first plaintiff over the relevant period suffer contumelia, deprivation of her right to liberty, impairment to her dignity, anguish, discomfort and humiliation to a substantial degree, she continues to suffer the ill effects of that treatment in the form of somatisation and post-traumatic stress disorder. She has currently and in the future to live with the constant reminder of her ordeal in that she bears numerous scars on her back and the injury to her genital area has not yet healed. She is no longer able to engage in sexual activities with her spouse and has suffered loss of the amenities and the ordinary pleasures of living have been diminished. Her mobility and independence is reduced, as she is unable to participate in basic and ordinary activities such as housekeeping, cooking and bathing herself. Although no claim has been made under a separate heading for loss of income, according to her undisputed evidence she was, before her arrest, engaged in income generating activities and is now no longer capable of contributing to the upkeep and maintenance of her household.

I would, having regard to the circumstances of this case, associate myself with the following remarks of van der Spuy JA in Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 850:
Page 371 of 2001 (2) ZLR 363 (H)
"… I am of the opinion that, when the police are holding prisoners and then resort to the kind of treatment which was meted out to plaintiff, causing considerable injury, indignity, discomfort, fear and anxiety, the court must make an award which in money terms expresses its disapproval of the seriousness, brutality and humiliating effect of such treatment."
The learned Judge of Appeal, at p 851 of the same judgment, considered the relevance in cases of this nature of factors such as the seriousness of the charge and the possible sentence. In the instant case, the charge faced by the plaintiffs was that of what is akin to a ritual murder. The allegation was that the plaintiffs connived with a third person to kill their maid, whose body they wanted to use in order to acquire a minibus. The plaintiffs could, on these allegations, have been sentenced to death.
In Ramakulukusha case supra, the learned judge concluded that it was to be taken into account that the plaintiff had the right to be compensated for personal insult, indignity, humiliation and the inevitable defamation which was and is suffered as a result of the prosecution in the course of which he was characterised as a "mavhia vhatu" to the people of the Republic of Venda and beyond and added that "although acquitted … the plaintiff has to bear the stigma of being a 'mavhia vhatu' or 'killer of human beings' which he may never be able to live down — and no award of money can truly compensate him for that".
The experience of the plaintiffs as described by the second plaintiff is that the couple has not been able to shake off the stigma.
This incident occurred a little over 18 months ago and since that time the value of money has been continuously and substantially eroded. In Biti v Minister of State Security 1999 (1) ZLR 165 (S) at 171, McNally JA remarked as follows:
"Nowadays, it is not safe to obtain guidance on quantum from other countries, given that our economies have changed so greatly and so differently. The parties, conscious of this, have based their submissions on the one relevant case in this jurisdiction, namely Minister of Defence & Anor v Jackson 1990 (2) ZLR 1 (S) in which there was an award of $35 000 under this head (general damages) …
The major consideration, to my mind, is that Dr Jackson's damages were awarded in May 1988, and Mr Biti's would have been awarded, had he been successful as we have held he should, in April 1997 …
Those nine years saw a huge change in the value of money in this country. In South Africa, according to Robert J Koch's useful Quantum Yearbook for 1997, the cost of living … increased from 830.4 in 1988 to 2193 in 1997 (Base: 1970 = 100). So any award in 1988 would have multiplied by 2.64 to obtain the equivalent figure in 1997.
In Zimbabwe, I have been unable to go back further than 1990, because the consumer price index has been based on 1990 as 100. The figure for April 1997 was 490.9 (see Quarterly Digest of Statistics, Vol 3, for September 1997). So $35 000 in 1988 would have to be multiplied at least by 5 to obtain a compensation figure in April 1997. Dr Jackson's award, had it been made in April 1997, would have been at least $175 000 and

probably well over $200 000. In the circumstances, one cannot say that the claim in this case, for $100 000 is excessive."

Since the date of the above judgment, the monetary unit in this country has been on a perceptible and alarming downward spiral, with the result that the Zimbabwe dollar is now worth substantially less than in 1997.

Visser and Potgieter on the Law of Damages through the Cases at p 504 note that the court in Ramakulukusha v Commander, Venda National Force supra remarked that —

"in its researches of the case law on the quantum of damages in cases involving the infringement of personality rights it had noted with some surprise the comparatively low and sometimes insignificant awards made in Southern African courts for the infringement of personal safety, dignity, honour, self-esteem and reputation and commented that it was of the opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual, especially in group-orientated societies where there appears to be an almost imperceptible but inexorable decline in individual standards and values."

The learned authors, however, took cognisance of the Appellate Division decision in Argus Printing & Publishing Co Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A) at 590 where it was held that an action for defamation has been seen by the courts "as the method whereby a plaintiff vindicates his reputation, and not as a road to riches".

In full appreciation of the foregoing and taking into account all the circumstances of the present matter, I consider a fair award to be in respect of the first plaintiff one of $1 250 000 and in respect of second plaintiff one of $20 000.

In the result, judgment with costs is granted:

1. For the first plaintiff, in the sum of $1 250 000 together with interest at the prescribed rate from the date of service of the summons.
2. For the second plaintiff, in the sum of $250 000 together with interest at the prescribed rate from the date of service of the summons.
3. The defendant is to bear the costs of this action.

Mabulala & Motsi, plaintiff's legal practitioners

Civil Division, Attorney-General's Office, defendant's legal practitioners

S v BLANCHARD & ORS

2001 (2) ZLR 373 (S)

Division: Supreme Court, Harare

Judges: Chidyausiku CJ, McNally JA & Sandura JA

Subject Area: Criminal appeal

Date: 5 July and 1 November 2001

Judgment Number: S-78-01

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 18(3) & 18(13)(b) — right to be presumed innocent until proved guilty — provision requiring accused to prove lawful excuse or authority or reasonable excuse — constitutionality

Criminal law — statutory offences — Aircraft (Offences) Act [Chapter 9:01] — s 7(1)(a) — placing dangerous goods aboard aircraft — intent necessary — lawful excuse — what is — proof of
Criminal law — statutory offences — Law and Order (Maintenance) Act [Chapter 11:07] — s 37(2) — possession of offensive weapons — intent necessary — lawful authority or reasonable excuse — what is — proof of
Criminal procedure (sentence) — general principles — back-dating of prison sentence to date of convicted person's arrest — incompetence of
Words and phrases — "lawful authority", "lawful excuse" and "reasonable excuse" — meaning — whether fact that conduct is not prohibited by common law necessarily amounts to lawful authority or lawful excuse — distinction between lawful authority or excuse and reasonable excuse
The appellants had tried to smuggle firearms and ammunition into an aircraft that was leaving Zimbabwe, and had left a large quantity of firearms and other weaponry hidden in a truck at the airport. They were convicted, firstly, of attempting to contravene s 7(1)(a) of the Aircraft (Offences) Act [Chapter 9:01] and, secondly, of contravening s 37(2) of the Law and Order (Maintenance) Act [Chapter 11:07]. The first section makes it an offence for a person "without lawful excuse" to place dangerous goods aboard an aircraft; the second makes it an offence "without lawful authority or reasonable excuse" to possess offensive weapons. Both sections place the onus of proving a lawful excuse, lawful authority or reasonable excuse on the accused person. The appellants claimed they were missionaries

in the Democratic Republic of Congo and possessed the weapons there for self-defence; they were returning to the United States via Zimbabwe, and did not disclose their weapons in order to avoid inevitable bureaucracy which would have delayed their flight. The trial court held that this did not amount to lawful authority or a lawful or reasonable excuse and convicted them on both counts. In regard to sentence, however, the court took into account the fact that the appellants had been assaulted by state agents, and back-dated the prison sentences it imposed to the date on which the appellants were first arrested; the effect was that they served only a further six months' imprisonment before they were released and deported.
Held, that to secure a conviction under s 7(1)(a) of the Aircraft (Offences) Act or s 37(2) of the Law and Order (Maintenance) Act, it is not necessary for the State to prove a sinister motive or, in the case of the former offence, an intention to endanger the safety of an aircraft or of passengers on an aircraft.
Held, further, that the phrase "lawful excuse" in s 7(1) of the Aircraft (Offences) Act means a reason or excuse that is in accordance with the law, and "lawful authority" in s 37(2) of the Law and Order (Maintenance) Act means the right by law to do what would otherwise be an offence. A suspect seeking to escape conviction on the basis of the existence of either a lawful excuse or lawful authority must establish a reason, predicated on some legal provision, for doing something that is on the face of it unlawful. It is not sufficient for a suspect to establish that his conduct was permissible under the common law. The phrase "reasonable excuse" in s 37(2) of the Law and Order (Maintenance) Act may be something less than "lawful excuse"

Held, further, that it had not been established that the excuse which the appellants gave for their conduct or the authority they claimed was in accordance with any law. It did not therefore amount to "a lawful excuse" or "lawful authority". Moreover, since their explanation for possessing and concealing the weapons was unreasonable and absurd, they had not established a "reasonable excuse" either.
Held, further, that the fact that s 7(1) of the Aircraft (Offences) Act and s 37(2) of the Law and Order (Maintenance) Act placed the onus of proving lawful excuse, lawful authority or reasonable excuse on the accused person did not render those sections ultra vires s 18 of the Constitution.
Held, further, that the trial court's order back-dating the sentences to the date of the appellants' arrest was incompetent.
Held, further, that in view of the seriousness of the offences, the sentences imposed on the appellants were inappropriately lenient. The appellants should have been sentenced to five years' imprisonment (per Chidyausiku CJ, Sandura JA concurring) or three years' imprisonment (per McNally JA).
Cases cited:
Emperor v Harpal Ral 1902 Indian LR 24
R v Chikoro 1965 RLR 455 (G)
S v Chogugudza 1996 (1) ZLR 28 (S)
S v Janyure 1988 (2) ZLR 470 (S)
S v Kinfe S-60-98
R v Mackay 1964 R & N 51 (S); 1964 (3) SA 176 (FSC)
S v Mahlanze A-86-81
S v Michael S-59-98
S v Ndebele S-35-84
S v Woods & Ors S-60-93
Page 375 of 2001 (2) ZLR 373 (S)
S v Sanjay Dutt [1966] 1 LRC 467
Thakur & Ors v State of Maharashtra & Ors 1994 (4) SCC 602
Legislation considered:
Aircraft (Offences) Act [Chapter 9:01], s 7(1)(a)
Law and Order (Maintenance) Act [Chapter 11:07], s 37(2)
J J Callow, for the appellants
P Muziri, for the respondent
CHIDYAUSIKU CJ: The three appellants were charged firstly with contravening 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] and secondly with contravening s 37(2) of the Law and Order (Maintenance) Act [Chapter 11:07]. In respect of count one, it is alleged that on 7 March 1999 and at Harare International Airport, the appellants or one or more of them unlawfully and without lawful excuse, the proof of which lies on them, attempted to place aboard an aircraft dangerous goods consisting of revolvers, pistols, rifles, ammunition, knives and an axe. In respect of the second count it was alleged that on the same date as in count one and again at Harare International Airport the appellants unlawfully and without lawful authority or reasonable excuse, the proof of which lies on them, had in their possession offensive materials and weapons, namely a variety of ammunition, pistols, revolvers, rifles, firearms accessories, bayonets, teargas

and electric shock devices and knives. A schedule of all the materials that the appellants attempted to place on board an aircraft and material found in their possession was attached to the indictment.

The appellants pleaded not guilty to both counts but they were all found guilty on both counts. Upon being found guilty they were sentenced to the following terms of imprisonment. On the first count, the appellants were each sentenced to six months' imprisonment with labour. On the second count, the appellants were each sentenced to 21 months' imprisonment with labour of which nine months' imprisonment with labour were suspended for five years upon certain conditions and the remaining six months of their sentence was ordered to run concurrently with the six months' imprisonment imposed on the first count.

The appellants noted an appeal against both the conviction and the sentence imposed upon them. The respondent, with the leave of the court, appealed against the sentence.

The appellants appealed against conviction essentially on the following three grounds:

(a) that the court a quo erred in failing to find that a necessary element of the charges was an intent to use the weapons for improper purposes, which intent the appellants did not have;

(b) that the court a quo erred in failing to find that the appellants had established a "lawful excuse" under count one, and "lawful authority" or "reasonable excuse" under count 2 entitling them to their acquittal;

(c) that the court a quo erred in failing to find that the provisions of the Acts under which the appellants were charged placed an onus on the appellants to establish "lawful excuse" under count one, "lawful authority" or "reasonable excuse" under count two did not contravene s 18 of the Constitution of Zimbabwe.

In respect of the sentence, although the appellants allege a number of misdirections by the court a quo while considering the sentence, the main thrust against the sentence was that it was manifestly excessive.

As I have already stated, the respondent, with the leave of the court, also appealed against the sentence imposed on the appellants. The respondent's notice of appeal can be condensed into the following two grounds:

(a) The sentence imposed by the court a quo was incompetent in law to the extent that the period of imprisonment was ordered to run from the date of the appellants' arrest and prior to the appellants' trial and conviction.

(b) That the sentence imposed by the court a quo was manifestly lenient taking into account all the facts of this case.

Before I deal with the specific grounds of appeal I very briefly set out the facts of this case. The most salient facts of this case are hardly in dispute.

The appellants are American nationals who claim to be missionaries. On 7 March 1999, the three appellants were arrested at Harare International Airport when they were about to depart aboard a Swiss plane to Zurich. Their luggage was scanned and it revealed firearms and ammunition. It was also established that they had booked their truck for safe-keeping. The truck, upon being searched, was found to contain an assortment of weapons and ammunition.

The appellants did not deny attempting to place the dangerous goods upon an aircraft nor did they deny possession of the offensive weapons and material found in the truck left for

safe-keeping. They sought to explain their possession of the material that formed the basis of the charges upon the following basis. The appellants alleged that they are American missionaries. They belong to a Christian missionary group registered in the United States of America named Harvestfield, led by Pastor Jonathan Wallace. In 1996, Jonathan Wallace was requested by the Pentecostal Church to minister in Zaire, now the Democratic Republic of Congo (DRC). Initially short-term trips were made to Zaire. With the passage of time Harvestfield resolved to establish a home in the DRC. At that time, Harvestfield's operative members were Wallace, Robert Banks, the three appellants and members of their families. In November 1997, each family sold up in the United States of

America and Harvestfield moved to the DRC to establish a home and to minister to the people with the assistance of the Pentecostal Church. They took with them to Zaire, contained in a 40 ft container, their household goods and also weapons and ammunition for self-protection and "to hunt for the pot". The majority of the weapons are said to belong to Banks, a guns collector. They took weapons and ammunition because they had been advised that the situation in the country was unstable. When war broke out in the DRC the appellants and their colleagues decided to return to America. They decided to take their weapons and ammunition with them. They also decided to exit Africa via Zimbabwe. The weapons and the ammunition were secured in specially constructed side wooden panels in the back of their truck, which was also loaded with some of their personal items. The appellants entered Zimbabwe at the Kariba border post on 5 March 1999 intending to fly out of Zimbabwe on 7 March 1999. The appellants decided to leave some of the weapons and ammunition in Zimbabwe because of the excess weight constraints. The appellants attempted to place on board an aircraft, and possessed in the truck, the following weapons and ammunition: 10 rifles, nine shotguns, seven revolvers, 13 pistols, five silencers, two insight sets and a large quantity of ammunition and other accessories.

The above is by no means a small quantity of arms and ammunition. It is quite an arsenal. It is not the type and quantity of arms and ammunition that one would expect to be possessed by missionaries even for self-defence. If anything, I would expect criminals to possess things like gun silencers to conceal a shooting. I will comment more on the quantity and kind of weapons found in the possession of the appellants when I deal with the issue of sentence.

In the first ground of appeal it is contended that the State had to establish or prove the appellants' mens rea in the sense of an intention, actual or constructive, to jeopardise the safety of the aircraft or passengers and the public. It was contended that such an intention or mens rea was an essential element of each of the offences the appellants were charged with and had to be established by the State. Thus, the argument went, the object of s 7 of the Aircraft (Offences) Act was to safeguard aircraft and persons on them and intention to jeopardise that safety was accordingly a necessary element of the offence. Similarly the object of s 37 of the Law and Order (Maintenance) Act is to ensure public safety and accordingly an essential element of the offence was to jeopardise public safety. A number of Indian cases were cited as authorities for this proposition. See Emperor v Harpal Ral 1902 Indian Law Reports 24, Thakur & Ors v State of Maharashtra & Ors 1994 (4) SCC

602 and S v Sanjay Dutt [1966] 1 LRC 467. This ground of appeal was advanced as a defence and similar submissions were made in

support of that defence at the trial. The learned trial judge dismissed that defence after a very careful review of the authorities cited. I can do no better than repeat what the learned judge said in dismissing that defencee:
"Now, it is clear from that section that what is required for the State to prove is firstly, the accused person had, with actual knowledge, dangerous goods which, secondly, he carried, placed or caused it to be placed aboard an aircraft.
Mr Andersen also submitted that, with regard to that provision as well as with regard to the second count that, in addition to proving possession, the State also had to prove that the possession or placing on board must also be with a further intent which is with the intent either to use it or for a sinister motive. He cited a number of cases and these were judgments from India and photocopies of them were provided to me. These judgments dealt with Indian legislation — Indian Arms Act and Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA).
The Indian Arms Act of 1878 was dealt with in the judgment of the Emperor v Harpal Ral 1902 Indian Law Reports 24 A 454. The facts were that a Mr Nicholas, resident in the district who owned a pistol which needed repairs, gave the pistol to the son of his employee so that he might take it to the neighbouring town to have it repaired. The son of the employee gave it to his father who was taking it to this neighbouring town when he was arrested. He was then charged under Section 19 of the Arms Act. It was held that his temporary possession without a licence did not create an offence within the meaning of Section 19 of the Indian Arms Act.
The two judgments referred to by Mr Andersen which arose under TADA where 'terrorist act' was assigned the meaning given to it s 3(1) of TADA and that terrorist must be construed accordingly. Section 5 of TADA provided that where any person is in possession of any arms and ammunition specified in column 2 and 3 of category I or category III(a) of Schedule 1 to the Arms Rules, 1962 or bombs, dynamite or other explosive substance unauthorised in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a terms (sic) which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.
It is clear from the cases submitted to me by Mr Andersen particularly in the two judgments — Hitendra Vishnu Thakur & Ors v State of Maharashtra & Ors (1994) 4 Supreme Court Cases 602 and S v Sanjay Dutt [1996] 1 LRC 467. Both these cases were concerned with s 5 of TADA and it is clear from these judgment (sic) that it dealt with a strict liability offence. It is also clear to me that what was indicated in these judgments that before a person could be found guilty under s 5 the State had to prove that he had actual knowledge of what he possessed. In other words, he knew he was carrying the arms and ammunition or a bomb or dynamite or other explosive substance. The State had to prove the requisite knowledge on his part of possession. These judgments did not indicate to me that in addition to proving that he had such possession that the State had also to prove that he intended to use them or that he had a sinister motive.
What was said in these cases that although this was a strict liability or absolute liability offence it was open to the defendant to lead evidence to show that he did not intend to use

the arms for terrorist activities or purposes. I am satisfied that these judgments are not relevant to the provisions in this case which I am asked to consider. It does not support the submission put forward by Mr Andersen as far as what the State has to prove in this case."

I agree entirely with the observations and conclusion of the learned trial

judge. The language of s 7(1) of the Aircraft Offences Act is very explicit. It prohibits the placing on board an aircraft of dangerous goods. There is nothing in the language or the context of the provision to suggest that the prohibition is predicated upon the existence of a sinister motive or an intention to endanger the safety of the plane or passengers on such a plane. If indeed the intention of the legislature was to make such an intention an essential element of the offence I would have expected the insertion in s 7(2) of the Act between the words "who" and "without" of the following words or words to similar effect "with the intention to jeopardise the safety of the aircraft or the passengers therein". Similarly, there is nothing in the language or context of s 37(2) of the Law and Order (Maintenance) Act which suggests that a sinister motive was an essential element of that offence. The trial court was quite correct in rejecting that contention, and the first ground of appeal must fail.

I now turn to deal with the contention that the appellants had a "lawful excuse" in respect of count one and "lawful authority" or "reasonable excuse" in respect of count 2.

In support of this contention, Mr Callow submitted that the appellants did not commit any breach of the criminal law in possessing their own property or in seeking to remove it from one country to another in order to transport it to their own house. They did so in circumstances of secrecy because they did not wish to compromise their colleagues and parishioners in the DRC. They ensured that the weapons would not fall into the wrong hands, of people who would use them for improper purposes. They did not disclose the firearms because that would have led to inevitable bureaucracy which would have prejudiced their flight. The above explanations, it was contended, constitute "lawful excuse", "lawful authority" or "reasonable excuse" and the appellants should have been acquitted.

Similar submissions were made at the trial but were rejected by the court a quo. In my view, the court a quo was correct in rejecting that contention. Section 7(1) of the Aircraft (Offences) Act and s 37(2) of the Law and Order (Maintenance) Act under which the appellants were charged provide as follows:

" 7.(1) Subject to subsection (2), any person who, without lawful excuse, the proof whereof lies on him —

(a) carries, places or causes to be placed any dangerous goods aboard an aircraft; or

(b) delivers dangerous goods to a person for the purpose of their being placed aboard an aircraft; or

(c) has dangerous goods in his possession aboard an aircraft;

shall be guilty of an offence and liable to imprisonment for a period not exceeding seven years."

Similarly, s 37(2) of the Law and Order Maintenance Act provides as follows:

“ (2) Any person who, without lawful authority or reasonable excuse, the proof whereof lies on him, has in his possession or in or upon any premises occupied by him any offensive weapon or any offensive material shall be guilty of an offence.”

It is quite clear from the above provisions that if the appellants establish “lawful excuse” in respect of count one and “lawful authority” or “reasonable excuse” in respect of the second count they would be entitled to an acquittal. The trial court, as I have said, considered that the appellants established neither “lawful excuse”, nor “lawful authority” nor “reasonable excuse” for their unlawful conduct.

The Federal Supreme Court had occasion to consider the definition, among other phrases, of the phrase “lawful excuse”, “lawful authority” and “reasonable excuse” in the case of R v Mackay 1964 R & N 51 (S); 1964 (3) SA 176 (FSC). At p 57A-E (SALR 183A-E), Clayden FCJ made the following observation:

“In Madanhe’s case [1963 R & N 383], the excuse was that a polite request, which the appellant was entitled to make, was used. In Muchina’s case [1963 R&N 389], legitimate criticism of the police might have brought them into disesteem, and the same was the position in Malianga’s case [1963 R&N 504]. In these cases, the appellants did what was forbidden; they could not show direct authority to do what they did; but they could show an excuse for doing what they did which was in compliance with the law. I think on further consideration that Madanhe’s case goes too far in saying that the excuse need only be ‘not unlawful’; I would rather say that the excuse should be in accordance with law. In a strict sense it was ‘not unlawful’ at common law to do many of the acts penalised by the Law and Order (Maintenance) Act, but the phrase ‘without lawful excuse’ cannot I think mean that an apparent offender can escape by saying that there was nothing in any other law to stop him doing what he did. He must have an ‘excuse’ for contravening the law, some other reason which made him do it, and it is in regard to that reason that lawfulness is considered. An illustration of a lawful excuse is that given by Lord Goddard CJ in Winkle v Wiltshire [1951] 1 All ER 479 at p 481. The purchaser of forged stamps from an authorised dealer, who is unaware of the forgery, is in possession of forged stamps, so as apparently to be guilty of the offence, but he shows an excuse for his possession, which was apparently the performance of a lawful act. Purchase from an unauthorised dealer, as was the fact, would not show apparently lawful acquisition. And once possession continued after knowledge of the forgery the original excuse for coming into possession no longer operated.”

Thus, the learned Federal Chief Justice, after a review of the authorities, concluded that “lawful excuse” means a reason or excuse that is in accordance with the law. He defined lawful authority as meaning the right by law to do what seems to be an offence. It follows from the above, therefore, that a suspect seeking to escape conviction on the basis of the existence of either a lawful excuse or lawful authority must establish a reason predicated on some legal provision for doing that which is on the face of it unlawful.

I find myself in agreement with the dicta of the learned Federal Chief Justice. I am also satisfied that the phrases “lawful excuse” and “lawful authority” have the same meaning in this case as was ascribed to them in Mackay’s case supra.

On the facts of this case, it has not been established that the excuse given and the authority claimed was in accordance with any law. It was pointed in Mackay’s case

supra, that it is not sufficient to establish that the conduct complained of was permissible under the common law.

In respect of count two, the appellants would succeed if they establish a reasonable excuse for their conduct. I hold the view that the phrase "reasonable excuse" means substantially the same as "reasonable cause" whose definition was considered by this court in S v Janyure 1988 (2) ZLR 470 (S). McNally JA at pp 475B-476C had this to say regarding the meaning of reasonable cause:

"THE LAW ON 'REASONABLE CAUSE'

In R v Mackay 1964 R&N 51; 1964 (3) SA 176, the Federal Supreme Court had to consider the phrase 'without lawful excuse'. At p 57F of the Report in the Rhodesia & Nyasaland Law Reports (183F of the SALR), Clayden CJ had this to say:

'In this case, the appellant had two reasons for keeping publications known to him to be prohibited, two excuses for contravening the Act. One was that he wanted the publications for accounting purposes. That would perhaps be a reasonable excuse if those had been the words used, but there was nothing lawful, in accordance with law, about it. The other was that he thought that the law required a publisher to keep a copy of all publications for seven years. There is no such law. Again, I think the excuse was reasonable, having regard to his view of the law, but the excuse cannot be shown to be in any way in accordance with the law.'

The appeal was dismissed, but the importance of the decision lies in the distinction between 'lawful excuse' and 'reasonable excuse' which latter phrase I consider to be indistinguishable from 'reasonable cause'. In other words a 'reasonable excuse' may be something less than a 'lawful excuse'. 'Reasonable cause' may be something less than 'lawful cause'.

This view was confirmed in R v Parker 1966 RLR 15 (1966 (2) SA 56) where, at 16E-H, Quenet JP said:

'It is not easy however to draw a clear line between such words as "sufficient", "reasonable" and "just" — they would of course include a "lawful excuse" but not necessarily so … I am of the opinion there is a difference between "lawful excuse" and "just excuse".'

Later at p 18 in fine, Macdonald JA, as he then was, said:

'… it is possible that even in a trial an excuse amounting to a "just" excuse but falling short of a "lawful" excuse might be offered.'

Again, at p 19B he said:

'Whether an excuse is "just" is to be determined not by the strict application of law to the problem but by the application of the principles of natural justice. The difference between "a lawful excuse" and "a just excuse" is the difference which existed in England between law and equity.'

Page 382 of 2001 (2) ZLR 373 (S)

In an earlier case, R v Allan NO 1956 (4) SA 208, Quenet J (as he then was) with whom Morton J concurred, held that the question whether or not 'reasonable cause' existed on the facts of a given case was a question of law 'and in the determination of that question this court is in a position no less favourable than the magistrate'."

What constitutes reasonable cause or excuse would depend on the facts of each case. Thus in Mackay's case supra, it was suggested that the retention of one copy of a banned publication for accounting purposes or under a bona fide misapprehension that it was a

legal requirement might constitute a reasonable excuse. In my view, what the appellants did in this case does not amount to a reasonable excuse. What the appellants did in this case is extremely foolish and leaves too many questions unanswered. They came to Africa as missionaries. They brought with them an arsenal of arms and ammunition. In fact, if every bullet they brought with them had been used on target they probably would have killed more people than they converted. They brought the weapons on the basis that they were required for self-defence. They were never used for that. Some of the accessories possessed by the appellants, such as gun silencers and flares, have very little, if anything, to do with self-defence. Gun silencers are primarily for concealing a shooting. Why would a missionary shooting in self-defence wish to conceal that fact? I find the appellants' explanation that they brought a large quantity of arms for self-defence unreasonable. I also find their reasons for concealing the arms, namely the desire to avoid bureaucracy and keep to the envisaged travel plans, equally absurd. No reasonable excuse or cause was established by the appellants.

Finally in respect of conviction, the appellants submitted that s 7(1) of the Aircraft (Offences) Act and s 37(2) of the Law and Order (Maintenance) Act under which they were charged were ultra vires s 18 of the Constitution in that they placed the onus to establish the lawful excuse, the lawful authority and the reasonable excuse on the appellants. In the case of S v Chogugudza 1996 (1) ZLR 28 (S), the full bench of this court held that the Constitution permitted the enactment of legislation reversing the onus in certain circumstances and set the following as guidelines for permissible legislation receiving the onus:

" 1. any presumption must not place the entire onus on the accused; there is always an onus on the State to bring him within the general framework of an enactment before any onus may be placed on him to prove his defence;

2. the presumption may relate to a state of mind, that is an intention, where the element of the crime is a fact exclusively or particularly within the knowledge of the accused;

3. a presumption will be regarded as reasonable if it places an onus upon the accused where proof by the prosecution of such a specific fact is a matter of impossibility or difficulty but where the fact is well known by the accused;

Page 383 of 2001 (2) ZLR 373 (S)

4. the presumption must not be irrebuttable."

A proper reading of s 7(1) of the Aircraft Offences Act and s 37(2) of the Law and Order (Maintenance) Act reveals that both provisions come with what is permissible under the Constitution using the criteria laid down in Chogugudza's case supra. Again, in this regard, the conclusion of the court a quo cannot be faulted.

I now tum to deal with the issue of sentence. The appellants appealed against sentence on the ground that it is manifestly excessive taking into account the circumstances of this case. The Attorney-General, on the other hand, appealed against the sentence on two grounds. The first ground was that the trial judge had erred in ordering that the period of imprisonment imposed on the appellants would start to operate from the date of the appellants' arrest which is prior to the trial and conviction of the appellants. The second ground was that the sentence imposed was manifestly lenient. The appellants have conceded that the backdating of their sentence was irregular and incompetent.

The learned trial judge did not give any reasons for backdating the sentence nor did he cite any authority under which he made the order. The order of the learned judge in this regard is clearly incompetent. Section 344 of the Criminal Procedure and Evidence Act [Chapter 9:07], which deals with judicial discretion in the type of sentence that can be imposed, confers no discretion to back-date a sentence. Indeed, the absurdities of an order backdating a prison term to the date of arrest were highlighted by Lewis J in the case of R v Chikoro 1965 RLR 455 (G) at pp 456I-457E:

"The absurdity of the proposition that a conviction can be back-dated is self-evident. This situation illustrates even more forcibly the fact that it is wholly irregular to back-date a sentence in this manner. The prison authorities have no power under the section to subtract from the total sentence the period spent in prison awaiting trial and then to credit the convicted prisoner with remission on any balance left over. The remission specified in the section is in respect of the whole sentence imposed by the court. The back-dating of sentences, therefore, renders the whole system of remission under the Prisons Act unworkable, apart from the other anomalies which result from it.

A few examples of these other anomalies will suffice. The back-dated sentence specifies that the imprisonment is imprisonment with hard labour; and an unconvicted prisoner awaiting trial cannot be made to work. He can, if he wishes, elect to do light work: see ss 75 and 76 of the Prisons Act.

Again, if there had been a co-accused in this case, arrested at the same time as the accused and tried jointly with him, and the co-accused had been acquitted, he would have been in exactly the same position as the accused who was convicted. Both would have been released immediately. In effect, therefore, the accused in this case has received no sentence at all. Alternatively, if, as the magistrate suggests, the period awaiting trial was a 'punishment', the innocent co-accused would have been punished alike with his guilty co-accused.

Page 384 of 2001 (2) ZLR 373 (S)

If the magistrate wanted the accused in this case to be released because of the long period already spent in custody awaiting trial, he should at least have sentenced him to be detained until the rising of the court."

In the result, I am satisfied that the back-dating of the sentence in this matter is patently absurd and irregular.

The respondent also submitted that the sentence imposed on the appellants is manifestly lenient while the appellants argued the contrary. The appellants contend the sentence is manifestly excessive. In submitting that the sentence was manifestly excessive, Mr Callow relied on the alleged torture of the appellants by the police. The respondent, on the other hand, submitted that the sentence was manifestly lenient having regard to the quantity of offensive weapons and material found in the possession of the appellants and also in the light of sentences imposed by this court in similar cases.

I find myself in agreement with the contention that the sentence imposed in this case is inappropriately lenient. The appellants were found in possession of a substantial quantity of offensive weapons and material. The appellants, as I have already stated, were in possession of 10 rifles, nine shotguns, seven revolvers, 13 pistols, teargas canisters, target selectors, five telescope, five silencers, two insight sets, 26 and a considerable quantity of ammunition and other accessories. The possession of materials such as silencers, teargas canisters and target selectors is not consistent with or supportive of the appellants'

contention that the weapons and material were for their own self-protection. In my view, possession of such a considerable quantity of offensive weapons and material is very serious. Indeed, many countries including Zimbabwe view illegal possession of firearms and offensive material very seriously. In the case of Zimbabwe this is, to some extent, manifested in the penalties prescribed in statutes that prohibit such possession. For instance, s 37(2) of the Law and Order (Maintenance) Act provides for a maximum penalty of imprisonment for a period of 20 years or life imprisonment, depending on the type of offensive material possessed. Section 4(2)(b) of the Firearms Act [Chapter 10:09] prescribes a minimum sentence of five years' imprisonment and a maximum sentence of 10 years' imprisonment for the illegal acquisition or possession of a firearm unless special circumstances are found to exist. On this basis, I have no doubt that the offence the appellants committed was very serious, warranting a substantial term of imprisonment as opposed to the token terms of imprisonment imposed by the court a quo. The appellants argued that because of the torture or ill-treatment they received at the hands of the police a lenient sentence was called for. I accept that ill-treatment of an accused person by a government agent is unacceptable and the courts will take that into account in determining an appropriate sentence. On that basis, the court a quo was correct in taking

that factor into account. However, in doing so, the court went overboard and imposed a sentence so lenient as to trivialise a very serious offence. Mr Muziri referred us to a number of cases which, in my view, support the contention that the sentence imposed in this case is manifestly lenient. In S v Kinfe S-60-98 the appellant was convicted of contravening s 37 of the Law and Order (Maintenance) Act. The appellant had brought into Zimbabwe offensive weapons comprising two machine guns, both fitted with silencers, two pistols fitted with silencers, one star pistol, six machine gun magazines with 57 live rounds and three pistol magazines with 30 rounds. The appellant had entered the country with the apparent intention to assassinate the former Ethiopian Head of State. He was seriously tortured by state agents. He had suffered considerably at the hands of former Ethiopian heads of state. He was in prison awaiting trial for a period in excess of one year. An effective sentence of 10 years' imprisonment with labour imposed by the regional court was reduced to two years' imprisonment by this court.
In the related case of S v Michael S-59-98, which matter arose from the same facts as that of Kinfe supra, the appellant was convicted by the High Court of a contravention of s 37 of the Law and Order (Maintenance) Act. He was sentenced to undergo five years' imprisonment with labour. On appeal, this was reduced to two years' imprisonment with labour, mainly because the appellant sustained very serious injuries at the hands of the police and had been in custody awaiting trial for a long time. In S v Woods & Ors S-60-93, the appellants had been convicted of contravening s 38(1)(b)(ii) of the Law and Order (Maintenance) Act. The appellants were sentenced to 15 years' imprisonment with labour. The first appellant was in possession of six bombs, the second appellant six firearms, four bombs, three detonators, two plastic bottles of explosive liquid and the third appellant possessed four bombs. The weapons were for use in Zimbabwe against the ANC of South Africa. This court refused to interfere with the sentence.

In S v Ndebele S-35-84, the appellant had been convicted of being in possession of four AK 47 rifles, ammunition and one land mine. A sentence of 15 years' imprisonment with

labour imposed by the High Court was reduced to nine years' imprisonment with labour. It was accepted in that case that the appellant had no sinister motive for possessing the weapons.

In S v Mahlanze A-86-81, the appellant had found one automatic rifle and 100 rounds of ammunition in the bush. He cleaned it and oiled it and kept it under his bed in order to use it for shooting wild pigs that were destroying his crops. He had intended to hand over the weapon after the harvest. Upon seeking leave to appeal against sentence, that sentence was set aside and substituted with a sentence of 12 months' imprisonment with labour half

of which was suspended on the usual conditions. In my view, the moral blameworthiness of the appellant in that case is nowhere near the moral blameworthiness of the appellants in this case, yet the effective sentence of the appellants, in this case, is more or less the same as that imposed in Mahlanze's case supra.

In conclusion, I am satisfied that the sentence imposed in this case was manifestly lenient. A sentence of five years' imprisonment with labour would have been appropriate for the offence.

In the result, the appeal against conviction and sentence by the appellants is dismissed, while the appeal against the sentence by the respondent is allowed.

McNALLY JA: I agree with almost everything the learned Chief Justice has said. In particular, I agree that the version of events presented to us by the appellants is one which no reasonable court could possibly believe. The possession of silencers in particular gives the lie to any innocent explanation.

I am aware that the question of sentence is academic, since the appellants had served their original sentences and left the country before the appeal was heard. Nevertheless, I would like to make a stand for a somewhat less severe attitude towards the offenders in this case.

In particular, I consider two factors have not been given adequate weight. The first is that, in relation to the Aircraft (Offences) Act, it is, in my opinion, very mitigatory that the weapons were dismantled and the parts packed separately, and they were all to travel in the hold. There was no danger whatever to the plane or to the passengers. I agree this is not relevant to conviction. But it is very relevant to sentence.

Secondly, it is clear that whatever the purpose of taking these weapons to the DRC, they were, at the time of the arrests, being taken back to the United States. There was no longer any danger to the DRC, and there was no threat to Zimbabwe.

In the light of these facts, I would have been content with an overall sentence of three years' imprisonment with labour. In the circumstances, no suspension of part of the sentence was appropriate. I would have made a declaration to that effect.

SANDURA JA: I have read the judgment prepared by Chidyausiku CJ and the comments made by McNally JA.

For the reasons given in the judgment, I agree with Chidyausiku CJ that the appellants' appeal against conviction and sentence has no merit and

should be dismissed. In addition, I agree that an overall sentence of five years' imprisonment with labour would have been appropriate.

Stumbles & Rowe, appellants' legal practitioners

CATERING EMPLOYERS ASSOCIATION OF ZIMBABWE v ZIMBABWE HOTEL AND CATERING WORKERS UNION & ANOR
2001 (2) ZLR 388 (S)
Division: Supreme Court, Harare
Judges: McNally JA, Muchechetere JA & Sandura JA
Subject Area: Civil appeal
Date: 1 November 2001
Judgment Number: S-112-01

Arbitration — award — grounds on which award may be set aside
Labour Relations Act [Chapter 28:01] — compulsory arbitration — order made by Labour Relations Tribunal on matter referred to it for compulsory arbitration — grounds on which order may be set aside by Supreme Court
When the Labour Relations Tribunal makes an order on a matter referred to it for compulsory arbitration under the Labour Relations Act [Chapter 28:01], the Tribunal is acting as an arbitrator in terms of the Arbitration Act [Chapter 7:15]. Consequently, the sole grounds on which its order may be set aside are those set out in Art 34(2) of the Model Law contained in the First Schedule to the Arbitration Act.
Article 34(2) of the Model Law sets out the sole grounds on which the High Court may set aside an arbitral award. The court cannot therefore rely on the grounds set out in s 27 of the High Court Act [Chapter 7:06] to set aside an arbitral award on review.
Cases cited:
Amalgamated Clothing and Textile Workers Union of SA v Veldspun (Pty) Ltd 1994 (1) SA 162 (A)
ZESA v Maposa 1999 (2) ZLR 452 (S)
Legislation considered:
Arbitration Act [Chapter 7:15], Art 34(2) of Model Law
High Court Act [Chapter 7:06], s 27
L Mazonde, for the appellant
L T Biti, for the respondent
SANDURA JA: This is an appeal against a judgment of the High Court which confirmed part of the order issued by the Labour Relations Tribunal ("the Tribunal") against the appellant. After hearing both counsel, we

dismissed the appeal with costs and indicated that our reasons would be given in due course. I now set them out.
The relevant facts are as follows. The appellant ("the Association") represents various employers in the hotel and catering industry, and the first respondent ("the Union") is a union of the workers employed by the Association's members in the same industry.
In terms of Part X of the Labour Relations Act [Chapter 28:01] ("the Act"), the Association and the Union are empowered to negotiate between them a collective bargaining agreement dealing with matters such as the conditions of service of the employees in the industry. At the relevant time, the collective bargaining agreement in force was the one published in SI 167 of 1991 as read with SI 310 of 1994, "the Agreement").
However, s 74(6) of the Act provides that:

"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:

Provided that the collective bargaining agreement shall be endorsed to reflect such higher rates of pay or other more favourable conditions of employment."

With those provisions in mind, the Union embarked upon wage negotiations with the Association in 1996. In addition to seeking wage increases for its members, the Union sought to improve the conditions of service of the members in three respects.

In the first place, the Union sought a housing allowance of $75 per month. The Agreement made no provision for such an allowance. Secondly, the Union sought "material transport", which meant the provision of motor vehicles to transport the workers to and from work. Again, the Agreement made no provision for this. And thirdly, the Union sought the abolition of split shifts, i.e. working shifts comprising two or more separate periods of duty.

The result of the 1996 negotiations was a failure to reach agreement on the appropriate wage increase and on the three issues set out above. In the circumstances, the parties referred all the issues to an arbitrator. The arbitrator subsequently made a determination on the wage increases for the year but referred the rest of the issues back to the parties for further negotiation. Regrettably, no progress was achieved. Consequently, when the Union embarked upon the wage negotiations for 1997, it again raised the three issues which had not been resolved previously, i.e. the introduction of a housing allowance of $75 per month, "material transport" and the abolition of split shifts. Once again, the parties failed to reach agreement on these issues and, therefore, declared a deadlock. As a result, the dispute was

referred to the Tribunal for compulsory arbitration in terms of the Act, and the Tribunal subsequently issued an order, the relevant part of which reads as follows:

" 2. That employers in the Catering Industry be and are hereby ordered to pay their employees minimum Housing and Transport Allowances equivalent to the average paid by employers in the Catering Industry at the material time. In computing the average, each party shall nominate 5 employers who are currently paying the allowances. This order is backdated to 1 April 1996. Should there be any dispute concerning the computation of such average, either party may refer such dispute to the Tribunal within 14 days' after the dispute has arisen.

3. That no employer shall require and no employee in the Catering Industry shall be obliged to work more than 2 split shifts in any period of 24 hours."

Aggrieved by that decision, the Association took the matter to the High Court on review. That court subsequently set aside the order to pay a transport allowance, on the ground that the issues submitted to the Tribunal for compulsory arbitration did not include the introduction of a transport allowance. With regard to transport, the issue which had been referred to the Tribunal was the provision of "material transport" in the sense as already explained. However, the learned judge confirmed the Tribunal's order in respect of the housing allowance and split shifts, but set aside the order that the housing allowance be

backdated to 1 April 1996. That order was set aside because the backdating of the allowance was not one of the issues submitted to the Tribunal for compulsory arbitration. Dissatisfied with the order in respect of the housing allowance and split shifts, the Association appealed to this court.

On appeal, the Association relied upon two grounds. The first was that the learned judge misdirected himself in finding that the Association's members had an obligation to pay a housing allowance to their employees; and the second was that the learned judge misdirected himself in allowing the Tribunal's order in respect of split shifts to stand.

The first point I wish to make is that the order made by the learned judge in respect of the housing allowance and split shifts merely confirmed the Tribunal's order, other than that part which backdated the housing allowance to 1 April 1996 which the learned judge set aside.

The second point is that the order made by the Tribunal was not made by the Tribunal acting in terms of the Labour Relations Act [Chapter 28:01]. Instead, it was made by the Tribunal as an arbitrator acting in terms of the Arbitration Act [Chapter 7:15]. The distinction is of great importance because the grounds on which the decision of an arbitrator may be set aside are very limited.

The learned judge was alive to that fact when he said:

"But here again we are up against the fact that the order to pay the housing allowance was made by the Tribunal as an arbitrator in terms of a submission made to it. That

decision can only be set aside if it meets the rather stringent test laid down in the decided cases."

The sole grounds on which an arbitral award may be set aside by the High Court are set out in Art 34(2) of the Model Law contained in the First Schedule to the Arbitration Act [Chapter 7:15] which reads as follows:

"An arbitral award may be set aside by the High Court only if —

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission or arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law.

(b) the High Court finds, that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

(ii) the award is in conflict with the public policy of Zimbabwe" (emphasis is mine).

Those are the only grounds on which an arbitral award may be set aside by the High Court.

Acting in terms of Art 34(2)(a)(iii) of the Model Law, the learned judge correctly set aside the Tribunal's order in respect of the transport allowance and the backdating of the housing allowance to 1 April 1996. Those issues had not been submitted to the Tribunal for arbitration. Accordingly, the Tribunal did not have the power to deal with them.

In my view, the learned judge could not have set aside the Tribunal's order on any ground other than those set out in Art 34(2) of the Model Law. Indeed, the appellant's grounds of appeal do not establish any of the grounds on which an arbitral award may be set aside in terms of Art 34(2) of the Model Law. For that reason, the appeal cannot succeed.

The binding nature and finality of an arbitral award was stated by Goldstone JA in Amalgamated Clothing and Textiles Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) at 169F-H as follows:

Page 392 of 2001 (2) ZLR 388 (S)

"When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under section 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course, and especially so in the labour field where it is frequently advantageous to all the parties and in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the courts should, in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith."

I entirely agree with those comments.

Finally, I would like to comment on what the learned judge in the court a quo said about the grounds on which the High Court may interfere with an arbitral award. He said the following:

"Returning to the question whether the arbitral award is reviewable, I think that a challenge to an arbitral award can be mounted, depending on the grounds thereof, either under the High Court Act or under the Arbitration Act or under both enactments. The adjudicating authority in either case is the High Court, and the result, if the application succeeds, is that the award will be set aside. Whilst, therefore, the Arbitration Act provides (in Article 34 of the Model Law) for the only grounds on which an arbitral award can be set aside, that Act does not take away the High Court's power in terms of section 27 of the High Court Act to review the proceedings of all inferior courts or tribunals in Zimbabwe on the grounds stated in that section … The Article lays down the only grounds on which an arbitral award may be set aside in terms of the Model Law."

The suggestion by the learned judge is that, in addition to the grounds set out in Art 34(2) of the Model Law, an arbitral award may be set aside by the High Court on review on the grounds set out in s 27 of the High Court Act [Chapter 7:06]. I respectfully disagree. In

my view, Art 34(2) of the Model Law sets out the sole grounds on which an arbitral award may be set aside by the High Court. That is what Art 34(2) says and that is what this court said in Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S) at 458F.

Fortunately, the learned judge set aside the Tribunal's order in respect of the transport allowance and the backdating of the housing allowance, not on the basis of the grounds set out in s 27 of the High Court Act [Chapter 7:06], but on the basis of the grounds set out in Art 34(2) of the Model Law, the sole grounds on which an arbitral award may be set aside by the High Court.

In the circumstances, the appeal had no merit and had to be dismissed.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S v JAURE

2001 (2) ZLR 393 (H)

Division: High Court, Harare

Judges: Ndou J and Assessors

Subject Area: Criminal trial

Date: 9 & 29 October and 2 November 2001

Judgment Number: HH-201-01

Criminal procedure (sentence) — common-law offences — murder — extenuating circumstances — assessment — role of assessors — duty of prosecutor to assist court in assessment of extenuating circumstances — repentance and attempts to assist victim — whether may be extenuating circumstances — whether death penalty may be imposed after finding of extenuating circumstances

A murder trial concludes with the decision on whether or not there are extenuating circumstances. That question must be decided by the majority view of the court, that is to say the judge and the assessors, even if the judge is in the minority. The death sentence may still be imposed after the judge and assessors have found that extenuating circumstances exist, if the judge concludes that the extenuating circumstances are far outweighed by the aggravating features; that is a matter for the judge alone though the assessors may give informal opinions on the issue to the judge.

Although the onus of proof of extenuating circumstances is said to be on the accused, counsel for the State can and should assist the court in arriving at an informed decision on extenuation. The court should examine all the evidence and consider whether extenuating circumstances are shown on a balance of probabilities, regardless of who produced the evidence.

Repentance and endeavours by the accused to assist his victim before the victim's death cannot, standing alone, amount to extenuating circumstances.

Cases cited:

S v Arnold 1965 (2) SA 215 (C)

R v Jairos 1966 RLR 115 (A)

S v Lekaota 1978 (4) SA 684 (A)

R v Lembete 1947 (2) SA 603 (A)

S v Mavhungu 1981 (1) SA 56 (A)
S v Munemo 1986 (2) ZLR 71 (S)
S v Phineas 1973 (1) RLR 260 (A); 1973 (3) SA 897 (RA)
S v Shabalala 1966 (2) SA 297 (A)
S v Sparks & Anor 1972 (3) SA 396 (A)
S v Theron 1984 (2) SA 868 (A)
S v X 1973 (2) RLR 229 (A)
Page 394 of 2001 (2) ZLR 393 (H)
Legislation considered:
Criminal Procedure and Evidence Act [Chapter 9:07], s 337
Miss E Zimudzi, for the State
Mrs E R Mutama, for the accused
NDOU J:
1. PRELIMINARY ISSUE
During the deliberations I had with the assessors on the question of extenuating circumstances, it seems clear to me that there was uncertainty as to whether the assessors should be involved in the determination of the existence or otherwise of extenuating circumstances. For the purposes of this ruling, I propose to start by clearing up this uncertainty.
My understanding is that the question whether there are extenuating circumstances must be decided by the majority view of the court viz., the judge and the assessors, even if the judge is the minority: see South Criminal Law and Procedure vol 2 by P M A Hunt (revised 2 ed by J R L Milton) p 387, para (2).
Generally, the assessor's function does not extend beyond verdict: see S v Sparks & Anor 1972 (3) SA 396 (A) at 404 and S v Shabalala 1966 (2) SA 297 (A) at 300B. Assessment of punishment is entirely the function of the judge, and the assessors have no voice although it is not irregular for a judge to seek consultation with them: S v Lekaota 1978 (4) SA 684 (A). Assessors are members of the court only for the purpose of the trial and their oath is to give a true verdict according to the evidence upon the issues to be tried: see s 7 of the High Court Act [Chapter 7:06]. A trial, in my view, is the determination of the matters put in issue and it concludes with the verdict or, in the case of a verdict of murder, with the decision of the question whether there are extenuating circumstances. The death penalty is a mandatory sentence for murder where there are no extenuating circumstances: s 337 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Where the accused has been convicted of murder and the court by the majority finds no extenuating circumstances, it is obliged to impose the death penalty. After convicting the accused of murder, the judge and the assessors will consider the question of extenuation in a second phase, although there is upon conviction a single, composite verdict of guilty with or without extenuating circumstances: S v Mavhungu 1981 (1) SA 56 (A) and S v Theron 1984 (2) SA 868 (A). It is my understanding that the assessors are involved at this stage of trial in cases of obligatory death sentence. This should be distinguished from the cases of discretionary death sentences. A discretionary death
Page 395 of 2001 (2) ZLR 393 (H)
sentence occurs in cases where the court (i.e. the judge and assessors) have found that extenuating circumstances exist. Even if the court finds that there were extenuating circumstances, it could still proceed to impose the death sentence if it concluded that the

extenuating circumstances were not strong and were far outweighed by the aggravating features: see S v Phineas 1973 (1) RLR 260 (A); 1973 (3) SA 897 (RA). In Criminal Procedure in Zimbabwe by John Reid Rowland it is stated at p 25-35 para (a)(i):

"Where the court is of the opinion that there are extenuating circumstances, it does not have to pass the death sentence. In most cases, the finding of extenuating circumstances means that the sentence of death is not passed, but the death sentence is still competent. There are several factors which the court must take into account before deciding that sentence of death is appropriate in spite of the finding of extenuating circumstances, including accused's criminal record."

It is evident that the discretionary death sentence is competent. The discretionary death sentence is a matter for the judge alone and the assessors play no role in the decision: see S v Sparks & Anor supra; S v Shabalala supra and S v Lekaota supra at 688. This, however, does not prevent them from giving informal opinions to the judge. In light of the above, the assessors will be involved in the determination of the existence or the non-existence of extenuation.

2. MAIN ISSUE

There are two approaches for determining whether or not a murder was committed with extenuation. Either approach is permissible and the end result should be the same. These two approaches were captured in Criminal Procedure in Zimbabwe supra at pp 25-36 as follows:

"The first approach is to consider, first, all those factors which reduce the moral blameworthiness of the accused. If, in the opinion of the court, the facts so warrant, it should find that extenuating circumstances exist. The approach at this stage is largely subjective and aggravating features, many of which may be of an objective character, are not considered. The second stage is then to decide on sentence. At this stage, all aggravating features, including the brutality of the crime and all those objective factors which would assist in the determination of the sentence, are considered. The court may well then decide that, despite the existence of extenuating circumstances, they are outweighed by the aggravating circumstances and the accused should be sentenced to death.

The second approach is for the court to consider all the usual factors which may be regarded as extenuating and weigh them against the aggravating features. If the court considers that the aggravating features outweigh those which reduce the accused's moral blameworthiness, the court will find that extenuating circumstances do not exist. If the court is of the opinion that aggravating features do not outweigh those which reduce the accused's moral blameworthiness, it will find that extenuating circumstances do exist."

Page 396 of 2001 (2) ZLR 393 (H)

See also S v Phineas supra.

In this case, the State and defence counsel are agreed that there is extenuation. According to the State counsel, the following amount to extenuation:

(a) the history of friction between the accused and the deceased (husband and wife respectively);

(b) the fact that the accused poured water over the deceased when she was giving in to the fatal poisoning she had been subjected to by the accused; and

(c) accused's attempts to summon help when he realised that deceased's condition had become critical. (i.e. he summoned assistance of his neighbours and also telephoned the Police).

Defence counsel agrees with the submission of State counsel and also submitted further that another factor is the lack of premeditation on the part of the accused. In passing, I would state that I find that the approach of State counsel correct. Decided cases suggest that the onus of proof of extenuating circumstances is on the accused: R v Jairos 1966 RLR 115 (A) at 119I; S v Munemo 1986 (2) ZLR 71 (S) and R v Lembete 1947 (2) SA 603 (A). The Criminal Procedure and Evidence Act makes no mention of onus, either expressly or impliedly. In the circumstances the onus need not be discharged by the accused giving evidence himself. It is proper for State counsel to assist the court in arriving at an informed decision on extenuation. This is a role that is in any event expected of her as an officer of this court. In Criminal Procedure in Zimbabwe supra, it is stated at pp 25-38:

"Of course, the accused, rather than the State, will usually assert the presence of extenuating circumstances — it is in his interests to do so — but if he fails to assert them or if he is found to be untruthful, it is well established that the court is still entitled to find extenuating circumstances. Where there is credible evidence on the point, whether the evidence has been led by the State or by the accused, the court may make a finding of extenuating circumstances. To say in these circumstances that the accused has discharged the onus on him is artificial, as he has plainly not done so. It is submitted that the correct approach should be that the court should, after convicting the accused, examine all the evidence and consider whether extenuating circumstances are shown on a balance of probabilities. It does not matter who produced the evidence, as long as the evidence is there. There should be no question of onus."

Although we accept that it is trite, according to case law, that the onus of establishing extenuating circumstances is on the accused, we will adopt the above approach in determining whether there are extenuating circumstances i.e. that the accused has discharged the onus. In our view, the four factors outlined by both counsel do not cumulatively constitute extenuation. In our view, repentance and endeavours to assist the victim before the actus reus is

complete, standing alone, cannot amount to an extenuating circumstance: see S v Arnold 1965 (2) SA 215 (C). In this case, the accused, who was found to have only dolus eventualis and who had suffered some provocation, set his wife alight then, immediately repenting, tried to put the flames out and in the process suffered severe burns. The court was doubtful whether his subsequent conduct, standing alone, could be treated as an extenuating circumstance. However, it accepted that this conduct, the provocation and the fact that there was only dolus eventualis, cumulatively constituted extenuating circumstances. What distinguishes the Arnold case from the one under consideration is that the accused, in our case, poured water over the body of the deceased who had consumed poison. Such conduct, in our view, was of meaningless assistance in saving the life of the deceased who had poison in her internal system. The pouring of water on the external parts of her body and attire would be of no assistance to her. The conduct of the accused in the Arnold case would, with some measure of luck, have saved the life of the deceased. In the Arnold case, the accused had been provoked and in this case the accused

had not been provoked by the deceased. In the Arnold case, the accused risked his life in an attempt to save his wife's life, with the result he suffered severe burns. The accused in our case did not suffer any injury. In a way, the accused in the Arnold case had a realistic chance of saving the life of his victim but the court was still doubtful whether his repentance and endeavours to assist the victim, standing alone, could be treated as an extenuating circumstance. In our case, the accused's conduct did not present him with a realistic chance of saving the victim's life.

We were referred, by State counsel, to S v X 1973 (2) RLR 229 (A). The facts of this case reveal that the court was dealing with a slightly different scenario. I propose to quote what Beadle CJ said at 236B-D to illustrate our point:

"The extent to which acts performed by an accused person after the murder has already been committed can be considered in deciding whether or not extenuating circumstances exist must depend on the individual circumstances of each case and it is not advisable to attempt to lay down any hard and fast rule. One thing, however, seems to me to be quite clear and that is that where the acts performed by an accused after the commission of the murder indicate what the state of mind of the accused was at the time when he committed the murder, then these acts can clearly be taken into considering the moral blameworthiness of the accused at the time when the murder was committed" (the emphasis is mine).

In this case, the acts performed by the accused after the murder do not seem to indicate what the accused's state of mind was at the time when he forced the deceased to drink poison.

We have analysed the evidence led by the State and the defence to see if there are additional facts, which taken with the four submitted by both counsel, would cumulatively constitute extenuation. The accused is an

illiterate rural dweller who subscribes to a custom of giving away his daughter to go and bear children for his married sister who was struggling to conceive. This arrangement did not go down well with the deceased, resulting in friction in his marriage to the deceased. The accused's conduct towards his wife appears to be that of a rural man who felt undermined by his wife. Unsophisticated men in accused's position would not appreciate being openly undermined by their wives, especially on an issue that involves their relatives.

In our view, when these factors i.e.

(a) accused's illiteracy;
(b) his rural background;
(c) his belief in a customary practice which the deceased did not subscribe to;
(d) his feeling of being openly undermined by his wife (the deceased);

are added to the four already stated by both counsel, they cumulatively constitute extenuation. We accordingly find that this murder was committed with extenuation.

Office of the Attorney-General, State's legal practitioners

Gula-Ndebele & Partners, accused's legal practitioners

PHILIP MORRIS PRODUCTS INC v MARLBORO SHIRT CO SA LTD

2001 (2) ZLR 399 (S)

Division: Supreme Court, Harare

Judges: McNally JA, Cheda JA & Ziyambi JA

Subject Area: Civil appeal
Date: 5 November 2001
Judgment Number: S-127-01

Intellectual property — trade mark — registration — priority in time of application for registration — importance when competing claims for registration are made by foreign companies with no reputation in Zimbabwe

The appellants both applied under the Trade Marks Act [Chapter 26:04] to be registered as proprietors of an identical trade mark containing the word "Marlboro", and both applied for registration in a class relating to clothing. Both were foreign companies, and neither had any significant previous reputation in ZimLbabwe. The appellant had never sold clothing in Zimbabwe, while the respondent had sold some shirts in this country eighteen years before it applied for registration of the mark. On appeal from a decision of the Patents Tribunal:

Held, that since both parties were foreign companies and neither had a reputation or track record of trade in Zimbabwe, priority in time should be the determining factor. The party whose application for registration was filed first should succeed.

Cases cited:

Philip Morris Inc & Anor v Marlboro Shirt Co SA Ltd & Anor 1991 (2) SA 720 (A)
Pick 'n Pay Stores Ltd v Pick 'n Pay Superette (Pvt) Ltd 1973 (1) RLR 244 (G); 1973 (3) SA 564 (R)
Victoria's Secret Inc v Edgars Stores Ltd 1994 (3) SA 739 (A)

Legislation considered:

Trade Marks Act [Chapter 26:04], s 15(3)

P Nherere, for the appellant
A P de Bourbon SC, for the respondent

McNALLY JA: This appeal concerns a trade mark dispute. In judgment S-66-01, this court allowed the substitution of the present appellant for Philip Morris Inc, on the grounds that the present appellant had, since 1987, conducted all the business of Philip Morris Inc outside the United States of America. I will refer to the parties as Philip Morris and Marlboro Shirt, and

will use the designation Philip Morris to describe both the present appellant and its predecessor.

Both parties applied to be registered as proprietors of the identical trade mark — a rectangular shape within which appears the word "Marlboro" under a chevron device. Philip Morris applied first on 30 January 1980 and 15 March 1982. Marlboro Shirt lodged its applications on 7 October 1983. There are two applications in each case because they applied for registration in two different classes, both relating to clothing. The Registrar of Trade Marks refused to register the trade marks because they resembled each other, and referred the question of who should succeed to the Tribunal, in terms of s 15(3) of the Trade Marks Act, then Chapter 203, now Chapter 26:04 (the Act). I use the word "Tribunal" because, oddly, its full name is not the Trade Marks Tribunal, but the Patents Tribunal, although now, by virtue of Act 10 of 2001, it is to be called the Intellectual Property Tribunal.

The Tribunal decided in favour of Marlboro Shirt. Hence the appeal.

In a similar dispute in South Africa Marlboro was also successful — see Philip Morris Inc & Anor v Marlboro Shirt Co. SA Ltd & Anor 1991 (2) SA 720 (A). But, it is argued, Marlboro Shirt was in a much stronger position in South Africa, because it was, and is, an incorporated South African company, selling clothing under the "Marlboro" mark since 1954. This, I think, is a valid distinction. Marlboro Shirt, in South Africa, was an existing user of the trade mark when Philip Morris applied for the expungement of its registered trade mark. The application failed.

The position in this country is entirely different. Neither of the two contenders seems to me to have had any significant previous reputation in Zimbabwe.

Philip Morris relied principally upon the international reputation of its trade mark. One must observe in passing that that international reputation relates almost entirely to its cigarette brands rather than to its clothing products. Patricia A Malzacher, whose affidavit is relied upon by Philip Morris, says that it manufactures, sells and distributes a variety of consumer goods including cigarettes, clothing, and other products. It has registered its trade mark, the Marlboro word and Marlboro label design, in numerous jurisdictions. In eight other jurisdictions — India, Indonesia, Iraq, Libya, Nigeria, Sri Lanka, United Kingdom and Zimbabwe — its applications are pending. But she claims no actual sales in Zimbabwe. She says simply:

"I would assume that many Zimbabweans who travel to Europe and/or Asia have been able to purchase Marlboro leisure wear and to bring such items back to Zimbabwe."

She then continues:

"Its current intention is to expand such clothing operations to select jurisdictions where possible."

Page 401 of 2001 (2) ZLR 399 (S)

No suggestion is made that Zimbabwe is one of those "select jurisdictions".

For Marlboro Shirt, a Mr Philip Kawitzky asserted that his company in South Africa had been recorded as a registered user of the trade mark Marlboro and Device in July 1954. At that time, the proprietor of the trade mark was Marlboro Shirt Company Inc, an American company. Marlboro Shirt took assignment of the South African Trade Mark on 26 April 1968.

During the period 1955-1965, i.e. before it became the registered proprietor of the mark, Marlboro Shirt marketed articles of clothing in Zimbabwe (then Southern Rhodesia). Since 1965 Exchange Control Regulations in this country have, he says, "effectively precluded" further exports. Nor is he able to give facts and figures as to the volume of these exports to Southern Rhodesia. However he refers to advertisements in a South African trade magazine, the Buyer, copies of which circulate to retailers in Zimbabwe. He also relies on an affidavit from a retailer in Mutare who recalls importing and selling "a fair quantity of Marlboro shirts on a regular basis" prior to 1965.

Even if one goes back to 1983, when Marlboro Shirt first lodged its application in the present matter, it would surely be fair to say that its reputation in this country was negligible. The shirts had not been on sale here for eighteen years.

The President of the Tribunal approached the problem as follows:

1. Philip Morris put up four arguments:

A. It had an international reputation.

B. Marlboro Shirt had not proved an exclusive right to the use of the name Marlboro.

C. A finding for Marlboro Shirt would cause deception and confusion.

D. Philip Morris applied first.

2. Marlboro Shirt's case was:

A. Philip Morris had never used or proposed to use the mark in Zimbabwe.

B. Marlboro Shirt had done so before 1965 and was ready to do so again.

C. There was no possibility of confusion. Philip Morris' advertising internationally concerned cigarettes not clothing.

3. The learned President then examined the case law, as follows:

A. In Pick 'n Pay Stores Ltd v Pick 'n Pay Superette (Pvt) Ltd 1973 (1) RLR 244 (G); 1973 (3) SA 564 (R), Davies J found that the applicant, a large South African chain, had no reputation in Rhodesia such as to lead to confusion between it and the small Mount Pleasant Superette. Nor did it trade in Rhodesia. He rejected the application.

B. In Philip Morris Inc & Anor v Marlboro Shirt Co SA Ltd & Anor

1991 (2) SA 720 (A), to which I have referred earlier, the South African Appellate Division refused to expunge Marlboro Shirt's registered trade mark because the latter had established a reputation in South Africa between 1954 and 1987, and there was no possibility of confusion.

C. In Victoria's Secret Inc v Edgars Stores Ltd 1994 (3) SA 739 (A), the court, faced as we are with competing applications, found in favour of the local South African respondent and against the American applicant in circumstances rather similar to the present. The American company had been the first to use the mark; the South African company had copied it. The evidence for the American company was remarkably similar to the evidence for Philip Morris in the present case. There were two differences between that case and this. First, Edgars was first in time in that it applied before Victoria's Secret. Second, Edgars was a local (i.e. South African) company whereas in the present case both parties are foreign. So Edgars had a reputation within the court's jurisdiction whereas Victoria's Secret did not.

4. The learned President then concluded that Marlboro Shirt should succeed. He based this conclusion on the finding that Philip Morris had no definite intention of trading in Zimbabwe in the immediate or even near future, whereas Marlboro Shirt had. Moreover, Philip Morris had no reputation in Zimbabwe in connection with clothing, though undoubtedly it had an international reputation in relation to cigarettes. Furthermore, Philip Morris had not established that the use of the mark would cause deception or confusion.

I must confess, with great respect, that I do not find the learned President's reasoning wholly convincing. There are two very important distinctions between the present case and the three cases relied upon.

In the first place, the Pick 'n Pay matter and the South African Philip Morris matter were both passing-off applications. Passing-off is a form of delict, and so the allegation by the foreign company was that the local company had committed a delict against it. Before a delict can be committed, the party offended must have a right within the jurisdiction capable of being infringed. That right, in the case of passing-off, is based upon reputation and/or a track record in trading. But where two parties lodge competing applications to register a trade mark, reputation and a track record may be an advantage, but they are not a prerequisite. See the judgment of Nicholas AJA (as he then was) in the Victoria's Secret case supra, at 753B.

Secondly, all three of the cases relied upon involved a conflict between a

local company and a foreign company. This present case involves a conflict between two foreign companies.
In my view, neither the applicant nor the respondent has either a reputation or a track record of trade in Zimbabwe. I decline to accept Marlboro Shirt's sales of unspecified numbers of shirts between 1955 and 1965 as being sufficient to establish either a reputation or a track record, as at 1983. Although Mr Kawitzky testified in 1991 that his company was ready to resume sales in Zimbabwe "as soon as circumstances permit", the fact is that there is no evidence of resumption to this date, and economic circumstances remain unpromising.
In the circumstances, I rely again upon the dicta of Nicholas AJA in the Victoria's Secret case, this time at 752D-F:
"In determining which of competing claimants should prevail, the guiding principle is incapsulated in the maxim qui prior est tempore potior est jure: he has the better title who was first in point of time. In the Moorgate judgment, Mr Trollip said:
'In a situation in which competing applications for the registration of the same or similar marks are filed in the [Republic of South Africa] the general rule is that, all else being equal, the application prior in point of time of filing should prevail and be entitled to proceed to registration. In a "quarrel" of that kind "blessed is he who gets his blow in first".'"
In my view, priority in time should be the determining factor in this case. On that basis, Philip Morris must succeed. I would allow the appeal with costs, set aside the decision of the Tribunal dated 11 March 1999, and order in its stead:
"The trade mark applications by Philip Morris Products Inc may proceed to registration, and the trade mark applications by Marlboro Shirt Co SA Ltd are refused."
CHEDA JA: I agree.
ZIYAMBI JA: I agree.
Coghlan, Welsh & Guest, appellant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners

S v CHAMUNORWA & ANOR
2001 (2) ZLR 404 (H)
Division: High Court, Harare
Judges: Makarau J
Subject Area: Criminal review
Date: 7 November 2001
Judgment Number: HH-197 –01

Evidence -sexual offences -rape -credibility of complainant –need to consider complainant's social beliefs, moral upbringing and social circumstances
Although the "cautionary" rule in sexual cases has been abolished, there is still a need to look carefully at the nature and circumstances of the case. In assessing the complainant's credibility, her peculiar social beliefs, moral upbringing and social circumstances should be taken into account in assessing whether or not her behaviour is credible and is consistent with lack of consent. Thus, a belief held by the complainant that after having sexual intercourse with a man, even without consent, she had to go and live with her

aggressor could not solely be used to discredit her. Nonetheless, her evidence should be otherwise credible and consistent.
Cases cited:
S v Banana 2000 (1) ZLR 607 (S)
MAKARAU J: The above two matters raise the same legal issue and it is convenient that they be reviewed at the same time.
In the first matter, Chamunorwa, aged 22, was convicted of one count of rape after a trial. He was sentenced to eight years' imprisonment, two of which were suspended for five years on condition of good behaviour.
The charge was that the accused raped the complainant, aged 16, on 2 December 2000. On the day in question, the complainant went to the accused's place of business and, while he was serving her, she invited him to a party in Zengeza. Prior to this, the two only knew each other by sight.
He, in the company of two friends, duly attended the party, where they were met and hosted by the complainant. Later on, the complainant had to go to the shops to make some more purchases for the party. The accused and his friends accompanied her to the shops. On their way back, the accused suggested that they pass by his place of residence, as he wanted to pick up something. When they got to his residence, his two friends left the accused and the

complainant on their own. It is not in dispute that the accused and the complainant thereafter had sexual intercourse. She alleges rape and he says it was consensual sexual intercourse.
It is further not in dispute that after the alleged rape, the complainant stayed with the accused as "husband and wife" for three months. The rape charge was then brought against the accused in March 2001, after the complainant left the relationship, which she described as abusive. After the date of the alleged rape and before the date when the charge was levelled against him, the accused had made known his intention to marry the complainant, by sending his intermediary to make a formal announcement under African custom to the complainant's parents that he had the complainant in his care, (matsvakirai kuno).
The complainant testified that she did not consent to the first sexual intercourse with the accused and, as evidence of her resistance, a pair of jeans she allegedly wore on the day, with a torn zipper, was produced as an exhibit. She further testified that after the alleged rape, she then decided to stay with the accused after the manner of husband and wife, as she could no longer go back to her parents after indulging in sexual intercourse with the accused.
In the second case, Andrew Chinyani was also convicted of one count of rape. He too denied the charge but, after trial, was found guilty and was similarly sentenced to eight years' imprisonment, two of which were suspended for five years on condition of good behaviour. The charge was that the accused, aged 29, had raped the complainant, aged 16, on 21 January 2000. On the day in question, the complainant was on her way on foot from Budiriro 2 to Glenview 8. She met with the accused who started walking her home at the same time getting acquainted with her. The accused made known to the complainant his desire to have sexual intercourse with her. The complainant turned down the advance. As the pair reached the outskirts of Glenview, the accused grabbed the

complainant by the waist and demanded that she agree to have sexual intercourse with him, failing which he would not let her go. The two then had sexual intercourse. Afterwards, the complainant refused to go home without the accused. He took her to her uncle's place, where she introduced him as her boyfriend with whom she had had sexual intercourse. She told her uncle that she had to go with the accused to his residence since he had had sexual intercourse with her. The accused suggested that they go to his aunt's place, as he stayed with a very cheeky uncle.. The aunt was found not to be at home and, upon promising to call upon the complainant's uncle the following day, the parties parted company. It was then that the complainant made a report to her uncle that the accused had raped her.

Until May 2000, it had long been accepted that criminal cases of a sexual

nature fell into a special category. It was said that there was an "inherent danger" in relying on the unconfirmed testimony of the complainant in such a case. That belief resulted in the courts adopting a fixed cautionary rule of practice. However, in S v Banana 2000 (1) ZLR 607 (S), the Supreme Court held that such a rule of practice placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved, and accordingly it ruled that the time had now come for our courts to move away from the two-pronged test in sexual cases. In endorsing the view adopted by countries such as Canada, the United Kingdom, New Zealand and Australia, that in sexual cases the cautionary rule of practice is not warranted, GUBBA Y CJ however, emphasised that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully. He further pointed out that it is permissible in terms of s 269 of the Criminal Procedure and Evidence Act [Chapter 9:07] for a court to convict a person on the single evidence of a competent and credible witness. Then at 615E-H, he said:

"In Zimbabwe, much the same approach has been adopted. In S v Nyati 1977 (2) RLR 315 (A) at 318E-G, LEWIS JP warned that the test in R v Mokoena supra is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence, a commonsense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. See also S v N athoo E Supermarket (Pvt) Ltd 1987 (2) ZLR 136 (S) at 138D-F.

Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution."

Before I proceed to deal with each case in detail, there is one aspect common to both cases that has struck me and which I feel constrained to point out. This is in relation to the manner in which both trial magistrates have commendably taken into account the social background of the complainants in assessing the evidence before them. More often than not, the peculiar social beliefs, moral upbringing and social circumstances of the complainant in a rape case are not taken into account in assessing whether or not her

behaviour is credible and is consistent with lack of consent. This is so because, historically, rape has always been an offence where the prosecution opens with suspect victim credibility and diminished accountability on the part of the aggressor, in that he does not have to prove consent on the part of the victim as part of his defence. The onus is on the State to prove, beyond reasonable doubt, that there was no consent and, to

do so, the State invariably has to rely on the evidence of a witness frequently labelled as a willing accomplice. In addition, the morals and social values and background of the judicial officer, guided by precedent from his or her peers, is then used to determine whether or not the victim is worthy of belief.

In both of the cases under review, the trial magistrates, independently and in different findings, accepted that the complainants had been conditioned by their social beliefs into genuinely believing that, after having sexual intercourse with a man, even without consent, they .had to go and live with their respective aggressors. Viewed from this standpoint, the fact that the complainant in the first case stayed with the accused for three months after the alleged aggression, and the complainant in the second case attempted to go and live with the accused, cannot solely be used to discredit the complainants. This is a belief borne out of social values and beliefs peculiar to the complainants. Prosecutors and judicial officers with different social backgrounds may not readily see this other, different viewpoint.

Turning now to the first case, I am of the view that had the trial magistrate D dispassionately applied the test laid down in Banana's case supra, and heeded the warning sounded therein of carefully considering the nature and circumstances of the alleged sexual offence, she would have come to a different conclusion.

A few unsatisfactory features of the complainant's evidence present themselves to me. The complainant was not consistent in her evidence. In ,her evidence-in-chief, she testified that when the accused was raping her, she cried, but not loudly enough for people to hear her. Under cross-examination, she was asked why she did not scream to attract the attention of people at the house and she responded thus:

"I cried and you were muffling my cries using your palm. Further, there was no one I could scream for help."

Again, the complainant in her evidence-in-chief said she did not tell the accused's mother two days later about the rape because the accused had threatened her with assault and stabbing with a knife if she told anyone, including his mother, about the rape. Under cross-examination as to why she did not tell the accused's mother about the rape, she answered that when she got to the accused's mother's home she was treated very nicely and hence she did not tell. Yet again, the complainant in her evidence-in-chief testified to the effect that on the morning following the alleged rape, the accused asked her to leave and she refused, because it was no longer possible for her to do so. When asked in cross-examination why she did not report the alleged rape the following day, she answered that she could not do so, as the accused kept

her locked in his room. If he wanted her to leave, he would not have kept her locked in the room.

The above inconsistencies in the evidence of the complainant on their own may not have led the trial magistrate to come to a conclusion different to the one she reached. However,

the inconsistencies, coupled with the fact that the complainant then spent the following three months living with the accused after the manner of husband and wife, and only left because the relationship became abusive, ought to have made the trial court hesitant in finding that the danger of false implication had been excluded beyond reasonable doubt. The possibility remains that, if the relationship had not become abusive, the charge would not have been brought. There is no proof beyond reasonable doubt that the charge would have been brought in any event, notwithstanding the three-month period of consensual co-habitation.

In my view, the trial magistrate ought not to have proceeded further to look for evidence corroborating that of the complainant in the circumstances of this matter.

For these reasons, I will quash both the conviction and the consequent sentence. It is so ordered.

I now tum to the second case. I am also of the view that had the trial court carefully scrutinised the direct evidence given by the complainant, it too would have come to a conclusion different to the one it reached.

A scrutiny of the evidence of the complainant will indicate the following exchange between the prosecutor and the complainant:

"Q: Accused says you agreed to have sexual intercourse with him.

A: No. He said he could not walk for that long distance with me for nothing. He said I had reason to reject him.

Q: When came to know he was married (sic)?

A: From the rape scene when we were about to get to my uncle's place.

Q: What did he say?

A: He said he was married but because he loved me he had sexual intercourse with me.

Q: Isn't it you wanted to fix him as he is married?

A: That is not true. He had threatened to kill me. He had de flowered me so I had given in when he said he would marry me" (the emphasis is mine).

And further on in the record, the following is exchanged between the prosecutor and the complainant:

"Q: Accused threatened to kill you?

A: It was after the act as he said I should leave him alone.

Q: Before or during the sexual intercourse did he threaten you?

A: No. But he held my mouth tightly.

Q: SO you were prepared to go and stay with the accused?

A: It was because he had deflowered me."

On the basis of this and other evidence, the trial court found that the sexual intercourse between the accused and the complainant was without consent. The trial court then proceeded to make the finding that the complainant was a credible witness. In coming to that conclusion, the trial court found that the complainant had no reason to lie against the accused.

It also found that, because the complainant knew that she was a virgin, she would not have acted in the manner she did (insisting to go with the accused) if she had consented to sexual intercourse. Further, since the parties had parted on good terms, in the opinion of the trial court, there was no reason for the complainant to fabricate a rape case against

the accused who had not denied responsibility for deflowering her. The complainant's background is another factor that made the trial court believe strongly that, C having just met the accused, the complainant could not have consented to sexual intercourse.
These findings by the trial court, while commendable in the sense that they represent a genuine effort on the part of a judicial officer to view the offence of rape from the viewpoint of the victim, somehow overlook the direct evidence given by the complainant. The complainant clearly indicated that she gave in when the accused promised her marriage. Did this "giving in" amount to submission or conditional consent to the sexual intercourse? The exact meaning of the term was not probed by further questioning nor was the issue ever discussed in the judgment. Further, the more important issue of when, during the entire process of walking with the accused and eventually having sexual intercourse with him, the complainant "gave in" on the promise of marriage was not adequately probed. While it is trite that if there was no consent at the moment penetration was effected, the offence of rape was committed, there is no such evidence on record.
In my view, the totality of the evidence by the complainant leaves one in doubt as to whether or not she consented to having sexual intercourse with the accused or gave in on condition the accused would marry her. Her actions after the alleged rape, as correctly captured in the judgment by the trial magistrate (but for a different reason), while not excluding the former, are wholly consistent with the latter. In the light of the complainant's social background and beliefs, it therefore remains a real possibility that the complainant would not have raised the charge if, on the same night, the accused had taken her to his home and thereafter took steps to formalise his relationship with her. It is not in dispute that the accused did not take the complainant home with him but promised to return the following day, whereupon the complainant made a report to her uncles that she had been raped. In the premises, it cannot be said that the danger of false implication was excluded beyond reasonable doubt.

On the basis of the foregoing, it cannot be held that the State proved its case beyond reasonable doubt. The benefit of the doubt goes to the accused who ought to have been acquitted at the end of the trial.
Accordingly, I must quash the conviction and sentence in this case. It is so ordered.
CHEDA J agrees.

S v DIFIRI
2001 (2) ZLR 411 (H)
Division: High Court, Harare
Judges: Smith J
Subject Area: Criminal review
Date: 7 November 2001
Judgment Number: HH-198-01

Criminal procedure (sentence) - statutory offences - infanticide factors inducing pressure or stress on mother of newly-born child - need for court to consider such factors
Criminal procedure (sentence) -general principles -factors affecting pre-trial incarceration - need to take lengthy period of incarceration into account for purposes of sentence
The accused, an 18-year-old girl employed as a housemaid, fell pregnant by a man who denied responsibility and then disappeared. Her seven months of pregnancy she gave

birth prematurely and unexpectedly in a toilet. She strangled the baby and put its body in a bag. She was subsequently convicted on her plea of guilty of infanticide in terms of s 2 of the Infanticide Act [Chapter 9:12] and sentenced to two years' imprisonment of which six months were suspended on conditions. In sentencing her, the magistrate said that the mitigating factors were outweighed by the principle of upholding the sanctity of human life. On review:

Held, that before passing sentence in all cases the court should enquire whether the accused has been on bail pending trial or on remand. If the accused has been in custody for a lengthy period awaiting trial, that should be taken into account in determining sentence.

Held, further, that the magistrate erred in deciding that the mitigating factors were outweighed by the principle of upholding the sanctity of human life. By enacting the Infanticide Act, the legislature intended that special consideration should be given to women who cause the death of their children within the first six months after birth. It is incumbent on courts, when dealing with cases of infanticide, to have regard to s 4 of the Infanticide Act, which sets out factors that may cause pressure or stress on a woman who has given birth to a child.

Held, further, that in view of the accused's comparative youth and the mitigating circumstances, the sentence should be altered to one of 12 months' imprisonment with half suspended on condition of good behaviour.

Legislation considered:

Infanticide Act [Chapter 9:12], s 4

Page 412 of 2001 (2) ZLR 411 (H)

SMITH J: The accused was charged with contravening s 2 of the Infanticide Act [Chapter 9:12] (hereinafter referred to as "Chapter 8:12"). She pleaded guilty and was duly convicted. She is 18 years of age. She fell pregnant and the man who was responsible for making her pregnant deserted her. When she was seven months pregnant she gave birth. She "strangled" the baby and put its body in her bag. The post-mortem report showed that the baby had been born alive and had died from asphyxia. The umbilical cord had been tied round the baby's neck.

In his reasons for sentence, the magistrate acknowledged that the accused was a first offender and had pleaded guilty and that her boyfriend, after making her pregnant, had not only denied responsibility but had also disappeared without trace. He then went on to say:

"I realise the dilemma you found yourself in. The mere thought of raising an illegitimate child with your scanty resources was too painful to contemplate. This was your first pregnancy. Obviously, you experienced serious complications. 1 am told it is an excrutiating experience that is likely to cause psychological and emotional disturbances. Whatever the case, you were not in full control of your faculties when this offence was committed."

Although acknowledging these mitigating factors, the magistrate then said that whatever the social problems of the accused, "the sanctity of human life reigns supreme". He then sentenced the accused to two years' imprisonment, of which six months were suspended on condition of good behaviour.

The offence was committed on 15 May 2001 and the accused appeared in court on 20 August. There is nothing in the record to show whether the accused was granted bail

pending trial or whether she was on remand. The magistrate should have inquired into that before sentencing the accused. That should be done in all case because if the accused has been in custody for a lengthy period awaiting trial then that should be taken into account in determining sentence.

In subs (2) of s 2 of Chapter 9: 12, it is provided that where a woman is charged with infanticide and it is proved that, within six months of the birth of her child, she unlawfully and intentionally caused the child's death, "it shall be presumed, unless the contrary is proved, that she did so at a time when the balance of her mind was disturbed as a result of giving birth to the child". The intention, clearly, was to give recognition to the emotional stresses suffered by a woman who kills her child. The court is required by s 4 of the Act to have regard to –

"any pressure or stress from which she suffered arising out of anyone or more of the following circumstances or considerations

(a) the effects which the birth had, or which she believed it would have, on her social, financial or marital situation;

(b) the difficulties which were created, or which she believed it would be created, in caring for the child in the social, financial or marital situation in which it was born;

Page 413 of 2001 (2) ZLR 411 (H)

(c) the difficulties which she had, or which she believed she would have, in caring for the A child due to her inexperience or inability;

(d) any other relevant circumstances or consideration, whether based on the psychological effects on the woman's mind arising from the birth itself, or otherwise."

When a woman is convicted of infanticide, the only sentence that can be imposed is imprisonment and the maximum period is five years. A sentence of five years will only be imposed in the most serious cases, where there are no mitigating factors or, if there are any, where they are far outweighed by the aggravating factors.

In Legal Forum (1992) vol 4 No. 4 P 22, there is a critical examination of Chapter 9:12 by Clive Broe. In that article, he dealt with the pattern of sentencing in the first year or so that Chapter 9:12 had been in operation (it came into effect on 18 January 1991). He said:

"It is too early yet to consider in depth sentencing under the new Act but a pattern is beginning to emerge. Of the 21 cases completed in the Regional Court in Harare, the most lenient sentence has been 18 months' imprisonment wholly suspended. Eight accused have received sentences of three years and the average is 2.9 years. Interestingly, four accused have received 5-year sentence, the maximum available.

This suggests that either there were cases with no mitigation (unlikely given the nature of the offence) and every possible aggravating factor or the magistrates may have felt that their powers were inadequate."

In my experience, since 1992 the pattern outlined above still exists.

The average sentence is three years' imprisonment.

In this case, although the magistrate quite rightly adverted to the mitigating factors, he then went on to say that they were outweighed by the principle of upholding the sanctity of human life. I consider that he erred in so deciding. The fact that Chapter 9:12 was introduced in Parliament and became the law of the land shows that the legislature intended that special consideration should be given to the case of women who cause the death of their children within the first six months of birth. The maximum penalty was reduced from the death penalty to five years' imprisonment. It is incumbent on the court,

in each case of infanticide which comes before it, to have regard to the factors set out in s 4 of Chapter 9:12 which I have set out earlier.
In this case, there are no aggravating factors. Admittedly, the accused did cause the death of her baby, but that element is common to every case of infanticide. The accused was 18 years old when she committed the offence. She was working at the time as a housemaid, and so was not living with her family. Her boyfriend who made her pregnant deserted her as soon as she told him she was pregnant. So she was completely on her own. The baby was born prematurely and it was her first baby. It arrived unexpectedly and she gave birth in the toilet where she was staying. She told the magistrate that she had no option but to kill the baby because the father had rejected her. She was

earning $930 a month as a housemaid and so could ill afford to raise the baby. All these factors must have caused great pressure or stress. She must have been living for months alone and worrying about what she could do when she had a baby and wondering how she would cope as a single parent. She was only 18 years old and had no-one to turn to.
Having regard to the comparative youth of the accused and the mitigating factors set out above, I consider that the sentence is excessive. The conviction is confirmed but the sentence is set aside and the following substituted:
The accused is sentenced to 12 months' imprisonment of which six months are suspended for five years on condition that, during that period, the accused does not commit any offence involving infanticide, concealment of birth or unlawful termination of pregnancy for which she is sentenced to imprisonment without the option of a fine.
MAKARAU J agrees.

GOMWE & ANOR v ASSOCIATED NEWSPAPERS OF ZIMBABWE (PVT) LTD
2001 (2) ZLR 415 (H)
Division: High Court, Harare
Judges: Smith J
Subject Area: Civil application
Date: 31 October & 14 November 2001
Judgment Number: HH-203-01

Company - director - dismissal - director who is also an employee - dismissal may be in terms of labour law - not necessary to follow procedures provided by Companies Act
Employment - contract - termination - director of company - when director is also an employee - director who is an employee may be dismissed under labour laws - not necessary "to follow procedures under Companies Act
The two applicants had been engaged by the respondent company in 1998, respectively as advertising and marketing director and financial director. Each had specific duties assigned to her or him, and specific salaries and benefits were fixed as consideration for the performance of those duties. They were expected to attend work during normal business hours, or longer, as required. They were also required to attend board meetings, as directors, and for those meetings were paid the appropriate directors' fees.
In 1999 the company suffered a financial crisis which necessitated restructuring and retrenchment. Both applicants were notified that they were to be retrenched. They were also notified that they were being suspended without pay or benefits, in terms of the labour regulations, on the grounds of unacceptably low performance of their respective

duties. The applicants contended that, as they had been appointed as directors, they could only be removed from office in terms of the company's articles and memorandum of association. They applied for an order setting aside their suspension and for the payment of their fees, salaries and benefits. The company opposed the application, claiming that the board of the company had been dissolved at a meeting of shareholders and a new board appointed, of which they were not members. The applicants alleged that a number of irregularities had affected the validity of the shareholders' meeting and that the decisions made at the meeting were invalid.

Held, that a director of a company is not bound to give continuous attention to the affairs of the company, his duties being of an intermittent nature, to be performed at periodical board meetings. For that he is paid a fee, not a salary. However, a director may also be an employee of that company, in that he receives a salary and other benefits and is obliged to devote his full time to the affairs of the company. The applicants were thus employees, not merely directors. As employees, they could be dismissed by following the procedures provided under the labour laws, rather than in terms of the Companies Act.

[The Chapter Number of the Labour Relations Act is changed to read " Chapter 28:01" – which is the correct reference – and not Chapter 29:02 – Editor.]

Cases cited:

Re City Equitable Fire Ins Co [1925] Ch 407

James North (Zimbabwe) Ltd & Ors v Mattinson 1989 (1) ZLR 322 (H)

Trussed Steel Concrete Co Ltd v Green [1946] Ch 115

K Ncube, for the applicants

F Girach, for the respondent

SMITH J: The respondent suspended the applicants in October 1999. The applicants filed this application on 13 June 2000 seeking an order that the purported suspension be set aside and that they be paid all due director's fees and relevant salaries and benefits from their date of suspension. In the application, the respondent was cited as Motley Trading (Pvt) Ltd t/a Associated Newspapers of Zimbabwe. In his opposing affidavit, the managing director of the respondent said that the respondent is no longer known as Motley Trading (Pvt) Ltd, as the name of the company has been changed to Associated Newspapers of Zimbabwe (Pvt) Ltd.

In the founding affidavit, the following allegations are made. In July 1998, the first applicant was engaged by the respondent as advertising and marketing director. In August 1998, the second applicant was engaged by the respondent as financial director. In mid-1999 the respondent suffered a financial crisis which necessitated restructuring and retrenchment. By letters dated 14 October, which letters were headed "Termination of Employment", both applicants were advised that their employment as advertising and marketing director and finance director, respectively, had come to an end with effect from 13 October because the shareholders wanted to restructure the department concerned. Each letter spelt out the shortcomings of the person to whom it was addressed and concluded by saying that she/he was suspended, without pay and benefits, with effect from 13 October 1999 pending dismissal for contravening s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (hereinafter referre to as "SI 371 of 1985"), in that her/his performance during the relevant period had been unacceptably low. A copy of each letter was sent to the Chief

Labour Relations Officer in the Ministry of Public Service, Labour Social Welfare (hereinafter referred to as "the Ministry of Labour").The applicants contend that, as they were appointed directors, they could only be removed from office in terms of the Articles and Memorandum of Association of the Company, as read with s 175 of the Companies Act [Chapter 24:03] (hereinafter referred to as "Chapter 24:03"). As directors, the Labour Relations Act [Chapter 28:01] (hereinafter referred to as "Chapter 28:01") does not apply to them and therefore the H application to the Ministry of Labour is of no import.
Page 417 of 2001 (2) ZLR 415 (H)
The respondent opposes the application. It contends that the applicants were no longer directors when they were suspended. On 30 September 1999, a meeting of shareholders was held. At that meeting a special resolution was passed dissolving the board of Motley Trading (Pvt) Ltd. A new board was then appointed for the company, then known as Associated Newspapers of Zimbabwe. The applicants were not appointed to the new board. Although the applicants ceased to be directors, they remained employees. Accordingly an application for permission to dismiss them was sent to the Ministry of Labour.
In their answering affidavit, the applicants denied that they had ceased to be directors of the company and made the following contentions. Although the shareholders did meet on 30 September 1999 and, inter alia, purported to remove the applicants from their positions as directors, the meeting could not transact any company business because there were a number of irregularities; the meeting was chaired by a legal practitioner who was not a director or a shareholder, thus contravening articles 55 and 56 of the Articles of Association; the minutes were produced by the legal practitioner and not by the second applicant, who held the position of company secretary; the list of persons present at the meeting did not indicate whether the persons purportedly representing them were doing so as being authorised by resolution or by proxy; the only valid shareholders of the respondent are W Mbanga and G Nyarota and the shareholders could not validly ratify an increase in the share capital; the applicants did not receive the requisite notice of the meeting and were not notified of the agenda until the start of the meeting; although the waiver of notice pursuant to s 127(2)(b) of Chapter 24:03 was supported by 100 percent of the members entitled to vote, Mr S Mattinson, the AMI (Z) representative, said that he did not have a mandate to vote; the dissolution of the Board did not comply with the requirements of Chapter 24:03; the special resolution was not filed at the Companies Office; neither of the applicants was given a chance to be heard before the vote on the resolution to dissolve the Board was taken. Because the provisions of Chapter 24:03 were disregarded, the applicants are still directors of the Board. The letters from the respondent to the Ministry of Labour merely inform the recipient that the applicants have been dismissed and does not request approval therefor.
The respondent applied for leave to file a supplementary affidavit to deal with issues raised by the applicants in their replying affidavit. Leave was granted. Employment contracts for the applicants were filed, but they were not signed by either party. There was also filed a letter from a labour relations officer advising the Chief Executive of the respondent that a hearing relating to the dismissal of the first applicant would be held on 12 June 200l. Although the notice was dated 30 May, it was post-marked 11 June and was
Page 418 of 2001 (2) ZLR 415 (H)

only received by the respondent on 13 June. The Chief Executive accordingly replied, asking if the matter could be re-set down. An affidavit from Mr Mattinson was also filed. It was stated therein that, by way of written proxy, he was authorised to represent and vote for African Media Investments Ltd at the meeting held on 30 September 1999 and that all shareholders were represented at the meeting. Ater the meeting was called to order, Notice thereof was waived by all present.

Mr Ncube said that both applicants remained members of the board of directors because the resolution purporting to dissolve the board was a nullity because of procedural improprieties. The requisite notice of the meeting was not given and the applicants should have been given a chance to be heard at the meeting. The person who chaired the meeting was neither a director nor a shareholders. Mr. Ncube further argued that directors who exercise executive functions are not employees as contemplated in s 3 of Chapter 28:01. Accordingly, if they are to be dismissed, the provisions of s 173(1) of Chapter 24:03 must be followed, and not those of Chapter 28:01. It was improper for the Chief Executive to dismiss fellow directors; that can only be done by way of a resolution passed by the board of directors: see James North (Zimbabwe) (Pvt) Ltd & Ors v Mattinson 1989 (1) ZLR 322 (H) at 334G. Even if Chapter 28:01 was applicable, the respondent had not complied with the provisions of SI 371 of 1985, in that the Chief Executive Officer summarily terminated the employment of the applicant and did not "forthwith" apply for approval. In fact, no such application has been made to date.

Mr Girach argued, in limine, that the application was fatally defective as the respondent should have been cited as Associated Newspapers of Zimbabwe (Pvt) Ltd. As regards the merits, the applicants were not executive directors of the respondent. They were employees. They seem to have accepted that because they are claiming both directors fees and salaries and benefits. It is agreed that directors are not employees as envisaged in s 3 of Chapter 28:01. In these letters of suspension sent to the applicants, no mention is made of the manner in which they conducted themselves as directors; the complaints related solely to the manner in which they carried out, or failed to carry out, their duties. ne suspensions are in order and the matter will now be determined in terms of Chapter 28:01. At the hearing before the labour relations officer, the applicants will be afforded an opportunity to be heard. As regards the termination of their directorships, a meeting of the Board was held and a special resolution to dissolve the Board was duly passed in terms of s 175 of Chapter 24:03. The applicants were present at that meeting and the decisions to waive notice and to dissolve the Board was unanimous.

In Re City Equitable Fire Insurance Co [1925] Ch 407 at 408 et seq,

Page 419 of 2001 (2) ZLR 415 (H)

ROPER J reviewed the case law relating to the duties of directors and deduced three propositions. The one relevant to this case is:

"A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever in the circumstances he is reasonably able to do so."

As the learned author of L C B Gower Modern Company Law 4 ed at p 603 say, some directorships are often little more than sinecures, requiring at most,attendance at occasional board meetings. In the United Kingdom, until recently, the possession of a

title was often regarded as a greater qualification for office than any amount of business acumen and drive. Then the function of a director of a company is to attend meetings of the Board of directors. For that he is paid an appropriate fee. He is not paid a salary. In the case of the applicants, the first applicant was appointed as advertising and marketing director and the second applicant was appointed as finance director. Whether or not their appointments were in terms of the contracts filed with the supplementary affidavit, clearly they must have entered into a contract of employment with the respondent because each had specific duties assigned to her or him, and a specific salary was fixed in consideration for the performance of those functions. It is obvious that the applicants had two hats with the respondent. During business hours and outside meetings of the Board, they were employees of the respondent, as such they were expected to report for duty and work business hours, or longer, as required by virtue of their contracts of employment. Each was then entitled to demand and be paid the appropriate salary and other benefits as provided in their contracts. However, when they attended board meetings they were directors and they attended the meetings in that capacity. For so attending they were paid the appropriate fee fixed by the board for all directors. In Trussed Steel Concrete Co Ltd v Green [1946] Ch 115 at 121, COHEN J said:

"When I find a man who is bound to devote his whole time to the affairs of the company, to do all in his power to develop and extend the business of the company, not to engage in any other business and who is engaged on the terms that his employment may be determined by the company by notice in writing, I find it impossible to say that he is not employed by the company."

In this case, the applicants were similarly bound to devote their full time to the affairs of the respondent and therefore, I too find that they were employees of the respondent, not just directors.

The letter of suspension sent to each applicant was indeed headed "Termination of Employment" and began by saying the applicant's appointment as advertising and marketing director or finance director, as the case may be, had come to an end because the shareholders wanted the

relevant department restructured. However, the complaints against the applicant were very clearly set out therein and then the letter concluded by saying "you are hereby suspended, without pay and benefits", pending for contravening s 3 of SI 371 of 1985. It is shown at the bottom that a copy of the letter was being sent to the Ministry of Labour. The covering letter that was sent to the Chief Labour Relations Officer did not specifically state that approval for the dismissal was required but clearly that was implied. It was obviously understood by the Chief Labour Relations Officer that approval was being sought because a hearing was set down, but unfortunately the notice of set down was only received by the respondent after the date set down.

I consider that the suspension of the applicants as employees of the respondent is in order and that the requirements of SI 371 of 1985 have been observed. Accordingly, at this stage, the applicants are not entitled to an order setting aside the suspensions and directing that the respondent pay their salaries and benefits from the date of their suspension.

As regards the directorships held by the applicants, Mr Mattinson has filed an affidavit in which he states that he did have the necessary proxy to vote at the board meeting on 30

September 1999. Although shareholders were not given adequate notice of the meeting, the requirement of due notice was validly waived. Both applicants attended the meeting and had an opportunity to have their say. I do not consider that the fact that the person who chaired the meeting was neither a director nor a shareholder had the effect of invalidating the decisions taken at that meeting. A resolution to dissolve the board and to appoint a new body of directors was passed at the meeting with the requisite majority. By virtue of the resolution so passed, the applicants ceased to be directors on the board of the respondent. Accordingly, they are not entitled to an order directing that the respondent pay their directors fees from the date of their suspension.

The application is dismissed with costs.

Gill, Goldonton & Gerrans, applicants' legal practitioners.

Honey & Blanckenberg, respondent's legal practitioners

SCIENTIFIC AND INDUSTRIAL RESEARCH AND DEVELOPMENT CENTRE v CHAKUPARIRA

2001 (2) ZLR 421 (S)

Division: Supreme Court, Harare

Judges: McNally JA, Muchechetere JA & Sandura JA

Subject Area: Civil Appeal

Date: 29 October and 15 November 2001

Judgment Number: S-94-01

Employment — contract — probationary period — presupposes that employee is on trial — does not amount to a fixed term contract — contract may be terminated on giving of requisite period of notice — right of employer to subject employee to tests and assessment while under probation

The appellant employed the respondent for a three-year probationary period, during which either party was entitled to terminate the employment contract on one monthís notice. During the probationary period, the respondent refused to sit an assessment test, for which he was suspended and subsequently dismissed for refusing to obey a lawful order. The Labour Relations Tribunal upheld his appeal against the dismissal, holding that he could not be required to sit an assessment test until the end of the period of probation. The appellant took the Tribunal’s decision on appeal to the Supreme Court.

Held, that at common law an employer in the appellant’s position has a right to test and assess an employee under probation. As in any period of probation the respondent was under scrutiny and liable to assessment; this was confirmed by the fact that his contract could be terminated on one month’s notice. His failure to undergo the test therefore constituted wilful disobedience to a lawful order and the appellant was entitled to dismiss him.

Cases cited:

Chironda v Swift Transport 1996 (1) ZLR 142 (S)

Gumbo v Air Zimbabwe (Pvt) Ltd 2000 (2) ZLR 126 (H)

Kazembe v Adult Literacy Organisation S-173-94

Kwete v Africa Community Publishing & Development Trust & Ors HH-216-98

Lever Bros (Pvt) Ltd v Marapuzah & Ors S-23-97

Madawo v Interfresh Ltd 2000 (1) ZLR 660 (H)

Matereke v CT Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S)

Min of Labour & Ors v PEN Transport (Pvt) Ltd 1989 (1) ZLR 293 (S)
National Foods Ltd v Masukusa 1994 (1) ZLR 66 (S)
PTC v Chihoro 1997 (1) ZLR 148 (S)
Tobacco Sales Floors Ltd v Chimwala 1987 (2) ZLR 210 (S)
Zieve v National Meat Suppliers Ltd 1937 AD 177
L T Biti, for the appellant
Miss J Siveregi, for the respondent
Page 422 of 2001 (2) ZLR 421 (S)
MUCHECHETERE JA: This is an appeal against the judgment of the Labour Relations Tribunal ("the Tribunal") on 19 April 2001 in which the appellant was ordered to either reinstate the respondent without any loss of salary and benefits or pay him damages in lieu of reinstatement.
The facts in the matter are that the respondent was employed as a research scientist on a three-year contract with effect from 5 August 1997, subject to extension upon successful completion of the three-year probation period. Clause 6 of the employment contract ("the contract") entered into between the parties reads as follows:
"6. Notice and Probationary Period
All SIRDC staff are recruited on the basis of a performance contract. Your assumption of duty will be on a three year probation period, during which time one calendar month's notice to terminate employment will be required on the part of either SIRDC or yourself. After successful completion of probationary service, all SIRDC's staff will be on a performance contract in which they are assessed every five years" (my emphasis).
On 1 October 1998, the appellant's director for environment and remote sensing institute ("the director") requested the respondent to sit an assessment test. In a letter dated 2 October 1998 to the director, the respondent declined to comply. On 5 October 1998, the director suspended the respondent and charged him with insubordination in terms of the appellant's code of conduct. This resulted in the respondent appearing before a disciplinary committee on 9 October 1998. The committee found and held as follows:
"Summary of Facts by the Chairman

(a) The test did not require any preparation as it was part of the everyday routine duties. He did not have to prepare for the test.

(b) Allegations by Mr Chakuparira that whatever was done by the director of environment and remote sensing institute was done by the director to victimise him highlight suspicion and mistrust.

(c) Allegations that SIRDC management collectively wanted to victimise him according to Mr Chakuparira was his own imagination.

(d) The correct procedure was to carry out an instruction and complain later following the code of conduct grievance procedure.

(e) Mr Chakuparira did not write the test but sat in the lab on a word processor to write a letter to the director, requesting the test to be postponed until he had consulted his lawyer. Since he did not write the test, he therefore disobeyed a lawful order.

Mr F Mwamuka: 1155 hours
The research scientist who set the test and also acted as an invigilator was called into the room and answered questions put to him.

(a) Reply: One set for the test.

(b) Reply: The other candidate was in the room.

(c) Reply: I attempted to give him the test paper, but he said that he was not going to write the test.

The Chairman

He said that was clear evidence that he disobeyed an order.

Page 423 of 2001 (2) ZLR 421 (S)

Disciplinary Committee Decision

1. The disciplinary committee found Mr Michael Chakuparira guilty of insubordination in that he refused to carry out a lawful order given by the superior.

2. Mr Michael Chakuparira would be written a letter by the human resources manager informing him of the decision of the disciplinary committee.

3. Mr Michael Chakuparira would also be advised of his right to appeal against the decision of the committee."

On 14 October 1998, the respondent was informed of the committee's decision, that the offence of which he was found guilty would inevitably lead to his dismissal and that his contract of employment was to be terminated with effect from the date of suspension, which was on 5 October 1998. On 26 October 1998, the respondent appealed against the decision to the director. On 2 November 1998, he also appealed against the committee's decision to the deputy director-general and also made an appeal to the director-general on 16 November 1998. On 25 November 1998, the director-general wrote to the respondent indicating that "your case has been carefully considered but that the decision to dismiss you will not be reversed". On 7 December 1998, the respondent appealed to the appellant's manpower and remuneration committee. That committee upheld the decision of the director-general and the respondent was advised, if he so wished, to appeal to the Tribunal.

The Tribunal upheld the respondent's appeal. Its reasons were as follows:

"An appellant having been on a three year fixed term contract, the test he was required to sit at the end of one year was premature. In terms of his contract of employment, the assessment to determine his suitability for continued employment was supposed to be done at the end of three years.

For that reason, I hold that the request to sit the assessment test was no more than a request which could be complied with or rejected without the appellant breaching the terms of his contract of employment. In order for the appellant to submit to an assessment test before the three year period stipulated in his contract of employment had expired would have been unlawful."

Mr Biti, for the appellant, submitted that the Tribunal erred in law in interpreting clause 6. He argued that the ordinary meaning of the clause was simply that the period of probation for the respondent was a three-year one and that after being confirmed as a permanent employee he would still be assessed after every five years. He further argued that as in any period of probation the respondent would be under scrutiny and would be under test and for the purposes of this case would be under assessment. I agree.

This position is confirmed by the fact that a period of one calendar month's notice is provided to terminate the contract of employment by either of the parties. That period presupposes that the employee is under assessment while he is under probation. He in fact is on a month-to-month contract. Compare Lever Brothers (Pvt) Ltd v Marapuzah & Ors S-23-97, and in particular the

passage at the foot of p 3. It is incorrect to describe the contract as a three-year fixed-term contract.
On the law, I agree with the sentiments in the cases Mr Biti cited. See the following cases: Kazembe v Adult Literacy Organisation S-173-94 at p 6 of the cyclostyled judgment, where Gubbay CJ said:
"A period of probation by its very nature presupposes that during the period of probation the probationer is on trial …"
See also Madawo v Interfresh Ltd 2000 (1) ZLR 660 (H) at 662G-H-663A-D, where Chinhengo J said:
"The question as to what probation means arose in Ndamase v Tyfe-King NO 1939 EDL 259 where at 262 Gane J said:
'"Probation" is defined in the New English Dictionary as "the action or process of testing or putting to the proof; … the testing or trial of a person's conduct, character or moral qualification; a proceeding designed to ascertain these … for some position or office". I think these words very well describe the process of probation as commonly undergone by accepted candidates … Ordinarily, no doubt, the question of the possession of the requisite qualification for the post is determined by prior examination or inquiry. Qualification is then taken for granted; what it is desired to test is the fixity of purpose, diligence and personal discipline of the candidate. The probationary period is not regarded as a period allowed for acquiring the necessary qualification'."
And at 663E-F, Chinhengo J continued as follows:
"In my view, this passage highlights the fact that an employee on probation may have his contract of employment terminated on giving the requisite notice if the purpose of the probation has been frustrated. This is in keeping with the general idea of probation. 'Probation' does not guarantee for the employee employment for the full period of the probation as initially agreed between the parties. Accepting this as being the position, the facts in this case are distinguishable in that the respondent did not terminate the appellant's contract of employment before the end of the period of probation. It gave the requisite notice and allowed the contract to terminate at the end of the period of probation, even though this was achieved by a payment in respect of the unexpired portion of the period of probation" (my emphasis).
See also Kwete v Africa Community Publishing & Development Trust & Ors HH-216-98; Gumbo v Air Zimbabwe (Pvt) Ltd 2000 (2) ZLR 126 (H); Minister of Labour & Ors v PEN Transport (Pvt) Ltd (1) 1989 (1) ZLR 293 (S).
I also agree that at common law the employer in the position of the appellant has a right of testing and assessing an employee under probation. In the result, the meaning of clause 6 of the said contract is not to the effect that the employee can only be tested and assessed at the end of the three-year period of employment. The Tribunal therefore misdirected itself on the issue.
On the facts, I also agree that the respondent clearly wilfully disobeyed a lawful order. He admitted that it was contemplated that there was going to be assessment and testing throughout the probationary period and that there had

been such assessment and testing prior to the one under discussion. This comes out from the record of the disciplinary inquiry, in that the respondent does not dispute that it was

mentioned that there had been an assessment of his performance at the beginning of the year in question. And he is said to have admitted that "there was nothing fishy about the tests as it was part of his everyday duties. The test involved downloading and plotting data. Mr Chakuparira agreed that it was part of his routine duties …". On wilfully disobeying lawful orders: see Matereke v C T Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S); National Foods Ltd v Masukusa 1994 (1) ZLR 66 (S); PTC v Chihoro 1997 (1) ZLR 148 (S) at 151B; Tobacco Sales Floors Ltd v Chimwala 1987 (2) ZLR 210 (S); Zieve v National Meat Suppliers Ltd 1937 AD 177; Chironda v Swift Transport 1996 (1) ZLR 142 (S) at 145B.

From the above, it is clear that I agree that the Tribunal misdirected itself in this matter. In the result, the appeal is allowed with costs. The order of the Tribunal is therefore set aside and the following is substituted instead:

"The appeal is dismissed with costs."

McNALLY JA: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

S v TSVANGIRAI

2001 (2) ZLR 426 (H)

Division: Supreme Court, Harare

Judges: Chidyausiku CJ, McNally JA, Ebrahim JA, Muchechetere JA & Sandura JA

Subject Area: Constitutional application

Date: 12 July and 20 November 2001

Judgment Number: Judgment No. S-91-01

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 18(3) & 18(13)(b) — right to be presumed innocent until proved guilty — provision whereby burden of proving certain facts can be laid on accused— when permissible — provision requiring accused to prove absence of criminal intent beyond reasonable doubt — unconstitutionality

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 20(1) — right to freedom of expression — Law and Order (Maintenance) Act [Chapter 11:07] — ss 51 & 58 — acts of terrorism and sabotage and incitement to public violence — unconstitutionality of sections

Criminal law — statutory offences — Law and Order (Maintenance) Act [Chapter 11:07] — ss 51 and 58 — acts of terrorism and sabotage and incitement to public violence — unconstitutionality of sections

Following a statement he was alleged to have made at a political gathering, the applicant was charged in the High Court with committing an act of terrorism or sabotage in contravention of s 51(2) of the Law and Order (Maintenance) Act [Chapter 11:07] and with the common-law offence of inciting public violence as read with s 58 of the Act. Section 51 made it an offence for anyone, intending to endanger the maintenance of law and order, to do any one of six broadly-described acts, and the section imposed a "reverse onus" on an accused: a person proved to have committed any one of those acts was presumed to have intended to endanger the maintenance of law and order unless he

proved the contrary beyond reasonable doubt. Section 58 of the Act stated in effect that if the natural and probable consequences of a person's conduct or words might reasonably be expected to be the commission of public violence, then he was deemed to have committed the common-law crime of incitement to public violence. The applicant challenged the constitutionality of ss 51 and 58 of the Act and the trial judge referred the question to the Supreme Court in terms of s 24 of the Constitution.

Held, that s 51 of the Act was ultra vires s 18(3)(a) of the Constitution, which guarantees the

right of an accused person to be presumed innocent until proved guilty, for the following reasons:

1. Section 18(3)(a) of the Constitution does no more than codify or carry forward what was allowed under common law, and by imposing on an accused person an onus that could only be discharged on proof beyond a reasonable doubt, s 51 went beyond the common law, under which a reverse onuses may be discharged on a balance of probability.

2. The presumption of innocence casts on the prosecution the burden of proving beyond reasonable doubt both the actus reus and the mens rea of an accused person. Legislation reversing the onus to prove mens rea is permissible where that element of the crime is a fact exclusively or peculiarly within the knowledge of the accused person and is a simple matter for the accused to prove but is difficult if not impossible for the State to prove. The onus created by s 51 did not pass this test.

3. A reversal of onus is not permissible if its purpose is merely to assist the State to secure a conviction, or to load the dice against an accused. That appeared to be the purpose of s 51.

The section was therefore unconstitutional.

Held, further, that for much the same reasons s 58 of the Act was unconstitutional. It shifted the onus to the accused once certain acts had been established, and did not serve any purpose except to give the State an unfair advantage over the accused.

Held, further, per McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA, that s 51 of the Act also contravened s 20 of the Constitution, which guarantees freedom of expression, for the following reasons:

1. By defining an act of terrorism or sabotage widely and vaguely — in particular by defining it as an act that was "likely" to have certain results, and stating those results in extremely broad terms — the section would tend to inhibit persons from legitimately exercising their freedom of expression for fear of falling foul of the law, and would encourage arbitrary and erratic arrests and convictions.

2. The section was not reasonably justifiable in a democratic society, and so saved by s 20(2)(a) of the Constitution, because the legislature's objective in passing it in 1960 was not the preservation of democratic institutions but rather the suppression of people who were then demanding democracy. Furthermore, the means used by the section to impair the right of freedom of expression were more than was necessary to accomplish the objective.

Held, further, per McNally JA, Ebrahim JA, Muchechetere JA and Sandura JA, that s 58 of the Act also contravened s 20 of the Constitution. It was a speculative offence that encouraged arbitrary and erratic arrests and convictions, and meant that legitimate

criticism was stifled where there was any danger that that criticism, perhaps because of its very cogency, might spark public indignation and result in public violence. Its sweep was too vague and too broad to be acceptable. It was not saved by s 20(2)(a) of the Constitution as being reasonably justifiable in a democratic society.
Cases cited:
Chavunduka & Anor v Min of Home Affairs & Anor 2000 (1) ZLR 552 (S)
Munhumeso & Ors, In re 1994 (1) ZLR 49 (S)
Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)
Papachristou v City of Jacksonville 405 US 156 (1972)
S v Chogugudza 1996 (1) ZLR 28 (S)
R v Kaukakani 1947 (2) SA 807 (A)
Page 428 of 2001 (2) ZLR 426 (S)
Legislation considered:
Constitution of Zimbabwe 1980, ss 18(3), 18(13)(b) & 20(1)
Law and Order (Maintenance) Act [Chapter 11:07], ss 51 & 58
J C Andersen SC, with him E T Matinenga, for the applicant
N Sibanda, with him R Tokwe, for the respondent
CHIDYAUSIKU CJ: The applicant in this matter was charged in the High Court with the crime of contravening s 51(2) of the Law and Order (Maintenance) Act [Chapter 11:07], hereinafter referred to as "the Act". The applicant was also charged in the alternative with the common law crime of inciting public violence as read with s 58 of the Act.
The applicant excepted to the charge or indictment. The grounds upon which the exception was taken are set out in the notice of exception. I shall refer to those grounds later on in this judgment, suffice it to state at this stage that the exception raised the issue of the constitutionality of ss 51 and 58 of the Act under which the applicant was being charged. On this basis, an application was made at the outset of the proceedings in the court a quo that this matter be referred to this court in terms of s 24 of the Constitution of Zimbabwe. Section 24(1) of the Constitution provides as follows:
"(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be, contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subs (3), apply to the Supreme Court for redress."
The court a quo granted the application, having concluded that there was merit in the constitutional point raised. That conclusion was correct, in my view, and the matter is properly before this court on referral from the High Court.
It would be appropriate to set out the factual background to this case at this point before dealing with the legal issues that arise in this case. The following are the facts.
The applicant is the leader of a political party known as the Movement for Democratic Change (MDC). The party was formed in 1999. The party contested the Zimbabwe General Election in June 2000 and over fifty of its members were duly elected to Parliament, made up of 120 elected members. The MDC is the main opposition party in Zimbabwe's Parliament. On 30 September 2000, celebrations to commemorate the founding of the MDC were held at Rufaro Stadium in Harare. It is estimated that about

20 000 people attended these celebrations. Among the people who addressed this gathering was the applicant. In his address to the gathering, the applicant
Page 429 of 2001 (2) ZLR 426 (S)
decried the existence of poverty in Zimbabwe and blamed this state of affairs on the Government led by President Mugabe. He further told the gathering that the Government was both corrupt and incompetent. It is also alleged that he told the crowd that there was no need to wait for the 2002 Presidential Election. He urged the people to be prepared for mass action against the Government. In particular, he is alleged to have uttered the following words:
"… Zvatichada what we would like to tell Mugabe (the President) today is that … please go peacefully. If you don't want to go peacefully, we will remove you violently …"
This speech which was delivered at Rufaro Stadium was also broadcast nationally in both the print and the electronic media.
Following this speech, and as I have already stated, the applicant was charged with contravening s 51(2) of the Act and alternatively with the common law offence of incitement of public violence as read with s 58 of the Act. The applicant filed an exception to the indictment. The exception raised constitutional issues. The learned judge was therefore obliged to refer the issues to this court, having been satisfied that there was substance in the issues raised. In formulating the issues to be referred to this court, the learned judge adopted the formulation in the notice to except. The learned judge, at p 6 of his cyclostyled judgment (S v Tsvangirai HH-81-01), stated the questions for referral as follows:
"The questions to be referred are as framed in the Notice to Except filed of record on 2 May 2001, except for paragraph (1) thereof. These questions are therefore referred to the Supreme Court in terms of section 24(2) of the Constitution."
The notice of exception filed of record, provides as follows:
"The grounds for excepting to the charge(s) are as follows:

1. Section 51 of the Law and Order (Maintenance) Act [Chapter 11.07] criminalises the commission of an act (emphasis added), not the making of a statement.

Accused is alleged to have made a statement. He did not commit an act.

2. The statements allegedly uttered by the accused and the messages communicated are protected in terms of section 20 of the Constitution of Zimbabwe. The persons who received the information had an equal right, protected by the same section, to receive the information and messages.

3. Insofar as the alleged contraventions place a reverse onus on the accused, such an onus denies the accused due protection in accordance with the law and is in contravention of section 18 of the Constitution of Zimbabwe and therefore unconstitutional.

WHEREFORE the accused prays that the main charge preferred against him be quashed. Further, and read with paragraph 1 of his defence outline, the accused prays that, in terms of section 24 of the Constitution, the matter be referred to the Supreme Court so that it determines the constitutionality of sections 51 and 58 of the Law and Order (Maintenance) Act [Chapter 11:07]."
The first ground of exception was not pursued in argument and I will proceed on the basis that it has been abandoned. Indeed, it would appear that
Page 430 of 2001 (2) ZLR 426 (S)

this ground of exception was abandoned in the court a quo and was excluded from referral to this court.

It is apparent from the notice of exception and the submissions made during the hearing that the constitutionality of ss 51 and 58 of the Act is being challenged on two grounds, namely, that they abridge the applicant's constitutional right to freedom of speech conferred on him by s 20 of the Constitution and, secondly, that they abridge his constitutional right to be presumed innocent until proven guilty conferred upon him by s 18 of the Constitution.

In my view, this matter can best be conveniently disposed of on the basis of the second ground of challenge for two reasons. Firstly, there is merit in the second ground of challenge which, in my view, must succeed. This would make consideration of other issues superfluous. Secondly, there is some incongruity between the first ground of challenge and the way the applicant's case was argued in this court. In the first ground, the applicant contends that the statement he made is protected in terms of s 20 of the Constitution of Zimbabwe and the persons to whom the statement was made had an equal right to receive the statement. This, in my view, does not put into issue the question of whether ss 51 and 58 of the Act are ultra vires s 20 of the Constitution. Yet the whole thrust of Mr Andersen's submissions in this court was that ss 51 and 58 of the Act are ultra vires s 20 of the Constitution. The defence raised in the first ground of exception is different from grounds dealt with in the heads of argument. The exception deals with the issue of whether the statement made is protected by s 20 of the Constitution, while the submissions made deal with the issue of whether or not ss 51 and 58 are ultra vires s 20 of the Constitution.

In the light of the express language of the learned judge in the court a quo, namely, that he was referring to this court, for determination, the constitutional questions as formulated in the notice to except, I have some doubt on whether the issue of ss 51 and 58 being ultra vires s 20 of the Constitution of Zimbabwe is properly before this court. I accept that both counsel made detailed submissions on the issue but that does not, in my view, constitute a referral. The problem is compounded by the fact that this court's rules of procedure do not specifically provide for the procedure to be followed where there is a referral under s 24 of the Constitution (referrals). With hindsight, had this issue been raised with counsel, the probabilities are that the notice to except would have been amended to take care of this problem. However, that did not happen. In the circumstances, I will not deal with the first ground raised in the exception because it was not argued and I will not consider whether ss 51 and 58 are ultra vires s 20 of the Constitution because that issue was not raised in the exception but only in argument. I leave that issue entirely open.

The majority of the court has come to a different conclusion on this issue. The majority has come to the conclusion that the issue of the two sections of the Act being ultra vires the Constitution as well as other issues raised in the defence outline, such as selective prosecution, are properly before this court. They considered the issue and concluded that ss 51 and 58 of the Act were ultra vires s 20 of the Constitution of Zimbabwe. I hold the view that the issues before this court are those referred to it by the court a quo. On the second ground of exception, namely that ss 51 and 58 are ultra vires s 18 of the Constitution of Zimbabwe, the court is unanimous in the conclusion that the above

sections of the Act are ultra vires the Constitution. The different judgments reveal that we have reached that destination via different routes.

I will now turn to deal with the issue of whether s 51 of the Act is ultra vires s 18 of the Constitution of Zimbabwe.

Section 51 of the Act, whose constitutionality is challenged, provides as follows:

"(1) In this section —

'act of terrorism or sabotage' means an act which has or is likely to have any of the following results —

(a) to further or encourage the achievement, by violence or forcible means, of any political aim, whether in Zimbabwe or in a neighbouring territory, including the bringing about of any social or economic change;

(b) to cause, encourage or further an insurrection in, or forcible resistance to the Government or armed or police forces of, Zimbabwe or a neighbouring territory;

(c) to endanger, interrupt or interfere with the carrying on of any essential service in Zimbabwe;

(d) to cause serious bodily injury to or to endanger the safety of any person in Zimbabwe;

(e) to cause substantial financial loss in Zimbabwe to any person or the State;

(f) to obstruct or endanger the free movement in Zimbabwe of any traffic on land or water or in the air;

'neighbouring territory' means any state, country or territory which borders on Zimbabwe.

(2) Any person who, with intent to endanger the maintenance of law and order in Zimbabwe or any part of Zimbabwe or in a neighbouring territory, commits any act of terrorism or sabotage shall be guilty of an offence and liable to imprisonment for life.

(3) If, in any proceedings under this section, it is proved that the person accused of an offence in terms of subsection (2) has committed an act of terrorism or sabotage, it shall be presumed that he committed that act with intent to endanger the maintenance of law and order in Zimbabwe or any part of Zimbabwe or in a neighbouring territory, as alleged in the indictment or charge, unless he proves beyond a reasonable doubt that he did not intend any of the results referred to in the definition of 'act of terrorism or sabotage' in subsection (1) …"

Subsection 51(3) of the Act clearly imposes on the applicant the onus to prove beyond reasonable doubt that he did not intend any of the results referred to in subs (1), the definition clause. This clearly is an abridgement of the applicant's right to a presumption of innocence conferred on him by

s 18 of the Constitution. Section 18(3)(a) of the Constitution, which confers on every person charged with a crime the right to be presumed innocent, provides as follows:

"(3) Every person who is charged with a criminal offence —

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;"

The presumption of innocence conferred on an accused person by s 18(3)(a) of the Constitution relates to both the actus reus as well as the mens rea of an accused: S v Chogugudza 1996 (1) ZLR 28 (S). This presumption of innocence has the effect of casting on the prosecution the burden of proving beyond reasonable doubt both the actus reus and the mens rea of an accused. On this basis, Mr Sibanda's contention that the

presumption in s 51(3) of the Act only relates to the mens rea and not the actus reus and is therefore constitutional is untenable. It was open to Mr Sibanda to attempt to argue that s 51(3) was saved by s 18(13)(b) of the Constitution, but he chose not to raise that argument. That being the case, there is no contention before us that s 51(3) of the Act is saved by s 18(13)(b) of the Constitution. In my view, such a contention would not have succeeded even if it had been made, in the light of the approach adopted by this court in Chogugudza's case supra.

In that case, this court had occasion to consider the constitutionality or otherwise of legislation that purports to reverse the onus by shifting it from the prosecution to an accused person. Apart from emphasising the importance and the essence of the time-honoured principle of the presumption of innocence, the court set out some guidelines in the determination of the constitutionality or otherwise of such legislation. In this regard, Gubbay CJ had this to say at pp 32E-34C:

"The presumption of innocence conferred by s 18(3)(a) of the Constitution of Zimbabwe upon every person charged with an offence lies at the very heart of criminal law. It finds expression in the fundamental and hallowed principle that the prosecution bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence) upon a standard of proof to be satisfied beyond a reasonable doubt (instead of proof on the balance of probabilities). This principle, which is reflected in the maxim 'in favorem vitae, libertatis et innocentiae omnia praesumuntur' (in favour of life, liberty and innocence all possible presumptions are made), was affirmed by Davis AJA in R v Ndhlovu 1945 AD 369 at 386. The only common law exception to it is that where the defence is one of insanity, the burden of proof rests on the accused: see R v Britz 1949 (3) SA 293 (A) at 302; S v Taanorwa 1987 (1) ZLR 62 (S) at 65F; and generally, Hoffmann and Zeffertt South African Law of Evidence 4 ed at pp 513-515.

There is, however, a qualification in s 18(13)(b) of the Constitution. It reads:

'Nothing contained in or done under the authority of any law shall be held to be in contravention of —

(a) …

(b) subsection (3)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.'

The immediate questions that arise are: How far does this provision go? What particular facts are involved? What proportion of the facts could the accused be expected to prove? No indication is given as to where the line should be drawn. Yet what is clear is that, read in the context of the presumption of innocence, section 18(13)(b) cannot be construed as holding valid a statutory provision that in actuality imposes upon the accused the burden of proving his innocence or disproving his guilt.

In the resolution of these questions, I have examined many cases dealing with the extent to which it is permissible for legislation to create presumptions, commonly referred to as 'reverse onus provisions', against an accused. From them, the following guidelines emerge:

1. The presumption must not place the entire onus onto the accused. There is always an onus on the State to bring the accused within the general framework of a statute or regulation before any onus can be thrust upon him to prove his defence: see S v

Broughton's Jewellers (Pvt) Ltd 1971 (2) RLR 276 (A) at 279E-G, 1971 (4) SA 394 (RA) at 396E-F; S v Marwane 1982 (3) SA 717 (A) at 755H-756C.

2. The presumption may relate to a state of mind, that is, an intention, where the element of the crime is a fact exclusively or particularly within the knowledge of the accused: see Katz & Khan v Town Council of Germiston 1930 TPD 373 at 376; Ex p Minister of Justice: In re R v Jacobson & Levy 1931 AD 466 at 470-471. The proposition that a state of mind is a fact has never been doubted since the famous dictum of Bowen LJ in Edgington v Fitzmaurice (1889) 29 Ch D 459 (CA) at 483 that —

'… the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.'

See also Curtis' Estate v Gronningsaeter & Anor 1942 CPD 531 at 540; R v Blackmore & Anor 1959 (4) SA 486 (FS) at 493H; S v Pineiro 1993 (2) SACR 412 (Nm) at 418A.

3. A presumption will be regarded as reasonable if it places an onus upon the accused where proof by the prosecution of such a specific fact is a matter of impossibility or of difficulty; whereas such fact is well known to the accused: see R v Chapman 1934 CPD 338 at 341; R v Michelson 1939 AD 10 at 15; R v Mahabeer 1945 NPD 130 at 132; R v Maseko 1946 TPD 263 at 268; R v Rabinowitz & Ors 1950 SR 77 at 80, 1950 (3) SA 279 (SR) at 282H; S v Schoenfeld 1963 (4) SA 77 (T) at 81E-F; S v Pineiro supra at 415B.

4. The presumption must not be irrebuttable: R v Rabinowitz & Ors supra at 80 and 282D-E respectively; S v Schoenfeld supra at 81D."

Apart from setting out the essence of the presumption of innocence and the guidelines developed at common law, the court also concluded that s 18(13)(b) of the Constitution does no more than codify or carry forward what was already allowed under common law, namely that the reverse onus may be placed on the accused. It also concluded that what the framers of the Constitution intended to convey in s 18(13)(b) of the Constitution, without specifying the exact limits, was that it was permissible for the legislature to enact reverse onus provisions in conformity with the guidelines developed by the common law. At common law, whenever an onus is placed on an accused such onus is

discharged on a balance of probability and not upon proof beyond reasonable doubt: R v Kaukakani 1947 (2) SA 807 (A). See also Hoffmann and Zeffertt South African Law of Evidence 4 ed at p 529. So to the extent that s 51(3) of the Act seeks to impose the onus on an accused to be discharged upon proof beyond reasonable doubt it goes beyond the common law guidelines set out in Chogugudza's case supra.

As already stated, s 18(3)(a) of the Constitution confers on an accused person the right to be presumed innocent until proved guilty. This means the duty to prove the accused's guilt lies squarely on the State. The only abridgement of this presumption permissible is in terms of s 18(13)(b) of the Constitution. This court has held in Chogugudgza's case supra that legislation reversing the onus to prove mens rea is permissible where that element of the crime is a fact exclusively or peculiarly within the knowledge of the accused and is a simple matter for the accused to prove but is difficult if not impossible for the State to prove. The onus created by s 51(3) does not pass this test.

It is also quite clear from Chogugudza's case that reversal of onus is permissible only in those circumstances where the State has established facts that create a strong suspicion

against an accused and the accused is required to reveal facts peculiarly known to him to rebut the suspicion. It follows from the above that a reversal of onus intended merely to assist the State secure a conviction is not permissible. A reversal of onus is not permissible if its purpose is to load the dice against an accused with the intended purpose of facilitating an easy conviction. A reading of s 51 of Act leaves me with the clear impression that subs (3) was enacted for the purpose of facilitating easy conviction of a certain class of persons, defined by subs (1) as terrorists and saboteurs. Subsection (3) was not enacted with the intention of facilitating the proof of facts peculiarly known to an accused person but difficult if not impossible for the State to prove.

I am reinforced in this conclusion by the following factors: Firstly, s 51(3) casts on an accused an onus that is discharged upon proof beyond reasonable doubt. I am unable to think of any reason why the burden of proof is placed at this high level, except to make it more difficult for the accused to discharge the onus. The inescapable inference is that proof beyond reasonable doubt is prescribed in order to make it more difficult for terrorists and saboteurs as defined in s 51(1) of the Act to escape conviction. Whenever common law places an onus on an accused that onus is discharged on a balance of probability. For the above reasons I have some difficulty in conceiving of a possible scenario where legislation casting upon an accused an onus, to be discharged beyond reasonable doubt, can be saved by s 18(13)(b) of the Constitution.

Secondly, s 51(1) defines an act of terrorism or sabotage in such unusually

wide terms that one is left in no doubt that the framers of that enactment intended to catch as many of the perceived terrorists and saboteurs as possible and enhancing the prospects of their conviction by reversing the onus in terms of s 51(3) of the Act. This provision predates the Constitution, and the limitations provided for in s 18(3)(a) as read with s 18(13)(b) would not have exercised the minds of the legislators of the day.

For the above reasons, I am satisfied that s 51(3) of the Act is ultra vires s 18(3)(a) of the Constitution and is not saved by s 18(13)(b) of the Constitution. I have considered the possibility of severing s 51(3) in order to save the rest of the section. That course, in my view, would not be proper, as Mr Andersen correctly submitted, for the simple reason that this case was not argued on that basis by the respondent. The State's case was argued on the basis that s 51 stands or falls as a whole. In the result, I come to the conclusion that s 51 of the Act is unconstitutional.

I now turn to deal with s 58 of the Act. That section provides as follows:

"A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, in the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed."

Much of the criticism that I have directed at s 51 of the Act applies to s 58 with equal force. Section 58 is a deeming clause which in effect shifts the onus to the accused person once certain acts have been established. It is difficult to imagine what facts on a charge of inciting public violence would be difficult if not impossible for the State to prove but are easy for the accused to prove. I have no doubt in my mind that s 58 was enacted with the

specific objective of making it more difficult for a person charged with the common law offence of incitement to public violence to escape conviction. Such a provision cannot be saved by s 18(13)(b) of the Constitution. I am therefore satisfied that s 58 of the Act is also unconstitutional.

Section 58 does not serve any purpose except to give the State an unfair advantage over the applicant. It is open to the State to proceed against the applicant under the common law charge of incitement to public violence if they so wish, but the State is not entitled to the unfair advantage accorded it by s 58 of the Act.

In the result, the Court unanimously concludes that both s 51 and s 58 of the Act are ultra vires s 18 of the Constitution and are struck down. However, my colleagues wish to go further and the order of the majority is to be found at the end of their joint judgment. The applicant is awarded his costs.

Page 436 of 2001 (2) ZLR 426 (S)

McNALLY JA, EBRAHIM JA, MUCHECHETERE JA and SANDURA JA: This is a matter referred to this court by the High Court in terms of s 24(2) of the Constitution of Zimbabwe. The questions specifically referred are whether ss 51 and 58 of the Law and Order (Maintenance) Act [Chapter 11:07] (the Act) are in conformity with the Constitution or whether they should be struck down as inconsistent with ss 18 and 20 of the Constitution. It is alleged in particular that:

" 1. The statements allegedly uttered by the accused and the messages communicated are protected in terms of s 20 of the Constitution of Zimbabwe. The persons who received the information had an equal right, protected by the same section, to receive the information and the messages.

2. Insofar as the alleged contraventions place a reverse onus on the accused, such onus denies accused due protection in accordance with the law, and is in contravention of s 18 of the Constitution of Zimbabwe and therefore unconstitutional."

Three things need to be said by way of introductory clarification.

The first is that, in our view, the constitutional reference requires us to make a determination as to the constitutionality of ss 51 and 58 of the Act, both in relation to s 18 of the Constitution and in relation to s 20.

It is true that, looked at in isolation, the first reference avers only that the statements allegedly made are protected in terms of s 20. It does not claim that the sections of the Act are ultra vires because of the provisions of s 20. It is on this basis that the learned Chief Justice, whose judgment we have had the opportunity to read, has restricted himself to declaring that ss 51 and 58 of the Act are ultra vires the Constitution by reference only to s 18 of the Constitution.

We, however, take the view that it was the intention of the learned judge also to refer the question whether the sections were ultra vires because of the provisions of s 20 of the Constitution. At p 2 of his judgment, the learned judge said:

"The grounds upon which the defence counsel requested a referral are the following:

(1) That the sections under which the accused is charged infringe s 20 of the Constitution …"

Accordingly, we have thought it proper to make a determination in relation to s 20 of the Constitution as well.

That determination, however, can only be a prima facie one at this stage. The provisions of s 24(5) of the Constitution require the court, if it is not satisfied that the provisions of

the sections of the Act are reasonably justifiable in a democratic society, to issue a rule nisi calling upon the responsible Minister to show cause why those provisions should not be declared to be in contravention of the section concerned.
Page 437 of 2001 (2) ZLR 426 (S)
It may be said that once the sections are held to be invalid in terms of s 18 of the Constitution, it is a mere academic exercise to determine whether they are invalid also in terms of s 20 of the Constitution. We do not agree with this. We think we should make a determination because:
(a) we have been asked to do so;
(b) we consider such a ruling will be highly relevant when the legislature comes to re-enact the legislation in a new form.
The second point to be made is that we are not concerned with the merits or demerits of the particular actions or statements of the applicant which gave rise to this prosecution. We are concerned only with the constitutionality of the sections.
The third is an historical point. The Act has an unsavoury history. It was promulgated on 2 December 1960 in order to suppress the legitimate aspirations of the majority of the population of this country. The fact that it was about to be introduced led to the resignation/retirement, on 30 November 1960, of the Federal Chief Justice, Sir Robert Tredgold. This most honourable man considered that he could not, in conscience, enforce the provisions of so draconian a piece of legislation, modelled as it was on the British legislation designed to suppress nationalist activity in Northern Ireland (since repealed). Section 58, which is here under investigation, was s 46 of the original Act, No. 53 of 1960. Section 51, on the other hand, was not in the original Act. It was only when even more draconian measures became necessary that Act 50 of 1967 (two years into the illegal independence, when the threat of insurgency was growing) was promulgated. That Act introduced a new s 48A into the Law and Order (Maintenance) Act. That section, later s 50 of Chapter 65 in the 1975 edition of the laws, contained virtually identical words to the words in the present s 51, save that the maximum penalty has been altered from death to life imprisonment.
This law was in existence when there was no justiciable Bill of Rights in the Constitution. It was bitterly criticised by the leaders of the nationalist movements, many of whom are in leadership positions in present day Zimbabwe. It was widely expected that it would be repealed after independence. In fact, it was only in 1998 that an attempt was made to replace it by a Public Order and Security Act, which was passed by the legislature. But it never received the Presidential assent. That Bill, therefore, remains in limbo and the Act remains in force. We note that the President announced at the opening of Parliament on 24 July 2001 that a new Public Order and Security Bill would be presented to Parliament in the coming session. This would presumably repeal the Act.
Various sections of the Act have been challenged in this court on previous
Page 438 of 2001 (2) ZLR 426 (S)
occasions. In In re Munhumeso & Ors 1994 (1) ZLR 49 (S), this court struck down s 6 (after the Minister of Home Affairs decided not to respond to a rule nisi); and in Chavunduka & Anor v Minister of Home Affairs & Anor 2000 (1) ZLR 552 (S), this court struck down s 50(2)(a). Section 6 was found to be ultra vires ss 20 and 21 of the Constitution; s 50(2)(a) was found to be in contravention of s 20 of the Constitution.

It is instructive to compare the impugned s 51 with clause 4 of the Bill designed to replace it.
Section 51 speaks of "acts of terrorism or sabotage" whereas clause 4 of the Bill uses the phrase "insurgency, banditry or sabotage".
The contrasting definitions are as follows:
In the Act
"51.(1) In this section —
'act of terrorism or sabotage' means an act which has or is likely to have any of the following results —
(a) to further or encourage the achievement, by violence or forcible means, of any political aim, whether in Zimbabwe or in a neighbouring territory, including the bringing about of any social or economic change;
(b) to cause, encourage or further an insurrection in, or forcible resistance to the Government or armed or police forces of, Zimbabwe or a neighbouring territory;
(c) to endanger, interrupt or interfere with the carrying on of any essential service in Zimbabwe;
(d) to cause serious bodily injury to or to endanger the safety of any person in Zimbabwe;
(e) to cause substantial financial loss in Zimbabwe to any person or the State;
(f) to obstruct or endanger the free movement in Zimbabwe of any traffic on land or water or in the air;
'neighbouring territory' means any state, country or territory which borders on Zimbabwe.'"
In the Bill
"In this Act —
'act of insurgency, banditry or sabotage' means any act, including the killing or injuring of persons, the damaging or destroying of property and the disruption of communications, which —
(a) is accompanied by the use or threatened use of weaponry; and
(b) has or is likely to have either or both of the following results —
(i) causing or furthering an insurrection in or forcible resistance to the Government or the Defence Forces or any law enforcement agency;
(ii) procuring by force the alteration of any law or policy of the Government;
The offences are then defined as follows:
In the Act
"(2) Any person who, with intent to endanger the maintenance of law and order in Zimbabwe or any part of Zimbabwe or in a neighbouring territory, commits any act of terrorism or sabotage shall be guilty of an offence and liable to imprisonment for life."

In the Bill
"4(1) Any person who intentionally commits an act of insurgency, banditry or sabotage in Zimbabwe, with the purpose of unlawfully furthering a political object in Zimbabwe, shall be guilty of an offence and liable to imprisonment for life."
Finally, there is a "reverse onus" provision in the Act. An accused person who has committed a specified act will be presumed, unless he proves the contrary beyond a reasonable doubt, to have had the intent to endanger law and order. In the Bill, by way of

contrast, there is a presumption, rebuttable on a balance of probabilities, that the accused had "the purpose of unlawfully furthering a political object in Zimbabwe".

It may be noted that the memorandum accompanying the Bill begins with these words:

"This Bill will replace the Draconian Law and Order (Maintenance) Act [Chapter 11:07] with provisions that protect public order and security in Zimbabwe while paying regard to the fundamental freedoms of assembly, association and expression laid down in Chapter III of the Constitution."

We draw attention, not only to the word "Draconian", but also to the fact that it was clearly the intention of the draftsman and, since the Bill was passed by the legislature, the intention of Parliament itself, to bring the pre-independence Act into conformity with the post-independence Bill of Rights — a tacit recognition of the fact that the Act is not worded appropriately for a state which has a Bill of Rights.

With these general and introductory remarks, we turn to consider the constitutionality of the two sections. This necessitates a reference to the two relevant provisions of the Constitution, s 20 and 18.

SECTION 20: PROTECTION OF FREEDOM OF EXPRESSION

This court has dealt at some length with the meaning of this section in Chavunduka supra. The most important points, for the purposes of this case, may be summarised as follows:

1. The section must be given a benevolent and purposive interpretation (at 558C of the Chavunduka decision);
2. The freedom protected may be restricted, but any law restricting it must be formulated with sufficient precision to enable the citizen to regulate his conduct. He must know, with reasonable certainty, what the law is and what actions are in danger of breaching the law (at 560-561);
3. The restriction or limitation on the freedom of expression, which is permissible in the circumstances set out in s 20(2) must be reasonably justifiable in a democratic society. It must not be arbitrary or excessive.

It must meet the three tests set out in Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S) at 13C-F (p 565).

SECTION 18: PROTECTION OF THE LAW

This section deals, among other things, with the presumption of innocence, and the question is whether there can be said to be a presumption of innocence when the law imposes upon an accused person the onus of proving beyond a reasonable doubt "that he did not intend any of the results referred to in the definition of the act of terrorism or sabotage in subsection (1)". We have dealt with the constitutionality of a reverse onus in general terms in S v Chogugdza 1996 (1) ZLR 28 (S) at 33-34. We will refer to that case in more detail when we come to deal with that issue.

SECTION 51(1) OF THE ACT: DEFINITIONS OF "ACTS OF TERRORISM OR SABOTAGE"

The subsection begins with the words:

"'act of terrorism or sabotage' means an act which has, or is likely to have any of the following results —."

The criminalisation of an action which is "likely" to have a particular result was criticised in Chavunduka supra, at 562B, in the following words:

"There is no requirement of proof of any consequences — of damage to the state or impact upon the public. What the lawmaker has provided for is a speculative offence. An offence has been created out of a conjectural likelihood of fear, alarm or despondency which may arise out of the publication of any statement, rumour or report, even to a single person. It matters not that no fear, alarm or despondency actually eventuates. Because s 50(2)(a) is concerned with likelihood rather than reality, and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide an interpretation. It places persons in doubt as to what can lawfully be done and what cannot. As a result, it exerts an unacceptable 'chilling effect' on freedom of expression, since people will tend to steer clear of the potential zone of application to avoid censure, and liability to serve a maximum period of seven years' imprisonment."

The "chilling effect" in the present case is, of course, even stronger since the maximum penalty is life imprisonment and not just seven years. On this ground alone, therefore we would consider that the subsection is inconsistent with s 20 of the Constitution in that it defines "act of terrorism or sabotage" by reference to an imprecise and vague criterion. Insofar as it concerns acts which are in fact statements, and assuming that statements fall within the definition of "acts", it would tend to inhibit persons from legitimately exercising their freedom of expression for fear of falling foul of the law.

We turn next to the various sub-divisions of the subsection which set out the likely results in terms of which an act or statement becomes definable as an act of terrorism or sabotage —

(a) (an act which has or is likely to have the result) to further or encourage the achievement, by violence or forcible means, of any political aim, whether in Zimbabwe or in a neighbouring territory, including the bringing about of any social or economic change.

This is an extraordinarily all-embracing definition. It would certainly, for example, cover the on-going farm invasions, and much of what currently passes for electioneering in Zimbabwe. It is the sort of enactment one would not expect to find in force except possibly during a period of public emergency as envisaged in s 25 of the Constitution.

It has been argued that "forcible" may mean no more than "forceful" which in turn is defined as "vigorous, powerful; (of speech) compelling, impressive." But we think there is a stronger argument. A man might be accused of an act of terrorism if he were to criticise a perceived injustice by the State, in circumstances in which others had taken up arms against the perpetrators of that injustice. His criticism might encourage those others, even if he had no connection whatever with them. It is all very well to say, as the State has contended, that there is the further element that he must have "the intent to endanger the maintenance of law and order in Zimbabwe …" However, the counter to this is twofold. First, subs (3) casts the onus on him to disprove that intent beyond a reasonable doubt, which might be very difficult. And even if we strike down that "onus" section as we propose to do, it remains a fact that the police arrest a man on the basis of what he does — the actus reus. The court may later acquit him for lack of the necessary intent — the mens rea. But the damage has already been done. It is the actus reus which the Act defines as an "act of terrorism or sabotage". Thus the section falls foul of the criticism in

Papachristou v City of Jacksonville 405 US 156 (1972) at 162, cited in Chavunduka supra at 561H:
"… it encourages arbitrary and erratic arrests and convictions."
(b) (an act which has or is likely to have the result) to cause, encourage or further an insurrection in, or forcible resistance to the government or armed or police forces of, Zimbabwe or a neighbouring territory.
This subsection is equally too wide and too vague. A critic of the government may easily say or do something, in the course of perfectly legitimate criticism, which may give encouragement to others who are involved in or contemplating an insurrection. To say that in so doing, he has committed an act of terrorism is undoubtedly to curtail inadmissibly his freedom of expression. People become afraid to criticise the government, for fear of being arrested for contravening the section.
Page 442 of 2001 (2) ZLR 426 (S)
(c) (an act which has or is unlikely to have the result) to endanger, interrupt or interfere with the carrying on of any essential service in Zimbabwe.
This subsection strikes at the heart of the trade union movement, and in particular seems to cover the same ground as is covered in Part XIII of the Labour Relations Act. That part also penalises unlawful collective job action in s 112, but the penalty is limited to a fine of $2 000 and one year's imprisonment. This is to be contrasted with the sentence of life imprisonment under s 51(1)(c) of the Act. Moreover, the offence is here categorised as an "act of terrorism or sabotage", and again the allegation of the "intent to endanger the maintenance of law and order in Zimbabwe or any part of Zimbabwe" is easy to make and difficult to disprove. This subsection is too wide and too vague. The "chilling effect" on legitimate trade union activity is obvious.
(d) (an act which has or is likely to have the result) to cause serious bodily injury to or endanger the safety of any person in Zimbabwe.
The offence here created seems to fall into two parts. The first part, involving serious bodily injury, is already covered by the common-law crimes of assault with intent to do grievous bodily harm, and an attempt to assault with intent to commit grievous bodily harm. Insofar as it goes further, one has to ask: What is "an act which is likely to have the result to cause bodily injury"? Is it something more than an attempt to cause serious bodily injury? If so, what is it? If not, why should an attempted assault with intent to cause serious bodily injury be categorised as an act of terrorism or sabotage?
The second part of the offence is to do an act which has or is likely to have the result of endangering the safety of any person in Zimbabwe. This is so wide and so vague that almost any criticism of a political opponent in a heated environment could be said to fall within the definition.
(e) (an act which has or is likely to have the result) to cause substantial financial loss in Zimbabwe to any person or the State.
This subsection is so wide that, for example, it could be used to silence a critic who alleges financial corruption on the part of his political opponent. We have no doubt that the words are too wide and too vague to describe "an act of terrorism or sabotage". They are clearly open to abuse.
(f) (an act which has or is likely to have the result) to obstruct or endanger the free movement in Zimbabwe of any traffic on land or water or in the air.

This final subsection is so wide as potentially to penalise any public demonstration or procession. We endorse what was said by the then Chief Justice in In re Munhumeso & Ors 1994 (1) ZLR 49 at 56G-59A about the importance of the right to freedom of expression and freedom of assembly. We agree that the limitation to those freedoms permitted by s 20(6)
Page 443 of 2001 (2) ZLR 426 (S)
of the Constitution must be interpreted restrictively. It seems to us to be clear, in the present case, that far too wide a restriction on freedom of assembly is imposed by this subsection. It allows an arresting officer to contend that a procession which (in his opinion) is "likely" to obstruct traffic is an act of terrorism or sabotage.
We conclude therefore, on the evidence before us, that s 51 of the Act is ultra vires s 20 of the Constitution. We reach this conclusion without even considering the "reverse onus" provisions in subs (3) of s 51. These provisions, as already indicated, seem beyond any question to infringe the "presumption of innocence" provisions in s 18(3)(a). Nor are they exempted from criticism by virtue of the provisions of s 18(13)(b) of the Constitution, which reads:
"Nothing contained in or done under the authority of any law shall be held to be in contravention of … subsection (3)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts."
Since we and the Chief Justice are all in agreement on this point, and since we have dealt with this question extensively in S v Chogugudza 1996 (1) ZLR 28, we do not propose to do more than refer to the tests set out in that judgment at 33D-34C.
It will be apparent in the case of this section that the burden of proof on the accused person is far too onerous because:

1. It requires him to prove his innocence beyond a reasonable doubt, which is a level of proof extraordinarily difficult to achieve particularly when it relates to one's own state of mind. The burden is too heavy.
2. The actus reus in many instances under the section is relatively innocuous. Thus obstructing traffic; doing something likely to cause substantial financial loss; doing something likely to endanger someone's safety, are all acts which may lead to a person being charged. That person then faces the horrendous penalty of life imprisonment for committing an act of terrorism or sabotage, unless he can prove beyond a reasonable doubt that he did not intend to endanger the maintenance of law and order. In short, the real and effective burden of proving his innocence rests on the accused. The burden is too extensive (Guideline 1 in Chogugudza supra, at p 33).
3. There is no reason to suppose that the State would have any more difficulty in proving mens rea in a case under the section, than in any other case where a special intent needs to be proved. The special intent is not "exclusively or particularly within the knowledge of the accused" (Guidelines 2 and 3 in Chogugudza supra, at p 33).

However, even if it could be argued that the court could sever subs (3) from the section as a whole, and strike down that subsection alone, we would be
Page 444 of 2001 (2) ZLR 426 (S)
of the opinion that that would not be enough. Even without subs (3) we consider that the section is inconsistent with the provisions of s 20 of the Constitution.
It will be clear from what we have said above that in our prima facie view the restrictions on freedom embodied in s 51 are not justified by the provisions of s 20(2)(a) of the

Constitution, because it has been shown that they are not reasonably justifiable in a democratic society.

There are two reasons for our saying this. Both arise from an application of the tests set out in Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S), and in particular the first and third tests at p 13D-E of the report.

The first is in answer to the submission, by counsel for the State, that the legislative intention in enacting the sections "is sufficiently important to warrant overriding a fundamental right." Nothing could be further from the truth. The Act was passed in 1960 and amended in 1967, years before the advent of democracy in this country. The legislative object in passing the Act was not the preservation of democratic institutions, because there was no democracy in this country at that time, but the suppression of African nationalists who were demanding democracy.

The second reason is that the sections fail the third test in Nyambirai supra, in that "the means used to impair the right of freedom are more than is necessary to accomplish the objective".

We turn finally to consider the constitutionality of s 58 of the Act which reads:

"A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, in the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed."

The section seeks in effect to extend the common law offence of incitement to public violence. It deems someone to have committed incitement to public violence when he has in fact not committed the offence. It matters not whether public violence results from what he does or says. He is punishable anyway. It matters not whether he intended to incite persons to public violence. He is punishable, regardless of his intention, if "it might reasonably be expected that the natural and probable consequences" of his action would be public violence. Again, as in Chavunduka supra, at 562B-C:

"There is no requirement of proof of any consequences — of damage to the State or impact upon the public. What the lawmaker has provided for is a speculative offence."

And, as in Papachristou v City of Jacksonville supra:

Page 445 of 2001 (2) ZLR 426 (S)

"… it encourages arbitrary and erratic arrests and convictions."

It means that legitimate criticism is stifled where there is any danger that that criticism, perhaps because of its very cogency, might spark public indignation and as a result public violence. This would be so even if the critic had been at pains to discourage such a reaction. This is what we have described earlier, in reliance on Chavunduka supra, at 562D, as the "chilling effect" on freedom of expression.

The sweep of the section is too vague and too broad to be acceptable. We are satisfied on the evidence before us that the section falls foul of s 20 of the Constitution. Nor does it seem to us, prima facie, to be saved by the provisions of s 20(2)(a) of the Constitution as being reasonably justifiable in a democratic society for the reasons already set out in relation to s 51 of the Act.

In terms of s 24(5) of the Constitution, we cannot come to more than a prima facie conclusion in relation to s 20 of the Constitution. We have to issue a rule nisi calling upon the responsible Minister, the Minister of Home Affairs, to show cause. This procedure is not however applicable to our decision in terms of s 18 of the Constitution. The application has been successful, whatever the outcome of the rule nisi, and therefore costs will follow the event.

Accordingly, we make the following order:

1. It is declared that ss 51 and 58 of the Law and Order (Maintenance) Act [Chapter 11:07] are in contravention of s 18 of the Constitution of Zimbabwe and are accordingly invalid and of no force and effect.
2. It is ordered that a rule nisi do issue, calling upon the Minister of Home Affairs to show cause before this court at 09.30 hours on 14 January 2002 why ss 51 and 58 of the Law and Order Maintenance Act [Chapter 11:07] should not be declared to be ultra vires s 20 of the Constitution of Zimbabwe and, accordingly, invalid on that ground as well.
3. The costs of this application are awarded to the applicant.

Atherstone & Cook, applicant's legal practitioners

OIL BLENDING ENTERPRISES (PVT) LTD v MINISTER OF LABOUR

2001 (2) ZLR 446 (H)

Division: High Court, Harare
Judges: Chinhengo J
Subject Area: Civil application
Date: 29 November 2001
Judgment Number: HH-213-01

Employment — contract — termination — in terms of labour regulations — failure by labour relations officer to dispose of matter within time stipulated by s 93(4) of Labour Relations Act — failure due to staff shortages — effect — whether mandamus can be issued requiring labour relations officer to comply with statutory duty

Practice and procedure — order — mandamus — when may be ordered against public official

The applicant company suspended one of its employees pending an application to the respondent Minister to terminate the contract of employment. A hearing date was requested, but the although a labour relations officer was assigned to the case, the Ministry, due to staff shortages and other problems, failed to allocate a hearing date and dispose of the matter within 12 months, as required by s 93(4) of the Labour Relations Act [Chapter28:01]. Theapplicant sought an order of mandamus, directing that the application should be dealt with forthwith.

Held, that s 93(4) of the Act imposed a duty on the Ministry to ensure that a labour relations officer "disposed of" the matter within twelve months of the date on which he was first seized of it. This meant that he had to complete the matter within the stipulated time limits.

Held, further, that a mandamus, being an order which requires a public authority to comply with a statutory duty imposed on it or to require that authority to perform some act which remedies a state of affairs brought about by its own unlawful administrative action, should be granted where the public authority is under a clear duty to perform the

act ordered. Itwould not be granted where rights are of a dubious nature or where the public officer has acted in the exercise of a discretion.
Held, further, that s 93(4) does not give a labour relations officer an unlimited discretion. He is obliged to dispose of the matter as soon as possible and in any case within twelve months. It was no excuse to say that there were no staff to carry out the duty. Where a public duty is imposed by statute on a public official, the official cannot refuse to perform that duty on the grounds that he has not staff with which to perform the duty. A mandamus would be issued requiring the respondent to allocate a hearing date within 14 days.
Page 447 of 2001 (2) ZLR 446 (H)
Cases cited:
Kinloch NO & Anor v Kinloch 1982 (1) SA 679 (A)
Moll v Civil Comr, Paarl (1897) 14 SC 463
Tribac (Pvt) Ltd v Tobacco Mktg Bd 1996 (2) ZLR 52 (S)
Legislation considered:
Labour Relations Act [Chapter 28:01], s 93(4)
Miss N Nagar, for the applicant
Miss S Jerere, for the respondent
CHINHENGO J: The applicant employed one T Mutengezanwa. By letter dated 13 September 1999, the applicant, through its legal practitioners, applied to the respondent in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 375 of 1985) ("the regulations") for authority to terminate the contract of employment of the said T Mutengezanwa. Mr Mutengezanwa had by letter dated 31 August 1999 been suspended from employment pending ministerial approval in terms of the regulations. The allegations against him were that he had committed an act, or conducted himself in a manner, inconsistent with the express or implied conditions of his contract of employment or, alternatively, that he had commited a theft or fraud. He was accused of having unlawfully taken two empty twenty-litre containers from the applicant's stocks without authority and without intention to return them. The applicant requested the respondent to allocate a hearing date for the matter. The letter was addressed to a labour relations officer, a Mr Muromba, an employee of the respondent. The letter was received at the respondent's offices on 14 September 1999. The applicant's legal practitioners, in writing, duly followed up on the application on 11 May, 6 July and 15 September 2000. As at 24 October 2001, when this court application was lodged, the applicant had not received a response from the respondent, nor had the respondent allocated a date for the hearing of that matter. In this application, the applicant averred that the delay in allocating a hearing date is inordinate and the respondent's failure to date to do so does not accord with s 93(4) of the Labour Relations Act [Chapter 28:01], which stipulates that a hearing date should be allocated not later than twelve calendar months from the date on which the matter was referred to the respondent.
The applicant averred that the delay in allocating a hearing date was prejudicial to its interests. The employee, T Mutengezanwa, remained on suspension and a substantive replacement appointment could not be made. If the matter is heard and the respondent refuses to grant the authority to
Page 448 of 2001 (2) ZLR 446 (H)

dismiss Mr Mutengezanwa, the applicant would be unduly burdened by having to pay large sums of money by way of back-pay and accrued interest when in fact Mr Mutengezanwa had not rendered any service. The applicant averred also that the mere fact of the inordinate delay in fixing the hearing date was prejudicial as the matter remained undetermined which is against the principle of finality of litigation. The applicant accordingly prayed to this court for an order of mandamus: that the respondent either personally or through his lawful delegate allocate a hearing date within fourteen days of the date of service of an order in that regard issued by this court. The applicant also asked for the costs of this application to be awarded to it.

The respondent's principal labour relations officer, Mr XC Ngwaru, duly authorised thereto, opposed the application and prayed for its dismissal with costs. He stated in the opposing affidavit that on 9 September 1999, the respondent received a complaint from Mr Mutengezanwa that he had been dismissed from employment by the respondent without complying with the laid down procedures. That complaint was allocated case No. 608 and the complaint was referred to Mrs Ganyani, a labour relations officer, to investigate and resolve. On 14 September 1999, the applicant's letter seeking the authority to terminate Mr Mutengezanwa's contract of employment was also received by the respondent and allocated case No. 653 on 20 November 1999. Mr P Mutengwa, also a labour relations officer, was assigned to determine this application. Mr Ngwaru deposed further that the respondent was not negligent in his failure to allocate a hearing date in respect of case No. 653. He stated that case No. 608 was determined in favour of the applicant on 23 April 2000, but the record of proceedings cannot be located. He explained the failure to allocate the date of the hearing in case No. 653 in para 5 of the opposing affidavit and the failure to locate the record of proceedings in case No. 608 in para 10 as follows:

" 5. This department has suffered a severe shortage of manpower since the government started the freezing of vacant posts or rather the measure not to replace any officers who resign from service for whatever reason. The department, therefore, has a back-log of embarrassing proportions."

And

" 10. ...It is not easy to find records of the case as the officer who dealt with the case, Mrs Ganyani, has since left the department. The office is not computerised and with the shortage of staff the filing system leaves a lot to be desired."

The above is candid explanation of the respondent's failure to provide a service timeously and efficiently. Candid yes, but does that provide a defence to the relief which the applicant seeks? The respondent candidly denied that his failure to allocate a date of hearing is due to negligence. It seems that beyond his denial the respondent has no defence. The applicant, naturally,

could not be satisfied that this was any defence at all. In the answering affidavit, the applicant avered that it has no knowledge that its application was referred to Mr Mutengwa and, though it noted that fact, its complaint had nonetheless remained unanswered and that a year after the matter was referred to the respondent and allocated to a labour relations officer as alleged, it still had not been dealt with or determined. No communication was made to it regarding any progress made in respect of a possible hearing of the matter. The applicant stated that it remained vulnerable to a potential claim

by Mr Mutengezanwa for reinstatement as the matter has not been determined within the twelve months prescribed by s 93(4) of the Labour Relations Act. The applicant also stated that it had no knowledge of the difficulties faced by the respondent as deposed to in paras 5 and 10 of the opposing affidavit. It found it inadequate that Mr Mutengwa had not filed an affidavit explaining what he had done, if anything, upon the application being referred to him. It noted that the respondent had not contested the applicant's assertion with regard to the prejudice it suffered. It observed that the determination of case No. 608 in its favour confirmed its position that the matter which is still pending before the respondent is its application for the termination of Mr Mutengezanwa's contract of employment. The applicant sums up its understanding of the respondent's position in the following words in para 9 of the answering affidavit:

"My understanding of the basis of the respondent's opposition to my application is that the court and litigants whose matters are referred to the Ministry of Labour should unconditionally accept the unsatisfactory manner in which their matters are being handled by the Department of Labour. With respect I submit that this is unacceptable and respectfully urge the court to ratify its concurrence with applicant's point of view by upholding this application in terms of the draft order filed of record."

The single issue for decision is whether a mandamus should, in the circumstances of this case, be issued directing that the application which has been pending before the respondent for more than a year should be dealt with forthwith.

Section 93(4) of the Labour Relations Act provides that:

The whole system on the resolution of labour disputes and unfair labour practices hinges on the efficient discharge of its duties by the respondent. Ifthe respondent's Ministry becomes inefficient in the discharge of its functions, either because of a severe shortage of staff or other reason, the whole edifice of our labour relations system crumbles.

Section 93(4) of the

Labour Relations Act makes it quite clear that a labour relations officer shall dispose of every dispute or unfair labour practice at the very most within twelve months from the date on which he is first seized of it. The Shorter Oxford English Dictionary gives the following meaning to the word "dispose" — "todeal with definitely, to get rid of, get done with, finish": see Kinloch NO & Anor v Kinloch 1982 (1) SA 679 (A) at 687. This is the meaning which must be given to the word in s 93(4).

A mandamus or mandatory interdict is a judicial remedy recognised under our law: see Tribac (Pvt) Ltd v Tobacco Marketing Board 1996 (2) ZLR 52(S). It is applied against public authorities. It is an order which requires a public authority to comply with a statutory duty imposed upon it or one which requires a public authority to perform some act which remedies a state of affairs brought about by its own unlawful administrative action (L Baxter on Administrative Law at p 687). It is, therefore, a judicial remedy available to enforce the performance of a specific statutory duty or to remedy the effects of an unlawful action already taken. In this application I am concerned with the former — to order or not to order the respondent to perform a specific statutory duty placed upon him. The remedy will be granted where the public authority is under a clear duty to perform the act ordered. In Moll v Civil Commissioner of Paarl (1897) 14 SC 463 at 468, it was stated that:

"But it is obvious that relief (mandatory interdict) will not be given where such rights are of a doubtful nature or where the public officer has acted in the exercise of a discretion left to him, but only where the existence and continued infringement of an absolute right have been clearly established."
See also Tribac's case supra.
Section 93(4) of the Act does not give a labour relations officer an unlimited discretion in regard to the time within which such officer is required to dispose of any dispute or matter referred to him. He is obliged (seethe use of the word "shall") to dispose of the matter as soon as is practicable and in any case within twelve months.
The excuse given by the respondent for his failure to have the matter disposed of within twelve months is a severe shortage of staff. I have therefore to determine if that is a reason which this court must accept. In the heads of argument filed on his behalf, the respondent submitted that the applicant was seeking a preferential treatment to have its matter heard ahead of others. This submission was not supported by any averment of fact in the opposing affidavit. Even if it was so supported, the essential question remains whether the respondent can be excused from performing a statutory duty because of a severe shortage of staff. I do not accept that the applicant sought preferential treatment. In its answering affidavit in para 6, the applicant reiterated its assertion that other matters which were filed with the

respondent subsequent to the applicant's application in respect of MrMutengezanwa were heard and determined. I further cannot accept the excuse given by the respondent for the reason that where a public duty is imposed by statute on a public official, the public official concerned cannot refuse to perform that duty on the basis that he has no staff with which to discharge that duty. It is perhaps a mark of inefficiency and inability to discharge his functions that the respondent comes to this court and pleads that he has no personnel to perform the function. That is not an excuse which Parliament would have envisaged when it put in place the labour dispute resolution mechanism under the Labour Relations Act. On the particular facts of this case, however, the excuse of lack of personnel cannot be valid in view of the fact that the matter was assigned to a Mr Mutengwa who has not filed any explanation as to his handling of the matter. There therefore seems to be no valid reason at law why the application filed by the applicant on 14 September 1999 has still not been determined. It may be advisable for the respondent to realise that it is not always necessary to defend himself in every case brought against him. Wherethe respondent has no answer to an applicant's claim, or no defence, as in this case, it is less costly and time saving to answer the claim by indicating his willingness to have the matter set down and determined. In this case, the respondent should not have bothered to defend himself. Instead, he should have simply set the matter down for a hearing and the matter would have been put to rest with a minimum of fuss, costs and inconvenience. In the result, I am satisfied that the relief sought by the applicant should be granted with costs. An order in terms of the draft order is hereby granted.
Gill, Godlonton & Gerrans, applicant's legal practitioners
Civil Division, Attorney-General's Office, respondent's legal practitioners
CABS v CHIROCHERWA
2001 (2) ZLR 452 (H)
Division: High Court, Harare

Judges: Ndou J
Subject Area: Chamber application
Date: 3 December 2001
Judgment Number: HH-222-01

Practice and procedure — process — service of — summons — service at domicilium citandi et executandi — when such service valid — summons left at vacant plot — such service contrary to justice

The applicant building society purported to serve a summons by leaving it under a rock at the vacant plot of land which the respondent was buying through a loan granted the applicant and secured by a mortgage over the plot of land. The respondent was unaware of the "service" and default judgment was sought against him. The standard form contract provided that at the domicilium citandi et executandi should be the property which was being mortgaged.

Held, that even if the service was technically within the rules, it was contrary to justice. The parties were not of equal bargaining strength and the respondent did not himself choose the domicilium citandi. Justice demanded that there should be realistic ways of ensuring that a defendant is notified of legal proceedings instituted against him, which was not the case in this matter. Default judgment would be refused.

Cases cited:

Botha NO v Botha 1965 (3) SA 128 (E)
CABS v Dube 2000 (1) ZLR 50 (H)
CABS v Kufa 1998 (1) ZLR 303 (H)

NDOU J: This matter was placed before me in chambers in an application for judgment in default of appearance to defend the action. The summons disclose that the defendant is indebted to the plaintiff in respect of the sum of $146 456.16 advanced and secured by a mortgage bond over stand No. 3610 Tynwald Township of Lot 1 of Tynwald, in the district of Salisbury. For the purposes of the bond and of any proceedings which may be instituted by virtue hereof, the defendant chose the mortgaged property as the domicilium citandi et executandi.

The Assistant Deputy Sheriff, Harare, served the court process at that address. His/her certificate of service reflects —

Address for service of execution or attempt: "Flat No. 3610 Tynwald North, Harare"

Remarks: "Served by placing under a stone at domicilium citandi et executandi chosen by the defendant since there was no one present and it is underdeveloped address".

The issue before me is whether this constitutes good service in terms of r 39(2)(b) as read with r 40 of the High Court Rules 1971. Rule 39(2)(b) provides that process may be served —

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

Rule 40 provides:

"Where any process is to be served and —

(a) …

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

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

In terms of these provisions, there is a greater obligation on the person seeking to effect service at the domicilium citandi than there is under the common law. No matter what the common law position may be, under these rules of court, service cannot be properly effected by leaving the process at a domicilium citandi which is a vacant plot of land. Under the rules, it is only if the process cannot be served on a responsible person that the process can be left in a conspicuous place. This seems to imply that the process could not simply be left at an empty plot of land. The rules do not provide for the leaving of process at a vacant plot of land: see CABS v Kufa 1998 (1) ZLR 303 (H) and CABS v Dube 2000 (1) ZLR 50 (H). In the latter case, Sibanda J stated:

"I agree with Gillespie J in CABS v Kufa supra, where he says that the former subparagraphs were combined into one rule under the present rule and that such condensation does not alter the requirement that under our rule service, even at a domicilium citandi, should be made upon a responsible person. Any departure from the express provisions of the rule is permissible only when a responsible person cannot be found after a diligent search and where, to frustrate service, the premises are kept locked by the person to be served, that service may be effected by leaving the process affixed to the premises in the manner expressly provided by the rule."

In this case, the court process was "placed under a stone at domicilium citandi et executandi … since there was no one present and it is underdeveloped address" (my emphasis). It seems to me that this is an undeveloped vacant stand. The process was placed under a stone in an undeveloped ("or underdeveloped") vacant stand. This is not different from what the Deputy Sheriff did in the case of CABS v Kufa supra. It is also not

materially different from what the Deputy Sheriff did in the case of CABS v Dube supra. The criticisms levelled against this form of service are valid for the purposes of this case. In this, as was the case in the other two CABS matters supra, the domicilium citandi was not freely chosen by the defendant but was the result of a clause included in a standard form mortgage agreement prepared by the plaintiff and which nominated the mortgaged vacant stand as the domicilium citandi. In this regard, in CABS v Kufa supra, Gillespie J stated in 307F-G and 308A-D:

"I consider that the circumstances of this case provide good reason for regarding this service as insufficient even if it were, technically, within the scope of the rules. My chief reason for so holding is that the rationale behind holding a person to be choice of his selected address for service is largely undercut in a case such as this. The choice of a domicilium citandi et executandi is contained in a standard form agreement of loan prepared by the plaintiff, the party seeking to effect service. This standard form contains a term selecting as the domicilium the property which in terms of the agreement is to be mortgaged to secure the loan. The parties are not of equal bargaining strength.

The selection by the defendant of the vacant stand as his stipulated address for service is therefore, on the face of it, not something to which the defendant has specifically adverted. Indeed, I would tend to think that had he known of the consequences of selection of a domicilium, the defendant would have given his residence or place of employment, rather than the land he had just committed himself to buy and had not yet started to develop, much less live on. I would go so far to say that it is generally undesirable for a lender in such circumstances to include in a standard form contract a clause rendering mortgaged premises the domicilium citandi where those premises are, to the knowledge of the mortgagor, undeveloped and vacant. Add to this that a summons, thrust under a rock on an empty plot, forming a thoroughfare in a busy high-density suburb, in the middle of the rainy season, is scarcely likely to come to the notice of the owner of the stand, no matter how frequently he visits it, and one can see it to be unfair to hold the service sufficient. I consider that where a vacant lot is in circumstances such as this chosen as a domicilium the court would usually tend to insist upon service at the residence of the debtor, even if service by leaving process on the ground at the stand would be valid in terms of the rules."

It seems to me that the issue of the "law" and "justice" arises in the circumstances of this case. In such cases, where possible, the court should lean towards justice. The classical maxim, "Justice is giving everyone his due", is applicable to legal procedure, where it means that the judge should be impartial, i.e. honestly follow the law and not extend favours or disfavours to those who are not legally entitled to them. But the content of laws thus scrupulously obeyed may itself be most unjust. The bitter cry for justice on the part of the legally oppressed throughout the ages should not be ignored. Since the dawn of history the bitter cry for justice has filled the human scene. The courts, in my view, should take the lead in systematic attempts to achieve justice. It is only when law is seen as part of the life of reason that the ideal of just law can become a real force for genuine

beneficence. Philosopher Morris Raphael Cohen in Reason and Law at pp 111-112 correctly observed:
"The problem of justice is that of cleansing the social order of its black spots. This is an endless as well as a difficult task because all we do is constantly befouled by our inevitable errors and folly. But life would be unbearable without the effort at purification. We must also remember that whatever our ideal of substantial justice, it is obviously incomplete unless it includes the ways of bringing it about. A duty that is not executory or would be a duty only under non-existent conditions is hardly a possible ideal for the legal system. Now the process of realisation must start with the actual, and it depends for its success on the extent to which we utilise the actual physical and social forces, human nature and its environment. Furthermore, there can be no just order unless there is also what I have called 'formal' justice, i.e. a general determination on the part of those who deal with law to live up to its spirit, to carry out not only its literal provisions but the ideal inherent in it. Doubtless, the law will never, so long as it is administered by human beings, be free from arbitrary will and brute force. Nevertheless, it cannot function in an organised society without some rational effort at justice as an ideal harmony."
The objective of domicilium is to facilitate access by the mortgagee to the mortgagor in the event of breach of the sale agreement. It is obvious that the service in two CABS

cases supra, and the one under consideration is technically within the rules. In CABS v Dube and CABS v Kufa supra) the learned judges exercised the court's general discretion to depart from the rules in the name of justice. The judges exercised their general discretion to achieve just consequences. Sibanda J went even further by examining practical ways of achieving just results on this matter. In CABS v Dube supra, he states:
"The issue of domicilium that has arisen in this case need not arise. In my opinion, in addition to the domicilium citandi et executandi already chosen in the standard form contract, the mortgagor should be asked to provide his present domicilium so as to be incorporated as a second so chosen domicilium. This will ensure that, in the event of the subject of the loan failing after part of the loan has already been disbursed and that such failure results in a situation akin to the present case, service can always be effected upon the second chosen domicilium. The present impasse would not arise as service on the second chosen domicilium would be sufficient service, irrespective of the fact that the defendant may have abandoned that domicilium in the interim. In my view, there is justification for the adoption of the dual domicilium concept for transactions such as the present one."
The objective of service of process is to ensure that the process is brought to the notice of the party against whom legal proceedings are instituted. This is done by serving a copy of the process and any annexures to it in the manner directed by the rules: see Botha NO v Botha 1965 (3) SA 128 (E) and Civil Practice of the Supreme Court of South Africa by L van Winsen, A C Cilliers and C Loots (4 ed) at p 279.
Justice demands that there should be realistic ways of ensuring that the

defendant or respondent is notified of the legal proceedings instituted against him or her. This is not the case in this matter.
Accordingly, judgment is refused. I direct that service of the process is to be effected by service on the defendant or responsible person at the defendant's residence or place of business or employment. In the event that such an address is unknown, then application for directions for substituted service is to be made in terms of the rules of this court.
Wintertons, plaintiff's legal practitioners

MINISTER OF LANDS & ORS v COMMERCIAL FARMERS UNION
2001 (2) ZLR 457 (S)
Division: Supreme Court, Harare
Judges: Chidyausiku CJ, Ebrahim JA, Cheda JA, Ziyambi JA & Malaba JA
Subject Area: Constitutional application
Date: 19-21 & 26 September; 3 December 2001
Judgment Number: S-111-01

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 16 — protection against acquisition of property — s 17 — protection against arbitrary entry of persons onto one's premises — s 18(1) and 18(9) — protection of the law — Rural Land Occupiers (Protection of Eviction) Act — protection of land invaders from eviction — former owners of farms compulsorily acquired under Land Acquisition Act — no rights to enforce against invaders

Court — contempt — party allegedly in contempt approaching court for relief — what must be shown by party alleging contempt — court's discretion to hear alleged contemnor
Court — Supreme Court — composition — court sitting as constitutional court — court having no jurisdiction to reconstitute itself
In late 2000, the full bench of the Supreme Court (then consisting of 5 judges) unanimously granted an interdict at the instance of the respondent union (CFU), requiring the applicants to comply with court orders previously granted in respect of the invasions of commercial farming land, and prohibiting them from taking any further steps to acquire land for resettlement. The interdict was postponed until 1 July 2001, 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 to the commercial farming areas.
In the Administrative Court, matters were not being proceeded with after 1 July, and the applicants approached the Supreme Court for directions as to how to proceed.
A reconstituted Supreme Court sat to hear the matter. Five of the eight Supreme Court judges now available were appointed, although only one of those had been a member of the court which issued the original interdict. The other three available judges, who had been members of that court, were not appointed.
It was argued on behalf of the applicants that the Government had produced a workable programme for land reform. A detailed document was submitted in support of this assertion. It was also argued that the enactment of the Rural Land Occupiers (Protection

from Eviction) Act [Chapter 20:06], which protected certain classes of invaders from any civil or criminal action, effectively legalised their presence on the farms they had invaded and to that extent the rule of law had been restored. Affidavits were also submitted detailing the increased efforts by the police to take action to deal with criminal acts.
The CFU applied for the Chief Justice to recuse himself and for the court to be reconstituted. On the merits of the case, it was argued that

(1) the applicants had been in contempt of court because they had not obeyed the court orders previously issued and that their contempt should be purged before they could be heard;

(2) the court could not revisit any factual determinations made previously;

(3) there was effectively no land reform programme in place;

(4) the Rural Land Occupiers (Protection from Eviction) Act was unconstitutional, in that it deprived the owner of a farm which had been invaded of any remedy against the invaders; and

(5) the rule of law had not been restored to the farming areas.

Held (per Chidyausiku CJ, Cheda JA, Ziyambi JA and Malaba JA, Ebrahim JA dissenting), that the court had no power to reconstitute itself. The power to constitute a constitutional court vested in the Chief Justice and the Minister of Justice. The court had no power to review a decision by either as regards the composition of the court.
Held, further, that the application for the Chief Justice to recuse himself was just a disguised attempt to have the court reconstituted with judges of the CFU's own liking.
Held, further, that the respondents could not be in contempt of court if they believed that the Act was valid and restored the rule of law. There was no evidence establishing

beyond reasonable doubt either the meaning of the previous court order or that the respondents deliberately decided to disobey it. In any case, the court had a discretion as to whether to hear the party allegedly in contempt.
Held, further, that the court was functus officio on the question of whether there was a land reform programme in force in late 2000 and on the date on which a land reform programme had to be produced. However, the court was not functus officio on the question of whether a programme had been produced by 1 July 2001 and whether law and order had been restored. The programme produced by the applicants was a "programme" in terms of s 16A of the Constitution, even if not ideal, and no case had been made out for a judicial review of the manner of its implementation.
Held, further, that the Rural Land Occupiers (Protection from Eviction) Act protected land invaders from legal action at the instance of the commercial farmers. To that extent, it restored the rule of law. The Act, by declaring court orders to be suspended, enforced the rule of law. It was not unconstitutional, because a farmer whose property has been acquired in terms of s 8(1) of the Land Acquisition Act is no longer the owner of the land and loses any rights of eviction.
Held, further, that on the facts, the police were taking adequate measures to uphold the law and prevent crime.
Held (per Ebrahim JA, dissenting), that even though the applicants had produced a document setting out their programme of land reform, the evidence of the CFU that the programme was not being followed and that the police were not doing their duty to enforce the law was not controverted. The court should not have accepted the applicants' assertions without oral evidence.
Held, further, that the rights of landowners to protection of the law had been effectively removed by the Rural Land Occupiers (Protection from Eviction) Act, and thus the Act was in

contravention of ss 16 and 18 of the Constitution. It also breached s 21, in that it effectively forced the landowner into an unwanted association with the invader.
Cases cited:
Bell v Bell 1908 TS 887
Bramblevale Ltd, Re [1970] Ch 128; [1969] 3 All ER 1062 (ChD)
Brightside Entprs (Pvt) Ltd v Zimnat Ins Co Ltd 1998 (2) ZLR 229 (H)
Brits & Ors v Engelbrecht & Ors 1907 TS 876
CCJPZ v A-G & Ors 1993 (1) ZLR 242 (S)
Chiltern District Council v Keane [1985] 2 All ER 118
Collins v Wayne Iron Works 227 P 326 (1910)
CFU v Mhuriro & Ors 2000 (2) ZLR 405 (S)
CFU v Minister of Lands & Ors 2000 (2) ZLR 469 (S); 2001 (1) SA 925 (ZS)
Commissioner of Police v CFU 2000 (1) ZLR 503 (H)
de Villiers & Anor v McIntyre NO 1921 AD 425
di Bona v di Bona & Anor 1993 (2) SA 682 (C)
Fawcett Security Ops (Pvt) Ltd v Dir of C & E & Ors 1993 (2) ZLR 121 (S)
Fedsure Life Assurance Ltd & Ors v Greater Johannesburg Transitional Metropolitan Council & Ors 1999 (1) SA 374 (CC)
Gordon v Gordon [1904] P 163 (CA); [1904-7] All ER Rep 702

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA)
Igudu Farm (Pvt) Ltd v Commissioner of Police & Ors 2001 (2) ZLR 143 (H)
Language Rights under s 23, Manitoba Act 1870, Reference re (1985) 19 DLR (4th) 1
Leavis v Leavis [1921] P 299; [1921] All ER Rep 206 (P)
Lesapo, Chief v North West Agricultural Bank & Anor 2000 (1) SA 409 (CC)
Min of Home Affairs & Anor v Austin & Anor 1986 (1) ZLR 240 (S)
Min of Home Affairs v Bickle 1983 (1) ZLR 99 (S)
Min of Lands v Paliouras 2001 (2) ZLR 22 (S)
Mlambo, Re 1991 (2) ZLR 339 (S)
Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)
Olmstead et al v US 277 US 438 (1928)
Retrofit (Pvt) Ltd v Min of Information 1995 (2) ZL 422 (S)
Roper Trust v District Administrator, Hurungwe, & Ors 2001 (2) ZLR 345 (H)
S v A Juvenile 1984 (2) ZLR 61 (S)
Sabawu v Harare West Rural Council 1989 (1) ZLR 47 (H)
Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S)
Sayprint Textiles (Pvt) Ltd & Anor v Girdlestone 1983 (2) ZLR 322 (H)
Legislation considered:
Constitution of Zimbabwe 1980, ss 16, 18(9), 18(13), 21 & 23
Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:06], s 3
Supreme Court Act [Chapter 7:13], s 3
B Patel, with him M Majuru, for the applicants
A P de Bourbon SC, with him J B Colegrave, for the respondent
CHIDYAUSIKU CJ: In December 2000, the Commercial Farmers Union made an application to this court. The present applicants were the

respondents in that application. In that case, Commercial Farmers Union v The Minister of Agriculture, Land and Rural Resettlement & Ors 2000 (2) ZLR 469 (S), hereinafter referred to as "the CFU case" this court issued the following order:

" 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 s 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 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 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."

In July 2001, this court delivered the judgment in Minister of Lands, Agriculture and Rural Resettlement v Paliouras S-55-2001*, hereinafter referred to as the Paliouras case. Although that case involved different parties except for the first applicant, it necessitated an interpretation of the court order in the CFU case as regards the import of the interdict and its impact on applications for the confirmation of acquisition orders which were pending before the Administrative Court at that time. The Paliouras case, like the CFU case, also concerned the constitutional significance of the land reform programme. Both decisions contain various observations on that subject.

After 1 July 2001, questions were raised before the Administrative Court as to the coming into effect of the interdict. The learned Presidents of the Administrative Court refused to answer those questions, principally on the basis that they lacked competence to make any ruling interpreting the

decisions of this court. As a result, all applications pending before the Administrative Court could not proceed. Faced with this situation, the applicants initially approached this court by way of an urgent application seeking directions and a further postponement of the operation of the interdict. I summoned both parties to my Chambers to discuss the timetable for the filing of papers and the possible date of set down. I indicated to the parties that it would be desirable to deal with the issues arising from the CFU judgment in a holistic as opposed to a piecemeal fashion. I suggested that the parties draw up an exhaustive list of issues, file all the papers, and then approach me for a date of set down. Both parties agreed to this as the best way forward. The respondent, for some unknown reason, now denies having agreed to this procedure. The parties subsequently approached me for a date and I constituted this court for the hearing. This is how the matter came to be before this court.

It was contended by Mr de Bourbon, for the respondent, that the applicants should have appealed against the decision of the Administrative Court as a way of vesting this court with jurisdiction to hear this matter. I do not agree with this submission. The applicants could only appeal against the determination by the Administrative Court that it had no jurisdiction to interpret this court's order in the CFU case. That would be the only issue this court would be seized with for determination on appeal. The effect and meaning of the court order in the CFU case would not have been adjudicated upon by the Administrative Court. No appeal could therefore lie against a determination that was never made. The only course open to the applicants was the one they took, namely to apply to this court for to seek guidance as to the meaning and effect of its order in the CFU case.

On 18 September 2001, the day before the hearing of this matter, the respondent gave notice of its intention to apply for a reconstitution of this court. The application was headed "Notice of an application for reconstitution of court and ancillary relief". The draft order attached to the application reads:

"IT IS ORDERED THAT —

1. For the purposes of hearing of Supreme Court application No. S-204-2001 the court be constituted by all the judges of the Supreme Court other than the Chief Justice."

After hearing the submissions from both counsel, the court dismissed the application and indicated that the reasons for so dismissing the application would be included in the main judgment. The following are the reasons.

Section 3 of the Supreme Court Act [Chapter 7:13] vests power and authority to constitute a constitutional court in the Chief Justice and the Minister of Justice, Legal and Parliamentary Affairs. Section 3 of that Act provides as follows:

"3. Composition of Supreme Court

For the purposes of exercising its jurisdiction in any matter, the Supreme Court shall be duly constituted if it consists of not less than three judges of whom one shall be:

(a) the Chief Justice; or

(b) a judge of the Supreme Court other than an acting judge of the Supreme Court:

Provided that —

(i) …;

(ii) …;

(iii) where the Chief Justice or the Minister so directs, in any case involving a question of the application, enforcement or interpretation or an infringement of the Constitution, the Supreme Court shall not be duly constituted unless it consists of not less than five judges of whom either —

(a) one shall be the Chief Justice and at least two others shall be judges of the Supreme Court, other than acting judges of the Supreme Court; or

(b) at least three shall be judges of the Supreme Court, other than acting judges of the Supreme Court."

Given the explicit and clear language of the above provision, this court has no authority or power to constitute itself. The power to constitute this court in any case involving the interpretation, application or enforcement of a constitutional right is, as stated above, vested in the Chief Justice or the Minister of Justice, Legal and Parliamentary Affairs. No authority was cited for the proposition that this court has the authority to constitute itself or review the decision of the Chief Justice or the Minister of Justice, Legal and Parliamentary Affairs. I do not believe there is authority to that effect.

The application to this court to reconstitute itself is therefore misconceived and without any legal foundation.

It was also argued in the alternative that the Chief Justice should recuse himself. The reasons submitted in support of that submission are essentially the same as those advanced in the application for the reconstitution of the court. This application is just a disguised attempt to have the court reconstituted and should be dismissed for the same reasons. The main thrust of the respondent's argument is that it does not like the political background of the Chief Justice and by implication it would prefer a court made up of judges with political backgrounds of its own liking.

I would like to assure legal practitioners that they are most welcome to make representations on the composition of the court whenever they feel constrained to do so.

Such representations will receive due consideration whenever they are properly made. Such applications or representations must be made with the professionalism and dignity we have become accustomed to expect from legal practitioners as officers of this court. The unbridled arrogance and insolence with which the application for the reconstitution of this court was made in this case is simply astounding and, to say the least, unacceptable. This is the first and the last time that such

contempt of this court will go unpunished. Legal practitioners are reminded that this court has an inherent disciplinary power over legal practitioners as officers of this court in matters of misconduct or unprofessional conduct: see de Villiers & Anor v McIntyre NO 1921 AD 425 at 435. This court will in future deal with contempt of this court firmly and decisively. The only reason why stern action was not taken in casu is that this case is of extreme national importance and distraction from the main issue was to be avoided at all costs.

The court also granted the following interim order:

"Pending determination of this matter and without in any way pre-judging any of the preliminary issues raised in the application, but recognising the importance of lawful land reform, the applicants are granted the following relief:

1. The first applicant is hereby granted leave to proceed, in terms of s 7 of the Land Acquisition Act [Chapter 20:10], with applications for confirmation orders in the Administrative Court, and the said court is hereby directed to proceed to hear the said applications in terms of the law.
2. For the avoidance of doubt, the adjudication on applications in respect of which preliminary notices of compulsory acquisition were issued after 1 July 2001 is not authorised in terms of this Order."

The court indicated at the time of handing down the interim order that reasons for the order were to follow. The following are the reasons.

The court order issued in the CFU case is set out above.

The court also concluded in the CFU case that the existence of a land reform programme was a pre-requisite to the compulsory acquisition of land for resettlement. This is what the court had to say at p 481B of the judgment:

"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."

Put differently, in terms of this judgment compulsory acquisition of the land without the prior existence of the land reform programme is ultra vires the Constitution of Zimbabwe and therefore unlawful. The court, however, in terms of the above order authorised the applicants to continue acquiring land despite the non-existence of the land reform programme thus authorising them to do what the court had found, in effect, to be unlawfully. The dispensation to act unlawfully was to come to an end on 1 July 2001. During that period, applications in terms of s 7 of the Land Acquisition Act [Chapter 20:10] for the confirmation of acquisition orders made in terms of s 8(1) of the same Act were filed and had been filed with the Administrative Court.

The interim order merely permitted or authorised the continued hearing of those applications already filed and pending before the Administrative Court while this judgment was awaited. Put differently, this court merely authorised the continuation of a due process that had already commenced. In the light

of the above, I have some difficulty in understanding the reported attitude of the respondent's legal practitioner in questioning the independence of this court in allowing due process already commenced to continue when he raised no complaint to this court's authorisation of the applicants to continue acquiring land in the absence of a land reform programme contrary to s 16A of the Constitution. The inescapable conclusion is that those utterances were criticism not of the order itself but of the court which issued it.
The above are the reasons for the interim relief that was granted by the majority of this court. The interim order merely allowed due process already begun to continue. The same considerations that moved this court in the CFU case to allow the applicants to continue for six months with conduct which it had concluded was unlawful apply with equal, if not more, force, to the decision of this court to allow due process to continue while it considered judgment in this matter.
I now wish to deal with the several issues raised in the main application. In my view, the following are the issues which fall for determination:

(1) Contempt of court by the applicants;
(2) Jurisdiction or competence of this court to hear this matter;
(3) The land reform programme;
(4) The meaning and effect of the Rural Land Occupiers (Protection from Eviction) Act, and its constitutionality;
(5) The rule of law — whether or not it has been restored to the commercial farming areas.

The first two issues are of a preliminary nature and the rest of the issues go to the substance of the matter. I will deal with the issues in the order I have listed them above.
CONTEMPT OF COURT
The respondent contends that the applicants have failed to obey court orders. In particular it is alleged that the applicants failed to comply with the High Court order of Garwe J made on 17 March 2000, the order of this court in case No. S-314-00, and the order in the CFU case supra made on 21 December 2000. The respondent contends that the applicants should purge their contempt before the court hears them. The applicants, on the other hand, contend that the operation of the High Court orders and this court's orders referred to above has been suspended by operation of law, namely, the Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26], and that they have complied with the order of this court in the CFU case. The Rural Land Occupiers (Protection from Eviction) Act in subss (2) and (3) of s 3 provides as follows:

" (2) Notwithstanding anything to the contrary in any other law, but subject to this Act, no court shall issue any order for the recovery of possession from a protected occupier of any rural land, or the ejectment therefrom of a protected occupier, or the payment of damages by such protected occupier in respect of the occupation or trespass of such land during any period referred to in section four.

(3) Any order referred to in subsection (2) that was issued in relation to any protected occupier before the date of commencement of this Act shall be suspended and of no force or effect during any period referred to in section four."

The provisions of the above section expressly suspend the operation of the eviction orders issued by the High Court and this court. The respondent has challenged the

constitutionality of the above Act. The issue of the constitutionality of the Rural Land Occupiers (Protection from Eviction) Act is dealt with elsewhere in this judgment. However, the applicants, who are relying on the above Act, cannot be said to be in contempt of the court order. They lack the mens rea if they bona fide believed the Rural Land Occupiers (Protection from Eviction) Act was valid. Their bona fides in this belief has not been challenged.

The other ground advanced is that the applicants are in contempt because they failed to comply with the order of this court in the CFU case. In particular it is alleged that the applicants failed to restore the rule of law in the farming areas; failed to produce a land reform programme by 1 July 2001; and continue to acquire land despite the interdict having come into operation on 1 July 2001. The applicants, on the other hand, contend that they had restored the rule of law to the farming areas before 1 July 2001, produced a land reform programme before that date and indeed have done everything that constitutes compliance with the order of this court in the CFU case. The order of this court in the CFU case is set out in full above. Can it be said the applicants deliberately failed to comply with that order and consequently are in contempt of this court?

C J Miller in his book Contempt of Court 2 ed at pp 423-424, has this to say on the issue of contempt of court:

"Before a finding of contempt can be made it is necessary to determine whether there has been a factual breach of an order or undertaking on the part of the body or person brought before the court. This necessarily demands that the terms of the order be expressed in clear unambiguous language and, insofar as is possible, the person should know with complete precision what it is he is required to do or to abstain from doing."

Similarly, the following observations were made in the case of Collins v Wayne Iron Works 227 P 326, 76A 24, 25 (1910):

"It (the court order) should be as definite, clear and precise in its terms as possible so that there may be no reason or excuse for misunderstanding it or disobeying it, and, when practicable, it should plainly indicate to the defendant all of the acts which he is restrained from doing without calling on him for inferences or conclusions about which persons may well differ."

Sir John Donaldson MR equally observed in Chiltern District Council v Keane [1985] 2 All ER 118 at 119:

"(What) is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of court."

In terms of the court order in the CFU case the first, second and third applicants are interdicted from taking any further steps in the acquisition of land for resettlement. The operation of the interdict against the first, second and third applicants was suspended until 1 July 2001 to enable the first, second and third applicants to produce a workable programme of land reform; and to enable the fourth and fifth applicants to satisfy this court that the rule of law has been restored in the commercial farming areas of Zimbabwe.

It is certainly arguable that the court order in the CFU case is stated in unambiguous terms. For instance, the first, second and third applicants are required to produce a workable land reform programme. It is not clear to whom, if anyone, the land reform

programme was to be produced by the first, second and third applicants. It is also unclear from the order how the fourth and fifth applicants were to satisfy this court that the rule of law had been restored. It is not clear what sanction, if any, would befall the fourth and fifth applicants for failure to restore the rule of law to the commercial farming areas. Nor is it clear from the court order that the first, second and third applicants would be sanctioned for the failure of the fourth and fifth applicants to restore the rule of law to the commercial farming areas. Apart from this, the interdict did not make it clear what would happen come 1 July 2001. This is particularly significant in the light of the applicants' contention that by 1 July 2001 the land reform programme had been produced and the rule of law had been restored in the commercial farming areas. The merits of this contention will be discussed under the heading "Rule of Law" but for the purpose of considering the contempt I am satisfied that the contention is made in good faith and does constitute a defence to a charge of contempt of court.

In considering whether contempt has been established, the court has also to bear in mind that proof of contempt is a very demanding one, being pitched at a level normally associated with criminal proceedings. Hence, the breach of the order and the clarity of its terms must be proved beyond reasonable doubt. See Re Bramblevale Ltd [1970] Ch 128 (ChD); [1969] 3 All ER 1062.

In casu, all we have before us is evidence in affidavit form with one party alleging contempt and the other denying the allegations. In my view, there is no evidence establishing beyond reasonable doubt, firstly, the meaning of the order allegedly violated and, secondly, that the applicants clearly understood

the meaning of that order and took a conscious and deliberate decision to disobey it.

Even if the respondent had established that the applicants were in contempt, the court has a discretion whether or not to bar the contemner. In the exercise of that discretion, courts are very reluctant to deny a contemner a hearing unless there are cogent grounds for doing so. The question whether there is a rule that an alleged contemner ought to be denied a hearing is debated in Barrie & Lowe's Law of Contempt 2 ed at p 460. The learned authors conclude that the modern application of the rule reflects the court's general reluctance to refuse to hear a party. They rely for this proposition on the often quoted remarks of Denning LJ in Hadkinson v Hadkinson [1952] 2 All ER 567 at 574. After reviewing the history of the rule and the decisions in recent cases, including Leavis v Leavis [1921] P 299 and Gordon v Gordon [1904] P 163 (CA), he came to the conclusion that:

"Those cases seem to me to point to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."

Thus a party will be heard to support a submission that upon the true construction of the order alleged to be disobeyed, his actions did not constitute a contempt or that, having regard to all the circumstances, he ought not to be treated as being in contempt — Hadkinson's case supra. Even in those cases where the rule is prima facie applicable, the better view is that the court nevertheless has a discretion whether or not to hear the party — see Leavis supra and Gordon supra.

The modern rule, as expounded by Denning LJ in Hadkinson's case supra has been followed in our courts as well as in South African courts. See, for example, Minister of Home Affairs v Bickle 1983 (1) ZLR 99 (S); Sabawu v Harare West Rural Council 1989 (1) ZLR 47 (H); and di Bona v di Bona & Anor 1993 (2) SA 682 (C).

In the result, we were satisfied that the applicants were not in contempt.

JURISDICTION

The respondent has submitted that this court has no jurisdiction to hear the matter because it has duly pronounced itself on the issues before the court. It was contended that the court was functus officio. The respondent argued that the court has a wide and unfettered power to grant an appropriate remedy in terms of s 24 of the Constitution of Zimbabwe when a breach of the Constitution has been established. For this proposition, reliance was placed on a number of cases, such as Re Mlambo 1991 (2) ZLR 339 (S) at 355C;

Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors 1993 (1) ZLR 242 (S); and T S Masiyiwa Holdings (Pvt) Ltd v Minister of Information 1996 (2) ZLR 754.

I agree with this submission and the contention that this court in the CFU case in December 2000 had not only the jurisdiction but the duty to issue an order relevant to the rights of the respondent. I also find myself in agreement with the contention by the respondent that a final judgment, which correctly expresses the decision of the court, cannot, once given, be altered by the same Court which pronounced it. In the case of Brits & Ors v Engelbrecht & Ors 1907 TS, the court intimated that it had no jurisdiction to vary its own order as to costs. In the case of Bell v Bell 1908 TS 887 at 894, Innes CJ said:

"The courts will not lightly vary their own orders, even though they may be of an interlocutory character. And the cases in which such orders will be altered cannot be numerous."

See also Saypoint Textile (Pvt) Ltd & Anor v Girdlestone 1983 (2) ZLR 322 (H).

This court will therefore not seek to revisit, in this case, any issue that was finally adjudicated upon in the CFU case.

A proper reading of the judgment and the order issued in the CFU case reveals that on some issues the court duly and finally pronounced itself but left other issues open and indeed by implication indicated that those issues would be adjudicated upon by this court at some future hearing of this case.

For instance, in the CFU case this court finally pronounced itself on whether or not a land reform programme was a pre-requisite for the compulsory acquisition of land for agricultural resettlement. It concluded it was. That issue cannot be revisited in the same case (this case is arguably the same as the CFU case) although it can be revisited in a different case in terms of s 26(2) of the Supreme Court Act [Chapter 7:13].

The court in the CFU case also finally pronounced itself on the issue of whether or not there was in existence a land reform programme as at December 2000. The court concluded that there was no land reform programme as of that date. This court is functus officio on that issue. This court cannot revisit the issue of whether there was in existence a land reform programme in December 2000.

As to whether there was in existence a land reform programme on 1 July 2001, the court did not decide that issue. In fact it is clear from the order that that issue was left open and was to be determined by this court in the future. The order of the court suspended the operation of the interdict in order to enable the first, second and third applicants to produce a land reform programme. What is in dispute is whether the interdict required the first, second and third applicants to come to this court to produce the land reform

programme and, if so, when. I will deal with that aspect of the matter later.
Similarly, the effective date of the interdict in the CFU case was postponed to 1 July 2001 to enable the fourth and fifth applicants to restore the rule of law in the commercial farming areas of Zimbabwe. This court is not functus officio on the issue of whether or not the rule of law had been restored in the commercial farming areas of Zimbabwe by 1 July 2001.
In my view, this court is functus officio on the question of the date by which the land reform programme had to be produced and the rule of law restored in the commercial farming areas of Zimbabwe. It is arguable whether this court can extend the date of compliance beyond 1 July 2001. If the applicants were to contend that they produced the land reform programme and restored the rule of law in the commercial farming areas of Zimbabwe after 1 July 2001 they would have very little prospect of persuading this court that the court has jurisdiction to extend the date of compliance. The applicants' case is that the conditions of the interdict were met prior to 1 July 2001.
The applicants argue that it is not clear from the order whether, after complying with the order, the applicants were required to approach this court. I agree with the contention that the order itself is not clear in that regard. The common sense view is that they should have approached the court before 1 July 2001.
I am satisfied, however, that the date on which the applicants were required to come to this court, if so required, is not one of the conditions upon which the interdict was postponed. The production of the land reform programme, and the restoration of the rule of law in the commercial farming areas of Zimbabwe were the two critical conditions upon which the interdict was postponed. This court is not functus officio in respect of whether or not a land reform programme was in existence as of 1 July 2001 and whether the rule of law in the commercial farming areas of Zimbabwe had been restored as of that date.
I also hold the view that this court has jurisdiction, and the applicants are properly before the court, because this matter involves the interpretation of an order of this court. The applicants were obliged to approach this court for an interpretation of its order to avoid interference by a lower court with the jurisdiction and authority of this court: see Commercial Farmers Union v Mhuriro & Ors S-131-00.
Apart from the above, this court's order in the CFU case virtually or by implication invited the parties to come back to this court over the production of the land reform programme and the restoration of the rule of law in the commercial farming areas of Zimbabwe. They have done so it would be absurd to dismiss the matter on the basis that the are not properly before the court.

In any event, the propriety of the applicants' presence before this court is a matter of procedure in respect of which this court has a wide inherent common law jurisdiction to

do anything which the law does not forbid and which discretion this court should exercise in favour of hearing the applicants, having regard to the importance of this case.
Finally, I have come to the conclusion that this court has the jurisdiction to adjudicate upon any of the issues not finally determined in the CFU case and that the applicants are properly before the court.
THE LAND REFORM PROGRAMME
As I have already stated, in the CFU case the court concluded that a land reform programme was a pre-requisite for the compulsory acquisition of agricultural land for the resettlement programme. The court also postponed to 1 July 2001 the operation of the interdict to enable the first, second and third applicants to produce a land reform programme. The court did not pronounce itself finally on whether there was a land reform programme in existence on 1 July 2001. Indeed it could not have done that, as that related to the existence of such a programme at some future date. This court is clearly not functus officio on the issue of the existence or otherwise of the land reform programme as of 1 July 2001.
The first applicant, in his affidavit, avers that a land reform programme was produced in February 2001. It was subsequently refined and then revised in June 2001. The applicants produced as Annexure "B" the land reform programme. The respondent disputes that a land reform programme was produced before 1 July 2001.
The respondent also contended, in the alternative, that even if the court accepts Annexure "B" as a land reform programme produced before 1 July 2001, that document is totally inadequate and does not represent what is happening on the ground. Put differently, Annexure "B" does not constitute a land reform programme in compliance with s 16A of the Constitution.
In the circumstances, two issues arise from the conflicting stances adopted by the litigants in respect of the land reform programme. These are: Was Annexure "B" produced before 1 July 2001; and if it was produced before then, are is it in compliance with s 16A of the Constitution and its implementation justiciable?
The first applicant clearly states in his affidavit that Annexure "B" was produced in February 2001. The document was subsequently revised and refined in June 2001. The respondent merely disputes the averments without providing the factual basis for so disputing. Consequently, the court has no

hesitation in accepting that Annexure "B" was produced in February 2001 and refined in June 2001. It was therefore in existence on 1 July 2001.
I now tum to deal with the issue of whether the production of Annexure "B", the land reform programme, is sufficient compliance with s 16A of the Constitution of Zimbabwe. Section 16A in part provides as follows:
" (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 —

…"

Annexure "B" is a fairly comprehensive document. It opens by giving a background to the land dispute in the following terms:

"CHAPTER 1: INTRODUCTION

1.1 Agrarian Reform

This Land Reform Resettlement Programme — Revised Phase II document supersedes the Land Reform and Resettlement — Phase II document of September 1998. It summarises the revisions and amendments to the policy and the implementation plan of Phase II of the Land Reform and Resettlement Programme since its launch in October 1998. It also incorporates relevant features of the Inception Phase Framework Plan (1999 to 2000) and the Accelerated Land Reform and Resettlement Implementation (Fast Track) Plan.

At independence, Zimbabwe inherited a racially skewed agricultural land ownership pattern where the white large-scale commercial farmers, consisting of less than 1 percent of the population occupied 45 percent of agricultural land. Seventy-five (75) percent of this is in the high rainfall areas of Zimbabwe, where the potential for agricultural production is high. Equally significantly, 60 percent of this large-scale commercial land was not merely under-utilised but wholly unutilised.

Agrarian reform in Zimbabwe therefore revolves around land reform where the systematic dispossession and alienation of the land from the black indigenous people during the period of colonial rule are adequately addressed. The Zimbabwean Agrarian Land Reform involves restructuring of access to land, and an overall transformation of the existing farming system, institutions and structures. It includes access to markets, credit, training and access to social, developmental and economic amenities. It seeks to enhance agricultural productivity, leading to industrial and economic empowerment and macro-economic growth in the long term."

The policy objectives of the programme, as set out in Annexure "B", are to ensure equitable and socially just access to land; to democratise land tenure systems and security of tenure for all land holdings; to provide participatory

management of the use and planning of land use; and to promote sustainable and efficient use and management of land.

It is also clear from the programme that redistribution of the land is intended to achieve the following objectives:

(a) decongestion of over-populated communal areas through the Fast Track Programme; and

(b) indigenisation of the large scale commercial farming sector through the Model A2 Scheme which involves the acquiring of land from the white commercial farming areas and dividing it into small, medium and large scale farms for indigenous farmers.

Annexure "B" sets out in some detail how it is intended to achieve the above policy objectives. It starts by recognising that Zimbabwe has a land area of 39 million hectares of which 33 million hectares are reserved for agriculture. Of the total of 33 million hectares of agricultural land, about 14 million hectares of the best agricultural land is owned by about 4 000 white commercial farmers who are fully utilising only 40 percent of that land. The rest of the population, some 13 million black people, have available to

them about 19 million hectares of agricultural land. It is apparent from the land reform programme that the applicants intend to acquire 8 million hectares of agricultural land belonging mainly to the respondent's members for redistribution in terms of the Fast Track and Model A2 Scheme. This will leave about 6 million hectares of agricultural land in the hands of the 4 000 or so members of the respondent.
The respondent, on the other hand, according to Mr Hasluck, has offered 1 million hectares for the land reform programme. This, the respondent contends, is what the applicants should be satisfied with for the land reform programme to be workable. The acquisition of land in excess of that by the applicants would make the programme unwieldy and unworkable.
Thus, looked at from these standpoints of the litigants, the core issue at the centre of this litigation is a mathematical one. The applicants contend that they need 8 million hectares for the land reform programme or redistribution. The respondent is offering 1 million hectares and contends that that should be enough. Indeed, if members of the respondent were willing to offer the applicants 8 million hectares instead of 1 million hectares there would be no litigation. Conversely, if the applicants were willing to scale down their land requirements from 8 million hectares to 1 million hectares there would be no litigation. In a way, it would appear the core issue at the centre of the litigation is a question of how the applicants can fit a size 8 foot into the size 1 shoe that is being offered.
Taken as a whole, Annexure "B" is fairly comprehensive in terms of its policy framework and guidelines. It incorporates the resettlement models to

be followed and an implementation plan with broad time-frames. It also sets out the relevant institutional, monitoring and evaluation arrangements to be applied. It also sets out a budget outline covering a period of ten years.
The main thrust of the respondent's criticism of the programme, as set out in Annexure "B", is that the document does not constitute a holistic programme capable of lawful implementation in fact and that stakeholders were not consulted in its formulation. The applicants dispute these contentions and through the affidavits of the first applicant contend that the programme was devised primarily by government with input from interested external agencies. National and international non-governmental organisations and the international donor community were also involved in its formulation. The whole implementation programme devolves down from central to provincial to district levels because of its multi-sectoral effects and the need for proper co-ordination.
The process of identifying properties for acquisition is not rigid and is unavoidably subject to occasional errors, which errors were highlighted by the respondent in the affidavit of Mr Hasluck and other supporting affidavits. The programme is intended as a guideline and has guided officials and committees operating at local levels in the implementation of the programme. The government contends that it has the requisite technical and logistical capacity to implement the programme, a claim disputed by the respondent. Training centres and networks for infra-structural development have been established.
The applicants contend that the selection of settlers for empowerment is conducted without discrimination on the ground of affiliation to a political party or otherwise. The respondent contends there is discrimination and land is being given to those affiliated to a political party. That factual dispute cannot be resolved on the papers. The probabilities

are that a certain amount of favouritism would inevitably find its way into a process of this magnitude, but because of the large number of people involved it is highly unlikely that only members of one political party are benefiting from this programme. It is also apparent on the papers that the whole resettlement process is being continually improved and professionalised.

On the basis of the above, the question that needs answering is whether Annexure "B" constitutes a land reform programme in terms of s 16A of the Constitution. In determining this issue, the critical consideration is the intention of Parliament in enacting s 16A. The issue is not what is the best land reform programme. I have no doubt that there is substance in some of the criticisms of the respondent, but does it follow then that the programme is inadequate for the purposes of s 16A of the Constitution?

In determining the intention of Parliament in enacting s 16A, it would be

instructive to have regard to the history of s 16A of the Constitution. The amendment was introduced in April 2000, following the rejection in a referendum of a draft Constitution prepared by the Constitutional Commission of 1999. Section 16A was uplifted from that draft Constitution verbatim. The mischief that s 16A intended to deal with was the lack of resources to carry on a land reform or redistribution programme on the scale currently taking place in accordance with the land reform programme set out in Annexure "B". There simply was no money to pay compensation in terms of s 16 of the Constitution for the amount of land that was required for a programme such as envisaged in Annexure "B".

Parliament decided to place the obligation to pay compensation on the British government. That was the main purpose and objective in introducing s 16A of the Constitution. The objective of s 16A was not to ensure that an ideal land reform programme was in place before the programme was carried out. Obviously, it is desirable that the land reform programme be an ideal, but an ideal programme is something that the litigants in this case would never agree on. It would appear to me that the concept of a land reform programme was introduced into s 16A in order to avoid arbitrary and unplanned acquisition of land. Thus it must have been envisaged that it would be undesirable to acquire one farm this year and ask the British government to pay for that one farm, then wait another year or so and acquire yet another farm and ask the British government for payment for that farm.

In my view, what must have been intended by the legislature by the use of the words "land reform programme" was to introduce the concept of a comprehensive, as opposed to a piecemeal, approach to land acquisition requiring a general plan on how the government intended to proceed in the acquisition and redistribution of the acquired land, identifying which land was to be acquired, who would be the recipients, how much of the land they would receive, and how government intends to finance the programme.

While it is impossible to define in precise terms what constitutes a land reform programme in terms of s 16A of the Constitution, I am satisfied Annexure "B" certainly provides sufficient detail of the applicants' plan of acquiring land to constitute such a land reform programme. In particular, Annexure "B" sets out in some detail the policy framework and guidelines. It sets out the resettlement models to be followed in the implementation of the programme. It sets out the institutional, monitoring and evaluation

mechanisms. It also sets out a budget, giving an estimation of the cost and how the money for resettlement is to be raised.
On the basis of the foregoing, I am satisfied that Annexure "B" does constitute a land reform programme in terms of s 16A of the Constitution of Zimbabwe and that it was in existence as of 1 July 2001.
Page 475 of 2001 (2) ZLR 457 (S)
It has been contended that the land reform programme, as set out in Annexure "B", is not being implemented. In other words, what is happening on the ground and what is contained in Annexure "B" are two different things. This, of course, raises the broader legal issue of whether the implementation of a land reform programme is justiciable. Again, one has to go back to the issue of whether Parliament intended that implementation of the programme be justiciable. I do not think it was ever the intention of Parliament to make the implementation of the land reform programme the subject of scrutiny by the courts.
The whole purpose and intention of introducing s 16A of the Constitution, as I have already stated, was to accelerate the pace of land acquisition and its redistribution to diffuse an explosive situation that had built up over the years as a result of the slow pace or progress in the land acquisition and redistribution. The last thing that the legislature would have intended was to tie their hands and slow down the process of land acquisition and redistribution by the introduction of judicial scrutiny into minute details of implementation such as whether the right person has been appointed to the committee for the identification of the land and the recipients. More importantly, land acquisition and redistribution is essentially a matter of social justice and not strictly speaking a legal issue. The only legal issue of substance is whether the acquisition is done within the procedures set out by the law.
Apart from this, I find myself in agreement with Mr Patel's submission that questions of economic and social policy are matters within the domain of the executive discretion and the courts should exercise great restraint in delving into the details of policy instruments or directing the precise manner of their implementation. In the case of Nyambirayi v NSSA & Anor 1995 (2) ZLR 1 (S), this court concluded that courts should not intrude into governmental assessments as to the adequacy of any programme unless they are convinced that the assessment in question is manifestly without reasonable foundation.
A perusal of Annexure "B" reveals that the land reform programme, as presently applied by the applicants, has been derived from earlier programmes on the basis of past experience. It was formulated under the aegis of an executive appreciation of societal needs within the rural areas of Zimbabwe. The respondent has not tendered anything plausible to suggest that the government's assessment of the public interest as captured in the programme is manifestly unreasonable so as to justify the exercise of review jurisdiction by this court.
In the result, the court is satisfied that implementation of Annexure "B" is not justiciable but reviewable and no case has been made out for a judicial review of the manner in which the programme is being implemented.
Page 476 of 2001 (2) ZLR 457 (S)
THE RURAL LAND OCCUPIERS (PROTECTION FROM EVICTION) ACT
In the CFU case, this court concluded:

"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 removed" (the emphasis is mine).

This court gave the applicants two options to regularise the unlawful farm occupations. The occupiers' presence on the land had to be legalised; or they were to be removed from the land, in order to put an end to their illegal occupation and restore the rule of law in the commercial farming areas of Zimbabwe.

The applicants, through the government, chose the former. In pursuance of the chosen option, the government enacted the Land Occupiers (Protection from Eviction) Act with the object of legalising the previously unlawful presence of the occupiers on commercial farms belonging to members of the respondent. The Act in s also suspended the operation of the orders of both the High Court and this court for the eviction of settlers. To that extent, the Act restored the rule of law in the commercial farming areas of Zimbabwe.

The Act provides in s 3(2) protection against eviction and civil liability for damages in respect of trespass during the prescribed period of protection. Section 3(4) of the Act protects the occupiers from criminal liability for trespass or unauthorised entry. The Act addresses what would otherwise constitute unlawful occupation, unauthorised entry or trespass. The effect of the Act is to legalise all the rural land occupations that are presently under consideration to the extent that they fall within the ambit of the Act.

The main thrust of the respondent's argument was that the Act was unconstitutional and consequently of no force or effect. The respondent also argued that this court has no jurisdiction to consider the constitutionality of the above Act because no-one has invoked the provisions of s 24(1) of the Constitution of Zimbabwe, which provide that:

"(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be, contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

In the circumstances, this court has really two options — either to invoke the principle of omnia praesumuntur rite esse acta and hold that the Act is

constitutional until such time as it will have determined otherwise in proceedings brought under s 24 of the Constitution; or, in the alternative, assume jurisdiction on the basis that this issue is a procedural one in that the applicants are seeking a declaratur that the Act is intra vires the Constitution, as opposed to seeking an order remedying a violation of a fundamental right. And in such case this court has jurisdiction. The declaratur is sought in circumstances where this court in effect invited the fourth and fifth applicants to satisfy it that the rule of law has been restored to the commercial farming areas of Zimbabwe. The applicants contend that they have legalised the invaders' occupation by enacting the Act, while the respondent contends that the Act is unconstitutional. In view of the immense importance of the issues, the court should exercise its discretion and assume jurisdiction and issue a declaratur on the constitutionality or otherwise of the Act. In any event, detailed submissions on the issue of the constitutionality of the Act have been made by both counsel.

The respondent challenges the constitutionality of the Act on the grounds that the Act:

(1) contravenes s 16 of the Constitution, in that it takes away or suspends the owner's right to evict and also constitutes a positive act of placing persons on land thereby taking that interest or right away from the landowner, without compensation;

(2) contravenes s 17 of the Constitution which protects every person against arbitrary entry of others onto his premises;

(3) contravenes s 18(1) and s 18(9) of the Constitution guaranteeing protection of the law, in that it renders ineffective judgments given and prohibits a court from determining the existence or extent of the civil rights of the owner since his right to recover possession of his property and eject persons therefrom is removed;

(4) contravenes s 21 of the Constitution, in that it forces the farmers to associate with occupiers in violation of the owner's right to freedom of assembly; and

(5) overturns decisions of this court and the High Court.

It is quite clear that the alleged infringements of the respondent's members' constitutional rights are predicated on the assumption that a member of the respondent from whom a property is acquired in terms of s 8(1) of the Land Acquisition Act [Chapter 20:10] remains the owner of such property. This is clearly wrong. Section 8(3) of that Act vests the ownership of the acquired land in the acquiring authority, leaving the original owner an ordinary occupant with no greater right than any other occupant. His status as owner is only regained upon the refusal by the Administrative Court to confirm the acquisition order. The acquiring authority becomes the new

owner of the property upon its being acquired in terms of s 8(1) and remains the owner during the subsistence of the order.

The only derogations from the acquiring authority's ownership are contained in s 9 of the same Act, which has been amended since the hearing of this matter. This aspect of the matter is discussed in greater detail later on in this judgment under the heading "The Restoration of the Rule of Law". In short, the respondent's members lost the rights they allege are abridged by this Act upon their property being acquired in terms of s 8(1) of the Land Acquisition Act.

It is also argued that the Act provides for compulsory acquisition without compensation. This argument would have been tenable prior to the amendment of s 16 of the Constitution by the insertion of s 16A. The meaning and effect of s 16A is to allow for compulsory acquisition of land for agricultural purposes without compensation by the Zimbabwean government. The payment of compensation in respect of the land but not the improvements is now the responsibility of the British government in terms of s 16A of the Constitution.

In the result, I am satisfied that the Rural Land Occupiers (Protection from Eviction) Act is intra vires the Constitution of Zimbabwe.

THE RESTORATION OF THE RULE OF LAW IN THE COMMERCIAL FARMING AREAS

The interdict granted against the first, second and third applicants prohibiting them from taking any further steps in the acquisition of land for resettlement had its operation postponed until 1 July 2001 to enable the fourth and fifth applicants to satisfy the court that the rule of law had been restored in the commercial farming areas of Zimbabwe.

Although Part A of the order required all the applicants to comply with the court orders of 17 March 2000 and 10 November 2000 the interdict, the operation of which was suspended until 1 July 2001, was not granted against the fourth and fifth applicants. It was granted specifically against the first three applicants. No mandatory interdict was granted as such against the fourth and fifth applicants to restore the rule of law in the commercial farming areas. The fourth and fifth applicants were to satisfy the court on a matter they were not obliged by the court order to bring about in the first place.
They averred, however, that although they did not approach the court before 1 July 2001 they nevertheless satisfied the conditions of the postponement of the operation of the interdict before the deadline date.
The fifth applicant deposed to an affidavit in which he said that the police had substantially restored the rule of law in the commercial farming areas. He said that in response to the interdict police increased patrols in the

affected areas. They attended to all reports of criminal acts committed in these areas, arrested and prosecuted the culprits. Annexed to his supplementary affidavit were sitrep reports from police stations in different parts of the country on cases of violence that took place on commercial farms under their respective areas of jurisdiction. The reports showed the number of cases reported and how they were disposed of.
The respondent alleged, through its Chief Executive, Mr Hasluck, that the rule of law had not been restored in the commercial farming areas. Attached to the opposing affidavit were sitrep reports from farmers in different parts of the country. The reports referred to fresh farm invasions, interruption of farming operations, demarcation of farms into plots and allocation thereof to people occupying the farms, assaults on farm workers, burning of their houses, driving of cattle from grazing land, and theft of livestock.
The farmers admitted, however, that police had attended to some of the reported cases and apprehended the culprits.
The respondent and its members alleged that the rule of law could only have been restored in the commercial farming areas of Zimbabwe before 1 July 2001 if the applicants had done the following things, that is to say, they had:

(a) complied with the order of the High Court of 17 March 2000 in case HC 3544/00;

(b) complied with the order of the Supreme Court of 10 November 2000 in case S-314-00;

(c) prevented the interruption of farming operations;

(d) stopped the demarcation and allocation of the occupied land; and

(e) prevented the commission of criminal acts on farmers and farm workers and their property.

The question, therefore, is whether these things had been done by the applicants before 1 July 2001. Before considering the question under the headings: (a) Court Orders; (b) Property Rights; and (c) Criminal Acts; it is necessary to set out the general principles of the concept of "Rule of Law".
There are many facets in the meaning of the expression but its essence is that the law is supreme over decisions and actions of government and private persons. There is, in short, one law for all. The concept postulates that the exercise of all public power must find its ultimate source in a legal rule. In other words, the rights enjoyed and powers exercised

must derive from duly enacted or established law. Put another way, the relationship between the State and the subject must be regulated by law. So must the relationship between subjects in order to prevent resort to self-help. The rule against self-help is necessary for the protection of the individual against arbitrary and
Page 480 of 2001 (2) ZLR 457 (S)
subjective decisions and conduct of an adversary — Chief Lesapo v North West Agricultural Bank & Anor 2000 (1) SA 409 (CC) at 416 para 18.
In Reference re Language Rights Under The Manitoba Act 1870 (1985) 19 DLR (4th) 1, the Supreme Court of Canada at p 22 said:
"The rule of law … must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals and thereby preclusive of the influence of arbitrary power. … Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilised life. The Rule of Law in this sense implies … simply the existence of public order."
(a) Court Orders
Compliance with the court orders is now considered. When the land hungry people first moved onto commercial farms on 16 February 2000, the law of trespass prohibited any person from entering another's land and remaining in occupation thereof without permission of the owner. The court orders of 17 March 2000 and 10 November 200 declared the occupation of the commercial farms by land hungry peasants to be unlawful acts and directed government to remove the illegal occupiers. Cases of groups of subjects resorting to self-help against other subjects had arisen and the enforcement of court orders was intended to restore the rule of law.
In an effort to restore the rule of law, the applicants opted against the forcible removal of occupiers and decided to enact a law the provisions of which had the effect of legalising, albeit temporarily, the occupation of commercial farms. This court had, as already stated, directed the applicants in the CFU case to either legalise the presence of the people on farms or remove them.
As a way of restoring the rule of law in the occupied commercial farms Parliament enacted the Rural Land Occupiers (Protection From Eviction) Act [Chapter 20:26]. The law protected from eviction any person who occupied rural land by 1 March 2001 in anticipation of being resettled by an acquiring authority on that or any other land for agricultural purposes and was in occupation on the date of commencement of the Act. The power of a court to issue an order for the recovery of possession from a protected occupier of any rural land, or the ejectment therefrom of a protected occupier, during the period referred to in the Act was removed.
As the provisions of the Rural Land Occupiers Act became the source of legal authority for dealing with the incidents of the occupation of commercial farms by the land hungry peasants, the court orders could not continue to be sources of the same legal authority. Section 3(3) of the Rural Land Occupiers Act declared those court orders suspended and of no force or effect during
Page 481 of 2001 (2) ZLR 457 (S)
periods of occupation of rural land by the protected occupiers referred to in the Act.

The enactment of the Rural Land Occupiers Act was an enforcement of the rule of law. Government could not have created a vacuum by suspending court orders and declaring them of no force or effect before enacting the Act. The enactment of the Act was done before 1 July 2001. The fourth and fifth applicants could not comply with court orders once they were suspended and declared of no force or effect.

(b) Property Rights

The first applicant over the last two years has issued preliminary notices of intention to acquire many of the occupied commercial farms in terms of s 5(1) of the Land Acquisition Act [Chapter 20:10] ("the Act"). It would appear that the first applicant issued orders for the acquisition of most of these farms in terms of s 8(1) of the Act. It is common cause that at least 2 345 properties had been listed for acquisition as of 7 November 2000.

It is clear from the number of commercial farms placed under preliminary notices and s 8(1) orders that government used the provisions of the Act as the constitution governing its relationship with farm owners or occupiers. It is also clear that government used the provisions of the Act to restore the rule of law on the commercial farms.

The respondent and its members said the rule of law was not restored before 1 July 2001 because farming operations were being interrupted by the settlers. They do not say under which dispensation farming operations were being carried on. At the same time they do not deny that the affected farms were subject to s 8(1) orders.

The Act was the law governing the land use and control at the time. Section 8(3) of the Act provides that subject to confirmation by the Administrative Court the effect of an order of acquisition made in terms of s 8(1):

"… shall be that ownership of the land specified therein shall … immediately vest in the acquiring authority whether or not compensation has been agreed upon, fixed or paid … and shall be free of all rights and encumbrances" (the emphasis is mine).

Once land was acquired under a s 8(1) order the farmer had no property rights in the land. The acquiring authority had the dominium.

The farming operations that members of the respondent engaged in would have been at the pleasure of the acquiring authority. How then could the government which had the power to prohibit these farming operations be accused of encouraging the protected occupiers to interrupt the farming operation in breach of the rule of law? In permitting the respondent's members to carry on with farming operations on farms, it had acquired,

government placed itself in the position in which it is being accused of furthering conflict between the settlers and the former farm owners or occupiers.

By hindsight government must have realised that the best way of resolving conflict between the former owners, now occupiers, and the previous invaders, now occupiers, on the acquired commercial farms would be the prohibition of the respondent's members from continuing to use the land. In a move designed to reduce conflict between members of the respondent and land occupiers and to restore law and order on these farms government has enacted the Presidential Powers (Temporary Measures) (Land Acquisition) (No. 2) Regulations 2001 SI 338 of 2001.

Section 9 of the Act has been repealed and in its place substituted subs (9)(b) which provides that in relation to any agricultural land acquired for resettlement purposes, the making of an order in terms of subs (1) of s 8 shall constitute notice in writing to the

owner or occupier to cease to occupy, hold or use that land immediately on the date of service of the order upon the owner or occupier.
Change in the law is to be deemed to have come into operation on 23 May 2000. What this means is that members of the respondent who had claimed rights to carry on farming operations on farms acquired by government in terms of s 8(1) of the Act before 1 July 2001 had in effect no right at all to use the land. They cannot claim that the applicants were in breach of the rule of law by not protecting their rights when they did not have the rights in respect to which they claimed protection of the law.
The respondent's members complained that government officials pegged or demarcated the rural land into plots and allocated them to the settlers. They claimed that these activities were unlawful and therefore in breach of the rule of law.
Mr Patel conceded that demarcation of land into plots and allocation to settlers was taking place. He also conceded that where these acts took place before the acquisition of the land had been confirmed by the Administrative Court they were unlawful. It is important to note, however, that even if the demarcation of the rural land into plots and allocation of the same to settlers were unlawful the acts had no effect on the rights of the respondent's members whose farms had been acquired under s 8(1) orders. Ownership of such land was vested in the acquiring authority free of all rights and encumbrances. The respondent's members would have no rights in the expropriated land to be affected by the unlawful pegging.
We would have held the acts of demarcation of the acquired land and allocation thereof to have been in breach of the rule of law because the acts were prohibited by law. The government has, however, removed the derogation

from the rights of ownership it had imposed upon itself. Section 3 of the Regulations repealed subs (2) of s 8 of the Act and substituted in its place subs (2)(b). The subsection provides that in relation to any agricultural land required for resettlement purposes the acquiring authority may exercise any right of ownership, including the right to survey, demarcate and allocate the land concerned for agricultural purposes. As the demarcation of the acquired land and its allocation which took place after 23 May 2000 is deemed to have been done under the authority of the new section, demarcation and allocation of the land were done in accordance with law. The question of breach of the rule of law did not arise.
(c) Criminal Acts
The last matter to be dealt with under the restoration of the rule of law in the commercial farming areas relates to steps which the fourth and fifth applicants say they took to prevent criminal acts being committed on commercial farms. It is common cause that violent clashes took place between settlers and farmers and their workers at commercial farms in different parts of the country. The sitrep reports made by the respondent's members show that in some instances farm houses have been destroyed and serious assaults committed.
Whilst acknowledging the occurrence of these criminal acts, the fourth and fifth applicants aver that the police took steps to contain them. They increased patrols; attended to all reported cases and brought to book the culprits. The respondent's members are not satisfied with the adequacy of the measures taken by the police to restore the rule of law in this regard although they admit that the police did their best to deal with a

difficult situation. Criminal acts are by their nature sporadic and unpredictable in occurrence. The presence of the rule of law does not mean a totally crime-free environment. By definition, the concept of rule of law foresees a situation in which behaviour proscribed as criminal will occur. To expect the fourth and fifth applicants to bring about a totally crime-free environment in the commercial farming areas of Zimbabwe would be inconsistent with the concept of the rule of law and its practical application. It simply means that government must take adequate measures to enforce law and order.

The test for the restoration of the rule of law in the commercial farming areas is, in our view, not the number and gravity of the criminal acts committed but rather all the measures including policing and prosecution adopted by government in the land reform exercise.

Taking an overall view of the developments in the commercial farming areas as at the deadline date of 1 July 2001, I am satisfied the measures taken by the fourth and fifth applicants met the requirements of the condition of

suspension of the interdict granted against the first, second and third applicants.

In the result, I am satisfied that the first, second and third applicants produced a land reform programme in terms of s 16A of the Constitution of Zimbabwe before 1 July 2001 and that the fourth and fifth applicants restored the rule of law to the commercial farming areas of Zimbabwe before 1 July 2001. I am also satisfied that it would have been prudent for the applicant to have approached this court before 1 July 2001. Such a course would have avoided the apparent confusion in this matter. However, a proper reading of the order in the CFU case reveals that the applicants' approach to this court before 1 July 2001 was not a condition of the postponement of the interdict.

In the result, the court makes the following order:

(1) It is declared that the applicants complied with the conditions of the suspension of the interdict in the CFU case and the continued acquisition of the land by the applicants is and has been lawful.

(2) There will be no order as to costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

EBRAHIM JA: I have read the judgment prepared by the learned Chief Justice. I respectfully disagree with it.

This application is brought by the Minister of Lands and the other parties who were the respondents in Commercial Farmers Union v Minister of Lands & Ors S-132-00, not yet reported in the Zimbabwe Law Reports although it has been reported in the South African Law Reports*: see 2001 (1) SA 925 (ZS). The background to this whole matter is fully set out in the judgment and there is no need to traverse it again.

In that case, this court made the following order:

" 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 s 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 section 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 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 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.

6. Costs, including the costs of three counsel, are awarded to the applicant."

The order made by consent, referred to above (case No. S-314-00) was sought by the Commercial Farmers' Union in an action in which the present applicants, with the exception of the President, were the respondents. In addition, all eight provincial governors were respondents in that case. The order read as follows:

" 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, insofar 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, is hereby interdicted from in any way or form —

(a) causing;
(b) facilitating;
(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.

3. This Order shall not prevent:

(a) a policeman entering upon the property in the course of carrying out his police duties, in a way which does not involve his acting in a manner which is in contravention of the Order made in para 2 above;

(b) any person or persons entering upon the property with the consent, freely given before the entry is made, of the owner of the property which is the subject of the entry; or

(c) any officer, employee or agent of the first, second or third respondents, named and duly authorised under written notice given by or on behalf of the first respondent to the owner or occupier of the property, entering the property at reasonable times, with necessary equipment and personnel to assist him, in the course of carrying out any necessary investigation as to the suitability of the land for acquisition by the first respondent or its value or extent, under ss 11 or 29B of the Land Acquisition Act [Chapter 20:10]; or

(d) any officer, employee or agent of the first, second or third respondents, named and duly authorised under written notice given by or on behalf of the first respondent to the owner or occupier of the property, entering the property to survey and demarcate the lands in order to enable allocation of the same for resettlement purposes, PROVIDED in relation to the property concerned all the requirements set out in paras 4 (a) (i), (ii) and (iii) and also 4(b) of this Order have first been fulfilled and PROVIDED FURTHER:

(i) such activities shall not interfere with the operations of the owner or occupier of that property or his employees; and

(ii) until all the requirements set out in para 4 of this Order have been fulfilled in relation to the property, nothing contained in this Order shall permit any person claiming to have been allocated land or seeking the allocation of land thereon to enter upon, take up or remain in occupation of any part of the property by virtue of its survey and demarcation as aforesaid.

4. The Order made in para 2 above shall apply to each property owned or occupied by a member of the Commercial Farmers Union until each of the following requirements have been complied with in relation to such property:

(a) (i) a preliminary notice of acquisition of the property by a competent acquiring authority has been given to the owner and other persons required in terms of s 5(1)(b) of the Land Acquisition Act; and

(ii) an order of acquisition of the property in terms of s 8(1) of the Land Acquisition Act has been served upon the owner by the acquiring authority; and

(iii) the owner or occupier has been given written notice to vacate by the acquiring authority, occurring after the date of notice as aforesaid of the order of acquisition; and

(iv) at least three months have expired from the giving of notice as aforesaid to vacate to the owner or, if some other person is in occupation under a lease agreement with the owner, such lesser period has expired, equivalent to the period of notice provided in the lease agreement; and

(v) if the owner or occupier fails to vacate the property upon expiry of the said notice to vacate given to him, a court of competent jurisdiction has issued an eviction order against him, having the effect of a final order; and

(b) if in terms of the Land Acquisition Act [Chapter 20:10] the owner or occupier has within thirty days after publication of the preliminary notice of acquisition served upon the first respondent or any officer in his employ the owner's objection to compulsory acquisition of the property, an order of court of competent jurisdiction, having the effect of a final order, has been made

confirming the compulsory acquisition of the property, or the objection filed to the compulsory acquisition has been withdrawn by the owner or occupier who filed such objection.

5. The fifth respondent and every police officer, whose geographical area of duties covers any property referred to in para 2 of this Order, 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.

6. Service of this Order upon the Officer Commanding the Province, within which police officers referred to in para 5 above carry on their duties, shall constitute valid and effectual service, forty-eight hours after the first mentioned service, upon all police officers who from time to time carry on their duties within that Province.

7. The second respondent is hereby ordered:

(i) to cause the terms of this Order and the second respondent's instructions that they be complied with to be communicated to each Provincial Administrator and each District Administrator within Zimbabwe, within forty-eight hours of service of this Order upon him; and

(ii) within the following period of forty-eight hours to confirm in writing to the Registrar of this Honourable Court that such communications have been made.

8. The first, second, third and fourth respondents, jointly and severally, are hereby ordered to pay the applicant's costs of suit."

The order granted by Garwe J on 17 March 2000, referred to above, was also granted by consent. The order, in brief, declared that the occupation of every commercial farm and ranch in Zimbabwe was unlawful. It required that persons who had occupied such land to vacate the land within twenty-four hours, and it required the Commissioner of Police to ensure that the order was carried out. The Commissioner of Police later attempted to get the High Court to reverse the order, claiming an inability to comply with it.

The Commissioner's application was refused by Chinhengo J. See Comr of Police v Commercial Farmers' Union 2000 (1) ZLR 503 (H).

In the CFU case this court, having found (and it was really not disputed by counsel for the respondents in that case) that the occupation of commercial farms was unlawful, that there was no "programme of land reform" as envisaged by s 16A of the Constitution of Zimbabwe, and that the land reform "exercise" (to use a neutral term) was in several ways unconstitutional, and interdicted the respondents in that case from taking any further steps in the acquisition of land for resettlement. This court took the unusual step, however, of postponing the operation of the interdict until 1 July 2001, to enable the first, second and third respondents (the Ministers concerned in the land reform exercise) to produce a workable programme of land reform, and

to enable the fourth and fifth respondents (the Minister of Home Affairs and the Commissioner of Police) to satisfy this court that the rule of law has been restored in the commercial farming areas of Zimbabwe.

As I see it, the meaning of the order was simple. On 1 July 2001, the interdict would have come into effect unless the respondents were able to satisfy this court that there was indeed a workable programme of land reform and the rule of law had been restored to the commercial farming areas of Zimbabwe. It was necessary for both requirements to be fulfilled.

The meaning and effect of the order in the CFU case was brought into question, as the Administrative Court declined to hear certain cases brought before it. In Minister of Lands v Paliouras & Anor S-55-01*, this court held, by a majority, that land compulsorily acquired for resettlement is acquired in terms of the Land Acquisition Act [Chapter 20:10], rather than in terms of the Constitution. It was misleading to talk of acquisition in terms of s 16 or 16A of the Constitution. The acquisition must, however, be in conformity with the Constitution. As to the meaning of s 16A of the Constitution, it was held that those provisions of the Act which allow for acquisition without compensation depend for their validity on s 16A. In order for acquisition to be lawful under s 16A, there must be in place a programme of land reform. If there is no such programme, then s 16A does not apply, and the acquisition must be legitimised by s 16.

CAN THIS COURT REVISIT ITS PREVIOUS DECISION?

Under s 80 of the Constitution, this court "shall have such jurisdiction and powers as may be conferred upon it by or in terms of this Constitution or any Act of Parliament". Those powers are set out in the Supreme Court Act [Chapter 7:13]. It is clear that this court is a court of appeal only; it does not even have the power to enforce its judgments, which are enforced as though they are judgments of the court appealed from (see ss 7 and 24).

It is only in respect of constitutional cases that this court has original jurisdiction. Its powers are set out in s 24 of the Constitution, the meaning of which has been considered in numerous cases, such as Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S). Once the court has made the determination that one of the rights guaranteed by the Constitution has been contravened, it has no option but to enforce the right at the instance of the aggrieved party. There is no provision for delaying the enforcement of the right: Retrofit (Pvt) Ltd v Minister of Information 1995 (2) ZLR 422 (S).

Once the court has made a decision, can it in any way revisit that decision? I will deal later with the question of adherence to precedent, where a similar case comes before the court. But in respect of a particular case, what is the situation? There is, of course, no appeal from any decision of this court (see s 26(1) of the Act), so there is no question of this court amending or reversing the decision in the CFU case. I do not, though, see any reason why the court should not clarify its decision, where there is doubt as to the meaning of that decision. See Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co Ltd 1998 (2) ZLR 229 (H) at 231, where Chinhengo J said:

"The issue placed before me is in essence a request for the court to supplement its order. It does not raise the problem whether I am functus officio or not. The clarification sought is an accessory or consequential matter which was overlooked because of the manner in which the case being a stated case came before me. It is consequential or accessory also

because, whilst the claim for interest was in fact made, the only defect was that the date from which such interest must be calculated was not specified in the summons, declaration or prayer. I am therefore not functus officio in respect of this matter."

I respectfully agree with Chinhengo J's reasoning, and would apply it to the present application. This court made an order in the CFU case, but suspended the operation of the order until 30 June 2001 provided certain conditions were met. If the conditions are met, the order falls away; if they are not, it comes into effect. It is therefore necessary for the applicants to show this court that the conditions have been fulfilled. To that extent, this court is not functus officio.

INTERIM ORDER

In these proceedings, the applicants initially sought directions as to how to proceed next. This was done on 16 July 2001 after the interdict granted by this court had come into effect. They then, only a week (11 September 2001) before the application was due to be heard, sought an interim order, granting leave for the first applicant to proceed, in terms of s 7 of the Land Acquisition Act [Chapter 20:01], with applications for confirmation orders in the Administrative Court, but not in respect of any notices of acquisition issued after 1 July 2001 (the date on which the interdict came into operation). This order was granted "pending determination of this matter and without in any way pre-judging any of the preliminary issues raised in the application, but recognising the importance of lawful land reform".

I did not agree to this order and dissented in its granting. In my view, none of the well-established requirements for the grant of interim relief were present. There was no urgency justifying the grant of the order, given that land reform is an on-going process and that, in view of how long this process

has been taking place, a delay of a few months will make little difference either way. In any event, the application filed on 11 September 2001 was not filed in terms of the Rules. There was no certificate of urgency and it was moved for before the respondent was required to reply.

I realise that, because the operation of the interdict was suspended until the end of June 2001, the applicants were not until that date interdicted from taking lawful steps to acquire land. These steps would include the notice of intention to acquire, objections, confirmation hearings before the Administrative Court and so on. However, it seems to me to be quite inappropriate to treat those matters differently from those arising after the end of June 2001. The whole subject should be treated as one, and the government's actions as a whole should determine this court's approach to the matter. If this court were to find that, although the government had gone through an ostensibly lawful process to acquire land, the rule of law had otherwise not prevailed at all, we would be condoning the breach of the rule of law if we were to say, in effect:

"It does not matter that you did not obey the orders of the courts; that unlawful occupations and other unlawful activities continued until 30 June 2001. You may still go ahead with your applications to the Administrative Court as though all the other illegal activities had not occurred."

Since the applicants were interdicted from continuing with land acquisition unless certain conditions were met, to allow them to now continue — even in respect of the notices of acquisition issued before 1 July 2001 — without having decided whether the conditions

were in fact met gives the impression that the court is pre-judging the issue as a whole, irrespective of the words given in the interim order.

JUSTICE OR LAW?

During argument, the view was expressed that justice was on the applicants' side, but the law was on the respondent's side. Admittedly law and justice do not always coincide. Examples of oppressive and unjust laws can be found in many countries. But this does not mean that the courts, which are sworn to uphold the law, can ever allow their personal, subjective view of what constitutes justice to override the clear provisions of the law.

It is not the function of the courts to support the government of the day, or the would-be government of tomorrow. It is not their function to support the State against the individual, or the individual against the State. The courts' duty is to the law and to the law alone. Judges, as individuals, have their own political, legal and social views and opinions. But it is the sworn duty of every judge to apply the law, whatever he or she may think of the law. If a law is

patently unjust, the courts can seek to ameliorate matters as far as possible, within the law, but they may never subvert the law. The remedy for an unjust law lies, not with the courts, but with the legislature. If the law does not allow the State to proceed as it apparently wishes in respect of land acquisition, the remedy is in its own hands. The legislature has, as it always has had, the power to pass laws which would enable land reform to take place in a lawful, organised and constructive, rather than in an unlawful, chaotic and destructive, manner. But until the law is changed, all we expect is that the State will follow its own laws. See Fedsure Life Assurance Ltd & Ors v Greater Johannesburg Transitional Metropolitan Council & Ors 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) where in a joint judgment Chaskalson P, Goldstone J and O'Regan J stated:

"(It) is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful."

Later in the same judgment, it is said that:

"(It) seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

See also Olmstead et al v United States 277 US 438, 485 (1928) where Brandeis J stated:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously … Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example … If the government becomes a law unto himself, it invites anarchy."

There seems to be no dispute about the justice of land reform. There can be no doubt that the communal lands are over-crowded, that the land there has been degraded, that there is a genuine need for more land to be made available, that some commercial farms are under-utilised, and so on.

PRECEDENT

Counsel for the applicants pointed out that this court is not bound by the decisions of any other court, or its predecessors, nor is it bound by its own decisions. This is, of course, true: see s 26(2) of the Supreme Court Act. The High Court is bound by the decisions of

this court, but this court is bound by no other. While this court is not bound by its own previous decisions, and on occasion has to revisit them, this does not mean that it should blithely disregard its own decisions. On the contrary, in my view, the policy should be that we should follow our previous decisions unless they are distinguishable on the facts or are, on careful analysis and sound reasoning, shown to have been erroneous. To act otherwise would create huge uncertainty in the law,
Page 492 of 2001 (2) ZLR 457 (S)
and this court would truly deserve the epithet that was once attributed to the short-lived Rhodesia and Nyasaland Court of Appeal, that it should be abolished under the Lotteries Suppression Act. See E Khan Law, Life and Laughter Encore p 269.
A change in personalities in this court, or any other, should not mean a wholesale change in its approach. As I have said, the judges of this court, as of the other courts, have their own personal viewpoints on a number of topics, whether those topics be politics, religion, social mores and so on. But we are all sworn to uphold the law, and when we do so our personal views take second place. We must follow precedents unless those precedents are clearly wrong.
By repeating the arguments that were previously rejected by this court, counsel for the applicants is trying to convince us that we should reverse this court's previous decision. I cannot agree. There is nothing new in what he says, and all the points made were carefully considered and that court came to the conclusion it did.
HAVE THE APPLICANTS COMPLIED WITH THE REQUIREMENTS OF THE INTERDICT?
(1) Is there a workable programme of land reform?
The applicants contend that they have complied with the two requirements imposed by this court, namely that there is a workable programme of land reform, and that the rule of law has been restored to the commercial farming areas of Zimbabwe. It is also argued on their behalf that, even if this court was correct in saying that a programme of land reform is a requirement, the details of such programme and its implementation in practice are matters beyond the bound of judicial scrutiny. It is correct, of course, to say that the courts may not inquire into policy matters, in the sense of not deciding whether one policy is better than another, but they may certainly inquire into whether legal requirements have been fulfilled and whether what is being done is in conformity with the law. Policy matters as to who should be resettled, how they are to be selected, and so on, are not matters on which this court can express an opinion. Those are matters for the executive. Provided that there is no discrimination in the choice of people to be resettled, and provided that the law is followed, we cannot inquire into the efficacy or otherwise of any policy.
The applicants have submitted that a number of criteria show that there is indeed a workable programme of land reform capable of lawful implementation. There may well be such a programme and it may well be capable of lawful implementation. But the real question is this: is it being
Page 493 of 2001 (2) ZLR 457 (S)
implemented lawfully? In my view, the evidence placed before us by the respondent has not been controverted.
If a piece of land is to be lawfully acquired for resettlement purposes, there are legal processes which must be followed: notices of intention to acquire the land must be given;

time must be given for objections; if there are objections, these must be heard and decided. Only after these processes have been followed and resulted in the land being acquired by the State, is it lawful for resettlement to begin, unless the landowner has previously, and genuinely, consented to such resettlement. Haphazard squatting cannot form part of a lawful programme of land reform.

(2) Has the rule of law been restored?

Even if it is accepted that the applicants have produced a workable programme of land reform, there is still the question of whether the rule of law has been restored in the commercial farming areas of Zimbabwe.

Here, the applicants argue, among other things, that:

(a) The government has endeavoured, as far as possible, to follow the procedural requirements of the law in implementing the land acquisition and resettlement process;

(b) It is not the government's policy to stop farming operations by landowners;

(c) Offers by farmers of alternative land have been considered and accepted or rejected on their merits;

(d) Pegging and allocation has taken place on some farms in anticipation of acquisition in order to avoid chaotic occupation patterns and the potential breakdown of law and order;

(e) All police officers have been instructed to comply with and give effect to court orders, subject to the position of protected occupiers being safeguarded.

The starting point, which the applicants cannot avoid, is that until a commercial farm has been lawfully acquired in terms of the Land Acquisition Act any trespass, pegging, farming and other activities by persons other than the owner of the farm are unlawful, not only in terms of the civil law, but also in terms of the criminal law. Indeed, this was conceded by counsel for the respondents in the previous cases — hence the grant of orders by consent. The Rural Land Occupiers (Protection from Eviction) Act is also based on the premise that the land occupations have been, and continue to be, unlawful. If they were not, the Act would have been unnecessary.

It is not lawful, and never was lawful, for any "occupiers", whether acting of their own accord or under instructions, to be on the land at all, let alone cut down trees, build homes, till land, graze their cattle and so on. To cut down

a tree on someone else's land is a criminal offence. Even to help oneself to thatching grass is a criminal offence. To plough up the landowner's crops is criminal. To prevent the landowner from carrying out lawful activities is criminal. To harass the landowner or his employees and by threats coerce them, or attempt to coerce them, to leave the farm is criminal.

It is not lawful for anyone to peg and allocate themselves land on some farms, and the applicants' attempt to justify this on the grounds of avoiding the breakdown of law and order is untenable. The pegging and other activities are themselves examples of the breakdown of law and order and cannot be justified on the grounds given.

The evidence from the respondent is that in numerous cases farmers are in fact being prevented from conducting farming operations and that, contrary to the applicants' assertions, the police are not doing their duty under the law. That detailed evidence is not

in any way contradicted and must be accepted. See Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise & Ors 1993 (2) ZLR 121 (S) at 127, where McNally JA said:

"The simple rule of law is that what is not denied in affidavits must be taken as to be admitted."

Without oral evidence, this court cannot in good conscience, in the face of the detailed answering affidavit submitted by the respondent and not rebutted by the applicants, accept the applicants' very generalised statements averring that the rule of law has been restored. In no way have the applicants produced sufficient evidence to satisfy the court that the second of the requirements we laid down for the uplifting of the interdict has been fulfilled.

I would also like to make some general observations about the rule of law and what it means. The subject has, regrettably, had to be raised many times in the superior courts in recent years. See, for example, the words of Chinhengo J in Commissioner of Police v CFU supra at 525-526. There are several criteria for showing whether the rule of law is being followed in a particular country. One of those criteria is, of course, that the orders of the courts are obeyed by all. It is not for one party or another to decide which courts orders to obey and which not to. If the party is the government, its remedy, if it does not agree with the decision of the courts, is to amend the law. But until the law is amended, the government, like everyone else, is obliged to obey the law. Where the government, or its agencies, does not obey the law, the rule of law cannot be said to apply. See Minister of Home Affairs & Anor v Austin & Anor 1986 (1) ZLR 240 (S) at 245, where Dumbutshena CJ said:

"When the executive ignores the orders and judgments of the courts there is the inevitable break-down of law and order, resulting in uncivilised chaos because the courts cannot enforce their own orders. Their jurisdiction and duty end after the delivery of judgment."

In the present situation, there have been two orders from the superior courts, both by consent, and the third one, which has given rise to the current application. The evidence indicates that the orders have not been obeyed, except spasmodically and in a few isolated instances. Generally speaking, though, the orders have not been obeyed, and there has been no attempt by the State to comply with them. The State has not come back to this court to show that it has attempted to comply with the orders made by this court and why it has been impossible to comply with them, and in these circumstances it is impossible to accept that the rule of law has been restored.

CONSTITUTIONALITY OF THE RURAL LAND OCCUPIERS (PROTECTION FROM EVICTION) ACT [CHAPTER 20:26]

I have dealt with the issue of the rule of law and the return to the rule of law. There appears, however, to be a perception that by passing laws the government can satisfy this requirement. There has been a reliance on the Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26] to meet this goal.

It was submitted by the applicants that the effect of this Act was that it suspends certain aspects of the decisions of the courts as well as orders of eviction obtained by disgruntled farmers. It also prevents the eviction by the owner of land of persons who have come onto his property without his permission. Such an occupier cannot be sued for damages emanating from his uninvited occupation. It also entitles such an occupier to remain on

such land against the will of the owner of the land and thus enforces an association between the parties whether the owner likes it or not.
Does the Act contravene s 16 of the Constitution of Zimbabwe (a freedom from acquisition without compensation)? In my view, it does. The Act does not simply take away or suspend a right to evict but constitutes a positive act of placing people on land, thereby taking away the landowner's right or interest in that land. The landowner is deprived of his right or interest in the land, without compensation being paid. Whilst the Act does not purport to transfer the property to the State, it does provide for the alienation of a right in the property acquired. The right of use and occupation is taken away from the owner and is left to the occupier, supported as he is by the State, the potential acquiring authority.
The Act was also attacked on the basis that it contravenes s 17 of the Constitution (i.e. protection from arbitrary search and entry). It was submitted that the land invasions and unauthorised trespass onto premises constitutes an entry by those persons onto the farms in question. Although s 17(2)(c) of the Constitution derogates from the general protection provided by s 17, the

Act is not a law that provides for the taking possession of or acquisition of any property or interest or right therein. I would therefore hold that s 17 is not contravened.
Does the Act contravene s 18 of the Constitution (protection of the law)? It seems to me that there can be no doubt that the rights of the landowners to the protection of the law have been effectively removed by the Act. People who are accepted by all — including the legislature — as being in breach of the law are protected, while those who are victims of illegality are left without a remedy. The Act is regarded in some quarters as being expedient, but one has to conclude that the constitutional rights of the landowners under s 18(1) and s 18(9) have been negated. Section 18 does not provide any derogation which would justify the Act.
Section 3(2) of the Act provides:
"(2) Notwithstanding anything to the contrary in any other law, but subject to this Act, no court shall issue any order for the recovery of possession from a protected occupier of any rural land, or the ejectment therefrom of a protected occupier, or the payment of damages by such protected occupier in respect of the occupation in respect of the occupation or trespass of such land during any period referred to in section four."
Section 3(3) of the Act provides:
"(3) Any order referred to in subsection (2) that was issued in relation to any protected occupier before the date of commencement of this Act shall be suspended and of no force or effect during any period referred to in section four."
Not only do these provisions abrogate the protection of the law but it purports to suspend and render of no effect judgments given by the courts. It clearly removes the right for a court to determine the existence of a civil right of the owner since his right to recover possession of his property and to eject persons therefrom is removed.
Section 3(2) of the Act gives immunity from damages claims during the "protected period" in respect of the occupation and trespass. This covers a situation where the occupier destroys or damages property, or uses the property of the owner without his consent, or hinders the owner in his farming activities. The Act extends the right of the occupier beyond mere presence and gives him immunity from any damage he may cause

whilst in occupation and yet does not give the owner the right to exercise his rights of redress enshrined in s 18(9) of the Constitution. This clause in the Constitution provides:
"(9) 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."
The right to have damages adjudicated upon cannot be removed by

legislation save where such is permitted under s 18(13), which provides as follows:
" (13) Nothing contained in or done under the authority of any law shall be held to be in contravention of —
(a) subsection (2), (3)(e) or (9) to the extent that the law in question makes reasonable provision relating to the grounds of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings;
(b) subsection (3)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;
(c) subsection (3)(e) to the extent that the law in question imposes reasonable conditions which must be satisfied if witnesses are called to testify on behalf of an accused person are to be paid their expenses out of public funds;
(d) subsection (6) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the appropriate disciplinary law, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law; or
(e) subsection (8) to the extent that the law in question authorises a court, where the person who is being tried refuses without just cause to answer any question put to him, to draw such inferences from that refusal as are proper and to treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person."
Section 18 does not provide any derogation which would justify the Act.
Does the Act contravene s 21 of the Constitution (freedom of association)? In two cases in the High Court: Igudu Farm (Pvt) Ltd v Commissioner of Police & Ors HH-143-01* and Roper Trust v District Administrator, Hurungwe & Ors HH-200-01,** the court held that the landowners and the occupiers had to reach some sort of modus vivendi. That is indeed the effect of the Act, and it is thus clear that s 21 is breached by forcing a landowner into an unwanted association with persons who have occupied his land.
The farmers do not have to associate with the occupiers and there is nothing in s 21 which allows Parliament to derogate from that position. See the CFU case at p 938D.
It was also submitted on behalf of the respondent that the Act is discriminatory in that it only applies to commercial farmers. Accepting, for the purpose of argument, that the Act is discriminatory against commercial farmers, does this mean s 23 is breached? The relevant parts of s 23 read as follows:

"23 (1) Subject to the provisions of this section:

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced:

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned."

Commercial farmers are a class of people, but in my view they are not persons of a "particular description by race, tribe, place of origin, political opinions, colour, creed or gender". Admittedly, they are predominantly white, but that is all. I do not think s 23 has been contravened.

In my view, there is merit in the submission made on behalf of the respondent that Parliament cannot overturn any ruling or relief given by this court in terms of s 24 of the Constitution other than by a duly enacted amendment of the Constitution itself. This has certainly been what the legislature has done in the past to overrule decisions of this court: see S v A Juvenile 1984 (2) ZLR 61 (S); Catholic Commission for Justice and Peace Commission in Zimbabwe v Attorney-General 1993 (1) ZLR 242 (S), 1993 (4) SA 239 (ZS) which led to s 15(3) and s 15(5) and (6) of the Constitution.

It is for these reasons that I conclude that the Rural Land Occupiers (Protection from Eviction) Act [Chapter 20:26] must be declared unconstitutional.

THE PRESIDENTIAL POWERS (TEMPORARY MEASURES) (LAND ACQUISITION) (NO. 2) REGULATIONS 2001

What of the Presidential Powers (Temporary Measures) (Land Acquisition) (No. 2) Regulations 2001? The immediate difficulty I have in connection with these Regulations is that none of the parties have had an opportunity to make submissions on their effect and validity on the issues in this case.

It seems to me that the lawfulness and constitutionality of these Regulations

is bound to be the subject of debate in the future. In my view, prima facie, the following questions arise: Was it necessary to pass these Regulations without waiting for Parliament to sit? These Regulations were promulgated on 9 November 2001. Parliament sat on 20 November 2001, a mere eleven days later. In this context, the question then arises: Was there really a situation of emergency justifying the exercise of the powers in terms of the Presidential Powers (Temporary Measures) Act [Chapter 20:10]? There is

also the question of the reasonableness or otherwise of the Regulations — one of the issues being whether the Regulations can be said to be irrational or otherwise.
As I see it, the object of the Land Acquisition Act is to ensure the equitable redistribution of land, redressing the manifest injustices of the past, while fairly addressing the rights of landowners, and preserving the economic well being of Zimbabwe. The Act at least arguably met these criteria prior to the recent amendment. What the amendment now does is to make occupation of land lawful immediately on designation and thereby negates any right of the owner to contest acquisition. It could be argued that the lawmakers are simply trying to make the "law" equate with what is prevailing on the ground rather than managing the land redistribution process to achieve its aims while preventing economic meltdown.
The effect of the Regulations is to allow occupation immediately on designation, and this makes a mockery of the right to contest such designation — unless the Administrative Court hearing to consider the correctness of the acquisition is heard within days of the land being occupied. This is something which is unlikely. If there is a substantial delay and the owner successfully challenges the acquisition, his victory in the face of his land having long since been resettled will be hollow and meaningless.
GENERAL
Before concluding I make the following observations.
I was party to the decision reached in the CFU case. In that matter, it was made clear that there was an urgent need for land reform and land redistribution. We said:
"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."
I continue to subscribe to those views.
During the course of the submissions in this matter, it has been said that the wording of the interdict which emanated from the CFU case is vague and ambiguous. The wording used was the following:
Page 500 of 2001 (2) ZLR 457 (S)
"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 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."
In my view, the wording is clear, unequivocal and unambiguous. What was called for was:

1. That the respondents produce a workable programme of land reform;
2. That the respondents satisfy this court that the rule of law has been restored;
3. That the respondents had until 1 July 2001 to do so.

Once these requirements were satisfied, it was to this court that the applicants had to come to say that the conditions set by this court had been met. If they were met, the process of land reform would proceed.
In my view, there is also no difficulty on what the cut-off date was to be. There is nothing unclear on what was intended. By 1 July 2001, the conditions laid down by this court had

to be satisfied. A failure to meet this deadline would and did bring the cut-off date for continuation of the land exercise into effect.
It follows from what I have said in this dissenting opinion that I hold the view that the application must fail and that the costs should be awarded to the successful party, namely the respondent.
Civil Division of the Attorney-General's Office, applicants' legal practitioners
Coghlan, Welsh & Guest, respondent's legal practitioners
SPORTS AND RECREATION COMMISSION v SAGITTARIUS WRESTLING CLUB & ANOR
2001 (2) ZLR 501 (S)
Division: Supreme Court, Harare
Judges: Ebrahim JA, Muchechetere JA & Malaba JA
Subject Area: Civil appeal
Date: 12 November & 6 December 2001
Judgment Number: S-104-01

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 21 — right to freedom of association — requirement by Sports Commission that there be only one national body for each sport — refusal to register more than one national association — not a breach of s 21
Sport — regulation of — Sport and Recreation Commission — registration of national sporting associations — policy of not registering more than one such association per sport — policy consonant with Commission's objects and responsibilities
The appellant commission was enjoined by s 29(1) of its enabling statute, the Sports and Recreation Commission Act [Chapter 25:15], to keep and maintain a register of national sporting associations. If a national association wished to be registered, it had to make application to the commission, which could register the association if satisfied as to certain criteria.
The respondent club, which was a "national association" in terms of s 2 of the Act, applied for registration, which was refused on the grounds that it had a policy that should be only one national association registered for each sport and that there was already one national association registered for the sport of wrestling. The commission said that the respondent could affiliate to the existing national body. The respondent sought an order, declaring that the refusal to register it violated its rights of freedom and association under s 21 of the Constitution. The High Court upheld this contention. On appeal:
Held, that the respondents' right to associate freely was not hindered by its not being registered. What was preventing the first respondent's member from participating in national and international contests was not the appellant's decision, but rather the law which compelled sporting associations to be registered. It was that law which should have been challenged.
Held, further, that the commission's policy of one national association per sport was not unconstitutional. There was nothing unreasonable about requiring clubs in a particular sport to come under one umbrella organisation, to prevent the kind of disputes that have occurred in the world of boxing, where there were a number of world boxing organisations. There was nothing to prevent the first respondent from being affiliated to the registered national association.

Held, further, that this case should never have been considered as a constitutional one at all. The courts will not normally consider a constitutional question unless the existence of a remedy depends on it. The respondents were not challenging any law, but an administrative decision. The respondent should have appealed to the Administrative Court, as required by the statute, or have brought the commission's decision on review.
Held, further, that the policy laid down by the Commission was quite consistent with the its objects and responsibilities as set out in the Act. The courts will not interfere with the exercise of discretion by an administrative functionary unless that discretion was not properly exercised. In this case, the Commission's decision could not be said to be grossly unreasonable or mala fide.
Cases cited:
Cluff Mineral Exploitation (Zim) Ltd v Union Carbide Mgmt Svcs (Pvt) Ltd & Ors 1989 (3) ZLR 338 (S)
Coetzee v Comitis & Ors 2001 (1) SA 1254 (C)
Holland & Ors v Min of the Public Svc 1997 (1) ZLR 186 (S); 1998 (1) SA 389 (ZS)
Kauesa v Min of Home Affairs & Ors 1996 4) SA 865 (NmS)
Mandirwhe v Min of State 1986 (1) ZLR 1 (A); 1981 (1) SA 759 (ZA)
Min of Home Affairs v Bickle & Ors 1983 (2) ZLR 431 (S); 1984 (2) SA 439 (ZS)
Munhumeso & Ors, In re 1994 (1) ZLR 49 (S)
Robinson v Min of Lands 1994 (2) ZLR 171 (S)
ZFC Ltd v Geza 1998 (1) ZLR 137 (S)
Legislation considered:
Constitution of Zimbabwe 1980, s 21
Sports and Recreation Commission Act [Chapter 25:15], ss 2, 19, 20, 29
P Nherere, for the appellant
T Magwaliba, for the respondents
EBRAHIM JA: The appellant is a body corporate established in terms of s 3 of the Sports and Recreation Commission Act [Chapter 25:15] ("the Act"). In terms of s 29(1) of the Act:
"the Commission shall keep and maintain a register of national associations."
Section 2 of the Act defines "national association" in the following terms:
"'national association' means any group or body of persons operating in Zimbabwe and having as its principal object the promotion or organisation on a national basis of —
(a) any particular sport; or
(b) any recreational activity; …"
In terms of subss 29(3) and (4), national associations wishing to be registered with the appellant submit an application to the appellant, and the Board of the appellant is enjoined to consider the application and:
"if it is satisfied —
(a) as to the suitability of the constitution and rules of the national association; and
(b) as to the good faith of the officers and members of the national association; and

(c) that the affairs of the national association will be properly managed;

the Board shall direct the Director-General to cause the national association and its constitution and rules to be registered."

It is not in dispute that the second respondent is a national association in terms of s 2 of the Act. It is common cause that the second respondent applied for registration in terms of s 29(3) of the Act, but that the appellant refused to register the second respondent on the grounds that it has a policy of registering one national association for each sport and that there was, at the relevant time, a registered national association for the sport of wrestling — the Zimbabwe Amateur Wrestlers Association ("ZINAWA"). It held the view that the second respondent could be affiliated to that national association.

The respondents applied to the High Court for an order and obtained the following order:

" 1. That the refusal to register the second applicant as a national association in terms of s 29(4) of the Sports and Recreation Commission Act [Chapter 25:15] is unlawful and violates the applicants' rights of assembly and association in terms of s 21(1) of the Constitution of Zimbabwe.

2. That the respondent shall within seven (7) days of the service of this order on it direct its Director-General to cause the registration of the second applicant as a national association in terms of s 29(4) of the Sports and Recreation Commission Act [Chapter 25:15].

3. That the respondent shall pay the costs of suit."

It was Mr Nherere's submission to this court that the respondents' cause of action was never clear. He referred us to s 32(1) of the Act, which provides:

"Any person who is aggrieved by a decision of the Board or the Commission in terms of this Act may appeal against the decision to the Administrative Court."

It was never clear whether the respondents were seeking a review of the appellant's decision or an order of mandamus. If it was an application for review, no grounds for review were established and none were pleaded. He said that an order of mandamus was out of the question as the appellant had taken a decision. If the respondents were unhappy with that decision, their remedy was to appeal to the Administrative Court, not the High Court.

In my view, these submissions are unassailable. I deal firstly with the constitutional point. The High Court held that the appellant's refusal to register the second respondent was a violation of the respondents' constitutional rights of assembly and association as guaranteed in s 21 of the Constitution of Zimbabwe ("the Constitution").

The essence of the substance of the "freedom of association" protected by the Constitution is to be found s 21(1) thereof. The provision reads:

"Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and

associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests."

Subsection (2) goes on to say:

"The freedom referred to in subs (1) shall include the right not to be compelled to belong to an association."

The appellant submitted that the Declaration of Rights contained in the Constitution has vertical application. It has no horizontal application. It applies only to the State and its

organs. It would clearly apply where the applicant was the Ministry of Sport as government decision. Otherwise had the complaint been raised against a sports club.
The normative content of the "freedom" enshrined in s 21 is, primarily, negative in character. The obligation on the State is not to hinder persons from freely associating. (Compare the legislative provisions impugned in In re Munhemeso & Ors 1994 (1) ZLR 49 (S), 1995 (1) SA 551 (ZS); Holland & Ors v Minister of the Public Service 1997 (1) ZLR 186 (S), 1998 (1) SA 389 (ZS)). The Constitution does not confer on the respondents a positive claim "right" to be registered with the appellant.
I find myself in agreement with the submission that the refusal to register the second respondent and, more particularly, the requirement that the second respondent affiliate to ZINAWA, does not constitute a hindrance of, nor an interference with, the second respondent's right freely to associate. I agree that the respondents can exercise their right to associate without being registered.
On the papers filed in the High Court, it is apparent that their freedom of association has not been interfered with. Interested wrestlers have freely associated to form the first respondent. The first respondent, presumably with other wrestling clubs, has freely associated to form the second respondent.
The respondents' submission is that registration of the second respondent would have meant national formal recognition and enabled the first respondent to participate in national and international wrestling contests.
Mr Nherere countered this submission by arguing that this is an a posteriori argument. What is preventing the first respondent or its members from participating in national and international contests is not the appellant's decision. What is preventing them is whatever law which requires sporting organisations to register with the appellant before they can be considered eligible to compete in any national or international contests. It is that law that the respondents should have been challenging. In In re Munhemeso & Ors supra, the applicants challenged the legislation that required them to obtain a permit, not the refusal to grant them a permit. I am in entire agreement with this submission.

As regards any law that requires associations to be registered, subs (3) of s 21 provides:
" (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision —
(a) in the interests of defence, public safety, public order, public morality or public health;
(b) for the purpose of protecting the rights or freedoms of other persons;
(c) for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations; …"
I am satisfied that the appellant's policy of one national association per sport is not unconstitutional and has not been shown to be so. It cannot be gainsaid that any profession or national sport must be regulated to a certain extent — these regulations can be internal or imposed by statute. Compare the reasoning in Coetzee v Comitis & Ors 2001 (1) SA 1254 (C) at 1269.
There is nothing unreasonable in requiring the clubs in a particular sport all come under one umbrella organisation. Whether that umbrella body is a federation of national associations or a national association of clubs is really a matter of detail. It is perfectly

understandable that what the appellant is attempting to do is to prevent the wrestling organs in this country from being embroiled in a similar situation as pertains in the international boxing world, where there appears to be some three or four world boxing organisation, with the unsuspecting public being none the wiser as to who the true world champion in any particular division is.

It seems to me that the learned judge a quo ought to have had due regard to the presumption of constitutionality. If the appellant's conduct could possibly be reconciled with the relevant constitutional provisions, then the learned judge ought not to have found the appellant's decision to the unconstitutional. See Minister of Home Affairs v Bickle & Ors 1983 (2) ZLR 431 (S); 1984 (2) SA 39 (ZS) at 448F-G; and see also Munhumeso & Ors supra.

There is also merit in Mr Nherere's submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights. See Mandirwhe v Minister of State 1986 (1) ZLR 1 at 6; 1981 (1) SA 759 (ZA) at 764H; Minister of Home Affairs v Bickle & Ors supra at 441; Kauesa v Minister of Home Affairs & Ors 1996 (4) SA 965 (NmS) at 974.

Page 506 of 2001 (2) ZLR 501 (S)

What happened in this case is that the respondents are not challenging any law. They are challenging an administrative decision. The respondents could either have appealed to the Administrative Court in terms of s 32 of the Act, or sought to have the decision reviewed on ordinary review grounds. This they did not do. In other words, they did not exhaust their domestic remedies.

The respondents' counsel raised a point in limine that that the issue which this court is being called upon to adjudicate upon will in effect result in this court substituting its discretion for that of the court a quo and that the issue now raised in this context was not before the court a quo.

In my view, this criticism fails in the light of the contents of the affidavit before the court a quo filed by the appellant, in which is stated:

"What they are apparently asking this Honourable Court to do is to substitute its decision-making powers for those of the respondent."

It was submitted that the expression "decision-making powers" is broad enough to embrace discretionary powers.

In terms of s 19 of the Act, the objects of the appellant include, inter alia:

" (a) to co-ordinate, control, develop and foster the activities of sport and recreation;

(b) to ensure the proper administration of organisation undertaking the promotion of sport and recreation; …"

In terms of s 20, the appellant has the responsibility to generally advise, assist and supervise national associations. In the discharge of its duties, in the interests of facilitating the controlling and supervision of sport, the appellant has deemed it desirable to have the "one national association per sport" policy.

It seems to me that this policy is quite consonant with the objects and responsibilities of the appellant as set out in ss 19 and 20 of the Act.
In considering this policy, it should be borne in mind that s 20(a) of the Act enjoins the appellant:
"… to ensure that membership of every such (registered national) association is open to all clubs and schools bona fide engaging in the activity for which the association is responsible and being prepared to pay its duties and abide by its rules; …"
In line with this requirement, the appellant has ensured that the second respondent may be affiliated to ZINAWA and ZINAWA is quite agreeable to such affiliation.
There is merit in Mr Nherere's submission that the appellant's decision that the first respondent affiliate to ZINAWA, thereby obviating the need to register the second respondent as a national association, was an exercise of discretion clearly within the four corners of the Act, and that the possibility of affiliating to ZINAWA means that the first respondent is not denied the right to compete nationally and internationally.
Page 507 of 2001 (2) ZLR 501 (S)
It is trite that a court will not interfere with the exercise of discretion by an administrative functionary unless it can be shown that the discretion was not properly exercised. In the case of ZFC Ltd v Geza 1998 (1) ZLR 137 (S) at 139, this court, dealing with condonation of the late filing of an application for review, held that:
"Condonation is a matter for the discretion of the hearing judge and the exercise of such a discretion can only be overturned where it is grossly unreasonable, capricious or mala fide."
Also see Cluff Mineral Exploration (Zimbabwe) Ltd v Union Carbide Management Services (Pvt) Ltd & Ors 1989 (3) ZLR 338 (S) at 344-5.
In Robinson v Minister of Lands & Anor 1994 (2) ZLR 171 (S), apropos an appeal from a decision of the Administrative Court based on the exercise of a discretion, it was held that the Supreme Court will interfere with that exercise of a discretion only if it finds the decision was not based on reasonable grounds, that some wrong principle was applied, that matters were taken into account which should not have been considered, or that matters were not considered which should have been taken into account.
In this case, it is my view that the High Court should not have substituted its discretion for that of the appellant without being satisfied that the appellant's decision was grossly unreasonable or mala fide. I am satisfied that the appellant has not breached each of these requirements.
Accordingly, the appeal is allowed with costs and the order of the court a quo is substituted with the following:
"The application is dismissed, with the applicant's costs to be payable by the first and second applicants jointly and severally."
MUCHECHETERE JA: I agree.
MALABA JA: I agree.
Gill, Godlonton & Gerrans, appellant's legal practitioners
Magwaliba, Matutu & Kwirira, respondents' legal practitioners
NDEWERE v ZIMBABWE NEWSPAPERS (1980) LTD & ANOR
2001 (2) ZLR 508 (S)
Division: Supreme Court, Harare
Judges: McNally JA, Ebrahim JA & Sandura JA

Subject Area: Civil appeal
Date: 22 November & 6 December 2001
Judgment Number: S-108-01

Delict — defamation — defamatory nature of words used — article appearing in newspaper — permissible to look at article as a whole and not just at words specified by plaintiff — questioning calibre of employees — necessarily implies that some are of a low calibre — allegation of "warped" thinking — defamatory nature of such allegation
Delict — defamation — defences — fair comment — need to show factual allegations are true — allegations made of one person when should have been made of another — defence unsuccessful

The second respondent wrote an article which appeared in a newspaper published by the first respondent. The article was critical of a decision made by the Zimbabwe Broadcasting Corporation. It alleged that the decision was taken by the Corporation's "in-house lawyer". The article referred to "the calibre of some of the people who make decisions at ZBC" and referred to "the lawyer's strange and warped thinking". The declaration was badly drawn. It did not correctly quote the article, and confused factual allegations and innuendo.

The appellant claimed that the article referred to her, as she was the Corporation's corporate secretary and legal adviser. She stated, though, that the decision which was being criticised was made, not by her, but by the Corporation's Board of Governors, although she had, in her official capacity, signed the press statement in which the decision was announced. The appellant's action was dismissed in the High Court. On appeal:

Held, that where an article in a newspaper is said to be defamatory, it is permissible for the court to ignore the words specified in the declaration and look to the whole article.

Held, further, that to question the calibre of people working for a particular employer necessarily implies that some are of a low calibre. When this was followed by reference to the lawyer's "strange and warped thinking", this necessarily implied that this was meant as an example of the work of a low calibre employee. While the word "strange" may not be regarded as defamatory, to refer to the "strange and warped" thinking of one of those employees is to make a statement calculated to lower that person in the esteem of those who know the remark refers to him or her.

Held, further, that although reference to the appellant was not clearly pleaded, it was sufficiently pleaded.

Held, further, that if fair comment is pleaded, the factual allegations on which it is based must be true. The article alleged that the appellant made the decision which was being criticised. The evidence established that the decision was not made by the appellant, even though she had, in her official capacity, signed the press statement. Where the allegations are made about the plaintiff, and should have been made about someone else, the defence of fair comment must fail.

Cases cited:

Madhimba v Zimbabwe Newspapers (1980) Ltd 1995 (1) ZLR 391 (H)
Moyse & Ors v Mujuru 1998 (2) ZLR 353 (S)
Rogaly v General Imports (Pvt) Ltd 1948 (1) SA 1216 (C)

O C Gutu, for the appellant
L T Biti, for the respondents
McNALLY JA: This appeal concerns a defamation action which was dismissed in the High Court.
The facts are that Mr Maruma wrote an article in The Sunday Mail on 13 September 1998. The Sunday Mail belongs to the first respondent. The article was critical of a decision by the Zimbabwe Broadcasting Corporation (ZBC) to close down Joy TV, an organisation broadcasting on Channel 2 under licence from the ZBC. It alleged that the decision was taken by "the Corporation's in-house lawyer". The appellant (Miss Ndewere) is that person. The article was entitled "Not fair to shut off Joy TV in such an abrupt manner".
The declaration setting out Miss Ndewere's case was badly drawn in relation to the cause of action. The pleader would have done well to consult Amler's Precedents of Pleading. Paragraph 6 of the declaration reads:
" 6. The said article said (of?) and concerning the plaintiff that 'The Zimbabwe Broadcasting Corporation's in-house lawyer acted maliciously in ordering the shutting down of Joy TV on Friday 4 September 1998.'
A copy of the newspaper article is attached hereto and marked Annexure 'A'."
The quotation is entirely incorrect. The article did not say she was malicious; it did not say she "ordered" the shutting down; it did not mention the date. We simply have to ignore the words specified and look to the whole article. This is permissible: see Rogaly v General Imports (Pvt) Ltd 1948 (1) SA 1216 (C).
Paragraph 7 continues as follows:
"The article in question is factually wrong and it was a personal attack on the plaintiff in the following respects —
(a) The article suggested that the decision to switch (off) Joy TV was personally taken by the plaintiff. This was wrong since the said decision was collectively taken by the Zimbabwe Broadcasting Corporation Board of Governors at its meeting on 4 September 1998;
Page 510 of 2001 (2) ZLR 508 (S)
(b) The article suggested that the statement which gave the reason for switching off Joy TV was issued by the plaintiff. This was wrong because the said statement was issued by the chairman of the Zimbabwe Broadcasting Corporation Board of Governors and not by the plaintiff;
(c) The article blamed the plaintiff for her 'strange and warped thinking'. In this respect, the article portrayed the plaintiff as an unreasonable person whose thinking is confused;
(d) The article portrayed the plaintiff as an incompetent in-house lawyer for the Zimbabwe Broadcasting Corporation whose actions were not reasonable and/or rational."
This paragraph confused factual allegations and innuendos. In subpara (a), the verb should be "stated". This subparagraph is alleging that the article is untrue insofar as it blames the plaintiff for the decision. The remaining subparagraphs deal with the innuendo, or the real meaning alleged to be contained in the words used.
Paragraph 8 then reads:

"The said article contained words that are wrongful, unlawful and defamatory of the plaintiff in that they were intended and were understood by the readers of The Sunday Mail newspaper to mean that the plaintiff was a malicious, inefficient and incompetent legal advisor for the Zimbabwe Broadcasting Corporation, her employer."

This is a further expression of the alleged innuendo.

The respondents did not except to the declaration on the ground that it was vague and embarrassing. They asked for further particulars. The first thing they asked was the source of the quoted words in para 6. Perhaps a rhetorical question. It was not answered. It was unanswerable. The pleader should have withdrawn the quotation.

The other question elicited a specification of "such words as" "Joy TV was not the only broadcaster affected by the lawyer's strange and warped thinking". By using the phrase "such words as", the pleader did not limit himself to reliance on those words only.

In consequence of this somewhat haphazard pleading, we are compelled to look at the article as a whole, though it would seem we are limited to the criticism relating to the closure of Joy TV. The relevant passage in the article would seem to be the following:

"To the fair-minded, it sometimes seems as if I am too harsh in my criticism of the calibre of some of the people who make decisions at ZBC. Following ZBC's decision last week to shut down Joy TV it may be time for these people to review their opinions and take my criticism seriously. The decision, according to sources at Pockets Hill, was taken by the Corporation's in-house lawyer …

The reason, according to a statement prepared by the lawyer, was that Joy TV owed ZBC a substantial amount of money in back payments for air-time.

Joy TV was not the only independent broadcaster affected by the lawyer's strange and warped thinking."

WERE THE WORDS DEFAMATORY?

It seems to me that whatever tests one applies — see Moyse & Ors v Mujuru 1998 (2) ZLR 353 (S) at 356F-H — these words were defamatory, at least in terms of the innuendo. The reference to the writer's "criticism of the calibre of some of the people who make decisions at ZBC" necessarily conveys the implication that some of the employees of ZBC are of low calibre. When this is followed by reference to the lawyer's "strange and warped thinking", it is clear that this is meant as an instance of the work of a low calibre employee. "Strange", by itself, might not be regarded as a defamatory description. But add the word "warped" (the Concise Oxford Dictionary defines it as "perverted, bitter or strange") in the context of a reference to the (low) calibre of some employees, and one has a statement calculated to lower the person referred to in the esteem of those who know the remark refers to her.

REFERENCE TO THE PLAINTIFF

The next question is whether the plaintiff has alleged and proved that the words complained of were used of and concerning her. Again this has not been clearly pleaded, but I think it has just sufficiently been pleaded. The plaintiff that she is the "corporate secretary and legal adviser" of the ZBC and later that the article was "of and concerning her".

In her evidence, she asserted what must in any event be obvious, that her friends, relatives, acquaintances and colleagues in the legal and broadcasting worlds would have known that she was the ZBC's "in-house lawyer". In fact, she avers that a number of

them telephoned her about the article. So there was reference to the plaintiff, although only to a limited number of readers.
Accordingly, there is prima facie defamation. It is next necessary to consider the defences. The first of these is —
Fair Comment
The tests for fair comment were set out by Bartlett J in Madhimba v Zimbabwe Newspapers (1980) Ltd 1995 (1) ZLR 391 (H) and approved by this court in Moyse supra at 359D-362C, subject to a re-wording of the fifth test proposed by the learned judge.
I do not think it necessary to go beyond the third test, namely —
The factual allegations on which the comment is based must be true.
The evidence shows clearly that the decision so sharply criticised was not made by her but by the ZBC Board of Governors. This was established by the production of a press statement by the Board to that effect. The fact that she

signed the statement, in her capacity as corporate secretary and legal adviser, is colourless. The statement itself purports to be issued by the chairman of the ZBC Board of Governors. It states, inter alia, that the Board, at its meeting of 4 September 1998, "resolved to withhold services on TV 2 until Joy TV clears its debt". She is not a member of the Board, even in an ex officio capacity, though she usually attends Board meetings as secretary and legal adviser.
Counsel for the respondents sought, as a fall-back position, to establish that the decision was taken by the Board on her advice. Had she conceded that, ot even tried to hide behind client confidentiality, I should have said that the allegation, though not strictly accurate, was substantially and essentially true. And indeed, at the hearing, our impression was that she had not clearly denied her involvement.
A careful subsequent re-reading of her evidence, however, reveals the contrary. This is what was said when she was cross-examined by Miss Miles:
" Q. When did you advise the ZBC that you thought it was in their interest to shut off Joy TV?
A. I did not advise them that it was in their interest to shut off Joy TV but they made that decision.
Q. How did they make that decision, do they have two legal advisers?
A. No, that is the point I am making My Lord, that you can be a legal adviser but it does not mean that an institution will abide by the advice that has been given, they look at other issues.
Q. (By DEVITTIE J) Yes, but did you give that advice?
A. I have said I did not advise ZBC to switch off Joy TV."
The witness then went on to say that after the Board had made the decision to switch off Joy TV, she did advise them to wait for seven days before doing so, because a letter of demand had been written by ZBC's external lawyers giving them seven days to pay.
It seems to me, therefore, that the court below was wrong to hold that the statements in the article were true and that the defence of fair comment was established. Had these statements been made about the ZBC generally, or about the Board of Governors, then I think the defence of fair comment might well have been established. But they were made about the plaintiff, and she was the wrong target. The writer of the article deliberately selected her as the object of his criticism. He selected the wrong person.

It is true, as the learned judge said, that at a later stage she said: "I don't think I am at liberty to disclose what advice I gave". But there is a difference between disclosing what advice you give, and asserting what advice you did not give. She had already clearly said what advice she did not give.
I conclude that the defence of fair comment fails.
Page 513 of 2001 (2) ZLR 508 (S)
It follows that the appeal must succeed. The matter must be remitted to the High Court for the assessment of damages. In the absence of the judge who heard the matter, the parties should consider settling the quantum of damages.
Accordingly, it is ordered as follows:

1. The appeal is allowed with costs.
2. The order of the court a quo is set aside with costs.
3. The matter is remitted to the High Court for the assessment of damages for the plaintiff.

EBRAHIM JA: I agree.
SANDURA JA: I agree.
Gutu & Associates, appellant's legal practitioners
Honey & Blanckenberg, respondents' legal practitioners

S v SIBANDA
2001 (2) ZLR 514 (H)
Division: High Court, Bulawayo
Judges: Cheda J
Subject Area: Bail appeal
Date: 6 December 2001
Judgment Number: HB-50-01

Appeal — notice of — validity of notice — requirement for appellant to comply with rules — failure to do so — notice a nullity — condonation of late noting of appeal — grounds — practitioner's earlier ineptness — not a ground on which to grant condonation

The accused was granted bail by a magistrate. The State's representative at the hearing announced that he would appeal against the grant of bail and the accused remained in custody. The subsequent notice of appeal did not comply with the requirements of r 7 of the High Court (Bail) Rules, nor was a copy served on the magistrate.
Held, that there was no appeal before the court, as the rules had not been complied with, and the magistrate's order stood. The only reason given for an application for condonation was "shortcomings" on the part of the State, which was not a good reason to condone the appellant's failure to comply with the rule. This was a case where the party (the State) would have to suffer for the negligence of its lawyer.
Cases cited:
S v Jack 1990 (2) ZLR 166 (S)
S v McNab 1986 (2) ZLR 280 (S)
S v Ncube 1990 (2) ZLR 303 S)
Saloojee & Anor NNO v Min of Community Development 1965 (2) SA 135 (A)
Legislation considered:
High Court (Bail) Rules 1991 (SI 109 of 1991), r 7

H S M Ushewokunze, for the State
J James, for the accused
CHEDA J: This is an appeal by the Attorney-General against a decision by the magistrate's court for granting bail to the respondent. The facts of the case are that the respondent is a 58 year old man, a self employed mechanic and a member of the Movement for Democratic Change, (hereinafter referred to as MDC) a lawful political organisation in Zimbabwe (an opposition political party). He is facing a charge of being an assessory after the fact to a charge of murder. It is the state's allegation that between 28 October 2001

and 5 November 2001, and on two different occasions, he was approached by members of MDC to conceal a motor vehicle being a Toyota Raider (white in colour) registration No. 733-394R.
On the first occasion, the said motor vehicle, it is alleged, was used in the kidnapping of Limukani Luphahla, a member of Zimbabwe African National Union (Patriotic Front), (hereinafter referred to as Zanu-PF, the ruling party) who was subsequently murdered. On the second occasion, the same motor vehicle was used in the kidnapping of yet another Zanu-PF member Cain Nkala who was also subsequently killed.
The respondent is said to have been approached by his fellow members of MDC to assist in the concealment of the said motor vehicle which he did. On the second occasion a similar request was made and he again carried it out. It was after the second concealment that the said motor vehicle disappeared and has not been found since. This led to his arrest and subsequent appearance in court on 15 November 2001. The court a quo, after listening to submissions by both the State and his legal practitioner, Mr James, granted him bail on the following conditions:

1. That he deposits $3 000 with the Clerk of Court, Bulawayo
2. That he reports twice a week every Mondays at 6.00 a.m. and 6.00 p.m. at Bulawayo Central Police (this condition is not clear as, although the magistrate refers to reporting twice a week, he however, only refers to reporting on Mondays only, which then means that he was to report once a week).
3. That he should not interfere with any potential State witnesses.

At the conclusion of this hearing, the State gave notice to appeal against that decision. The effect of that "appeal" simply nullified the court's ruling, thereby resulting in the respondent being further remanded in custody.
Mr James, for the respondent, raised a point in limine with regards to the filling of notice of appeal by the appellant. He challenged the validity of the notice of appeal filed with this court on 20 November 2001. In terms of r 7 of the High Court (Bail) Rules 1991, a notice of appeal should be filed within 7 days. On 20 November, the Attorney-General filed a notice of appeal and his grounds of appeal read as follows:
"
1. That the magistrate erred in granting the respondent bail in this matter on the facts that were before him;
2. That the magistrate erred in not considering that the motor vehicle used in the commission of the offence has not yet been recovered;
3. That the respondent was the last person to have been seen in possession of the motor vehicle;

4. That the magistrate erred in not considering that the respondent may be harmed if released on bail. This is, moreso in view of the fact that political violence engulfed the environs of the city centre and its surroundings in the aftermath of the death of

Cain Nkala, and that the same motor vehicle used to kidnap him is the same motor vehicle being alluded to in the charges faced by the respondent;

5. In view of the averments made in paragraph 4 above it is clear that harm might befall the respondent in this matter, as reprisals have been threatened and have already taken place in the days immediately preceding the arrest of the respondent and immediately his arrest and incarceration.

6. Wherefore the decision to grant the respondent bail is a misdirection leading to a gross miscarriage of justice and should be quashed."

The rule states as follows:

" (1) An appeal by the Attorney-General in terms of paragraph (b) of subsection (1) of section 111A of the Criminal Procedure and Evidence Act [Chapter 9:07] shall be noted within 7 days after the magistrate granted bail, by filing with the Registrar a written statement setting out —

(a) the name of the person who was granted bail;

(b) (i) the offence with which the person is charged;

(ii) the court by which and the date on which the person was granted bail;

(d) the amount of bail granted and any conditions of the recognisance; and

(e) the grounds on which the Attorney-General seeks the reduction or alteration of bail.

(2) As soon as possible after filing an appeal in terms of subrule (1), the Attorney-General shall cause a copy of the statement referred to in that subrule to be served on —

(a) the person whose bail is the subject of the appeal and, if he is legally represented, on his legal practitioner, and

(b) the magistrate whose decision is the subject of the appeal.

(3) Where practicable, a magistrate on whom a statement has been served in terms of subrule (2) shall file with the Registrar his written comments on appeal at least three hours before the hearing of the appeal.

It is Mr James's contention that the respondent did not comply with the rules and as such there was no appeal before the court. This argument has merit and I agree with Mr James as the law regarding appeals is clear, as will morefully appear below.

The question is whether or not the notice of appeal is defective.

In S v Ncube 1990 (2) ZLR 303 (S) at 304E, where a "notice of appeal" was defective McNally JA had this to say:

"The appeal against conviction was therefore a nullity."

In S v Jack 1990 (2) ZLR 166 (S), McNally JA at 167E stated:

"Rule 22, contained in SI 504 of 1979, requires a notice 'setting out clearly and specifically the grounds of appeal'"

and at 167G he further stated:

"It seems to be widely believed that when a client who has been convicted and sentenced belatedly instructs a legal practitioner, all that is necessary is that a notice of appeal be lodged setting out the most cursory and meaningless ground, with (sometimes) the
Page 517 of 2001 (2) ZLR 514 (H)
promise that proper grounds will be substituted when the record is available. This is not so. A notice of appeal without meaningful grounds is not a notice of appeal. Since it is a nullity it cannot later be amended."

The State, through Mr Ushewokunze, filed a defective notice of appeal on 15 November 2001, defective in that it did not comply with r 7 of the High Court of Zimbabwe (Bail) Rules 1991, which requires that the offence which the person is charged and the amount of bail granted and any conditions of recognisance be stated; and as soon as possible after filing an appeal in terms of subrule (1) the Attorney-General shall cause a copy of the statement referred to in that sub-rule to be served on the magistrate whose decision is the subject of the appeal.

The magistrate whose decision is being appealed against was not served and therefore, this court has not had an opportunity to hear his reasons for arriving at the decision being appealed against.

Mr Ushewokunze does not seem to have realised that he had not complied with the rules when he was served with respondent's reply to appellant's notice of appeal on 23 November 2001. He did nothing about it, only to file an addendum on 28 November wherein he purported to comply with the rules. He was already out of time, therefore his attempt to rectify the procedural error at that stage, required an application for condonation for the late filing of a notice of appeal, which he did not do.

The second point was that he had not served the magistrate, as a result of that up to the date of hearing, the magistrate is therefore deemed to have not been aware of the reasons of the appeal against his decision.

Mr Ushewokunze indeed admitted to his failure to follow the rules and referred to his failure as "shortcomings" on the part of the State. This, if I understood him properly, was an attempt to apply for condonation for failing to comply with the rules. An application for condonation must contain reasons for failure to comply with the requirements. To me, "shortcomings" is not a good reason for the court to condone appellant's failure to comply with rules. The appellant has therefore failed to make out a case to warrant condonation for his failure to comply with the rules. The effect of this therefore is that there was no appeal pending before this court, and that appeal being a nullity it cannot be amended as he attempted to do.

In S v McNab 1986 (2) 280 (S) at 283H-284A, Dumbutshena CJ had this to say:

"It is in the discretion of the court to refuse condonation even in cases in which the respondents do not object to relief being granted to the applicants. In cases in which defective notice of appeals are filed it is in most cases applicant's legal practitioners who are to blame. In such cases the court has to consider whether to punish the applicants for the negligence of their legal practitioner. In my view, clients should in such cases suffer for the negligence of their legal practitioner."

Page 518 of 2001 (2) ZLR 514 (H)

He went further and quoted with approval a view expressed by Steyn CJ in Saloojee & Anor NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141C when he said:

"There is a limit beyond which a litigant cannot escape the result of his attorneys' lack of diligence of insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect of this court."
Dumbutshena CJ went further at 284E and stated:
"I have dealt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice."
As the state has failed to file a notice of appeal, it stands to reason therefore that the respondent's status reverts to the status quo and he is entitled to his release on the terms and conditions set out by the court a quo.
This, in my view, is one of those cases where the principle in McNab's case should apply in light of the manner the state handled this matter. As pointed above, Mr Ushewokunze did not apply for condonation and as such this is a case where a litigant can not escape the result of his attorney's lack of diligence.
The defective notice is as a result of the state's failure to handle this matter with due diligence, in fact Mr Ushewokunze was very inept in this matter and as such the State must suffer for the negligence of the official of the Attorney-General's office as compliance with the rules is mandatory.
This application is therefore dismissed.
Criminal Division of the Attorney-General's Office, appellant's legal practitioners
James, Moyo-Majwabu & Nyoni, respondent's legal practitioners
GOTO v GOTO
2001 (2) ZLR 519 (S)
Division: Supreme Court, Harare
Judges: Chidyausiku ACJ, Muchechetere JA & Sandura JA
Subject Area: Civil appeal
Date: 30 April and 7 December 2001
Judgment Number: S-60-01

Appeal — power of court on appeal — exercise of discretionary power by lower court — interference with — principles
Appeal — point raised for first time on appeal — when appeal court will consider
It is a well-settled principle that the Supreme Court will not interfere with a trial court's exercise of a judicial discretion, such as the very wide discretionary power conferred by s 7 of the Matrimonial Causes Act [Chapter 5:13], unless there has been a misdirection as where the trial court acted upon a wrong principle, or allowed extraneous or irrelevant considerations to influence its discretion, or was mistaken on the facts upon which the discretion was exercised, or failed to take into account some relevant consideration.
Both parties appealed against an order of the High Court for the division of their three pieces of immovable property following their divorce. The High Court awarded the husband the matrimonial home and made provision for the wife to receive 45 per cent of the total value of the properties from the husband or, if he failed to pay it to her, through the sale by public auction of the other two properties. The husband withdrew his appeal but the wife persisted with her cross-appeal, in which for the first time she sought an order that she be awarded one of the two properties that the judge had ordered to be sold. Neither party suggested that the properties should be sold by private treaty.

Held, per Chidyausiku ACJ (Muchechetere JA and Sandura JA dissenting) that although there had not been a misdirection on the part of the trial court, the matter should be remitted for the trial court to reconsider whether the wife should be allocated one or both of the properties, and whether the properties should be sold by auction or to best advantage.
Held, further, per Muchechetere JA and Sandura JA, that the issue of whether the matrimonial assets should be sold by auction or to best advantage had not been raised at any stage of the proceedings by either party, both of whom were represented by counsel, and it was not for the Supreme Court to raise it mero motu.
Held, further, per Sandura JA, that it is the duty of an appellate court to determine whether the trial court came to a correct decision on the case submitted to it, though points of law may be raised for the first time on appeal. The wife's contention that she should be awarded one of the properties was not a legal issue, so in the absence of an amendment to her declaration it was not open to her to claim on appeal something which she did not claim in the trial court.

Cases cited:
Amalgamated Engineering Union v Min of Labour 1949 (3) SA 637 (A)
Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)
Cape Dairy & General Livestock Auctioneers v Sim 1924 AD 167
CIR v Est Crewe & Anor 1943 AD 656
CIR v Est Lazarus & Anor 1958 (1) SA 311 (A)
Cole v Union Govt 1910 AD 263
Collin v Toffie 1944 AD 456
Crouch v Dube 1997 (1) ZLR 427 (S)
Farmers Co-op Soc (Reg) v Berry 1912 AD 343
Home Sites (Pty) Ltd v Senekal 1948 (3) SA 514 (A)
Neethling & Anor, ep 1951 (4) SA 331 (A)
Ngani v Mbanje & Anor; Mbanje & Anor v Ngoni 1987 (2) ZLR 111 (S); 1988 (2) SA 649 (ZS)
R v Zackey 1945 AD 505
Zimbank v Mashamhanda 1995 (2) ZLR 417 (S)
Legislation considered:
Matrimonial Causes Act [Chapter 5:13], s 7
M Foroma, for the appellant
A Mugandiwa, for the respondent
CHIDYAUSIKU ACJ: Mrs Goto, who I shall refer to in this appeal as the appellant, sued her husband Mr Goto, who I shall refer to hereinafter as the respondent. Initially, it was Mr Goto who appealed against the judgment of the court a quo and Mrs Goto cross-appealed. Mr Goto withdrew his appeal but Mrs Goto persisted with her cross-appeal. It is more convenient to refer to her as the appellant although she originally was the respondent. Mrs Goto sued her husband in the High Court for divorce, custody of the minor children of the marriage and the division of the matrimonial assets in such a way that she would receive an equal share of the value of the assets. The divorce was not contested and was granted on an uncontested basis. The custody of the minor children of the marriage and the distribution of the matrimonial assets was hotly contested. Custody

of the minor children of the marriage was awarded to the respondent.* The reasoning leading to that award and the award of custody to the respondent are simply unassailable. Indeed there is no appeal against that part of the judgment. After a careful consideration of the evidence the court a quo also came to the conclusion that this was a classic case where the party who gets custody of the minor children of the marriage should be awarded the matrimonial home, the main consideration in this regard being that not only did the minor children of the marriage live

in the matrimonial home but also some of the major children live there. It is always desirable to maintain the family unit whenever possible. That decision is not being challenged. None of the parties is aggrieved by it. The only source of grievance leading to this appeal seems to flow from the way in which the immovable property was distributed between the parties. In this regard, the court a quo, after a careful and meticulous analysis of the evidence, concluded that the three immovable matrimonial properties were acquired by the joint effort of the parties. I entirely agree with this conclusion. On the basis of this conclusion, the learned trial judge proceeded to make the following order in respect of the immovable property:

" 4.(a) The Registrar of the High Court shall appoint a valuer, being a member of the Estate Agents Council of Zimbabwe or some other person as the Registrar deems fit to value stand No. 9420-26 Patrenda Way, Glenview, stand No. 4753 Glenview 3 and stand No. 8145 Kuwadzana 1;

(b) The defendant shall retain, if he so wishes, the matrimonial home as his sole and exclusive property subject to subpara (c);

(c) Of the value of the immovable properties referred to in subpara (a) the plaintiff be and is hereby awarded 45 per cent thereof and the defendant 55 per cent thereof. Twenty per centum (20 per cent) of the value of the property determined in terms of subpara (a) shall be paid by the defendant within fourteen days of the date of the submission of the valuation report to the Registrar and the balance within four months from the same date;

(d) In the event that the defendant fails or neglects to pay to the plaintiff within four months from the date on which the valuation report is submitted to the Registrar, her entitlement in terms of subpara (c) hereof, the properties referred to in subpara (a) shall be sold by public auction and the proceeds thereof distributed in accordance with subpara (c) hereof.

5. The plaintiff be and is hereby awarded one of the two grave sites at Warren Hills Cemetery.

6. The costs of the valuation shall be paid by the defendant and he may recover them from the proceeds of the sale of the immovable properties or one half thereof from the plaintiff upon her receiving her share as in this order made."

The respondent initially appealed against the award to the appellant of 45 per cent of the value of the immovable assets. In the notice of appeal, he maintained that the court a quo had erred in awarding the appellant 45 per cent of the value of the matrimonial assets. He was of the view that she should have been awarded a lesser per centage. That appeal has since been abandoned. The appellant was also aggrieved with some aspects of the above order and she cross-appealed. She cross-appealed on the following grounds:

“ 1. The learned judge though correct in his order granting 45 per cent of the value of immovable assets as valued to the respondent, erred in granting the appellant the option to take over all buildings and pay the respondent her 45 per cent in money.

2. The learned judge ought to have distributed the immovable assets as valued between the parties with an appropriate cash adjustment provision to achieve the 45 per cent for the respondent and 55 per cent for the appellant sharing ratio.

Page 522 of 2001 (2) ZLR 519 (S)

WHEREFORE the respondent prays that the judgment of the court a quo be altered in order to achieve such a distribution of the assets as will result in an award to the respondent of one of the commercial buildings with an appropriate cash adjustment in order to achieve the 45 per cent to 55 per cent sharing ratio.”

The three immovable properties consist of the matrimonial home being the house at No. 9420-26 Patrenda Way and two commercial properties, one in Glenview 3 and the other in Kuwadzana 1. The commercial properties are either utilised by the respondent for business purposes or rented out to generate income.

Mr Foroma’s main submission was that, the court a quo having found that the above immovable property was acquired through the joint effort of the parties, it erred in granting the respondent the option to give the appellant her share of the matrimonial assets in monetary value. The court a quo, it was argued, ought to have made an order awarding each party at least one immovable property subject to valuation so as to ensure that the remaining immovable property would be taken by the respondent with appropriate cash adjustments in order to achieve the 55 per cent to 45 per cent proportion which the court had ruled to be appropriate proportion for sharing the immovable property between the parties. It was further argued that as the respondent was awarded the matrimonial home the appellant should have been awarded the commercial property at Kuwadzana. In respect of the Glenview commercial property, it was submitted that the respondent should be given the option of taking it over and paying the appellant the cash adjustment to achieve her 45 per cent in value. In the event of the respondent not being willing to exercise the above option the option should be given to the appellant. If none of the parties wishes to exercise that option, then the Glenview commercial property be sold by private treaty and the proceeds shared so as to achieve the 45 per cent to 55 per cent proportion already determined, bearing in mind the value each of the parties will have got from the respective immovable property awarded.

In the light of the court a quo’s finding that the immovable assets were acquired by the joint effort of the parties, I have no doubt, in my mind, that the distribution proposed by Mr Foroma is eminently fairer and more equitable than that made by the court a quo. The proposed distribution leaves each of the parties with at least one of the three immovable assets as compared to the court a quo’s distribution that virtually awards all the three immovable properties to one party, the respondent.

In making the award that it did, the court a quo was exercising the discretionary power conferred on it by s 7 of the Matrimonial Causes Act [Chapter 5:13]. That discretion is very wide. It has not been submitted that that discretion was not properly exercised. Indeed there would be no basis for

Page 523 of 2001 (2) ZLR 519 (S)

such a submission. Mr Foroma’s proposed distribution was never submitted to the court a quo. I have no doubt that if that proposed distribution had been made to the court a quo it

would have been given very serious consideration. In fact, if anything, the appellant's pleadings are misleading if she sought, in the court a quo, to have the immovable assets distributed as now proposed by Mr Foroma. In particular in the declaration the appellant prayed for the distribution of the matrimonial assets in such a way that the appellant "is awarded an equal share of the value of the assets".

In his written final address to the court, Mr Foroma made the following submission:

"In the circumstances of this case, the court is urged to order that the property be shared equally and bearing in mind that there is no dispute regarding movable assets the method proposed by the plaintiff (appellant) where assets are not sold but distributed such that she is given the matrimonial home with appropriate cash adjustments on valuation of all assets with the defendant (respondent) the two business premises is a very sensible approach to dealing with the matrimonial assets."

What Mr Foroma failed to address is what should happen in the event of his client failing, as she indeed failed, to get the matrimonial home.

It is a well settled principle that this court will not interfere with the exercise of judicial discretion of a trial court unless there has been a misdirection such as:

(a) the court having acted upon a wrong principle; or

(b) the court having allowed extraneous or irrelevant considerations to influence its discretion; or

(c) the court being mistaken on the facts upon which the discretion was exercised; or

(d) failure to take into account some relevant consideration.

The following cases are authority for the above proposition: Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S); Crouch v Dube 1997 (1) ZLR 427 (S); Zimbank v Mashamhanda 1995 (2) ZLR 417 (S); Farmers Co-op Soc (Reg) v Berry 1912 AD 343.

Mr Foroma has not been able to point out any misdirection and I do not believe there is any.

On this basis alone, I would have had no hesitation in dismissing the appeal. However, there is one aspect of the above court order which is a cause for some concern and would justify this court in referring this matter back to the trial court for further consideration of the distribution of the assets.

The order of the court a quo provides that the immovable matrimonial property, including the matrimonial home, be sold by auction in the event of the respondent failing to raise, within a period of 40 days, sufficient money to pay the appellant 45 per cent of the value of the immovable property. This order could have serious financial implications for both parties. In my

view, they should have been heard on the issue of the sale by auction before the order was made. A sale by auction is a forced sale that fetches forced sale prices which are usually far below market value or sales by private treaty. The probabilities are that if the immovable property is sold by auction both parties stand to lose, including the minor children who may end up without a home. It is quite conceivable, having regard to prevailing property prices, for the three properties to be valued at $4 million dollars and for the respondent to fail to raise the $1.8 million within the 40 days prescribed in the order, in which event, the property will be sold by auction at prices far below market value. The parties will not be able to buy similar property at market price with the

proceeds. In my view, in situations such as this, the property should be sold to the best advantage and the sale by auction should be an option of last resort.

For the foregoing reasons, I am satisfied that the best way to proceed in this matter is to remit it to the trial court for the reconsideration of the following two issues:

(1) whether or not the appellant should be allocated, as part of her share of 45 per cent, one or both of the commercial stands;

(2) whether, in the event of a sale of any of the matrimonial assets, such sale should be by auction or to best advantage.

In order to enable the court a quo to do the above, it is necessary to amend its original order by the deletion of paras 4(c) and (d) of that order. Accordingly, that order is so amended. It shall be open to the court to hear such evidence or submissions on those two issues as it deems fit.

In my view, neither party is deserving of any award of costs.

In the result, the matter is remitted to the trial court on the above conditions and there will be no order as to costs.

MUCHECHETERE JA: I have read the judgment prepared by the learned Acting Chief Justice but respectfully disagree with the order he has given at the end of the judgment. In my view, the first issue in the order, that is, the reconsideration of whether or not the respondent should be allocated, as part of her share of 45 per cent, one or both of the commercial stands, is not in accord with the reasoning and conclusion the learned Acting Chief Justice arrived in his judgment. I say that because the learned Acting Chief Justice properly restated the principle that this court will not interfere with the exercise of the judicial discretion of a trial court except in the circumstances he listed. He then went on to apply the principle to the above issue and came to the conclusion that the learned judge in the court a quo exercised his discretion properly in the circumstances. The learned Acting Chief Justice's views in point one are in paras 6 and 7 of his judgment.

Further, it is admitted by the respondent that the distribution made by the learned trial judge is fair. In my view, that should be the end of the matter. The fact that this court might consider that there could be a fairer distribution is, in my view, no reason to seek to interfere with a discretion which was properly exercised.

In connection with the second issue of the order, that is, a consideration of whether in the event of a sale of any of the matrimonial assets such sale should be by auction or to best advantage, my view is that as this issue was not raised by either party at any time during the proceedings, either before the court a quo or before this court, it is not for this court to seek to raise it. The parties were, in both courts, represented by counsel and they would have been alive to the implication of the order of the court. This court must, in the circumstances, assume that both parties are comfortable that the fears expressed by the learned Acting Chief Justice on this issue are most unlikely to occur because both parties will, out of self-interest, act in a manner that will enhance the value of the properties.

In the result, I would dismiss the appeal with costs.

SANDURA JA: In this matter, the appellant ("Leonard") withdrew his appeal, but the respondent ("Mercy") persisted with her cross-appeal against the judgment of the High Court which, in a divorce action instituted by her against Leonard, awarded her, inter alia, 45 per cent of the value of the three immovable properties owned by Leonard. The

properties comprised the matrimonial home in Glenview Township, commercial premises in the same township, and commercial premises in Kuwadzana Township.
It was common cause that all the three properties were acquired during the subsistence of the parties' marriage.
In her cross-appeal, Mercy contended that she should have been awarded one of the three immovable properties. Her grounds of appeal and prayer read as follows:
" 1. The learned judge though correct in his order granting 45 per cent of the value of immovable assets as valued to the respondent, erred in granting the appellant the option to take over all buildings and pay the respondent her 45 per cent in money.
2. The learned judge ought to have distributed the immovable assets as valued between the parties with an appropriate cash adjustment provision to achieve the 45 per cent for the respondent and 55 per cent for the appellant sharing ratio.
WHEREFORE the respondent prays that the judgment of the court a quo be altered in order to achieve such a distribution of the assets as will result in an award to the respondent of one of the commercial buildings with an appropriate cash adjustment in order to achieve the 45 per cent to 55 per cent sharing ratio."
Mercy's argument has found favour with Chidyausiku ACJ who is of
Page 526 of 2001 (2) ZLR 519 (S)
the view that the matter should be remitted to the trial court for it to reconsider the following issues:
" 1. Whether or not the appellant (Mercy) should be allocated, as part of her share of 45 per cent one or both of the commercial stands;
2. Whether in the event of a sale of any of the matrimonial assets such sale should be by auction or to best advantage."
I have read the judgment prepared by Chidyausiku ACJ, but respectfully disagree with the decision to remit the matter to the trial court. In my view, the cross-appeal should be dismissed with costs. I say so for two reasons. The first is that in her declaration Mercy sought an order granting her an equal share of the value of the matrimonial assets. She did not seek the order which she now seeks in the cross-appeal. The second reason is that there is no basis for interfering with the order made by the trial judge, an order made in the exercise of his discretion.
I now wish to deal with both reasons in detail.
In her declaration, Mercy sought, inter alia, a "distribution of the matrimonial asserts (sic) in such a way that the plaintiff is awarded an equal share of the value of the said asserts (sic)".
It is clear from her declaration that what she sought was an order granting her 50 per cent of the value of the assets, and not an order granting her a particular property. However, in his final address to the court a quo, Mercy's counsel submitted that Mercy be "given the matrimonial home with appropriate cash adjustments on valuation of all assets". This was contrary to the order sought in the declaration, and no application for the amendment of the declaration had been made. In any event, her counsel did not submit that the assets be distributed in the manner now suggested in the cross-appeal. The suggested distribution is, therefore, being raised for the first time on appeal.
It is a well-established principle that the duty of an appellate court is to determine whether the trial court came to a correct conclusion on the case submitted to it.

In Cole v Government of the Union of South Africa 1910 AD 263 at 272, Innes J (as he then was) said:
"The duty of an appellate tribunal is to ascertain whether the court below came to a correct conclusion on the case submitted to it."
As the learned judge observed, the only qualification to that principle is that a point of law may be raised for the first time on appeal if the point is covered by the pleadings, and its consideration on appeal does not involve any unfairness to the party against whom it is raised. However, in my view, the qualification does not apply to the present case because the issue raised by Mercy in the cross-appeal is not a question of law.

Subsequently, in Commissioner For Inland Revenue v Estate Crewe & Anor 1943 AD 656, Watermeyer CJ, dealing with a new argument raised on appeal for the first time, said the following at 682:
"This contention, however, raised an entirely new case; it was not a contention put forward in the special case nor was it considered in the trial court, and it cannot now be considered, and I express no opinion upon it."
The above passage was quoted with approval by Schreiner JA in Commissioner For Inland Revenue v Lazarus' Estate & Anor 1958 (1) SA 311 (A) at 320G.
Finally, in Ngani v Mbanje & Anor; Mbanje & Anor v Ngani 1987 (2) ZLR 111 (S) at 114D-F; 1988 (2) SA 649 (ZS) at 651C-E, this court quoted with approval the passage in Cole's case supra, which I have set out above.
In the circumstances, it is not open to Mercy, in the absence of an amendment to her declaration, to claim on appeal something which she did not claim in the court a quo. On that basis alone, her cross-appeal should be dismissed with costs.
However, I will deal with the second reason why the cross-appeal should be dismissed with costs. In the distribution of the matrimonial assets, the learned judge in the court a quo exercised his discretion. It has been stated in a number of cases that an appellate court should not substitute its discretion for that of the trial court unless there are special reasons for do so. In R v Zackey 1945 AD 505, Greenberg JA commented on the discretion of the judicial officer presiding at the trial and said the following at 511 in fine to 512:
"The decision under the section is one within the discretion of the judicial officer presiding at the trial and should, therefore, not be interfered with except on the ground that he has not exercised a judicial discretion … As has often been said, an appeal court should not substitute its discretion for his and should therefore not interfere merely on the ground that it would have come to a different conclusion."
The principle in Zackey's case supra, was applied in Ex p Neethling & Ors 1951 (4) SA 331 (A) at 335B-E.
More recently, in our own jurisdiction, this court set out the circumstances in which an appeal court would interfere with the exercise of a judicial discretion in Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S) at 62-63A as follows:
"The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first — one which clearly involved the exercise of a judicial discretion — may only be interfered with on limited grounds … These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a

different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant

matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

In my view, once one accepts, as Chidyausiku ACJ does, that the trial judge properly exercised his discretion, cadit quaestio. That is the end of the matter, and this court cannot, interfere with the judge's decision. On this basis too, the cross-appeal should be dismissed with costs.

However, Chidyausiku ACJ justifies interference with the trial judge's order as follows:

"… there is one aspect of the above court order which is a cause for some concern and would justify this court in referring this matter back to the trial court for further consideration of the distribution of the assets. The order of the court a quo provides that the immovable matrimonial property including the matrimonial home be sold by auction in the event of the respondent (Leonard) failing to raise, within a period of 40 days, sufficient money to pay the appellant (Mercy) 45 per cent of the value of the immovable property. This order could have serious financial implications for both parties. In my view, they should have been heard on the issue of the sale by auction before the order was made."

In this regard, it is pertinent to note that Leonard did not appeal against that part of the order of the court a quo which sets out the circumstances in which the immovable properties would be sold by public auction. The same applies to Mercy. She too did not raise the issue in her cross-appeal. This is significant, bearing in mind the fact that both Leonard and Mercy were legally represented both in the court a quo and in this court. However, the question which arises is whether this court can raise such an issue mero motu. I do not think so.

Dealing with the power of a court of appeal to raise issues mero motu, the learned authors of Herbstein & van Winsen's The Civil Practice of the Supreme Court of South Africa 4 ed, have this to say at p 914:

"The court of appeal may take notice of the illegality of a contract mero motu and arrest the proceedings. Similarly, if a third party not before the court may be affected by the order the court is asked to make, the court of appeal may mero motu raise the question of non-joinder, and either set aside the order of the lower court and refer the matter back for the joinder of the necessary party or make some other appropriate order."

See: Cape Dairy & General Livestock Auctioneers v Sim 1924 AD 167; Collin v Toffie 1944 AD 456; Home Sites (Pty) Ltd v Senekal 1948 (3) SA 514 (A); and Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A).

Thus, whilst a court of appeal may raise mero motu issues such as illegality and the non-joinder of a third party who would be affected by the order it is asked to make, there is no basis on which the issue of the sale of

the immovable properties by public auction in this case can be raised by this court mero motu.
Incidentally, the order of the court a quo provided that the immovable properties would be sold by public auction if Leonard failed to pay to Mercy her 45 per cent share of the value of the immovable properties within a period of four months from the date on which the valuation report was submitted to the Registrar of the High Court. It seems to me that a period of four months is long enough for Leonard to raise the necessary funds by means of a mortgage bond or mortgage bonds, or by selling one or two of the properties by private treaty. That is perhaps why there was no appeal or cross-appeal on the issue of the sale of the properties by public auction.
In the circumstances, there is no basis on which this matter should be remitted to the trial court.
The cross-appeal is, therefore, dismissed with costs.
Wintertons, appellant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners
HATENDI v HATENDI
2001 (2) ZLR 530 (S)
Division: Supreme Court, Harare
Judges: Chidyausiku CJ, Sandura JA & Ziyambi JA
Subject Area: Civil appeal
Date: 11 October and 7 December 2001
Judgment Number: S-107-01

Family law — husband and wife — divorce — division of property following divorce — discretion of court — when discretion will be interfered with on appeal
The division of matrimonial assets on divorce in terms of s 7(1) of the Matrimonial Causes Act [Chapter 5:13] may involve factors that are not easily quantifiable in money terms and is a theoretical exercise in which the courts are given a wide discretion. That discretion cannot be interfered with on appeal unless the trial court exercised the discretion erroneously, or if it acted on a wrong principle, or if it allowed extraneous or irrelevant matters to guide or affect it, or if it mistook the facts or did not take into account some relevant consideration.
Cases cited:
Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)
Ncube v Ncube 1993 (1) ZLR 39 (S)
Neethling & Ors, Ex p 1951 (4) SA 331 (A)
Legislation considered:
Matrimonial Causes Act [Chapter 5:13], s 7(1)
Appellant in person
Miss E K Mushore, for the respondent
SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the respondent was granted a decree of divorce and 35 percent of the value of the matrimonial home ("the property"). The appeal is only in respect of the division of the property.
The background facts are as follows. The appellant ("Baxter") and the respondent ("Silvia") were married to each other in 1993 in terms of the Marriage Act [Chapter

5:11]. Baxter had two children from a previous marriage, and so did Silvia. At the time of the marriage, Silvia was a State Registered Nurse employed at Watershed School, and Baxter was a farmer at Pinewood Farm ("the farm") in Marondera district. Silvia owned a flat in Harare ("the flat"), and Baxter owned the farm and two undeveloped stands

in Marondera. On each stand, he was building a house, and the house which later became the matrimonial home had been built up to window level. Both parties had considerable household goods and personal effects. After the marriage, Silvia moved from Watershed School to the farm where Baxter lived, although she continued working at Watershed School. However, the couple later moved to one of the two stands in Marondera which then became the matrimonial home.

Although the marriage was initially a happy one, irreconcilable differences subsequently developed, culminating in Silvia's departure from the matrimonial home in April 1999, by which time both the farm and the flat had been sold. There were no children born of the marriage. After leaving the matrimonial home, Silvia issued a summons against Baxter claiming a decree of divorce, 45 percent of the value of the matrimonial home, the right to retain the movable property already in her custody, and costs of suit.

When the matter came up for trial, the only bone of contention was the matrimonial home. Silvia contended that she was entitled to 45 percent of its value, and estimated the value of the property to be $1 700 000. On the other hand, Baxter who estimated the value of the property to be $700 000, contended that Silvia's contribution to the construction of the property was only $35 000, and that that was all that she was entitled to.

The learned judge in the court a quo accepted Silvia's estimate of the value of the property and awarded her 35 percent of that value. Aggrieved by that decision, Baxter appealed to this court.

The issue which arises in this appeal is whether the decision by the learned trial judge to award to Silvia 35 percent of the value of the property was wrong. In considering that issue, it is necessary to bear in mind that one of the facts which the court must take into account in making an order for the division, apportionment or distribution of matrimonial assets, in terms of s 7(1) of the Matrimonial Causes Act [Chapter 5:13], is the direct or indirect contribution made by each spouse to the acquisition of the property.

In the present case, Silvia's evidence was that she made a very substantial contribution to the construction of the matrimonial home. That contribution was both direct and indirect. Her evidence on the direct contribution was summed up by the learned trial judge as follows:

"At the time of the marriage, the plaintiff (Silvia) was in receipt of a monthly income of $5 000 which increased by between 20 percent to 40 percent per year until it reached $15 000 per month which she currently earns …

She used part of her salary for building the matrimonial home. Some of the money she paid direct to the defendant (Baxter) who bought the building materials or paid for the labour. More directly, she paid for part of the ceiling, (and) plastering of part of the house. She bought paint for the house and paid for the painting of part of it. She paid for stone

paving [and] rhino setting; for brick gloss, cement and other expenses. She bought the jetmaster for the fireplace.
To prove her direct contribution, she produced proof that she borrowed from her employer $20 000, [and] from the bank, Standard Chartered, the following amounts: $4 200 (30.1.95), $6 000 (26.11.96), $19 400 (29.4.98), and $25 000 (29.4.99); total: about $55 000 between 1995 and 1999.
She sold her flat for $260 000, and apart from buying herself a replacement motor vehicle for $62 000 and some household goods, she applied the proceeds to the construction of the house."
That, in my view, is an accurate summary of Silvia's evidence of her direct contribution.
The learned judge summed up Silvia's evidence on her indirect contribution to the construction of the matrimonial home as follows:
"She has been employed as a State Registered Nurse at Watershed School. She enjoyed the benefit that her children did not in practical terms pay school fees both at Watershed and at Diggleford, a sister school. Under this benefit, she would pay only $200 per month to cover tuition and boarding fees for her child at Watershed, and $145 per month to cover the same at Diggleford.
The actual fees in 1995 were $16 000 per term at Watershed and $8 000 per term at Diggleford. The savings were obvious and considerable. The fees at Watershed have over the years increased. They now stand at $36 000 per term. The same goes for Diggleford, from $8 000 to $15 000 per term.
Having agreed at the time of marriage that they would treat their respective children in the same manner, [Silvia] applied to have the tuition and boarding fees facility extended to [Baxter's] children. Her employer approved the application. She said that [Baxter's] children enjoyed this facility for five years.
[Baxter] obviously saved considerably in respect of fees for his children. [Silvia] estimated that in the first year the benefit accruing to [Baxter's] children was about $60 000 per child, increasing to about $120 000 per child per year in the last year. She said the two of them made up for any shortfalls although she paid the bulk of those shortfalls by way of a deduction from her salary. Her salary slips were proof of this fact.
She bought uniforms for all the four children and birthday presents among other things.
In respect of household expenses, she said that she paid for the food, [and] occasionally paid for electricity and water. She paid the house helper or maid, and paid for the fuel for the family cars. Later she paid the maintenance expenses for her vehicle and his."
Again, that correctly sums up Silvia's evidence of her indirect contribution.
Commenting on Silvia's evidence as a whole, the learned judge said:
"In cross-examination she was not challenged on most of her evidence … The overall picture was that the cross-examination did not dent her evidence at all. Her credibility remained intact. She was articulate, forthright and candid with the court."
Having carefully perused the record of the proceedings in the court a quo I wish to say that I am in complete agreement with the observations made by the learned trial judge. Silvia gave her evidence very well, and was not shaken in cross-examination. In addition, I agree that Silvia's contribution to the

construction of the property was substantial and that she was, therefore, entitled to a significant share of the value of the property.

After a very careful analysis of the evidence before him, the learned judge in the court a quo concluded that Silvia was entitled to 35 percent of the value of the property. In reaching that conclusion, he exercised a judicial discretion. That discretion is a wide one. As Korsah JA said in Ncube v Ncube 1993 (1) ZLR 39 (S) at 40H-41A, whilst referring to the facts which the court should take into account in the division of matrimonial assets in terms of s 7(1) of the Matrimonial Causes Act [Chapter 5:13]:

"The above provisions, to my mind, do no more than furnish broad guidelines for deciding what is a fair order in all the circumstances, adjusting property rights if need be, under the wide powers bestowed on the court. The determination of the strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money, is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion."

I am in complete agreement with the views expressed by the learned Judge of Appeal.

In the present case, as the determination of Silvia's share clearly involved the exercise of a judicial discretion, it can only be interfered with on limited grounds. Those grounds were set out by Gubbay CJ in Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S) at 62F-63A as follows:

"The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first — one which clearly involved the exercise of a judicial discretion — may only be interfered with on limited grounds. See Farmers' Co-operative Society (Reg.) v Berry 1912 AD 343 at 350. 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."

Similar views were expressed by Greenberg JA in Ex p Neethling & Ors 1951 (4) SA 331 (A) at 335D-G where the learned Judge of Appeal said:

"Can it be said in the present case that the court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons? I can see no ground for answering this question in the affirmative. The court fully considered the question and came to a decision on grounds that were relevant and of considerable force. Indeed, I am far from satisfied that I would not have come to the same conclusion … but even if this court was satisfied that it would have granted the application that in itself would not be ground for interference."

In my view, the above comments apply to the present case with equal force.

Applying the principles set out above to the facts of the present case, I am satisfied that there is no basis whatsoever for interfering with the determination made by the learned trial judge. No error was made by him in exercising his discretion, and no valid criticism was made by the appellant of the manner in which the learned judge exercised that

discretion. In addition, the learned judge did not act upon a wrong principle, nor did he allow extraneous or irrelevant matters to guide or affect him. On the contrary, in concluding that Silvia was entitled to 35 percent of the value of the matrimonial home, he took into account all the relevant facts. In particular, he took into account Silvia's direct and indirect contributions to the construction of the property.

As already indicated, Silvia's evidence was not seriously challenged by the appellant. In my view, that evidence clearly established that Silvia was entitled to a substantial share of the value of the property.

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Wintertons, respondent's legal practitioners

NHARI v PUBLIC SERVICE COMMISSION

2001 (2) ZLR 535 (S)

Division: Supreme Court, Harare

Judges: McNally JA, Ebrahim JA & Sandura JA

Subject Area: Civil appeal

Date: 20 November & 7 December 2001

Judgment Number: S-113-01

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 16(1) — protection against acquisition without compensation — Public Service (Disciplinary) Regulations 1992 — s 23 — provision that where discharge of public servant is set aside by court, public servant reverts to being suspended and not entitled to salary and benefits — such provision unconstitutional

The appellant, a public servant, had been the subject of disciplinary proceedings. He had been discharged from the public service. His discharge was set aside by the Supreme Court and the matter remitted for hearing by a different magistrate. In terms s 23 of the Public Service (Disciplinary) Regulations 1992, the regulations then in force, if a public servant had been suspended and then discharged and the discharge was set aside by a competent court, he would then revert to being suspended. Suspension would deprive him of his salary and benefits. The appellant sought an order from the High Court, setting aside his suspension and directing the respondent to pay him his full salary and benefits from the date of discharge until the date on which his discharge was set aside. The High Court refused the application but ordered that the misconduct hearing be held within 30 days.

On appeal, it was argued on his behalf that when the Supreme Court set aside the suspension, it restored the status quo ante, and he was entitled to his salary and benefits. The effect of the Regulations was to deprive him of his salary and benefits, and contravened s 16(1) of the Constitution because it deprived him of his property without compensation.

Held, that the section did contravene s 16(1) of the Constitution, because it deprived him of his property without compensation, and thus was of no force or effect.

Legislation considered:

Public Service (Disciplinary) Regulations 1992 (SI 65 of 1992), ss 9 & 23

L T Biti, for the appellant

G M Zengeni, for the respondent

SANDURA JA: This is an appeal against the refusal by the High Court to set aside the appellant's suspension from the Public Service and order that he be paid his full salary and benefits from 12 June 1997 to 14 June 1999.

The relevant facts are as follows. In 1979, the appellant joined the

Department of Immigration as a junior employee. Thereafter, in 1991 he became the deputy chief immigration officer, after steadily rising through the ranks.

However, in 1995, the chief immigration officer suspected that the appellant had committed several acts of misconduct in the course of his duties. As a result, in 1996 the appellant was relieved of his post as deputy chief immigration officer and was transferred to the department of national archives in order to facilitate the investigation of the allegations of misconduct.

Thereafter, an inquiry, presided over by a provincial magistrate, was convened in terms of the Public Service (Disciplinary) Regulations 1992, published in SI 65 of 1992 ("the 1992 Regulations"), and the result was that the appellant was found guilty of certain acts of misconduct.

After consideration of the result of the inquiry, the respondent discharged the appellant from the Public Service with effect from 12 June 1997. However, the appellant's discharge was set aside by this court on 14 June 1999, but the charges of misconduct brought against the appellant were remitted for rehearing by a different provincial magistrate. See Nhari v Public Service Commission 1999 (1) ZLR 513 (S).

Subsequently, in a letter dated 22 September 1999, which was later corrected by one dated 30 September 1999, the respondent informed the appellant that in terms of s 23 of the 1992 Regulations he was suspended from the Public Service with effect from 12 June 1997, and that in terms of s 9(2)(a)(ii) of the same Regulations, he would be paid a suspension allowance equal to half of his gross salary per month. The appellant was also informed that the misconduct charges levelled against him would in due course be heard afresh by a different provincial magistrate as directed by this court.

Dissatisfied with the decision to suspend him and pay him half of his salary, the appellant filed a court application in the High Court seeking, inter alia, an order setting aside his suspension and directing the respondent to pay him his full salary and benefits, together with interest on the arrears thereof, from 12 June 1997 to 14 June 1999.

The learned judge in the court a quo refused to grant the order sought by the appellant but granted a mandamus directing that the hearing of the misconduct charges against the appellant was to commence within thirty days after the date of his order.

Aggrieved by the learned judge's refusal to grant the order sought, the appellant appealed to this court.

Before dealing with the issues raised by the appellant, I would like to set out the relevant sections of the 1992 Regulations. They are ss 9 and 23.

Section 9, which deals with the effect of a suspension order, reads as follows:

" (1) Where a member has been suspended from service, he shall —

(a) not attend at his place of work or carry out any duty unless directed to do so by the head of department, head of Ministry or the Commission, as the case may be, in which case he shall carry out such duties as directed;

(b) not be entitled to his salary in respect of the period of suspension unless ordered to carry out other duties, in which case he shall continue to receive his salary;
(c) …
(2) Notwithstanding paragraph (b) of subsection (1) —
(a) where the nature of the allegations do not (sic) involve financial prejudice to the Government, and the member is not directed to carry out other duties, the member shall be entitled to an allowance for up to three months, equal to half his gross salary per month, pending the determination of the allegation:
Provided that the Commission may authorise the payment of an allowance —
(i) where the allegation involves financial prejudice to the Government; or
(ii) for a period in excess of three months where the allegation has not been determined; or
(iii) in excess of the amount referred to in this paragraph;
(b) …"

It was common cause that the allegations of misconduct levelled against the appellant did not involve any financial prejudice to the government.

Section 23 of the 1992 Regulations reads as follows:

"Notwithstanding anything to the contrary contained in these regulations but subject to an order of a competent court, where the discharge of a member is set aside by a competent court, a member, who had been suspended from service prior to the said discharge, shall revert to being suspended and where he had not been suspended shall be deemed suspended with effect from the date of discharge until the matter is finalised by the Commission."

At this stage, I think that I should mention that the 1992 Regulations were repealed by the Public Service Regulations 2000, which were published in SI 1 of 2000 and which came into effect on 3 January 2000 ("the 2000 Regulations").

Section 66(4) of the 2000 Regulations reads as follows:

"In the case of a member against whom an allegation of misconduct is made and in respect of whom any action has been taken prior to the date of commencement of these regulations in terms of the Public Service (Disciplinary) Regulations, 1992, any such action shall be deemed to have been taken in terms of the corresponding provision of these regulations, and the provisions of these regulations shall thereafter apply accordingly."

I think that it was common cause that the 2000 Regulations did not have any provision corresponding to s 23 of the 1992 Regulations. What that means will be dealt with later in this judgment.

However, in order to complete the picture, I should add that subs (4) of s 66

of the 2000 Regulations was later repealed by s 23 of the Public Service (Amendment) Regulations 2001 (No. 1) ("the 2001 Regulations") published in SI 58A of 2001, which came into force on 23 February 2001. A new subs (4) was substituted and it reads as follows:

" (4) In the case of a member against whom an allegation of misconduct is made and in respect of whom any action has been taken prior to the date of commencement of these regulations in terms of the Public Service (Disciplinary) Regulations 1992, any such action shall be continued in terms of these regulations."

Although s 23 of the 1992 Regulations was repealed on 3 January 2000 it is relevant in the determination of this appeal because the appellant's suspension with effect from 12 June 1997 was based on the provisions of that section.

The argument advanced on behalf of the appellant was as follows. On 14 June 1997, this court set aside the appellant's discharge from the Public Service. The court, therefore, restored the status quo ante, which he occupied before he was discharged. As he was in receipt of his full salary and benefits before the discharge, the order issued by this court on 14 June 1997 meant that the appellant should be paid his full salary and benefits from 12 June 1997 to 14 June 1999. To the extent that s 23 of the 1992 Regulations brought about his suspension from the Public Service which deprived him of the salary and benefits which he had already earned, it contravened s 16(1) of the Constitution of Zimbabwe because it was a deprivation of his property without compensation. The section is, therefore, of no force or effect and the appellant is entitled to his full salary and benefits from 12 June 1997 to 14 June 1999.

I find this argument very persuasive indeed.

It was common cause that prior to 12 June 1997 the appellant was in receipt of his full salary and benefits. He had not been suspended from the Public Service. When this court set aside his discharge, he immediately reverted to his former position, and would have been paid his full salary and benefits from 12 June 1997 to 14 June 1999 had it not been for the provisions in s 23 of the 1992 Regulations.

The section provided that where the discharge of a member was set aside by a competent court and the member had not been suspended prior to his discharge, he was deemed suspended with effect from the date of the discharge until the matter was finalised by the Commission. As a result of this provision, the member automatically lost the right to his earned salary and benefits in terms of s 9(1)(b) of the same Regulations.

Undoubtedly, the section deprived the appellant of his salary and benefits already earned by and due to him for the period extending from 12 June 1997 to 14 June 1999. I am satisfied that this was a deprivation of his

property without compensation, in contravention of s 16(1) of the Constitution.

In my view, s 23 of the 1992 Regulations was, therefore, unconstitutional and of no force or effect.

It therefore follows that, the appellant's suspension from the Public Service with effect from 12 June 1997 falls away, and that he is entitled to his full salary and benefits from 12 June 1997 to 14 June 1999.

Finally, I wish to make two points. The first is that even if the appellant's suspension in terms of s 23 of the 1992 Regulations had been valid, it would have lapsed on 3 January 2000 when the 2000 Regulations, which repealed the 1992 Regulations, came into force; and the second point is that the legislature must have realised that s 23 of the 1992 Regulations was unconstitutional. That is why, in my view, it repealed the section and did not include any corresponding provision in the 2000 Regulations.

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

" 1. The applicant's suspension with effect from 12 June 1997 is set aside with costs.

2. The respondent shall pay to the applicant his full salary and benefits from 12 June 1997 to 14 June 1999, together with interest at the prescribed rate on the arrears thereof, taking into account what has already been paid to him in respect of that period."

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

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

MACHAFA v MUKUMIRWA

2001 (2) ZLR 540 (H)

Division: High Court, Harare

Judges: Smith J

Subject Area: Civil action

Date: 12 December 2001

Judgment Number: HH-214-01

Family law — husband and wife — customary marriage — termination — distribution of property — share in matrimonial home — wife attempting to mislead court as to her contribution towards home — reduction of her share by court accordingly

The parties entered into a customary marriage but separated fifteen years and six children later. The husband remarried and for many years lived with his new wife in the parties' matrimonial home, which was registered in his name, until his former wife (the defendant) returned to live there as well. In a dispute over who was entitled to the house, the defendant filed papers falsely alleging that she was entitled to a 96 per cent share in it because her late father had donated it to her. She later abandoned that allegation and claimed a half share. The parties agreed that because of the marriage the defendant was entitled to a share in the house, even though she had not contributed financially towards it, and they asked the court to determine what her share should be.

Held, that because the house was registered in the plaintiffís name and he had been living in it with his present wife for many years, the defendant would not have been entitled to a half-share in the house. She would have been awarded a one-third share had she not tried to mislead the court; but the court showed its displeasure at that attempt by reducing her share to 20 per cent.

Cases cited:

Chapeyama v Matende & Anor 1999 (1) ZLR 534 (H)

Chapeyama v Matende & Anor 2000 (2) ZLR 356 (S)

Jengwa v Jengwa 1999 (2) ZLR 121 (H)

Kambarami v Kambarami HH-66-99

Muteke v Muteke S-88-94

Ncube v Ncube 1993 (1) ZLR 39 (S)

Sithole v Sithole & Anor HB-14-94

SMITH J: The parties entered into a customary marriage in 1970 and separated in 1985. There were six children born of the marriage. The matrimonial home is at stand No. 11400, Zengeza 4, Chitungwiza. It was acquired during their marriage and is registered in the name of the plaintiff. The defendant returned to the matrimonial home in 1998 and has remained there ever since. The plaintiff instituted an action seeking an order

for the eviction of the defendant from the matrimonial home. The defendant opposed the plaintiff's claim. Initially, she filed a counter-claim based on the averment that she was entitled to a share in the house because the parties had been customarily married. Later, she filed an amendment thereto, seeking an order that she be declared entitled to a 96 per cent share of the matrimonial home because it had been donated to her by her late father. At the pre-trial conference, it was agreed that, by virtue of their customary marriage, each party was entitled to a share of the matrimonial property. The only dispute was as to the equitable distribution thereof. The plaintiff considered that he should be entitled to 85 per cent and the defendant 15 per cent whereas the defendant considered that each should be awarded 50 per cent. Apparently, the parties had earlier agreed that the plaintiff was entitled to 70 per cent and the defendant to 30 per cent, but that agreement was not confirmed because the defendant would not agree to the rider that the plaintiff would pay her for her 30 per cent share and retain the house. She objected to him and his new wife staying at the matrimonial home whilst she was forced to leave it.

In order to avoid the expense of further litigation, the parties agreed to submit two issues for determination. They are:

1. What is the most just and equitable share for each party from the matrimonial house known as stand No. 11400, Zengeza 4, Chitungwiza?
2. Should plaintiff buy defendant out of the matrimonial home or else the property should be sold to a third party, given the history surrounding the acquisition of same?

On behalf of the plaintiff, the following submissions were made. The parties entered into their customary union in 1970 and separated in 1985. The defendant left the matrimonial home in 1985, taking their six children. She only returned in 1998 and refused to leave the home, much to the consternation of the plaintiff and his new wife who were living in the house. Initially, the defendant claimed that she was entitled to a share in the house by virtue of the customary marriage. She then filed a notice of amendment stating that she would base her claim on an allegation that the property had been donated to her by her late father. However, that allegation was completely false. The property was registered in the plaintiff's name and therefore it is presumed that he is the one who has a real right therein — see Ncube v Ncube 1993 (1) ZLR 39 (S) at 46C. The defendant never made any financial or direct contributions to the acquisition and development of the property. Therefore she was entitled to not more than 15 per cent of the property. In Kambarami v Kambarami HH-66-99, where the customary union of the parties had subsisted for 38 years, but they were separated for 21 of those years, the wife had been awarded a third share in the matrimonial home. In Jengwa v Jengwa 1999 (2) ZLR 121 (H), the wife was likewise

awarded a third share. In Chapeyama v Matende & Anor 2000 (2) ZLR 356 (S), the Supreme Court confirmed the decision of the High Court awarding the wife a half share but that was because of the contributions made by the wife.

The following submissions were made on behalf of the defendant. The parties had stayed together for almost 28 years but there had been "bouts of differences" after which the defendant would depart for her parental home but then she would return to the matrimonial home. Although the defendant had claimed 96 per cent of the matrimonial home because the property had been donated to her by her late father, she abandoned that

claim. She had agreed to accept a 30 per cent share but that was on condition that she could buy out the plaintiff's share and keep the house. At the pre-trial conference, the defendant had insisted that she wanted a 50 per cent share. In Sithole v Sithole & Anor HB-14-94, the court held that even if a wife has made only indirect contributions, she cannot leave empty-handed merely because she did not contribute financially. The court went on to hold that the wife was entitled to a 40 per cent share. In Muteke v Muteke S-88-94, the wife was awarded a substantial share of the matrimonial property, even though her contributions were solely as a housewife. Chinhengo J, in Chapeyama v Matende & Anor 1999 (1) ZLR 534 (H) awarded the wife, in an unregistered customary-law marriage, a 40 per cent share but remarked that where quantification of a wife's contribution was difficult, the parties should each be awarded a 50 per cent share. His decision was confirmed on appeal — see Chapeyama v Matende & Anor 2000 (2) ZLR 356 (S). In this case, it would be just to award the defendant a 50 per cent share and order that the matrimonial property be sold and the net proceeds shared.

The parties are agreed that the division of the matrimonial home should be done in accordance with the principles enunciated by Chinhengo J in the Chapeyama case supra, as confirmed on appeal by the Supreme Court. In that case, Chinhengo J found that the rights in the matrimonial home were jointly held by the parties and that, after the wife had left the matrimonial home, the husband had effected certain improvements thereto. He also found that the wife had contributed financially towards the acquisition of the matrimonial assets. He awarded the wife a 40 per cent share in the matrimonial home. In Jengwa v Jengwa supra, Gillespie J at p 133-4 said:

"Normally the appellant, with a marriage of such long-standing, would be reasonably confident of achieving a substantial apportionment. The birth and upbringing of children, the home-making, the income-producing endeavours, would entitle her to expect something close to parity with the husband. That expectation suffers in this case. It suffers from the long-standing estrangement. It suffers from the polygamous way of life and the contributions and expectations of other women and children. The diminution in expectation, still, is mitigated by the subsequent reconciliation and birth of children. The effect of the

estrangement is diminished by the late solemnisation of the marriage. The claim to an apportionment is reinforced by the respondent's reliance upon the wife for a house to live in, and for some financial assistance, while the new house was being built. The expectations of other wives are at least partially, if not wholly, catered for by the existence of an acknowledged windfall forming no part of the apportionment."

He then went on to award the wife a third share in the house.

In this case, the parties were living together for a substantial period. After being married in 1970, they first separated in 1985 after the defendant had given birth to six children. During the period they were living together, the defendant made little direct financial contribution towards the maintenance of the family. However, she was responsible for the upbringing of the children and running the home. At one stage, the defendant was prepared to accept a 30 per cent share but that was on condition the plaintiff sold the property because she could not bear the thought of the plaintiff's present wife living in the house.

The defendant amended her pleadings to substitute a new claim on the matrimonial home. Instead of relying on the customary marriage, she based her claim on the allegation that her late father had donated the property to her. She gave the names of three witnesses who would testify to that effect. That claim was clearly bogus and was not persisted in. However, the court must show its displeasure at the attempt by the defendant to mislead the court by making false allegations. Having regard to the fact that the plaintiff has been living in the matrimonial home with his present wife for many years and that the property is registered in his name, clearly the defendant is not entitled to a half share in the house. I would have been prepared to award her a third share, had she not made an attempt to mislead the court.

In all the circumstances, I consider that an equitable share for her would be 20 per cent. Since the matrimonial home is registered in the name of the plaintiff and he and his wife are living there, I consider that he should be entitled to buy her out. The defendant will have to vacate the property.

It is ordered that:

1. If the parties cannot, within 10 days of the date of this order, agree on the value of stand No. 11400, Zengeza 4, Chitungwiza (hereinafter referred to as "the Property"), they shall appoint a valuator to do so.
2. If the parties cannot, within 10 days, agree on a valuator, the Registrar shall appoint a valuator.
3. The valuator shall, as soon as possible, value the property and, if there are any outstanding obligations, shall indicate the net value thereof.
4. The costs of valuation shall be paid by the plaintiff.

5. The plaintiff shall pay to the defendant, before 30 April 2002, 20 per cent of the net value of the property less the costs of valuation.
6. If the plaintiff fails to comply with para 5, the Property shall be sold and the plaintiff shall pay the defendant 20 per cent of the net proceeds less the costs of valuation.

For the removal of doubt, it is declared that the costs of valuation are to be deducted from the net value or the net proceeds, as the case may be, and the defendant is to receive 20 per cent of the resultant amount.

Tuso & Partners, plaintiff's legal practitioners
Hungwe & Partners, defendant's legal practitioners

MALAMBO v CITY OF HARARE
2001 (2) ZLR 545 (H)
Division: High Court, Harare
Judges: Smith J
Subject Area: Civil application
Date: 10 October & 12 December 2001
Judgment Number: HH-217-01

Local government — municipal council — employee — dismissal of — may only be discharged by executive council
Practice and procedure — application — review — failure to comply with requirements of High Court Rules — effect — application a nullity

The applicant was employed by the Harare City Council as senior electrical engineer. He was suspended from duty and appeared before the Council's Inquiries Committee on allegations of insider trading. The committee found him guilty as charged and he was dismissed from his employment by the Commission that was then acting in place of the elected Council. He instituted an application for review, alleging that the Council had not followed the provisions of the Urban Councils Act [Chapter 29:15] in dismissing him. He alleged that only the Executive Committee of the Council, not the Commission, had the power to discharge him.

The application was opposed mainly on procedural grounds. It was contended by the respondent that the application was submitted out of time; that there had been no application for condonation; that there had been no short and clear statement of the grounds on which review was sought, as required by r 257 of the High Court Rules; and that the chairman of the Inquiries Committee had not been cited as a party; and that the applicant had not exhausted his domestic remedies. It was also argued that the power to dismiss an employee was not limited to the Executive Committee. It could also be exercised by the council itself or, in the case of Harare, by the Commission.

Held, that the application was fatally defective. It was filed out of time; an interested party was not cited; and there was no compliance with r 257. There have been enough warnings by the courts about the consequences of failure to comply with the rule. Because of these defects, the application would have to be dismissed.

Held, further, that an employee of a municipal council may be discharged by the executive committee of the council, but it may not do so unless the council itself has approved the discharge.

Cases cited:

Chataira v ZESA S-83-01

Dandazi v Wankie Colliery Co Ltd 2001 (2) ZLR 298 (H)

Mudziri v City of Harare HH-83-01

Muranda v City of Harare HH-172-01

Sithole v City of Harare HH-55-01

Page 546 of 2001 (2) ZLR 545 (H)

Legislation considered:

Urban Councils Act [Chapter 29:15], ss 141 & 145

G E Mandizha, for the applicant

L T Biti, for the respondent

SMITH J: The applicant (hereinafter referred to as "Malambo") was an employee of the respondent, being the Senior Electrical Engineer responsible for public lighting. He was suspended from duty on 26 April 2000. It was alleged that he was involved in insider trading. On 9 August 2000, he appeared before the Inquiries Committee of the respondent. That committee found him guilty as charged and, by letter dated 24 October 2000, he was dismissed with effect from 27 April. He appealed to the Review Board but there was no response to his appeal. He then instituted this application for review on the following grounds. The respondent had not followed the provisions of the Urban Councils Act [Chapter 29:15] (hereinafter referred to as "Chapter 29:15") in suspending him or in subsequently dismissing him and the decision to dismiss him was grossly unreasonable. The respondent opposed the application. The respondent took the preliminary points that: (a) the grounds for review were not stated clearly and succinctly

as required by the rules of court; (b) the application was filed hopelessly out of time.
The opposing affidavit was deposed to by the Chamber Secretary. She confirmed that Malambo was a junior employee, for the purposes of Chapter 29:15, and had been suspended by his Head of Department. The report of the Inquiries Committee was forwarded in terms of s 141(5) of Chapter 29:15, to the Commission which was acting in place of the City Council. The Commission met on 25 October, considered the report and decided to terminate Malambo's contract of employment. She was not aware that Malambo had referred his case to the Review Board. He could have approached a labour relations officer if he was aggrieved at the delay in getting a response from the Review Board or else applied to the courts for a mandamus or even written to her or to the Town Clerk. It was not the Human Resources and Management Systems Committee that had suspended Malambo. She denied that the decision to dismiss Malambo was unreasonable. The report of the Inquiries Committee showed that Malambo had committed misdemeanours.
Mr Mandizha submitted that the opposing affidavit was not properly before the court because the deponent is the Chamber Secretary and is not automatically authorised to depose to affidavits on behalf of the respondent. The court should consider the application, even though Malambo had not exhausted his domestic remedies, because the Review Board had refused to hear his application. Even though the application was out of time, Malambo

had shown, from the beginning, that he was opposed to the irregularities that had occurred and on the merits, he had a strong case. The action of the Director of Works in dismissing Malambo and the meeting of the Commission to consider the report of the Inquiries Committee were both irregular. In terms of s 141 (6)(b)(ii) of Chapter 29:15, it is the Executive Committee that should have exercised those functions, and not the Commission. As regards the merits, it is clear that Malambo did not do anything that was inconsistent with his conditions of service as an employee of the respondent.
Mr Biti submitted, firstly that the matter was lis pendens, as Malambo had filed an application (HC-4943-01) on 22 May which sought relief similar to that sought in this application but the former application was defective. It had not yet been withdrawn. Secondly, he submitted that the application was out of time since Malambo had been dismissed on 26 October 2000 and this application was not filed until 28 June 2001, some 8 months later. There is no application for condonation of the late filing. Furthermore, there has been a failure to comply with r 257 of the High Court Rules 1971, as there is no short and clear statement of the grounds on which Malambo relies. Additionally, there has been a failure to comply with Order 33 of the Rules, in that the chairman of the Inquiries Committee should have been cited as a party. Mr Biti also submitted that Malambo should have exhausted his domestic remedies before approaching the courts. He should have submitted his appeal to the Review Board through his Head of Department and not direct. When he heard nothing after a reasonable period, he should have followed up the matter and not just sat back and done nothing. Finally, Mr Biti argued that the power to dismiss an employee was not limited to the Executive Committee: it could also be exercised by the Council, or in this case the Commission, of the respondent: see Sithole v City of Harare HH-55-01. As regards the merits of the case,

the evidence set out in the report of the Inquiries Committee showed that Malambo's conduct was undesirable.

It is clear that the application suffers from a number of defects. Firstly, it was filed out of time and there is no application for condonation of the late filing. Secondly, Malambo failed to cite the Chairman of the Inquiries Committee as a party. Malambo is alleging that the decision of the Inquiries Committee is grossly unreasonable. Therefore, the Chairman of that body should have been cited: see Order 33 r 258 of the High Court Rules. Failure to cite an interested party is a fatal defect. Thirdly, there was no compliance with r 257 of the High Court Rules 1971, as the application did not give a short and clear statement of the grounds relied. That rule has, in the past, been more honoured in the breach than in the observance. The time has now come

when the court must insist that r 257 be observed and complied with. In Dandazi v Wankie Colliery Co Ltd HH-180-01,* Chinhengo J referred to r 257 and went on to say:

"This is not an idle requirement. It was inserted in the rules of the court so that both the respondent and the presiding judicial officer are clearly informed of the grounds. This is necessary in order to ensure that the respondent will be able to decide whether or not to oppose the application and, if he does decide to oppose it, to file an affidavit and papers which deal adequately with the grounds spelt out. It also assists the presiding judicial officer in identifying the issues which need to be resolved. Often, in review applications, all sorts of grounds are lumped together in the body of the founding affidavit, making it very difficult for the presiding judicial officer to determine the grounds upon which the matter is to be reviewed. If, as in the present case, the grounds are based on bias and gross irregularity in the proceedings, thten those grounds must be stated in the application. A failure to do so, as was the case in this application, is a failure to comply with Order 33 r 257. The consequence of that failure is that the matter is not properly before the court and the applicant should not be heard. It is important therefore that legal practitioners comply with r 257 in every case if they are to avoid the embarrassment of the matter being struck off for failure to comply with the rules of this court: see the warning given in Minister of Labour & Ors v PEN Transport (Pvt) Ltd 1989 (1) ZLR 293 (S) at 295G-296D."

Similar views were expressed by Ebrahim JA in Chataira v ZESA S-83-01 at p6 of the cyclostyled judgment, where he said:

"As regards the failure on the part of Chataira to comply with r 257 of the High Court Rules, the learned judge said:

'It seems to me that such non-compliance would constitute good grounds for dismissing this application. Rule 257 requires that an application to bring proceedings under review shall state shortly and clearly the grounds upon which the appellant seeks to have the proceeding set aside or corrected and the exact relief prayed for. In the PEN Transport, Mushaishi and Marumahoko cases referred to earlier, the courts clearly stated that failure to comply with r 257 constituted a fatal flaw. Despite those warnings, legal practitioners still fail to comply with the rule. The time has surely come to any enough is enough and to dismiss the defective applications without considering the merits.'

In my view, these observations are beyond criticism."

Enough warnings have been given to members of the legal profession about the consequences of failure to observe the rules of court and especially r 257.

I agree, too, with the submission by Mr Biti that Malambo should have made greater efforts to exhaust his domestic remedies. He should have followed up his appeal to the Review Board and not merely acquiesced in the apparent refusal of the Review Board to hear his appeal. If he had done something positive he would, no doubt, have found that his papers were not properly before the Review Board. He should follow up this aspect and request that his appeal be heard. In Mudzuri v City of Harare HH-83-01,
Page 549 of 2001 (2) ZLR 545 (H)
Blackie J did point out that the court has a discretion to hear applications of this sort, even if the applicant has not exhausted his domestic remedies. However, because of the defects in the application, I feel that it would not be proper to exercise that discretion. Because of these defects, the application must be dismissed. Before doing so, however, I feel constrained to comment on certain aspects of the opposing papers of the respondent. The first issue relates to the opposing affidavit which was deposed to by the Chamber Secretary. In her affidavit, she did not aver that she had been duly authorised by the City Council or the Commission, or by the Town Clerk, to depose to the opposing affidavit. She merely stated that, as Chamber Secretary she was duly authorised to make the affidavit on behalf of the respondent. In my view, she is not so authorised merely because she is Chamber Secretary. Sections 136 and 137 of Chapter 29:15 provide for the functions of the Town Clerk and the Chamber Secretary respectively. The Town Clerk is responsible for the proper administration of the council, managing its operations and property and supervising and controlling the activities of the employees of the council. The Chamber Secretary, on the other hand, is responsible for preparing and distributing minutes of the proceedings of the council and agendas and notices of meetings and any other duties which may be assigned to him or her, from time to time, by the Town Clerk. It seems to me, therefore, that whilst the Town Clerk may, by virtue of the office he holds, depose to an affidavit relating to the affairs of the council without stating that he is duly authorised thereto, the Chamber Secretary does not have similar capacity to do so. The functions of the office of Chamber Secretary are very circumscribed and therefore, generally speaking, the Chamber Secretary would have to be duly authorised by the Town Clerk, or by the council or its executive committee, to depose to an affidavit on behalf of the council.
The second issue I want to advert to is the capacity of the Commission or a council to discharge an employee other than a senior official. The power to discharge such employees is conferred by s 145 of Chapter 29:15. Subsection (2) thereof provides that, subject to the conditions of service of the employee concerned, a council or, in the case of a municipal council, the executive committee of the council, may at any time discharge an employee, other than a senior official, on specified grounds. Subsection (3) then provides that an executive committee shall not discharge an employee unless the council has approved the discharge. In Sithole v City of Harare HH-55-01, the court held that, in the case of a municipal council, both the council and the executive committee had the power to terminate the employment of an employee. The grounds for so holding were that, since an executive committee is a
Page 550 of 2001 (2) ZLR 545 (H)
committee of the council, which exercises powers delegated to it by the council, it stands to reason that what the executive committee can do the council can also do, unless the Act specifically provides otherwise. However, in Mudzuri v City of Harare supra, at p 5

of the cyclostyled judgment, Blackie J held that Chapter 29:15 requires that once an employee has been suspended, the Town Clerk must report that to the executive committee at the earliest opportunity; the executive committee must authorise the inquiry and consider the results of the inquiry; the executive committee must determine on the dismissal of the person charged.

The views expressed by Blackie J were quoted with approval by Chiweshe J in Muranda v City of Harare HH-172-01. Chiweshe J referred to the relevant provisions of s 141 of Chapter 29:15. Subsection (1) provides as follows:

" (1) Employees of a council, other than senior officials, shall be appointed —

(a) in the case of a municipal council, by the executive committee on the recommendation of the town clerk;

(b) in the case of a town council, by the council on the recommendation of the secretary."

Subsection (2) of s 141 then provides that a council or, in the case of a municipal council, the executive committee of the council, may discharge an employee. Finally, subs (3) of s 141 provides that an executive committee of a council shall not discharge an employee unless the council has approved the discharge. The learned judge then said that, in the case before him, the point in contention was whether the respondent, which was the City of Harare, in dismissing the applicant without a recommendation from the executive committee, acted lawfully within its powers. He considered Sithole's case supra, and said:

"With respect, the provisions of the enabling Act are clear and positive. It is not the power of the council to discharge employees that is at stake. What the Act is concerned with is the manner in which the respondent goes about doing so. The respondent must abide by the provisions of the enabling Act which, in my view, are peremptory. Should any council in the respondent's position seek to discharge an employee then it is incumbent upon it to follow the procedures laid down in the Act. Failure to do so renders the discharge a nullity."

I agree with the views expressed by Chiweshe J. The legislature took great pains to distinguish between municipalities and towns and to specify that, in the case of a municipality, it was the executive committee which hired and fired staff, whereas in the case of a town it was the council that did so.

The application is dismissed with costs.

Chigwanda Legal Practitioners, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

GRASPEAK INVESTMENTS (PVT) LTD v DELTA OPERATIONS (PVT) LTD & ANOR

2001 (2) ZLR 551 (H)

Division: High Court, Harare

Judges: Ndou J

Subject Area: Urgent civil application

Date: 11 & 13 December 2001

Judgment Number: HH-223-01

Practice and procedure — application — urgent application — good faith and full disclosure of all material facts — need for — consequences of applicant's dishonesty and concealment of material facts

An urgent application is an exception to the audi alteram partem rule and, as such, the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that a matter is urgent. Although the court has a discretion to grant or dismiss an application even where there is material non-disclosure, the court should discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosures, mala fides or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a sign of its disapproval of mala fides or dishonesty on the part of litigants.

Cases cited:

Barclays Bank v Giles 1931 TPD 9
Becker v Noel (Practice Note) [1971] 1 WLR 803; [1971] 2 All ER 1248 (CA)
de Jager v Heilbron & Ors 1947 (2) SA 415 (W)
du Plessis & Anor v Tzerefos 1979 (4) SA 819 (O)
Hall & Anor v Heyns & Ors 1991 (1) SA 381 (C)
Hillman Bros (West Rand) (Pty) Ltd v van den Heuvel 1937 WLD 41
Leydsdorp & Pietersburg (Tvl) Ests Ltd, In Re 1903 TS 254
Logie's Est v Priest 1926 AD 312
Madikiza & Uxor, Ex p 1995 (4) SA 433 (Tk)
Mauerberger v Mauerberger 1948 (3) SA 562 (C)
Power NO v Bieber & Ors 1955 (1) SA 491 (W)
Peru, Republic of v Dreyfus Bros & Co (1886) 55 LTR 802
Schlesinger v Schlesinger 1979 (4) SA 342 (W)
Venter v van Graan 1929 TPD 435

J Musimbe, for the applicant
G Chikumbirike, for the first respondent

NDOU J: This is an urgent application which seeks an order in the following terms:

"TERMS OF THE FINAL ORDER SOUGHT:

That the respondents show cause to this Honourable Court why a final order should not be made in the following terms:

1. That pending the determination of the interpleader proceedings to be instituted by the second respondent, the respondents and all persons claiming through them be and are hereby interdicted from removing or selling applicant's property or any property from Shop No. 1 and 2 Antrim Building, Stamolly Drive, Avondale, Harare.
2. That if the property mentioned in paragraph 1 of this order has already been removed the second respondent be and is hereby ordered to return and restore possession of the same to the applicant pending the determination of the interpleader proceedings referred to in paragraph 1 of this order.
3. That the respondents and all persons claiming through them be and are hereby interdicted from evicting the applicant's officials from shops No. 1 and 2 Antrim Building, Stamolly Drive, Avondale, Harare without a court order or unlawfully

interfering with the applicant's business operations at the said premises. That the respondents pay the costs of this suit on an Attorney and Client scale.

TERMS OF THE INTERIM RELIEF GRANTED

That pending the determination of this matter, the applicant is granted the following relief —

1. That paragraphs 1 and 3 of the final order sought shall operate as a temporary order."

The facts are that on 2 January 2001 the applicant entered into a lease agreement with Mrs R Hassam in respect of shop Nos. 1 and 2 Lot B of Block 15C Antrim Building, Stamolly Drive, Avondale, Harare. At the said premises, the applicant is operating a bar and is trading under the style "Faffy's Bar".

Prior to the applicant's occupation of the premises, the previous tenant was one Georgina Majange. She was also operating a bar and trading as Faffy's Bar. She terminated her lease sometime in December 2000. The first respondent obtained a judgment against the said Georgina Majange in this court in case No. HC 17587/99. In a nutshell, the applicant's claim is that its property was wrongly attached for the debt of the previous tenant. In support of the application, one Prosper Matewa, in the founding affidavit avers:

Paragraph 5 —

"When Georgina Majange vacated the premises after terminating her lease agreement she took away all her property and presently she does not have any property on the said premises. All the movable property presently on the premises belong to the applicant. The company is not associated in any way with Georgina Majange" (the emphasis is mine).

Paragraph 9 —

"As I have already indicated Georgina Majange no longer has any property at the premises. The applicant is trading as Faffy's bar and the applicant's property cannot be legally removed to satisfy another person's debt" (the emphasis is mine).

In the certificate of urgency, the applicant's legal practitioner also states:

Paragraph 6 —

Page 553 of 2001 (2) ZLR 551 (H)

"The judgment debtor, namely Georgina Majange has no property on the said premises and the applicant's property cannot be attached and removed for another person's debt" (the emphasis is mine).

The first respondent opposed this urgent application. In opposing the case the first respondent produced a "Memorandum of Agreement of Lease of Commercial Premises". The applicant's legal practitioner submits that the existence of this agreement was not brought to his attention by his client or counsel for the first respondent. This agreement states:

"Made and entered into between

PROSPER MATEWA

and

GEORGINA MAJANGE

Trading in partnership as Faffy's Off Sales Bottle Store

(Herein referred to as the Landlord on the one part)

and

CASPER GARISE

(Herein referred to as the Tenant)
Lease of Premises:
The landlord leases to the Tenant the premises called No. 3 Antrim Building, Avondale Shopping Centre, Harare
Period
The lease shall commence upon the signing of this Agreement and shall continue for a period of one year terminating on 31 December 2001 …
Notices
The landlord chooses as its domicilium citandi No. 16 Argyle Road, Avondale, Harare ... Dates at Harare this 25th day of January, 2001" (the emphasis is mine).
Annexure D, the liquor licence under which applicant carries out its liquor business was "renewed" on 4 January 2001. This is not a fresh application. In other words, Faffy's Bar renewed its liquor licence with Mr Prosper Matewa as its approved manager. If Ms Georgina Majange and Mr Prosper Matewa were not acting in partnership the question of renewal would not arise.
From the passages cited above, it is evident that Prosper Matewa, representing the applicant, deliberately concealed the fact that Georgina Majange is a partner in the applicant. In paras 5 and 9 he deliberately tried to mislead the court by giving the impression that the applicant "is not associated in any way with Georgina Majange". If the court had chosen the ex parte route, which is competent, it would have been misled by the applicant. In applications of this nature, utmost good faith must be shown by the applicant: see Barclays Bank v Giles 1931 TPD 9; Hillman Brothers (West Rand) (Pty) Ltd v van den Heuvel 1937 WLD 41; de Jager v Heilbron

& Ors 1947 (2) SA 415 (W) and In re Leydsdorp and Pietersburg (Transvaal) Estates Ltd (in liquidation) 1903 TS 254. It is the duty of the applicant to lay all relevant facts before the court, so that it may have full knowledge of all the circumstances of the case before making its order: see Estate Logie v Priest 1926 AD 312 at 323. In The Civil Practice of the Supreme Court of South Africa by Herbstein & van Winsen 4 ed on p 367 it is stated:
"Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his right, when he is bringing an ex parte application in which relief is claimed against another party he must made full disclosure of all the material facts that might affect the granting or otherwise of an order ex parte. The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court, so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order ort not, the court has a discretion to set the order aside with costs on the ground of non-disclosure."
See also Mauerberger v Mauerberger 1948 (3) SA 562 (C); Power NO v Bieber & Ors 1955 (1) SA 491 (W); Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 353C-D and Hall & Anor v Heyns & Ors 1991 (1) SA 381 (C) at 397B-C; du Plessis & Anor v Tzerefos 1979 (4) SA 819 (O) at 825B-C; Ex p Madikiza et Uxor 1995 (4) SA 433 (Tk) at 436I-J.
In my view, the principles set out above apply to all urgent applications wherein the indulgence of the court is sought. In early English practice, a failure to disclose material

facts fully in ex parte applications was invariably visited with rescission: see Republic of Peru v Dreyfus Brothers and Co (1886) 55 LTR 802 at 803. This strict approach was, however, later relaxed and now appears to be in line with the approach in our jurisdiction: see Becker v Noel (Practice Note) [1971] 1 WLR 803; [1971] 2 All ER 1248(CA).
The court should always frown on an order obtained ex parte on incomplete information. In this urgent application, I caused of the matter to be set down within two days and directed that the respondents be served with the application and the notice of set down. I did so because I hold the view that the court should not generally deal with urgent applications on an ex parte basis. The audi alteram partem rule, as a principle of natural justice, is applicable to urgent applications with warranted exceptions. A respondent in this urgent case is obviously in a better of position than one in an ex parte application. The respondent in this case has been served with the application, albeit at very short notice, and is required to oppose the application in a very short space of time as the court has dispensed with forms and service generally provided for in the rules. A short notice given to a respondent in an urgent application is a major

constraint. The respondent does not have sufficient time to be heard from an informed position. An urgent application is an exception to the general rule and as such the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that the matter is urgent. The objective of requiring a certificate of urgency by a legal practitioner is to ensure that, as an officer of the court, the legal practitioner will only use this route for true urgent applications. This court has a discretion, even if the non-disclosure is material, to grant or dismiss the application: see Venter v van Graan 1929 TPD 435. The circumstances are normally so divergent and variegated that it is not possible for me to lay any guideline on the circumstances under which the court may grant or dismiss the application in the face of non-disclosure of material facts by the applicant.
The courts should, in my view, discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosures, mala fides, or dishonesty. Depending on circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of mala fides or dishonesty on the part of litigants. In this case, the applicant attempted to mislead the court by not only withholding material information but by also making untruthful statements in the founding affidavit. The applicant's non-disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis. The applicant will pay the costs of this application.
J Musimbe & Associates, applicant's legal practitioners
Chikumbirike & Associates, first respondent's legal practitioners
S v NCUBE
2001 (2) ZLR 556 (S)
Division: Supreme Court, Harare
Judges: Sandura JA (in chambers, in terms of s 121(2)(a) of the Criminal Procedure & Evidence Act [Chapter 9:07])
Subject Area: Criminal appeal
Date: 17 December 2001
Judgment Number: S-126-01

Criminal procedure — bail — decision of High Court — limited grounds on which Supreme Court may interfere with judge's decision — irregularity or misdirection entitling Supreme Court to interfere

Criminal procedure — bail — principles to be observed — onus on accused to show that he should be freed on bail — accused must be allowed to call evidence to show that allegations are unfounded

The power of the Supreme Court to interfere with a decision of the High Court in a bail application is rather limited. It may only interfere where the judge a quo committed an irregularity or misdirection, or where the manner in which he exercised his discretion was so unreasonable as to vitiate the decision made.

In considering a bail application, a judicial officer must bear in mind the presumption of innocence, and should grant bail where possible.The onus (the quantum of which varies from case to case) is on the accused to show why he should be granted bail. A relevant factor is the strength of the case for the prosecution. He can discharge this onus by calling witnesses to show that the allegations against him are unfounded. Failure by the court to allow him to call such evidence is a serious misdirection, one which would allow the Supreme Court to interfere with a decision of a judge of the High Court to refuse bail.

Cases cited:

Aitken & Anor v A-G 1992 (1) ZLR 249 (S)

S v Chikumbirike 1986 (2) ZLR 145 (S)

A Moyo, for the appellant

N Mushangwe, for the respondent

SANDURA JA: This is an appeal against the decision of a judge of the High Court who dismissed the appellant's bail application.

At the hearing of the appeal, it was ordered by consent that the appellant be released on bail on the following conditions:

1. That he deposit the sum of $100 000 with the Registrar of the High Court in Bulawayo;
2. That he surrender his passport to the Registrar of the High Court in Bulawayo;
3. That he should not in any way interfere with Remember Moyo and Khethani Augustine Sibanda;
4. That he report at Hillside Police Station once every Friday between 8 a.m. and 8 p.m.;
5. That he reside at 7 Oxford Road, Hillside, Bulawayo;
6. That he surrender the title deeds for the property known as 7 Oxford Road, Hillside, Bulawayo, to the Registrar of the High Court in Bulawayo.

The background facts in this matter are as follows.

The appellant ("Ncube") is a Member of Parliament and the National Treasurer of the Movement for Democratic Change ("the MDC"). He was charged with two counts of murder arising out of the death of two members of the Zimbabwe African National Union — Patriotic Front ("Zanu-PF"). One was Limukani Lupahla ("Lupahla"), a youth leader in Lupane district, and the other was Cain Nkala ("Nkala"), the provincial Chairman of the War Veterans Association in Bulawayo.

In summary, the allegations against Ncube were that, after attending a meeting or meetings which discussed ways of killing Zanu-PF officials, he supplied a motor vehicle to Khethani Sibanda ("Sibanda"), Remember Moyo ("Moyo") and other MDC members to enable them to kidnap and murder Lupahla and Nkala as a revenge for the death of Patrick Nabanyama, an MDC election agent believed by the MDC to have been kidnapped and murdered by members of Zanu-PF during the 2000 general election. It was alleged that after the commission of the murders Sibanda, Moyo and the other members of the MDC involved in the murders met Ncube and were paid for having carried out the murders.

Subsequently, Sibanda and Moyo were arrested by the police. Thereafter, Ncube was arrested on the basis of the information given to the police by Sibanda.

Shortly after his arrest, Ncube filed his bail application in the High Court in Bulawayo. The application was opposed on two main grounds. The first was that if released on bail Ncube was likely to abscond and avoid standing trial, and the second was that he was likely to interfere with police investigations or tamper with prosecution witnesses.

When the bail application was heard in the court a quo, Ncube gave evidence under oath and was cross-examined. He denied any involvement in the murders and maintained that he was innocent and would not abscond as he had nothing to fear. He added that he was not in good health.

After giving his evidence, he informed the learned judge that he intended calling Sibanda as his witness. However, the learned judge informed him that it was not necessary to call Sibanda because Sibanda's evidence was only relevant to the merits of the murder charges. He added that that evidence was irrelevant for the purposes of determining the bail application.

Consequently, Sibanda, who had allegedly given to the police the information which led to Ncube's arrest, was not called as a witness.

In opposing the granting of bail, the prosecutor relied upon the affidavit of Detective Inspector Matira, the investigating officer. That affidavit contained the allegations against Ncube which I have already summarised.

After considering the application, the learned judge dismissed it on two grounds. The first was that if released on bail Ncube was likely to interfere with police investigations or tamper with State witnesses, and the second was that he was likely to abscond. Aggrieved by the dismissal of his application, Ncube appealed to this court.

In considering a bail application, a judicial officer must bear in mind that the accused is presumed innocent until he is proved guilty. It is, therefore, necessary for the judicial officer to strike a balance, as far as that can be done, between protecting the accused's liberty and safeguarding the administration of justice.

In Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S) at 252G-253C, Gubbay CJ said the following:

"The basic purpose from society's point of view of the procedure known as 'bail' is to strike a balance between two competing interests — the liberty of the accused, and the requirement of the State that he stand trial to be judged and that the administration of justice be safeguarded from interference or frustration. This proposition is amply supported by authority. See, for instance, Lobel & Anor v Claassen NO 1956 (1) SA 531 (W) at 532 in fine — 533A; S v Essack 1965 (2) SA 161 (D) at 162C-H; S v Bennett

1976 (3) SA 652 (C) at 654G-H; S v Chiadzwa 1988 (2) ZLR 19 (S) at 20D; S v Mataboge & Ors 1991 (1) SACR 539 (B) at 542d-f. The system allows advantages to both the accused and the State. The accused is permitted to keep the fabric of his life intact, to continue with his employment or occupation, to support his dependants, and be accorded the fullest opportunity of preparing his defence free from restraint. It spares his family the hardship and indignity of enforced separation and, perhaps, reliance upon welfare. The State, on the other hand, secures the attendance of the accused at the trial without the costs of having to maintain him in prison.

The notion that an accused is presumed innocent until proven guilty is the cornerstone in an application for bail. Consequently, it is the tradition of our courts to lean in favour of and not against the liberty of the subject, and to grant bail where possible."

In my view, these considerations ought to be borne in mind when determining bail applications.

Having said that, I hasten to add that the power of this court to interfere with the decision of the High Court in a bail application is rather limited. This point

was made in S v Chikumbirike 1986 (2) ZLR 145 (S) at 146E-F where Beck JA said:

"The next matter to be decided is whether this court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it were a hearing de novo. Once again, that matter has been decided by the case of S v Mohamed 1977 (2) SA 531 (A) at 542B-C where Trollip JA said that in an appeal of this nature the Court of Appeal will only interfere if the court a quo committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision."

The same point was subsequently made by Gubbay CJ in Aitken's case supra at 252E-F as follows:

"While the Judge President, in considering the appeal, was at liberty to substitute his discretion for that of the magistrate on facts placed before the latter, the present appeal is one in the narrow sense. The powers of this court are, therefore, largely limited. In the absence of an irregularity or misdirection, this court has to be persuaded that the manner in which the Judge President exercised his discretion was so unreasonable as to vitiate the decision reached. See S v Barber 1979 (4) SA 218 (D) at 220E-G; S v Chikumbirike 1986 (2) ZLR 145 (S) at 146F-G."

The principle is, therefore, well established. It follows that in the present appeal, for the decision of the learned judge to be reversed, it must be shown that the learned judge committed an irregularity or misdirection, or that the manner in which he exercised his discretion was so unreasonable as to vitiate the decision made.

In my view, there is no doubt whatsoever that the learned judge committed a serious misdirection. I say so because he expressed the view that in determining the bail application it was not necessary for him to consider whether there was any cogent evidence implicating Ncube in the commission of the two murders.

In his judgment, after summarising the allegations against Ncube, he said the following:

"It is important to point out that for purposes of this application it is not required that the court considers the merits or otherwise of these allegations. I will therefore assume for purposes of this application that the allegations are true …

In addition, both the applicant and the respondent have tended to delve into the merits of the allegations levelled against the applicant. As already indicated these are not per se relevant in an application of this nature."

As a result of the misdirection, the learned judge prevented Ncube from calling Sibanda as a witness in an attempt to establish his innocence. It cannot be doubted that this was a very serious irregularity in the proceedings.

It has been stated by this court in a number of cases that in a bail application the onus rests upon the accused to show, on a balance of probabilities, why the application should be granted. For example, in Aitken's case supra, Gubbay CJ said the following at 253D-E:

Page 560 of 2001 (2) ZLR 556 (S)

"The onus is upon the accused to show on a balance of probabilities why it is in the interests of justice that he should be freed on bail. See de Jager v Attorney-General, Natal & Anor 1967 (4) SA 143 (D) at 149G-H; S v Chiadzwa 1988 (2) ZLR 19 (S) at 21F. This is the all embracing issue the court is enjoined to address."

One of the ways in which the accused can discharge the onus is to show that the allegations against him are unfounded, that he does not expect any conviction at the trial, and that he has nothing to fear and would not, therefore, abscond. In order to discharge the onus, it may be necessary for him to call witnesses to testify on his behalf. It appears that that is what Ncube intended doing but was prevented from doing by the learned judge.

I should add that in determining a bail application the strength of the case for the prosecution should be assessed. As Millin J said in Liebman v Attorney-General 1950 (1) SA 607 (W) at 609:

"The court looks at the circumstances of the case to see whether the person concerned expects, or ought to expect, conviction. If it is found on circumstances disclosed to the court that the likelihood of conviction is substantial, that the person ought reasonably to expect conviction, then the likelihood of his absconding is greatly increased. Thus the court goes into the circumstances of the case, that is, the evidence at the disposal of the Crown. Where there has been a preparatory examination that is the material which is used. Where no preparatory examination has yet been held the court has to consider such material as is furnished to it by the accused himself (the applicant) or by the Attorney-General or his representative."

In the present case, the strength of the case for the State was not assessed. The application was dismissed on the basis of bald allegations set out in an affidavit by the investigating officer who did not indicate how the allegations would be proved at the trial.

In the circumstances, there was no cogent basis for the conclusion that if released on bail Ncube was likely to abscond. The fact that he was charged with capital offences did not provide a basis for drawing that conclusion.

Similarly, there was no cogent basis for the conclusion that if released on bail Ncube was likely to interfere with police investigations or tamper with State witnesses. In his evidence, Ncube stated that he had no reason for interfering with the investigations or tampering with the witnesses because he was innocent. No reason was given by the learned judge for rejecting that evidence.

In the circumstances, Mr Mushangwe, who appeared for the State, could not support the decision of the learned judge and conceded, correctly in my view, that the appellant should have been released on bail. Any other stance would have been legally untenable.
Webb, Low & Barry, appellant's legal practitioners
PETHO v MINISTER OF HOME AFFAIRS & ANOR
2001 (2) ZLR 561 (H)
Division: High Court, Harare
Judges: Ndou J
Subject Area: Civil application
Date: 28 November and 19 December 2001
Judgment Number: HH-221-01

Practice and procedure — parties — representation — class action — who may bring class action — suitability of representative — assessment of — need for representative to be able to explain nature of class actions to members of class he intends to represent
The applicant sought leave in terms of s 3 of the Class Actions Act [Chapter 8:17] to institute a class action on behalf of all persons who had been born in Zimbabwe to foreign-born parents but who had never applied for or been granted citizenship of a foreign country. In the action, he would seek an order declaring that such persons were not required to renounce foreign citizenship in order to retain their Zimbabwean citizenship in terms of s 9(7) of the Citizenship of Zimbabwe Act [Chapter 4:01]. The class of persons the applicant sought to represent was huge and of varying social, economic and educational background. Most members of the class, however, were likely to be poor, ill-educated rural dwellers. The applicant proposed to notify them of the impending class action by publishing notices in two English-language newspapers published in Harare.
Held, that the Class Actions Act [Chapter 8:17] is an exception to the locus standi rule that a person who approaches the court must himself be adversely affected by the wrong complained of and is entitled to claim only such relief as is in his own interests. The Act is wide enough to cover ideological or non-Hohfeldian applicants, i.e. applicants who bring proceedings not for personal gain but out of a conviction that public authorities or representative bodies should not be allowed to act unlawfully. The court has a wide discretion to appoint any suitable person to be the representative of the class of persons concerned in the class action, including a person who is not a member of that class.
Held, further, that the decision whether or not a person is suitable to be a representative is one that should be reached after careful examination of the circumstances of the case, because of the far-reaching consequences of such a decision on the rights of members of the class concerned. The court must bear in mind that the decision has an impact on their access to justice, a fundamental constitutional matter.
Held, further, dismissing the application, that the applicant had not shown he had the capacity and resources to carry out the mammoth task of informing members of the class he sought to represent of the concept of class actions, which they needed to know in order to make informed decisions whether or not to intervene independently in the action in terms of s 10 of the Class Actions Act. Placing notices in all the newspapers in circulation in Zimbabwe might be insufficient to reach the majority of members of the class.

Cases cited:
Cabinet of Transitional Govt for SWA v Eins 1988 (3) SA 369 (A)
Carr v Registrar-General 2000 (2) ZLR 433 (S)
Chassay Bros (Pvt) Ltd v Shaw & Anor 1956 R & N 188 (S); 1956 (3) SA 502 (FSC)
Dalrymple & Ors v Colonial Treasurer 1910 TS 372
Patz v Greene & Co 1907 TS 427
Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 87
Shifidi v Administrator-General for SWA & Ors 1989 (4) SA 631 (SWA)
Wilson v Zondi 1967 (4) SA 713 (N)
Wood & Ors v Ondangwa Tribal Authority & Anor 1975 (2) SA 294 (A)
Legislation considered:
Class Actions Act [Chapter 8:17], ss 3, 5, 6, 7 & 11
A P de Bourbon SC, for the applicant
M Majuru, for the respondents
NDOU J: This interlocutory application is brought in terms of s 3 of the Class Actions Act [Chapter 8:17] for leave to institute a class action on behalf of the following class of persons, namely:
"person born in Zimbabwe, either or both of whose parents were both born in a foreign country, but who have never applied for and/or been granted citizenship of any foreign country."
The applicant submits that this is an appropriate matter in which to allow such a class action because many people are affected by the issue. The applicant contends that the main factor in this application is the need to avoid a multiplicity of actions by people in this class. Until about 1984, the Constitution of Zimbabwe allowed for dual citizenship. However, at that time the right to dual citizenship was removed and it became necessary for persons to sign a renunciation form in respect of any foreign citizenship.
The Government obviously realised that the manner in which the law was then framed did not necessarily have the effect of a citizen who signed the renunciation form in fact losing his citizenship of another country. The decision of the Supreme Court in Carr v Registrar General 2000 (2) ZLR 433 (S) confirmed that under the law of Zimbabwe renunciation was sufficient if the local renunciation form was completed. To overcome this legal position, the Citizenship of Zimbabwe Amendment Act, 2001 (No. 12 of 2001), was promulgated on 6 July 2001. In terms of the new s 9(7) of the Citizenship of Zimbabwe Act [Chapter 4:01], persons who were citizens of Zimbabwe on 6 July 2001 and also citizens of a foreign country as at that date are obliged to renounce this citizenship they hold in that foreign country effectively in terms of the law of that foreign country, failing which as at 6 January 2002 those persons will lose their right to citizenship of Zimbabwe.

The dispute that arises in this matter is whether what has to be renounced is not merely the fact of holding a foreign citizenship, but also any right to claim a foreign citizenship. The purpose of the class action is to determine whether or not the respondents (in particular the second respondent*) are correct in insisting that what has to be renounced is not merely the fact of holding a foreign citizenship, but also any right to claim a foreign citizenship. This is the substantive issue to be determined during the main

application. I give these facts in order to determine whether the applicant qualifies to bring a class action this matter. The applicant seeks an order in the following terms:
"IT IS ORDERED THAT:

1. The applicant be and is hereby granted leave in terms of section 3(1) of the Class Actions Act (No. 10/99) [Chapter 8:17] to institute a class action on behalf of the persons set out in paragraph (2) below for an order referred to in paragraph (3) below.

2. The class of persons referred in para (1) is as follows:

2.1 All persons who are citizens of Zimbabwe by birth in terms of section 4 or section 5 of the Constitution of Zimbabwe; and

2.2 Either or both of whose parents where (sic) born in a foreign country; but

2.3 Who have never applied for and/or been granted citizenship of a foreign country.

3. The Order referred to in paragraph (1) is as follows:

IT IS DECLARED THAT:

3.1 The provisions of section 9(7) of the Citizenship of Zimbabwe Act [Chapter 4:01], as amended by section 3 of the Citizenship of Zimbabwe Amendment Act (No. 12/2001), do not apply to the applicant and the class of persons defined in paragraph (2) above.

3.2 Consequently, the provisions of the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship Regulations (SI 217 of 2001) do not apply to the applicant and the class of persons referred to in paragraph (2) above.

3.3 The applicant and the class of persons referred to in paragraph (2) are citizens of Zimbabwe and will, after 6 January 2002, remain citizens of Zimbabwe.

ACCORDINGLY, IT IS ORDERED THAT:

3.4 The respondents shall continue to recognise the applicant and the class referred to in paragraph (2) as citizens of Zimbabwe after 6 January 2002 and afford them the rights and protection as citizens of Zimbabwe.

3.5 The respondents shall issue and renew Zimbabwe Passports to the Applicant and the class referred to in paragraph (2) as citizens of Zimbabwe.

3.6 The respondents shall pay the applicant's costs of suit.

4. In terms of section 7(1)(a) of the Class Actions Act (No. 10/99) [Chapter 8:17], the applicant shall cause to be published (in) The Daily News and The Herald a notice in the form attached hereto.

5. The costs of this application be reserved pending the outcome of the court application."

The notice referred to in para 4 of the draft order is stated as follows:

"NOTICE

In terms of section 7 of the Class Actions Act (No. 10/99) [Chapter 8:17], Notice is hereby given that the High Court sitting in Harare has granted leave to institute a Class Action.

A. CLASS OF PERSONS

The Class of Persons included in the class action is as follows:

1. All persons who are citizens of Zimbabwe by birth in terms of section 4 or section 5 of the Constitution of Zimbabwe; and

2. Either or both of whose parents were born in a foreign country; but

3. Who have never applied for and/or been granted citizenship of a foreign country.

B. CAUSE OF ACTION

The cause of action giving rise to the Class Action is the uncertainity as to whether or not after 6 January 2002, the above class of persons will continue to remain citizens of Zimbabwe.

C. RELIEF SOUGHT

The nature of the relief sought in the Class Action is as follows:

IT IS DECLARED THAT

1. The provisions of section 9(7) of the Citizenship of Zimbabwe Act [Chapter 4:01], as amended by section 3 of the Citizenship of Zimbabwe Amendment Act (No. 12/2001), do not apply to the Applicant and the class of persons defined in paragraph (A) above.

2. Consequently, the provisions of the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations 2001 (SI 217/2001) do not apply to the applicant and the class of persons referred to in paragraph (A) above.
3. The applicant and the class of persons referred to in paragraph (A) above are citizens of Zimbabwe and will, after 6 January 2002, remain citizens of Zimbabwe.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondents shall continue to recognise the applicant and the class of persons referred to in paragraph (A) above as citizens of Zimbabwe after 6 January 2002 and afford them the rights and protection as citizens of Zimbabwe.
2. The respondents shall issue and renew Zimbabwe Passports to the applicant and the class of persons referred to in paragraph (A) above as citizens of Zimbabwe.
3. The respondents shall pay the applicant's costs of suit.

D. NOTICE TO MEMBERS OF CLASS

The members of the class of persons referred to in paragraph (a) above are advised that:

1. All members of the class will be bound by the Class Action and its results unless any member notifies the Registrar of the High Court, Harare within 14 days of the date of this publication that he/she wishes to be excluded from the action; and
2. Each member of the Class has the right to apply for leave to intervene in the Class Action in order to protect his/her interests in terms of section 10 of the Class Actions Act.

Dates at Harare this 2001

Registrar

High Court."

Page 565 of 2001 (2) ZLR 561 (H)

My understanding is that we are dealing here with the concept of standing i.e. locus standi in iudicio. This legal principle has been stated as follows:

"The standard action procedure comprises the bilateral interaction of two parties: the plaintiff and the defendant. This is a basic principle which has been extended to include other persons as parties to an action ... The capacity to participate in legal proceedings is technically described by the phrase locus standi in iudicio and has been succinctly summed up in the following terms:

'The right to sue or the liability to be sued depends in the first place on capacity. In order to be capable of either suing or being sued, a person must have locus standi in iudicio. Consequently, persons who are wanting in that capacity cannot be parties to any civil action unless that want of capacity has first been implemented.'

In all cases, a plaintiff must allege sufficient facts in his declaration or particulars of claim to indicate that he has the necessary locus standi to institute proceedings" — Introduction to South African Law and Legal Theory 2 ed by W J Hosten, A B Edwards, F Bosman and J Church. See also Wilson v Zondi 1967 (4) SA 713 (N).

The traditional approach is that a plaintiff or applicant may not approach the court on the basis that the defendant or respondent is doing something in contrary to the law and that it is in the public interest that the court should grant appropriate relief. A person who approaches the court for relief must at least have an interest in the sense of being personally adversely affected by the wrong alleged — see Patz v Greene & Co 1907 TS 427 at 433-5; Dalrymple & Ors v Colonial Treasurer 1910 TPD 372 at 386; Wood & Ors v Ondangwa Tribal Authority & Anor 1975 (2) SA 294 (A); Shifidi v Administrator-General for South West Africa & Ors 1989 (4) SA 631 (SWA); Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 (A) 87 and Cabinet of the Transitional Government for Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 389I. This is a restrictive approach to the issue of locus standi.

The locus standi concept is common in the field of public law because often the party who brings a public law issue before the court does so not for personal gain, but out of a sense of conviction that public authorities or representive bodies should not be allowed to act unlawfully. Such parties have been referred to as ideological plaintiffs or non-Hohfeldian plaintiffs in the United States of America: see "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or ideological Plaintiff" (1968) 116 University of Pensylvania LR 1033 — by Loiuse L Jaffe; "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 by Hohfeld; and Constitutional Law of South Africa by M Chaskalson, J Kentridge, J Klaaren, G Marais, D Spitz and S Woolman at p 8.2. Such plaintiffs or applicants are claiming relief in the public interest or in the interest of a section of the public, the members of which are adversely

affected by the wrong complained of. In Zimbabwe, there is an exception to the application of the locus standi rule requiring that a person who approaches the court be personally adversely affected by the wrong complained of and be entitled to claim only relief which is in that person's own interest. The exception is in terms of the Class Actions Act[Chapter 8:17] (Act 10 of 1999). This piece of legislation came into operation with effect from 20 October 2000. It is necessary to examine the relevant provision of this Act in detail in order to appreciate the extent of this exception.

A class action is defined in s 2 as follows:

"... any form of legal proceedings, whether an action or an application, instituted by a representative or the Attorney-General on behalf of a class of persons, and any reference to "plaintiff" and "defendant" shall be construed accordingly;"

Section 3 provides:

" (1) Subject to this section, the High Court may on application grant leave for the institution of a class action on behalf of any class of persons.

(2) An application for the institution of a class action —

(a) may be made by any person, whether or not he is a member of the class of persons concerned; and

(b) shall be made in the form and manner prescribed in rules of court.

(3) The High Court shall grant leave in terms of subsection (1) if it considers that in all the circumstances of the case a class action is appropriate, and in determining whether or not this is so the court shall take into account —

(a) whether or not a prima facie cause of action exists; and

(b) the issues of fact or law which are likely to be common to the claims of individual members of the class of persons concerned; and

(c) the existence and nature of the class of persons concerned, having regard to —

(i) its potential size; and

(ii) the general level of education and financial standing of its members; and

(iii) the difficulties likely to be encountered by the members enforcing their claims individually;

and

(d) the extent to which the members of the class of persons concerned may be prejudiced by being bound by any judgment given in the class action; and

(e) the nature of the relief claimed in the class action, including the amount or type of relief that each member of the class of persons concerned might claim individually; and

(f) the availability of a suitable person to represent the class of persons concerned; and

(g) any other relevant factor.

(4) The High Court may grant leave in terms of subsection (1) notwithstanding that —

(a) the claims of individual members of the class of persons concerned involve different issues of fact or law; or

(b) the relief sought by individual members of the class of persons concerned may require individual determination; or

Page 567 of 2001 (2) ZLR 561 (H)

(c) members of the class of persons concerned seek different forms of relief."

Section 5 provides:

" (1) When the High Court grants an application under section three for leave to institute a class action it shall appoint the applicant or any other suitable person to be the representative of the class of persons concerned in the class action.

(2) In making an appointment for the purposes of subsection (1), the High Court shall have regard to —

(a) the suitability of the appointee to represent the best interests of all the members of the class of persons concerned; and

(b) any conflict of interest between the appointee and the members of the class of persons concerned; and

(c) the ability of the appointee to make satisfactory arrangements to pay for the class action and to pay any order of costs that may be made."

Section 6 reads:

" (1) When granting leave to institute a class action or at any time thereafter, the High Court may order the representative concerned to provide security for costs.

(2) Where the Attorney-General has instituted a class action, the High Court may at any stage in the proceedings order a person who has obtained leave to be joined as a party to the action in terms of section ten to provide security for costs."

Section 7 provides:

“ (1) Where —
(a) the High Court has granted leave to institute a class action, the representative shall cause a notice specifying the matters referred to in subsection (2) to be given to members of the class of persons concerned in such manner and within such period as the court shall specify;
(b) …
(2) A notice referred to in subsection (1) shall specify —
(a) the cause of action giving rise to the class action, with sufficient detail to enable the circumstances giving rise to the action to be identified; and
(b) the nature of the relief being sought in the class action; and
(c) the class of persons concerned in the class action, with sufficient detail to enable the members to identify themselves with the intended action;
and shall advise members of the class concerned that —
(i) each member of the class concerned will be bound by the class action and its results unless the member notifies the Registrar of the High Court, within a period fixed by the court or rules of court, as the case may be, and specified in the notice, that he wishes to be excluded from the action; and
(ii) each member of the class concerned has the right to apply for leave to intervene in the class action in order to protect his interests in terms of section ten.
(3) A failure on the part of a member of a class of persons concerned in a class action to receive notice in terms of this section shall not —
(a) invalidate the class action; or
(b) prevent the member from being bound by the class action and its results.”

Section 11 provides —
“The judgment of the court in a class action shall be binding on all members of the class of persons concerned, other than a member who has advised in terms of the notice published in terms of section seven that he wishes to be excluded from the action.”
The provisions of the Act that I have quoted above are relevant for the determination of this application. It seems to me that these provisions have far-reaching consequences on the concept of legal standing. The provisions of the Act justify the relaxation of the traditional rule against representative standing. They are wide enough and, in my view, cover ideological or non-Hohfeldian plaintiffs/applicants because s 3(2)(b) allows for an application for the institution of a class action “by any person, whether or not he is a member of class of persons concerned”. The court has a wide discretion as far as the appointment of a representative is concerned. It does not only have the discretion to appoint the applicant but may also appoint “any other suitable person to be the respresentative of the class of persons concerned in the class action”.
As far as the facts of this case are concerned, it seems clear to me that the applicant does not fit in the class of persons he wishes to represent. The applicant is born of “stateless” parents. The applicant was born in Zimbabwe of a stateless immigrant to Zimbabwe and therefore has no possible claim to any foreign citizenship. Furthermore, according to the papers before me, the applicant’s parents have never applied for and/or been granted citizenship of a foreign country. From the facts of this case, I agree with the second respondent (“the Registrar-General”) that the applicant does not fall into a category of persons that he wishes to represent. The category or class of persons that the applicant

wishes to represent have "a possible claim, on the criteria set, to foreign citizenship". This class of persons that he wishes to represent is required to renounce foreign citizenship or entitlement or claim in terms of the Citizenship of Zimbabwe Amendment Act No. 12 of 2001. The applicant, according to the Act, is not required to renounce foreign citizenship or entitlement because his father was stateless at time he acquired Zimbabwean citizenship. The class that he has identified does not share with him such stateless parentage. Their parents where born in a foreign state and came to Zimbabwe as citizens of such foreign states. The applicant's parents arrived as stateless so the fact that they were born in Hungary is immaterial for purposes of the citizenship of Zimbabwe Act. I am satisfied that the applicant does not belong to the class that he wishes to represent. This finding, however, is not material or helpful in the resolution of the issues before me. This finding is of no consequence in light of the provisions of s 3(2)(b) of the Class Actions Act [Chapter 8:17] as I have already indicated above. The Act effectively introduces a very liberal

approach to legal representative standing. The court has a wide discretion to appoint any suitable person to be the representative of a class of persons concerned in the class action. I am, however, satisfied that the applicant established the existence of a class for the purposes of the Act. The class comprise:

(a) all persons who are citizens of Zimbabwe by birth in terms of s 4 or s 5 of the Constitution of Zimbabwe; and

(b) either or both of whose parents were born in a foreign country; but

(c) who have never applied for and/or been granted citizenship of a foreign country.

It is common cause that a substantial number of persons fall within this class. According to the applicant, "their parents originate from such countries as: Mozambique, Zambia, Malawi, India, Pakistan, South Africa and the United Kingdom" (para 10 of his founding affidavit).

In my view, the only issue left to be determined in this application is whether the applicant is a suitable person to be the representative of the class of persons defined in the preceding paragraph. This decision should be reached after careful examination of the circumstances of the case. I say so because of the far-reaching consequences of such a decision. According to s 11 the judgment of the court in a class action "shall be binding on all members of the class of persons concerned, other than a member who has advised in terms of the notice published in terms of section seven that he wishes to be excluded from the action" (my italics). Section 7(3) indicates that:

"a failure on the part of a member of a class of persons concerned in a class action to receive notice in terms of this section shall not —

(a) invalidate the class action; or

(b) prevent the member from being bound by the class action and its results" (my italics).

These provisions place an onerous burden on a member of the class. Ignorance of the existence of the class action will not be of assistance to a member of the class. In this case the applicant, in terms of para 4 of the draft order, seeks an order to publish the s 7(1)(a) notice in The Herald and The Daily News newspapers. The applicant, however, rightly observed in para 11 of his founding affidavit:

"I am not authoritatively able to comment on the general level of education and financial standing of the members of the class. However, generally, most people in Zimbabwe are poor and this would apply in relation to the majority of persons in the class. As the majority of the people in Zimbabwe live in the rural areas, most of the people in the class would live in the rural areas. Most of the people in the class would have an average education bearing in mind that most are poor and live in the rural areas."

In para 16, the applicant further states:

Page 570 of 2001 (2) ZLR 561 (H)

"A very relevant factor in relation to bringing this class of action is that there has been virtually no publicity given to the provisions of the Citizenship of the Zimbabwe Amendment Act (No. 12 of 2001). It is my firm belief that the vast majority of people in the proposed class as set out in para 5 herein are unaware of the contents of this Amendment Act, or if they are aware of it, they do not appreciate that the terms of it apply to them."

I have quoted the above passages to highlight the stark reality that any representative of this class will face. The s 7(3) notice is directed at this class. In order to reach the intended audience, it has to overcome the problems highlighted by the applicant. Put in another way, can a representative's notice reach all, or at least the majority of, the persons in the class by merely placing such a notice in two English language newspapers, namely The Herald and The Daily News? Is this not a situation that requires onerous public education of the majority of the class before one can realistically expect them to participate in the class action? It seems to me that the class as defined by the applicant is numerically huge. It involves persons of varied background i.e. socially, educational and economically. Anyone who seeks to institute a class action on behalf of such a class must have the necessary capacity and resources to do so. This is crucial in determining whether the applicant meets the requirements set out in s 5(2) of the Act. I am enjoined by the provisions of s 5(2)(a) to have regard to "the suitability of the appointee to represent the best interests of all the members of the class of person concerned ..." Section 5(2)(b) is not relevant in this case.

Section 5(2)(c) is, however, also crucial for the determination of this application, as I have to have regard to "the ability of the appointee to make satisfactory arrangements to pay for the class action and to pay any order of costs that may be made". I have to decide whether Mr Leslie Levento Petho is a suitable person to represent this class of person bearing in mind the far-reaching consequences of such a decision in terms of s 11 of the Act. His application represents the basis for the determination of whether he is a suitable person to present the class. From the papers before me, especially his founding affidavit and the draft order, I am not convinced that the applicant has a comprehensive or holistic outreach strategy to ensure awareness of the class action among the majority of the persons in the class. From his papers, it is evident that the targeted recipients of the s 7 notice are those within the class who are able to access and read two English newspapers, namely The Daily News and The Herald. There is nothing to show that he intends to reach the majority of persons in this class who due to financial or literacy constraints have no access to these two newspapers. In any event, there are places where most of the persons in the class are resident where these newspapers are not sold. The applicant does not say how he will ensure awareness of the class action by these persons. I

Page 571 of 2001 (2) ZLR 561 (H)

believe that the purpose of s 7 is to inform as wide as possible members of the class.
As far as the ability to make satisfactory arrangements to pay for the class and any other costs that may be made, the applicant, in para 17 of his founding affidavit states:
"Another relevant factor in bringing this class action is that of costs. I have approached the Test Case Committee of the Legal Resources Foundation, a non-governmental organisation, and they have kindly agreed to finance this application. In view of the very high costs of litigation, I could not possibly do this out of my own resources. Neither could the vast majority of people in the class of persons referred to herein."
From this averment, it seems that the applicant has made some arrangements to pay for the class action. There is, however, no mention of payment of "any order of costs that may be made". Whether such arrangements are "satisfactory" is another matter. It seems to me that as far as the latter is concerned I can resort to s 6(1) and order the applicant to provide security for costs. In the circumstances I think the only key issue for determination is suitability of the applicant to represent the best interest of the all the members of the class of persons concerned as required by s 5(2)(a). In other words, I am satisfied that the applicant has made satisfactory financial arrangements as required by s 5(2)(c). Even if I doubt that he had done so, I have a discretion to order the applicant to provide security for costs in terms of s 6(1).
The draft order in pp 8 and 9 and the s 7 notice in pp 10 and 11 are indicative of the approach by the applicant in this matter. I am convinced that the applicant is a person of benevolent intentions as far as this matter is concerned. This is highly commendable. Even in cases where the applicant is genuine I think it is still necessary for the court to determine his/her suitability to represent the best interests of all the members of the class of persons. Although the applicant declared an intent to represent all members of the class his draft order and the notice reflect that his target is those who read and have access to newspapers or print media. I am of the view that this is a minority of the persons in the class. As highlighted by the applicant himself above, the majority of persons in this class are rural, poor and unsophiscated. There is very little said in the application how the applicant will overcome the barriers such as difficult geographical inaccessibility, illiteracy, inaccessibility to print media. In order to make realistically informed decisions in terms of s 10, such persons need to understand the concept of class actions as provided for in the Act. This is a major challenge that any aspirant class representative of such a class will face. The applicant has to convince the court on the ability to provide representative standing of a quality that is in the best interests of all members of this class. From what is in the application, it seems to me that the applicant does not seem to

appreciate the magnitude of the issues involved. There is no indication in the application of his capacity and resources to carry out such a mammoth task except access to financial resources from the Legal Resources Foundation as I have already indicated. To reach the majority of persons in the class, the applicant may have to reach them in languages that they understand and through a medium easily accessible to them. Placing a notice in all the newspapers in circulation in Zimbabwe may still be insufficient to reach the majority of these persons. The Act should be viewed as an exception justifying the relaxation of the traditional rule against representative standing. The traditional rule against

representative standing was followed for a long time in our jurisdiction: see Chassay Brothers (Pvt) Ltd v Shaw & Anor 1956 R&N 188; 1956 (3) SA 502 (FSC).
I think that it is important for the court, when dealing with appointment of a class representative in terms of the Act, to appreciate that this appointment impacts on the access to the courts and justiciability by members of the class. Access to court is a fundamental constitutional matter and the court should bear this in mind when dealing whether a particular person is suitable as a representative of class in terms of this piece legislation.
In the circumstances, I am of the view that the applicant is not suitable to represent the best interests of all the members of the class of persons in this case. I dismiss the application. The costs of this application is reserved for the determination at the hearing of the main (court) application.
Gill, Godlonton & Gerrans, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners
In re GONYORA
2001 (2) ZLR 573 (H)
Division: High Court, Harare
Judges: Adam J
Subject Area: Civil review
Date: 28 December 2001
Judgment Number: HH-226-01

Family law — child — guardianship — application to juvenile court in terms of s 9 of Guardianship of Minors Act [Chapter 5:08] — need for extensive enquiry when application is contested — principles on which guardianship to be awarded — need to avoid uprooting child except for sound reasons — review of proceedings — need for juvenile court to provide written reasons for decision.
The applicant was the maternal grandmother of a six-year-old boy whose parents had both died within six months of each other. The boy's mother had left him in the applicant's care and he had been with her since then, a period of about eight months. She applied to a juvenile court in terms of s 9 of the Guardianship of Minors Act [Chapter 5:08] to be appointed the boy's guardian, but her application was opposed by his paternal uncle, who was a medical doctor and had been appointed executor of the boy's father's estate. The juvenile court awarded him guardianship of the boy, but gave no written reasons for its decision.
Held, that the record of proceedings of a juvenile court which is submitted to the High Court for review in terms of s 9(4) of the Guardianship of Minors Act [Chapter 5:08] must include written reasons for the court's decision. Without a record and written reasons for the decision the High Court cannot carry out its review powers to determine whether the proceedings were in accordance with justice.
Held, further, that the juvenile court should have taken into consideration the principles that bear on the child's best interests, the first of which is that a minor child should not be uprooted except for sound reasons. A more extensive enquiry was required, in which other relatives should be given an opportunity to seek the boy's guardianship.
Cases cited:
French v French 1971 (4) SA 298 (W)

Joffe & Co Ltd v Hoskins & Anor 1941 AD 431
Lord v Johnson & Anor 1965 RLR 110 (G)
McCall v McCall 1994 (3) SA 201 (C)
van Rooyen v Werner (1892) 9 SC 425
Legislation considered:
Guardianship of Minors Act [Chapter 5:08], s 9
Page 574 of 2001 (2) ZLR 573 (H)
Adam J:
[The learned judge set out the facts of the case, which were as follows:
This was a review of a decision of a juvenile court in terms of s 9 of the Guardianship of Minors Act [Chapter 5:08] appointing the applicant as guardian of her six-year-old grandson.
The child's parents were married under the Marriage Act [Chapter 5:11]; his father died in October 2000 and his mother in March 2001. Since early December 2000, the child had been living with the applicant, his maternal grandmother, and was attending a pre-school. She claimed he was happy and settled in her custody. Her application for appointment as guardian was opposed by the child's paternal uncle, who was a medical doctor and had been appointed executor of the child's father's estate. He claimed that he and his wife were better able than the applicant to look after the child and that, according to well established custom and tradition, the child belonged to his side of the family.
The juvenile court issued a certificate of guardianship to the child's paternal uncle and, in terms of s 9(4) of the Guardianship of Minors Act, sent the record to the High Court for review. The record contained no written reasons for the decision, but in response to a query the presiding magistrate justified his decision by stating that the child was sickly and would be better cared for by his uncle, and that the applicant was keeping the child in a boarding school rather than in her direct care. The evidence at the hearing did not support either of these grounds.
Having outlined the facts and the evidence given in the juvenile court, the learned judge continued:]
The provisions of s 9 of the Guardianship of Minors Act [Chapter 5:08] are as follows:
" (1) Without prejudice to rights, powers and privileges of the High Court as upper guardian of minor children, and the Master in terms of section 74 of the Administration of Estates Act [Chapter 6:01], the juvenile court may, on application in terms of this section, appoint a fit and proper person to be the guardian of a minor who has no natural guardian or tutor testamentary.
(2) Where a minor has no natural guardian or tutor testamentary —
(a) a relative or person having the care and custody of the minor; or
(b) a probation officer;
may apply to the juvenile court by way of an application lodged with the clerk of that court for the appointment of a person as guardian of the minor, and such application may propose the appointment of a specified person as the guardian.
(3) Upon receipt of an application in terms of subsection (2) the clerk of the juvenile court shall, notwithstanding subsection (5) of section 5 of the Children's Protection
Page 575 of 2001 (2) ZLR 573 (H)

and Adoption Act [Chapter 5:06] published in the Gazette and in a newspaper circulating in the area where the minor resides a notice which —

(a) calls upon any person who has an interest in the matter to appear before the juvenile court on a date specified in the notice, which shall be not less than seven days and not more than thirty days after the publication of the notice; and

(b) specifies the name of the person, if any, proposed for appointment as the guardian;

(4) On the date specified in a notice published in terms of subsection (3), or any later date fixed by the juvenile court, that court shall inquire into the matter and, having regard to the welfare and interests of the minor, may appoint such person as it thinks fit and proper to be the guardian of the minor with all or such of the rights, powers and privileges of guardianship, or on such conditions, as the court may specify:

Provided that where a different person has already been appointed a tutor dative by the Master in terms of the Administration of Estates Act [Chapter 6:01], any appointment of guardianship in terms of this section shall be subject to the rights, powers and privileges of such tutor dative and shall not derogate therefrom.

(5) The clerk of the juvenile court shall issue to a person who has been appointed a guardian in terms of subsection (4) a letter of appointment which shall —

(a) specify the powers, rights and privileges conferred upon him in terms of subsection (4); and

(b) be sufficient proof of his authority to exercise such powers, rights and privileges.

(6) Whenever the juvenile court appoints a person as guardian in terms of subsection (4), the clerk of the juvenile court shall, within seven days thereof, submit the record of proceedings in the matter to the registrar of the High Court, who shall lay the record before a judge in chambers.

(7) A judge before whom a record of proceedings has been laid in terms of subsection (6) may —

(a) confirm, vary or set aside the decision of the juvenile court; or

(b) remit the matter to the juvenile court with such instructions as to the further proceedings to be had in such matter as he thinks fit; or

(c) give such other order or make such other direction, including an order for the production of further evidence before him, as he thinks fit.

(8) Any person who is aggrieved by the decision of the juvenile court in making an appointment in terms of subsection (4) may appeal against that decision to the High Court.

(9) An application may be made to the juvenile court for the variation of any appointment of a person as a guardian in terms of subsection (4) and this section shall apply, mutatis mutandis, in relation to any such application."

It should be stressed that upon the death of his father on 15 October 2000 the minor child's mother succeeded him under the Roman-Dutch common law as his natural guardian: Joffe & Co Ltd v Hoskins & Anor 1941 AD 431 at 459. In van Rooyen v Werner (1892) 9 SC 425, de Villiers CJ observed at 428-431:

"In considering what the powers of parents are in this country at the present day, it should be remembered that they exercise those powers subject to the supervision of this court as

the upper guardian of all minors. So long as the authority of the parents is not abused … their powers … may be briefly summed up as follows: Firstly, as to the father, he is the natural guardian of his legitimate children until they attain majority … He alone is entitled to their custody, has control over their education …
Coming next to the mother, her rights of control over the person and property of her legitimate children do not arise until after the death of the father … She then has all the powers the husband enjoyed until his death …"
In terms of s 3A of the Deceased Estates Succession Act [Chapter 6:02], the minor child's mother, being the surviving spouse of his father who died wholly or partly intestate on 15 October 2000, became entitled to receive from the free residue of the father's estate, the matrimonial house as well as the household goods and effects in which she lived immediately before his death. Upon her death on 27 March 2001, this formed part of her estate.
Prior to the enactment of s 9 of the Guardianship of Minors Act by the Guardianship of Minors Amendment Act, 1983, which came into operation on 27 January 1984, it was the duty of this court to appoint guardians for orphan children where no testamentary appointment had been made. In Lord v Johnson & Anor 1965 RLR 110 (G), Beadle CJ said at 111-113:
"The early Roman-Dutch authorities show that the practice in Holland varied from time to time, and probably was not uniform in the various towns and provinces …
And, finally, Grotius (… he seems to recapitulate the common law more succinctly than any of the others) in his Jurisprudence of Holland, 1, V11.10 (Lee's translation, p 37) states:
'When no provision for the guardianship had been made by last will, in old times guardians were chosen by "the four quarters", that is by the nearest kin on the father's father's side and on the father's mother's side, on the mother's father's side and on the mother's mother's side: but afterwards it was thought better that guardians should be appointed by the proper authority, that is by the Court of Holland … or by the Orphan Chambers … but the paramount control over minors remains vested in the court. These authorities in appointing guardians are wont and bound to hear the views of the nearest relatives and also to choose the guardians from amongst them so far as this is consistent with the interests of the minors.'
In view of this statement of the law by Grotius, which seems to summarise what the other writers say, I do not think any useful purpose would be served by delving further into the early Roman-Dutch law writers on the subject. The law of Holland, as I understand it, seems generally to have been this: That where an Orphan Chamber existed at the place, the appointment was made by the Orphan Chamber in consultation with the relatives; where no Orphan Chamber existed the appointment was made by the court, also after consulting the relatives; the guiding principle always being what was considered to be best in the interest of the minor."
In that case, the orphan child lost her parents and paternal grandmother in a car accident. No tutor testamentary had been appointed by will. The minor girl's maternal grandparents were alive and looked after her. The applicant,

who was the daughter of the minor girl's uncle, sought with her husband the guardianship and custody of the minor girl. The minor girl's nearest relatives were her maternal

grandparents. By agreement between the parties, the minor girl's maternal grandfather was appointed joint guardian with the applicant's husband and the maternal grandmother was awarded custody of the minor child.

In French v French 1971 (4) SA 298 (W), the principles that bear on what would be in the child's best interest were stated to be: (1) In respect of a young child, its sense of security should be preserved and protected above all. The child must feel that it is welcome, wanted and loved. This is the principle underlying decisions that children should not be uprooted except for sound reasons; (2) After applying the primary test how the sense of security of a child will be best preserved, the suitability of the proposed custodian parent is to be tested by enquiring into his or her character, and by enquiring into the religion and language in which the children are to be brought up; (3) Even when the suitability of the proposed custodian parent is settled and the psychological security of the child is ensured, material considerations to the child's well-being will also be considered; (4) Finally, the wishes of the children will be taken into account — with young children as a constituent element in the enquiry whether they will attain a sense of security, and with more mature children a well informed judgment, albeit a very subjective judgment, of what the best interests of the child really demand.

In McCall v McCall 1994 (3) SA 201 (C), it was indicated that in determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure his or her physical, moral, emotional and spiritual welfare which must be assessed on certain factors or criteria such as: (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child; (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires; (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings; (d) the capacity and disposition of the parent to give the child the guidance he requires; (e) the ability of the parent to provide for the basic physical needs of the child, the so-called "creature comforts", such as food, clothing, housing and other material needs; (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular; (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development; (h) the mental and physical health and moral fitness of the parent; (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo; (j) the child's

preference, if the court is satisfied that the child's preference should be taken into consideration; (k) any other factor which is relevant to the particular case with which the court is concerned.

Before examining the foregoing in relation to this matter, it is necessary to make certain observations as to the conduct of the juvenile court. Section 9(1) of the Act in specific terms states that the juvenile court has a discretion, on application in terms of s 9, to appoint a fit and proper person to be guardian of a minor who has no natural guardian or tutor testamentary. The object of s 9(3) is very closely connected with s 9(2) which allows more than one relative or the person having the care and custody of the minor to apply for guardianship. The purpose of s 9(3) in calling for the publication in the Gazette and in the newspaper is to allow publicity to be given to the names of those who have

applied for guardianship so that any person who may have an interest in the matter can appear before the juvenile court when, in terms of s 9(4), it shall inquire into those persons that have applied under s 9(2), having regard to the welfare and interests of the minor. Section 9(4) gives the juvenile court a discretion to appoint from those persons who have made an application such person as it thinks fit and proper to be the guardian of the minor. The clerk of the juvenile court under s 9(5) must issue to the person who has applied for guardianship under s 9(2) a letter of appointment. There is no provision in the Guardianship of Minors Act for the magistrate of the juvenile court to issue a Certificate of Guardianship. Section 9(4) permits the juvenile court, when it appoints a guardian, to specify all or such of the rights, powers and privileges of guardianship and on such conditions it may specify.

Further, the record of proceedings does not support the juvenile court's finding that the minor child was sickly and that he was in a boarding school and not in the direct care of the applicant. On the contrary, the testimony of the applicant, which was not contradicted, was that the minor child was not ill and that is why he was not examined by a physician, and that the minor child was at a pre-school at Joylands Daycare Centre with her in Kadoma but that she had in keeping with the minor child's mother's wishes provisionally enrolled him at Eiffel Flats Primary School, a boarding school. The juvenile court in reaching a decision took into account matters that were not properly before it. Also, it has been stated in various judgments of this court and the Supreme Court that when a statutory provision requires the proceedings of an inferior court or tribunal to be sent on review to this court or the Supreme Court there must be a record of proceedings, which must include written reasons for the decision made. Without a record of proceedings and written reasons for the decision this court cannot carry out its review powers to determine whether the proceedings were in accordance with justice.

It is also abundantly clear that the juvenile court did not take into careful consideration the principles mentioned in French v French supra, which bear on what would be in the child's best interest or the criteria or factors enumerated in McCall v McCall supra, which seem to overlap the principles in French v French supra. The juvenile court candidly admitted that it made what can be termed a value judgment, but without any written reasons it is most difficult to fathom why the juvenile court uprooted a six-year-old minor child who had in a very short period on 15 October 2000 lost his father when on 7 December 2000 he was left by his mother in custody of his maternal grandmother and then on 27 March 2001 lost his mother as she was sick. The first principle in French v French supra, requires that the minor child should not be uprooted except for sound reasons. The grandmother in her testimony alluded to the bond that had been established between her and her orphaned grandson and pleaded that the father's family wait to allow the minor child to settle. The juvenile court did not in the response to this court's query provide any sound reason as to why the minor child had to be removed from his grandmother at this particular time. Further, a more extensive enquiry was required in this case by the provincial magistrate before the appointment of a guardian. For this purpose, the minor child's maternal grandfather and his paternal grandparents, who are his nearest relatives, as well as his other relatives on his father's and mother's side ought to be given an opportunity to seek his guardianship. They may make an application in terms of s 9 of the Act just as the applicant has done, which can be considered together

with the applicant's application. It may be appropriate for the applicants to consider that a family counsellor be appointed to prepare a report, the costs of which may be paid from the funds in the minor child's deceased parents' estate.

The juvenile court must inform the applicant, the child's uncle and the other relatives of this review judgment.

It follows that the decision of the juvenile court must be set aside. Accordingly, it is ordered:

(1) that the appointment of the guardianship of the minor child be set aside; and

(2) that in the interim the applicant shall have custody of the minor child, who must be delivered to her forthwith; and

(3) that the matter is remitted to the juvenile court before another provincial magistrate.