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GUARDIAN SECURITY SERVICES (PVT) LTD v ZIMBABWE BROADCASTING CORPORATION 2002 (1) ZLR 1 (S)

Citation	2002 (1) ZLR 1 (S)
Case No	Judgment No. S-95-01
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Ziyambi JA
Heard	9 October 2001
Judgment	20 November 2001
Counsel	*E W W Morris*, for the appellant *B T Mtetwa*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

D **Appeal** — *new issue — issue not raised in pleadings — when may be dealt with by appeal court*

Contract — *breach — election by innocent party to terminate or abide by contract — election inferred from conduct — party's intention — objective test*

E **Damages** — *assessment — contractual damages — unlawful termination of contract — net loss claimable*

Headnote

Although generally speaking all the issues in a civil action should be raised on the pleadings, an appeal court may decide an issue which was not so raised, even where no amendments have been applied for, if the issue F was fully canvassed at the trial.

If, following a breach of contract, the innocent party, with full knowledge of his rights, performs an unequivocal act from which it can reasonably be inferred that he has elected to abide by the contract, his intention in performing the act is to be tested objectively. He is not at liberty to say that his conduct was not motivated by an intention to waive his right to G terminate the contract.

The respondent engaged the appellant to supply security guards for its premises. Property was stolen from the premises, almost certainly due to the negligence of one of the appellant's security guards, and the respondent demanded compensation from the appellant which the H appellant refused to pay. For the next twelve months, the respondent

continued paying the appellant its monthly fee and the appellant A continued to supply guards for the premises. Only then did the respondent purport to cancel the agreement between the parties on the ground that the security guard's negligence in allowing the property to be stolen was a material breach of the agreement. The appellant sued the respondent in the High Court for unlawful termination of the agreement, claiming B damages in the amount of its monthly fee for the period that the agreement would have endured had it not been terminated. Although the appellant's pleadings did not allege that the respondent had waived its right to cancel the agreement, the issue was raised in evidence at the trial and fully investigated. Despite that, the appellant's claim was dismissed and the appellant appealed. C

Held, that in the circumstances the Supreme Court was entitled to treat the issue of waiver as if it had been pleaded by the appellant.

Held, further, that when there is a breach of contract the innocent party is entitled to a reasonable time in which to decide whether to enforce the contract or terminate it. Twelve months was too long for the respondent to make its election in this case, and by continuing to pay the appellant's D monthly fee for twelve months it clearly indicated that it had elected to abide by the

agreement. Whatever mental reservations it may have had were irrelevant because they were not communicated to the appellant.

Held, further, as to damages that the appellant was entitled to its net loss only. Deductions had to be made in respect of expenses it saved as a E result of the premature termination of the agreement and for amounts it earned whilst doing other work in order to mitigate its damages, as it was obliged to do.

Cases cited

Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 1996 (2) SA 537 (C)F

Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A)

Mahabeer v Sharma NO & Anor 1985 (3) SA 729 (A)

Masukusa v Tafa 1978 RLR 167 (A)

Middleton v Carr 1949 (2) SA 374 (A)

Multilateral Motor Vehicle Accidents Fund v Meyerowitz 1995 (1) SA 23 (C)G

Myers v Abramson 1952 (3) SA 121 (C)

Palmer v Poulter 1983 (4) SA 11 (T)

Sager's Motors (Pvt) Ltd v Patel 1968 (2) RLR 267 (A)

Segal v Mazzur 1920 CPD 634

Thomas v Henry & Anor 1985 (3) SA 889 (A)H

Sandura JA

Case information

A*E W W Morris*, for the appellant

B T Mtetwa, for the respondent

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's claim against the respondent for damages in the sum of $5 000 000 for breach of contract.

B The background facts are as follows. In June 1982, the appellant ("Guardian") and the respondent ("ZBC") concluded an agreement in terms of which Guardian undertook to guard daily and on a 24-hour basis ZBC's premises in Harare, Gweru and Bulawayo, in return for a fee payable monthly in arrears. The agreement was for a period of ten years, but was automatically C renewable at the end of that period for a further period of ten years. Thereafter, it could be terminated by either party giving to the other 12 months' written notice. In addition, clause 11 provided that either party could terminate the agreement if the other party committed a material breach of the agreement. Subsequently, in June 1992, the agreement was automatically renewed for a further period of ten years.

D Thereafter, on 16 September 1997 some property belonging to ZBC and valued at about $50 000 was stolen from its premises in the suburb of Eastlea in Harare ("the premises"). The property included a number of radiators each weighing about 196 kg. At the relevant time, the premises were fenced and gated, and were guarded by a man employed by Guardian.

E ZBC discovered the theft on 19 September 1997 and reported the matter to the police. It subsequently contacted Guardian and demanded compensation for the loss, alleging that the loss had occurred due to the inefficiency and negligence of Guardian's employee, and that Guardian had not, therefore, carried out its obligations in terms of the agreement. Guardian denied liability and indicated that it would investigate the matter. That was F in October 1997.

Because of the size and weight of the items stolen, it was common cause that the property in question could only have been removed from the premises by means of a truck which would have

been driven into and out of the premises through the gate.

G Whilst the theft was being investigated by Guardian and by the police, ZBC continued paying to Guardian the agreed fee of $100 000 per month for the security services rendered to it by Guardian without reserving its right to terminate the agreement for breach of contract.

Subsequently, on 15 September 1998, ZBC's lawyers wrote a letter to H Guardian indicating that their client was terminating the agreement for

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breach of contract. The relevant part of the letter reads as follows: A

> "In terms of clause 11 of the main agreement, our client hereby cancels the agreement and for purposes of giving you time to accordingly arrange your affairs, the termination will be with effect from 31 December 1998."

However, the termination of the agreement was later postponed to March 1999 B because ZBC had to comply with certain tender procedures before it could hire another company to provide the required security service.

Aggrieved by the termination of the agreement, Guardian issued a summons against ZBC claiming damages in the sum of $5 000 000 for breach of contract. ZBC denied having terminated the agreement unlawfully. C It alleged that it was entitled to terminate the agreement in terms of clause 11 because Guardian had committed a material breach of the agreement as a result of which ZBC's property was stolen from the premises at Eastlea.

In addition, ZBC counter-claimed payment of the sum of $50 000 as compensation for the stolen property.

When the matter came up for trial in the court *a quo*, Guardian's counsel, D whilst conceding the counter-claim, submitted that whatever negligence was displayed by his client's employee when the property was stolen was condoned by ZBC, and that ZBC, therefore, clearly elected to abide by the agreement. In the circumstances, he submitted that ZBC had waived the right to terminate the agreement for breach of contract. E

Counsel's submissions did not find favour with the learned judge. She dismissed Guardian's claim with costs. Aggrieved by that decision, Guardian appealed to this court.

At the hearing of the appeal, Mr *Morris*, who appeared for the appellant, submitted that ZBC had waived its right to terminate the agreement because F after the alleged breach it had elected to abide by the agreement. Dealing with that submission Mrs *Mtetwa*, who appeared for ZBC, submitted that Guardian could not rely upon the allegation that ZBC had elected to abide by the agreement because the issue had not been pleaded. She further submitted that, in any event, ZBC had not elected to abide by the agreement and had not, therefore, waived its right to terminate it. In reply, Mr *Morris* submitted that G the issue of election had been pleaded. In making that submission he relied upon the fact that in its declaration Guardian stated that the termination of the agreement by ZBC was unlawful. In my view, that statement did not raise the issue of election because the termination of the agreement was said to be unlawful in that Guardian alleged that it had not committed any material breach of its contractual obligations. In fact, Guardian, in its replication, H

A denied that the property had been stolen, but alleged that it had been removed from the premises by Mr Matanga, ZBC's internal auditor. In the circumstances, Guardian alleged that it had not committed any breach of the agreement, and that, accordingly, ZBC had unlawfully terminated the agreement. A further reason for concluding that the issue of election was not pleaded is that neither party raised it in its pre-trial conference minute. As a B result, the issue was not discussed at the pre-trial conference, nor was it raised by either party.

Quite clearly, therefore, the issue was not pleaded. In its replication, Guardian should have pleaded that ZBC had elected to abide by the agreement and had, therefore, waived its right to terminate it.

C I now wish to consider the consequences of Guardian's failure to plead the issue. The question for consideration is whether Guardian is at liberty to rely upon the allegation that ZBC elected to abide by the agreement, notwithstanding the fact that the issue was not pleaded.

As the purpose of pleadings is to clarify the issues between the parties, generally speaking, all the issues in a civil action should be raised on the D pleadings. A party should not direct the attention of the other party to one issue and then, at the trial, canvass another unless the court grants him leave to amend his pleadings. However, in some cases courts have adjudicated on issues not raised on the pleadings even where no amendments have been applied for. This has been the case where the issues in question had been fully E canvassed at the trial.

In *Collen* v *Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433, Centlivres JA, referring to an issue not raised on the pleadings but fully canvassed at the trial, said:

> "This court, therefore, has before it all the materials on which it is able to F form an opinion, and this being the position it would be idle for it not to determine the real issue which emerged during the course of the trial."

Subsequently, in *Middleton* v *Carr* 1949 (2) SA 374 (A) at 385, Schreiner JA, commenting on an issue not raised on the pleadings but fully canvassed at the trial said:

> G "[W]here there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised."

The above passage was quoted with approval in our own jurisdiction by Lewis AJA (as he then was) in *Sager's Motors (Pvt) Ltd* v *Patel* 1968 (2) RLR 267 (A) H at 274A-B, after saying the following at 273H:

Sandura JA

> "The *ratio decidendi* of the cases … referred to above is that where there A has been a full and thorough investigation into all the circumstances of the case and a party has had every facility to place all the facts before the trial court, the court will not decline to adjudicate on an issue thus fully canvassed simply because the pleadings have not explicitly covered it."

Applying the above principles to the facts of the present case, I conclude B that Guardian is at liberty to rely upon the allegation that ZBC elected to abide by the agreement, notwithstanding the fact that the issue was not pleaded. I say so because the issue was raised by Mr *Morris* at the commencement of the trial before any evidence was led, and was thereafter fully canvassed during the trial. In his opening address to the trial court, he said: C

> "Perhaps, it would be convenient for me to mention at this stage, my Lady, that it would be the plaintiff's contention in so far as the cancellation is concerned that whatever negligence may … have been displayed by its servants, such negligence was accepted and the defendant made a clear election to abide by the contract, and this arises out of the fact that it was D only 12 months or so after the alleged negligence that the defendant actually cancelled the contract, and in that intervening period of 12 months, the defendant continued paying the contractual price and allowing the plaintiff to provide the service."

Thereafter, Mr *Morris* called one witness who testified on behalf of Guardian, and Mrs *Mtetwa* called three witnesses who gave evidence for ZBC. E

In my view, the evidence given by the witnesses and the submissions made by both counsel at the end of the trial indicate that the allegation that ZBC elected to abide by the agreement was fully investigated. In the circumstances, this court is entitled to treat the issue as if it had been pleaded by Guardian.

Before determining whether ZBC elected to abide by the agreement I would F like to set out the doctrine of election. It was stated by Watermeyer AJ in *Segal* v *Mazzur* 1920 CPD 634 at 644-5 as follows:

> "Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect G not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held H

> A to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct …"

In my view, that accurately sets out the nature of the doctrine of election. It is clear that election generally involves a waiver. One right is waived by choosing to exercise another right which is inconsistent with the former.

B The next issue which I wish to consider is whether the intention to waive or to elect not to enforce a contractual right is to be tested objectively or subjectively. In other words, the question is whether the innocent party is at liberty to say that his conduct was not motivated by an intention to waive his right to terminate the agreement. The point was left open in *Mahabeer* v *Sharma NO & Anor* 1985 (3) SA 729 (A) C , and in *Thomas* v *Henry & Anor* 1985 (3) SA 889 (A).

In my view, the objective test must apply where the innocent party, with full knowledge of his rights, performs an unequivocal act from which it can reasonably be inferred that he has elected to abide by the agreement.

D I find support for my view in a number of South African cases. In *Palmer* v *Poulter* 1983 (4) SA 11 (T) at 20C-D, Ackermann J, in delivering the judgment of the Full Bench, said:

> "If the appellant, with full knowledge of the facts has so conducted herself that a reasonable person would conclude that she had waived her accrued right to cancel the agreement or had affirmed the agreement, a mental E reservation to the contrary will not avail her."

The objective test therefore prevailed. That decision was followed by the full bench of the Cape Provincial Division in *Multilateral Motor Vehicle Accidents Fund* v *Meyerowitz* 1995 (1) SA 23 (C) at 27. Subsequently, in *Bekazaku Properties (Pty) Ltd* v *Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C)F at 543J-544A, Friedman JP, in delivering the judgment of the full court, said:

> "If the innocent party with full knowledge of his rights performs an unequivocal act from which a reasonable person would necessarily infer that he has elected to affirm the contract, he would be bound thereby, whatever subjective reservations he might have had. On the other hand, G if the act on which it is sought to rely for the exercise of an election is not unequivocal, regard may be had to the subjective considerations which motivated the party concerned in order to determine whether the act in question does in fact constitute an election or not."

Later in the judgment, the learned Judge President said the following H at 549H-I:

> "Whatever mental reservations the applicant might have had, these were A never conveyed to the respondent. The respondent was never told that the applicant was reserving its rights or that it was considering its position. The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds."

With those principles in mind, I now turn to the facts in this case in order to determine whether ZBC elected to abide by the agreement. B

As already stated, ZBC became aware of the breach on 19 September 1997 when it discovered that the property had been stolen. Thereafter, in a letter dated 10 October 1997, it demanded compensation in the sum of $50 000 but Guardian denied liability and refused to pay for the loss.

However, without in any way reserving its right to terminate the agreement C on account of the breach, ZBC continued paying to Guardian the monthly fee in terms of the agreement. It was only about twelve months after the breach that it decided to terminate the agreement and communicated that decision to Guardian.

It is well established, as already indicated, that when there is a breach of D contract the innocent party is entitled to a reasonable time in which to decide whether to enforce the contract or terminate it. The issue now to be considered is whether twelve months could be regarded as a reasonable time. I do not think so.

It was quite clear from the evidence given by ZBC's witnesses that within three or four days after the property had been stolen ZBC knew that the theft E had occurred because Guardian had not carried out its obligations in terms of the agreement. That is why ZBC subsequently demanded compensation for the loss. That being the case, the investigations which Guardian undertook to carry out were irrelevant to ZBC's decision whether to abide by the agreement or terminate it. When ZBC discovered the breach it had to make F its election within a reasonable time and, at the latest, by the deadline date for the payment of the September 1997 fee to Guardian, the fee being payable in arrears. I say so because by allowing Guardian to provide the security service in October 1997 and thereafter paying the October fee, without reserving its right to terminate the agreement, ZBC unequivocally approbated the contract. In fact, after the breach ZBC continued paying the monthly fee to Guardian G for twelve months as if nothing had happened. In my view, that was a clear indication that it had elected to abide by the agreement. Whatever mental reservations ZBC might have had were irrelevant because they were not communicated to Guardian.

The same principles apply to a landlord whose tenant is in breach of the lease agreement. In such a case, the landlord must, within a reasonable time, H

Sandura JA

A exercise his election whether to abide by the lease or cancel it. Thus, in *Masukusa* v *Tafa* 1978 RLR 167 (A), Lewis JP, commenting on cases cited by counsel for one of the parties, said the following at 172C-G:

> "They are no authority for the proposition that having accepted a timeous payment, and without any subsequent default on the tenant's part, the landlord can then go back in time and rely upon previous late payments B in order to cancel the lease. The answer may well be that *on the occurrence of the breach entitling him to rescind, the landlord must exercise his election whether to abide by the contract or cancel it within a reasonable time* (see Cooper*, South African Law of Landlord and Tenant*, p 288, citing *North Vaal Mineral Co. Ltd* v *Lovasz* 1961 (3) SA 604 (T)) C *and where the rental is payable monthly in advance he should reasonably exercise it before the deadline date for the next month's payment. In other words, by accepting the next month's payment on due date, he loses his right to cancel and must be deemed to have elected to abide by the contract*. Another way of looking at it is that an attempt to go back in time to previous months' defaults, after acceptance of D subsequent timeous payments, enables the lessee to resist a claim for ejectment by raising the *exceptio doli* against the landlord …" (the emphasis is mine).

In the circumstances, I am satisfied that ZBC elected to abide by the agreement and, therefore, waived its right to terminate it. Accordingly, the E subsequent termination of the agreement was unlawful, and Guardian was entitled to damages for the unlawful termination of the agreement.

I now wish to consider the quantum of those damages.

The sum of $5 000 000 claimed by Guardian was obtained by multiplying 51 months, the period by which the agreement was prematurely terminated, by F $100 000, the monthly fee payable by ZBC. In fact, the sum should have been $5 100 000 had there been no mathematical error in the calculation.

However, Mr *Morris* submitted that taking into account the benefit of the accelerated payment of the fees, and making allowance for various contingencies, it was proper that the claim by Guardian be abated to $3 800 000. In order to arrive at that figure, he utilised the annuity and G discount tables in *The Quantum of Damages in Bodily and Fatal Injury Cases* 3 ed, by Corbett, Buchanan and Gauntlett.

Nevertheless, Mrs *Mtetwa* submitted that Guardian had not proved its damages. In addition, she submitted that in the event that the court found ZBC liable to pay damages to Guardian, the matter should be remitted to the trial H court for a proper assessment of the *quantum* of damages payable.

Sandura JA

The issue for determination is whether the sum of $3 800 000 is a genuine A estimate of the loss incurred by Guardian as a result of the unlawful termination of the agreement by ZBC. I do not think that it is.

I say so because, for example, in arriving at that figure, no deductions were made in respect of the expenses which were saved by Guardian as a result of the premature termination of the agreement.

In addition, no deductions were B made in respect of what Guardian earned or will earn whilst doing other work in the time that became available, in order to mitigate its damages, as it was obliged to do.

As Professor Christie states in *The Law of Contract in South Africa* 3 ed at 612: C

> "[A] plaintiff who has been prevented by the defendant from doing work and earning his reward cannot claim the reward without either doing the work or making a deduction for expenses saved and other work done in the time that became available."

The case of *Myers* v *Abramson* 1952 (3) SA 121 (C) illustrates the point. Myers, a medical practitioner, sued Abramson for the balance of the fee due D to him in terms of a certain contract of service between the parties which Abramson had unlawfully terminated. Alternatively, he claimed damages in the sum of £550.

Having come to the conclusion that the only remedy open to Myers was that of damages, van Winsen J said the following at 127C-F: E

> "What is the measure of such damages? Mr *Bloch* contends that he is entitled to surrogate damages, i.e. damages which are substitutional for specific performance and which in the circumstances of this case would amount to the same sum as would be awarded on a claim for specific performance. I have found no precedent for awarding surrogate damages to a wrongfully dismissed employee. The measure of damages accorded F such employee is, both in our law and in the English law, *the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.* See *Hunt* v *Eastern Province Boating Co* 3 EDC 12 at p 23; *Denny* v *S.A. Loan Co. Ltd* 3 EDC 47 G at p 59; *Bulmer* v *Woollens Ltd (in Liquidation)* 1926 CPD 459 at p 467; *Farrington* v *Arkin*, 1921 CPD 286; *Beeton* v *Peninsula Transport Co (Pty) Ltd* 1934 CPD 53 at p 59" (the emphasis is mine).

Those comments are pertinent to the assessment of the damages in the present case. It is clear that Guardian is entitled to its net loss only, otherwise it would be over-compensated. H

Sandura JA

A In the circumstances, I am satisfied that Guardian did not prove its damages.

As it is not possible for this court to say what the award of damages should be, the most reasonable and equitable course to take is to remit the matter to the trial judge for her to hear further evidence on the quantum of damages and then make an appropriate award.

B As far as the costs of the appeal are concerned, Guardian, having succeeded, is entitled to its costs. In addition, it is entitled to its costs in respect of the claim-in-convention in the court *a quo* because it succeeded in establishing ZBC's liability to pay damages to it. However, the issue of the costs of the further hearing should be determined by the trial judge.

Finally, I hope that this matter will be settled and that the further hearing will C not be necessary.

In the circumstances, the following order is made:

1. The appeal is allowed with costs.
2. Paragraph 1 of the order of the court *a quo* is set aside.
3. The matter is remitted to the trial judge for her to hear further evidence D on the *quantum* of damages and then make an appropriate award.
4. The costs of the claim-in-convention in the court *a quo* are to be borne by ZBC, but the issue of the costs of the further hearing shall be determined by the trial judge.

E CHIDYAUSIKU CJ and ZIYAMBI JA concurred.

Mabuye & Company, appellant's legal practitioners

F *Kantor & Immerman*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/MATABELELAND ZAMBEZI WATER TRUST v ZIMBABWE NEWSPAPERS (1980) LTD & ANOR 2002 (1) ZLR 12 (H)

MATABELELAND ZAMBEZI WATER TRUST v ZIMBABWE NEWSPAPERS (1980) LTD & ANOR 2002 (1) ZLR 12 (H)

Citation	2002 (1) ZLR 12 (H)
Case No	Judgment No. HB-59-01
Court	High Court, Bulawayo
Judge	Malaba J
Heard	15 June 2001
Judgment	10 January 2002
Counsel	*J James*, for the applicant *P Dube*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

D **Practice and procedure** – *discovery – information in possession of third party regarding wrongdoing – when order may be granted compelling third party to disclose information – legal or other action must be contemplated against wrongdoer*

Headnote

Allegations were published in one of respondents' newspapers to the effect E that the applicant trust had been defrauded by certain unnamed people in its employment. The applicant applied to the court for an order compelling the respondents to disclose the names of the employees who were the subject of the allegations. It claimed it needed the information in order to decide whether or not to set up an independent investigation F into the allegations, though it declared that they were vague and baseless. It disclaimed any intention of proceeding against the respondents for defamation, though it accused the respondents of injuring its reputation. The applicant's counsel based his client's right to the relief it sought on a right of access to information which, he said, was contained in s 20(1) of the Constitution. G

Held, that s 20(1) of the Constitution, which states that no one may be hindered in the enjoyment of his freedom of expression, does not create a right of access to information. It could not form the basis of the relief sought by the applicant.

Held, further, that an order of disclosure of information to find the identity of a wrongdoer is available against anyone against whom the applicant H

Malaba J

A has a cause of action in relation to the same wrong, or against anyone who, through no fault of his own, gets mixed up in the delictual acts of the wrongdoer so as to facilitate the wrongdoing.

This principle applies whether or not the applicant intends to pursue an action in the courts against the wrongdoer, provided he shows he is genuinely seeking lawful redress of the wrong.

B *Held*, further, that in order to saddle the respondents with the duty to disclose the information sought, the applicant had to accuse its employees of wrongdoing, and show that the respondents were connected with the wrong or facilitated the perpetration of the wrong. It had failed to discharge that onus. It did not need the information in order to decide whether or not to set up an independent investigation into the allegations C against its employees, since it could obtain the necessary information through an examination of its own books of account.

Cases cited

British Steel Corp v Granada Television Ltd [1981] 1 All ER 417 (HL)

D *Norwich Pharmacal Co & Ors v Commissioners of Customs & Excise* [1974] AC 133; [1973] 2 All ER 943 (HL)

Upmann v Elkan (1871) LR 12 Eq 140

Legislation considered

E Constitution of Zimbabwe, s 20(1)

Case information

J James, for the applicant

P Dube, for the respondent

Judgment

Malaba J This is an opposed application for an order requiring the F respondents, jointly and severally, to disclose information in their possession on the names of employees and officials alleged in a series of articles published in *The Chronicle* newspaper to have defrauded applicant of tens of thousands of dollars.

The applicant, referred to hereinafter as "MZWT", is a body corporate G formed in terms of a Deed of Trust which also created a Board of Trustees to manage its affairs. The main object of applicant, as stated in the Deed of Trust, is to secure the construction of a pipeline to bring water from the Zambezi River to the City of Bulawayo and the drought-prone region of Matabeleland. For that purpose, the Board of Trustees is entrusted with the responsibility of establishing a fund and to that end to solicit, collect and raise H money from individuals, public and private organisations.

Malaba J

The first respondent is the proprietor, printer and publisher of a A daily newspaper called *The Chronicle* (the newspaper). The second respondent is the editor of the newspaper.

What brought the parties to court by way of application, is information contained in articles published by the respondents in the editions of *The Chronicle* of 27 and 28 October 1999. The articles contained allegations B from what were described as "highly placed sources", to the effect that certain of applicant's employees and officials had defrauded it of tens of thousands of dollars through false claims for travel and subsistence allowances after trips abroad.

It was alleged in particular that:

1. Some employees and officials of MZWT went on foreign trips in respect C to which travel and subsistence expenses were paid for by sponsors but nonetheless submitted claims for the same on their return home and applicant approved the false claims. An example was given of two officials who fraudulently claimed $90 000 after a foreign trip.
2. One official made several trips to Harare from Bulawayo by air on D private business but had the air tickets paid for by MZWT.
3. One official who was attending a conference in South Africa on MZWT's business booked into the hotel a 21 year old female relative on applicant's account.

4. Some employees went to MZWT offices on weekends and made private E international telephone calls at its expense. Relatives and friends of these employees were allowed to use MZWT's fax machines and telephones free of charge.

In an editorial, in the edition of *The Chronicle* of 28 October 1999, the second respondent made comments to the effect that the reports of fraud and F corruption in the management of MZWT's financial affairs damaged its reputation and undermined public confidence in its ability to administer public funds. He called upon the MZWT to set up an independent audit team to investigate the allegations and restore public confidence in its activities. In publishing the articles containing allegations of fraud and corruption against MZWT's employees and officials, the respondents withheld the G names of the alleged wrongdoers.

MZWT reacted to the allegations by ordering internal auditors to examine its books of account and records. The results of the internal audit suggested that there was no wrongdoing by any of its employees and officials. The report indicated, however, that the audit was limited in scope, having been confined to the examination of the evidence relevant to the amounts and disclosures H

Malaba J

A made in the accounts. The internal auditors recommended that a special investigation be conducted if all the weaknesses in the operational activities and accounting procedures of MZWT were to be exposed.

MZWT turned to the respondents and asked them to give it names of the employees and officials accused of fraud and corruption in the management of its financial affairs. The respondents, for a number of reasons, refused to B give MZWT the information it sought. On 16 February 2000, MZWT made the application for an order of disclosure against the respondents.

In the founding affidavit deposed to by the secretary of the Board of Trustees, MZWT accused the respondent of injuring its reputation. It averred, however, that it had no intention of bringing action for defamation against the C respondents. It said it required the information in the possession of the respondents for the purposes of deciding whether or not to set up an independent investigation into the allegations of fraud and corruption contained in the articles they had published. In the same breath and relying on its internal audit report, MZWT declared that the allegations against its employees and officials were vague and baseless.

D In the opposing affidavit, the respondents gave reasons why the order of disclosure should not be made against them. They admitted being in possession of the information required by MZWT. They said they did not owe MZWT a legal duty to disclose the information. According to the respondents MZWT had not shown a real need for the information, which it could easily E obtain through an examination of its own books of account and records. In other words, a disclosure order was not the only effective remedy by which the information could come to MZWT's knowledge. It was also suggested that disclosure would be in breach of journalistic ethics.

The application is simply for an order that respondents disclose the identity F of the employees and officials alleged in the articles published in *The Chronicle* to have defrauded applicant of its money. There is no cause of action being pursued or intended to be pursued against the respondents. The applicant said it had no intention of bringing action against the respondents for defamation. On what legal basis has the applicant sought the relief which is in the nature of discovery?

G Mr *James* argued that the relief was founded on a right of access to information contained in s 20(1) of the Constitution. The subsection provides that:

> "… no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and H impart ideas and information without interference …"

Malaba J

In my view, s 20(1) does not create a right of access to information. Whilst A freedom of expression incorporates the right to publish or withhold information from publication, it does not include a right to receive information, let alone a positive right like access to information in the possession of another.

Freedom to receive information is a state of liberty, denoting readiness to receive what the giver is prepared to disseminate. One is at liberty not to B receive the information just as one is not under a duty to give it. A right to receive information would mean that the person who has possession of it is under a duty to publish it to the potential recipient who has no choice but to receive it. There would be no freedom to talk about.

Freedom to receive information imports absence of any legal duty which would limit, within the legally protected sphere of liberty, the capacity to do C as one pleased. The provisions of s 20 (1) cannot, therefore, form the basis of the relief sought by the applicant in these proceedings.

One must turn to common law. Can an order of disclosure of the identity of a third party be granted against the respondent where there is no actual or intended proceedings against him? In other words, can disclosure of the D identity of a third party be ordered against anyone who can give that information to the applicant? It is not necessary to consider Miss Du*be*'s argument that the order of disclosure would constitute pre-action discovery because applicant made it clear that it had no intention of bringing any action against the respondents.

The principles applicable to such a case were stated and discussed in two E decisions of the House of Lords, the cases of *Norwich Pharmacal Co & Ors* v *Commissioners of Customs and Excise* [1973] 2 All ER 943 and *British Steel Corporation* v *Granada Television Ltd* [1981] 1 All ER 417 at 452.

In the *Norwich Pharmacal* case, the Commissioners of Customs and Excise knew from documents lodged with them who were the importers of a F substance called furazolidone. Norwich Pharmacal were the owners of the patent relating to that chemical. None of the importations of it were licensed by Norwich Pharmacal. In relation to the majority, if not all, of them the importations constituted an infringement of the patent. Unless Norwich Pharmacal could secure disclosure by the Customs and Excise of the identity of the importers, they could not take any steps to protect their rights G in the patent. Norwich Pharmacal started proceedings against the Commissioners of Customs and Excise. The proceedings were treated as an action for disclosure of the identity of the importers. The question arose as to whether the respondents, who were not themselves wrongdoers, could be ordered to disclose the names of the importers who admittedly were wrongdoers. H

Malaba J

A The following passages from the speeches contain the principles found applicable in such a case:

Lord Reid at p 948A-D said:

> "… appellants contend, that discovery (disclosure) will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that … So discovery to find the B identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their C conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed. Does this involvement in the matter make a difference?"

He thought that the observations of Mr Lord Romilly and Lord Hatherley LC D in *Upmann* v *Elkan* (1871) LR 12 Eq 140 at 145 pointed to:

> "a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it E matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.
>
> F I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred G some minor liability."

Lord Morris at p 951J said:

> "It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose

of bringing H some proceedings. At the very least, the person possessing the information

2002 (1) ZLR p18

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would have to have become actually involved (or actively concerned) in A some transaction or arrangements as a result of which he has acquired the information."

Viscount Dilhorne at p 960 said disclosure can be ordered against a person who, the fact of some wrongdoing being established, was respon*sible* for it and it mattered not whether his involvement was innocent and in ignorance B of the wrongdoing (the underlining is for emphasis).

Lord Cross thought that the right to disclosure depended on the relation between the respondent to the action for disclosure and the persons the disclosure of whose names was sought.

The facts in the *BSC* case were these. In January 1980, during a national steel C strike by British Steel Corporation ("BSC) employees, a television company (Granada) decided to broadcast a programme on the strike. A few days before the programme Granada received copies of 250 secret and confidential documents from BSC's files relating to internal actions and discussions at a high level within BSC and between BSC and the government.

The documents were received unsolicited from an unofficial source, who D was clearly someone inside BSC who had access to them. The information in the documents showed possible mismanagement within BSC. Granada used 27 of the documents in their programme. The informant was not revealed, in accordance with a promise by Granada to him that his identity would not be disclosed. E

BSC brought proceedings against Granada seeking an order that Granada disclose the identity of the informant. BSC contended that it was necessary for them to know the identity of the informant in order to prevent future misuse of its documents and to remove the suspicion directed at those of their staff who had access to the documents.

On the hearing of the motion, the judge ordered Granada to disclose the F identity of the informant, and that order was upheld by the Court of Appeal. Granada appealed to the House of Lords.

In the Court of Appeal, Templeman LJ at 443d-e said:

"In my judgment, the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against G the wrongdoer, provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice … Justice can be achieved against an erring employee in a variety of ways and a plaintiff may obtain an order for discovery provided he shows that he is genuinely seeking lawful redress of a wrong and cannot otherwise obtain redress. H

2002 (1) ZLR p19

Malaba J

A … In the third place, BSC must establish that discovery by Granada of the identity of the employee is necessary."

In the House of Lords, Lord Wilberforce at 459F said:

"It is said that the relief, being in the nature of discovery, can only be granted in aid of some existing proceedings, or at the most in aid of B intended proceedings. This is supported by the admirably brief authority of *Cardale* v *Watkins* (1820) 5 Madd 18; 56 ER 801. But there may be a middle ground between the 'mere gratification of curiosity' which is discountenanced and 'in aid of some other proceeding either pending or intended' which is permitted … Now I would be prepared if necessary to hold that, *given a cause of* C *action, an intention to seek redress, by court action or otherwise, would be enough* …" (my emphasis).

Lord Fraser held at 479 that an intention to raise proceedings against the person the disclosure of whose identity is sought is not necessary as long as the applicant has a cause of action and disclosure is not sought for the mere gratification of curiosity but for the vindication of rights.

D The onus is on the applicant to produce facts which show that there has been a violation of its rights by its employees and officials for the purposes of the vindication of which it requires the information in the possession of the respondents. It must also show that the respondents mixed themselves up with the tortious acts committed against it by the employees and officials. It would show that by their own relationship with wrongdoers the respondents E submitted to the duty to disclose the information required.

The applicant has, in my view, failed to meet the above requirements. It took the position that the allegations of fraud and corruption levelled against its employees and officials were false and therefore defamatory. It did not accept that any of its employees and officials committed a wrong against it.

F As far as the applicant was concerned, the right which was infringed was the right to good reputation and by the respondents. It must follow that applicant does not consider any of its employees and officials wrongdoers. There would be no point in ordering the respondents to disclose the identity of employees and officials alleged in the articles published in *The Chronicle* to have defrauded it when the applicant says it has no cause of action against G them. It is clear from the above authorities that to saddle the respondents with the duty to disclose the information it wanted, the applicant had to accuse its employees and officials of wrongdoing. It would have had to show that the respondents were connected with the wrong or facilitated the perpetration of the tortious acts against it. It failed to discharge that onus.

H One is left with the impression that disclosure is sought not for the purpose

Malaba J

of vindicating rights but for the mere gratification of curiosity. The applicant A said it required the information in the possession of the respondents to establish the veracity of the allegations levelled against its employees and officials. It is clear from this statement that applicant does not believe that any of its rights were violated by its employees. It seeks disclosure for the purposes of satisfying curiosity because it has already said the allegations are B false. Disclosure cannot be ordered to enable the applicant to use the information to find out whether or not any of its rights has been violated. Rights should be shown to have been violated at the time relief of disclosure is sought. Disclosure of the information requested by applicant is not necessary for the purposes of deciding whether or not to set up an independent audit team to investigate the allegations levelled against its employees and C officials. The applicant can easily obtain the information through the examination of its own books of account. In the light of the view, I have taken of the ground on which the application was made there is no need to consider the argument that disclosure would be in breach of journalistic ethics.

The application is dismissed with costs. D

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners

Coghlan & Welsh, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/MKOMBACHOTO v COMMERCIAL BANK OF ZIMBABWE LTD & ANOR 2002 (1) ZLR 21 (H)

MKOMBACHOTO v COMMERCIAL BANK OF ZIMBABWE LTD & ANOR 2002 (1) ZLR 21 (H)

Citation	2002 (1) ZLR 21 (H)
Case No	Judgment No. HH-10-02
Court	High Court, Harare
Judge	Ndou J
Heard	15 November 2001

Judgment 16 January 2002

Counsel *M Harvey*, for the applicant
G S Wernberg, for the first respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

D **Company** — *legal personality — when "corporate veil" may be lifted — limited grounds for doing so*

Property and real rights — *lien — always accessory to a principal obligation — mortgage bond — mortgagor's liability only in respect of obligation for which mortgage undertaken and no other — not permissible for bond* E *holder to retain title deeds as security for other unsecured loan*

Headnote

The applicant had obtained an overdraft from a bank and mortgaged her immovable property as security for the overdraft. She repaid the overdraft and sought return of her title deeds, as she wished to donate the property to her minor son. The bank refused to return the title deeds F on the grounds that she was a guarantor of loans to two companies of which she was a director and the title deeds were the bank's only security. She was not the sole guarantor of those loans. The bank alleged that the applicant was disposing of her property in order to defeat the bank's right to recovery, and that without the bond, there was no other way of recovering the monies loaned to the applicant and her G companies. She applied to the High Court for an order compelling the bank to return the title deeds to her.

Held, that a *jus retentionis*, commonly referred to as a line, is a right tacitly conferred by law on a person who is in possession of the property of another, on which he has spent money or money's worth, of retaining H possession of the property until he has been duly compensated. The

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Ndou J

right is limited: the lien does not give the holder the power to have the A thing sold in execution to satisfy the claim. A mortgage, which is a form of lien, is always accessory to a principal obligation. The mortgagor's liability is only in respect of the obligation for which the mortgage was undertaken, and no other.

Held, further, that the court may only "lift the corporate veil" and disregard B the separate legal personality of a company in limited circumstances, such as fraud or manifest injustice. There was no fraud in this case, nor was there any manifest injustice. The bank could have sought security from the guarantors of the loans to the companies but did not do so.

Cases cited

Albert v Papenfus 1964 (2) SA 713 (E) C

Bark & Anor NNO v Boesch 1959 (2) SA 377 (T)

Botha v van Niekerk 1983 (3) SA 513 (W)

Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1970 (3) SA 264 (A)

Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 (2) RLR 261 (A); 1974 (1) SA 163 (RA) D

Crees, R P, (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd 1975 (1) RLR 151 (G); 1975 (2) SA 485 (R)

Knightsbridge Investments (Pvt) Ltd v Gurland 1963 R&N 37; 1964 (4) SA 273 (SR)

Massicott v Meyrick Park Motors (Pvt) Ltd 1989 (3) ZLR 357 (H) E

Muller NO v Bryant & Flanagan (Pty) Ltd 1976 (3) SA 210 (D)

Orbit Motors (Pty) Ltd v Reeds (Cape) Ltd 1975 (2) SA 333 (C)

R P Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd 1975 (1) RLR 151 (G); 1975 (2) SA 485 (R)

Thienhaus v Metje & Ziegler Ltd 1965 (3) SA 25 (A) F

Trans-Drakensberg Bank Ltd v Guy 1964 (1) SA 790 (D)

United Bldg Soc v Smookler's Trustees 1906 TS 623

Case information

M Harvey, for the applicant

G S Wernberg, for the first respondent G

Judgment

Ndou J The applicant, Gloria Rumbidzai Mukombachoto, obtained personal overdraft facilities from first respondent, Commercial Bank of Zimbabwe Ltd, for the sum of $85 000. As security for the overdraft, the applicant registered mortgage bond number 10201/98 in favour of the first respondent on 25 September 1998, mortgaging Stand 9525 Salisbury Township. This is a continuing covering bond. H

Ndou J

A On 15 September 1999, the applicant wrote a letter to the first respondent enclosing a cheque in the sum of $85 194.54 in payment of the overdraft and requesting cancellation of the overdraft facilities. On 9 December 1999, the applicant donated her immovable property, Stand 9525 Salisbury Township to her minor son, Munyaradzi Tamuka Mkombachoto (born 16 May 1992) by way of a donation *inter vivos.* The applicant's legal practitioners wrote to B the first respondent on 8 May 2000 and 13 June 2000, requesting their cancellation requirements for the mortgage bond. The first respondent responded by letter dated 28 September 2000 advising that they required payment of the sum of $1 428 017.68 made up as follows:

(a) Spencer Sullivan Asset Management (Pvt) Ltd — $1 139 555.71 as at C 31 July 2000; and

(b) Structured Risks Investments (Pvt) Ltd — $228 481.97 as at 31 July 2000.

The first respondent is claiming the said sum of $1 428 017.68 from the applicant on the basis that she was a guarantor and director of the abovementioned companies. The applicant was, however, not the sole D guarantor for these companies.

The applicant contends that the registered bond was a security for the overdraft in respect of her personal account number 11070662 and, as such, has nothing to do with accounts or liabilities for Spencer Sullivan Asset Management (Pvt) Ltd or Structured Risks Investments (Pvt) Ltd. It is clear E from the letter dated 28 August 2000 that the first respondent has not requested payment of any monies in the applicant's personal capacity as she had already paid her personal liability in respect of her overdraft facilities. The first respondent contends that the applicant is liable for the payment of monies owed to them by Spencer Sullivan Asset Management (Pvt) Ltd and Structured Risks Investment (Pvt) Ltd. The basis of such contention is that F the applicant is donating Stand 9525 Salisbury Township to her minor son to place it beyond access of the creditors. There is also a contention on whether security given by applicant for one debt can be used for another debt. The first respondent also contends that they hold a lien over Stand 9525 Salisbury Township through operation of law. Paragraph 5.1 of first respondent's G opposing affidavit states:

> "While it may be true that the bond is limited to a value of $85 000, the refusal to release the title deeds of the property in question is based on the banker's lien and applicant's personal indebtedness, in her capacity as guarantor of her two companies. The applicant does not deny the indebtedness but fails to advise the court of her personal liability as H guarantor."

Ndou J

Paragraph 7 states: A

> "… The applicant does not disclose to this court her personal liability in respect of her guarantees for the two companies. She further does not deny that as guarantor, whatever assets she possesses in her name are subject to liquidation to satisfy her companies' indebtedness. The applicant has been disposing of her assets in attempting to defeat the first B respondent's entitlement to recovery."

Paragraph 7.1 states:

> "It is submitted that there would be no point in the first respondent obtaining judgment under case HC 930/01 and HC 909/01 if there will be no assets to satisfy those judgments. The release of the title deeds to C the applicant at this stage will grossly prejudice the first respondent as the applicant has already disposed of and is in the process of disposing of her assets. The applicant has not bothered to negotiate with the first respondent on how she can pay for her indebtedness in respect of the exposeres of the two companies, giving an impression that she has no intention to settle this debt and would do anything including donating her D assets, just to evade paying this debt. The mortgage bond in light of this is only real security left from which first respondent can hope to recover monies loaned and advanced to the applicant and her now defunct companies. The first respondent is entitled to hold on to whatever it has as security for the applicant's indebtedness as guarantor until the applicant has extinguished her indebtedness as guarantor. No tender or E offers of settlement have been made by the applicant, neither has any payment in respect of the two companies debts been received. first respondent is therefore entitled to, *as a lien*, hold on to whatever security it has in its possession, until the requirements that applicant pay the amounts due in the aforesaid matters have been met."

The above averments capture the first respondent's dilemma. The two F companies are separate legal *personae*. Once the applicant had discharged her obligation in terms of continuing covering bond, the bond has to be cancelled. The only issue for determination is whether the first respondent holds a lien over Stand 9525 Salisbury Township through operation of law.

(a) *Lien* G

The issue here is whether the first respondent holds a lien over the bond. The lien or a right of retention arises by operation of law from the principle that no one should be unjustly enriched at the expense of another — see *United Building Society* v *Smookler's Trustees* 1906 TS 632 at 637 and *Business Law in Zimbabwe* by R H Christie.

In other words, where a person has expended money or labour on someone H

Ndou J

A else's thing, he has the right to retain possession of that thing, which may be movable or immovable, until he has been compensated. A right of retention, *jus retentionis,* commonly referred to as a lien, is a right tacitly conferred by law on a person who is in possession of the property of another, on which he has expended money or moneys worth, of retaining possession of the property until he has been duly compensated. This is a limited real right — B see *Wille's Principles of South African Law* 8 ed by D Hutchison, B van Heerden, DP Visser and CG van der Merwe at p 342 and *Brooklyn House Furnishers (Pty) Ltd* v *Knoetze & Sons* 1970 (3) SA 264 (A). A lien is merely a weapon of defence in that it is used to repulse the owner's vindication but does not give the holder the power to have the thing sold in execution in satisfaction of his claim. The right of retention is lost if the C holder loses possession of the thing: *Orbit Motors (Pty) Ltd* v *Reeds (Cape) Ltd* 1975 (2) SA 333 (C); *Muller NO* v *Bryant & Flanagan (Pty) Ltd* 1976 (3) SA 210 (D) and *Introduction to South African Law and Legal Theory* 2 ed by Hosten, Edwards, Church and Bosman at pp 656-657.

The object of a lien is two-fold: (a) to provide security to the creditor; and (b) D to ensure that the creditor is not deprived of the payment on his expenses by long and unnecessary litigation. On the other hand, the law is not intended to enable the creditor unreasonably to keep the owner of property from the enjoyment of that property. In ensuring that neither the creditor nor the debtor takes advantage of the other, the court's equitable discretion plays a pivotal role: *Massicott* v *Meyrick Park Motors (Pvt) Ltd* 1989 (3) ZLR 357 (H).

E A mortgage, using the term in its wider sense in which it includes pledge, lien, and any other form of hypothecation, is a right which secures the fulfilment of an obligation and it is always accessory to a principal obligation. In other words, in the same way as a suretyship, a mortgage cannot exist without a valid principal obligation. In *Thienhaus* v *Metje & Ziegler Ltd* 1965 (3) SA 25 (A) F at 32 it was stated:

> "It is clear that a mortgage bond as a deed of hypothecation must relate to some obligation … If on a *concursus creditorum* a mortgage, or a pledge, fails to establish an enforceable claim which it was intended should be secured by the hypothecation, the bond or the pledge, as the case may be, falls away."

G This requirement of a valid principal obligation for the enforcement of a mortgage is very similar to the same requirement in relation to a contract of suretyship. Therefore, whenever the validity of the principal obligation in the case of a mortgage is in doubt, the cases on the law suretyship may provide guidance. See Silberberg and Schoeman's *Law of Suretyship* at p 35 *et seq*: H "*The Principal Obligation*" and *Albert* v *Papenfus* 1964 (2) SA 713 (E).

2002 (1) ZLR p26

Ndou J

The mortgagor's liability is in respect of the very obligation for which he or A she has undertaken the mortgage and no other. See *Trans-Drakensberg Bank Ltd* v *Guy* 1964 (1) SA 790 (D) and *Knightsbridge Investments (Pvt) Ltd v Gurland* 1963 R&N 37; 1964 (4) SA 273 (SR).

(b) *Lifting or Piercing the Corporate Veil*

As indicated, the two companies, Spencer Sullivan Asset Management (Pvt) B Ltd and Structured Risks Investments (Pvt) Ltd are separate legal personae from the applicant. The two companies have separate corporate personalities. There are, however, occasions when the court is entitled to peer behind the facade of a fictitious separate legal persona. See *Bark & Anor NNO* v *Boesch* 1959 (2) SA 377 (T) at 382C and *Cattle Breeders Farm (Pvt) Ltd* v *Veldman (2)* 1973 (2) RLR 261 (A); 1974 (1) SA 163 (RA). In fact, the first C respondent's case can only have a foot to stand on if I disregard the company's separate legal personality and focus on the natural person, i.e. the applicant, as if there were no dichotomy between applicant and the two companies. It does not appear that the law is settled as to the circumstance in which the court can or should "lift" or "pierce the veil" of corporate D personality. See *R P Crees (Pvt) Ltd* v *Woodpecker Industries (Pvt) Ltd* 1975 (1) RLR 151 (G); 1975 (2) SA 485 (R).

In my view, the court has no general discretion to disregard the company's separate legal personality whenever it considers it just to do so. The court may "lift the veil" only where otherwise as a result only of its existence fraud would exist or manifest justice would be denied. See *Botha van Niekerk* 1983 (3) SA 513 (W) E at 522-524 and *Henochsberg on the Companies Act* by PM Meskin (assisted by JA Kunst and KE Schmidt) vol 1 pp 54-55. This principle was discussed by Professor MP Larkin in "*Practical Company Law: A Look at the New Henochsberg*" (1987) 104 *SALJ* 684. The learned author stated at pp 697-8: F

> "Take the doctrine of 'piercing the corporate veil'. The authorized sources of company law lay down that a company has a separate legal personality. But the courts have arrogated to themselves the right to disregard the separate personality rule in certain circumstances. Henochsberg puts the position very well: '[T]he court has no general discretion to disregard the company's separate legal personality whenever it considers it just to do G so; and … the court may only "lift the veil" where otherwise as a result only of its existence fraud would exist or manifest justice would be denied.' For this conclusion, Henochsberg has drawn on the decision that has faced the issue in greatest depth, *Botha* v *van Neikerk en 'n ander*, which phrased the test as requiring at least 'a conviction that the applicant has suffered an unconscionable injustice and this as a H

2002 (1) ZLR p27

Ndou J

> A consequence of something which is, to the right-minded person, clearly improper conduct on the part of the respondent? One notices that injustice and improper conduct are tolerated, provided only that there is not 'manifest' injustice or 'clearly' improper conduct."

I agree with the above principle as formulated in the *Botha* case *supra*. In the circumstances of this case, I can only disregard the separate legal personalities B of Spencer Sullivan Asset Management (Pvt) Ltd and Structured Risks Investments (Pvt) Ltd on the existence of fraud on the part of the applicant. From the papers before me, I am unable to make a finding of the existence of fraud on the part of the applicant. In the circumstances, the only other issue I have to determine is whether manifest justice would be denied if I do not C "lift the veil". As indicated above, the problems of the first respondent seem to be self-inflicted. The first respondent should have sought security for the indebtedness that the two companies were about to incur. The first respondent, in its wisdom, chose not to do so. The first respondent can still sue and recover from the applicant and other guarantors for the companies' indebtedness. I do not think that manifest justice would be denied in such

circumstances. D I, therefore, cannot disregard the separate legal personalities of the two companies under consideration. In the circumstances, I also hold that the first respondent failed to establish that it is entitled to, as a lien, hold possession of the bond. The requirements of lien, as espoused in the preceding paragraphs, have not been met.

E The applicant has established her case on a balance of probability and she is therefore entitled to the relief sought.

It is ordered:

1. That the first respondent sign the consent to cancellation of mortgage bond number 10201/98 dated 25 September 1998 passed by Gloria F Rumbidzai Ndoro (born 1 February 1961) in favour of Commercial Bank of Zimbabwe Ltd for the sum of $85 000 plus additional sum of $8 500 within ten days from the date of service of this order on first respondent.
2. That the first respondent shall forward the client copy of mortgage bond number 10201/98 to the applicant's legal practitioners within ten days G from the date of service of this order on the first respondent.
3. That should the first respondent not sign the consent to cancellation of mortgage bond number 10201/98 within ten days from the date of service of this order on the first respondent, then the Registrar of Deeds is hereby directed to cancel mortgage bond number 10201/98 using a H certified photocopy of mortgage bond number 10201/98 issued for

Ndou J

judicial purposes, and upon production of a certificate from the applicant's A legal practitioners as proof that the first respondent has neglected or refused to sign the consent to cancellation within ten days from the date of service of the order on them.

4. That the first respondent shall pay the costs of suit. B

Byron Venturas & Partners, applicant's legal practitioners

Zamuchiya Costa, first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v TOTOTAI 2002 (1) ZLR 29 (H)

S v TOTOTAI 2002 (1) ZLR 29 (H)

Citation	2002 (1) ZLR 29 (H)
Case No	Judgment No. HH-5-02
Court	High Court, Harare
Judge	Hungwe J
Heard	16 January 2002
Judgment	16 January 2002
Counsel	Details not supplied
Case Type	Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure (sentence) — *general principles — corporal punishment* D *—a very severe form of punishment — should not be resorted to where other sentencing options are available*

Headnote

The accused, a 16-year-old juvenile, was convicted of housebreaking with intent to steal and theft. He had broken into a dwelling house and stolen a small amount of money and two boxes of matches. Some of the money E was recovered. He pleaded guilty and was sentenced to receive a moderate correction of three strokes with a cane. On automatic review:

Held, that corporal punishment is a very severe form of punishment and should only be imposed when the personal circumstances of the accused and the nature of the crime clearly justify it. It must be the most effective, if not the only, form of punishment available. It should not be F imposed where it is possible for a young person to pay a fine or undergo community service. In view of the applicability of community service in this case, that option should have been taken.

Cases referred to

G *S v A Juvenile* 1989 (2) ZLR 61 (S)

S v C; *S v F* 1979 RLR 7 (G)

S v du Chattlier 1973 (2) RLR 339 (G)

S v F 1988 (1) ZLR 327 (H)

S v V en 'n Ander 1989 (1) SA 532 (A)

S v Mathe 1983 (2) ZLR 178 (H)

H *S v Ndhlovu & Ors* 1981 ZLR 600 (H)

2002 (1) ZLR p30

Hungwe J

Legislation considered A

Criminal Procedure & Evidence Act [*Chapter 9:07*], s 353

Judgment

Hungwe J The accused in this case was charged with housebreaking with intent to steal and theft in that in the morning of 24 November 2001 at Gutusa Village, Zaka, he approached the complainant's home and broke a window B pane to gain entry wherein he then stole $100 and two boxes of matches. On being arrested, he admitted the charges and $10 was recovered from him. In court, he pleaded guilty. He is a 16-year-old first offender. In mitigation, he stated that he is unemployed and has nothing to his name. He depends on his mother. He has not gone beyond Grade 5 in school.

In passing sentence the magistrate rated his moral blameworthiness as very C high stating that this type of offence is both serious and prevalent in the district of Zaka. He expressed the view that corporal punishment would meet the justice of the case and sentenced the accused to a moderate corporal punishment of three strokes with a rattan cane in terms of s 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. D

There can be no doubt that corporal punishment is a most severe type of punishment. That this is so can be deduced from the fact that the legislation has fixed the upper limit of strokes to be imposed on any such convicted person at any one time at six. Section 353(4) states that the person so sentenced has to be examined by a medical doctor first and certified healthy enough to withstand

this judicial assault on his person and the further E requirement that a medical officer (doctor or nurse) be present during its administration so as to suspend the further infliction of this harm should it appear in his view that the prisoner cannot withstand the balance of the strokes is stipulated in regulations. As such, it is a form of punishment, a court should hesitatingly resort to, if at all. Over the years, this type of sentence has to come under heavy judicial criticism, for good reasons. F

Before independence, judges were more concerned with one of the primary purposes of the present s 353 of the Act or its predecessor sections, which was "to enable the court to sentence a juvenile to a whipping instead of sentencing him to prison where he would come into contact with hardened criminals to the detriment of his character": *per* Beadle AJ in *S* v *C*; *S* v *F* 1979 RLR 7 (G) G at 8. See also *S* v *de Chattlier* 1973 (2) RLR 339 (G).

But the courts have never lost sight of the fact:

> "… that whipping was by its very nature an extremely humiliating and physically very painful form of punishment and ought to be imposed with great circumspection and only when the personal circumstances of the accused or the nature and circumstances of the crime clearly justified H

Hungwe J

> A it; it was imposed on juveniles and adults where there was a significant degree of cruel violence in the commission of the crime."

See *S* v *V en 'n Ander* 1989 (1) SA 532 (A).

In *S* v *F* 1988 (1) ZLR 327 (H) at 332E-333B, Greenland J expressed abhorrence at the imposition of a sentence which was cruel and inhuman on B a ten-year old boy thus:

> "Not for a moment did he consider the brutalising effect such a punishment would have on this child at such an extremely impressionable age. The accused's interests were neither considered or weighed up on the scales of justice. The magistrate simply did not proceed with the caution required in view of the fact that whipping has always been resorted to with judicial C reluctance."

Gubbay J (as he then was) in *S* v *Ndhlovu & Ors* 1981 ZLR 600 (H), categorised the punishment of whipping of an adult as "an inhuman, humiliating and degrading mode of punishment" and in *S* v *Mathe* 1983 (2) ZLR 178 (H), he called it "judicial barbarism".

D Such was the judicial disapproval of corporal punishment that in *S* v *A Juvenile* 1989 (2) ZLR 61 (S), the Supreme Court bench, by three against two, ruled it a degrading and inhuman punishment, therefore offending against s 15(1) of the Zimbabwe Constitution.

That legislative amendment put this type of punishment back on the statute book should not on its own be taken as wholesale approval of its negative E effect on the prisoner to be punished. As is tradition, the sentence assessed must fit both the crime and the criminal. It must meet the reasonable expectations of society. It must be assessed as the most effective if not the only form of punishment available to the trial court.

In the instant case, the trial court stated that three strokes would meet the F justice of the case. There is nothing on record to indicate whether consideration was given to the imposition of community of service or a fine. The fact that the accused is unemployed does not exclude him from that type of punishment. An inquiry into whether he was amenable to community service may well have established that he was.

G As pointed out above, this type of punishment should be resorted to if it is the only available sentencing option. In view of the applicability of community service in such cases as this one, it cannot be said that corporal punishment was the only option. What must always be borne in mind even where a court decides, for good reasons to impose corporal punishment, that such a sentence is justified, is that a whipping in terms of s 353 of the Act is a very H severe form of punishment and should not be ordered in cases where the

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Hungwe J

gravity of the offence does not demand such a punishment and where it is A possible for a young person to pay a fine or undergo community service.

In my view, this would have been an appropriate case for community service had the relevant inquiries been conducted. As matters stand, a 16-year-old who broke into a house in broad daylight

has been savaged by the judicial system. The harm he has suffered is incomparable to the loss suffered by B the complainant or the community at large. In the circumstances, I am unable to certify these proceedings as being in accordance with real and substantial justice.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/SEKE ELECTION PETITION 2002 (1) ZLR 33 (H)

SEKE ELECTION PETITION 2002 (1) ZLR 33 (H)

Citation	2002 (1) ZLR 33 (H)
Case No	Judgment No. HH-11-02
Court	High Court, Harare
Judge	Ziyambi J
Heard	18 July 2001
Judgment	23 January 2002
Counsel	*A Kara*, for the petitioner *N Mutsonziwa*, for the first respondent Mrs *B Mtetwa*, for the second respondent
Case Type	Election petition
Annotations	No case annotations to date

Flynote

Elections — *Electoral Act [Chapter 2:01] — s 149 — non-compliance with Act — when invalidates election — incomplete* D *voters rolls causing voters to be turned away from polling stations — whether affected result of election*

Words and phrases — *"affect" — Electoral Act [Chapter 2:01] — when non-compliance with Act affects result of election*

Headnote

E In this election petition, it was proved that some polling stations were issued with incomplete voters rolls and that some presiding officers had wrongly turned voters away through confusing their surnames and forenames in the rolls. Some 3 000 voters were wrongly turned away from polling stations, and not all of them returned to cast their votes when rectification was effected. The petitioner challenged the result on F the ground described in s 149 of the Electoral Act, namely that because of non-compliance with the Act the election had not been conducted in accordance with the principles laid down in the Act and the non-compliance had affected the result.

Held, that one of the principles of the Act is that polling stations should be brought to the people and that every effort should be made to ensure that G every registered voter is afforded the opportunity to cast his vote for the candidate of his choice. A large proportion of the electorate

had not been afforded the opportunity to cast their votes, and it was no answer to say that they should have walked several kilometres to the next polling station in the hope that they might find their names recorded H there.

2002 (1) ZLR p34

Ziyambi J

Held, further, that the Registrar-General had failed to discharge the onus that A was cast upon him once the irregularity was proved, of establishing that the non-compliance with the Act was trivial. The election had not therefore been conducted in accordance with the provisions of the Act.

Held, further, that non-compliance with the Act will affect the result of an election for the purpose of s 149 of the Act if, but for the non-compliance, B the result would have been different — *semble*, if the winning candidate's majority would have been substantially different — and not only if another candidate would have been elected.

Held, further, therefore, that non-compliance with the Act had affected the result, and the election had to be set aside. C

Cases cited

Borough of Hackney case: Gill v Reid & Holms (1874) 31 LTR 69

Mtoba & Ors v Sebe & Ors 1975 (4) SA 413 (E)

Legislation considered

Electoral Act [*Chapter 2:01*], s 149 D

Case information

A Kara, for the petitioner

N Mutsonziwa, for the first respondent

Mrs *B Mtetwa*, for the second respondent

Judgment

Ziyambi J In this petition, brought in terms of s 149 of the Electoral Act E [*Chapter 2:01*], (the Act), the petitioner prays that the election held in the Seke Constituency on 24-25 June 2000 be set aside. It was alleged that there was non-compliance with the provisions of the Act to such an extent that the election was a nullity. The main complaint raised by the petitioner was that a large number of voters were denied their right to vote because their names F were not found recorded on the voters roll at the polling stations where they tendered their votes. Both respondents denied that there was any justification for setting aside the election.

At the outset of the trial it was decided that a verification exercise in respect of the polling stations mentioned by the petitioner in his affidavit be conducted with a view to curtailing the proceedings. At the end of the G exercise a number of witnesses gave evidence. The following is a summary of the evidence.

[The learned judge then summerised the evidence given by each witness and, having described the inconclusive results of a second verification exercise which the court ordered to be held, continued as follows:] H

2002 (1) ZLR p35

Ziyambi J

A This dispute is essentially between the petitioner and the first respondent * as the second respondent was not involved in the conduct of the elections, which is the function of the first respondent. In effect, the second respondent abandoned all but one of the allegations of corrupt practice levelled against the petitioner in his opposing affidavit, and this allegation I have already found to be unsubstantiated. I have also found to be without substance the B allegation by the petitioner that the assault, proved to have occurred at Rusununguko polling station, was perpetrated at the instance of, or with the knowledge of, the second respondent. I therefore dismiss the

allegation that either the petitioner or the second respondent was guilty of corrupt practices as described in the Act.

C The sole issue to be decided, therefore, is whether the non-compliance with the terms of the Act was such as to justify the setting aside of the election as Mr *Kara* for the petitioner urged upon this court.

Section 149 of the Electoral Act [*Chapter 2:01*] provides as follows:

> "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 D appears to the High Court that—
>
> (a) the election was not conducted in accordance with the principles laid down in this Act; and
>
> (b) such mistake or non-compliance did affect the result of the election."

One of the principles of the Act is that every person should be afforded a fair E opportunity to cast his vote for the candidate of his choice. Thus, s 56(1)(a) of the Act provides that:

> "every voter registered on the voters roll for the constituency … shall be entitled to vote."

The petitioner averred in his petition that the election in the Seke constituency F was not conducted in compliance with the provisions of the Act and that such non-compliance had affected the result of the election.

The main ground on which this averment is based is that there were pages missing from the voters roll in that constituency and that as a result registered voters were denied an opportunity to cast their votes. [Other G irregularities established were that at one polling station the protocol register, a document in which the presiding officer is duty bound to record the particulars of every voter who tendered his vote at that polling station and was denied the vote as well as the reason for such denial, was missing at one polling station. Thus, there is no record in Exhibit 2 of the H

proceedings at that polling station. One presiding officer allowed to vote, A persons whose names were not on the voters roll but who satisfied him that they either knew the headmaster of the school where they went to inspect the voters roll or could identify the classroom where they inspected the voters roll. Many voters were turned away because the presiding officer regarded the names "Betty" and "Elizabeth" as surnames B and wrongly concluded that their names were not on the roll. Indeed, it was the opinion of the Deputy Registrar-General that some of the presiding officers ought to have been prosecuted for their misdeeds in connection with the election].

It is necessary to recall here that the evidence given by Hibu Batani ** establishes that in respect of seven polling stations verified at the beginning C of the trial, the voters roll was incomplete in that 197 pages were determined to be missing therefrom and close on 11 000 people would have been affected by this mistake. Indeed, the evidence revealed that some 3 000 voters were wrongly turned away for not being on the voters roll. In addition, one can only speculate how many registered voters were dissuaded from going to cast their votes by those who had been wrongfully denied the vote by reason of the D missing pages.

As was said in the election petition of the *Borough of Hackney* (1874) 31 LTR 69 at 70:

> "it is utterly impossible for any person to guess what number of voters were prevented from voting … because in order to ascertain that, it E would be necessary to know the business time, the occupations, and the necessities of each voter. It would be necessary also to know what information was given by voters who found that they could not vote, or by other persons to voters who might be anxious to vote, and in consequence of which information, and in reliance upon which F information, persons who might otherwise have voted did not go and tender their votes."

It was proved at the trial that not all who were turned away by reason of this mistake returned to cast their votes when rectification was effected. It was not established that all the voters turned away were told that there was likely to be a rectification and that they should return at a stated time to cast their vote. G The evidence established that rectification in some cases did not take place until the afternoon of the second day of the poll and that in one case a registered voter was wrongly turned away as late as 4.35 p.m. on the second day by reason of his/her name not appearing on the voters roll. H

Ziyambi J

A It is immaterial, in my view, whether it was an entire series or a number of pages from the relevant series which was missing. The reality of the matter is that a large portion of the electorate of the Seke constituency was not afforded the opportunity to cast their votes because of the fact that their names were not recorded on the voters roll at the polling stations at which they tendered their vote. It is no answer to say, as the respondents did, that B it was incumbent on the voter who was wrongly denied the opportunity to vote at one polling station to walk some five to seven kilometres to the nearest polling station in the hope that he might find his name recorded on the roll there. It seems to me, upon a reading of the Act, that one of the intentions of the legislature in enacting the Electoral Act was that the polling station should be brought to the people and that every effort should be made to ensure C that every registered voter is afforded the opportunity to cast his vote for the candidate of his choice.

As it was put in *Mtoba & Ors* v *Sebe & Ors* 1975 (4) SA 413 (E) at 421D, by Kotzé J, when referring to the Election Proclamation R.194, which contained similar provisions to our Electoral Act:

> D "the entire scheme of the Election Proclamation is to take the polling station to the voter and not to expect the voter to travel unnecessarily in search of polling stations."

I do not agree with the submission, made on behalf of the respondents, that the irregularity or non-compliance was not such as to justify the setting aside E of the election. Once the irregularity was proved, the onus was on the first respondent to establish that the non-compliance was trivial. This onus the first respondent has failed to discharge. 197 pages missing from the voters roll, with rectification not being effected until the afternoon of the second day and in some cases not at all, cannot be said to be a trivial matter; nor can the fact that persons were denied the vote because the presiding officer did not F exercise the requisite care in searching for their names on the roll. I have therefore come to the conclusion that the election held in the Seke constituency was not conducted in accordance with the provisions of the Act.

In terms of s 149 of the Act, I am obliged to set the election aside if, in addition to the above, it appears to this court that the mistake or non-compliance did G affect the result of the election. I do not consider the words "affect the result of the election" to mean that the court must be satisfied that but for the mistake or non-compliance, another candidate, say the petitioner, would have been elected. To put this construction on the that section would be tantamount to attributing to the court prophetic powers which would enable it to know whether the 10 835 affected persons would all have voted and how they H would have voted. Rather, I respectfully agree with the reasoning of Grove J

Ziyambi J

in the *Borough of Hackney* case at p 72 where he said: A

> "I am very strongly inclined to think that the expression 'the result of the election,' does not in this Act necessarily mean the result as to another candidate having been elected at the poll. The result may be of various kinds. The result of the election would in my judgment be affected, if, instead of a majority of 500, there was a majority of only 10 or even of B 100 … Does not the word 'affect' mean substantially 'bear upon the result?'."

In the instant case, although it is not possible for this court to say what the result might have been had the affected voters been afforded the opportunity to cast their votes, it appears to me that the result would have been different. In the result, I am satisfied that the mistake or non-compliance did affect the C result of the election. It follows that the election must be set aside.

On the question of costs, Mr *Kara* submitted that the costs of the petitioner and the second respondent should be paid out of the Consolidated Revenue Fund. It seems to me that this would be the proper course to adopt, firstly because it was the non-compliance by the first respondent with the provisions D of the Act which necessitated this petition and secondly, there was no suggestion of *mala fides* on the part of the first respondent.

In the result, it is ordered as follows:

1. The election for the Seke constituency be and is hereby set aside;
2. The costs of the petitioner and the second respondent shall be paid out E of the Consolidated Revenue Fund.

By copy of this judgment, the Speaker is notified that the seat of the second respondent has become vacant.

Hussein, Ranchod & Co, first respondent's legal practitioners F

* The Registrar-General of Elections. — *Editor.*
** The Deputy Registrar-General. — *Editor.*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/TSIKWA & ORS v PUBLIC SERVICE COMMISSION & ORS 2002 (1) ZLR 39 (H)

TSIKWA & ORS v PUBLIC SERVICE COMMISSION & ORS 2002 (1) ZLR 39 (H)

Citation	2002 (1) ZLR 39 (H)
Case No	Judgment No. HH-20-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	17 October 2001
Judgment	23 January 2002
Counsel	*C Mukwesha*, for applicants *G Zengeni*, for respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

D **Magistrates court** — *magistrates — appointment — when person becomes magistrate — entitlement of persons who have been appointed as magistrates to be paid as such — differentiation in remuneration between magistrates — when permissible*

Words and Phrases — *"appoint" — meaning — when person appointed as magistrate*

Headnote

E A person becomes a magistrate under the Magistrates Court Act [*Chapter 7:10*] if he is appointed as such by the Public Service Commission or its delegate in terms of s 7(1) of the Act, and takes the oath of office required and prescribed by s 9 of the Act.

Less than a year after being engaged as magisterial assistants in the F Ministry of Justice, the applicants took the magistrates' oath of office prescribed in s 9 of the Magistrates Court Act and commenced to perform all the duties and functions of magistrates as provided in the Act. They continued to be paid as magisterial assistants, however, and their application to the High Court

for an order that their salaries be increased to the appropriate magistrates' scale was G met with the contention that under administrative regulations issued by the Public Service Commission they had to serve as magisterial assistants for three years before they could be advanced to the grade of magistrate.

Held, that the applicants had been appointed as magistrates by the head of H the Ministry of Justice, acting as the Public Service Commission's

---

delegate, and hence had taken the magisterial oath of office. From the A date on which they took the oath they were magistrates.

Held, further, that as magistrates the applicants were entitled to be remunerated as such, subject to differentiation based on genuine material differences between them and other persons appointed as magistrates — in this case, differentiation based on their different qualifications. B

Cases cited

Clay Cross (Quarry Services) Ltd v Fletcher [1979] 1 CR 1

Gohlke & Schneider & Anor v Westies Minerale (Edms) Bpk & Anor 1970 (2) SA 685 (A)

Case information

C Mukwesha, for applicants C

G Zengeni, for respondents

Judgment

Chinhengo J The applicants are all judicial officers in the Public Service of Zimbabwe. They have brought the same case to this court. They also seek the same relief. The respondents are the applicants' employer, the Public D Service Commission ("PSC"), the Minister of Justice, Legal and Parliamentary Affairs ("the Minister") and the Director of the Salary Service Bureau ("SSB").

The applicants were employed by the PSC as magisterial assistants from about 3 February 1997. On or about 15 December 1997, they took the oath of office of magistrate which is prescribed by s 9 of the Magistrates Court E Act [*Chapter 7:10*] ("the Act"). Upon taking the oath of office of magistrate, they commenced to perform all the duties and functions of magistrates as provided in the Act.

To become, a magistrate a person must be qualified to hold that public office. He may have obtained a law degree or he may have undergone and passed a F magisterial training course conducted by the Judicial College of Zimbabwe. The entry qualifications are different and the PSC has recognised that difference by paying those magistrates who hold a law degree more than those who were appointed by virtue of having completed the training course conducted by the Judicial College of Zimbabwe. Before a person is appointed to the office of G magistrate he or she may be appointed to the office of magisterial assistant as a first step. An appointment as a magisterial assistant does not entitle the holder of that position to perform the duties of a magistrate. The remuneration paid by the PSC to a magisterial assistant is lower than that paid to a magistrate.

The applicants' remuneration was not altered or adjusted or increased upon H

A their taking office as magistrates. They continued to receive the remuneration paid to them as magisterial assistants.

The PSC has in place certain regulations on the Appointment, Performance, Advancement, Regrading, Promotion and Training Procedures of Magistrates and Law Officers. They are contained in a document REF/B/C/12/97 issued by the PSC and attached to the founding affidavit as Annexure "A" B (hereinafter called "the regulations".) It is important to understand what these regulations provide in respect of magistrates. In part A of the regulations, it is provided that:

> "All appointments to entry level posts throughout the Service shall be approved by the Head of Ministry who may delegate his/her authority C to Heads of Department, and copies of documents of all such

appointments submitted to the Public Service Commission for records. All appointments to the Service shall be effective with approved candidates listed from the employment registers compiled by the Public Service Commission."

It seems to me that the appointment of a person to the entry level post is made D either by the Head of Ministry or by the Head of Department and submitted to the PSC. The appointment becomes effective only upon the appointee's name being listed in an employment register maintained by the PSC. The entry level post for a magistrate is that of magisterial assistant. In certain instances, the person may be directly appointed as a magistrate without E having been appointed as a magisterial assistant. The regulations provides for a performance based advancement through various grades or levels in the magistracy. From the entry level position of magisterial assistant, an appointee will, on meeting certain criteria be advanced to the grade of magistrate, senior magistrate, provincial magistrate and regional magistrate. The criteria stipulated in the regulations are that the person: F

" (i) has completed three (3) years in the service in the case of a non-degreed magisterial assistant and two years in the service in the case of a graduate appointed without a Masters' degree or one year in the case of a graduate with a Masters' degree or an LLB degree.

(ii) has shown exceptional work performance i.e. rating 4 or 5 G consecutively in two years.

(iii) (not relevant).

(iv) is recommended for performance advancement by the Ministerial Performance Management Board …"

Within the magisterial grade, an appointee may be advanced to a higher grade H which will entitle him or her to receive a higher remuneration as a magistrate.

2002 (1) ZLR p42

Chinhengo J

The regulations also set the criteria for advancement to the higher grades in A the magistracy i.e. the grades of senior, provincial and regional magistrate.

After their appointment to hold the office of magistrate, the applicants' remuneration was not increased to reflect that they were no longer magisterial assistants but actual magistrates. They were also not advanced through the same grade of magisterial assistants so as to become entitled to a higher B salary. It does not appear that the regulations make any provision for advancement within the grade of magisterial assistant, but such advancement would seem to take place on the basis of length of service.

In May 2000, the PSC suspended all advancements within the Public Service. This suspension also affected the applicants so that despite their having become eligible for advancement, it was no longer possible for them to be advanced. C

In this application, the applicants contend that they should have been paid the salary of a magistrate from the time that they took the oath of office of magistrate and that they should not have continued to receive, as they did, the salary paid to them as magisterial assistants. They also contend that the suspension of all advancements in the Public Service should not have D affected them because when the suspension came into effect in May 2000, they had become due for advancement in February 2000 and they had in fact been recommended for advancement. They contend that the suspension should not have operated retrospectively so as to stop their advancement. These are the reasons for which the applicants seek the order that the regulations be set aside as being *ultra vires* the Act, that it be declared that E the applicants became magistrates and therefore entitled to the salary and all the benefits of that office as from the date on which they took the oath of office. In the alternative, they seek an order that it be declared that the suspension of all advancement operated prospectively only, with the result that the applicants became magistrates from February or March as the case F may be. The alternative relief fell away because at the hearing of this matter, the applicants were advanced to the grade of magistrate with effect from the dates which they had stipulated in the relief they sought in the alternative. The issue for determination in this application is two-fold — whether the applicants became magistrates from the date on which they took the oath of office and whether they became entitled as from that date to the salary and benefits payable to magistrates. G

The PSC and the Minister took seemingly divergent positions in this matter. In an affidavit deposed to by the Chairman of the PSC, Dr Nzuwah, the PSC professed ignorance about the applicants' employment and about the fact that the applicants took the oath of office of magistrate on 15 December 1997. This was rather surprising, because the PSC is the employer. Dr Nzuwah H

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A went further to state that as far as the PSC was concerned:

> "The applicants were not appointed as magistrates in terms of the relevant regulations cited in paragraph 9 of applicant one's founding affidavit. Such appointments therefore are null and void."

The Minister on the other hand admitted that the applicants were employees B of the PSC.

The PSC and the Minister both contended that the applicants could only become magistrates after completing three years in the service as magisterial assistants, as provided in the regulations. The Minister was much more explicit in this regard. He stated in paragraph 6 of his affidavit that:

> C "… it is denied that taking an oath confers magisterial status on Magisterial Assistants. The oath confers power on the applicants and others in their category to sit on the bench, preside over cases — civil and criminal — and perform other functions which relate to the oath they will have taken. The oath enables those in authority over applicants and others in their category, to properly assess the suitability of the applicants and their D counterparts, for advancement to the grade of magistrate."

In so far as, the Minister was concerned the oath which the applicants took enabled them to sit on the bench and try cases in order for them to be assessed for the purpose of being advanced to the grade of magistrate and as such their status remained unaltered particularly in respect of their salary and other E conditions of service.

The crisp question for determination would appear to be whether a person becomes a magistrate by virtue of an appointment by the PSC as such or by virtue of having taken the oath of office of magistrate. The Act in s 2, defines a "magistrate" as:

> "any person who has been appointed to hold magisterial office in terms F of this Act."

Section 7(1) of the Act provides that:

> "Subject to subsection (4) of section 75 of the Constitution, the Public Service Commission may appoint any person to hold magisterial office."

The Act makes further relevant provisions in respect of magistrates. In terms G of s 7(2) of the Act the PSC is empowered to appoint from persons holding magisterial office persons to be senior magistrates, and s 7(3) provides for the appointment from the ranks of senior magistrates, persons to hold the office of Chief Magistrate, deputy Chief Magistrate, regional magistrate and provincial magistrate.

H Section 8(3) of the Act provides that a magistrate may exercise the powers

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and jurisdiction conferred upon him by the Act or by an other enactment in A any province. The jurisdiction of a magistrates court is prescribed in Part II (civil jurisdiction) and in Part IV (criminal jurisdiction).

Section 9 of the Act provides that:

> "A magistrate on appointment in terms of subsection (l) of section seven shall, before exercising any of the functions of his office, in open court B take the following oath …"

It seems to me that the scheme under the Act is that for any person to hold the office of magistrate he has to satisfy two things. First, he has to be appointed by the PSC in terms of s 7(1) of the Act. Second, he has to take the oath of office required and prescribed by s 9 of the Act. C

The word "appoint" was interpreted in *Gohlke & Schneider & Anor* v *Westies Minerale (Edms) Bpk & Anor* 1970 (2) SA 685 (A) at 690B-D where Trollip JA aid:

> "According to the *Oxford English Dictionary*, the meaning of "appoint" in the sense relevant here is 'to determine authoritatively, prescribe, D decree, ordain' and specially in regard to office 'to ordain or nominate a person to an office … (or) to be an official'. In that context, 'nominate', I think, means 'to appoint (a person) by name to hold some office or discharge some duty' rather than 'to propose, or formally enter, (one) as a proper person or candidate for election', which is also given as another meaning of 'nominate' in that dictionary. The *Standard Dictionary*, too, E defines 'appoint' as 'to designate, fix upon or select as being the person or subject for some position, object or the like : as to appoint to postmaster'. Thus, in my view, the ordinary meaning of 'appoint a director' is not merely to nominate or propose a person for appointment as a director but to effect his appointment as such." F

I accept the meaning ascribed to the word "appoint" in the case I have just cited. When the PSC appoints a magistrate it is not merely proposing the appointee for appointment but it, in effect, appoints such person as a magistrate. The power to appoint a magistrate is clearly reposed in the PSC. The PSC may in terms of s 27(1) of the Public Service Act [*Chapter 16:04*] delegate any of its functions. In respect of magistrates, the PSC delegated G the function of appointment to the Head of Ministry, as provided in the regulations the relevant part of which I have quoted earlier in this judgment. The two stages to becoming a magistrate are therefore: (i) appointment by the PSC or a delegated authority; and (ii) the taking of the oath of office of magistrate.

A magistrate is appointed to preside over a court of a magistrate (s 6 of the H

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A Act) and his powers and jurisdiction are prescribed by the Act. I do not think that it is possible, let alone desirable, that any person may take the oath of office of a magistrate, preside over a court of a magistrate and exercise the powers and jurisdiction conferred on him by the Act without being duly appointed as such. In my view, the applicants were appointed as magistrates and hence they took the magisterial oath of office. From what I have said B hereinbefore, they were appointed by the Head of Ministry, as authorised and provided in the regulations and they then took the oath of office. They were magistrates as defined in the Act from the date on which they took the oath.

The determination that the applicants were duly appointed as magistrates and become such upon taking the oath does not, in my view, resolve the question C of the remuneration they were entitled to receive. There is, as I have already observed, only one ground for differentiating on their appointment the remuneration payable to magistrates in terms of the regulations. It is whether the person holds a law degree or has passed the magisterial training course only. If he falls in the latter category he becomes entitled to a lower salary than a person who falls in the former category. His remuneration cannot, even D under the regulations, be the same as that of a magisterial assistant. As at 1 July 1998, the salary scale for a magisterial assistant was:

> "$74 460 x $1 920 to $78 300 x $1 896 to $83 988 x $2 376 to $88 740 *per annum,*"

whilst that of a magistrate was:

> E "$91 128 x $2 388 to $93 516 x $936 to $94 452 x $3 312 to $104 388 *per annum.*"

This meant that a person appointed as a magisterial assistant would receive the remuneration specified for that office during the three-year period before appointment as a magistrate. On appointment as a magistrate, he would be entitled to receive the salary specified for that office, the minimum or starting F remuneration being $91 128 *per annum* as at 1 July 1998. The performance of judicial functions as a magistrate is such an important task that the person who performs them cannot do so unless he is duly appointed as such. His duties, powers and jurisdiction are clearly and specifically spelt out in the Act. They could not have been left to conjecture. Parliament was careful to G provide in legislation the magistrate's duties, functions and jurisdiction. It could never have been in Parliament's contemplation that the Ministry of Justice, Legal and Parliamentary Affairs could administer the oath of office to any person other than a person who was duly appointed as such. I have not been able to establish exactly how the applicants' predicament arose or what the Ministry's reasons were for failing to ensure that the applicants were H correctly remunerated. I do not see any divergence between the regulations

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and the Act. The regulations provide for the appointment of a person to the post of magisterial assistant. A magisterial assistant in the position in which the applicants were, being non-degreed, remains in that position for three years but would during that period be entitled, subject to the criteria set by the PSC, to salary advancements through the scales I have already noted. A degreed magisterial assistant who does not possess a Masters' degree or an LLB degree remains a magisterial assistant for two years. B

It seems to me that the Minister (in reality, the Head of Ministry) acted precipitously and appointed the applicants to the post of magistrate to which they would have been appointed only after completing three years as magisterial assistants. In terms of the regulations the Head of Ministry may approve the direct appointment of persons to the grade of magistrate C (see Part A(b) to (c) at

p 8 of the papers). From the action of the Ministry, it may be inferred that the applicants' appointment was a kind of direct appointment to the office of magistrate.

I do not believe that there is any conflict between the regulations and the Act. I believe on the contrary that there was a confusion in the first respondent's D Ministry. There was a complete failure to understand or appreciate the provisions of the regulations. If the Ministry had wanted time to assess the suitability of the applicants for appointment as magistrates, it only needed to have waited for three years before requiring the applicants to perform the functions of a magistrate. The regulations to my mind are not in disharmony with the Act. It is their implementation which brought about what would now E appear to be a disharmony between the Act and the regulations. The fault lies entirely with the Minster's officials, in particular the Head of Ministry who failed to implement the regulations according to their intendment. I would not find that the regulations are *ultra vires* the Act or that they should be set aside, but I would find that the applicants are entitled to the relief prayed for in paras (b) to (e) of the draft order. F

I must point out that in my view this application is really concerned with the principle of equal pay for like work. I have already mentioned that s 6 of the Act provides that every court of a magistrate shall be presided over by a magistrate. The powers, duties and jurisdiction of a magistrate are clearly spelt out in the Act. There must be a minimum remuneration for a person who G is appointed to hold the responsibilities of a magistrate. That remuneration as at 1 July 1998 was $91 128 *per annum*. This was therefore the basic pay for a magistrate. The regulations prescribed the salary bracket for a magistrate. The only differentiation, which is reasonable in all the circumstances, is that based on qualifications.

A non-degreed magistrate may, subject to a minimum scale of salary for all H

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A magistrates, be paid a lower salary than that of a degreed magistrate or a magistrate with a higher qualification. The like work concept, which requires that persons who do like work should be paid the same, focuses on the make-up of the job whilst the differentiation I have alluded to is based on the concept of genuine material differences of the persons appointed as magistrates. Lawton LJ in *Clay Cross (Quarry Services) Ltd* v *Fletcher* [1979] B 1 CR l at 9 (reported in *Bowers on Employment Law* at p 70-71 said of the concept of genuine material difference:

> "… (it) embraces what appertains to her in her job, such as the qualifications she brought to it, the length of time she has been in it, the skill she has acquired, the responsibilities she has undertaken, and where and under C what conditions she has to do it."

To me, this principle provides the only basis in the circumstances of this case to differentiate the salaries payable to magistrates.

It would appear therefore that the person solely responsible for the failure to pay the magistrates what was due to them is the second respondent's Ministry. The PSC regulations were quite in order. For reasons only known D to the second respondent's Ministry, the applicants were appointed as magistrates before they had been in the service of the State for three years as stipulated in the regulations. The reasons could have had something to do with a shortage of magisterial staff or with the appointees' clear suitability for appointment. But since they were appointed, they became entitled to the E remuneration that was paid to the magistrates, subject only to the application of the principle of genuine material differences between persons appointed to hold that public office. My order of costs will reflect my finding that the Minister or his officials were solely responsible for the confusion which arose and resulted in this suit.

It is, therefore, ordered that: F

1. The applicants were appointed to hold the office of magistrate and became magistrates with effect from the date on which each one of them took the oath of office in terms of s 9 of the Magistrates Court Act [*Chapter 7:10*].
2. The first respondent be and is hereby ordered to pay to each applicant that G salary paid to a magistrate as provided in its regulations with effect from the date mentioned in paragraph 1 for each applicant.
3. The second respondent shall pay the costs of this application.

Mtombeni, Mukwesha & Associates, applicants' legal practitioners

H *Civil Division of the Attorney-General's Office*, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v ZACHARIA 2002 (1) ZLR 48 (H)

S v ZACHARIA 2002 (1) ZLR 48 (H)

Citation	2002 (1) ZLR 48 (H)
Case No	Judgment No. HH-17-02
Court	High Court, Harare
Judge	Garwe JP & Chinhengo J
Heard	15 November 2001
Judgment	23 January 2002
Counsel	*G M Mabuye*, for the appellant *R K Tokwe*, for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure — *charge — splitting of — concern of courts directed at prejudicial duplication of convictions — test for — dominant purpose* D *test — ease of application*

Headnote

A depot supervisor employed by a wholesaler altered 27 receipts to suggest that customers had paid him lesser amounts than they had in fact done, and stole the difference. It was not clear whether he altered the receipts E all at once or on separate occasions. He was convicted of 27 separate counts of fraud, though the magistrate took all the counts as one for the purposes of sentence. On appeal, it was argued that there had been an improper splitting of charges or duplication of convictions.

Held, that the phrase "duplication of convictions is preferable to "splitting of charges" because it more clearly expresses the courts' concern about F avoiding prejudice to an accused person from a duplication of convictions. If no prejudice is occasioned to him, then the question whether or not there has been a duplication of convictions becomes one of little or no consequence.

Held, further, that of the two tests for determining whether or not there has been an improper duplication of convictions, the dominant purpose test G relates to the accused person's intention as he performs several acts which separately constitute offences but which are logically and intrinsically connected to the one offence which he then commits. It is quite possible and easy to apply the test in many cases.

Held, further, that although it was not clear from the facts of this case whether the accused had committed 27 separate offences or only one, H

Chinhengo J

A the magistrate had cured any prejudice by treating all the counts as one for the purpose of sentence and basing his sentence on the overall prejudice caused to the accused's employer.

Cases cited

R v Gordon 1909 EDC 254

B *S v Grobler & Anor* 1966 (1) SA 507 (A)

S v Jambani 1982 (2) ZLR 213 (H)

R v Makaza & Ors 1969 (1) RLR 97 (G)

S v Mutawarira 1973 (1) RLR 292 (A)

R v Peterson & Ors 1970 (1) RLR 49 (G)

C *S v Ramushu & Ors* S-25-93

Case information

G M Mabuye, for the appellant

R K Tokwe, for the respondent

Judgment

Chinhengo J The appellant was employed by Mashonaland Cooperative D Hardware Stores (Mashco) as a depot supervisor at Kotwa in Mudzi. On 11 June 2001, he was arraigned before the magistrates court at Mutoko on twenty-seven counts of fraud. He was not legally represented at his trial. He pleaded guilty to all the twenty-seven counts and, all counts being treated as one for sentence, was sentenced to thirty months' imprisonment of which ten months were suspended on condition of good behaviour and a further ten E months on condition of restitution. He appealed to this court against both conviction and sentence.

The first ground of appeal against conviction was that the trial magistrate misdirected himself "in that the several thefts from different persons were treated as several different offences when in substance it (*sic*) was one criminal F offence and should have been charged as one offence". This, it was argued, amounted to an improper splitting of charges. The second ground of appeal against conviction was that the appellant's "uncorroborated statement … is not proof *aliunde* of the commission of the offence for basing a conviction".

The appeal against sentence was based on two grounds: first that the magistrate failed to consider community service as an appropriate punishment G and, second, that in arriving at the sentence, he ignored the fall in the value of the Zimbabwean dollar.

In the notice of appeal, several cases were cited in support of the grounds of appeal. Further authorities were referred to in the heads of argument. I will refer only to *S* v *Jambani 1*982 (2) ZLR 213 (H), which was cited for the H proposition that there was an improper splitting of charges.

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In *S* v *Jambani supra*, the accused pleaded guilty to one count of theft by false A pretences, six counts of forgery and six counts of uttering. The facts were that he pretended to be a school teacher who was entitled or authorised to collect other teachers' pay cheques. He collected six cheques and took them to the bank. With the assistance of another teacher there at the bank, he encashed the cheques and converted the money to his own use. The theft B charge related to the theft of the six cheques from the school official. The six charges of forgery related to his signing the names of the payees and the uttering charges related to the cashing of the cheques so forged. McNally J (as he then was) referred to *R* v *Peterson & Ors* 1970 (1) RLR 49 (G) at 53B-F; *Gordon* v *R* 1909 EDC 254

at 268-9; *S* v *Mutawarira* 1973 (1) RLR 292 (A) at 296 and to *S* v *Grobler & Anor* 1966 (1) SA 507 (A) at C 523. He then stated at 215H-216C as follows:

> "I now return to the facts of the present case. It seems to me to be abundantly clear that there was one dominant purpose in the mind of the accused and that was to steal the proceeds of the six pay cheques. In order to steal the proceeds he had first to acquire the cheques from the school official, second to forge the payees' endorsement (and, for some unknown D reason, Gondo's as well) and third to utter the cheques to the bank.
>
> In my view, therefore, he should have been charged with the overall offence of theft by false pretences of the proceeds of the cheques from the bank. Since he was not so charged, there is no objection to his being convicted on 6 counts of forgery and six counts of uttering (cf *R* v E *Hymans* 1927 AD 35). But to charge him, on top of that, with the theft of the six cheques from the school official has brought about a duplication which has prejudiced the accused.
>
> I am satisfied that, whatsoever test one applies, the 'theft' of the cheques themselves from the school official should not have been charged separately. That 'theft' was merely a step in the achievement of the F dominant purpose."

Quite clearly, the application of the dominant purpose test was fully justified on the facts of this case.

There are basically two tests as to whether there has been an improper splitting of charges or a duplication of convictions. There is the single intent G or continuous transaction test and the same evidence or dominant intent test. McNally J applied the dominant intent test. This test means that where the accused performs a series of acts or more than one act which standing alone would constitute an offence but which are a necessary adjunct or necessarily incidental to the commission of the offence which he intends to commit, then the accused should be charged with one offence. In my view, the dominant H

Chinhengo J

A purpose test is not related to the accused's intention as regards the one act in the literal sense so as to say that a person who, for example, steals from three people different kinds of property at different times should be charged with one count of theft. Rather, it relates to the intention of the accused person as he performs the several acts which are logically and intrinsically connected to the one offence which he then commits. Although in *Gordon*'s case *supra,* B Kotzé JP said that:

> "it is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule which will apply with justness in every instance …",

it is quite possible and in fact easy, to apply the rule in many cases and exclude them from its ambit.

C The difficulty which may have led the court to move in the wrong direction in this case may have originated from the facts, which were not at all clear. In paragraph 3 of the outline of the State case, it is stated as follows:

> " 3. On various dates shown on Column One of the Schedule to the indictment, the accused person would receive cash from customers who D would have bought Hardware from Mascho — as on receipts with serial numbers as shown on column two of the Schedule to the indictment charging them sales tax.
>
> Later, when the customer would have gone the accused person would alter the sales tax portion and total portion on the receipts with serial numbers and tax exemption numbers purporting as if sales tax was not E charged and would convert the sales tax money with the amounts shown on column three to the indictment, to his own use."

It is apparent that these facts do not make it clear whether the accused made the alterations each time a customer had paid and left or whether he would make the alterations at one sitting at the end of the day or at the end of the F month or whether he did so at the end of the whole period concerned. If the accused made the alterations at one sitting at the end of the entire period then there would be an improper splitting of the charges. But if he did so at the end of the day or at the end of the month, then there would be no splitting of the charges in the first case but there would be some splitting of the charges in the second case and the number of counts would have to be reduced to align G them with the number of months.

The facts as given in the outline of the State case are not clear enough to assist the court in deciding whether there has been a duplication of convictions. Thus on the facts as they are there

could well have been a splitting of the charges or a duplication of convictions. I prefer the use of H the phrase "duplication of convictions" because it more clearly expresses

Chinhengo J

the concern of the courts about this problem. The concern of the courts is A with the conviction, *in specie,* i.e. the duplication of convictions which prejudices or is potentially prejudicial to the accused. The concern whether the criminal conduct is in reality a single conviction is aimed at avoiding prejudice to the accused where the duplication of convictions arises. If no prejudice is occasioned to the accused, then the question whether or not B there has been a duplication of convictions becomes one of little or no consequence. The prejudice to the accused may be avoided by treating all the separate counts as one for the purposes of sentence. In *R* v *Makaza & Ors* 1969 (1) RLR 97 (G), Beadle CJ approved of this proposition when he said at 104A-C that:

> "Many magistrates … treat all counts arising out of one transaction as one C for the purpose of sentence, and the sentence ultimately imposed is generally one appropriate to the most serious of the charges with which the accused is charged … I commend this approach, and, if it were universally adopted, much of the objection to multiple charges would disappear." D

This statement emphasises the point that the courts' concern with the splitting of charges is the likely result that the accused will be prejudiced. I do not however think that if the number of counts is large and the magistrate is affected by their number in assessing the sentence that the objection would quite disappear. But if in every case the judicial officer properly applied his mind to the sentence which he imposes the prejudice will indeed disappear. E

In practice and in the majority of cases, judicial officers do assess sentence after a careful analysis of the gravity of the overall offence and in this way they eliminate any prejudice to the accused. In the present case, the magistrate treated all the twenty-seven counts as one for the purposes of sentence. If the factual position had been that the appellant altered the invoices at one sitting F at the end of each month and then submitted the invoices so altered to his head office, then he should have been charged with six counts and not twenty-seven counts. The magistrate however cured the prejudice that may have arisen from a splitting of the charges by treating all the twenty-seven counts as one for the purpose of sentence. He was guided not by the number of counts but by the overall prejudice caused to the complainant. I am, therefore, G satisfied that the magistrate eliminated any prejudice that may have been occasioned to the appellant by basing his sentence on the overall prejudice caused to the employer i.e. $68 524.56 and not on the number of counts. The conviction of the appellant cannot therefore be attacked on the basis that there was a splitting of charges.

The second ground on which the conviction is attacked has no validity. The H

Chinhengo J

A appellant, though not legally represented, pleaded guilty to the charge of theft. There is no suggestion that his plea was misconceived. He admitted the facts and there was, in my view, no need for other evidence to be adduced to establish his guilt. The conviction cannot therefore be set aside on that basis.

The grounds of appeal against sentence were framed without due regard to B the principles on which an appeal court operates. It does not simply operate on the basis that the sentence imposed appears to be or is indeed severe and should therefore be set aside. An appeal court does not lightly interfere with the sentencing discretion of a judicial officer in the lower court. There must be a misdirection which warrants the setting aside of the sentence. The sentence C must also be so severe as to induce a sense of shock — see *S* v *Ramushu & Ors* S-25-93.

The appellant was employed in a very senior capacity. He planned the offence meticulously. His offence is a typical white-collar offence which is often difficult to detect. He betrayed the trust reposed in him and prejudiced his employer of thousands of dollars. I am not persuaded that the sentence D imposed is at all so excessive as to induce a sense of shock. The appeal against sentence must also fail.

Accordingly, the appeal is dismissed.

E Garwe JP concurred.

Mabuye & Associates, appellant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/PTC v LAMB 2002 (1) ZLR 54 (H)

PTC v LAMB 2002 (1) ZLR 54 (H)

Citation	2002 (1) ZLR 54 (H)
Case No	Judgment No. HH-19-02
Court	High Court, Harare
Judge	Smith J
Heard	23 November 2000
Judgment	23 January 2002
Counsel	*E W W Morris*, for the plaintiff *P Nherere*, for the defendant
Case Type	Stated case
Annotations	No case annotations to date

Flynote

Contract — *suretyship — surety — liability of — action brought against surety after judgment taken against principal debtor — action brought* D *after prescription period for original debt had expired but before expiry of prescription period for novated debt — surety's liability dependent on construction of deed of suretyship*

Prescription — *period of — novation — novated debt — action brought against surety after judgment taken against principal debtor — action* E *brought after prescription period for original debt had expired but before expiry of prescription period for novated debt — surety's liability dependent on construction of deed of suretyship*

Headnote

In terms of a deed of suretyship, the defendant guaranteed the debts owed by a third party to the plaintiff. In the deed, he undertook to liquidate all F phone bills due and payable by the third party in the event of the third party failing to pay such bills on demand. Action was taken against the third party in 1992 and judgment obtained in 1994. In 1997, the plaintiff commenced action against the defendant, who pleaded prescription. The plaintiff argued that the original debt had been novated by the judgment and the prescription period thereby extended to 30 years. The G defendant argued that the plaintiff's cause of action arose from the contract between itself and the defendant, and that while the principal debt and the suretyship were related, they were separate and distinct contracts giving rise to distinct obligations.

Held, that whatever the common law might be about the continuing liability of sureties, it was the wording of the deed of suretyship that was H

A decisive. The defendant had guaranteed only the original debt for telephone calls. He did not undertake to pay any other causes of debt arising out of her transactions with the plaintiff. Accordingly, prescription had run in respect of the plaintiff's claim against the defendant because it commenced action against him more than 3 years after the demand was made of the third party. While the debt owed by the third party had B been novated by the judgment, the prescription period of the debt owed by the defendant by virtue of the deed of suretyship was not extended by the judgment.

Cases cited

Bank of the Orange Free State v Cloete 1985 (2) SA 859 (E)

C *Bulsara v Jordan & Co Ltd (Conshu Ltd)* 1996 (1) SA 805 (A)

Cronin v Meerholz 1920 TPD 403

E A Gani (Pty) Ltd v Francis 1984 (1) SA 462 (T)

Jordan & Co Ltd v Bulsara 1992 (4) SA 457 (E)

Metequity Ltd & Anor v Heel 1997 (3) SA 432 (W)

D *Neon & Cold Cathode Illuminations (Pvt) Ltd v Ephron* 1978 (1) SA 463 (A)

Rand Bank Ltd v de Jager 1982 (3) SA 418 (C)

Skelton v Shelvoke & Anor (1904) 21 SC 664

Standard Bank of SA Ltd v Wilkinson 1993 (3) SA 822 (C)

Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A)

E *Union Govt v van der Merwe* 1921 TPD 318

Visser v T Sassen & Sons (Edms) Bpk 1981 (4) SA 253 (C)

Volkskas Bpk v The Master & Ors 1975 (1) SA 69 (T)

Zimbabwe Football Assn v Mafurusa 1985 (1) ZLR 244 (H)

Case information

E W W Morris, for the plaintiff

F *P Nherere*, for the defendant

Judgment

Smith J The plaintiff (hereinafter referred to as "the PTC") sued the defendant (hereinafter referred to as "Lamb") for the sum of $24 160.46 with interest. Lamb opposed that claim on the basis that it has prescribed. Since G the parties are agreed as to the facts, they have prepared a stated case for determination. The agreed facts are as follows. Mrs Linda Merle Jackson (hereinafter referred to as "Jackson") was indebted to the PTC in the sum of $24 160.46 in respect of telephone services rendered to her. Lamb guaranteed payment of Jackson's debt to the PTC by way of a deed of suretyship. The PTC made a demand against Jackson on 19 June 1992 and thereafter H issued summons and obtained judgment on 4 January 1994. Action was

Smith J

commenced against Lamb on 17 March 1997. It is accepted that the A prescription period against Lamb commenced running on 19 June 1992. The points for determination are:

1. Has prescription run against the PTC because it only commenced action against Lamb in March 1997, more than 3 years after l8 June 1992? B
2. Did the judgment taken by the PTC against Jackson novate her indebtedness to the PTC?
3. Is the prescription period of such novated debt 30 years from the date of judgment, which was 4 January 1994?

4. Did Lamb guarantee the novated debt or only the original debt? C
5. Has the prescription period of the debt Lamb owed the PTC by virtue of his signing of the deed of suretyship been extended by the judgment taken against Jackson to 30 years from the date of that judgment?

Mr *Morris* argued that the surety agreement entered into by Lamb was an undertaking to pay the debt of Jackson so long as it could be exacted from D Jackson. The judgment against her extended the period during which the debt could be exacted to 30 years from the date of judgment. Accordingly, the surety was extended by a like period. Mr *Morris* submitted that the basis of the claim by PTC rests on the following statement in Voet *Commentaria ad Pandectas* 46.1.36:

> "But if the principal debtor has been summoned, but the surety never, not E even for thirty years, yet the latter could not protect himself by the plea of prescription, because, as the obligation has been perpetuated against the debtor himself by a summons against him, the rule is that the same obligation should be perpetuated against the sureties and the other assessors." F

That statement was adopted with approval by Wessels JP in *Cronin* v *Meerholz* 1920 TPD 403 at 406-407 and in *Union Government* v *van der Merwe* 1921 TPD 318 at 320. See too *Volkskas Bpk* v *The Master & Ors* 1975 (1) SA 69 (T) at 77-78.

Mr *Morris* also argued that the same conclusion could be arrived at by different means. The judgment against Jackson amounted to a n*ovatio* G *necessaria*. Such a novation is different from a n*ovatio voluntaria* because it strengthens the original debt instead of totally replacing it as in the case of a *novatio voluntaria* — see van Leuween *Censura Forensis* 1.4.34.7, Voet 46.21 and *Skelton* v *Shelvoke & Anor* (1904) 21 SC 664. Those authorities were followed and the proposition stated that where a creditor takes a judgment against a debtor in order to enforce the right to payment, that H

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A judgment reinforces the original debt and does not supplant it. See *Swadif (Pty) Ltd* v *Dyke NO* 1978 (1) SA 928 (A), *Standard Bank of SA Ltd* v *Wilkinson* 1993 (3) SA 822 (C) at 833H and *Metequity Ltd & Anor* v *Heel* 1997 (3) SA 432 (W) at 434H. It has been held in this jurisdiction that an extension of time given to a debtor to perform does not release the surety — see *ZIFA* v *Mafurusa* 1985 (1) ZLR 244 (H). By parity of reasoning, an B extension of the prescriptive period does not release the surety. The law as laid down by Wessels JP in the *Cronin* case *supra*, was specifically departed from in *Rand Bank Ltd* v *de Jager* 1982 (3) SA 418 (C) and the decision in the latter case was upheld in *Bank of Orange Free State* v *Cloete* 1985 (2) SA 859 (E). However, in *Jordan & Co Ltd* v *Bulsara* 1992 (4) SA 457 (E), Mullin J refused to follow the decision in the *Rand Bank* case *supra,* and C followed the reasoning of Wessels JP in *Cronin*'s case *supra*.

Mr *Nherere* argued as follows. The PTC's cause of action arises from contract and therefore the period of prescription is 3 years. The prescription period started to run on 19 June 1992 and therefore the claim became prescribed on 19 June 1995. The institution of proceedings against Jackson D did not interrupt the running of prescription against Lamb. The novation of the original debt by the judgment debt did not affect the contract between the PTC and Lamb. While the principal debt and the suretyship are obviously related, the principal contract and the suretyship contract are two separate and distinct contracts that give rise to two distinct obligations. See *Neon and Cold Cathode Illuminations (Pvt) Ltd* v *Ephron* 1978 (1) SA 463 (A) at 471, E the *Rand Bank Ltd* case *supra*, the *Metequity* case *supra*, and *Bulsara* v *Jordan & Co Ltd (Conshu Ltd)* 1996 (1) SA 805 (A) at 810. Whilst the service of summons on Jackson did interrupt the running of prescription in relation to her obligation to the PTC, it did not interrupt the running of prescription in relation to Lamb's obligation to the PTC. As the liability of the principal F and the surety are two distinct obligations, arising from two separate and distinct contracts, the institution of proceedings to enforce the one contract does not interrupt the running of prescription in the other — see the *Rand Bank Ltd* case *supra*. In the *Bank of the Orange Free State* case *supra*, it was held that the tacit admission of liability by the principal debtor did not operate to interrupt prescription against the surety. Mr *Nherere* went on to argue G that the guarantee provided by Lamb was not a continuing guarantee and did not guarantee any judgment debt against Jackson. Lamb undertook to

> "liquidate all the phone bills due and payable by Mrs M L Jackson in the event of the said [M L Jackson] failing to pay such bills on demand."

In *E A Gani (Pty) Ltd* v *Francis* 1984 (1) SA 462 (T) and the *Bulsara* case H *supra*, which also involved actions against a surety, the plaintiff relied on the

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judgment debt and not the original cause of action. In both of those cases, the A court construed the suretyship agreement as including not only the principal debtor's indebtedness but also the judgment debt. In this case, the PTC relies not on the judgment debt but on the failure by Jackson to pay her telephone bills, because that is all that the agreement of guarantee covered.

In *Cronin*'s case *supra*, it was held that both under the common law and under B the Transvaal Act 26 of 1908, the obtaining of a judgment against the principal debtor was a perpetual bar to a plea of prescription by the surety. That was before statutory provision reduced the period from perpetuity to 30 years. That principle was followed in *Union Government* v *van der Merwe* 1921 TPD 318 and both cases were approved, without discussion, in *Visser* v *T Sassen & Sons (Edms) Bpk* 1981 (4) SA 253 (C). However, in the *Rand* C *Bank Ltd* case *supra*, after an exhaustive review of the authorities, Baker J concluded that the decision in *Cronin*'s case did not reflect correctly the position under common law. At p 448, he said:

> "The statement in *Caney* at 214 that
>
> 'the surety's obligations continue so long as the principal debtor is D bound, unless there is stipulation to the contrary'
>
> is, with respect, incorrect. The true position is that the surety is bound until released by the completion of whatever period of prescription applies to him. Reliance on common law writers who in turn rely on Roman texts, can be dangerous and misleading, for in the old Roman law E there was no prescription of debts — the debt remained until paid (*van Warmelos* 637)."

In the *Bank of Orange Free State* case *supra* at 864F, Kannemeyer J referred to the *Rand Bank Ltd* case and said:

> "The judgment of Baker J was the result of an exhaustive review of the F authorities and so, if I may say so, both erudite and convincing. I am in respectful agreement with it."

In *Gani*'s case *supra*, which also dealt with the liability of a surety in a case where judgment had been given against the debtor, the court held that the judgment created an independent cause of action. It then went on to hold that assuming, but without deciding, that the surety's liability for the original G indebtedness had prescribed, the new cause of indebtedness created by the judgment fell within the wide undertaking of the surety in the deed of suretyship. The deed of suretyship had created a continuing security for all indebtedness for which the debtor was then, or thereafter might be, liable to the creditor. Mullins J, in the *Jordan* case *supra*, was not prepared to accept the conclusions reached by Baker J in the *Rand Bank Ltd* case *supra*. H

A At pp 463-464, he said:

> "These principles, which were referred to and criticised by Baker J in the *Rand Bank* case, appear to me to be far more convincing and in accordance with our accepted common-law principles than the contrary view arrived at in that case. At 455E-F of the *Rand Bank Ltd* case, Baker J expressed the view that:
>
> B 'on *Voet's* rule, where sureties are involved, the creditor can saddle sureties with 30 years of jeopardy merely by suing the principal debtor, without giving any notice in the sureties at all. For reasons already stated, that is manifestly unfair.'
>
> I have, with respect, difficulty in following this argument. A surety C undertakes that he will pay if the principal debtor does not pay. A principal debtor might delay payment indefinitely by admitting liability within each period of three years. He does not have to tell the surety he has so admitted liability, nor is the creditor required to do so.
>
> Furthermore, in assuming the liabilities of a surety, one of the possibilities that he must foresee is that the principal debtor might default and that D judgment might be taken against such principal debtor. It is far more unfair to the creditor that the surety should escape liability while the principal debtor remains liable than that the surety's obligations should remain in force until the debt is paid, whatever the period involved."

When Bulsara appealed against the determination of Mullins J, with which E Jansen J concurred, the appeal court held that the correctness or otherwise of the judgments in the *Rand Bank Ltd* case and

the *Bank of the Orange Free State* case did not arise for decision in the appeal. Joubert JA, at 809D said:

> "Counsel were *ad idem*, in my view correctly, that this question has to be decided exclusively with reference to the interpretation of the deed of suretyship."

F After listing the main provisions of the deed of suretyship, he continued, at 809H-J:

> "It is clear from the wording of the deed of suretyship as a whole that the intention of the parties was not to limit the liabilities in respect of goods sold and delivered by the creditor to the principal debtor since the G wording was very widely stated to include 'any other causes of debt arising out of such transactions', i.e. out of transactions of sale and delivery of goods which would include judgment debts in respect of such sales. The deed of suretyship read as a whole supports the interpretation that the parties intended to include a judgment debt against the principal H debtor for goods sold and delivered to the latter by the creditor as the

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> subject of the suretyship. In other words, the deed of suretyship evinces A an intention of the parties to cover both the original cause of debt as well as a judgment debt."

In the deed of suretyship entered into by Lamb, he undertook to liquidate all the phone bills due and payable by Jackson in the event of her failing to pay such bills on demand. It is clear that he did not undertake to pay any other B causes of debt arising out of her transactions with the PTC.

If the court adopts the reasoning of Baker J in the *Rand Bank Ltd* case *supra*, then the liability of Lamb has become prescribed. If, on the other hand, the court finds that the conclusions of Mullins J in the *Jordan & Co* case *supra* are more convincing, then his liablity has not become prescribed. C

I consider that the views expressed in the *Rand Bank Ltd* case are more compelling.

Accordingly, the answers to the points stated for determination are:

1. Prescription, in respect of the PTC's claim against Lamb, has run because it commenced action against him more than 3 years after 18 June 1992. D
2. The judgment taken by the PTC against Jackson did novate her indebtedness to the PTC.
3. The prescription period of such novated debt is 30 years from 4 January 1994.
4. Lamb guaranteed only the original debt and not the novated debt. E
5. The prescription period of the debt Lamb owed the PTC by virtue of the deed of suretyship has not been extended by the judgment taken against Jackson to 30 years from the date of that judgment. F

Coghlan,Welsh & Guest, plaintiff's legal practitioners

Calderwood, Bryce Hendrie & Partners, defendent's legal practitioners

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S v MACHONA 2002 (1) ZLR 61 (H)

Citation 2002 (1) ZLR 61 (H)

Case No Judgment No. HH-14–02

Court High Court, Harare

Judge	Chinhengo J & Guvava J
Heard	10 January 2002
Judgment	23 January 2002
Counsel	*J J Callow*, for the appellant Mrs *M Gurure*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure — *verdict — special verdict under Mental Health Act* D *[Chapter 15:12]— person suffering from temporary psychotic episode at time of offence — entitled to special verdict and, if no longer mentally disordered, to be released*

Headnote

After a series of personal misfortunes, the appellant attempted to commit suicide by cutting his own throat. When taken to a doctor for treatment, E he attacked the doctor, severely and permanently injuring him. He was charged with attempted murder. The medical and psychiatric evidence was that the appellant had lost his self-control as a result of suffering a brief "reactive psychosis" or "psychotic episode" which was unlikely to recur unless the traumatic events leading up to his behaviour were recreated.

F *Held*, that the law is concerned only with whether the mental condition afflicting the accused prevented him from knowing the nature and quality of his act or that it was wrong or gave rise to an irresistible impulse. On the evidence, the appellant was mentally disordered at the time, and not merely suffering from diminished responsibility, and should have been found not guilty by reason of insanity. This verdict is G regarded as an acquittal except for the purposes of any appeal or reservation of a question of law. Because he was no longer mentally disordered at the time of the trial, he was entitled to be released from custody.

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Cases referred to A

S v Gambanga 1997 (2) ZLR 1 (H)

S v Sibanda S-137-93

S v Stephen 1992 (1) ZLR 115 (H)

Legislation considered

Mental Health Act [*Chapter 15:12*], ss 10 & 29(2) B

Case information

J J Callow, for the appellant

Mrs *M Gurure*, for the respondent

Judgment

Chinhengo J This is an appeal from the decision of the Regional Court C sitting at Harare in terms of which the appellant was convicted of attempted murder and sentenced to 10 months'

imprisonment of which 5 months were suspended for five years on the usual condition of good behaviour.

The facts on which the conviction and sentence were based are not in contention. They were accepted by the appellant at the trial. On those facts, however, the appellant submitted in this appeal, as he did in the court *a quo*, D that he should not have been convicted but acquitted. He based this submission on s 29(2) of the Mental Health Act [*Chapter 15:12*] in terms of which, if his submission is sustainable, he would be entitled to a special verdict.

The facts of this matter which, as I have said, are not contested, are the following. On 22 July 1997, the appellant was found in his house bleeding E profusely from a cut on his throat. It was not nor has it since been established how the appellant sustained that injury. The evidence seems to indicate that the injury was self-inflicted. The doctors who later examined the appellant to establish the state of his mind at the time of committing the offence of which he was convicted accepted that the appellant had, for some unknown reasons, cut himself. The appellant was taken to a hospital at Norton. F Dr Shamu attended to him. He sutured the appellant's wound under an anaesthetic. After completing this procedure, the doctor turned away from the appellant and walked towards the door of the operation theatre to hung up his apron. The appellant got up, picked up a scissors from the trolley and struck the doctor with it. The scissors broke and its blades remained embedded in the doctor's head. The doctor fell to the ground and became G unconscious. The appellant however continued to assault him with a drip stand, an iron rod and a bottle of medicine, which broke in the process. The doctor sustained a broken skull. He was severely bruised and bled profusely. He suffered damage to a part of his brain, the result of which is that after treatment, he remained permanently disabled. His speech function was severely weakened. His sight, memory and mental faculties were seriously H

A impaired. He cannot practice as a medical doctor again. He was permanently disabled. An affidavit tendered in court on the injuries which the doctor sustained describes the injuries as "compound depression fracture of the skull with severe brain damage".

There is no doubt at all that the attack on the doctor was severe and devasting and it brought to an end the professional life of a very useful member of B society. It was a misfortune which quite certainly was most painful to him and to members of his family and, indeed, to the community at large.

The facts I have narrated were contained in the State outline. Though admitting them, the appellant pleaded not guilty to the charge of attempted murder. His defence was encapsulated in the words "I do not know anything C about what transpired". Before the State closed its case, certain medical reports were, with the consent of the defence counsel, submitted in evidence: the report by Dr Auchterlonie on the injuries sustained by Dr Shamu; the reports by Dr Madhombiro and Dr Muzamhindo on the mental condition of the appellant. Dr Madhombiro reported that the appellant may have suffered a mental disorder because of post anaesthetic effects. He was not categoric. D Dr Muzamhindo's report was not helpful. He seemed to have learnt of the appellant's mental condition from some other doctor. He could not give any reason for that condition. He simply noted that "the factors which caused the mental disorder or defect are unknown".

The medical reports by Doctors Madhombiro and Muzamhindo are important E in that they accept that the appellant suffered from a mental disorder. These two doctors are employed at Harare Remand Prison and Chikurubi Hospital respectively. They also reported that the appellant did not receive any treatment. This is an important disclosure because the appellant did not display any mental defect at his trial nor at any time after the commission of the offence. He was normal.

F The question for the court's decision was whether the appellant was suffering from a mental disorder or defect at the time that he committed the offence with which he was charged and consequently whether s 29(2) of the Mental Health Act should be applied in the case.

The appellant himself gave evidence at the trial. He called two psychiatrists G in his defence and his wife also. The appellant's evidence was that before he slit his throat and committed the present offence, he had had a number of misfortunes. He father had died, then his brother. His rented house and movable property therein were destroyed in a fire. He lost $18 000 which was all his life's saving and with which he intended to pay a deposit for the purchase of a house. His daughter was

impregnated and gave birth to twins H which died soon after their birth. All these misfortunes occurred one after

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the other. He was particularly disturbed by the death of his father and only A brother and sibling. He told the court that there was some history of epileptic attacks in his family. He had heard that his mother had suffered an epileptic attack before he was born. He maintained that he did not remember attacking Dr Shamu but said that he could not dispute that he had done so. As regards Dr Shamu, he stated that he would have had no reason B at all to attack and injure him. He had not known him before and there would have been no reason to attack a doctor who had treated him of the injuries to his throat.

The appellant was quite extensively cross-examined by the prosecutor. Nothing of any significance emerged from that cross-examination. His testimony was not contradicted by any other evidence. C

The evidence of Dr Chikara, a government psychiatrist, was that the appellant suffered a brief reactive psychosis which was not likely to recur "unless one was to recreate … [the] traumatic events leading up to his behaviour". He was of the view that the appellant had recovered his mental equilibrium and that there would be no purpose in detaining him in a special D or mental institution. Dr Chikara did not think that the appellant had suffered an epileptic fit, even though there was some history of epileptic fits in his family. He said that the probability of him having inherited this illness from his mother was 50 per cent, but there was no evidence to suggest that the appellant had suffered from this illness. Dr Chikara was asked in cross-examination to explain what he meant by reactive psychosis. E He said:

> "It's a psychosis where there is a stressor. A stressor which would elicit some confusion or a mental illness or depression in a number of people. If we look at the way these events were unfolding — that's what I am looking at as the stressor." F

He was asked if the appellant lost control of his mental faculties at the time of the commission of the offence. His answer was:

> "At the time of the alleged offence, my opinion is that he didn't have control."

Later on in his evidence, he again stated his opinion that there was no G likelihood that the reactive psychosis would recur.

The appellant's wife gave evidence that she was called home from work to find that the appellant had slit his throat and that he was bleeding profusely. She took the appellant first to the police station and then to the hospital. She did not witness the attack on Dr Shamu but was informed about it. She gave information to Drs Chikara and Nhiwatiwa when they examined H

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A the appellant. She told the court that the events that had preceded the attack on Dr Shamu, i.e. the death of appellant's father and brother and the destruction of their home in a fire, had so severely affected the appellant that he had shown signs of illness. In particular, he had began to talk to himself inaudibly and incoherently. She was cross-examined but nothing of any significance emerged from her cross-examination. She also stated that there B had been no suggestion that the appellant's throat injury may have been caused by any other person other than the appellant himself. She had accepted that the injury had been self inflicted.

The appellant then called his employer, Mr Paul Fisher, who gave confirmatory evidence as to the misfortunes that the appellant had suffered. He said that the C appellant had been adversely affected by those events and had become hesitant in his work attitude. He said that after the attack on Dr Shamu the appellant was "quite upset" and he (the employer) and appellant's workmates had to constantly give the appellant reassurances and had to relieve him of any pressures at work. He said that the appellant had now fully recovered and was performing his tasks normally.

D Dr Nhiwatiwa's evidence which was given very well, in my view, confirmed that of Dr Chikara. She stated that the appellant was in a "psychotic episode" when he committed the offence. She said:

> "You have to take the events into context because usual people try to, I mean, he cannot remember why he cut his throat but in our experience E people who try to inflict harm on themselves are actually suicidal

which may mean that he may actually have been psychotically depressed at the time."

Later, Dr Nhiwatiwa stated that the psychotic episode which the appellant suffered was in fact a mental disorder which was the same condition described by Dr Chikara as a "brief reactive psychosis". Dr Nhiwatiwa also F stated that a brief reactive psychosis is usually a "once-off thing" and unlikely to recur. She said that in her opinion she did not think that the appellant should be placed in a mental institution. Under cross-examination, she was again asked why the appellant should not be placed in a mental institution and she said:

G "He had a brief psychotic episode. Now he is ok. So mental institutions are for people who are actively psychotic."

Dr Nhiwatiwa also stated that, from the information given to her by the appellant's wife, the appellant was mentally disturbed at the time that he caused the injury to his throat.

H The evidence led in the court *a quo* can be summarised as follows. On the

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morning of 22 July 1997, the appellant injured himself by slitting his throat A and bled profusely from that wound. His children became aware of this and called their mother. The mother took the appellant first to the police station and then to the hospital. At the hospital, the appellant was treated by Dr Shamu who sutured the wound on his throat under anaesthetic. After Dr Shamu completed this procedure, the appellant, without any B apparent cause, attacked Dr Shamu and caused serious injuries to him which have resulted in Dr Shamu being permanently disabled such that he can no longer practice his profession. The appellant suffered a brief psychotic episode and lost control of himself and of his mental faculties. The evidence of both Dr Chikara, a government psychiatrist of sixteen years standing and Dr Nhiwatiwa also a psychiatrist of fifteen years C standing was to the effect that the appellant suffered a brief reactive psychotic episode and that he was not responsible for his actions at the time that he attacked Dr Shamu.

In her judgment, the magistrate analysed the evidence led in court and identified the question for determination as being "whether the accused was suffering from diminished responsibility or mental disorder in terms of the D Mental Health Act 1996".

It seems to me that the magistrate was led astray in her reasoning when she thought that Dr Chikara's opinion that diminished responsibility was the same thing as a mental disorder was correct. She lurched at that statement and drifted from the correct path. To clearly understand what Dr Chikara said in E this regard, I refer to p 22 of the record where he was being cross-examined. He was asked the question:

"So, Doctor, how do you arrive at the conclusion that at the time he committed the offence he (the appellant) had diminished responsibility?"

He answered: F

"Yes. If you look at the whole thing in context, I mentioned at the end to say if he had committed the alleged offence first and then tried to cut his throat regretting or fearing the consequences, to me, in my view, it would have made sense. So first, he cut his throat for what reason …"

And at p 23: G

"If he was depressed after all these events he would need to be a very strong person indeed. Then you put together the question of diminished responsibility, it's a British concept which we have taken into our legal system that he did not have full responsibility. At the same time, probably having no responsibility at all but the responsibility is reduced."

It will be clear on perusal of Dr Chikara's evidence as a whole that his H

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A professional assessment was that the appellant suffered a "brief reactive psychosis", which was the same diagnosis made by Dr Nhiwatiwa. The two doctors clearly stated that this was a form of mental disorder which was brief in nature but which, when it occurs, the person concerned loses the control of his mental faculties. Dr Chikara does not seem to have clearly understood the legal concept of diminished responsibility and his understanding of it B should not have been relied upon by the court. The magistrate conceived that Dr Chikara's evidence was in substance to the effect

that the appellant was in a state of diminished responsibility. She then relied on *S* v *Stephen* 1992 (1) ZLR 115 (H) and in particular on a statement by a specialist witness who stated that a special verdict was no longer automatically returnable in such cases. The magistrate in my view also misconstrued Dr Nhiwatiwa's evidence C when she stated:

> "Dr Nhiwatiwa's report was also not conclusive. She stated that at the time Mr Machona (appellant) could have been mentally disturbed before being attended to by Dr Shamu. The doctor's reports, therefore contradicted each other and they were not conclusive on what accused's D state of mind at the relevant time was."

I must confess that I find no contradiction at all in the evidence of Dr Chikara and Dr Nhiwatiwa. Both of them were agreed that the appellant suffered a brief reactive psychosis or a psychotic episode. Both were agreed that he lost his self-control. They were thus agreed that the appellant suffered from a E mental disorder at the time that he attacked Dr Shamu. It is clear from their evidence that they were of the opinion that the psychotic episode may have commenced at the time that the appellant slit his own throat through to the time that he attacked Dr Shamu. It is rather surprising that against this clear evidence given by Dr Chikara and Dr Nhiwatiwa the magistrate came to the conclusion that:

> F "… there was no evidence to show that the accused was suffering from a diseased mind. There was also no evidence to show that the accused though suffering from diminished responsibility, lost total control of himself."

With all due respect to the magistrate, I find that her appreciation of the G evidence and its effect was quite erroneous. The evidence, as I have endeavoured to show, clearly established that the appellant was mentally disordered at the time that he attacked and severely injured Dr Shamu and that he had lost control of his mental faculties. This failure to appreciate the effect and nature of the evidence before her led the trial magistrate to the conclusion that the evidence did not show that the appellant lost total control or that his H mind was diseased at the time of the offence. With this finding and relying

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on *S* v *Sibanda* S-137-93 and *S* v *Gambanga* 1997 (2) ZLR 1 (H), she decided A that "diminished responsibility only affects the accused's moral and not legal blameworthiness" and she refused to return the special verdict and instead found the appellant guilty on the charge.

It seems to me that in deciding that the appellant suffered not from a mental decease but from diminished responsibility the magistrate failed to appreciate B what in law constitutes diminished responsibility and what constitutes insanity. Burchell and Hunt in *South African Criminal Law and Procedure* Vol 1 (1970 ed) at p 2134 state that:

> "Diminished responsibility is usually a finding where the accused is a psychopath and in cases of epilepsy and mental deficiency which do not amount to legal insanity. Whether the mental abnormality in question C does justify diminished responsibility and if so, whether, in a case of murder, the death penalty should not be imposed, are questions to be determined in the circumstances of the particular case."

The same authors at pp 198-199 say the following about insanity:

> "The meaning of insanity for the purpose of the defence to criminal D liability is wider than that under the Mental Disorders Act (No. 38 of 1916). It matters not how temporary the disease of the mind is, nor is its cause relevant. The latter point arose crisply for decision in *R* v *Kemp* [1957] 1 QB 399; [1956] 3 All ER 249. The accused made a motiveless and irrational attack with a hammer upon his wife. He suffered from arteriosclerosis (hardening of the arteries) which caused a congestion of E blood in the brain and resulted in a temporary unconsciousness at the time of the attack. It was contended on behalf of the accused: (i) that his defect of reason resulted, not from a mental disease, but from a physical one; and (ii) that arteriosclerosis only became a mental disease when it caused degeneration of the brain which had not yet occurred. In rejecting F these contentions and holding that the accused was suffering from a disease of the mind, Devlin J said:
>
> 'The distinction between the two categories (diseases of the mind which are physical in origin and those that are mental in origin) is irrelevant for the purposes of the law, which is not concerned with the origin of the disease or the cause of it but simply with the mental G condition which has brought about the act. It does not matter, for the purposes of the law, whether the defect is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law … [The law] is not in any way concerned with the brain but with the mind, in the sense that the term is ordinarily used when speaking of H

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> A the mental faculties or reasoning, memory and understanding … If one read for 'disease of the mind' 'disease of the brain' it would follow in many cases that pleas of insanity would not be established because it would not be established that the brain had been affected either by degeneration of the cells or in any other way. In my judgment, the condition of the brain is irrelevant'."

B The important point to note from the above statement is that the law is concerned with what has happened with the accused's mind as distinguished from his brain. The law is therefore concerned only with whether "the mental disease has prevented the accused from knowing the nature and quality of his act or that it is wrong or gives rise to an irresistible impulse" (Burchell and Hunt *op cit* at pp 299-200).

C The appellant's plea in the court *a quo* was in substance one of insanity. That plea is supported by all the evidence led at the trial. I am satisfied that the court *a quo* arrived at a wrong determination that the accused suffered from diminished responsibility.

Section 29(2)(c) of the Mental Health Act provides that:

> D "(2) If a judge or magistrate presiding over a criminal trial is satisfied from the evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or when he did the act he was mentally disordered or intellectually handicapped so as not to be responsible for the act, the judge or magistrate shall return E a special verdict that the accused person is not guilty because of insanity, and may—
>
> (a) …
>
> (b) …
>
> (c) if the judge or magistrate is satisfied that the accused person is no F longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged, order his discharge and, where appropriate, his release from custody."

I have determined that the appellant did the act and that when he did it he was mentally disordered so as not to be responsible for the act, that is to say, the G appellant was insane at the time he did the act. The obvious verdict which the court below should have returned is that the appellant was not guilty because of insanity, which verdict, is in the Mental Health Act, referred to as a special verdict. A special verdict is, in terms of the proviso to s 10 of the Mental Health Act, regarded as an acquittal except for the purposes of any appeal or reservation of a question of law when it is regarded as a conviction in which H case ss 34 to 41 and 44 of the High Court Act [*Chapter 7:06*] and ss 9 to 17

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of the Supreme Court Act [*Chapter 7:13*] shall *mutatis mutandis* apply to the A proceedings concerned.

It is important to make a general observation about the Mental Health Act at this point. Most of its provisions are concerned with a person who is mentally disordered or intellectually handicapped and such a person is defined in s 2 of the Act thus — B

> "in relation to any person, means that the person *is* suffering from a mental illness, arrested or incomplete development of the mind, psychopathic disorder or any other disorder or disability of the mind" (the emphasis is mine).

The definition, as is apparent, does not include within its ambit a person C who is not suffering from a mental disorder at the time that he is appearing in court, that is to say a person who has fully recovered, such as the appellant was — *vide* the use of the word "*is*" in the definition. Section 29(2)(c) of the Act is, therefore, concerned with a person who lost his mind and became mentally disordered at the time that he committed the offence. Section 29(2)(a) and (b), on the contrary, are concerned with D a person who is mentally disordered as defined and has done an act constituting the offence charged but when he did it he was, and continues to be, mentally disordered such that he can not be held responsible for his actions, hence he may be returned to prison for transfer to an institution for examination or treatment or he may be ordered to submit himself for examination or treatment or his guardian, spouse or close relative may be E ordered to apply for him to be received for examination or treatment at any institution in terms of the Act.

The acquittal of both categories of mentally disordered persons referred to in s 29 of the Act is in recognition of the fact that that person lacked the necessary *mens rea* when he committed the offence of which he was charged. F Before its repeal and replacement with Act No. 15 of 1996, the Mental Health Act [*Chapter 15:06*] did not provide that on returning a special verdict the accused shall be regarded as having been acquitted. The special verdict in terms of s 28 of the repealed Mental Health Act merely meant that the accused was guilty of the act or omission but was mentally disordered at the time when he did the act and the judge or magistrate was then required to G order in every case that person's return to prison for transfer to an institution for examination.

In view of the new provisions of the Mental Health Act, if a person committed an offence during a moment of insanity and he is, to the satisfaction of the court no longer mentally disordered, that person is entitled not only to an acquittal but also to be released from custody. In this case, the State conceded H

Chinhengo J

A that the proper verdict was an acquittal. It further conceded during oral submissions that the appellant did not have to be further detained at a mental institution. This concession was proper, because the appellant not only had not been treated at all for the illness but had fully recovered at the time that he was arraigned before the court.

The appeal therefore succeeds. The conviction is quashed and the sentence B is set aside.

GUVAVA J concurred.

C *Stumbles & Rowe,* appellants' legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/CHADUKA NO & ANOR v MANDIZVIDZA 2002 (1) ZLR 72 (S)

CHADUKA NO & ANOR v MANDIZVIDZA 2002 (1) ZLR 72 (S)

Citation	2002 (1) ZLR 72 (S)
Case No	Judgment No. S-114-01
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, McNally JA, Muchechetere JA, Ziyambi JA & Malaba JA
Heard	4 October 2001
Judgment	28 January 2002
Counsel	*P Nherere*, for the appellants *L T Biti*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* D *Rights — s 23 — protection of freedom from discrimination — whether section has only vertical application — discrimination by church-run teacher training college against student — public authority — what is — college not a public authority — discrimination not proscribed under Constitution*

Contract — *validity — clause contrary to public policy — clause* E *discriminatory against women and not justifiable on grounds of morality*

Headnote

The respondent was a student at a teacher training college run by a church. She signed a 3contract on entering the college, agreeing that if she F became pregnant she would be withdrawn from the course. She married under customary law and later became pregnant. She was obliged by the college to withdraw from the college before completing her studies. It was argued that she was being 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, contrary to G s23(1)(b) of the Constitution.

Held, that the term "public authority" not being defined in s 113 of the Constitution, the court could place a wider meaning on the word "public", as used in that phrase, than in the other phrases in that section where the word "public" occurred. "Public authority" was a broader concept than "State authority", and could thus include local government H

2002 (1) ZLR p73

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A institutions or other bodies which had public or statutory duties to perform. However, a college such as in this case, even if it did provide a public benefit, and was supervised by the State in terms of ss 46 and 66 of the Education Act [*Chapter 25:04*], was not under State control to the extent where it could be regarded as an organ of the State. The State was not responsible for, nor did it have control of, the education B at the college.

Held, further, that without deciding whether the Declaration of Rights generally had only vertical application, it was clear that s 23 had only such application. But this did not render the Declaration of Rights totally irrelevant to any litigation between private litigants. It has a mediate or indirect application, in that a private litigant may well say C that the law or executive act that the other is relying on is unconstitutional. Reprehensible conduct between private individuals is normally dealt with by legislation or the common law. There was no such legislation affecting this situation and, consequently, the respondent could not get relief under s 23.

D *Held*, further, however, that the discriminatory clause in the contract could be struck down as being *contra bonos mores*, being worded far more widely than would be necessary if it related strictly to morality. It punished the married woman who fell pregnant, but not the male student who has extra-marital sex with a non-student, even if pregnancy resulted. It could this not be defended on the grounds that a religious E organisation is entitled to insist on certain moral standards among its students.

Cases cited

Botha (now Griessel) v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A)

Chinamora v Angwa Furnishers (Pvt) Ltd & Anor 1996 (2) ZLR 664 (S); F 1998 (2) SA 432 (ZS)

de Jager en Andere v ABSA Bank Bpk 2001 (3) SA 537 (A)

Embling v Headmaster, St Andrews College, Grahamstown 1991 (4) SA 458 (E)

Greenwood v Atherton [1938] 4 All ER 686 (CA); [1939] 1 KB 388

G *Jones v Alfred H Mayer Co* 392 US 409; 88 S Ct 2186; 20 L Ed 1189 (1968)

Kombayi v Registrar-General 2001 (2) ZLR 356 (S)

Lees Import & Export (Pvt) Ltd v Zimbank 1999 (2) ZLR 36 (S); 1999 (4) SA 1119 (ZS)

Mandizvidza v Chaduka NO & Ors 1999 (2) ZLR 375 (H)

H *Mufamadi & Ors v Dorbye Finance (Pty) Ltd* 1996 (1) SA 799 (A)

McNally JA

R v Barrington 1969 (2) RLR 361 (A); 1969 (4) SA 179 (RA) A

Runyon v McCrary 427 US 160 (1976)

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

Wittman v Deutscher Schulverein, Pretoria & Ors 1998 (4) SA 423 (T)

Legislation considered

Constitution of Zimbabwe 1980, ss 23(1) & 113 B

Case information

P Nherere, for the appellants

L T Biti, for the respondent

Judgment

McNally JA: his appeal has been argued primarily in relation to s 23 of the Constitution of Zimbabwe. The facts are as follows. C

Ms Mandizvidza (the student) was a third and final year teacher training student at Morgenster Teacher Training College (Morgenster), a private educational institution run by the Reformed Church in Zimbabwe. On enrolment she was required to, and did, sign a contract with Morgenster. The contract contained clause 7(a), which provided: D

> "I understand that I will be withdrawn from the course when I fall pregnant or am involved in causing the pregnancy of another student or pupil."

In December 1998, the student was married according to customary law and tradition. She became pregnant. On 9 July 1999, she was called to the office of the first appellant (the principal). She was reminded of her contract and required to write out and sign a letter reading: E

> "I am withdrawing from the college with effect from 14 July 1999. I am seven months pregnant."

She did so. The form contained a recommendation that she be allowed to rejoin in the year 2000, but for reasons unexplained she has not in fact completed her course. F

Soon after leaving Morgenster, the student complained to the Minister of State in the President's Office. Correspondence ensued. Morgenster supported its action by pointing out that —

1. It had moral standards to maintain;
2. The student had signed a contract containing the clause referred to; G
3. She had not been expelled but had voluntarily withdrawn;
4. She would almost certainly be allowed to rejoin in 2000;
5. If other students had avoided the penalty, this must have been an oversight. H

McNally JA

A The student then, on 24 September 1999, sought relief from the High Court in the form of an urgent chamber application for a provisional order, by way of interim relief, that she be allowed to sit her final exams. The final order sought was that —

1. The policy be declared unconstitutional; B
2. The decision to expel be declared null and void;
3. She be allowed to sit her examinations;
4. She be allowed to submit all assignments and course work papers;

5. Costs be paid on the higher scale.

The learned judge handed down a judgment on 24 November 1999. It is C reported as *Mandizvidza* v *Chaduka NO & Ors* 1999 (2) ZLR 375. The relief sought was granted. Presumably, by then, it was too late to sit the exams. The provisional order was then confirmed in September 2000 (the exact date does not appear on the papers) with two modifications. The generality of the first prayer was altered so as to declare merely that clause 7(a) of the students' contract was unconstitutional. Costs were ordered D on the ordinary, not the higher, scale. Against this confirmation the appeal was lodged.

Section 23 of the Constitution of Zimbabwe is headed "Protection from discrimination on the grounds of race etcetera". It reads, in relevant part:

> "(1) Subject to the provisions of this section —
>
> (a) E 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) F 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 G 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 H according of that privilege or advantage is wholly or mainly attributable

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McNally JA

> to the description by race, tribe, place of origin, political opinions, A colour, creed or gender of the persons concerned.
>
> (3) …
>
> (4) …
>
> (5) Nothing contained in or done under the authority of any law that discriminates between persons on the ground of their gender shall be B held to be in contravention of subsection (1)(a) or (b) to the extent that the law in question —
>
> (a) gives effect to section 7(2) or any other provision of this Constitution; or
>
> (b) takes due account of physiological differences between persons of C different gender; or
>
> (c) makes provision in the interests of defence, public safety or public morality;
>
> except in so far as that law or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a D democratic society."

Mr *Nherere* expressly disavowed any reliance on the argument, put forward in the court below, that s 23(3)(a) of the Constitution provided an escape clause for his clients on the basis that the law of contract was a matter of personal law. For that reason, I have not found it necessary to set out the section. Mr *Nherere* also accepted that clause 7(a) of the contract was E discriminatory. In the light of the reasoning beginning at 381A in the judgment of the court *a quo*, I believe that concession to be proper.

We are left therefore with the single issue as to whether Morgenster is a "public authority" within the meaning of that phrase as used in s 23(1) of the Constitution. In other words, was the principal of Morgenster a person: F

> "acting … in the performance of the functions of any … public authority?"

The Constitution has an interpretation section placed, rather unusually for this country, at the end rather than the beginning of the document. It is s 113. It defines "public moneys", "public office", "public officer" and "Public Service" but not "public authority". All these four definitions refer to the G State. Thus "public moneys" means "fees … payable to the State …"; "public office" means "a paid office in the service of the State"; "public officer" means a person holding a public office; "Public Service" means "the service of the State …".

The omission of "public authority" from the list of definitions is clearly deliberate. It seems to me that it rules out the application of the principle of H

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A interpretation known as "*noscitur a sociis*" or, in English "it is to be known by the company it keeps". In other words, one would normally say that because all the other definitions involving the word "public" define the word as meaning "pertaining to the State", then when we speak of "public authority" we must mean "an authority pertaining to the State" or "a State authority".

B But because "public authority" is not defined, and, we must assume, deliberately not defined, when the other phrases using the word "public" are defined, the opposite conclusion is justified. See Du Plessis *The Interpretation of Statutes* para 58.2 on p 156 where the learned author says:

> "Where an enactment makes express provision for certain circumstances, C it is inferred that for opposite circumstances the contrary will obtain."

One must assume that a limited definition has been given to the word "public" in all the defined phrases. Since "public authority" is not defined, the limitation does not apply. Therefore, a public authority may be an authority which is not a State authority. This wider definition has ample precedent. See D for example, Bennion *Statutory Interpretation* para 384 p 838, under the heading "Example 1".

This is an instance of the application of another principle of interpretation which is "*expressio (or 'inclusio') unius est exclusio alterius*". (To express one thing is to exclude another). In the present instance, it means that where the word "public" is defined in a limited way in four cases, but not in the E fifth, one is entitled to define it differently, or more widely, in that fifth case.

I am aware that it has been said that the "*expressio unius*" rule will not be applied "where it would obviously defeat the intention of the legislature and permit the very mischief which the statute is designed to prevent" — *per* F Beadle CJ in *R* v *Barrington* 1969 (4) SA 179 (RAD) at 182; 1969 (2) RLR 361 (A) at 365G-H. However, this is not such a case. There is no problem about giving "public authority" a definition wider than "State authority".

The next question is "How wide?" At what level does an authority cease to be public and begin to be private? It seems to me that a local authority is G clearly a public authority. In *Kombayi* v *Registrar-General* 2001 (2) ZLR 356 (S), I referred to s 23(3)(d) of the Constitution. That section speaks of "service as a public officer or … service with any public authority …" Clearly therefore, those are two separate things. It was not necessary, for the purposes of that case, to bring the City of Gweru into the definition of "public authority", but I have no doubt that it falls into that category. So also, I think, H would public utility corporations like the Zimbabwe Electricity Supply

2002 (1) ZLR p78

McNally JA

Authority or the various recently privatised sub-divisions of the Posts and A Telecommunications Corporation. Perhaps if they were completely privatised commercial undertakings, without government shareholding, they might not be public authorities.

But can one go so far as to say that a private, Church-run teacher training B college is a public authority?

In Halsbury's *Laws of England* 3 ed Vol 30, 682, 683 there is a long definition of "Public Authority" as follows:

> "**1317. Characteristics.** A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform …, and which performs those duties and carries out its transactions for the benefit of the public and not C for private profit … Such an authority is not precluded from making a profit for the public benefit …, but commercial undertakings acting for profit and trading corporations making profits for their corporators are not public authorities, even if conducting undertakings of public utility … A natural or individual person might, when acting in execution of a D public duty, be a public authority for the purpose of the provisions, now repealed …, which formerly enacted a special limitation period for actions against public authorities …"

In para 1318, Halsbury gives instances of what are public authorities, saying:

> "No general definition of what is and what is not a public authority has been attempted by the courts, but the question has been decided in a E number of specific instances."

Among the instances, the closest to the present situation is:

> "local authorities, when acting as harbour, burial, highway, education or sanitary authorities."

Morgenster is certainly not a local authority acting as an education authority. F In *Greenwood* v *Atherton* [1938] 4 All ER 686; [1939] 1 KB 388 (CA) at 391 MacKinnon LJ ruled that the board of managers of a "non-provided voluntary school" was a public authority, but that was because, by statute, "the local education authority shall be responsible for, and have the control of, all secular education in public elementary schools not provided by them". The school in question was such a school. G

In Halsbury's *Laws of England* 4 ed Vol I para 6 p 9, the definition (now under the heading of "Administrative Law") is much shorter:

> "A public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit. Not every such person or body is expressly defined as H

McNally JA

> A a public authority or body, and the meaning of a public authority or body may vary according to the statutory context."

Morgenster is entrusted (by the Reformed Church) with teacher training functions to perform for the benefit of the public. I think one may assume that it was not established for private profit. Any profit made would certainly be re-invested in the college or possibly in other public works of B the Church. In that sense therefore, it would fit the definition of "public authority".

My difficulty, however, with this interpretation is that "entrusted" must surely mean "entrusted by government" in the sense that the body is either a municipal or local authority or an off-shoot of such a body, or a public utility C corporation or statutory body. In the English cases involving educational institutions, the schools have fallen within the definition solely because they have been under the administrative control and authority of the local education authority.

That is not the position with Morgenster. It is a private teacher training college. It is funded by the State in terms of the provisions of the Education D Act [*Chapter 25:04*], Part IX. It is registered by the State as an "independent college" in terms of Part IX of the same Act. It is supervised by the State in terms of ss 46 and 66 of the Act. But the State is not responsible for, nor does it have control of, the education at the college, as in *Greenwood* v *Atherton supra*.

E Exactly the same situation arose in *Wittman* v *Deutscher Schulverein, Pretoria & Ors* 1998 (4) SA 423 (T). At 454, van Dijkhorst J observed:

> "For this argument (that the school was an organ of state), counsel relied on the fact that the school exercises a public function in educating children subject to compulsory education and that the State exercises control by virtue of criteria for registration and subsidising …
>
> F It was common cause that the persons controlling the association and the school are not appointed by the State. The State is not effectively in control of this school. The fact (if such it is) that the entry age of pupils, educational standards, standards in respect of buildings, qualifications of teachers, hours of schooling, the school calendar are G determined by the State, that the constitution has to be approved and that annual financial statements have to be submitted upon sanction of deregistration, does not constitute that type of control as to render the school an organ of State. Just as one cannot declare a butchery an organ of State merely because health regulations, labour law, minimum wages provisions, restrictions on the hours of trading, etc., have to be H complied with. It can hardly be argued that the State can be held

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McNally JA

> vicariously liable for the delicts of private schools, despite the A requirements above set out.
>
> In my view, the German School is clearly not an executive organ of State."

I respectfully agree with these observations of the learned judge.

Accordingly, I do not consider that Morgenster is a public authority. B Compare also *Embling* v *Headmaster, St Andrews College (Grahamstown)* 1991 (4) SA 458 (E) especially at 467E-F.

I also agree with Mr *Nherere*'s submissions that we should not become embroiled in general discussion as to whether the Declaration of Rights has horizontal or vertical application. It seems to me to be clear that this particular C section has vertical application only. Had it been intended to have horizontal application as well there would have been no need to split subs (1) into paras (a) and (b). Section 23(1) would simply have read:

> "Subject to the provisions of this section no person shall be treated in a discriminatory manner by any person."

I further agree with Mr *Nherere*'s submission that the American cases cited D by Mr *Biti* do not indicate that the constitutional safeguards in the American Bill of Rights apply horizontally between citizens. When there is a need to outlaw discrimination as between one individual and another, a federal or state law is passed. See Title VI of the 1964 Civil Rights Act and the decisions in *Jones* v *Alfred H Mayer Co* 392 US 409 (1968), 88 S-Ct 2186, 20 L Ed 2d E 1189; and *Runyon* v *McCrary* 427 US 160 (1976).

Similarly, in our constitutional jurisdiction, to hold that the Declaration of Rights in our Constitution has no direct horizontal application is not to say that it is totally irrelevant to any litigation between private litigants. As Mr *Nherere* pointed out, the Declaration of Rights has mediate or indirect F application in that a private litigant may well say to another that the law or executive act that the other is relying on is unconstitutional. For instance, in *Chinamora* v *Angwa Furnishers (Pvt) Ltd & Anor (Attorney-General intervening)* 1996 (2) ZLR 664 (S); 1998 (2) SA 432 (ZS), it was not the applicant's argument that Angwa Furnishers had violated his s 13 right to personal liberty. His contention was that the law of civil imprisonment, on G which Angwa Furnishers was relying, was inconsistent with s 13 of the Constitution. The immediate target of the challenge was a law, not the conduct of Angwa Furnishers. The same may be said, *mutatis mutandis*, of *Lees Import and Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S); 1999 (4) SA 1119 (ZS).

The point is, and again I adopt Mr *Nherere*'s submission, that reprehensible H

McNally JA

A conduct between private individuals is normally dealt with by legislation or the common law. Thus —

1. While racial discrimination practised by private persons may not come within the ambit of s 23 of the Constitution, it is in various circumstances outlawed by the Public Premises (Prevention of Racial Discrimination) Act [*Chapter 8:12*]; the Variation of Racial Trusts Act [*Chapter 8:15*]; B and the Prevention of Discrimination Act [*Chapter 8:16*].
2. While s 12 (the right to life) of the Declaration of Rights may not have horizontal application, it does not follow that Zimbabweans have a licence to kill each other. The common law protects us.
3. Stealing by individuals is not dealt with under the provisions of s 16 of C the Constitution relating to expropriation of property without compensation. It falls under the common law of theft or the civil law relating to the *actio rei vindicatio*.
4. Religious and other forms of discrimination at private educational institutions are dealt with ad hoc in subsidiary legislation like, for example, the Statutory Instrument establishing the Catholic University, D SI 268 of 1998, which states in s 16:

   > "No test of religious or political belief, race, ethnic origin, nationality or sex shall be imposed upon or required of any person in order to entitle that person to be admitted as a member of the staff or student body of the University …"

E I conclude therefore that the offending clause in the agreement signed by the respondent is not unconstitutional.

However, I do not think that is the end of the matter, because in my opinion the clause is to be struck down on the ground that it is *contra bonos mores*, or contrary to public policy. These phrases have been used interchangeably F in such cases as *Sasfin (Pty) Ltd* v *Beukes* 1989 (1) SA 1 (A) at 7I-9A; *Botha (now Griessel)* v *Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782I-783C; and *Mufamadi & Ors* v *Dorbye Finance (Pty) Ltd* 1996 (1) SA 799 (A) at 801I-803A. These cases make it clear that the courts must be careful but not over-cautious. As Smalberger JA put it in *Sasfin supra*:

> "No court should therefore shrink from the duty of declaring a contract G contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be

exercised sparingly and only in the clearest of cases …"

And see *de Jager en Andere* v *ABSA Bank Bpk* 2001 (3) SA 537 (A) at 543G.

The clause as worded is far wider than would be necessary if it related strictly H to morality. It punishes the married woman who falls pregnant. It does not

McNally JA

punish the male student who has extra-marital sex with a non-student, even A if she becomes pregnant as a consequence. It cannot thus be defended on the grounds that a religious organisation is entitled to insist on certain moral standards among its students.

I would agree with the learned judge of first instance that the appellants cannot rely on the fact that the respondent "voluntarily" withdrew. It is clear B that she withdrew only under pressure.

Accordingly, I would amend para (a) of the order confirming the provisional order so that it reads:

"(a) It is declared that the provisions of clause 7(a) of the agreement between the applicant and the second respondent, which clause C provides for the expulsion of the applicant in the event of her falling pregnant, are contrary to public policy and thus null and void and of no force and effect."

For the rest, I would dismiss the appeal with costs.

CHIDYAUSIKU CJ, MUCHECHETERE JA, ZIYAMBI JA and D MALABA JA concurred.

Winterton, Holmes & Hill, appellants' legal practitioners

Honey & Blanckenberg, respondent's legal practitioners (IFP) E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/(1) Combined Harare Residents Association & Anor v Registrar-General & Ors

[zRPz](1) Combined Harare Residents Association & Anor v Registrar-General & Ors (2) Registrar-General v Combined Harare Residents Association & Anor (1) (3) Registrar-General v Combined Harare Residents Association & Anor (2) (4) Registrar-General v Combined Harare Residents Association & Anor (3)

(1) Combined Harare Residents Association & Anor v Registrar-General & Ors1

Citation	2002 (1) ZLR 83 (H)
Case No	Judgment No. HH-24-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	28 January 2002
Judgment	28 January 2002
Counsel	Ms *E K Mushore*, for the applicants Mrs *L Matanda-Moyo*, for the respondents
Case Type	Civil application

Annotations Link to case annotations

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(2) Registrar-General v Combined Harare Residents Association & Anor (1)

Citation 2002 (1) ZLR 83 (H)

Case No Judgment No. S-4-02

Court Supreme Court, Harare

Judge Chidyausiku CJ (in Chambers)

Heard 1 February 2002

Judgment 1 February 2002

Counsel Details not Supplied

Case Type Application for leave to appeal

Annotations Link to case annotations

(3) Registrar-General v Combined Harare Residents Association & Anor (2)

Citation 2002 (1) ZLR 83 (H)

Case No Judgment No. HH-27-02

Court High Court, Harare

Judge Chinhengo J

Heard 4 February 2002

Judgment 4 February 2002

Counsel M *Majuru*, for the applicant
Ms *E K Mushore* and *Mrs S Jarvis*, for the respondents

Case Type Application for leave to appeal

Annotations Link to case annotations

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(4) Registrar-General v Combined Harare Residents Association & Anor (3)

Citation 2002 (1) ZLR 83 (H)

Case No	Judgment No. S-7-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ebrahim JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	6 February 2002
Judgment	8 February 2002
Counsel	Mrs *L Matanda-Moyo*, for the appellant Ms *E K Mushore*, for the respondents
Case Type	Application for leave to appeal
Annotations	Link to case annotations

Flynote

Practice and procedure — *order — validity — order purporting to modify* D *statutory requirements — not competent for court to do so, irrespective of motives*

Statutes — *regulations — validity — presumption in favour of — regulations remaining as law in force until struck down by competent court* E

Headnote

(1) In late 2001, the Association brought an action in the High Court to compel the Registrar-General to hold mayoral and council elections for Harare. The city had, for well over a year, been run by a commission appointed by the Minister of Local Government, in spite of the provisions of the Urban Councils Act that the maximum period should not exceed F six months. The High Court ordered that the elections be held on 28 December, 2001. The order stipulated that it was to remain operative despite the noting of an appeal. The Registrar-General appealed, but made no attempt to comply with the order. The Supreme Court dismissed the appeal, other than to change the date for the elections to 11 February, 2002. G

If the Registrar-General was going to comply with the Supreme Court's order, he would have had to start the election process no later than 14 January, 2002. He failed to take any steps to comply with the Supreme Court's order.

On 23 January, 2002, the President issued a notice, purportedly in terms of s 158 of the Electoral Act [*Chapter 2:01*], which stated that H

Chinhengo J

A notwithstanding any law or order of court to the contrary, the Harare mayoral and council elections were to be held on 9 and 10 March 2002, the same weekend as the Presidential election. On 28 January, the Association sought provisional orders from the High Court (1) compelling the Registrar-General to give formal notice of the election in terms of the Supreme Court's order and (2) declaring the Presidential B notice to be *ultra vires* the Act.

Held, that before a provisional order could be issued, the court had to be satisfied that the Association had made out a *prima facie* case. This it had done: the Supreme Court's order was still extant. The High Court had the power to enforce, but not to amend, an order of the Supreme Court.

C *Held*, further, that it seemed clear that s 158 of the Electoral Act did not allow the President to override a court order. The section specifically referred to the provisions "of this Act or any other law in so far as it applies to any election". The Supreme Court's order still being extant, nothing short of holding the elections on 11 February would amount to full D compliance with the order. However, the time limits set out in the Act would of necessity have to be modified to meet the stipulated election date of 11 February.

(2) The Registrar-General filed a notice of appeal, and the papers were laid before the Chief Justice in chambers.

Held, that the order against which the Registrar-General sought to appeal E was a provisional one, and he should have sought leave of the court *a quo* to appeal. The crucial issue was whether the Presidential notice was valid. Leave to appeal should have been sought from the court *a quo*. Only if the court *a quo* refused leave to appeal, should the Registrar-General approach a judge of the Supreme Court for leave to appeal.

(3) F The Chief Justice ordered that the matter be set down for hearing 3 days later. The Registrar-General duly applied to the court *a quo* for leave to appeal.

Held, that there could only be one ground of appeal, namely, that the Association had failed to make out a *prima facie* case. To succeed in G showing this, the Registrar-General had to show that he had a reasonable prospect of success. Any prospect of success depended on the validity of the Presidential notice. Section 158(1) of the Electoral Act allowed the President to make such SIs as he considers necessary or desirable to ensure any election is properly and efficiently conducted and to deal with any matter or situation connected with or arising out of or resulting H from the election. Section 158(2) provides that such a SI may provide

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for suspending or amending any provision of the Act or any other law, A in so far as it applied to any election.

Held, further, that on the authorities, and on a reading of s 158 itself, "any other law" was to be limited to statute law, not to court orders or the common law. There was thus no prospect of success and leave to appeal would be refused.

(4) The Registrar-General then sought leave of the Supreme Court to B appeal against the provisional order. It was argued on his behalf that the judge *a quo* had erred, in that in attempting to enforce the Supreme Court's order, the 28 days' notice required by a 103L of the Act were not given. The court decided to hear submissions both on the application for leave to appeal and on the merits of the appeal. C

Held (by the majority), that the court *a quo* had no power to modify the provisions of the Electoral Act by prescribing shorter periods for the election process than those in the Act; only Parliament could do that. Non-compliance with the requirements of the Act meant that an election was liable to be declared invalid. That alone meant the provisional order could not be upheld. D

Held, further, that the Notice was the law in force until a competent court declared it invalid. The court *a quo* did not have to, and could not, make a final determination on that issue, as its order was provisional only. What the court *a quo* effectively did was conclude that the Notice would be declared invalid on the return day and give relief predicated on that E probable outcome. Such an approach was directly in conflict with the presumption of validity.

Held, further, that because no final determination of the validity of the Notice had been made by the court *a quo*, and because that court's interim order had been set aside, it was not competent in these circumstances for the Supreme Court to determine the validity of the F Notice, which thus remained the existing law.

Held (by Ebrahim JA, dissenting), that the question for determination was the validity of the Notice, and the phrase "any other law" in s 158 could not be interpreted as including a court order.

Cases referred to

Batista v Commanding Officer, SANAB, South African Police, Port Elizabeth, and Others G
1995 (4) SA 717 (SE)

Bowker v Registrar of Deeds 1939 AD 401

Dickinson & Anor v Fisher's Exors 1914 AD 424

Econet (Pvt) Ltd v Min of Information 1997 (1) ZLR 342 (N)

Galant v du Toit 1946 CPD 247 H

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A *Goslar (Pty) Ltd v Gargian* 1949 (3) SA 240 (C)

Johannesburg City Council v Makaya 1945 AD 252

Kairowsky v Gradner & Anor 1933 CPD 295

Mader v Fraserburg Municipality (1899) 16 SC 503

R v Baloi 1949 (1) SA 523 (A)

R v Kisten & Ors 1959 (1) SA 105 (N)

B *R v Mpeta* 1912 AD 414

Schuurman & Anor v Motor Insurers' Assn of Southern Africa 1960 (4) SA 316 (T)

Torwood Properties (Pty) Ltd v S A Reserve Bank 1996 (1) SA 215 (W)

Whata v Whata 1994 (2) ZLR 277 (S)

Legislation considered C

Electoral Act [*Chapter 2:01*], ss 103L, 158

High Court Act [*Chapter 7:06*], s 43(2)(d)

Supreme Court Act [*Chapter 7:13*], s 24

Case information

Appearances: D

(1) Ms *E K Mushore*, for the applicants
Mrs *L Matanda-Moyo*, for the respondents

(3) *M Majuru*, for the applicant
Ms *E K Mushore* and Mrs *S Jarvis*, for the respondents

(4) Mrs *L Matanda-Moyo*, for the appellant
Ms *E K Mushore*, for the respondents

Judgment

E **CHINHENGO J:** Thecauses of this application revolve around the provisions of the Electoral Act [*Chapter 2:01*] as amended in 1997.

This is an application for the grant of a provisional order with the following relief:

F Paragraph 1:

> G "That the Registrar-General shall forthwith give Notice of the mayoral and Council Elections for the City of Harare in accordance with the Supreme Court order."

The earlier draft which was amended at the hearing read as follows:

> "The Registrar-General shall forthwith give notice of the mayoral and council Elections for the City of Harare in accordance with section 103L of the Electoral Act [*Chapter 2:01*], fixing the polling date, 28 days thereafter being the shortest possible time thereafter permitted by the Electoral Act, and to take all such other steps as may be necessary in terms of that Act to have such mayoral and council elections on the date H so fixed."

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Paragraph 1, has therefore been amended. A

Paragraph 2:

> "The Registrar-General shall within twenty four hours (24), hereof arrange publication of such notice in at least one Newspaper circulating in the area as quickly as possible and file proof of this with this court, and furnish a copy of it to the applicant's legal practitioners within 24 hours B hereof."

Paragraph 3:

> "Should the Registrar-General fail to comply with any part of the interim relief granted under this provisional order, the applicants may approach this court to anticipate paragraph 3 of the final order so that this court may C commit the Registrar-General to gaol until such time as such steps as maybe specified by it are taken. The applicants are hereby given leave to supplement their papers to show good cause for this. The pplicants should first approach the Registrar-General's legal practitioners to agree in consultation with the Registrar of this court or appropriate Judge's Clerk on a suitable hearing date. If this cannot be agreed or there is a great D urgency, they may make a Chamber Application on Notice to the applicants for directions from a judge as to when that issue can be argued."

Paragraph 4:

> "That in the event of an appeal being noted against this provisional order, E notwithstanding such noting of an appeal, this order is declared operative and in effect and shall not be suspended, unless the court or a judge with appropriate jurisdiction is duly furnished with all the documents filed herein and in accordance with due process orders otherwise."

That is the provisional relief sought by the applicants in this matter. The final relief sought by the applicants is fourfold. First, the confirmation of the F interim relief which I may grant with the issuance of the provisional order. Second, the declaration as null and void of the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002 (SI 13A of 2002), which I will refer to as "the Notice". Third, the committal to gaol of the first respondent, the Registrar-General, if he has not complied fully with G the interim order. Fourth, a declaration that the order granted shall remain operative and in effect not withstanding any appeal noted against it.

The interim relief sought by the applicants, and the final relief as well, seemed to me to be at some variance with what, going by the applicants' founding affidavit, is the relief which this court may grant if it is so satisfied. The founding affidavit and the certificate of urgency filed by the applicant's H

A legal practitioner in terms of r 244 of the rules of this court make it apparent that the applicant is seeking to enforce the judgment of the Supreme Court in case S-348-01; whereas the relief sought in terms of the draft provisional order before it was amended at the hearing is not for a strict implementation of the Supreme Court order but for its variation in some degree. I will endeavour to show later as I hand down this judgment how this is so and B reflect my own appreciation of the issues at stake in the order that I will make.

It is important to recite the facts forming the background to this application. The first applicant made an application in case HC 9073/01 to this court to compel the first respondent to hold the mayoral and council elections for the City of Harare by a given date. This court ordered that those C elections were to be held on 28 December 2001 and in compliance with a timetable which this court set for the publication of various notices required by the Electoral Act to be published in respect of the holding of such elections.

The order stipulated that it was to remain operative despite the noting of any appeal. The Registrar-General, who is the first respondent, nonetheless D appealed to the Supreme Court against the judgment of Hungwe J in HC 210/01 and did not comply with the order of this court at that stage. His appeal was, however, dismissed by the Supreme Court, which issued the following order:

> "(1) That subject to the qualification that the election time-table set by E the court *a quo* is set aside, the appeal is dismissed.
>
> (2) That the first appellant shall hold mayoral and council elections for the City of Harare in terms of the Electoral Act [*Chapter 2:01*] on or before 11 February 2002.
>
> (3) That the appellant shall pay two thirds of the respondent's costs F jointly and severally, the one paying the other to be absolved."

It seems to me that if the first respondent in this case was to comply with the Supreme Court order, which I have recited, he had to have, by 14 January 2002, commenced the various steps required to be followed for the holding of elections on 11 February 2002. He apparently did not do so, and has not done so to date.

G At the hearing today, some programme was mentioned as having been put in place by the first respondent for holding the elections on 9 and 10 March 2002.

The applicants clearly seek the enforcement of the Supreme Court order by this court. Whilst in my view they are entitled to do so, the remedy they have sought, before the amendment at the hearing, is not consistent with the strict H enforcement of the Supreme Court order. They have sought to give latitude

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to the first respondent to hold the elections other than on or before A 11 February 2002, hence in para 50 of the founding affidavit, which I would say encapsulates their position, they state:

> "The only way for him [that is, the first respondent], to purge his contempt is to immediately give notice that he will hold the elections within the shortest possible period allowed by the Electoral Act."

I do not think that it would be competent for me to give the relief sought by B the applicants as originally framed in the manner they have sought it and at the same time achieve what I believe is the primary objective of this application, which is to enforce the Supreme Court order.

The power of this court to enforce an order of the Supreme Court derives from C s 24 of the Supreme Court Act [*Chapter 7:13*], which provides:

> "Except as otherwise provided in any other law, a judgment of the Supreme Court in any appeal in terms of this Part, shall be recorded in the court or tribunal of first instance and such judgment may be enforced in all respects as if it had been given by that court or tribunal."

This provision does not, in my view, give the court of first instance, in this D case the High Court, the power to vary the Supreme Court order in any way. The power to enforce an order is not, I do not think, necessarily contemporaneous with the power to vary the order concerned.

The first respondent, in any case, has attempted to obtain a variation of the Supreme Court order when he filed the applications referred to at this E hearing, that is, in case S-8-02 and case number S-12-02. He, however, withdrew that application or those applications on or about 24 January 2002.

It is not in dispute that the Notice was promulgated on 23 January 2002. The Notice provides that the Harare City Council elections shall be held on 9 and 10 March 2002, notwithstanding the provisions of the Urban Councils Act [*Chapter 29:15*], the provisions of the Electoral Act [*Chapter 2:01*] or F any other law or order of court to the contrary. I lay emphasis on the words, "or order of court".

The applicants have averred in the affidavit, and orally at the hearing, that this Notice is liable to be struck down as null and void for the reasons which they give in the founding affidavit, as well as the reasons advanced by Ms *Mushore* G at the hearing.

The declaration that that Notice is null and void is a part of the final relief which the applicants seek. But it seems to me, and it has been stated by Ms *Mushore,* that apparently the first respondent withdrew his application to the Supreme Court in case S-12-02, because he must have believed that he was now saved by the Notice. H

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A I must emphasize that I am concerned in this application only with the issuance of a provisional order together with the interim relief prayed for. To issue the provisional order, I must be satisfied that the applicants have made out a *prima facie* case. This is trite law. Rule 245(2) of the Rules of this court provides:

> "Where in an application for a provisional order the judge is satisfied that B the papers establish a *prima facie* case, he *shall* grant a provisional order either in terms of the draft filed or as *varied*" (emphasis added).

Now to satisfy myself whether or not a *prima facie* case has been made, I think I have to have regard, in this case, to the following considerations. First, whether *prima facie,* the Notice is null and void. I must mention and C emphasise the fact that the question of the validity or otherwise of the Notice is a matter to be dealt with on the return day. But in order to satisfy myself whether in fact a *prima facie* case has been made, I think I must be satisfied too that the Supreme Court order is extant, i.e. is still alive and surviving even in view of the Notice, and I think I must be satisfied that *prima facie* the first respondent is in contempt of the Supreme Court order. The Notice in effect D sets aside the Supreme Court order and any court order which may have been made against (or it attempts to nullify any order of court made against) any decision or any act of the Commissioners appointed for the City of Harare.

I do not want to enter the debate, which is really a jurisprudential question, as to whether in view of the doctrine of the separation of powers, a law may E be passed to directly nullify *ex post facto* an order of the Supreme Court. This point may be addressed by the parties on the return day of this provisional order.

I think, however, that the Notice may be found wanting and therefore likely to be declared invalid because of its wide sweep as alluded to by the F applicants in paras 33 and 34 of their founding affidavit. In this regard, one needs only to give an example arising from the provisions of s 4 of the Notice which provide as follows:

> "Notwithstanding anything in the Urban Councils Act [*Chapter 29:15*], the Electoral Act [*Chapter 2:01*] or any other law or order of court to the contrary —
>
> (a) G (not relevant).
>
> (b) all decisions and acts of the Commissioners referred to in paragraph (a) [that is, the Commissioners running the City of Harare], made before the date of commencement of this Notice, in the exercise or purported exercise of the functions of the Harare City Council are H hereby validated."

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The emphasis, as I said, is on the sweep of this provision. Some examples A have been given as to the possibility that if these courts had issued an order, for instance re-instating an employee dismissed by the City Council, quite conceivably this section might render that order inoperative. And it is that sweep which I consider might result in, among other reasons, this court pronouncing that the Notice may in fact be null and void. B

Additionally, there is what may appear to many as the obvious point, that the Notice was made in terms of s 158 of the Electoral Act. That section empowers the President to make certain Statutory Instruments as he considers desirable. I do not wish to recite the entire section. But what is significant, in my view, is that the section does not empower the President to issue a notice or issue a Statutory Instrument which has the effect of setting aside a court C order. That is my reading of that section. It is specific that it relates to the provisions of any Act or any other law.

I must confess I do not subscribe to Mrs *Matanda-Moyo's* view that "any other law" includes a court order. And even if one were to look at s 158 of the Electoral Act from the point of view of the interpretation of statutes, one D would obviously say, if the legislature intended to include a court order, it would very easily have done so. It is not a matter which would have been left to doubt, but the reason why it was not done that way is probably self evident, considering the respective functions of the three arms of the State.

If I am correct in what I have said, it means therefore that the Supreme Court order is still valid. It is apparent that the Supreme Court order may be in E danger of being disregarded. There is no doubt that the Supreme Court order was quite obviously disregarded during the period between 14 and 23 January 2002 and no steps were taken in terms of the Electoral Act to meet the deadline for holding the elections as established by the Supreme Court.

I think the point that a court order must be obeyed, whatever a litigant might F think about it, is adequately dealt with in a number of cases in this court and elsewhere and in particular, the case drawn to my attention, *Whata* v *Whata* 1994 (2) ZLR 277 (S) at 281F-282A.

So it seems, therefore, that, having said that the Supreme Court order is extant and having satisfied myself that there might be no validity in relying on G SI 13A of 2001, the Registrar-General, the first respondent, should have long ago taken steps to ensure that the elections will be held on or before 11 February 2002.

This of course means that the first respondent is more than just *prima facie* in contempt of the Supreme Court order.

It must be apparent that the applicants, from what I have said, have H

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A established a *prima facie* case for the issuance of the provisional order sought. But, to give effect to the Supreme Court order and for this court to enforce it without variation or amendment, it seems to me that the first respondent must work towards the holding of the elections on 11 February 2002. In my view, nothing short of holding the elections on or before that date will amount to full compliance with the Supreme Court order.

B The various steps which must be taken by the first respondent in terms of the Electoral Act must of necessity be modified to ensure that the Supreme Court order is complied with.

In my view, the guiding principle is that an order of the Supreme Court must be complied with in all respects and any other consideration must take second C place. In the time available and in order to meet the deadline set by the Supreme Court of 11 February 2002 for the holding of the elections, the draft order must be so worded as to enable the first respondent to hold the elections on 11 February 2002 at the very latest.

Further, in my view, the issuance of the provisional order gives to the first respondent the opportunity to attempt to purge his contempt of the Supreme D Court order, because for as long as he holds the elections on 11 February 2002, he cannot be held absolutely to be in contempt as long as he can secure the holding of the elections by 11 February 2002. I do not think he can be held to be absolutely in contempt of the court order.

If I must err in this particular judgment, I choose to err on the side of giving E effect to an existing Supreme Court order and grant such provisional relief as will be consistent with the intention of giving effect to the Supreme Court order.

The relief sought in para 4 of the draft order is merited. *Whata* v *Whata supra* beckons me to issue that part of the draft order because it is competent that F such an order may be issued by this court.

The Supreme Court order, therefore, shall, pending the final determination of this matter be enforced by the issuance of a provisional order and the granting of the following interim relief:

1. That the first respondent shall on or before 31 January 2002, give notice of the mayoral and council elections for the City of Harare and fix G 11 February 2002 or 11 February 2002 and any preceding day or days as the polling date or dates on which a poll take place, if a poll becomes necessary.
2. The first respondent shall fix 4 February 2002 as the day on which the nomination court will sit to receive nominations of candidates for H election of councillor or mayor, as the case may be.

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3. For the purposes stated in paras 1 and 2 hereof and for the purpose of A giving effect to the Supreme Court order of 7 December 2001, the provisions of the Electoral Act [*Chapter 2:01*] shall be construed with such necessary modification as will ensure compliance with those paragraphs.
4. Should the Registrar-General fail to comply with any part of the interim B relief granted under this provisional order, the applicants may approach this court to anticipate para 3 of the final order, so that this court may commit the Registrar-General to gaol until such time as such steps as may be specified by it are taken. The applicants are hereby given leave to supplement their papers to show good cause for this. The applicants should first approach the Registrar-General's legal practitioners to C agree, in consultation with the Registrar of this court, on a suitable hearing date. If this cannot be agreed or there is a great urgency, they may make a chamber application, on notice to the applicant, for directions from a judge as to when that issue can be argued.
5. That in the event of an appeal being noted against this provisional order, D notwithstanding such noting of an appeal, this order is declared operative and in effect and shall not be

suspended, unless a court or judge with appropriate jurisdiction is duly furnished with all the documents filed herein and, in accordance with due process, orders otherwise.

SERVICE OF THIS ORDER AND FILING OF FURTHER E DOCUMENTS

Service of this provisional order shall be deemed to have taken place at the time of granting hereof.

That, therefore, is the decision I have come to on this application for a provisional order. F

Atherstone & Cook, applicants' legal practitioners

Office of the Attorney-General's Office, legal practitioners for the respondents

Before: CHIDYAUSIKU CJ, in chambers. G

The registrar has placed before me matters S-22-02 and S-27-02 and sought my directions. The issues raised on the papers are of such extreme importance that directions in respect thereof need to be in the form of a judgment.

In matter S-22-02, the appellant filed an notice of appeal against a provisional order of Chinhengo J issued on 28 January 2002. That order provides in part as follows: H

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A **"A. REGARDING THE FINAL ORDER SOUGHT**

It is ordered that the respondents show cause why an order should not be granted in the following terms:

1. The interim relief granted hereunder be and is hereby confirmed.
2. It is declared that the Electoral Act (Modification) (Postponement of B Harare Elections) Notice 2002, SI 13A of 2002, is null and void.
3. [If the interim order has not been fully complied with] the Registrar-General (which expression includes any acting Registrar-General) be and is hereby committed to gaol for the continuing contempt of court until such time as a notice of election as set out therein is given in terms of and accordance with s 103L fixing the polling date C 28 days thereafter, and/or all such other steps are taken as may be required in terms of the Electoral Act to hold the elections on that date.
4. That in the event of an appeal being noted against this order, notwithstanding such noting of an appeal, this order is declared D operative and in effect and shall not be suspended.
5. The first and second respondents shall pay the costs of this application.

B. INTERIM RELIEF GRANTED

It is ordered that the Supreme Court order shall, pending the final determination of this matter, be enforced by the issuance of the provisional E order and the granting of the following relief:

1. The first respondent shall on or before 31 January 2002 give notice of the mayoral and council elections for the City of Harare and fix 11 February 2002, or 11 February and any preceding day or days, as the polling date or dates on which a poll shall take place, if a poll becomes necessary. F
2. The first respondent shall fix 4 February 2002 as the date on which the nomination court is to sit to receive nominations for candidates for election as councillors or mayor, as the case may be.
3. For the purposes stated in paras 1 and 2 hereof and for the purpose of giving effect to the Supreme Court order of 7 December 2001, the G provisions of the Electoral Act shall be construed with such necessary modification as will ensure compliance with those paragraphs.
4. Should the first respondent fail to comply with any part of the interim relief granted under this provisional order, the applicants may approach this court to anticipate para 3 of the final order, so that H this court may commit the first respondent to gaol until such time as

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such steps as may be specified by it are taken. The applicants are A hereby given leave to supplement their papers to show good cause for this. The applicants should first approach the first respondent's legal practitioners to agree, in consultation with the registrar of this court, on a suitable hearing date. If this cannot be agreed or there is a great urgency, they may make a chamber application, on notice to B the first respondent, for directions from a judge as to when that issue can be argued.

5. That in the event of an appeal being noted against this provisional order, notwithstanding such noting of an appeal, this order is declared operative and in effect and shall not be suspended, unless a court or judge with appropriate jurisdiction is duly furnished with C all the documents filed herein and, in accordance with due process, orders otherwise."

In the second matter, S-27-02, the appellant filed what is described on the papers as an urgent chamber application, although the contents of the application suggest that it is a court application. In that application the following relief is sought:

"1. The judgment and order by Chinhengo J in case HC 738/2002 handed down on 28 January 2002 be and is hereby stayed, pending the final determination of an appeal by this court.

2. That the respondents pay the costs of this application."

The respondent's legal practitioners have written a long and detailed minute to the registrar, setting out their objection to the notice of appeal and the urgent application. In the minute to the registrar, the legal practitioners raise essentially three grounds of objection:

(1) The appeal has been filed contrary to s 43(2)(d) of the High Court Act [*Chapter 7:06*];

(2) This court was *functus officio*, in that it has previously ordered the appellant in case number S-348-01 to perform his statutory obligations in terms of the Electoral Act [*Chapter 2:01*]; and

(3) The appellant was in contempt and should not be heard by this court.

The respondent's legal practitioners are correct in contending that the provisions of s 43(2)(d) of the High Court Act have not been complied with.

There is substance in the first point taken by the respondent. Section 43(2)(d) provides as follows:

" (2) No appeal shall lie — …

(d) from an interlocutory order or interlocutory judgment made or given

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by a judge of the High Court, without the leave of that judge or, if that has been refused, with the leave of a judge of the Supreme Court, except in the following cases —

(i) where the liberty of the subject or the custody of minors is concerned;

(ii) where an interdict is granted or refused;

(iii) in the case of an order on a special case stated under any law relating to arbitration."

The order against which the appellant appeals against is a provisional order. A provisional order is, generally speaking and subject to what I have to say about this particular provisional order, an interlocutory matter. The appellant therefore should have sought the leave of the court *a quo* before approaching this court. It is only after the refusal to grant such leave that the appellant should have sought the leave of a judge of this court to appeal against the provisional order granted by the court *a quo*.

The respondents in the court *a quo* sought and obtained a provisional order in terms of which the appellant is ordered to hold elections for the City of Harare on or before 11 February 2002. The order also stipulates that the noting of an appeal will not suspend the operation of the order. Thus, the order, although couched in provisional terms, is in fact and in effect final, in that it cannot be altered before the critical date of 11 February. If this view is correct, then the appellant is deprived of his right to appeal as of right. A litigant can appeal as of right to this court against a civil judgment of the High Court.

The learned judge in the court *a quo* stipulated that the noting of an appeal will not affect his order, for obvious reasons. If the noting of an appeal were allowed to have the effect of suspending the order, it would have rendered his order nugatory as the effect of the order is that the elections at issue be held on or before 11 February 2002. If normal procedures were to be followed, it is unlikely that the appeal will have been heard by that date.

On the other hand, the appellant is entitled to be heard by the highest court in the land. Unless the order granted by the court *a quo* is suspended pending an appeal, his right of appeal is rendered nugatory as the relief sought on appeal would have been superseded by events.

In my view, given the importance and the significance of the issues involved in this case, a way has to be found which does not prejudice either party. This court and judges of this court have powers to depart from the Rules of this Court in the interests of justice. To this end, r 4 of the Supreme Court Rules provides as follows:

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"4. Departure from rules

Subject to the provisions of subsection (3) of section 19 of the Act, a judge or the Court may direct a departure from these rules in any way where this is required in the interests of justice and, additionally or alternatively, may give such directions in matters of practice or procedure as may appear to him or it to be just and expedient."

It is quite apparent to me from the papers and the judgment of the learned judge in the court *a quo* that the critical issue in this case is: "Whether the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002, published in SI 13A of 2002, is *ultra vires* s 158 of the Electoral Act [*Chapter 2:01*] and the Constitution of Zimbabwe and that in the event of it being *intra vires* what effect, if any, does it have on the Supreme Court order of 7 December 2001".

Counsels' attention is drawn to s 15(2) of the Electoral Act and its possible relevance to the court order directing the Registrar-General to act in a particular manner.

Having regard to the urgency and importance of this matter, I direct as follows:

1. That this matter be set down for hearing at 9.00 a.m. on Monday, 4 February 2002;
2. That the appellant is directed to apply for leave to appeal against the interim order granted in this matter as soon as possible from the court *a quo* but by not later than 9.00 a.m. on 4 February 2002;
3. That the issues to be determined at the above hearing are:
   (a) In the event of the appellant being refused leave to appeal, whether such leave should be granted by this court;
   (b) In the event of the leave to appeal being granted by the court *a quo* or by this court, whether or not the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002, published in SI 13A of 2002, is *intra vires* s 158 of the Electoral Act [*Chapter 2:01*] or the Constitution of Zimbabwe and, if so, what effect, if any, it has on the Supreme Court order of 7 December 2001;
   (c) Any other issue relevant to the above issue either party, with the leave of the court, may raise for determination; and
   (d) The papers filed in the High Court and in this court shall constitute the record in this matter. The registrar is accordingly directed to compile such record. Counsel should file heads of argument by 8.00 a.m. on Monday 4 February 2002.

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

Atherstone & Cook, respondents' legal practitioners

CHINHENGO J: On 28 January 2002, in judgment HH-24-02, I issued a provisional order whose net effect was that pending the confirmation or discharge of the provisional order, the applicant would publish notices for the nomination of candidates for election of councillors and the mayor of Harare and for the holding of the elections on 11 February 2002, as ordered by the Supreme Court in case S-348-01. The idea was that with the publication of the notices the applicant would be on course to hold the Harare City council and mayoral elections on 11 February 2002, assuming that it was found on the return day that the Supreme Court order had to be enforced despite the provisions of the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002 (SI 13A of 2002) ("the Notice"). Immanent in this idea was that if the Supreme Court order was found to be unenforceable or no longer operative because of the Notice, nothing would have been lost to the applicant and the elections would, in terms of the Notice, be held as stipulated therein on 9 and 10 March 2002.

The applicant published the relevant notice on 1 February 2002 and not on 31 January 2002 as I had ordered. It is significant, though, that the notice has been published. No explanation was given on the papers before me for the failure to publish the notice on 31 January 2002.

The respondent raised the point *in limine* that the applicant should not be heard as he was in contempt of the orders of this court and the Chief Justice's directions to the effect that he should have sought leave to appeal from this court by 9.00 a.m. today. I gave my reasons for hearing the applicant at the hearing. Its not necessary for me to repeat them here.

It is permissible in terms of the rules of this court for either party to anticipate the return day of any provisional order issued in any matter. Thus, either the applicant or the respondent (except the third respondent in judgment HH-24-02 who did not oppose the application and indicated that it would abide by any decision of the court) could have anticipated the return day of G the provisional order so that a judge of this court would have determined whether to confirm or discharge the provisional order. I gave an *ex tempore* judgment in chambers in order to afford the parties ample time to file the necessary papers, so that the matter would be heard before the week was out. Neither of them anticipated the return day. Instead, the applicant decided to appeal to the Supreme Court against my decision granting the provisional H order. In judgment S-4-02, the Chief Justice ordered that the applicant should

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seek leave to appeal from me. This judgment was brought to my attention A well after 10.00 a.m. today.

The basis of the applicant's appeal to the Supreme Court can only be one, in my view. It can only be that I erred in finding that the respondents had established a *prima facie* case. That ground of appeal revolves around the question whether or not the Notice invalidated the Supreme Court order. B Mr *Majuru*, for the applicant, conceded this as being so. The order against which they are appealing is interlocutory. That much was accepted by the Supreme Court in judgment number S-4-02. Now, in order for the applicants to succeed in this application they must, in my view, fulfil one requirement only. There are other requirements but they are not relevant. The requirement which the applicants must fulfil is that they must show or satisfy the court that C there is a reasonable prospect of success on appeal (*R* v *Baloi* 1949 (1) SA 523 (A) at 524). That prospect hinges on whether the Notice is not *ultra vires* the enabling provision of the Electoral Act [*Chapter 2:01*], *in specie* s 158(2) thereof. Section 158(1) of the Electoral Act empowers the President, subject to subs (2) to make such SIs as he considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any D matter or situation connected with or arising out of or resulting from the election. Subsection (2) of s 158 aforementioned provides in the relevant part as follows:

> "Statutory instruments made in terms of subs (1) may provide for —
>
> (a) suspending or amending *any provision* of this Act or *any other law* E in so far as it applies to any election" (my emphasis).

The Notice, which is the Statutory Instrument in terms of which the order of the Supreme Court was purportedly rendered inoperative, provides that any court order (which in context is a reference to the Supreme Court order) shall be of no effect. The argument made before me was that s 158(2)(a) in F reference therein to "any other law" encompasses a court order. I was of the *prima facie* view that it does not. I must examine that argument again to determine whether the respondents have any reasonable prospect of success on appeal.

I have searched through the law reports to find cases in which the words "any other law" were given a judicial interpretation in this jurisdiction. My search G was not successful, in so far as decided cases in this jurisdiction were concerned. I found some cases which were decided in South Africa. These cases are of persuasive value. They are: *R* v *Mpeta* 1912 AD 414 at 417; *Bowker* v *Registrar of Deeds* 1939 AD 401 at 407; *Johannesburg City Council* v *Makaya* 1945 (A) 252 at 255; *Goslar (Pty) Ltd* v *Gargian* 1949 (3) SA 240 (C) at 242*; Galant* v *du Toit* 1946 CPD 247 at 251; *Torwood* H

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A *Properties (Pty) Ltd* v *South African Reserve Bank* 1996 (1) SA 215 (W) at 218 and 226; *Schuurman & Anor* v *Motor Insurers' Association of Southern Africa* 1960 (4) SA 317 (T) at 318 and *R* v *Kisten & Ors* 1959 (1) SA 105 (N) at 109.

I will briefly refer to some of these cases. *R* v *Mpeta* was to the effect that "any other law" meant any other statutes and any other clauses of the Act under B consideration. In *Makaya*'s case "any other law" was held not to include the common law. At issue for interpretation was a provision of an insurance statute. In *Galant* case, the meaning of the words "any other law" was said to be limited

to laws of the same kind as the Act under consideration. In *Torwood Properties*, it was held that "any other law" did not include the C common law.

It will be apparent that in none of these cases was the phrase "any other law" interpreted as amounting to a court order. A judgment is a decision made by the court upon relief claimed in an action and an order is relief claimed not by action but by motion, petition or other machinery recognised in practice. See the *Civil Practice of the Supreme Court of South Africa* 4 ed at p 849 and D *Dickinson & Anor* v *Fisher's Executors* 1914 AD 424 at 429.

The Notice was quite specific in its scope. It stated quite clearly that it would apply notwithstanding the Urban Councils Act [*Chapter 19:15*], the Electoral Act "or any other law or order of court". This is in stark contrast to s 158(2)(a), which empowers the President to make Statutory Instruments E which may suspend or amend any provision of the Electoral Act or any provision of "any other law". The words "any provision" qualify the words of s 158(2)(a) "this Act" and the words "any other law". In my view, para (a) of s 158(2) empowers the President, in addition to suspending or amending any provision in the Act, to suspend or amend "the provisions of any other law". The use of the words "provisions of" is significant. It points to the fact F that a statute was in the contemplation of the legislature and not an order of court. It would be absurd, or at least inelegant, to refer to the "provisions" of a court order. I am quite satisfied that the meaning of "any other law" in s 158(2)(a) of the Electoral Act is to be limited to laws of the same kind i.e. to statute law concerned with elections. This interpretation is supported by the G fact that the Notice itself had to add the words "or court order". This was done in the full realisation that if a court order was not specifically included, then it would be excluded from the ambit of the words "any other law" as much as it was excluded by s 158(2)(a) of the Electoral Act. In conclusion, I would like to make it clear that, to my mind, the words "any other law" in s 158(2)(a) do not include, as part of their meaning, a court order. It seems to me that the H common law is also not included in "any other law", as there is no common

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law that applies to elections. To the extent that the notice provides for the A suspension or amendment of a court order which is not mentioned in s 158(2)(a), the Notice is *ultra vires* s 158 of the Act. If the legislature had intended to include a court order it would have quite easily done so, as was done in the Notice. As indicated in my judgment HH-24-02, s 4 of the Notice is also *ultra vires* the provisions of s 158 of the Electoral Act.

The application for leave to appeal from the order that I issued, based as it is B on the submission that s 158(2)(a) empowers the President to suspend a court order, cannot succeed. There is no prospect of success on appeal and accordingly leave to appeal is refused.

CHIDYAUSIKU CJ: The respondents in this case launched an urgent C chamber application on 25 January 2002. In that application, the respondents sought the following relief:

> "**A. REGARDING THE FINAL ORDER SOUGHT**
>
> It is ordered that the respondents show cause why an order should not be granted in the following terms: D
>
> 1. The interim relief granted hereunder be and is hereby confirmed.
> 2. It is declared that the Electoral Act (Modification) (Postponement of Harare Elections) Notice 2002, SI 13A of 2002, is null and void.
> 3. [If the interim order has not been fully complied with] the Registrar- E General (which expression includes any acting Registrar-General) be and is hereby committed to gaol for the continuing contempt of court until such time as a notice of election as set out therein is given in terms of and accordance with s 103L fixing the polling date 28 days thereafter, and/or all such other steps are taken as may be F required in terms of the Electoral Act to hold the elections on that date.
> 4. That in the event of an appeal being noted against this order, notwithstanding such noting of an appeal, this order is declared operative and in effect and shall not be suspended. G
>
> **B. INTERIM RELIEF GRANTED**
>
> IT IS ORDERED THAT THE SUPREME COURT ORDER SHALL, PENDING THE FINAL DETERMINATION OF THIS MATTER, BE ENFORCED BY THE ISSUANCE OF THE PROVISIONAL ORDER AND THE GRANTING OF THE FOLLOWING RELIEF:
>
> 1. The Registrar-General shall forthwith give notice of the mayoral H

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A and council elections for the City of Harare in accordance with the Supreme Court order, fixing the polling date twenty-eight days thereafter, being the shortest possible time thereafter permitted by the Electoral Act, and to take all such other steps as may be necessary in terms of that Act to have such mayoral and council elections on the date so fixed. B

2. The Registrar-General shall within twenty-four hours hereof arrange publication of such notice in at least one newspaper circulating in the area as quickly as possible, and file proof of this with this court and furnish a copy of it to the applicants' legal practitioners within twenty-four hours hereof. C

3. Should the Registrar-General fail to comply with any part of the interim relief granted under this provisional order, the applicants may approach this court to anticipate para 3 of the final order, so that this court may commit the first respondent to gaol until such time as such steps as may be specified by it are taken. The applicants are hereby given leave to supplement their papers to show good cause D for this. The applicants should first approach the Registrar-General's legal practitioners to agree, in consultation with the registrar of this court, on a suitable hearing date. If this cannot be agreed or there is a great urgency, they may make a chamber application, on notice to the applicants, for directions from a judge as to when that issue can E be argued.

4. That in the event of an appeal being noted against this provisional order, notwithstanding such noting of an appeal, this order is declared operative and in effect and shall not be suspended, unless a court or judge with appropriate jurisdiction is duly furnished with all the documents filed herein and, in accordance with due process, F orders otherwise."

It is clear from para 1 of the interim relief sought that when the respondents approached the High Court they were not insisting that elections be held on 11 February 2002. I have no doubt that this was due to an appreciation that, as of that date, it was no longer possible to hold an election on 11 February G 2002 without breaching the provisions of s 103L of the Electoral Act [*Chapter 2:01*], hereafter referred to as "the Act". I shall refer to this aspect of the case later on in this judgment.

It would also appear that para 1 of the interim relief was amended in the course of the hearing by its deletion and was substituted with the following H paragraph:

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That the Registrar-General shall forthwith give notice of the mayoral and A council elections for the City of Harare in accordance with the Supreme Court order."

At the conclusion of the hearing the court *a quo* granted, the following order:

"The Supreme Court order, therefore shall, pending the final determination of this matter, be enforced by the issuance of a provisional order and the B granting of the following interim relief:

1. That the first respondent shall on or before 31 January 2002 give notice of the mayoral and council elections for the City of Harare and fix 11 February 2002, or 11 February and any preceding day or days, as the polling date or dates on which a poll shall take place, if a poll C becomes necessary.

2. That the first respondent shall fix 4 February 2002 as the date on which the nomination court will sit to receive nominations for candidates for election as councillors or mayor, as the case may be.

3. For the purposes stated in paras 1 and 2 hereof and for the purpose of giving effect to the Supreme Court order of 7 December 2001, the D provisions of the Electoral Act [*Chapter 2:01*] shall be construed with such necessary modification as will ensure compliance with those paragraphs."

The appellant (the first respondent in the court *a quo*) was aggrieved by the above order and appealed against it upon the following grounds: E

"1. The judge *a quo* erred in suspending the operation of the Electoral Law in particular s 103L of the Electoral Act in that in trying to enforce the Supreme Court order in case 348/2001 he failed to give the required period of twenty-eight days between the issuing of the Notice and the Election date.

2. The judge *a quo* erred in determining a matter which amounted to F variation of the Supreme Court order. The matter should have been referred to this Honourable Court for determination since enforcement of the court order was no longer practical; enforcement meant non-compliance with the law.

3. The judge *a quo* erred in finding that *prima facie* the Supreme Court **G** order in case 348/2001 was still operational despite the promulgation and coming into force of SI 13A of 2002.

4. The judge *a quo* erred in finding that the noting of [an] appeal does not suspend the operation of his order.

5. The learned judge erred in finding that *prima facie* SI 13A of 2002 H

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A contravenes s 158 of the Electoral Act and in finding that the President is not empowered in terms of s 158 of the Electoral Act to issue a notice setting aside an order of court."

After noting the appeal, the appellant filed a chamber application seeking an urgent hearing of the appeal. Upon receipt of the notice of appeal and the B application, I issued directives to be found in *Registrar-General* v *Combined Harare Residents Association & Anor* S-4-02. In accordance with the directives, the appellant sought leave of the court *a quo* to appeal against the provisional order. The court *a quo* refused to grant such leave on the grounds that there were no prospects of success on appeal.

The appellant then sought leave of this court to appeal against the provisional C order. I advised both counsel at the commencement of the hearing that the court would hear submissions on both the application for leave to appeal and the merits of the appeal. Should the court refuse the leave to appeal, that will be the end of the matter.

The court is of the unanimous view that such leave should be granted for two D reasons: firstly, the matter is of such importance that each party should be allowed access to the highest court in the land, and, secondly, the appeal has prospects of success.

The first ground of appeal advanced by the appellant is that the court *a quo* erred in suspending the operation of the Electoral Act, in particular, s 103L thereof, in that in trying to enforce the Supreme Court order in case S-348-01, E it failed to give the required period of twenty-eight days between the issuing of the notice publishing the election and the election date.

In my view, there is substance in this ground of appeal. In para 3 of the order issued in the court *a quo*, the learned judge expressly stated that for the purpose of giving effect to the Supreme Court order the provisions of the Act F should be construed with such "*necessary modification*" as would enforce compliance with those paragraphs. At p 9 of the cyclostyled judgment, he makes the following observation:

"The various steps which must be taken by the first respondent in terms of the Electoral Act must, of necessity, be modified to ensure that the Supreme Court order is complied with."

G With respect, this is where the learned trial judge fell into error. The court cannot suspend the provisions of the Act for whatever purpose and no matter how desirable and plausible that might be. It is the legislature itself, and possibly an authority properly delegated, that can amend an Act of Parliament. A court cannot amend an Act of Parliament. This is trite. P S Atiyah in his H work, *Law and Modern Society* at p 131 had this to say:

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It is of course quite clear that law-making by the courts is a different sort A of process from law-making by Act of Parliament. Apart from the totally different procedures involved, and the different characteristics of the persons who make the law in the two processes, even the most fervent admirer of judicial law-making will admit that it differs from parliamentary legislation in important respects. First, it is subordinate law-making. B Parliament can override judicial decisions, while the judges cannot override what Parliament does. A court can declare a SI void on the ground that it was not within the authority delegated by Parliament but (subject to the doubts discussed above concerning Scotland and the EEC) no court can declare an Act of Parliament void."

Zimbabwe has a written Constitution. The courts can declare an Act of C Parliament unconstitutional by virtue of the provisions of s 3 of the Constitution of Zimbabwe, which provides that the Constitution shall be the supreme law of Zimbabwe and if any other law is inconsistent with the Constitution that other law shall, to the extent of the inconsistency, be void. A court can strike down an Act of Parliament for being *ultra vires* but cannot amend it simply because necessity so demands. Thus, the learned judge clearly misdirected D himself in concluding that it was incumbent upon him to modify the provisions of the Act.

Having erroneously assumed powers to amend the Act, the learned judge proceeded to set down 31 January 2002 as the date when notice publishing the election should be issued, 4 February 2002 as the nomination date and E 11 February 2002 as the election date, contrary to s 103L of the Act which

expressly provides that the nomination date shall not be more than sixty-six days or less than twenty-eight days before the election date.

Section 103L(1)(c) also provides that no less than seven days and no more than twenty-one days must separate the publication of the notice and the nomination day. The court *a quo* altered the period to four days by ordering F that publication of notice should be on 31 January 2002 and nomination on 4 February 2002. This non-compliance with the provisions of the Act renders such an election liable to be declared invalid in terms of s 149 thereof. See *Mader* v *Fraserburg Municipality* (1899) 16 SC 503; and *Kairowsky* v *Gradner & Anor* 1933 CPD 295. G

On this ground alone, I would set aside the interim order made by the court *a quo*.

There is also a further ground upon which the interim order cannot be allowed to stand. On 23 January 2002, SI 13A, the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002 ("the SI") was published and came into effect. The SI has the effect of overriding the H

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A Supreme Court order of 7 December 2001. The fact that the statutory Instrument is the law in force until such time as it shall have been struck down by a court of competent jurisdiction as being invalid cannot be disputed. Until such an adjudication, there is a presumption in favour of the validity of the Statutory Instrument. It is quite clear from the learned judge's judgment, HH-24-02, that he held over for determination on the return day the question B of the validity or otherwise of the Statutory Instrument.

In this regard, this is what the learned judge said in his judgment:

> "Now to satisfy myself whether or not a *prima facie* case has been made, I think I have to have regard, in this case, to the following considerations. First, whether *prima facie* the Notice is null and void. *I must mention and* C *emphasise the fact that the question of the validity or otherwise of the Notice is a matter to be dealt with on the return day*" (the emphasis is mine).

On the same page, the learned judge further comments:

> "I do not want to enter the debate, which is really a jurisprudential D question, as to whether, in view of the doctrine of the separation of powers, a law may be passed to directly nullify ex p*ost facto* an order of the Supreme Court. *This point may be addressed by the parties on the return day of this provisional order*" (the emphasis is mine).

On p 7 of the same judgment, the learned judge continues in the same vein:

> E "I think, however, that the Notice may be found wanting and therefore, *likely to be* declared invalid because of its wide sweep as alluded to by the applicants in paras 33 and 34 of their founding affidavit" (the emphasis is mine).

Again, at p 8, the learned judge makes the following remark:

> "So it seems therefore that, having said that the Supreme Court order is F extant and having satisfied myself that there *might be no* validity in relying on SI 13A of 2001, the Registrar-General, the first respondent, should have long taken steps to ensure that the elections will be held on or before 11 February 2002" (the emphasis is mine).

The above remarks of the learned judge clearly establish that he did not make a final determination on the issue of the validity of the Statutory Instrument. G In the judgment refusing leave to appeal, he attempts to resile from this position. In my view, this cannot be done as he was not then seized with the issue of the validity of the Statutory Instrument.

Thus, on a proper reading of judgment HH-24-02, the learned judge concluded that the probabilities were that the Statutory Instrument would be declared H invalid on the return day and proceeded to give interim relief predicated on

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that probable outcome. Such an approach is directly in conflict with the A presumption of validity.

In the case of *Batista* v *Commanding Officer, SANAB, SA Police, Port Elizabeth* 1995 (4) SA 717, it was held that an applicant cannot rely, in order to establish a present *prima facie* right, on the

probability that existing legislation which he contravened may be altered at some future time or on the B probability that such existing legislation may be held unconstitutional. By parity of reasoning, I am of the view that the respondents were not entitled to the interim relief they obtained on the basis that the SI that disentitles them to that relief may be held to be *ultra vires*.

On that basis also, I would set aside the interim relief granted by the court *a quo*. C

In my view, the relief sought and granted in the draft interim order is the same as that sought on the return day.

Where the relief sought as interim relief is essentially the same as the relief sought on the return day, the court's correct approach should be to proceed by way of an urgent court application seeking final relief. See *Econet* v *Min of Information* 1997 (1) ZLR 342 (H) D .

Having set aside the interim order of the court *a quo*, it is not competent for this court to determine whether or not the Statutory Instrument is *ultra vires*, s 158 of the Act because no final determination of that issue has been made by the court *a quo*. It might have been different if the interim order had been E allowed to stand. While it is correct that I directed counsel to address the issue, such a directive does not confer jurisdiction on this court to hear an appeal against a judgment that has not been made or is yet to be made. The directive was issued on the basis that the validity of the Statutory Instrument would have to be considered if it was found that the interim relief was a relief properly granted. F

I have read the draft judgment of my brother Ebrahim JA. He has determined the issue of the validity of the Statutory Instrument. I wish to leave open the issue of the validity of the SI until such time as this court is properly seized with the matter. To express a view on that issue would be premature since there is no final judgment of the High Court on the matter. All that was G in existence was an interim order, which has been set aside. This approach is consistent with the approach taken by the respondents and upheld by this court, that the appellants needed leave of the court *a quo* to appeal against the interlocutory ruling, the interim order in question. Had the court *a quo* given a final judgment no leave to appeal would have been necessary.

In the circumstances, I would order that the interim order granted by the court H

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A *a quo* be set aside. The rest of the provisional order remains intact. Proceedings to confirm or discharge the remaining part of the provisional order may proceed before the High Court in terms of the rules of that court. For the avoidance of doubt, the Statutory Instrument remains the existing law until such time as it is declared invalid.

B In the result, the appeal succeeds and the interim order of the court *a quo* is hereby set aside.

Neither party addressed the court on the issue of costs. The normal practice is that costs follow the result. However, this is a matter of considerable public importance justifying a departure from normal practice in order not to discourage litigation in matters of public importance. For this reason, no C order of costs will be made against the respondents.

In the result, the appeal succeeds and the interim order of the court *a quo is* hereby set aside. There will be no order as to costs.

CHEDA JA, ZIYAMBI JA and MALABA JA concurred.

D EBRAHIM JA: In my view, the key to determining this issue is for this court to consider the validity of the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002 (SI 13A of 2002). I agree with the sentiments expressed by the learned Chief Justice in *Registrar-General* v *Combined Harare Residents Association & Anor* E S-4-2002*, w*here he said:

> "It is quite apparent to me from the papers and the judgment of the learned judge in the court *a quo* that the critical issue in this case is: 'Whether the Electoral Act (Modification) (Postponement of Harare City Council F Elections) Notice 2002, published in SI 13A of 2002, is *ultra vires* section 158 of the Electoral Act [*Chapter 2:01*] and the Constitution of Zimbabwe and that in the event of it being *intra vires* what effect, if any, does it have on the Supreme Court order of 7 December 2001'."

This notice reads as follows:

> "WHEREAS the High Court issued judgment on 23 November 2001, G ordering the Registrar-General of Elections to conduct elections of councillors and for the office of mayor for the Harare City Council in

accordance with a timetable set by the High Court;

AND WHEREAS on 7 December 2001, the Supreme Court, on an appeal from the judgment referred to in the preceding paragraph, ordered H that the aforesaid elections should be held on or before 11 February 2002;

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AND WHEREAS the Registrar-General of Elections lacks the human, A material and financial resources to properly prepare for and conduct elections of councillors and for the office of mayor for the Harare City Council on or before 11 February 2002.

NOW, THEREFORE, it is hereby notified that His Excellency the President, in terms of section 158 of the Electoral Act [*Chapter 2:01*], B has made the following notice:

1. This notice may be cited as the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice, 2002.
2. In this notice —

   Harare City Council elections' means the election of councillors C and for the mayor for the Harare City Council referred to in section 3.
3. Notwithstanding any provision of the Urban Councils Act [*Chapter 29:15*], the Electoral Act [*Chapter 2:01*] or any other law or order of court to the contrary, the Harare City Council elections shall be held on 9 and 10 March 2002. D
4. Notwithstanding anything in the Urban Councils Act [*Chapter 29:15*], the Electoral Act [*Chapter 2:01*] or any other law or order of court to the contrary —
   (a) the commissioners appointed for the Harare City Council in terms of section 80 of the Urban Councils Act [*Chapter 29:15*] E shall continue in office and exercise all of the functions of Harare City Council until the last day of the Harare City Council elections:
   (b) all decisions and acts of the commissioners referred to in paragraph (a) made before the date of commencement of this F notice, in the exercise or purported exercise of the functions of the Harare City Council, are hereby validated."

This court, on 7 December 2001, issued an order which in part read as follows:

"IT IS ORDERED: G

That the first appellant shall hold mayoral and council elections for the City of Harare in terms of the Electoral Act [*Chapter 2:01*] on or before 11 February 2002."

It is apparent that what is being attempted to be achieved by this Notice in SI 13A of 2002 is that the court order referred to above be rendered of no force and effect. H

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A The issue then which falls for determination is whether this is permissible in terms of the provisions of s 158 of the Electoral Act [*Chapter 2:01*].

Section 158 provides that:

"(1) Notwithstanding any other provision of this Act but subject to subs (2), the President may make such statutory instruments as he B considers necessary or desirable to ensure that any election is properly and effectively conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.

(2) Statutory instruments made in terms of subs (1) may provide for — C

(a) suspending or amending any provision of this Act or any other law in so far as it applies to any election;
(b) altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done;
(c) validating anything done in connection with, arising out of or D resulting from any election in contravention of any provision of this Act or any other law;
(d) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from any election;
(e) E penalties for contraventions of any such SI, not exceeding the maximum penalty referred to in section *one hundred and fifty-five*."

The crisp issue as I see it is whether the President had the power to negate the court order.

The learned judge a quo in his judgment *Combined Harare Residents Association & Anor v Registrar-General & Ors* HH-24-02 F stated:

> "Now to satisfy myself whether or not a prima facie case has been made, I think I have to have regard, in this case, to the following considerations. First, whether *prima facie* the Notice is null and void. I must mention and emphasise the fact that the question of thevalidity or otherwise of the G notice is a matter to be dealt with on the return day. But in order to satisfy myself whether in fact a *prima facie* case has been made, I think I must be satisfied too that the Supreme Court order is extant, i.e. is still alive and surviving even in view of the Notice, and I think I must be satisfied that *prima facie* the first respondent is in contempt of the Supreme Court order. The Notice in effect sets aside the Supreme Court order and any H court order which may have been made against (or its attempts to nullify

> any order of court made against) any decision or any act of the A Commissioners appointed for the City of Harare."

In the same judgment, the learned judge also observed:

> "Additionally, there is what may appear to many as the obvious point, that the Notice was made in terms of s 158 of the Electoral Act. That section empowers the President to make certain statutory instruments as he B considers desirable. I do not wish to recite the entire section. But what is significant is that, in my view, the section does not empower the President to issue a notice or issue a statutory instruments which has the effect of setting aside a court order. That is my reading of that section. It is specific that, it relates to the provisions of any Act or any other law.
>
> I must confess I do not subscribe to Mrs *Matanda-Moyo*'s view that 'any C other law' includes a court order. And even if one were to look at s 158 of the Electoral Act from the point of view of the interpretation of statutes, one would obviously say, if the legislature intended to include a court order, it would very easily have done so. It is not a matter which would have been left to doubt, but the reason why it was not done that D way is probably self evident, considering the respective functions of the three arms of the State."

In a later judgment, Registrar-General v Combined Harare Residents Association & Anor HH-27-02, the same learned judge stated:

> "That ground of appeal revolves around the question whether the Notice E invalidated the Supreme Court order or not. Mr Majuru for the applicant conceded this as being so.
>
> …
>
> The Notice, which is the statutory instrument in terms of which the order of the Supreme Court was purportedly rendered inoperative, provides that any court order (which in context is a reference to the Supreme Court F order) shall be of no effect. The argument made before me was that s 158(2)(a) in reference therein to 'any other law' encompasses a court order. I was of the *prima facie* view that it does not."

The learned judge then extensively researched authorities which give judicial interpretation to the words "any other law". The following were the cases he G looked at: *R* v *Mpeta* 1912 AD 414 at 417; *Bowker* v *Registrar of Deeds* 1939 AD 401 at 407; *Johannesburg City Council* v *Makaya* 1945 AD 252 at 255; *Goslar (Pty) Ltd* v *Gargian* 1949 (3) SA 240 (C) at 242; *Galant* v *du Toit* 1946 CPD 247 at 251; *Torwood Properties (Pty) Ltd* v *SA Reserve Bank* 1996 (1) SA 215 (W) at 218 and 226; *Schuurman & Anor* v *Motor Insurers' Assn of SA* 1960 (4) SA 317 (T) at 318 and *R* v *Kisten & Ors* 1959 (1) SA 104 (W) at 109. H

A In my view, he correctly concluded that the sheer weight of legal opinion was that the phrase "any other law" cannot be interpreted to include "a court order". I too have examined these cases and find the learned judge's conclusion unassailable. These authorities clearly lay down the principle that the phrase "any other law" does not embrace court order.

B It is significant that s 158(2)(a) of the Electoral Act allows "for the suspending or amending (of) any provision of the Act or any other law …" Yet the SI, purporting to be made in terms of s 158, goes further and speaks of "any other law *or order of court*" (emphasis added). The added words show clearly that the SI goes further than the empowering Act.

The learned judge *a quo* did not suspend the operation of s 103 of the Electoral C Law. The main thrust of the first paragraph of his order is that the mayoral election be held in compliance with the

order of the Supreme Court which was issued on 7 December 2001, namely, that the election be held on or before 11 February 2002. What the learned judge did do, however, is that he recognised that in view of the inactivity of the applicant to comply with the time scales provided for by the provisions of the Electoral Act he could still D achieve the target date of 11 February 2002 if he followed the prescription suggested by the learned judge. There is, therefore, no merit in the appellant's first ground of appeal.

It seems to me that what clearly emerges from the judgments of the learned judge *a quo* (HH-24-02 and HH-27-02) is that he did make the ruling that the E Notice as reflected in SI 13A of 2002 was *ultra vires* s 158 of the Electoral Act. He stated in his judgment HH-27-02:

> "To the extent that the notice provides for the suspension or amendment of a court order which is not mentioned in s 158(2)(a), the Notice is *ultra vires* s 158 of the Act."

F In the light of this finding, one cannot therefore avoid determining the issue of the validity of the relevant SI. That is the inevitable conclusion to be drawn from the reading of the two judgments.

It is my view, therefore, that s 3 of 13A of the Notice is *ultra vires* the powers conferred on the President in terms of s 158 of the Electoral Act.

G Mrs *Matanda-Moyo* correctly conceded that s 4 of the relevant notice is, in fact, *ultra vires* and I, therefore, do not consider it necessary to say any more on this aspect. But I must observe in passing that the very wide wording of s 4(b) of the Statutory Instrument goes much further than I think would possibly have been intended. It purports to validate all decisions and acts of the Commission whether or not they would have been lawful if taken or done H by a lawfully elected Council. It thus, purports to grant some sort of general

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Chinhengo J

amnesty or blanket pardon for anything decided by the Commission regardless A of incapacity, incompetence or error.

I believe that the issue which we were required to resolve was the validity or otherwise of the notice. Having come to the conclusion I have, there is really no need to determine on the constitutionality of s 158 of the Electoral Act.

In the result, I would hold that the Electoral Act (Modification) (Postponement B of Harare City Council Elections) Notice 2002, SI 13A of 2002 is *ultra vires*.

I would dismiss the appeal, with costs.

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

Atherstone & Cook, respondents' legal practitioners

1 Because these four cases were so closely connected both in terms of time and subject-matter, it was considered convenient to deal with them all in a single report. — *Editor*.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v BITI 2002 (1) ZLR 115 (H)

S v BITI 2002 (1) ZLR 115 (H)

Citation 2002 (1) ZLR 115 (H)

Case No	Judgment No. HH-23-02
Court	High Court, Harare
Judge	Ndou J
Heard	28 January, 2002
Judgment	1 February, 2002
Counsel	*N Maredza*, for the applicant *C U Kandemiiri*, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — application for — factors to be taken into* D *consideration by court*

Headnote

In bail applications, the primary question for consideration is whether the applicant will stand trial or abscond, but equally important is whether the applicant will influence the fairness of the trial by intimidating witnesses or interfering with evidence. The court should always grant E bail where possible and should lean in favour of the liberty of the applicant, provided that the interests of justice will not be prejudiced. The approach is one of striking a balance between the interests of society (that the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused person (who, pending the outcome of the trial, is presumed to F be innocent). The court may refuse bail where the court considers it likely that if the applicant is released he would commit an offence, but this should not be used as a means of deterring the offender. The onus is on the applicant to show on a balance of probability that the interests of justice will not be prejudiced by granting him bail.

G The applicant was charged with four counts of armed robbery, it being alleged that as part of a gang of six he had robbed three banks and the occupants of a vehicle. The prosecution case against him appeared strong — he had been positively identified by witnesses — and two members of the gang remained at large. He applied to the High Court for bail.

H *Held*, that in considering his application, the court should take into account

Ndou J

the seriousness of the charges against the applicant and the likelihood A of a severe sentence being imposed on conviction; the strength of the prosecution case; and the fact that two of his alleged accomplices were still at large.

Cases cited

AG v Phiri 1987 (2) ZLR 33 (H); 1988 (2) SA 696 (ZHC) B

De Jager v AG Natal 1967 (4) SA 143 (D)

S v Essack 1965 (2) SA 161 (D)

R v Gentry (1955) 39 Cr App R 195 (CCA)

S v Hartman; S v Jacobs 1968 (1) SA 278 (T)

S v Hlongwa 1979 (4) SA 112 (D)

S v Ho 1979 (3) SA 734 (W) C

S v Hudson 1980 (4) SA 145 (D)

S v Lulane & Anor 1976 (2) SA 204 (N)

S v Mhlawli & Anor 1963 (3) SA 795 (C)

S v Ndhlovu HH-177-2001

S v Smith & Anor 1969 (4) SA 175 (N) D

S v Vankathathnam & Ors 1972 (2) PH H139 (N)

S v Visser 1975 (2) SA 342 (C)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 116(7) E

Case information

N Maredza, for the applicant

C U Kandemiiri, for the respondent

Judgment

NDOU J: The applicant is charged with four counts of armed robbery. The allegations are that he was part of a gang of six robbers. In the first charge the allegations are that on 7 September 2001, applicant and his gang robbed F Standard Chartered Bank, Karigamombe, at gunpoint. During the robbery, the robbers fired two gunshots and assaulted bank officials. As the gang were leaving the scene, one of them dropped his cellular phone which led the Police to where he was hiding, resulting in exchange of gunfire. The gang member was killed in this exchange. The applicant, after his arrest, allegedly G admitted to the Police that he had supplied the vehicle registration numbers which were used on the get-away vehicle, and these number plates were recovered from him.

In the second charge, it is alleged that on 7 September 2001, the applicant's gang robbed Standard Chartered Bank, Mount Pleasant, at gunpoint. The gang members ordered all the people who were in the banking hall to lie H

Ndou J

A down and robbed them of their cash. Before departing from the scene, one member of the gang fired one shot in the air to scare people. An AK cartridge was found in the get-away vehicle. In the third charge, the allegations are that the applicant's gang approached five Zambian nationals who were driving a UD lorry. At gunpoint, they robbed them of US$4 250, Z$45 000 and Z$520 700 Zambian kwacha. The gang is also facing a charge of robbing B Stanbic Bank, Avondale using a *modus operandi* similar to that in the first two charges. According to averments in an affidavit of the Investigating Officer, Inspector Huni, the applicant was positively identified at an identification parade by witnesses in respect of all the four charges. The applicant was identified as the one who was armed with the AK rifle during C the robberies. Detective Insp Huni opposes bail on the basis that the applicant is aware that these are serious offences which invariably attract custodial sentences upon conviction. He further states that one of the weapons used during the robberies was not recovered, thus providing the applicant with means of committing further offences should he be released on bail. Further, the applicant's mother has indicated to him that the applicant no longer D resides with her at her home, resulting in him concluding that he is of no fixed abode. Further, he states that two members of the gang have not been arrested. His fear is that the applicant may link up with these two and commit further offences.

Overall, the respondent's attitude is that there is evidence linking applicant E with the offences. The applicant has been positively identified at an identification parade in all counts. He has also made indications to the police. The expectation of a substantial custodial sentence upon conviction will provide an incentive for him to abscond. Once in default, it will be difficult for the police to apprehend him. It is further alleged that the investigations are at an advanced stage and it is not in the interest of justice to admit applicant F to bail.

It is trite that in bail applications the primary question for consideration is whether the applicant will stand trial or abscond. Of equal importance, however, is whether the applicant will influence the fairness of the trial by intimidating witnesses or interfering with evidence — see *S* v *Ndhlovu* G HH-177-2001 at p 3. In bail applications, the presumption of innocence, "*in favorem vitae libertatis et innocentiae omnia praesumuntur*" is favour of the applicant — *S* v *Essack* 1965 (2) SA 161 (D). In other words, 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 — see *Attorney-General* v *Phiri* 1987 (2) ZLR 33 (H); 1988 (2) SA 696 (ZHC) H ; *S* v *Smith & Anor* 1969 (4) SA 175 (N); *S* v *Hlongwa* 1979

Ndou J

(4) SA 112 (D); and *S* v *Mhlawli & Anor* 1963 (3) SA 795 (C). The approach A is one of striking a balance between the interest of society (i.e. 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 or her trial, is presumed to be innocent).

EXPECTATION OF A LENGTHY CUSTODIAL AS AN INCENTIVE B FOR ABSCONDMENT

Mr *Maredza,* for the applicant, submitted that this factor should not be taken into account because the applicant has not yet been convicted. Whilst he concedes that the allegations against the applicant are very serious, calling for custodial punishment, he submits that this should not be used to refuse the C applicant bail. He argues that to do so would amount to convicting the applicant of the charges even before the trial. In my view, the seriousness of the offence charged and the likelihood of a severe sentence being imposed (upon conviction) are factors that the court must take into account as an inducement for abscondment — see *S* v *Ho* 1979 (3) SA 734 (W) at 740 and *S* v *Hudson* 1980 (4) SA 145 (D). I will take this factor into account in the D determination of this application.

STRENGTH OF THE PROSECUTION CASE

According to Mr *Kandemiiri,* for the respondent, the applicant was positively identified at an identification parade. He has also made indications to the police. This evidence provides a nexus between the applicant and the serious E crimes against him. These facts, if proven during the trial, will establish a strong prosecution case. I have to take into account this factor in determining this application — see *S* v *Lulane & Anor* 1976 (2) SA 204 (N); *S* v *Hartman; S* v *Jacobs* 1968 (1) SA 278 (T) and the *Ndhlovu* case *supra*. On the facts before me, it appears that the respondent has a strong case against the applicant. I will take this into account in determining the outcome of this F application.

RISK OF COMMISSION OF FURTHER CRIMES

Bail is non-penal in character, but in bail applications the court is empowered to refuse bail in instances where the court considers it likely that if the G applicant is admitted to bail he would commit an offence — see s 116(7) of the Criminal Proce dure and Evidence Act [*Chapter 9:07*]. In this regard, it was stated as follows in *Attorney-General* v *Phiri, supra* at 39H-40B (SALR 701B-D):

> "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 H

Ndou J

> A 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 indication that he is an incorrigible and unrepentant B criminal."

Such preventive detention, however, should not be used as a means of deterring the offender. The orthodox way of dissuading those of criminal propensities from their inclination is by the threat of detection and punishment — see *S* v *Visser* 1975 (2) SA 342 (C) and *R* v *Gentry (*1955) 39 Cr App R

195 (CCA). C Although this factor was alluded to by the investigating officer I do not seem to find reliable facts in its support in this application. In the circumstances it is safe to disregard it.

WHERE APPLICANT WAS NOT ACTING ALONE; BUT IN ASSOCIATION WITH OTHERS STILL AT LARGE

D The respondent states:

> "Investigations into the matter are almost at an advanced stage. What is outstanding is to apprehend two outstanding accused … There is danger that if released on bail, the applicant may interfere with investigations."

In this regard, Detective Inspector Huni states "The Police are still looking E for two more outstanding accused responsible for these cases who might team up with accused once granted bail." This is a factor that I will also take into account in this application. The allegations are that the applicant acted in association with five other armed persons in the commission of these offences. Such an association with others who are still at large is a relevant factor in applications of this kind — see *S* v *Vankathathnam & Ors* 1972 (2) PH, H 139 (N). F

The applicant has offered to report daily to the police to allay some of the fears of the respondent. Whilst conceding that his mother informed the investigating officer that he no longer resides with her, the applicant alleges that she did so in a fit of anger.

G I have considered all the facts placed before me and applied the above legal principles. I conclude that the applicant has failed to prove on a balance of probability that I should exercise my discretion in favour of granting him bail. The onus is on him and he failed to show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial or otherwise interfere with the administration of justice or commit an offence H —see *De Jager* v *Attorney-General, Natal* 1967 (4) SA 143 (D).

2002 (1) ZLR p120

Ndou J

The respondent has shown that the applicant is facing four serious allegations A of armed robbery. It has shown that these were well-orchestrated allegations carried out with criminal precision. Perpetrators of such organised armed robberies realistically expect long custodial sentences. In this case, this factor will serve as an incentive or inducement for abscondment. The respondent has also established that it has a strong case against the applicant. The B respondent has also established that the applicant was acting with others, two of whom who are still at large.

The effect of these facts, established by the respondent, is that the applicant is not a candidate for bail. In the circumstances, I dismiss his application for bail. C

Honey & Blankenberg, applicant's legal practitioners

Office of the Attorney-General, respondent's legal practitioners D

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Source:
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TIME BANK OF ZIMBABWE LTD v MOYO 2002 (1) ZLR 121 (H)

2002 (1) ZLR p121

Citation 2002 (1) ZLR 121 (H)

Case No Judgment No. HH-26-02

Court	High Court, Harare
Judge	Smith J
Heard	16 January, 2002
Judgment	6 February 2002
Counsel	*P Nherere*, for the plaintiff *W Makuyana*, for the defendant
Case Type	Application for summary judgment
Annotations	No case annotations to date

Flynote

Practice and procedure — *summary judgment — application for — founding* D *affidavit — requirements when applicant a corporate body — extent to which deponent must have personal knowledge of facts*

Headnote

The plaintiff bank applied for summary judgment to recover loans it had advanced to the defendant, a former employee whom it had engaged on probation and dismissed on notice at the end of his probationary period. E The defendant argued that the bank's founding affidavit, deposed to by the bank's chief internal auditor, did not comply with r 64 of the High Court Rules in three respects: firstly because the deponent could not swear positively to the facts he alleged, though he averred they were personally known to him; secondly, because he did not in so many words verify the cause of action and the amount claimed; and, thirdly, F because he did not state that in *his* belief there was no *bona fide* defence to the bank's action, though he did say that the defendant had no good defence. In addition, the defendant alleged he had a counter-claim for damages arising out of his dismissal, which he alleged was motivated by malice.

G *Held*, that the plaintiff bank is a juristic *persona*, and any opinions and beliefs attributed to it could only be held by one or more of its employees. Its chief internal auditor clearly occupied a position that gave him access to the relevant documents on which he could obtain the knowledge or form the beliefs set out in his affidavit, and it was not necessary that he himself should be the author of those documents. As H a senior employee he was a member of a class of persons who were in

a position to swear positively to the facts set out in the affidavit. And A when he stated that the defendant had no good defence, he was surely stating what he believed to be the case.

Held, further, that since the defendant was serving a probationary period when he was dismissed, the bank could terminate his services at any time by giving him the requisite notice; its motives were irrelevant. The B defendant's counter-claim was therefore not soundly based.

Cases cited

Barclays National Bank Ltd v Love 1975 (2) SA 514 (D)

Chiadzwa v Paulkner 1991 (2) ZLR 33 (S)

Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) C

Misid Investments (Pty) Ltd v Leslie 1960 (4) SA 473 (W)

Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd & Ors 1999 (4) SA 229 (C)

Legislation considered

High Court Rules, 1971, r 64(1) & (2) D

Case information

P Nherere, for the plaintiff

W Makuyana, for the defendant

Judgment

SMITH J: The plaintiff (hereinafter referred to as "Time Bank") issued summons claiming from the defendant (hereinafter referred to as "Moyo") E payment of $5 084 702.46, with interest thereon at 71,5 per cent *per annum* with effect from 1 February 2001 to date of payment, and an order declaring property in Bluff Hill to be executable. Moyo filed notice of opposition. Time Bank then applied for summary judgment.

The founding affidavit was deposed to by Mr Dzirutwe, the Chief Internal F Auditor of Time Bank. He said that he had been duly authorised to make the founding affidavit and that the contents thereof were personally known to him. He deposed as follows. In June 2000, Time Bank and Moyo entered into a contract of employment. In pursuance, thereof Moyo assumed duty as Manager, Accounting Department, at Head Office. One of the conditions of appointment was that Moyo was to be on a probationary basis for six months, G beginning on l August 2000. In his capacity as Manager, Moyo was eligible to obtain motor vehicle, housing and personal loans at a concessionary rate of 7.5 per cent *per annum*. Moyo was given a housing loan of $3 672 611.99, a motor vehicle loan of $1 390 721.98, a personal loan of $38 250 and a further personal loan in the form of an overdraft in the sum of $52 303.69. In terms of the rules of Time Bank, governing loans to members of staff, upon H ,

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A termination of employment, the bank was entitled to increase the rate of interest to the prevailing lending rate at the date of termination and immediately call up the full amount owing. In January 2001, Time Bank gave notice to Moyo of its intention to terminate his employment on 1 February 2001 and increase the rate of interest on his loans to 71,5 per cent *per annum*. In addition, full repayment of the loans, amounting to $5 084 702.64, was B demanded on or before 1 February 2001. When Moyo failed to pay the amount he owed, summons was issued. Appearance to defend was lodged in order to delay repayment as Moyo has no good defence to the claim. As security for the repayment of the loans, Moyo permitted the registration of a mortgage bond over property he owned in Bluff Hill.

C Moyo filed a voluminous opposing affidavit in which he made the following submissions and averments. *In limine,* he submitted that the application was fatally defective because it did not comply with subrules (1) and (2) of r 64 of the High Court Rules. Firstly, although Mr Dzirutwe averred that the facts were personally known to him, he is not, in fact, able to swear positively to the facts. Secondly, he did not verify the cause of action and the amount D claimed. Thirdly, he does not state that "in *his* belief, there is no *bona fide* defence to the action". As regards the merits, Moyo averred as follows. As Mr Dzirutwe was not present at any point during the negotiations leading to, and at the signing of, the contract of employment, he is not qualified to comment on its contents, nor is he qualified to place it before the court. E The contract of employment was novated in September 2000 when he was promoted from his initial position of Finance Manager to that of Corporate Finance Manager. At that point, his salary was increased from $100 000 a month to $120 000. Neither he nor Time Bank negotiated for, or agreed to, a probationary period, with the result that he became a permanent employee. Moyo filed a copy of the letter he received from Time Bank giving notice of F its intention to terminate his employment on 31 January 2001 and his letter in response, which was dated 10 January 2001. He claimed that his services were terminated because he had filed a report in which he gave details of a significant number of abuses by the Managing Director of Time Bank. This report soured relations between him and the Managing Director, a situation which was made worse by his continuing investigations and G unearthing of yet more unprofessional, unethical and improper practices in the way the Managing Director was running the business of Time Bank.

Moyo does not dispute that he was advanced the amounts specified in the summons, but says that the dates they were advanced are not specified. That is necessary for the purpose of calculating the interest due. When the H loans were granted he signed an agreement with Time Bank. That agreement

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constituted the entire contract and therefore, any rules of the bank are not A applicable. In terms of the agreements he signed, on termination of his employment the rate of interest could be increased to the Bank "prime rate". As regards the termination of his employment, Mr Dzirutwe is not able to comment, as he was not involved in the discussions and had nothing to do with the events leading up to the termination of his services. Therefore, his B averments are hearsay and inadmissible.

Moyo claims that he has a counter-claim in both delict and contract. In delict, he has a claim for $500 000 for general damages for emotional and psychological stress, anguish, pain and suffering, altering his chosen career path and harm to his professional good name and integrity. In contract, he has a claim for $5 357 411.75 in respect of loss of salary, loss of earnings from C January 2001 to December 2002, loss of pension, loss of benefits, loss of loan benefits and expenses incurred in employing a security guard because he feared for his safety.

Time Bank filed an answering affidavit and applied for leave to do so. Moyo objected. After hearing argument, I granted leave for the additional affidavit D to be filed — see HH-212-01. That affidavit was also deposed to by Mr Dzirutwe. He said that, as Chief Internal Auditor, he is able to liaise directly with all departments of Time Bank and is fully informed of, and involved in, all development throughout the Bank. On that basis, he has direct knowledge of the operations of Time Bank. Mr Dzirutwe went on to say that Moyo had engaged in activities well outside his area of responsibility. He is E being investigated for spying for information concerning the Bank and passing it on to a syndicate of persons who are suspected to be wanting to take over the Bank or to remove it from the scene. Mr Dzirutwe went on to say that Moyo was a Manager in the Accounting Department and reported to the F Assistant General Manager, Finance. On 2 October 2000, he was transferred, laterally, to the Business Development Department and reported to the Assistant General Manager of that Department. Mr Dzirutwe denied that the contract with Moyo had been varied or novated when he was transferred from one department to another in October. He was the manager of one and was then transferred to be the manager of the other. The increase in salary was because Time Bank effected a general cost of living adjustment for all G members of staff.

Mr *Nherere* submitted that, as a juristic person, Time Bank cannot personally depose to its founding affidavit. It must of necessity rely on agents. Time Bank's case is based on documentary evidence. As the Chief Internal Auditor, Mr Dzirutwe is in a position to swear positively to the facts set out in the summons and in the founding affidavit. Furthermore, the founding H

A affidavit does substantially comply with the requirements of r 64(2) of the High Court Rules, despite the fact that Mr Dzirutwe does not actually say that he "verifies the cause of action". He also states that there is no good defence to the claim, which is as good as saying "in his belief, there is no *bona fide* defence to the action". As regards the merits, Mr *Nherere* argued that Moyo does not raise even a *prima facie* defence to the summons. He admits that B the loans were made in the amounts specified. His defence that the termination of his employment on 31 January 2001 was unlawful is not tenable. The contract of employment provided for a probationary period of six months, which terminated on 31 January 2001. Whether he was promoted or laterally transferred in September 2000, neither would have meant that his contract was novated. Therefore, all the loans became due on 1 February C 2001 and there is no basis for Moyo's counter-claim.

Mr *Makuyana* argued that the application is fatally flawed on three grounds. Firstly, Mr Dzirutwe was not able to swear positively to the facts set out in his affidavit since they are not personally known to him, notwithstanding his assertion to the contrary. Secondly, he did not satisfactorily verify the cause D of action and the amount claimed by Time Bank. Thirdly, he failed to aver that, in his belief, there is no *bona fide* defence to the action. As regards the merits, Mr *Makuyana* argued that Moyo, at the time of his purported dismissal, had become a permanent employee, with the result that his dismissal amounted to a repudiation of the contract of employment. Furthermore, the purported

cancellation of the contract of employment is a E legal nullity, as it was motivated by bad faith. In addition, Time Bank had failed to stipulate when the various loans were advanced, and so it was not possible to determine the exact sum due. Finally, he argued that Moyo had a counter-claim, both in delict and in contract.

In *Barclays National Bank Ltd* v *Love* 1975 (2) SA 515 (D), which also dealt F with an application for summary judgment, the defendant had also queried the competence of the employee of the bank, who was the manager of the branch concerned, to depose to the founding affidavit. At pp 515-516, Miller J said:

> "Regarding the second point *in limine*, it is clear that a deponent's ability to swear positively to the facts is a *sine quo non* to the effectiveness, for G purposes of summary judgment, of any deposition he may make (*Fischereigesellschaft F. Busse & Co Kommanditgesellschaft* v *African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at p 108). Mr *Meskin* is therefore correct in saying that one who does not have personal knowledge of the facts to which he deposes but merely believes them to be the facts H because of information which he has obtained from others, is not a

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Smith J

> person such as is visualised in r 32(2). Whether the deponent is a person A able to swear positively to the facts will depend largely upon what he says in the affidavit but the ipse d*ixit* of the deponent will not necessarily be sufficient to establish the necessary qualification. *Lagos* v *Grunwaldt*, (1910) 1 K.B. 42, to which Mr *Meskin* referred me and upon which he relied, is an example of such a case. Notwithstanding the assertion of the B deponent that the facts were within his knowledge the court found, *ex facie* his own affidavit, that the circumstances indicated that his professed knowledge stemmed from what he had been told. The case is clearly distinguishable from the one now before me. Although it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should, where C he is not the plaintiff himself, at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes (cf*. Sand & Co Ltd* v *Kollias supra* at p 166, *Sekretaris van Landboukrediet en Grondbesit* v *Loots* 1973 (3) SA 296 (NC) at pp 297-8). It must be remembered that there is nothing in r 32 which requires the deponent to use a formula or to confine D himself to specific words in qualifying himself as a person able to swear positively to the facts."

Then at 516 H-517A, the learned judge continued:

> "We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the E defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would F have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which G show the amounts paid into his account and the amounts withdrawn by the client. When such a manager says that he knows or believes that the client is indebted to the bank in a specified sum of money, it is implicit in what he says that he has had regard to the bank records and that he accepts (or 'believes') that they give a true reflection of the state of the client's account." H

Smith J

A Time Bank is a juristic persona. In itself, it cannot hold opinions and beliefs. Any opinions and beliefs can only be held by one or more of its employees. Mr Dzirutwe clearly holds a position with Time Bank that gives him access to the relevant documentation on which he can obtain the knowledge or form the beliefs set out in the founding affidavit. It is not necessary, as argued by Mr *Makuyana*, that Mr Dzirutwe must be the author of the relevant B documents on which he has made his determination or based his knowledge. Mr *Makuyana* referred the court to *Misid Investments (Pty) Ltd* v *Leslie* 1960 (4) SA 473 (W) where an objection had been raised to the founding affidavit in an application for summary judgment, because it contained hearsay evidence. At p 474E-G, Munnik AJ said:

> " C In so far as the approach of the court is concerned, when objections are raised on technical grounds to an applicant's application for summary judgment, it was pointed out by Marais J, in *Mowschenson and Mowschenson* v *Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at p 366:

'The proper approach appears to me to be the one which keeps the D important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial.'

That being so, the applicant in summary judgment proceedings must, in my view, comply strictly with the requirements laid down in the r 42 *bis*. E One of the requirements of the Rule as set out in subrule (2) thereof is that, the plaintiff must deliver with the notice —

'an affidavit made by himself or by any other person who can swear positively to the facts.'

In other words, the affidavit, if not made by the plaintiff himself, must F be deposed to by a deponent who belongs to a particular class of persons, namely, persons who can swear positively to the facts. It must appear from the affidavit itself that the deponent in fact does belong to such a class of persons."

As Time Bank cannot, itself, depose to an affidavit, one of its senior employees must do so on its behalf. It seems to me that Mr Dzirutwe is a G member of the class of persons who is in a position to swear positively to the facts set out in his founding affidavit.

In *Maharaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A), which also concerned an application for summary judgment, Corbett JA, at 422, referred to the corresponding rule in the South African rules of court dealing with H summary judgments and then said:

2002 (1) ZLR p128

Smith J

"In my view, the requirements of this portion of the Rule were correctly A stated by Theron J, in *Fischereigesellschaft F. Busse & Co. Kommanditgesellschaft* v *African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at p 108, as follows:

'(a) that the affidavit should be made by the plaintiff himself or by any other person who can swear positively to the facts; B

(b) that it must be an affidavit verifying the cause of action and the amount, if any, claimed; and

(c) that it must contain a statement by the deponent that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of C delay.'

(See also *Flamingo Knitting Mills (Pty) Ltd* v *Clemans & Ors* 1972 (3) SA 692 (D) at p 694; cf. *Pillay* v *Andermain (Pty) Ltd* 1970 (1) SA 531 (T) at p 535). As regards requirement (b) above, I think that the English version of the Rule is quite clear. The Rule demands, in my view, that the affidavit, whether made by the plaintiff himself or by another person, D should verify the cause of action and the amount, if any, claimed. The history of the Rule and its predecessors and of the procedure which it seeks to embody (as described by Theron J, in the *African Frozen Products* case *supra*, and by Trollip J, in *Sand and Co. Ltd* v *Kollias* 1962 (2) SA 162 (W) strongly supports this interpretation. Moreover, the word E 'verifying' cannot be taken to qualify the word 'facts' and to be part of the definition of the 'any other person' who may make the affidavit, as has been held in some cases, since this would run counter to the meaning of the word 'verifying' and the grammatical construction of the sentence in which these words occur. The relevant meanings of 'verify' in the *Shorter Oxford Dictionary* are: F

'to testify or affirm formally or upon oath; … to testify to, to assert as true or certain.'

Clearly, facts do not verify; a person verifies an alleged state of facts. And where the verification takes the form of a sworn affidavit it may be said, figuratively, that the affidavit verifies the facts. In addition, the G words 'and stating', appearing later in the same sentence as 'verifying', qualify the same subject-matter. Were this not so the word 'and' linking the two participles would be inappropriate and redundant. It can hardly be suggested that the word 'stating', and what follows thereon as to what must be stated, can have reference to anything but the content of the affidavit. It is, therefore, plain that the words, H

2002 (1) ZLR p129

Smith J

' A verifying the cause of action and the amount, if any, claimed …'

also refer to the content of the affidavit."

The learned Judge of Appeal, as he then was, went on to cite with approval, extracts from the *Barclays National Bank* v *Love* case *supra*. Similar views were expressed in *Standard Bank of S A Ltd* v *Secatsa Investments (Pty) Ltd & Ors* 1999 (4) SA 229 (C) B . At 235C-I, van Heerden AJ said:

"Regarding the second point *in limine*, Mr *Fitzgerald* relied heavily on the decision of the Full Bench of the Transvaal Provincial Division in the case of *van den Bergh* v *Weiner* 1976 (2) SA 297 (T). In that case, the plaintiff had stated in his affidavit annexed to his application for summary judgment that 'the first defendant is truly and lawfully indebted C to the plaintiff on the grounds as set out in the summons'. It is

interesting to note that these words are almost identical to the words used by Mr Green in his affidavit. Cilliers JP, with whom Boshoff and Eloff JJ concurred, said at 299G:

'The words of the Rule have not been followed meticulously, and it is D said that there should have been a specific statement that the amount as such is also verified and confirmed. Because of the cryptic statement it is contended that the provisions of the Rule had not been complied with. This court is of the opinion that the affidavit complies substantially with what is required under the Rule, namely verification of the cause of action and the amount claimed. By reference to the combined summons E and the grounds set out therein, the respondent is in effect referring to and confirming the cause of action and the amount. The affidavit is not irregular …'

The decision in the *van den Bergh* case has been referred to with approval in subsequent decisions of the same Division, notably *Lohrman* v *Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) F at 395; *Joubert, Owens, van Niekerk Ing* v *Breytenbach* 1986 (2) SA 357 (T) at 359; and *Kruger* v *Standard Krediet Korporasie Bpk* 1988 (1) SA 570 (T) at 573. The *van den Bergh* case was regarded by Mr *Fitzgerald* as conclusive of the second point *in limine*.

The decision in the *van den Bergh* case is, in my view, clearly good law G *on the facts of that case*. As Cilliers JP pointed out at 300C-D:

'Rule 32 gives a court power to grant judgment without trial even though notice of the defendant's intention to defend had been properly given. This power must be exercised with great care, which is achieved, *inter alia*, by ensuring that the plaintiff brings his case within the scope H of the Rule. It does not mean the effect will be given to any insubstantial

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2002 (1) ZLR p130

Smith J

technicality that may be set up by way of objection to the grant of A summary judgment'."

See too *Chiadzwa* v *Paulkner* 1991 (2) ZLR 33 (S).

Mr Dzirutwe says, in his affidavit, that Moyo has no good defence to Time Bank's claim. Admittedly he does not say that it is his belief that Moyo has no *bona fide* defence, as required by r 64(2). However, when he says that B Moyo has no defence surely he is stating what he believes to be the case. Consequently, he has substantially complied with the requirements of r 64(2). As Corbett JA said in the *Maharaj* case *supra*, undue formalism in procedural matters is always to be eschewed. As regards r 64(2), it is important that an applicant should, in substance, do what the rule requires of him. I consider that that is what Time Bank has done in this case. Moreover, C the facts on which its claim is based are admitted by Moyo. He admits that the loans, in the amounts specified, were advanced to him. He does not allege that he has repaid any of the capital of the loan. Irrespective of when the loans were advanced, Time Bank is only claiming interest at the enhanced rate with effect from 1 February 2001. Even as regards the actual termination of his D employment, Moyo does not dispute that he was required to serve a probationary period of six months, which commenced on 1 August 2000, and that Time Bank wrote to him to say that his services were being terminated with effect from 31 January 2001.

The basis of Moyo's defence is that when he was promoted in September 2000, his initial contract of employment was, *ipso facto*, novated and he became a E permanent employee. He does not allege that he was advised of that fact, either verbally or in writing, by the General Manager or any other senior employee of Time Bank. Mr Dzirutwe says that Moyo was laterally transferred, not promoted, and that the increase in salary that Moyo received was as a result of an across-the-board cost-of-living adjustment that was granted to all employees. To my mind, it is irrelevant whether Moyo was promoted or F merely transferred from one Department to another. Neither would have had the effect of novating his contract of employment. That could only have been done by a deliberate act on the part of Time Bank. Such a novation would not automatically flow from a promotion or transfer to another Department. When Moyo received the letter dated 29 December advising that his G employment was being terminated, he responded in a letter dated 10 January 2001. In that letter, he said that he was very concerned, as it inferred that he had not proved himself during his probation. He then went on to suggest that he be retained as an employee for a maximum period of six months "from the end of my probation period". Clearly, therefore, at that stage Moyo believed that he was still on probation. H

2002 (1) ZLR p131

Smith J

A Moyo claimed that the termination of his employment was motivated by bad faith. As he was still serving his probationary period, Time Bank was entitled to terminate his services at any time within the probationary period merely by giving Moyo the requisite notice. Its motives are irrelevant.

Moyo's counter-claim is founded on the basis that the termination of his service was unlawful. As I have found that Time Bank acted lawfully, within B its rights, it follows that the counter-claim is not soundly based.

Summary judgment is therefore granted against Moyo. An order in terms of the draft is issued.

C *Ziumbe & Mtambanengwe,* applicant's legal practitioners

Mawere & Sibanda, respondent's legal practitioners

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Source:
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AIR ZIMBABWE (PVT) LTD v ZENDERA & ORS 2002 (1) ZLR 132 (S)

Citation	2002 (1) ZLR 132 (S)
Case No	Judgment No. S-125-01
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	23 October, 2001
Judgment	7 February, 2002
Counsel	*F Girach*, for the appellant *S V Hwacha*, for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract — *formation — employer unilaterally increasing allowances payable to employees — acceptance of such increase constituting a* D *contract — alteration of contract — contract not capable of alteration unilaterally*

Headnote

The respondents were flight attendants with the appellant airline. A few years earlier, the airline had increased the meal allowances paid to flight attendants and pilots when they were outside Zimbabwe. Subsequently, E in the light of the airline's financial performance and trends within the industry, the airline had agreed with an association representing the pilots (but not the flight attendants) that the allowance should be reduced to half of what it had been. The airline, without prior consultation with the respondents, extended the reduction to them on the basis that F it was

logical to do so, having regard to the manner in which it was increased in the first place. The respondents argued that the airline had no right to do so.

Held, that when the airline raised the allowance, and the pilots and flight attendants accepted the increase, a contract was created. This contract could not be unilaterally altered. The fact that the pilots' association had G later agreed to a reduction in the allowance was irrelevant. The respondents were not members of that association and had not given it a mandate to act on its behalf. The shortfall should be paid with effect from the date it was reduced, but because it was to be paid in foreign currency (UK pounds), interest would be payable at the rate prevailing at the Bank of England. H

Chidyausiku CJ

Cases cited A

AMI Zimbabwe (Pvt) Ltd v Casalee Hldgs (Successors) (Pvt) Ltd 1997 (2) ZLR 77 (S)

Young v Canadian Northern Rly Co [1931] AC 83 (PC)

Case information

F Girach, for the appellant

B *S V Hwacha*, for the respondents

Judgment

CHIDYAUSIKU CJ: The respondents are cabin crew members in the employ of the appellant. As part of their remuneration, the appellant paid the respondents an overseas meal allowance in the sum of £3.50 up until 30 April 1999. The appellant reduced this allowance by fifty percent to C £1.75. The respondents successfully challenged in the court *a quo* the appellant's decision to reduce the allowance. The High Court set aside the reduction in the allowance payable to the respondents. The appellant was aggrieved by that decision and now appeals to this court.

The facts that are critical to the determination of this case are common cause. D It is the application of the law to those facts and the consequences of such an application that are in dispute.

The facts are these:

The respondents were employed by the appellant as members of its cabin crew. They are members of the Cabin Crew Association of Zimbabwe and E the first respondent is the chairman of the Association. The legal status and the existence of the Association is disputed by the appellant. That dispute is not relevant to the resolution of the critical issue that falls for determination in this case.

In 1997, the Zimbabwe Flight Crews Association, an association to which the respondents do not belong, negotiated a salary review with the appellant. F These negotiations resulted in an agreement increasing the salaries and also other allowances payable to captains, first officers and flight engineers, members of that Association. In terms of the agreement reached between these parties, the overseas meal allowance was increased to £3.50 per hour for all cockpit crews which was the amount prevailing at the time having G regard to what other airlines were paying their crews. It is contended by the appellant that the primary reason for this was to rationalise the meal allowance paid. The practice was that for local and regional routes all flight crews, that is to say, the cockpit crews and the cabin crews, received the same allowance. This increase, the appellant further contends, became a contractual obligation between the appellant and the cockpit crews. In line with H rationalising the meal allowance, the appellant decided, without consulting

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Chidyausiku CJ

the respondents, to award a like increase to the cabin crews, namely the A respondents. Some time in 1999 and in the light of the appellant's financial performance and trends within the industry, further negotiations were entered into between the Zimbabwe Flight Crews Association and the appellant, resulting in an agreement between the two parties to reduce the meal allowance to £1.75 per hour. As previously stated, the respondents were B not members of the Zimbabwe Flight Crews Association which agreed to the reduction in the meal allowance. It is also common cause that the

Zimbabwe Flight Crews Association had no mandate, specific or implied, to act for or negotiate on behalf of the respondents.

The appellant, without prior consultation with the respondents, extended the reduction to them on the basis that it was logical to do so, having regard to C the manner in which it was increased in the first place.

The learned judge in the court *a quo* concluded, quite correctly in my view, that two issues fell for determination:

1. Whether or not the overseas meal allowances are contractual between the appellant and the respondents; and D
2. Whether or not the appellant can unilaterally or without the consent of the Zimbabwe Flight Crews Association or the respondents reduce the overseas meal allowances.

The learned judge, after reviewing the law on this matter and applying it to the facts of this case, concluded at p 10-11 of her cyclostyled judgment, E *Zendera* v *Air Zimbabwe (Pvt) Ltd* HH-172-00:

> "The respondent at p 78 of the papers clearly recognises that the 1997 increase which followed upon negotiations between it and the Zimbabwe Flight Crews Association was accepted by the applicants. In my respectful view, the decision to increase the allowance, albeit unilaterally, translates into a matter affecting the rights of individual employees under their F contracts of employment and cannot therefore be termed to have been in the nature of a gentleman's agreement or a matter of policy. The agreement was therefore, in other words, a document adapted to be a document for conversion into an incorporation with a service agreement (*Young* v *Canadian Northern Railway Co* [1931] AC 83 (PC)).
>
> That being the case, the next question for determination is whether the G respondent could unilaterally or with the consent of the Zimbabwe Flight Crews Association reduce the overseas and meal allowance.
>
> The respondent argues that the amount payable in respect of the allowance was based on the amount negotiated and agreed upon between the respondent and the Zimbabwe Flight Crews Association and that the H

Chidyausiku CJ

> A 1999 reduction was again negotiated by the Zimbabwe Flight Crews Association and it therefore, cannot be said to have been a decision made without consultation. The respondent has been careful before the court (about) information as to the status or constitution of the Zimbabwe Flight Crews Association and its membership. The court has not been made privy as to the identity of the interest group represented.
>
> B The very contents of clause 6.2.4, which refers to £1.75 per hour for captains, first officers and flight engineers, is suggestive of the fact that the parties affected were the cockpit crews and not cabin crews (that is, the flight attendants). On the respondent's own papers, it is clear that the negotiations between the respondent and the Zimbabwe Flight Crews C Association did not involve the applicants. It is further not the respondent's case that the representation of the Zimbabwe Flight Crews Association was inclusive of the applicants or cabin crews. Although the point has not been raised by either party, the document makes no specific reference to reduction of the overseas meal allowances for cabin crews. As for the increase, it (is) common cause that the new rates applied with effect from D May 1997 and that the applicants have until the circular of 30 April 1999 been receiving the increased rate."

The reasoning of the learned judge cannot be faulted. The appellant (the respondent in the court *a quo*), in para 8 of the opposing affidavit, avers:

> " E As previously stated and, I submit, as documented, the alteration of the overseas meal allowance was a negotiated decision between the respondent and the Zimbabwe Flight Crews Association. The 1997 increase was negotiated by the Zimbabwe Flight Crews Association and *undoubtedly accepted by the applicants*. The 1999 reduction was again negotiated by the Zimbabwe Flight Crews Association and, therefore, F cannot be said to have been a decision made without consultation. I, again, dispute that the variation is unlawful" (the emphasis is mine).

It is quite clear from the above that the appellant in 1997 offered the respondents an increase in the overseas meal allowance. The respondents, on the appellant's own admission, accepted the offer. Upon the acceptance of the offer, the contract between the parties was perfected and a legal and G contractual relationship was created between them. The negotiations, or anything for that matter, which preceded the perfection of the contract are irrelevant.

A contract having been concluded between the appellant and the respondents, it could not legally be repudiated or altered by either party unilaterally. The H appellant's contention that negotiations with, or consent to the reduction by,

Chidyausiku CJ

the Zimbabwe Flight Crews Association constitutes consent by the respondents A or binds the respondents is seriously flawed and unsustainable.

Firstly, the respondents are not members of the Zimbabwe Flight Crews Association; therefore they cannot be bound by that Association's action as if they were members.

Secondly, the respondents never, or at least it is not averred that they ever, B gave the Zimbabwe Flight Crews Association a mandate to act or negotiate conditions of service on their behalf.

It follows, therefore, that the two questions identified by the learned judge in the court *a quo* have to be answered in favour of the respondents. There was a contractual relationship between the appellant and the respondents created in 1997, in terms of which the appellant was obliged to pay the respondents C an overseas meal allowance at the rate of £3.50. The appellant's reduction of that meal allowance in 1999 was unilateral and in breach of the existing contract between the two parties. On this basis, the appeal cannot succeed.

Having found in favour of the respondents, the learned judge in the court *a quo* ordered the payment of the shortfall in the meal allowance backdated D to 1 May 1999, together with interest at the prescribed rate. The appellant has appealed against the payment of interest at the prescribed rate. In doing so, reliance was placed on the case of *AMI Zimbabwe (Pvt) Ltd* v *Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S). The respondents virtually conceded that interest at the prescribed rate cannot be awarded to a party awarded a judgment sounding in foreign currency. The appellant must E succeed on this point, but I do not consider that this should affect the question of costs, especially in the light of the fact that the respondents conceded that point.

In the result, the order of this court is as follows:

1. The appeal is dismissed with costs. F
2. The order of the court *a quo* is varied by the deletion of the words "at the prescribed rate" and the substitution of the following:

   "at the rate of interest prevailing at the Bank of England on 1 May 1999."

ZIYAMBI JA and MALABA JA concurred. G

Robinson & Makonyere, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners H

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Source:
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S v BHEBHE & ORS 2002 (1) ZLR 137 (H)

Citation	2002 (1) ZLR 137 (H)
Case No	Judgment No. HB-25-02
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	12 February 2002

Judgment 12 February 2002

Counsel *J Tshuma*, with him *N Mathonsi*, for the appellants
Mrs *M Cheda*, for the State

Case Type Appeal against refusal of bail

Annotations No case annotations to date

Flynote

Criminal procedure — *bail — grounds for refusing — safety of accused* D *— unlawful threats made against accused — not a reason to refuse bail*

Headnote

The appellants, all members of the main opposition party in Zimbabwe, were arrested on allegations of contravening the Public Order and Security Act [*Chapter 11:17*]. They had been apprehended by members E of the Army and "war veterans", who severely assaulted them in the presence of police. The police did nothing to prevent the assaults. They appeared before a magistrate at Nkayi and were denied bail on the grounds that their lives would be in danger from the same soldiers and "war veterans" if released. During the bail hearing, the court room was cordoned off by these persons, some of whom watched the F proceedings through the court room windows. The appellants appealed against the refusal to grant bail.

Held, that fears for the safety of the accused because of the unlawful actions of the mob outside the court room, threatening to kill the accused, were not a ground to refuse to grant bail, particularly once the accused had G been removed from the area. The State appeared to be suggesting that the rights of ordinary citizens be trampled on in order to give way to the unlawful activities of the "war veterans".

Case information

J Tshuma, with him *N Mathonsi*, for the appellants

H Mrs *M Cheda*, for the State

2002 (1) ZLR p138

Kamocha J

Judgment

KAMOCHA J: The first and second appellants are members of Parliament A for Nkayi and Hwange West constituencies respectively. The third to the 38th appellants are all members of the Movement for Democratic Change ("MDC"), a registered political party in Zimbabwe. They were all arrested on 6 February 2002 at Nkayi. They appeared before the magistrates court at Nkayi on 8 February 2002 and were all denied bail by the presiding B magistrate. They appealed against that refusal to grant them bail. After hearing arguments from both counsel, I granted all the appellants bail in the following terms and indicated that my reason would follow in due course.

> "It is ordered that appellants be and are hereby admitted to bail on the following conditions:
>
> (a) That they each deposit a sum of $1 000 with the Registrar of the High C Court of Bulawayo.
>
> (b) That they do not interfere with state witnesses."

The State's allegations against all the appellants appear on a document commonly known as "Request for Remand" form. They are alleged, firstly, to have contravened s 17(1)(a) and (b) of the Public Order and Security Act D [*Chapter 11:17*] ("the Act"). Secondly, they were charged with contravening s 30(1)(2) (*sic*) of the Act. This charge does not make sense as it stands since s 30(1) of the Act is a definition section. I think what was intended was s 30(2) of the Act.

The brief circumstances given by the State were that on 6 February 2002, at E Nkayi Business Centre, the 38 appellants, who were all members of the MDC travelling together in a motorcade of vehicles registration numbers 772-052L, 772-564Y and 772-830G acted in concert and threw stones at Nkayi Business Centre and also had in their possession in vehicles they were travelling in, offensive weapons, that is to say, stones, axes, knobkerries, empty bottles, knives and others (*sic*). F

All the appellants are denying the charges. Their side of the story goes like this. On the day in question, they were peacefully minding their own business in the Nkayi area. They stopped at the Nkayi Business Centre to fuel their vehicles when members of the Zimbabwe National Army, in the company of "war veterans", approached them and deflated the wheels of their motor vehicles by shooting them. G

They went on to severely assault all the appellants and badly injured all of them. The appellants were taken to Nkayi Police Station where their captors continued with the brutal assaults with rifle butts, knobkerries, sjamboks and planks. They were made to crawl on their stomachs for a distance of about 20 metres while singing ZANU-PF slogans. H

Kamocha J

A The appellants sustained serious life-threatening injuries of varying degrees. The first appellant, for instance, had a gaping wound on the head inflicted with an axe right in front of the police, by a certain war veteran called Ndebele. The first appellant also had severe lacerations all over the body, caused by lashes with a sjambok. The fifth appellant, Theresa Kabondo, had, among other injuries, a broken left arm. These brutal assaults and torture took B place in full view of the police who, needless to say, did not do anything. The appellants were denied any medical attention.

The appellants submitted that they were in fact victims of serious political violence and were merely being punished for belonging to an opposition party. They asserted that the charges brought against them were meant to C cover up the offences perpetrated against them by their captors.

The magistrate in the court *a quo* denied all the appellants bail because he felt that if granted bail their safety would be in great danger from the "war veterans" and the same members of the Zimbabwe National Army. The magistrate arrived at that conclusion because during the hearing of the applications for bail the court room was cordoned off by the same "war veterans". Some of D them were even peeping through the court room windows, while others were peeping through the windows next to the magistrate himself.

At the hearing of the appeal, State counsel continued to oppose bail, still arguing that the safety of the appellants would be in danger. It was submitted that since the "war veterans" threatened to kill the appellants if they were E granted bail they should still be denied bail. After the magistrate had refused them bail, he remanded them to Bulawayo which was safe from those "war veterans". But counsel for the State still argued that those "war veterans" would carry out their threats anywhere in the country. She went on to submit that tempers were high and that may lead to public disorder. She said the anger of the "war veterans" could easily threaten the security of other citizens F and also state security.

State counsel's submissions paint a very frightening picture of the behaviour of those "war veterans". It seems they have become a law unto themselves. One would have expected them to have been arrested for threatening to kill other people. Yet the State appears to be suggesting that the rights of ordinary G citizens be trampled upon in order to give way to unlawful activities of the said "war veterans". There was clearly no basis for opposing bail in this case once the appellants had been transferred to Bulawayo. Consequently, I granted each appellant bail on the conditions given earlier in this judgment.

NOTICE OF APPEAL

H After I had handed down this judgment *ex tempore*, State counsel notified me

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Kamocha J

that the State wished to appeal against the granting of bail. It was brought to A the attention of State counsel that the decision was unappealable in the light of s 121(8) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as amended by Act 8 of 1997. Section 8 recites that:

"(8) There shall be no appeal from a decision or order of a judge in terms of this section." B

In the result, leave to appeal was refused *in casu.*

Webb, Low & Barry, appellants' legal practitioners

Criminal Division of the Attorney-General's Office, respondent's legal C practitioners

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Source:
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COLD STORAGE CO NATIONAL WORKERS COMMITTEE v COLD STORAGE CO LTD 2002 (1) ZLR 141 (H)

Citation	2002 (1) ZLR 141 (H)
Case No	Judgment No. HB-8-02
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	5 October 2001
Judgment	14 February 2002
Counsel	*N Mazibuko*, for the applicant *A K Maguchu*, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

D **Employment** — *industrial disputes — representation — workers committees — no right to represent members in litigation*

Practice and procedure — *parties — representation — workers committee — not entitled to represent members in litigation on their behalf*

Headnote

E The workers of the respondent elected a workers committee in terms of s 23 of the Labour Relations Act [*Chapter 28:01*]. When the respondent took steps to terminate the employment of certain employees in terms of a "voluntary mutual separation agreement", the workers committee filed an application, seeking an order of reinstatement. The respondent raised the question of whether the workers committee had the legal capacity F to institute the proceedings.

Held, that a workers committee was not a legal *persona* and was not entitled to represent its members in litigation. Although a workers committee was empowered by s 24 of the Act to represent the employees concerned in any matter affecting their rights, the legislation did not

make any workers committee a body corporate, with the right to sue and be sued. G In the event of the matter going in favour of the other party with costs, the other party would have no-one to recover its costs from.

Cases cited

H *Rushwaya v Enbee Stores (Pvt) Ltd* S-79-00

Kamocha J

Legislation considered A

Labour Relations Act [*Chapter 28:01*], s 24(1)

Case information

N Mazibuko, for the applicant

A K Maguchu, for the respondent

Judgment

KAMOCHA J: The workers of the Cold Storage Company Ltd B —"the respondent" — elected a workers' committee in terms of the provisions of s 23 of the Labour Relations Act [*Chapter 28:01*] ("the Act"). Their workers' committee — hereinafter called "the applicant" — filed this application on an urgent basis and a judge of this court directed that the matter be argued in court as soon as possible. The applicant sought an order in these terms: C

> "That it be and is hereby declared that the termination of employment of all the respondent's employees in terms of the Voluntary Mutual Separation Agreement is illegal and invalid.
>
> All the employees of the respondent whose employment was terminated in terms of the aforesaid Voluntary Mutual Separation Agreement be and are hereby reinstated to their employment with the respondent with D immediate effect.
>
> That the aforesaid employees be paid their salary and other benefits by the respondent to which they are entitled until such time they are retrenched in terms of the applicable regulations.
>
> That the respondent pays the costs of suit." E

The respondent raised the question of whether or not the workers committee has the legal capacity to institute these proceedings. The functions of a workers committee are laid down in s 24 of the Act. *Inter alia*, a workers' committee is entitled to represent the employees in any matter affecting their rights and interests. It has power to negotiate with the employer a collective F bargaining agreement relating to the terms and conditions of employment of the employees. It can elect some of its members to represent employees on the works council.

Does s 24(1)(a) of the Act endow a workers' committee with the power to litigate in this court on behalf of the employees? The section reads as G follows:

> "**24. Functions of workers' committees**
>
> (1) A workers' committee shall —
>
> (a) subject to this Act, represent the employees concerned in any matter affecting their rights and interest, and …"

The legislature did not give the workers' committee the right to sue and to be H

Kamocha J

A sued like it did to the employment council. In s 60 of the Act, employment councils were made bodies corporate, capable of suing and being sued. It seems to me that if the intention of the legislature was to make workers' committees legal *personae*, it would have said so.

The applicant, however, argued that it derived its authority from the provisions of the Act quoted *supra.* It seems to me that the argument ignores the fact that B in the event of the case going in favour of the other party with costs such party would have no one to recover its costs from, as the

applicant is not capable of suing and being sued. There would also be no one to execute the order against.

Another issue raised by the respondent before dealing with the merits was whether or not the applicant had approached the right forum. The applicant's C complaint is that the employer, i.e the respondent in this case, committed an unfair labour practice as defined by s 8 of the Act. The Act provides in s 93 that matters of unfair labour practices be dealt with by a labour relations officer. However, where good cause is shown such a case may be heard by this court. In *Rushwaya* v *Enbee Stores (Pvt) Ltd* S-79-00, the need for litigants to use the right forum when mounting their claims was stressed. D The court held that the appellant, who had argued that she had signed resignation forms under duress, should have taken her matter before the labour relations officer. Her argument was that there was a large backlog of cases in the Labour Relations Tribunal, that was why she had instituted proceedings in the High Court. The Supreme Court rejected that explanation, E saying it did not justify taking labour disputes to the High Court, fearing that such practice would turn the High Court into a labour relations court. *In casu,* no attempt was made by the applicant why it chose to launch its application in this court instead of taking the matter to the labour relations officer. Therefore, no good cause has been shown at all why this matter was brought to this court.

F Having found that the workers' committee lacked authority to sue and be sued and that it brought this matter to this court without any good cause for doing so, I find no need to deal with the merits of the case.

The issue of costs is clearly going to cause problems, but it seems to me that the employer could recover its costs from the particular employees who G instructed the workers committee to represent them in court.

The order of this court is that the application be and is hereby dismissed with costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners

H *Dube, Manikai & Hwacha*, respondent's legal practitioners

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GALANTE v GALANTE (1) 2002 (1) ZLR 144 (H)

Citation	2002 (1) ZLR 144 (H)
Case No	Judgment No. HH-31-02
Court	High Court, Harare
Judge	Smith J
Heard	6 December 2001
Judgment	20 February 2002
Counsel	*A P de Bourbon* SC, for the plaintiff *L Weinkove* SC, with him *F Girach*, for the defendant
Case Type	Special plea
Annotations	Link to case annotations

Flynote

Practice and procedure — *res judicata — issue estoppel — distinction between issue estoppel and res judicata — applicability of issue estoppel* D *in Zimbabwean law*

Headnote

The defendant instituted a divorce action in the High Court against her husband, alleging in her declaration that he was domiciled in Zimbabwe. In his plea, he admitted this. She then obtained an award of maintenance *pendente lite* from the High Court, relying on her earlier claim that he was domiciled in E Zimbabwe; and again domicile was not put in issue. Subsequently, after the holding of a pre-trial conference, she withdrew her action against him and he then instituted divorce proceedings in the High Court against her. She countered with a special plea to the court's jurisdiction, alleging that he was not and never had been domiciled in Zimbabwe. F

Held, that in the defendant's divorce action, subsequently withdrawn, and in her husband's current action, the parties, the issues and the relief sought were identical. The defendant's assertion that her husband was domiciled in Zimbabwe was essential to establish the court's jurisdiction to hear her action, and was never disputed. On the basis of issue estoppel, she could not now dispute that issue even though there had G been no final adjudication on her action. She had not shown that the equities required a lifting of the bar imposed by issue estoppel.

Cases cited

Arnold & Ors v National Westminster Bank plc [1991] 3 All ER 41

Boshoff v Union Government 1932 TPD 345 H

Smith J

A *Eilon v Eilon* 1965 (1) SA 703 (A)

Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630; [1965] 2 All ER 4

Gordon v Tarnow 1947 (3) SA 525 (A)

Horowitz v Brock and Others 1988 (2) SA 160 (A)

Howard v Howard 1966 RLR 182 (G); 1966 (2) SA 718 (R)

B *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155; [1925] All ER Rep 56

Kashiri v Muvirimi 1988 (1) ZLR 270 (S)

Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (A)

Liley & Anor v Johannesburg Turf Club & Anor 1983 (4) SA 548 (W)

Moresby-White v Moresby-White 1972 (1) RLR 199 (A)

C *Willowvale Mazda Motor Industries (Pvt) Ltd v Sunshine Rent-a-Car (Pvt) Ltd* 1996 (1) ZLR 415 (S)

Case information

A P de Bourbon SC, for the plaintiff

D *L Weinkove SC*, with him *F Girach*, for the defendant

Judgment

SMITH J: On 6 December 2000, the plaintiff (hereinafter referred to as "Edward" issued summons claiming, *inter alia*, a decree of divorce and custody of the two minor children of the marriage. In his summons, he claims that the parties are domiciled in Zimbabwe. The defendant (hereinafter E referred to as "Ronnie") filed a special plea claiming that this court does not have jurisdiction to

determine Edward's action against her because he is not domiciled in Zimbabwe. She alleges that he has not abandoned his domicile of origin, which is the United States of America, and did not enter Zimbabwe with the necessary *animus manendi*. Edward claims that Ronnie is issue-estopped from denying this court's jurisdiction. The court must F decide whether to uphold the special plea or to dismiss it.

The relevant facts leading up to this case are as follows. The parties were married in Harare on 1 September 1985. On 3 November 1998, Ronnie instituted a claim for divorce and other relief in case HC 13661/98 (the First Divorce case). In para 3 of her declaration, she stated that Edward "is domiciled G in Zimbabwe". On 1 February 1999, Edward filed his plea in which he admitted the statement contained in the said para 3. In January 1999, Ronnie instituted case HC 1305/98 (the Maintenance case) seeking maintenance *pendente lite* for herself and the two minor children and a contribution towards her costs in the First Divorce case. In para 2 of her founding affidavit, she said she adhered to the contents of her declaration in the First Divorce H case. In para 4 thereof, she stated:

Smith J

> "We returned to this country in 1992. We have lived here since that time A and the respondent (i.e. Edward) holds a permanent residence permit."

In para 6.3, thereof she stated:

> "The list (of assets) was prepared when we immigrated to Zimbabwe."

In March 1999, Edward filed his opposing affidavit in the Maintenance case and did not put in issue the question of domicile. In her answering affidavit B filed in the Maintenance case on 4 June 1999 she stated, in para 4.2:

> "We returned to the United States thereafter and returned to Zimbabwe in 1992 and have lived here ever since."

The Maintenance case was heard on 25 November 1999 and Bartlett J awarded maintenance for Ronnie and the two children and ordered that she C be paid a contribution towards her costs. Edward noted an appeal against the order of Bartlett J, which was heard by the Supreme Court on 7 September 2000, and judgment was handed down on 7 December — S-92-00. A pre-trial conference for the First Divorce case was held before Blackie J on 4 December 2000 and the First Divorce case was set down for hearing on 5 December. Ronnie then withdrew all her claims and Edward instituted this case on the D following day. On 16 February 2001, Ronnie sought further particulars, which were filed by Edward on 15 March. The special plea as to jurisdiction was then filed by Ronnie on 6 April. Then on 17 September Ronnie instituted proceedings in the Superior Court of California, County of San Francisco, seeking a legal separation and other relief. E

Mr *de Bourbon* submitted that the onus rests on Ronnie to prove that Edward is not domiciled in Zimbabwe. She must establish that he did not abandon his domicile of origin and therefore did not acquire a domicile of choice, i.e. Zimbabwe. In the First Divorce case, Ronnie averred that Edward was domiciled in Zimbabwe, and she persisted with that allegation right up to the time she withdrew her claims in that case in December 2000. However, when F Edward instituted these proceedings for divorce and ancillary relief, she changed her attitude and disputed the very allegation on which she had based her litigation. The special plea is premised on the assertion that Edward's domicile of origin is the United States of America. However, in a country with a federal system, such as is the case in the United States of America, a G person is domiciled within a particular state or other entity with a separate legal system. Neither can a person be domiciled in a city, such as San Francisco in California, as alleged by Ronnie in para 2(a) of her special plea. Accordingly, the special plea must be dismissed solely on those two points.

Mr *de Bourbon* went on to deal with the principles inherent in the special plea. In order to change a domicile of origin and acquire a domicile of choice, there H

Smith J

A are four requisites that must be satisfied : a physical move from the domicile of origin; the physical arrival and residence at the domicile of choice; the intention to abandon the domicile of origin and acquire a new domicile of choice; the power to carry out that intention. A person's

residence in a country is *prima facie* evidence that he is domiciled in that country and the length of the residence must be taken into consideration. It is not necessary B to turn one's back on the country of origin or to sever all connections with that country or to have no desire ever to return there. All that is needed is an intention to live in the new country indefinitely. The fact that a person does not possess citizenship or even permanent residence does not affect the issue of domicile of choice.

C Finally, Mr *de Bourbon* argued that Ronnie is estopped from challenging the jurisdiction of this court in the present matter as she had, herself, sought the jurisdiction of this court for the same relief in the First Divorce case. In the Maintenance case, Ronnie adhered to her declaration in the First Divorce case, including the averment that the court had jurisdiction because Edward is domiciled in Zimbabwe. When the case was argued before D Bartlett J the issue of jurisdiction was not argued. The learned judge found in Ronnie's favour, thus accepting that the court had jurisdiction. A pre-trial conference was held in connection with the First Divorce case. That was a formal step which could not have been taken unless the court had jurisdiction. There was an appeal against the order granted by Bartlett J in the Maintenance case and the Supreme Court heard the appeal and made a finding — S-92-00. E Even when Ronnie applied for leave to withdraw the First Divorce case, Adam J granted the application and ordered that Ronnie pay the costs. The admission made by Ronnie in the First Divorce case that Edward is domiciled in Zimbabwe constitutes a judicial admission — see *Gordon* v *Tarnow* 1947 (3) SA 525 (A) and *Moresby-White* v *Moresby-White* 1972 (1) RLR 199 (A). As such, it constitutes a finding by the court, or at least an acceptance F by the court, that the court has jurisdiction to entertain the application by her for a divorce. Accordingly, the issue of jurisdiction has been decided between the parties. It is a species of issue estoppel — see *Willowvale Mazda Motor Industries (Pvt) Ltd* v *Sunshine Rent-a-Car (Pvt) Ltd* 1996 (1) ZLR 415 (S). Ronnie held out for three years that Edward was domiciled in this country and G when she wanted to apply for maintenance *pendente lite*, she was content to rely on her averment that Edward is domiciled in this country. Now she wants to disclaim this court's jurisdiction and to litigate in California. In her special plea, there is no allegation that there has been a change in circumstances since she issued summons in the First Divorce case in 1998. Public policy requires that she should not now be allowed to deny what she has earlier relied on to H pursue her claims — see *Arnold & Ors* v *National Westminster Bank plc*

Smith J

[1991] 3 All ER 41. In that case, it was held that issue estoppel was a complete A bar but could be relaxed. However, that would only be in exceptional cases and that would have to be pleaded. In this case, the equities demand that this court should determine the issue. Both parties are ordinarily resident within the jurisdiction, the children are resident in this country and all the witnesses live here. Ronnie, in the First Divorce case, could have relied on s 3(1)(b) of B the Matrimonial Causes Act [*Chapter 5:13*] as conferring jurisdiction, but she did not. She relied on her averment that Edward is domiciled in this country.

Mr *Weinkove* argued that the question of domicile must be established when litigation is instituted. If at that stage the court has jurisdiction, then it maintains jurisdiction for the entire case — see C *Howard* v *Howard* 1966 RLR 182 (G); 1966 (2) SA 718 (R). In the First Divorce case, Ronnie was asked if Edward lives in Zimbabwe and she said he did. However, there are two aspects to the question of domicile. Mere physical presence is not sufficient. The question of intention is of equal significance. As was said in *Howard*'s case *supra*, to acquire a new domicile it is essential to show that the person D who is said to have changed his domicile has abandoned his former domicile *animo et facto*. In the First Divorce case and the Maintenance case, the issue of domicile was never argued or adjudicated on. Edward never testified. When Ronnie applied to withdraw her action, Adam J allowed her to do so without deciding the question of domicile. There was no evidence led on this issue. Ronnie disputes Edward's allegation that he is domiciled in Zimbabwe. E The duty lies on him to prove what he has averred. Admittedly, the parties both live in Zimbabwe. Ronnie was entitled to claim that this court had jurisdiction to deal with the First Divorce case by virtue of the provisions of s 3(1)(b) of the Matrimonial Causes Act [*Chapter 5:13*]. As Edward did not file a counter-claim, once Ronnie withdrew her claim the First Divorce case came to an end. This present case is an entirely new and different case. Ronnie F is entitled to show that Edward is not domiciled in this country. Domicile cannot be established on the mere *ipse dixit* of a party — see *Eilon* v *Eilon* 1965 (1) SA 703 (A). It would be against public policy and also inequitable to silence Ronnie on this issue. Edward had a master plan which did not include him living in this country for the rest of

his days. He had taken steps G to relocate and live elsewhere. If this case were decided by this court, Ronnie would have to be satisfied with a judgment sounding in Zimbabwe dollars. If, however, the case were to be determined in San Francisco, the judgment would sound in United States dollars. The maintenance that Edward is paying is losing its value daily because of the rampant inflation in Zimbabwe.

It is common cause that this court will not have jurisdiction to deal with this H

2002 (1) ZLR p149

Smith J

A case unless Edward has acquired a domicile of choice in Zimbabwe. His domicile of origin is California or one of the other States in the United States of America. He has established a residence in Zimbabwe and the parties were married and lived together in this country. Both their children were born in the USA but have grown up in this country since 1992. It is not disputed, however, that Edward could only have acquired a domicile of B choice in this country if he had the requisite intention.

When Ronnie instituted action in the First Divorce case she alleged that Edward was domiciled in Zimbabwe. That was necessary in order to satisfy the court that it had jurisdiction to handle the case. She could, had she so wished, have relied on the provisions of s 3(1)(b) of the Matrimonial Causes C Act [*Chapter 5:13*] to found jurisdiction but she did not do so. When she instituted the Maintenance case, she again relied on the averment that Edward was domiciled in Zimbabwe in order to establish that this court had jurisdiction. She was awarded maintenance, which she has been receiving since the order issued by Bartlett J. When she withdrew her case, she did not allege that the case should be struck off the roll because the court did not have D jurisdiction to deal with the case. She merely applied for leave to withdraw her claim.

The doctrine of issue estoppel was considered by the Privy Council in *Hoystead & Ors* v *Commissioner of Taxation* [1926] AC 155 : [1925] All ER Rep 56. Lord Shaw, in delivering the judgment of the Judicial Committee E said at p 165-166 (p 62A-D All ER):

> "In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous F assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If G this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has H not been traversed. In that case also, a defendant is bound by the

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2002 (1) ZLR p150

Smith J

> judgment, although it may be true enough that subsequent light or A ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

The rule was expressed thus by Lord Denning MR in *Fidelitas Shipping Co Ltd* v *V/O Exportchleb* [1965] 2 All ER 4 at 9A: [1966] 1 QB 630 at B 640B-C:

> "The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances." C

Then, in *Arnold*'s case *supra*, at p 47 Lord Keith Of Kinkel said:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks D to reopen that issue. This form of estoppel seems first to have appeared in *Duchess of Kingston*'s *Case* (1776) 20 State Tr 355, [1775-1802] All ER Rep 623. A later instance is *R* v *Inhabitants of Hartington Middle Quarter* (1855) 4 E & B 780, 119 ER 288. The name 'issue estoppel' was first attributed to it by Higgins J in the High Court of Australia in *Hoystead* v *Federal Comr of Taxation* (1921) 29 CLR 537 at 561. It was E adopted by Diplock LJ

in *Thoday* v *Thoday* [1964] 1 All ER 341 at 352, [1964] P 181 at 198. Having described cause of action estoppel as one form of estoppel *per rem judicatam*, he said:

'The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which F can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of G action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined H

Smith J

A that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was'."

In our law, the principles of *res judicata* are almost analogous to those of issue estoppel. In *Liley & Anor* v *Johannesburg Turf Club & Anor* 1983 (4) SA 548 (W), Goldstone J at 551-552, after referring to the judgment of B Greenberg J in *Boshoff* v *Union Government* 1932 TPD 345, said:

"The importance of this discussion relates to the question much debated by counsel yesterday as to whether our law relating to *res judicata* covers what has come to be called 'issue estoppel' in the Anglo-American law, i.e. where the parties or the privies are estopped from disputing an issue decided by the judgment of a court, as distinct from being estopped only C from relying upon the same cause of action.

The judgment of Greenberg J in *Boshoff's* case has been followed for over 30 years in the Courts of South Africa and, what is more important in this case, by this Division : see, for example, the judgment of Murray J in *Turk* v *Turk* 1954 (3) SA 971 (W). Indeed, in the second edition of Hoffman on the *South African Law of Evidence* at 247 the following D conclusion is stated after a full discussion of this matter —

'The present state of the authorities seems to show that at least in civil cases issue estoppel has come to stay. It has been applied in a large number of cases over a period of more than 30 years, so that it is probably too late even for the Appellate Division to uproot it, although E technically the matter is still open.'

Apart from the fact that I am in respectful agreement with the approach of Greenberg J, in my view, the state of the law is such that it would not be proper for a single Judge in this Division to strike out in a new or different direction. The formulation of the rule now under consideration is thus correctly reflected in the following passage from Spencer-Bower F on *res judicata* which has been cited with approval, *inter alia*, in the *Boshoff* case *supra* and also in the dissenting judgment of Curlewis JA in *R* v *Manasewitz* 1933 AD 165 at 189:

'Where the decision set up as *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that G the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms; but beyond these limits there can be no H such thing as a *res judicata* by implication'."

Smith J

The requisites of a valid defence of *res judicata* were clearly set out by A Smalberger JA in *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 178-179 as follows:

"The requisites of a valid defence of *res judicata* in Roman-Dutch law are that the matter adjudicated upon, on which the defence relies, must have B been for the same cause, between the same parties, and the same thing must have been demanded. (Voet *Commentarius ad Pandectas* 44.2.3; *Bertram* v *Wood* (1893) 10 SC 177 at 180; *Mitford's Executor* v *Ebden's Executors & Ors* 1917 AD 682 at 686.) The rule that the same thing must have been demanded in both actions has been held to mean —

'that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing C between the same parties, cannot be resuscitated in subsequent proceedings'

(per Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562D).

The doctrine of issue estoppel does not require for its application that the D same thing must have been demanded, and it is the lack of this element which distinguishes it from *res judicata*. The doctrine, although not specifically referred to by the name by which it is currently known, appears to have first found acceptance in our law in *Boshoff* v *Union Government* 1932 TPD 345."

The learned judge of appeal went on at 179H-180 to say: E

> "An issue, broadly speaking, is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought. As pointed out by Innes CJ, in the oft-quoted passage from *Robinson* v *Randfontein Estates GM Co Ltd* 1925 (A) 173 at 198, F
>
> '(the) object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or prevent full enquiry. But within these limits the court has a wide discretion.'
>
> According to Beck *Theory and Principles of Pleading in Civil Actions* G 5 ed at 32, one of the functions of pleadings 'is to place the issues raised in the action on record so that when a judgment is given such judgment may be a bar to parties litigating again on the same issues'. In motion proceedings, the issues appear from the affidavits filed by the parties and are crystallised in the relief sought, such relief being definitive of the essential issue(s) between the parties." H

2002 (1) ZLR p153

Smith J

A The Appellate Division again dealt with the principle of issue estoppel in *Kommissaris van Binnelandse Inkomste* v *ABSA Bank Bpk* 1995 (1) SA 653 (A). At p 657C-F, the headnote to that case reads:

> "The Appellate Division pointed out that in the context of the appeal the issues in (1) and (2) above were not as such in dispute; the question was whether the court *a quo*'s conclusion in regard to Volkskas' third ground B of objection was correct. (At 664A-B).) The court remarked that it was generally accepted that the use of issue estoppel by the Provincial Courts had been established in *Boshoff* v *Union Government* 1932 TPD 345. (At 666H/I-1). In that case, the defence of *res judicata* was upheld despite the fact that that which was claimed and the cause of action had C not been the same in the two actions in question. Although the decision was based to some extent on common-law principles, the court, invoking English law, preferred an expansive application of the *exceptio rei judicatae*, but did so without applying English law to the exclusion of common-law principles; the view that *Boshoff* had to be rejected because the court had deserted the common law and imported English principles D was accordingly erroneous. (At 667J-668B-C and 668D). The true significance of *Boshoff* was that the strict common-law requirements for the defence of *res judicata* (in particular *eadem res* and *eadem petendi causa*) should not be taken literally and in all cases applied as inflexible rules, but that there was, in the light of the underlying requirement of *eadem quaestio* and the defence of *res judicata*, room for the adaptation E and extension thereof. (At 669F-G-H). The court was of the opinion that there was, in the light of the above, nothing wrong with the approach adopted in *Boshoff*, but pointed out that every case had to be decided on its own facts."

The doctrine of issue estoppel has been considered in our courts. In *Kashiri* F v *Muvirimi* 1988 (1) ZLR 270 (S) at 274D-F, Korsah JA said:

> "The policy of the law, as regards issue estoppel, was succinctly stated in *Phipson on Evidence* 13 ed paras 28-46, thus:
>
> 'If, in litigation upon one such cause of action, any of such separate issues as to whether a particular condition has been fulfilled is determined G by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation H determined that it was.'

2002 (1) ZLR p154

Smith J

> With regard to P, precisely the same issue as that before the community A court — sexual intercourse between the parties — arose in the present case for determination. That issue having been determined between the same parties by the community court, the determination of it by that court raises an issue estoppel. The parties are estopped from disputing an issue decided by a judgment of a court of competent jurisdiction."

Then, in *Willowvale Mazda Motor Industries* v *Sunshine Rent-a-Car supra*, B Korsah JA again dealt with the doctrine of issue estoppel. At p 423B-F, he said:

> "While the doctrine of issue estoppel may not be part of Roman-Dutch law and may not as yet have found a berth in South African law, it seems to me that this court, in the wider application of existing law in the light of C current modes of thought, has found the artificiality of limiting estoppel to the same subject to be unproductive of justice, and has embraced the doctrine of issue estoppel under the general rule of public policy that there should be finality in litigation.

> The doctrine is succinctly stated thus by Lord Diplock in *Mills* v *Cooper supra* at 468 thus: D
>
> 'A party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the E same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him'." F

The parties to this case, the issues and the relief sought are identical to those in the First Divorce case. In the First Divorce case, there was no final adjudication on the issues because Ronnie withdrew her claims. However, her summons was accepted as properly founding her claims because the case proceeded to the pre-trial conference stage, which is the penultimate step before the hearing G of the case. In her declaration, Ronnie asserted that Edward is domiciled in Zimbabwe. That was admitted by Edward in his plea. At the pre-trial conference, the question of domicile was not put in issue by either party.

In my view, the assertion by Ronnie in the First Divorce case that Edward is domiciled in this country, and the fact that that was accepted by both parties and by the judge before whom the pre-trial conference was held, is one that H

Smith J

A she cannot now dispute. As if that is not enough, in the Maintenance case Ronnie also pleaded that Edward is domiciled in Zimbabwe and Edward admitted that allegation. In that case, Bartlett J awarded her a substantial sum by way of maintenance *pendente lite* and a contribution towards costs. That order went on appeal and was dealt with by the Supreme Court. In both courts, it was accepted that Edward is domiciled in Zimbabwe. The question of his B domicile was clearly fundamental to Ronnie's claim. Therefore the courts acted on the basis that Edward is domiciled in this country.

It is accepted that, although issue estoppel is a complete bar, the bar can be lifted if the equities of the case so require. It has not been argued, on behalf of Ronnie, that the equities do so require. It is not surprising that no such C argument has been put forward because, if anything, it seems to me that the equities require that the case be heard in our courts. The parties were married in this country and have lived here since 1992. Their matrimonial home is in this country and both their children were brought up here since 1992. Most of the matrimonial property, the ownership of which is in dispute, is in this country.

D The special plea is dismissed with costs.

Atherstone & Cook, plaintiff's legal practitioners

E *Honey & Blanckenberg*, defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v BANDA 2002 (1) ZLR 156 (H)

S v BANDA 2002 (1) ZLR 156 (H)

Citation 2002 (1) ZLR 156 (H)

Case No Judgment No. HB-13-02

Court	High Court, Bulawayo
Judge	Kamocha J & Chiweshe J
Heard	11 February 2002
Judgment	21 February 2002
Counsel	*A Sibanda*, for the appellant Mrs *I Nyoni*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law — *common law offences — rape — essential elements — penetration — when considered to have occurred* D

Headnote

The appellant, a man of 26 years of age at the time of the alleged offence, was convicted on a charge of raping a six-year old child. He was sentenced to 10 years' imprisonment, of which 2 years were conditionally suspended. The evidence from the child, given in a "victim friendly" court, was that his organ contacted and moved around her genitalia. She E did not indicate that penetration had taken place, and the child's mother saw no sign of bruising, tenderness or swelling.

Held, that rape is committed when the male organ penetrates the female genitalia even to the slightest degree. However, where the male organ merely contacts the outside of the female genitalia, without any F penetration, the accused can be convicted only of attempted rape.

Held, further, that the sentence imposed was appropriate for attempted rape, but would have been regarded as inadequate had the conviction for rape been upheld.

Case information

A Sibanda, for the appellant G

Mrs *I Nyoni*, for the respondent

Judgment

KAMOCHA J: The appellant, who was aged 26 at the time of the alleged offence, was facing a charge of rape. It was alleged that on 6 July 1997 at house number 7950/33 Sizinda, Bulawayo he unlawfully and intentionally had sexual intercourse with the complainant, who was aged 5 years 11 months. H

Kamocha J

A He pleaded not guilty but was found guilty despite his protestation. He was sentenced to undergo 10 years' imprisonment of which 2 years' imprisonment was suspended on the customary conditions of future good behaviour. This appeal is against both conviction and sentence.

While the appellant agreed with the findings of the trial court that the complainant was a credible witness, he complained that her evidence was B uncorroborated on a number of material points. In particular, he complained that the doctor who examined the complainant within 48 hours concluded that there was no evidence of penile penetration of the complainant *per vaginam*.

The appellant also attacked the trial court's manner of handling the trial. He C alleged that the trial court allowed the public prosecutor to put leading questions on matters that did not emanate from the complainant's testimony. That criticism was clearly unfounded because the prosecutor was merely seeking clarification on matters that the complainant had mentioned in her evidence in chief.

The questions that must be decided are: (a) whether or not the crime of rape D was committed; and (b) whether or not the complainant's evidence was corroborated.

Her evidence was that on the day in question her mother left her and her sister Millicent in the custody of the appellant's wife. The appellant's wife was her mother's friend. The mother went to see a sick relative after a church service, E leaving the children and the accused's wife at the church. The appellant was also at the church. After the complainant's mother had left, the appellant proceeded home with the complainant, leaving his wife and Millicent at the church. This piece of evidence is supported by the accused's wife. The wife also supports the evidence that when she got home she found the complainant sitting on the bed, contrary to the appellant's story that the complainant was F getting off the bed. The evidence that the appellant's wife and Millicent at some stage went to the shops, leaving the appellant and the complainant in the room, is also supported by appellant's wife. The complainant gave a detailed account of how the appellant allegedly raped her. She described an unusual scenario where she was allegedly raped while standing with her legs astride and the appellant seated. The appellant removed her panties and G pulled her dress up and then caused his male organ "to dance" onto her female organ. She even demonstrated in the victim friendly court using two dolls. The male doll was seated while the female one was standing. She illustrated how the male doll was moving its penis around the female genital organ. There was contact between the male and the female organs.

H The appellant's untruths also corroborated the complainant's evidence

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Kamocha J

because he would not be untruthful if he was innocent. As the trial progressed, A the appellant suggested the complainant and her mother must have been influenced to incriminate him by one Mrs Ndlovu. That was clearly an afterthought, because he does not mention that in his somewhat detailed defence outline. He was also untruthful when he suggested that when his wife and Millicent arrived at the house the complainant was getting off the bed. B The wife said the complainant was seated on the bed when they arrived.

Millicent supports the complainant's story that she (the complainant) reported the alleged rape to her on that same day. The rape story was repeated to the mother that same evening.

Upon receiving such a report the mother immediately examined the complainant in a bid to establish whether or not there was something to C suggest that penetration could have been effected. She saw no signs of injury or bruises, tenderness or inflammation. The appellant was aged 26 years at the time, while the complainant was only a month less than six years. It seems to me that if the appellant's penis had slightly penetrated the complainant *per vulva* and was rubbed around, there would have been some signs of tenderness or inflammation or even some slight bruising and swelling in view D of the complainant's age.

The trial court concluded that there was legal penetration. What has now come to be known as legal penetration is where the male organ is in the slightest degree within the female's body: G Feltoe *A Guide to Zimbabwean Criminal Law* (Reprint 1991). *South African Criminal Law and Procedure* E Vol II 3 ed by J R L Milton at 448 also states that the slightest penetration establishes the necessary element for liability of an accused person. The slightest penetration is given by the learned author as being entry (in the sense of *res in re*) into the *labia* (the anterior of the female genital organ).

In casu, the evidence established that the appellant's organ was in contact with the complainant's genital organ. She described it as "dancing on", not F dancing inside. In the absence of evidence of any legal penetration, it would be wrong to conclude that because the male organ was in contact with the female genital organ there was legal penetration. The mere contact of the male organ with the female genital organ without any slightest penetration does not amount to legal penetration. The appellant cannot, therefore, be G guilty of rape.

What admits of no doubt, however, is that appellant removed the complainant's pants and pulled up her dress and tried to rape her. His male organ got as far as the complainant's genital organ but fortuitously did not penetrate her. He is clearly guilty of attempted rape.

In as far as sentence is concerned, Mr *Sibanda*, representing the appellant, H

Kamocha J

A properly conceded that the sentence was in line with sentences that are normally imposed for offences of this nature.

The appellant was sentenced to 10 years' imprisonment of which 2 years' imprisonment was suspended for raping a 6-year-old child. I must point out that the trial court erred on the side of leniency. People who rape children should receive effective sentences of not less than 10 years. In this case, the B appellant was 26 years at the time he committed the crime. That gives an age difference of 20 years. Moreover, the accused is married, which makes it difficult to understand why he ever abused this child. This is what makes the sentence imposed by the court *a quo* still appropriate on a conviction of attempted rape, although it would have been inadequate if the conviction for C rape had been upheld.

The appeal against conviction succeeds to the extent that the conviction of rape is set aside and substituted with one of attempted rape. The appeal against sentence is dismissed.

D CHIWESHE J concurred.

Joel Pincus, Konson & Wolhuter, appellant's legal practitioners

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

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Source:
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MPOFU v MLILO 2002 (1) ZLR 160 (H)

Citation	2002 (1) ZLR 160 (H)
Case No	Judgment No. HB-11-02
Court	High Court, Bulawayo
Judge	Cheda J
Heard	21 February 2002
Judgment	21 February 2002
Counsel	*D Mazibuko*, for the applicant *R Nyathi*, for the respondent
Case Type	Application for stay of execution
Annotations	No case annotations to date

Flynote

Court — *contempt — party in contempt — party against whom ejectment order granted — such party disobeying and thwarting execution of order* D *— not entitled to be heard until contempt purged* E

Practice and procedure — *parties — party in contempt — party against whom ejectment order granted — such party disobeying and thwarting execution of order — not entitled to be heard until contempt purged*

Headnote

The applicant had sold a piece of immovable property to the respondent, but refused to give vacant possession. The respondent obtained an ejectment order against the applicant and the Sheriff had effected the ejection. However, immediately after the ejectment, the applicant sought the aid of a city councillor, who prevented the respondent from taking possession. F The councillor claimed that he had the authority to stop the eviction by the Deputy Sheriff. The applicant then sought a stay of execution. Counsel for the respondent raised the question of whether the applicant was properly before the court.

Held, that the applicant could not be heard. He was in contempt of court. His remedy, if he did not accept the ejectment order, was to appeal against G it. Until he did so, he was bound to obey it. He unlawfully and wilfully sought to frustrate and impede the course of justice.

Cases cited

Baron v George 1994 (2) ZLR 141 (S)

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA) H

Cheda J

A *Lindsay v Lindsay (2)* 1995 (1) ZLR 296 (S)

Scheelite King Mining Co (Pvt) Ltd *v* Mahachi 1998 (1) ZLR 173 (H)

Case information

D Mazibuko, for the applicant

R Nyathi, for the respondent

Judgment

B **CHEDA J**: This is an application for stay of execution. The applicant (hereinafter referred as "Mpofu") entered into an agreement of sale with one Charity Moyo who was the lease holder of stand 13424 Nkulumane, Bulawayo. Subsequent to the said agreement, Charity Moyo entered into another agreement of sale with the respondent (hereinafter referred to as "Mlilo") and the said property was eventually transferred into Mlilo's name.

C The applicant was called upon to give vacant possession of the said stand but refused and/or neglected to do so until the respondent applied for an eviction order which was granted to him on 16 February 2001. The relevant part of the order reads:

> "The respondent together with all those claiming through him be and is D hereby ordered and directed upon being served with this order, to vacate house 13424 Nkulumane Township, Bulawayo within 14 days of the service of this order.
>
> Failing compliance … the Deputy Sheriff of this honourable court be and is hereby authorised and directed to forthwith evict the respondent together with all those claiming through him from the said premises and E to deliver vacant possession of the premises to the applicant."

In pursuance of the said order, the Deputy Sheriff evicted the respondent together with all those who claimed occupation through him on 23 April 2001. However, immediately after the eviction the respondent's wife brought in Alderman Sidanile into the scene. He prevented the respondent from taking F occupation as he claimed that he, being a councillor of the City of Bulawayo, had authority to stop the eviction of the Deputy Sheriff.

On 10 August 2001, the applicant issued out summons out of this court against the respondent and Bulawayo City Council, claiming that the agreement of sale entered into between the respondent and Charity Moyo be declared invalid and also asking for an order that the immovable property in G

dispute be transferred into his name. The facts in this matter are the same as those in the present application.

Subsequent to this action, the applicant made an application on 17 August 2001 for stay of execution of the order of ejectment granted by this court on 16 February 2001. At the hearing, Mr *Nyathi* raised a point *in limine*, being that H the applicant was not properly before this court as he had not complied with

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Cheda J

the eviction order and as such was in contempt of court. He further argued that A if he was indeed in contempt of court the matter should end there and asked me to make a finding. After hearing both arguments, I reserved my ruling and allowed the applicant to be heard on the main action.

I now deal with the arguments raised *in limine*. Mr *Mazibuko* argued that the applicant was not in contempt for these reasons: B

1. that the respondent at one stage withdrew his contempt of court proceedings; and
2. that if any person was in contempt it was the councillor and his actions cannot be visited upon the applicant.

Indeed, it is correct that the respondent attempted to institute contempt of C court proceedings against the applicant and later withdrew. This, however, in my view, does not assist the applicant in his defence, as the contempt is against the order of the court and not against the respondent. The respondent is, however, entitled to institute the said proceedings, as failure by the applicant to comply indeed results in him suffering in the process.

The second point is whether or not the actions of the councillor is legally that D of the applicant. I am constrained to look at the order itself and the order, in my view, should be given its true and ordinary meaning. The order calls upon the applicant and all those who claim under him. In *Baron* v *George* 1994 (2) ZLR 141 (S) at 145C, McNally JA stated:

> "an order of court must be presumed, where it is not ambiguous, to mean E what it says."

In this regard, the order is clear, so much so that even he who runs can read it. The councillor was summoned by the applicant's wife for the sole objective of stopping the eviction and that objective was indeed achieved.

I have to decide therefore whether in light of the above the applicant was in contempt. In our law, failure to comply with a court order, for whatever F reason, renders one contemptuous. In *Lindsay* v *Lindsay (2)* 1995 (1) ZLR 296 (S) at 300D, Gubbay CJ stated:

> "The contempt of the order of this court continues until it is purged by compliance."

I hasten to add that I am strengthened by the above observation of the learned G Chief Justice, which puts paid to all doubts regarding the correct legal position in this regard.

In the present case, after having been served with a warrant of ejectment, the applicant did not appeal against that order, which was the proper course of action to take. He, instead, issued summons against the respondent on the basis of the same facts which were used in the matter where he was ordered H

Cheda J

A to give the respondent vacant possession. He subsequently made this application. In my view, the summons and the present application were purely a ploy to frustrate the court order issued against him. A court order remains in force until it is complied with or set aside on appeal. In as much as it primarily must be complied with, as is what the applicant would have prayed successfully for, this court has equally an interest in its compliance B for the insurance of the protection, upholding of the dignity and its respect.

Our courts take a serious view of anybody who disobeys a court order. The English courts hold the same view, as stated in *Hadkinson* v *Hadkinson* [1952] 2 All ER 567 (CA) at 569C where Romer LJ remarked:

> "It is the plain and unqualified obligation of every person against, or in C respect of, whom an order is made by a competent jurisdiction to obey it unless and until that order is discharged. The uncompromising

> nature of this obligation is shown by the fact it extends even to cases where the person affected by an order believes it to be irregular or even void."

There are two consequences that flow from that obligation. The first is that anyone who disobeys an order of court is in contempt even if he believes it D to be irregular. The second is that no application to court by such a person will be entertained unless he has purged himself of his contempt. Therefore, the disregard of an order of court is a matter of sufficient gravity and as long as it has not been discharged it remains in force whatever the order may be.

Denning LJ (as he then was) in *Hadkinson supra* at 574 had this to say:

> " E 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 considerations of public policy. It is a step which a court will only take when the contempt itself impedes the cause of natural justice and where there is no other effective means of securing his compliance."

It is plainly clear that the courts will not take kindly to litigants who disobey F its orders willy nilly. The court, in my view, has a discretion to either give or refuse audience to the offending party. Such discretion from Denning LJ's point of view ought to be exercised with a view of the consequences of such failure by the litigant. In this case, the applicant frustrated the Deputy Sheriff in the execution of his duties and went further to issue out summons out of this court on the basis of the same facts upon which this court ruled against G him. This, in my view, was a deliberate way of frustrating and impeding the otherwise smooth course of justice. It is in the interest of justice that matters before the courts should reach a certain conclusion, they cannot continue in perpetuity.

I agree with Mr *Nyathi* that the applicant did not comply with the court order H and his hands are therefore not clean. He cannot, therefore, expect the court

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Cheda J

to hear and/or symphathise with him when he has totally ignored its authority. A

In *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H), Gillespie J restated the correct legal position at 177H:

> "Before holding a person to have been in contempt of court, it is necessary to be satisfied both that the order was not complied with and that non-compliance was wilful on the part of the defaulting party." B

In this instance, there is no doubt that there was no compliance by the applicant and he did not dispute it. The question which perhaps is pertinent is whether or not the non-compliance was wilful. In determining this question, I have to take into account the circumstances surrounding this C incident on the date in question:

(a) there was a lawful order;

(b) the Deputy Sheriff had given respondent vacant possession;

(c) the applicant's wife summoned the councillor in order to persuade and/or stop the eviction.

These factors, taken in totality, in my view amount to nothing other than both D unlawfulness and wilfulness on the part of the applicant and those who claim through him.

I, therefore, find that the applicant is in contempt of court and as such cannot be heard. This application is accordingly dismissed with costs. E

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners

Sibusiso Ndlovu, respondent's legal practitioners

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Source:
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S v MUTUKURA 2002 (1) ZLR 165 (H)

Citation	2002 (1) ZLR 165 (H)
Case No	Judgment No. HH-39-02
Court	High Court, Harare
Judge	Chinhengo J & Guvava J
Heard	21 February 2002
Judgment	21 February 2002
Counsel	*G Manyurureni*, for the appellant *N Nemadire*, for the State
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure — *sentence — common-law offences — bribery —* D *attempt to bribe police officer — principles to be observed*

Headnote

The appellant, a 21-year-old conductor of a commuter omnibus, offered a $200 bribe to a policeman who was issuing him with a ticket for a relatively minor traffic offence. He pleaded guilty to and was convicted of bribery and was sentenced to an effective term of imprisonment. On E appeal:

Held, that the trial court had misdirected itself in the following respects:

(a) it had not taken into account the fact that the appellant had pleaded guilty. This is a factor that must always be taken into account.

(b) F it had not considered community service as an alternative to imprisonment. It should have done this since it was considering an effective sentence of less than 12 months.

(c) although bribery is a serious offence and invariably attracts stiff penalties, a distinction in sentencing must be drawn between members of the public and public officers. A firmer view is taken G when the offender is a public officer.

Cases cited

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

S v Buka 1995 (2) ZLR 130 (S)

S v Matombo S-181-89

H *S v Ngara* 1987 (1) ZLR 91 (S)

Guvava J

S v Sidat 1997 (1) ZLR 487 (S) A

S v Sithole 1992 (2) ZLR 110 (H)

Case information

G Manyurureni, for the appellant

N Nemadire, for the State

Judgment

GUVAVA J: The appellant was convicted of bribery. At the trial, he pleaded B guilty to the offence and was sentenced to six months' imprisonment of which two months' imprisonment were suspended on condition of good behaviour.

The appellant appeals against the sentence only.

The facts which gave rise to this offence are as follows. The appellant was C employed by one Murungagono as a conductor. On 8 June 2001, the accused was operating his employer's minibus between Banket and Guruve. At Shingi turn-off he came upon a roadblock manned by members of the Zimbabwe Republic Police. Sergeant Nyamakope then sought to issue the accused with a ticket for operating without a vehicle licence in contravention of the Vehicle Registration and Licensing Act [*Chapter 13:14*]. The accused D produced $200 which he gave to Sgt Nyamakope so that he would not issue him with a ticket, and he was arrested for bribery.

The appellant has attacked the sentence on the basis that the court *a quo* did not take into account a number of factors when it imposed a custodial sentence. He has stated that the court did not consider the appellant's plea of E guilty, the age of the appellant and that he is a first offender. It has also been argued that the court did not consider community service as an alternative to a term of imprisonment. Mr *Manyurureni* submitted that the court did not distinguish the fact that the appellant was not a public officer but an ordinary member of the public when assessing sentence. The State has, in my view, correctly conceded that the trial magistrate misdirected himself as he did not F take into sufficient account the factors outlined above. It is trite that a sentence will only be interfered with if there has been a misdirection by the trial magistrate or if the sentence imposed is so excessive that it induces a sense of shock.

The appellant was a young first offender, being only 21 years old at the time G that he committed the offence. Our courts have repeatedly stressed the need to keep young first offenders out of prison unless the court has no option but to impose a custodial sentence.

There is no indication on the record that the court *a quo* took into account that the appellant pleaded guilty to the offence. In *S* v *Buka* 1995 (2) ZLR 130 (S) at 134H-135A, Ebrahim JA stated that: H

Guvava J

> " A Judicial officers do not always give sufficient weight to where an accused person tenders a plea of guilty to a charge levelled against him. It is important not merely to pay lip service by repeating what one is expected to say when a plea of guilty has been tendered … It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of mitigation and judicial officers should B take proper account of them."

McNally JA in the case of *S* v *Sidat* 1997 (1) ZLR 487 (S) at 493B, reiterated this approach and stressed the importance of taking into account a plea of guilty by an accused. He said:

> "A plea of guilty must be recognised for what it is — a valuable C contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty?"

In this case, if the court had placed due weight to the appellant's plea of guilty D a lesser sentence would have been imposed.

There is also no indication that the court *a quo* considered community service as an alternative to imprisonment in view of the fact that the sentence imposed was below 12 months' imprisonment. In the case of *S* v *Antonio & Ors* 1998 (2) ZLR 64 (H), Chinhengo J said that failure to consider community service where the court is imposing an effective sentence of E 12 months or less is a misdirection. In my view, the court *a quo* misdirected itself in failing, in its reasons for sentence, to properly consider whether or not community service would have been a suitable punishment in the circumstances of this case.

As has been submitted by the respondent, bribery is always a serious offence F and invariably attracts stiff penalties. Bribery and corruption once entrenched are like a cancer in a society and as a general rule an offender once convicted of such an offence is visited with a custodial sentence. In

S v *Matombo* S-181-89 Gubbay JA (as he then was) said of the need to impose stiff penalties for such offences on offenders:

> "This is because it is aimed at depriving society of a good, fair and orderly G administration, and if allowed to go unchecked or inadequately punished would lead to an erosion of confidence on the part of the public."

Nevertheless, each case must be viewed independently as circumstances are different in each case.

Where a member of the public is an offender, a distinction in sentencing must H be drawn from that of a public officer. Our courts have always made that

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Guvava J

distinction and taken a firmer view of offenders who are public servants. A In *S* v *Ngara* 1987 (1) ZLR 91 (S) at 101B, it was stated:

> "Any form of corruption resorted to by government servants, especially police officers whose duty it is to uphold the law and by their conduct set an example of impeccable honestly and integrity, is rightly viewed by the courts with abhorrence." B

In the case of *S* v *Sithole* 1992 (2) ZLR 110 (H), Smith J reviewed a number of cases where the offenders were members of the public. Most of the sentences were reduced to fines because the court found that their moral blameworthiness was low and that there were a number of mitigating features. This case falls in this category. The appellant was only 21 years old and a first offender who pleaded guilty. There is no evidence on the record C that the offence was premeditated or that he persisted in seeking to bribe the police officer. It appears that the money was produced on the spur of the moment in order to stop the police officer from issuing a ticket for failing to license his employer's motor vehicle. The offence itself which he was seeking to avoid was not a serious one. The amount involved was only $200.

In my view, although a term of imprisonment was not called for due to the D factors mentioned above, the court must impose a sentence which reflects the seriousness and abhorance with which it views offences of this nature.

Accordingly, the appeal against the sentence imposed by the court a *quo* succeeds. The sentence is set aside and substituted as follows:

> "$3 000 or in default of payment, 2 months' imprisonment, in addition, E 3 months' imprisonment is wholly suspended for 5 years on condition that the appellant does not within that period commit an offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine." F

CHINHENGO J concurred.

Guni, Wabatagore & Co, appellant's legal practitioners

Attorney-General's Office, defendant's legal practitioners G

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Source:
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S v MUNUKWA 2002 (1) ZLR 169 (H)

Citation 2002 (1) ZLR 169 (H)

Case No Judgment No. HH-35-02

Court High Court, Harare

Judge	Chinhengo J & Guvava J
Heard	21 February 2002
Judgment	27 February 2002
Counsel	*A Nyamayaro*, for the appellant *M Nemadire*, for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure (sentence) — *general principles — youthful offenders —* D *need to treat differently from adult offenders — need to avoid imprisonment*

Headnote

The appellant was 18 years old when he was convicted of attempted rape and sentenced to 3 years' imprisonment, of which 12 months were conditionally suspended. He appealed against both conviction and sentence but the appeal against conviction was not persisted with. E The appellant had virtually admitted the offence during cross-examination.

Held, that the sentencing of young offenders is a particularly difficult task. The tendency to impose long prison sentences is the easiest option. This tendency is supported by the traditional and less enlightened methods of treating or punishing young offenders.

F *Held,* further, that offenders in the age group of 18 to 21 years are young offenders who, depending on the offence of which they are convicted and the circumstances thereof, must generally be treated differently from adult offenders. In this country, there are advanced, modern and appropriate provisions for the treatment of young offenders, including G being dealt with by a juvenile court in terms of the Children's Protection and Adoption Act; placement in a training institute; and placement under the supervision of a probation officer. Judicial officers are unfortunately lagging behind in their treatment of young offenders and have not acclimatised themselves to these alternative methods of treating youthful offenders. The routine imprisonment of H such offenders should be avoided.

2002 (1) ZLR p170

Chinhengo J

Held, further, that the magistrate did not accord due weight to all the A mitigatory offences. The ability to assess an appropriate sentence on the particular facts of each case is an attribute which every judicial officer must necessarily have. In this case, a custodial sentence was not appropriate, but nor was a fine. Community service was a suitable option, and the sentence would be altered accordingly. B

Cases cited

S v Dube 1996 (1) ZLR 77 (S)

S v Tendai & Anor (Juveniles) 1998 (2) ZLR 423 (H)

S v Dube 2000 (1) ZLR 386 (H)

Legislation considered C

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 351, 352

Case information

A Nyamayaro, for the appellant

M Nemadire, for the respondent D

Judgment

CHINHENGO J: The appellant was about 18 years old when he was convicted on 2 April 2001 of attempted rape and sentenced to three years' imprisonment of which 12 months were suspended for five years on the condition that during that period he did not commit any offence "involving statutory rape" or rape for which he would be sentenced to imprisonment E without the option of a fine.

He appealed against both conviction and sentence. Although the notice of appeal and the heads of argument addressed the question of conviction, the appellant's legal practitioner stated, at the hearing of the appeal, that he was not persisting with the appeal against conviction. This concession was merited because the evidence on the record was quite supportive of the F conviction, as the appellant had virtually pleaded guilty to the charge. Under cross-examination, he admitted that he had attempted to have sexual intercourse with the complainant without her consent. The only question which remained to be determined on appeal was the appropriateness of the sentence. G

It is necessary to recount the facts and the evidence in order to make a proper determination whether this court can interfere with the sentence.

The complainant was 15 years old. She was sent from her home to a nearby shop to buy some eggs. After buying the eggs, she walked back to her home. At the gate to the shop premises, she met the appellant, who was in the company of a friend. The appellant is related to the complainant. They live H

A in the same village. They knew each other. The appellant and his friend walked with the complainant for a short distance, then the appellant's friend went away, leaving the appellant and the complainant walking together in the direction of the complainant's home. The appellant proposed love to the complainant. His proposal was turned down. Once they were walking through a crop field, the appellant tripped the complainant and she fell to the B ground. They struggled on the ground. The complainant fought back and forcefully prodded the appellant in the rib-cage area. The appellant let go. The complainant stood up and removed some grass from the back of her head and from her buttocks. The appellant had, during the struggle, pulled down his trousers, and lain on top of the complainant. He had tried to remove or pull down the complainant's underwear (presumably, panties) but had been C unsuccessful as the complainant held onto it. When he was forcefully prodded with an elbow on the side of the rib-cage, he had let go and the appellant had stood up. It is then that she removed the grass from her buttocks. She asked for the eggs which she had bought at the shop and the appellant pointed them out to her. The complainant stated in her evidence that a watery D substance fell on her thighs during the struggle. There was, in my view, sufficient evidence that the appellant had attempted to rape the complainant. See *S* v *Dube* 1996 (1) ZLR 77 (S) at 79H-81B.

When the complainant got home, she reported the attempted rape to her paternal aunt, who then advised the complainant's mother. The matter was discussed with the complainant's parents, during which discussion the E appellant apologised for his conduct and asked for forgiveness. The forgiveness was not forthcoming. The complainant's mother reported the matter to the police.

It is significant in assessing the appropriateness of the sentence to have regard to the following factors: F

(i) The attempted rape was preceded by a proposal which was turned down mainly because the two were related.

(ii) The appellant tried to force himself onto the complainant but on meeting with equal or greater force in resistance he did not pursue his purpose. He did not use greater countervailing force to overcome the appellant's resistance. G

(iii) He did not use greater force or persist in his lascivious conduct. This is borne out by the fact that when he let go, the complainant stood up, removed the grass from her back, asked for

her eggs and, after they were pointed out to her, walked away to her home.

(iv) When the appellant was confronted about his conduct he apologised and H asked for forgiveness.

2002 (1) ZLR p172

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(v) At the trial he pleaded not guilty but during cross-examination he A virtually admitted his wrongdoing.

The sentencing of young offenders is a particularly difficult task for any judicial officer. The tendency to impose a long sentence of imprisonment for an offence of this kind is perhaps the easiest option available to a judicial officer. This tendency, unfortunately, is supported by the traditional and B less enlightened methods of treating or punishing young offenders. The Criminal Procedure and Evidence Act [*Chapter 9:07*] recognises that a person in the age bracket of the appellant is a young offender. It provides in s 351(2) that —

> "(2) Any court before which a person under the age of nineteen years has been convicted of any offence may, instead of imposing a punishment C of a fine or imprisonment for that offence, subject to subsection (1) of section *three hundred and thirty seven* —
>
> (a) order that he shall be taken before a juvenile court and dealt with in terms of the Children's Protection and Adoption Act [*Chapter 5:06*]; or D
>
> (b) after ascertaining from the Minister responsible for social welfare that accommodation is available, order that he shall be placed in a training institute in Zimbabwe or in a reform school in the Republic of South Africa for the period specified in subsection (1) of section *three hundred and fifty two*."

Further recognition of certain offenders as youthful and deserving of a E different treatment is made in s 351(3) of the Criminal Procedure and Evidence Act in respect of persons who are nineteen years of age or more but who are under twenty-one years of age and who have been convicted of any offence other than murder, treason or rape. This category of offender may, instead of being imprisoned or fined for the offence of which they stand F convicted, be placed under the supervision of a probation officer or any suitable person designated in the order of court for a period specified in s 352(1) aforesaid, that they shall reside as directed by the court from time to time or they shall be placed in a training institute in Zimbabwe or in a reform school in the Republic of South Africa for such period as may be specified. G

The Criminal Procedure and Evidence Act in ss 351 and 352 clearly acknowledges that offenders in the age group of 18 to 21 years are young offenders who, depending on the offence of which they are convicted and the circumstances thereof, must generally be treated differently from adult offenders. A comprehensive analysis of the modern approach to the treatment of juvenile or young offenders was made in H *S* v *Tendai & Anor* 1998 (2) ZLR

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423 (H). A In that case, Gillespie J strongly disapproved of routine imprisonment of young offenders. He stated at 432F-433B as follows:

> "The next most frequently imposed sentence — imprisonment — combines retribution with temporary prevention. It may be thought to involve a degree of deterrence although that should be the subject of some doubt. None of these address the primary objective of rehabilitation. In the B absence of programmes of counselling and management within the prison environment, no degree of rehabilitation can be hoped for. An adult prison is completely unsuitable for a juvenile. A prison which has as its inmates only young adults might be less objectionable, but cannot be as well-calculated as a juvenile 'boot camp', combining enforced C discipline with education, training and counselling. Actual imprisonment does at least have the advantage that the offender will temporarily be removed from society. Nevertheless, his incarceration will end. And it will end with the release into the community without any further supervision of an offender whose carnal appetite can be expected to have been heightened by long denial. Imprisonment of young first offenders D is, at best, a necessary evil to be imposed as a last resort."

The provisions of the Criminal Procedure and Evidence Act which I have cited clearly indicate that we have in this country advanced, modern and appropriate provisions for the treatment of young offenders. Judicial officers are unfortunately lagging behind in their treatment of young offenders and E have not acclimatised to these alternative methods of treating youthful offenders. A reading of *Tendai*'s case provides good guidance to judicial officers in matters of this kind. At 436C of *Tendai*

supra, Gillespie J called for the establishment of a body to administer a juvenile offender management programme. He said:

> " a national committee on community service was established by the F Ministry of Justice in order to provide coordination and management of resources towards implementing the community service programme. A similar body to administer a juvenile offender management programme would be desirable. I would suggest that the time has come for the establishment of a national committee coordinating the management of juvenile offenders, similar to the national committee on community G service and with comparable objects and functions."

I must add my voice to this call and strongly urge the Ministry of Justice to set up such a body.

The appellant's grounds of appeal were that the magistrate did not accord due weight to the mitigatory factors in this case, in particular to the fact that the H appellant was a youthful first offender. There are, in addition, other factors

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which, in my view, go to mitigate the sentence. The amount of violence A applied by the appellant to achieve his purpose was, in the circumstances, minimal. He tripped the complainant and tried to force himself upon her. When he met with resistance he did not persist. After the attempted rape, the appellant showed the complainant where her eggs were. He apologised to the complainant's parents and sought their forgiveness. Unfortunately, in assessing B the appropriate punishment, the magistrate adopted a tariff approach to sentencing. Although the magistrate accepted that the appellant was a youthful first offender who was "genuinely contrite", he nonetheless found that his conduct was aggravated by the fact that had the complainant not "vigorously" resisted, he would have achieved his purpose. That may have been so, but sight should not have been lost of the appellant's disinclination C to use greater and persistent force to achieve his aim. The magistrate found as an aggravating factor that the appellant and the complainant were related. This factor is not, in my view, relevant at all. The magistrate then highlighted the adverse effect on the complainant of the appellant's conduct — traumatisation. He highlighted the prevalence of the offence and its gravity. It is well worth remembering what was stated in D *S* v *Dube* 2000 (1) ZLR 386 (H) at 387D that —

> "whenever a sentencer is obliged to have regard to guidelines set by the superior courts, it becomes important to have proper regard to the particular facts of each case. The tariff approach has the advantage that it provides a degree of uniformity, but an inflexible approach may lead E to injustice."

The ability to assess an appropriate sentence on the particular facts of the case before him is an attribute which every judicial officer must necessarily have. Every case is different from the other and that difference must be reflected in the sentence which a court imposes. In *Tendai*'s case *supra*, the sentences F which had been imposed on the juvenile offenders concerned by the lower courts were severely criticised. The court stated that it was wrong in principle to sentence a juvenile as an adult and that the court must be exceedingly slow to do so. There the juveniles concerned were convicted of actual rape of very young girls. The younger offender Tendai (aged 16 years) had been sentenced to corporal punishment and to a wholly suspended prison term of four years. G The older offender, Fungayi, was sentenced to six years' imprisonment of which 2 1_2 years were conditionally suspended. The learned judge was unable to interfere with Tendai's sentence but he withheld his certificate because the sentence had not accomplished any desirable purpose, in particular, the objective of rehabilitation. In *Fungayi*'s case, he set aside the sentence and remitted the matter to the court *a quo* to pass sentence afresh after receiving H

A and taking into account reports, which he directed had to be sought, of an educational psychologist and of a probation officer. The remittal was ordered in the hope that a less severe sentence would be passed on reconsideration. It is important to note that *Tendai supra* was concerned with the actual rape of a 9-year-old girl by Tendai who was sixteen years old and the actual rape of an 11-year-old girl by Fungayi who was seventeen years old and was also B related to her. The present case, on the contrary, is concerned with the attempted rape by an 18-year-old youth of a 15-year-old girl. By itself, this does not make the offence any less serious but it is a sufficiently strong factor not only for the purposes of distinguishing the present case from Tendai's but also for the purposes of determining the appropriate sentence, which C comparatively, must be lighter.

The facts in the present case are quite similar to the facts in *S* v *Dube* 1996 (1) ZLR 77 (S). In that case, the appellant, an adult male, had made a proposition to the complainant which was rejected. He had seized the complainant, thrown her to the ground and tried to remove her pants but he then got up and desisted from further attack because he discovered that she D was menstruating. The Supreme Court set aside a sentence of imprisonment of 3 years and substituted it with one of imprisonment for 3 years of which one year was suspended for 3 years. The court held that it was desirable to suspend a portion of the sentence because of the "rehabilitative and salutary effect" of such a suspension. The court, it must be emphasised, was dealing E with an adult male. That distinguishes that case from the present case where a youthful offender is the subject. The respondent's counsel conceded that this court may interfere with the sentence. I consider that the age of the appellant, the absence of persistent violence in his conduct, the genuine contrition, and that he is a first offender are weighty factors in any judicious assessment of the appropriate sentence. The cases which I have cited are solid F precedent for the proposition that the imprisonment of a youthful offender such as the appellant would not serve any useful purpose. A custodial sentence is not appropriate. The appellant must be given an opportunity to reform and rehabilitate. His family members will, it is hoped, assist him in his reformation and rehabilitation.

G A fine is not appropriate for such an offence. It may be viewed as a trivilisation of what is really a serious offence. But since imprisonment is equally inappropriate for the reasons I have outlined above (see *Tendai supra*), I consider that community service would, in the circumstances of this case, be quite appropriate. It seems that the appellant resides in the same village as the complainant and that he may have a stable family background. H He had completed 'O' levels the year preceding that in which he committed

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Chinhengo J

the offence. I have no doubt that a placement can be found for him at a suitable A institution for him to do community service work. But I will have to remit the matter to the court *a quo* for it to establish a suitable institution at which the appellant will do the community work.

In the result, the appeal aga inst conviction is dismissed. The appeal against sentence is allowed and the sentence imposed by the court *a quo* is set aside B and substituted with the following:

1. Twenty four months' imprisonment of which —
   (a) twelve months are suspended for 3 years on condition that during that period the appellant is not convicted of an offence of a sexual nature for which he is sentenced to imprisonment without the C option of a fine;
   (b) the remaining twelve months are suspended on condition that the appellant performs 420 hours of community service at such institution and on such conditions as the court *a quo* shall specify.
2. The matter is remitted to the court *a quo* to act in terms of paragraph 1(b) hereof. D

GUVAVA J concurred.

Tuso & Partners, appellant's legal practitioners E

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

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BITI & ANOR v MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS & ANOR 2002 (1) ZLR 177 (S)

Citation	2002 (1) ZLR 177 (S)
Case No	Judgment No. S-10-02
Court	Supreme Court, Harare
Judge	Ebrahim JA, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	27 February 2002
Judgment	27 February 2002
Counsel	*A P de Bourbon* SC, for the applicants *M Majuru*, for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

D **Constitutional law** — *Parliament — Standing Orders — nature and effect — when Parliament may suspend Standing Orders and rescind its motions and resolutions — power and duty of courts to determine lawfulness of Parliament's actions, including lawfulness of procedures adopted for passage of Bills*

Headnote

E The applicants applied to the Supreme Court in terms of s 24 of the Constitution for a declaration that a Bill, subsequently promulgated as an Act, had not been lawfully enacted by Parliament. The Bill had been negatived at its third reading but two days later, on the motion of the Minister responsible for the Bill, Parliament resolved to suspend the F Standing Order which prohibited the introduction of the same Bill twice in the same session, and resolved to rescind its decision on the Bill's third reading. The Minister then moved again that the Bill be read a third time, and this time it was passed by the House. The applicants, a Member of Parliament and his political party, complained that the G manner in which the Bill was passed was unlawful and failed to afford them due process and protection of law.

Held, that s 18 of the Constitution guarantees all persons, inside and outside Parliament, the right to protection of the law, which includes the right to due process. The application was therefore properly before the Supreme Court in terms of s 24 of the Constitution.

H *Held*, further, that Parliament's Standing Orders, being made in terms of

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s 57 of the Constitution, constitute legislation which must be obeyed A and followed. Parliament cannot suspend them for the expedience of a party. It is required to comply with its own laws regarding the enactment of legislation.

Held, further, that Standing Order 127, which prohibits the introduction in Parliament of a Bill which is substantially the same as another Bill that B has been introduced in the same session, embodies an established convention of the British Parliament which, through s 3 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], is binding on the Zimbabwean Parliament.

Held, further, that it is established parliamentary practice for Parliament's power to rescind motions and resolutions, embodied in Standing C Order 69, to be used very sparingly. The power cannot be used merely to override a negative vote of the House. In any event, the Standing Order does not apply to public Bills.

Held, further, that even if Standing Order 127 could have been suspended, the suspension would not have allowed debate on the Bill to be resumed at the point where it was negatived: the Bill would have had to be D reintroduced and taken through all the various stages for the passage of public Bills through Parliament.

Held, further, that Zimbabwe is a constitutional democracy in which it is for the courts, not Parliament, to determine the lawfulness of actions of bodies, including Parliament. The Supreme Court has not only the E power, but the duty, to determine whether or not legislation has been enacted as required by the Constitution. Parliament can do only what is authorised by law — specifically by the Constitution.

Held, further (Malaba JA dissenting), that the manner in which the third reading of the Bill was done was contrary to the Constitution and the legislation thereunder, and accordingly the resultant Act was not validly F enacted.

Cases cited

Attorney-General of NSW & Ors v Trethowan & Ors [1932] AC 526 (PC)

Bribery Commissioners v Ranasinghe [1965] AC 172 (PC); [1964] 2 All G ER 785 (PC)

Chairman, PSC & Ors v Zimbabwe Teachers' Association & Ors 1996 (1) ZLR 637 (S); 1997 (1) SA 2109 (ZS)

De Lille & Anor v Speaker of the National Assembly 1998 (3) SA 430 (C)

Executive Council, Western Cape Legislature, & Ors v President of RSA & Ors 1995 (4) SA 877 (CC) H

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A *Harris & Ors v Minister of the Interior & Anor* 1952 (2) SA 428 (A)

Mandirwhe v Minister of State 1986 (1) ZLR 1 (S)

Marumahoko v Chairman of the Public Service Commission & Anor 1991 (1) ZLR 27 (H)

Minister of the Interior & Anor v Harris & Ors 1952 (4) SA 769 (A)

President of RSA & Anor v Hugo 1997 (4) SA 1 (CC)

R v Mercure [1988] 1 SCR 234

B *Re Manitoba Language Rights* [1985] 1 SCR 721

Smith v Mutasa NO & Anor 1989 (3) ZLR 183 (S)

Sonderup v Tondelli & Anor 2001 (1) SA 1171 (CC)

Speaker of the National Assembly v De Lille & Anor 1999 (4) SA 863 (SCA)

C *Special Reference No. 1 of 1964* [1965] 1 SCR 413

Legislation considered

Constitution of Zimbabwe 1980, ss 18, 51(3a) & (3b) & 57 and Schedule 4

Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], s 3

D Standing Orders of Parliament, Nos. 69 & 127

Case information

A P de Bourbon SC, for the applicants

M Majuru, for the respondents

Judgment

E **EBRAHIM JA**: The applicants sought the following order:

"1. THAT the rights of the applicants as contained in section 18(1) of (the Constitution of Zimbabwe) have been breached.

2. THAT the General Laws Amendment Act (No. 2 of 2002) was not lawfully enacted by Parliament.

F Consequently,

IT IS ORDERED:

1. THAT the General Laws Amendment Act (No. 2 of 2002) is illegal and of no force or effect.
2. THAT the first respondent shall pay the applicants' costs of suit."

G The respondents submitted:

"… that this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regard to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act No. 2 of 2002).

H It is respectfully submitted that even if such competency were to be

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assumed, the passage of the Bill was wholly consistent with Constitutional A provisions and Parliamentary Standing Orders."

At the conclusion of the hearing, the court made an order effectively as prayed. These are the reasons for that order.

FACTUAL BACKGROUND

The undisputed facts are that the General Laws Amendment Bill was B introduced into Parliament and was the subject of the usual procedures within Parliament, that is to say, a first reading, a second reading and committal to the committee of the whole House. During that process, it was referred to the Parliamentary Legal Committee.

On 8 January 2002, the Bill was re-committed to the committee of the whole C House for further amendments to be made. Once these amendments had been agreed, the Bill was then reported to the House, and referred again to the Parliamentary Legal Committee. Subsequently, that same day, a non-adverse report was received from the Parliamentary Legal Committee. The first respondent then moved the third reading of the Bill, but when a division was called, it was defeated by 36 votes to 24. D

On 9 January 2002, the first respondent gave notice that he would move a motion that the House rescind its decision on the third reading in terms of Standing Order 69. In addition, he gave notice that he would move to suspend the provisions of Standing Order 127 in respect of the General Laws Amendment Bill. He later emphasised that he was acting also in terms of E Standing Order 190, which provides as follows:

"(1) Save as is provided in Standing Order No. 21, any Standing or Sessional Order or Orders of the House may only be suspended upon motion moved after notice: …"

On 10 January 2002, the two motions by the first respondent were debated F by Parliament, both were affirmed, and a new third reading of the General Laws Amendment Bill took place. On this occasion, the third reading was approved by a vote of 62 to 49.

On 4 February 2002, the General Laws Amendment Act, 2002 (Act 2 of 2002) was promulgated. G

The applicants complain that the manner in which the third reading of the General Laws Amendment Bill was undertaken for a second time by Parliament failed to afford them due process and protection of law and failed to follow correct legal processes, in that the provisions of the Constitution of Zimbabwe and Standing Orders were breached, and that, therefore, the General Laws Amendment Bill was not properly passed by Parliament, and H

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A is invalid legislation. In this regard, their complaints in terms of the papers filed by them are:

"… that the purported amendments to the Electoral Act are of major importance and are having, and if they are to be continued to be implemented, will continue to have a crucial and decisive impact on the forthcoming Presidential election.

B … that there is a real danger that the impact of these amendments on the forthcoming Presidential election will be to completely undermine the validity and legitimacy of the election and to deny the

electorate their constitutional right to elect a President of their choice.

… that the various amendments made by the purported General Laws C Amendment Act to the Electoral Act … in terms of the new section 14B(1) of the Electoral Act, monitors have substantial and far-reaching powers.

… that the appointment of monitors is restricted to members of the Public Service.

… that this Government (has) for a long time packed the Public Service D with their own supporters and they will therefore act in a biased manner at the forthcoming Presidential election in favour of their candidate. It is of course very important for them to act as impartial monitors."

There were also allegations made relating to the appointment of the Observers Accreditation Committee, the issue of voter education and that some of the amendments had done away with the "fundamental concept of universal E adult suffrage".

It seems to me that these assertions justify that the Court sit as a Constitutional Court to determine the issue whether s 18(1) of the Constitution has been breached. It follows that I hold that the applicants have satisfied the provisions of s 24(1) of the Constitution, which is the provision which gives F them a right to seek redress before this court.

Mr *de Bourbon* submitted that in terms of s 3 of the Constitution, the Constitution is the supreme law of Zimbabwe, and any law inconsistent with the Constitution is void. Section 3 provides:

"This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of G the inconsistency, be void."

Section 18 of the Constitution guarantees all persons, whether inside or outside Parliament, the right to the protection of the law, which includes the right to due process. In this regard, see *Marumahoko v Chairman of the Public Service Commission & Anor* 1991 (1) ZLR 27 (H) at 42-44, where the H following passages appear:

2002 (1) ZLR p182

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"AMERICAN AUTHORITIES A

The Constitution of the US of America under the Fifth Amendment provides —

'No person shall … be deprived of life, liberty, or property, without due process of law …'

and under the Fourteenth Amendment in Section 1 specifies — B

'… No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.'

It was only well after the Civil War that the US Supreme Court began C significant developments under these Amendments. The 'due process' clause governed both procedure and also what came to be known as 'substantive due process'. At first, on procedural content the US Supreme Court in *Don* v *Hoboken Land and Improvement Co* (1856) 18 How 272, 15 L Ed 372 (US Sup Ct) spoke of due process of law as having the same meaning as 'by the law of the land' in the English Magna Carta and D sought guidance from English practice. Subsequently after *Hurtado* v *California* (1884) 110 US 516, 28 L Ed (US Sup Ct) it was not English practice itself but 'principles of liberty and justice' that determined due process. It was over quite some time that the US Supreme Court under substantive due process evolved what formed constitutionally protected E 'liberty' and 'property' under these Amendments. Beginning with *Goldberg* v *Kelly* (1970) 397 US 254, 25 L Ed 2d 287 (US Sup Ct) the US Supreme Court acknowledged the rise of government as an important source of wealth that dispensed money, benefits, services, contracts, franchises and licences which usually also involved claims by individuals and so to adjudication. In a number of cases involving claims, the US F Supreme Court upheld that the due process mandated some form of adjudicatory hearings and dealt at length with the kind of hearings that was required under those Amendments — *Perry* v *Sindermann (1972*) 408 US 593, 33 L Ed 2d 570 (US Sup Ct).

In *Board of Regents of State Colleges* v *Roth* (1972) 408 US 564, 33 L G Ed 2d 548 (US Sup Ct), Stewart J at 572 pronounced on 'liberty' and 'property' in the following manner:

'"Liberty" and "property" are broad and majestic terms … the court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights. H

2002 (1) ZLR p183

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A The court has also made clear that the property interests protected by procedural due process extends well beyond actual ownership of real estate, chattels, or money. By the same token, the court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by criminal process … For the words "liberty" and "property" in the Due Process Clause of the 14th Amendment must be B given some meaning.

While this court has not attempted to define with exactness the liberty … guaranteed (by the 14th Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any C of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognised … as essential to the orderly pursuit of happiness by free men. *Meyer* v *Nebraska* 262 US 390, 399. In a D Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed … There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated.'

At the same time, the equal protection clause of the Fourteenth Amendment was also touched. Initially, it merely played a marginal role in judicial E intervention — *Railway Express Agency* v *New York* (1949) 336 US 106, 93 L Ed 533 (US Sup Ct). But during the era of the Warren Court a dynamic period of equal protection scrutiny unfolded with the US Supreme Court identifying appropriate areas for intervention — *Griffin* v *Illinois* (1956) 351 US 12, 100 L Ed 891 (US Sup Ct). It was under the 'fundamental rights or interests' element, which allowed the US Supreme F Court, just as in the case of substantive due process, to articulate that certain protected constitutional rights could be derived directly from the equal protection clause — *Douglas* v *California* (1963) 372 US 353, 9 L Ed 2d 811 (US Sup Ct).

SCOPE OF SECTION 18 OF THE ZIMBABWE CONSTITUTION

G It is accepted that the notion of 'fair hearing' includes 'procedural fairness' and from this the courts have generally formulated a sort of code of fair-play akin in some measure to the due process of the US Constitution. It was by speaking of natural justice, as found in the two Latin maxims *audi alteram partem* ('hear the other side') and *nemo judex in causa sua* ('no man a judge in his own cause'), that the courts H imposed upon other adjudicating authorities the duty to act fairly. The

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form that natural justice took varied, as was clearly recognised by A Tucker LJ in *Russell* v *Duke of Norfolk & Ors* [1949] 1 All ER 109 (CA) at 188E, when he said:

'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.'

In other words, it is true that under the maxims *audi alteram partem* and B *nemo judex in causa sua* adjudicating bodies did not necessarily have to adopt all those important principles so fundamental to court proceedings — *Jeewa* v *Dönges NO & Ors* 1950 (3) SA 414 (A) at 422-3.

It is correctly pointed out that the words 'civil rights' are wide and their ambit is not easily defined — *Cole* v *Commonwealth of Australia* (1961) C 106 CLR 653 (HC of Aust) at 656-657. Suffice to say that 'civil rights and obligations' would certainly include, not only, the prejudicial effect on 'property' and 'liberty' set forth by Stewart J in *Board of Regents* v *Roth supra*, but also, the recently extended use of what is said to be the reasonable and legitimate expectations of the aggrieved person — *Administrator, Transvaal & Ors* v *Traub & Ors* 1989 (4) SA 731 (A)." D

See also *Mandirwhe* v *Minister of State* 1986 (1) ZLR 1 (S), where Baron JA at 7F-8A stated:

"We arrive at the same result if we consider simply the general structure of s 24 and the proper construction of subs (2) in the context of that structure. The purpose of s 24 is to provide, in a proper case, speedy E access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. F And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division without protracted litigation. Subsection (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been G (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division."

And see also *Smith* v *Mutasa NO & Anor* 1989 (3) ZLR 183 (S) at 208B, where Dumbutshena CJ stated:

"The independence enjoyed by Parliament in the control of its internal H

Ebrahim JA

A affairs does not prevent its Members from defending their fundamental rights should they believe that Parliament has wrongfully abrogated or infringed them. Section 24 of the Constitution of Zimbabwe enables such Members to apply to the Supreme Court for redress."

I am satisfied therefore that this matter is properly before this court.

B The Constitution creates Parliament as the law-making body in Zimbabwe. Schedule 4 to the Constitution lays down in broad terms the procedures regarding the introduction of Bills, motions and petitions in Parliament. The Constitution distinguishes between a Bill and a motion. In this regard, see Schedule 4, which provides:

"PROCEDURE WITH REGARD TO BILLS AND OTHER MATTERS C IN PARLIAMENT —

1. Introduction of Bills, motions and petitions

(1) Subject to the provisions of this Constitution and Standing Orders —

(a) any member of Parliament may introduce any Bill into or move any D motion for debate in or present any petition to Parliament;

(b) a Vice-President, Minister or Deputy Minister may introduce any Bill into or move any motion for debate in or present any petition to Parliament.

(2) Except on the recommendation of a Vice-President, Minister or E Deputy Minister, Parliament shall not —

(a) proceed upon any Bill, including any amendment to a Bill, which, in the opinion of the Speaker, makes provision for any of the following matters —

(i) imposing or increasing any tax; F

(ii) imposing or increasing any charge on the Consolidated Revenue Fund or other public funds of the State or varying any such charge otherwise than by reducing it;

(iii) compounding or remitting any debt due to the State or condoning any failure to collect taxes; G

(iv) authorising the making or raising of any loan by the State;

(v) condoning unauthorised expenditure;

(b) proceed upon any motion, including any amendment to a motion, the effect of which, in the opinion of the Speaker, is that provision should be made for any of the matters specified in subparagraph (a); H or

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(c) receive any petition which, in the opinion of the Speaker, requests A that provision be made for any of the matters specified in subparagraph (a).

(3) The provisions of subparagraph (2) shall not apply to any Bill introduced, motion or amendment moved or petition presented by a Vice-President, Minister or Deputy Minister." B

By virtue of s 57 of the Constitution, it is clear Standing Orders have constitutional standing. This section provides as follows:

"57 Standing Orders

(1) Subject to the provisions of this Constitution and any other law, Parliament may make Standing Orders with respect to — C

(a) the passing of Bills;

(b) presiding over Parliament;

(c) any matter in connection with which Standing Orders are required to be made by this Constitution; and

(d) generally with respect to the regulation and orderly conduct of D proceedings and business in Parliament.

(2) Standing Orders made in terms of subsection (1) shall provide for the appointment, membership and functions of a Committee on Standing Rules and Orders."

There is, therefore, merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much E as any other person or institution in Zimbabwe.

Because Standing Orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as "rules of a club". Standing Orders constitute legislation which must be obeyed and followed. F

I turn now to deal with Standing Order 127, which provides as follows:

> "Same Bill may not be twice offered in same session
>
> 127. *Subject to the provisions of the Constitution*, no Bill shall be introduced which is of the same substance as some other Bill which has been introduced during the same session and which has not been G withdrawn" (emphasis added).

The reference therein to the Constitution clearly is a reference to subss 51(3a) and (3b) of the Constitution. They provide:

> "(3a) Where the President withholds his assent to a Bill, the Bill shall be returned to Parliament and, subject to the provisions of subsection (3b), the Bill shall not again be presented for assent. H

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> " A (3b) If, within six months after a Bill has been returned to Parliament in terms of subsection (3a), Parliament resolves upon a motion supported by the votes of not less than two-thirds of all the members of Parliament that the Bill should again be presented to the President for assent, the Bill shall be so presented and, on such presentation, the President shall assent to the Bill within twenty-one days of the presentation, unless he sooner B dissolves Parliament."

It seems to me that the only Bill that may be re-introduced into Parliament during the same session is one where the President has withheld his assent to the Bill.

Standing Order 127 is based on the convention in the United Kingdom to the C same effect, see p 499 of Erskine May *Parliamentary Practice* 22 ed, where appears the following passage:

> "***Bills with the same purpose as other bills of the same session***. There is no general rule or custom which restrains the *presentation* of two or more bills relating to the same subject, and containing similar provisions. *But* D *if a decision of the House has already been taken on one such bill, for example, if the bill has been given or refused a second reading, the other is not proceeded with if it contains substantially the same provisions; nor could such a bill be introduced on a motion for leave (see p 493). On the same principle, in July 1994 the House agreed that the presentation of a bill substantially the same as one for which leave had previously been* E *refused under the 'ten-minute' rule should be prohibited.* The Speaker has declined to propose the question for the second reading of a bill which would have had the same effect as a clause of a bill which had already received a second reading. Similarly, a new clause offered at the consideration stage of one bill was ruled out of order when it substantially repeated the provisions of another bill of the same session, the F consideration stage of which had been adjourned. But if a bill is withdrawn, after having made progress, another bill with the same objects may be proceeded with" (emphasis added).

There is therefore merit in the submission that Parliament, having set the rules in terms of s 57 of the Constitution, cannot suspend those rules for the G expedience of a party. Not only does Standing Order 127 embody a convention, it is the rule or law applicable by virtue of s 57(1)(a) of the Constitution in relation to the passing of Bills.

Standing Order 69 reads as follows:

> "Proceedings may be expunged, discharged or rescinded
>
> H 69. The House may, by resolution after notice, direct that any *motion*

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> submitted or any resolution or other vote, or entry in the Journals, A be expunged or discharged from the Order Paper or rescinded during the same session, or at any time thereafter. Such *motion* shall be moved only by a Vice-President, a Minister or by the member who had been in charge of the business concerned" (emphasis added). B

It is clear that this provision refers only to *motions.* It is made in terms of s 57(1)(d) of the Constitution, and finds its place in Standing Orders in relation to what is termed *Public Business*, Standing Orders 31-81, and not in relation to *Public Bills*, Standing Orders 101-128.

Insofar as this rule applies in the House of Commons, Erskine May s*upra* at p 368 states: C

> "The power of rescission has only been exercised in the case of a resolution resulting from a substantive motion, and even then sparingly. It cannot be exercised merely to override a vote of the House, such as a negative vote. *Proposing a negatived question a second time for the decision of the House, would be, as stated earlier, contrary to the* D *established practice of Parliament*" (emphasis added).

At p 370, the learned editors state:

> "The reason why motions for open rescission are so rare and the rules of procedure carefully guarded against the indirect rescission of votes, is that both Houses instinctively realise that *parliamentary government* E *requires the majority to abide by a decision regularly come to, however unexpected, and that it is unfair to resort to methods, whether direct or indirect, to reverse such a decision*. The practice, resulting from this feeling, is essentially a safeguard for the rights of the minority, and a contrary practice is not normally resorted to, unless in the circumstances of a particular case those rights are in no way threatened" (emphasis F added).

The reasoning of the learned editors is clear. Once Parliament has taken a vote, that vote cannot be rescinded simply by changing allegiances or changing numbers in the House in order to reverse the decision.

In any event, I agree that Standing Order 69 does not deal with Bills. It is a G matter legislated by Parliament "with respect to the *regulation and orderly conduct of proceedings and business in Parliament*", in terms of s 57(1)(d) of the Constitution. It deals with *motions, not with the passing of Bills*. Thus, Standing Order 69 could not be used to achieve the purpose sought by the first respondent.

Even assuming that Parliament was entitled to suspend Standing Order 127 H

Ebrahim JA

A and allow a second Bill in terms thereof to be introduced in the same session, that Bill must be introduced and dealt with in terms of the Constitution. Such requirement, as set out in para 1 of Schedule 4, is for the matter to be dealt with in terms of Standing Orders. Thus, it must be introduced and a first and second reading held. It cannot have been the intention that one could go straight into debating the Bill at the point where it had been negatived. B The procedures relating to the introduction, or re-introduction, of Public Bills must follow the procedures stipulated in Standing Orders 101-128.

What happened in this matter is that the first respondent truncated the constitutional requirements regarding legislation and, having introduced a second Bill of the same substance as that already dealt with, by virtue of C purporting to suspend Standing Order 127, truncated the procedures in Parliament, and dealt only with a third reading, and then presented the Bill for assent. This is clearly not permissible and was improper. Had the Minister arranged to prorogue Parliament and within days reintroduced the Bill in terms of the Standing Orders 101-128 there might have been no problem. See Erskine May *supra* at 501 where it is stated:

> D "In 1721, a prorogation for two days was resorted to in order to enable Acts relating to the South Sea Company to be passed, contradictory to clauses contained in another Act of the same session, CJ (1718-1721) 640 (1721)."

This was held to be acceptable.

E JURISDICTION OF THE COURTS

Common sense dictates that Parliament is required to comply with its own laws regarding the enactment of legislation. This principle stems from as far back as the decision in *Minister of the Interior & Anor* v *Harris & Ors* 1952 (4) SA 769 (A), in which the Appellate Division struck down legislation F passed by the Nationalist Government in South Africa to create a High Court of Parliament to override the Appellate Division's earlier decision in respect of voting rights of non-white persons, see *Harris & Ors* v *Minister of the Interior & Anor* 1952 (2) SA 428 (A).

In other jurisdictions, the courts have applied the principle that legislation G which is enacted by a legislative body without compliance with the existing law in respect to the enactment of legislation will be declared void by the courts, even where the constitution provides for a parliamentary democracy form of government. See *Attorney-General of New South Wales & Ors* v *Trethowan Ors* [1932] AC 526 (PC, Australia); *Bribery Commissioners* v *Ranasinghe* [1965] AC 172, [1964] 2 All ER 785 (PC, Ceylon); *R* v *Mercure* [1988] 1 SCR 234 (Supreme Court of Canada) H ; and *Re Manitoba Language*

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Rights [1985] 1 SCR 721 (Supreme Court of Canada). A

Zimbabwe, unlike the United Kingdom, is not a parliamentary democracy, but a constitutional democracy — see *Chairman, Public Service Commission & Ors* v *Zimbabwe Teachers' Association & Ors* 1996 (1) ZLR 637 (S) at 651, 1997 (1) SA 209 (ZS) at 218-219 (following *Smith* v *Mutasa NO & Anor supra* at 192. The majority of the court said: B

> "We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centre-piece of our democracy is not a sovereign parliament but a supreme law (the Constitution)."

The learned judges continued: C

> "Similarly, the principle of the separation of powers is a broad but flexible principle. The fact that certain powers, for an interim period, are given to a body other than the executive, the legislature or the judiciary, should be seen as a variation rather than a negation of the principle. And, of course, the legislature retained the power, which it has now exercised, to reclaim from the Commission the functions it exercised under the D Constitution. But it had to do so by amending the Constitution, by following the procedures required. The legislature could not, by the ordinary process of passing an Act by a simple majority, have ousted the authority of the Commission."

In a constitutional democracy, it is the courts, not Parliament, that determine E the lawfulness of actions of bodies, including Parliament.

In *Smith* v *Mutasa supra*, it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens, see p 192. It was also held that Parliament could not disregard the fundamental rights enshrined in the Constitution, see p 192-193:

> "In Zimbabwe, the question of Parliamentary privileges has not remained F static. It has to some extent been affected by the Declaration of Rights contained in the Constitution. *The result is that the Parliament of Zimbabwe, unlike the House of Commons on 24 September 1923, may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights guaranteed by the Constitution. If in Zimbabwe* G *there is a conflict between fundamental rights and the privileges of Parliament the conflict can only be resolved by the courts of justice.*
>
> The Constitution of Zimbabwe is the supreme law of the land. It is true that Parliament is supreme in the legislative field assigned to it by the Constitution, but even then Parliament cannot step outside the bounds H

Ebrahim JA

> A *of the authority prescribed to it by the Constitution*. As Gajendragadkar CJ said in *Special Reference number* 1 of 1964 [1965] 1 SCR at 445G-H:
>
> 'If the Legislatures step beyond the legislative fields assigned to them, or acting within their respective fields they trespass on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are B liable to be struck down by courts in India. Therefore, it is necessary to remember that though our Legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution.'
>
> The difference between the powers of the House of Commons and our C House of Assembly is that the Constitution of the United Kingdom does not permit the judicature to strike out laws enacted by Parliament. Parliament in the field of legislation is sovereign and supreme. That is not the position in Zimbabwe, where the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the Constitution and all legislation. *In Zimbabwe, the* D *Judiciary is the guardian of the Constitution and the rights of the citizens.*
>
> It is essential to understand that all the three branches of Government, the executive, the legislature and the judiciary, are bound by and work within the confines of the Constitution. For instance, the House of E Assembly cannot, in the name of Parliamentary privileges, immunities and powers, disregard the fundamental rights enshrined in the Constitution. If it does that, it invites the intervention of the Judiciary:
>
> '… there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution F and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the Legislature is valid or not. Just as the Legislatures are conferred legislative authority and their G functions are normally confined to legislative functions, and the

functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material H question as to whether legislative authority has been exceeded or

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fundamental rights have been contravened can be decided by the A legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the judicature of this country …' *per* Gajendragadkar CJ in *Special Reference number 1 of 1964 supra* at 446D-G" (emphasis added).

The Supreme Court in that matter referred to and approved the approach of B the Supreme Court of India in *Special Reference number 1 of 1964* [1965] 1 SCR 413.

Likewise, in South Africa, it has been held that all branches of the Government are subject to scrutiny by the courts, and that even the President is subject to the provisions of the Constitution — see *President of the Republic of South Africa & Anor* v *Hugo* 1997 (4) SA 1 (CC) at paras 12 and 28, as well as C *Executive Council, Western Cape Legislature, & Ors* v *President of the Republic of South Africa & Ors* 1995 (4) SA 877 (CC).

The matter was dealt with more fully in the judgment of Hlophe J (as he then was) in *De Lille & Anor* v *Speaker of the National Assembly* 1998 (3) SA 430 (C). Reference is made to paras 22- 25. At para 25, p 449, he said: D

"The National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by E the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows, therefore, that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication." F

On appeal — see *Speaker of the National Assembly* v *De Lille & Anor* 1999 (4) SA 863 (SCA) — Mahomed CJ put the matter thus in para 14, pp 868-869:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. *It* is supreme — not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, G however, *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows H

A that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution, is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances."

See also *Sonderup* v *Tondelli & Anor* 2001 (1) SA 1171 (CC) at para 27, B p 1183.

There is therefore, no merit in the submission of Mr *Majuru* when he said that:

"… this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regards to the third reading and passage C of the General Laws Amendment Bill (now the General Laws Amendment Act No. 2 of 2002)."

It is my view that this Court has not only the power, but also the duty, to determine whether or not legislation has been enacted as required D by the Constitution. Parliament can only do what is authorised by law and specifically by the Constitution.

The manner in which the third reading of the General Laws Amendment Bill was done on 10 January 2002 was contrary to the Constitution and the legislation thereunder, and accordingly was not validly enacted.

Section 3 of the Privileges, Immunities and Powers of Parliament Act E [*Chapter 2:08*] provides as follows:

"3. Privileges, immunities and powers generally

Parliament and members and officers of Parliament shall hold, exercise and enjoy —

(a) the privileges, immunities and powers conferred upon Parliament, F respectively, by this Act or any other law; and

(b) all such other privileges, immunities and powers, not inconsistent with the privileges, immunities and powers referred to in paragraph (a), as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on 18 April 1980."

G The powers of Parliament by virtue of s 3 of that Act are those conferred upon Parliament by this Act or any other law (which would include the Constitution and Standing Orders), as well as the powers which are not inconsistent with the powers applicable to the House of Commons on 18 April 1980. Those powers are part of the general and public law, see s 4 of the Act.

H Nowhere in that legislation is it provided that Parliament can bring for the

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Ebrahim JA

second time the third reading of a Bill; nor is it provided that a Bill may be A brought for the second time before the same session; nor is it provided that a matter that has been negatived may be brought again before the same session. Indeed, by virtue of s 3(b) of that Act, such would be inconsistent with the powers of the House of Commons as at 18 April 1980, and therefore also inconsistent with the law of Zimbabwe. Section 3 of the Privileges, B Immunities and Powers of Parliament Act itself expressly forbids what was done in the present case. In terms of s 3 of the Act, our legislation provides succinctly that our Parliamentary practice is guided by practices in the House of Commons. The "Bible", on Parliamentary practice of that body, is enshrined in *Erskine May supra* and the editors of that work have no doubt that a negatived Bill should not be re-introduced in the same session of C Parliament. We therefore must stand guided by what the editors in *Erskine May supra* have indicated.

Accordingly, it must be held that the General Laws Amendment Act 2002 was invalidly enacted by Parliament.

I believe that we were left with no choice but to grant the application with D costs. The order we made was as follows –

"THAT the General Laws Amendment Act (No. 2 of 2002) is invalid and of no force or effect.

THAT the first respondent shall pay the applicants' costs of suit." E

SANDURA JA, CHEDA JA and ZIYAMBI JA concurred.

MALABA JA: I have read the judgment of the majority written by Ebrahim JA but disagree with the decision reached and the reasons thereof. The assumption F on which the applicants sought relief before the Supreme Court was that the majority vote of 8 January 2002 in the House was valid at law. That is also the basis on which the decision of the majority has been reached. The assumption on the validity of the majority vote of 8 January 2002 is, in my view, wrong.

Section 51(1) of the Constitution of Zimbabwe provides that subject to the G provisions of Schedule 4 thereof the power of Parliament to make laws shall be exercised by Bills *passed* by Parliament and assented to by the President.

Parliament has power under s 57(1)(a) of the Constitution to make Standing Orders with respect to the *passing* of Bills. Standing Orders have constitutional standing and are binding on Parliament until repealed. H

MALABA JA

A Section 56(1) provides that save as otherwise provided in the Constitution all questions *proposed for decision* at a sitting of Parliament shall be determined by a majority of the votes of the members present and voting.

The presumption is that the questions proposed for decision are lawfully put to the House at the time they are proposed for decision. If the question proposed for decision cannot by force of law be put at the time it is proposed B for decision, the vote on it, whether affirmative or negative, is of no legal force and effect. It is a nullity with no binding effect on Parliament.

In pursuance of the legislative power granted to it in s 57(1)(a) of the Constitution Parliament, made Standing Order 124 in respect to the passing of Bills. In clear and mandatory language, Standing Order 124 provides C that:

> " After the third reading no further question shall be put and the Bill shall be deemed to have been passed by Parliament."

It is clear to me that putting a question on the passing or otherwise of a Bill after it has been read the third time is prohibited by Standing Order 124. D A Bill is passed immediately after it is read the third time.

It is clear from the record of proceedings before the House, attached as annexures to the applicants' founding affidavit, that the Bill was in fact read the third time on 8 January 2002 and thereafter a question, probably as to its passage, put to the House for determination. It is then that the House divided E on a majority of 36 to 24 in favour of the applicants. In para 23 of the founding affidavit, the first applicant accepts the fact that the Bill was read the third time. He avers therein that "Parliament had no power to rescind the third reading of the Bill".

My interpretation of Standing Order 124 is that the question put to the House on the passage of the Bill after it had been read the third time was not legally F permissible. By the time that question was put, the Bill had passed and the majority vote on the question proposed for decision could not affect the passage of the Bill. The vote was in fact null and void. It was of no legal consequence purporting, as it did, to determine a question, the putting of which was strictly prohibited by Standing Order 124. Erskine May G *Parliamentary Practice* 20 ed states at p 509 that: "according to established usage, a bill, when read the third time, has passed".

In my view, the General Laws Amendment Bill was properly passed by Parliament after it was read the third time on 8 January 2002. It was unnecessary for the Minister of Justice, Legal and Parliamentary Affairs, who had introduced the Bill into Parliament, to take all the trouble he took H trying to have the majority vote rescinded when that vote was a nullity insofar

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MALABA JA

as the passage of the Bill after the third reading was concerned. It was A therefore a moot question before the Supreme Court whether what the Minister did was lawful or not.

My decision is therefore as follows:

> "The application is dismissed with costs." B

Gill, Godlonton & Gerrans, applicants' legal practitioners

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

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BITI & ANOR v MINISTER OF HOME AFFAIRS & ANOR 2002 (1) ZLR 197 (S)

Citation	2002 (1) ZLR 197 (S)
Case No	Judgment No. S-9-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA

Heard	15 February 2002
Judgment	28 February 2002
Counsel	*A P de Bourbon* SC, for the applicants *Y Dondo*, for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

D **Constitutional law** — *Constitution of Zimbabwe — Declaration of Rights — ss 20 and 21 — freedom of expression and freedom of assembly — requirement under s 24 of Public Order and Security Act [Chapter 11:17] that organiser of public gathering must give police notice thereof — whether contravenes s 20 or s 21 of Constitution*

E **Statutes** — *Public Order and Security Act [Chapter 11:17] — s 24 — organiser of public gathering to give police notice of gathering — constitutionality*

Headnote

Section 24 of the Public Order and Security Act [*Chapter 11:17*], which F requires organisers of public gatherings to give four days' notice of their gatherings to the police, infringes the rights of freedom of expression and freedom of assembly, but does not do so arbitrarily or excessively. It is therefore, reasonably justifiable in a democratic society and does not contravene s 20 or s 21 of the Constitution.

Cases cited G

Bull v Minister of Home Affairs 1986 (1) ZLR 202 (S)

Hewlett v Minister of Finance & Anor 1981 ZLR 571 (S)

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

Legislation considered

H Public Order and Security Act [*Chapter 11:17*], s 24

Sandura JA

Case information

A P de Bourbon SC, for the applicants A

Y Dondo, for the respondents

Judgment

SANDURA JA: This application was brought directly to this court in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"). In it, the applicants sought a declaration that s 24 of the Public Order and Security Act B [*Chapter 11:17*] ("the Act") contravened ss 20 and 21 of the Constitution.

The background facts are as follows. The first applicant ("Biti") is a Member of Parliament for the constituency of Harare East. He is a member of the National Executive of the Movement for Democratic Change ("the MDC"), the main opposition party in Zimbabwe.

On 28 January 2002, Biti, acting in terms of s 24(1) of the Act, wrote to the C Officer Commanding the Police, Harare Suburban District, Chief Superintendent Kupara ("Kupara"), notifying her that the

MDC would be holding twelve public meetings in the Harare East constituency from 2 to 23 February 2002. The date and venue of each meeting, as well as the time at which each meeting was to commence, were given. D

In reply, Kupara informed Biti that only four of the twelve meetings could be held. The rest were prohibited for various reasons. Aggrieved by that decision the applicants approached this court and filed this application, alleging that s 24 of the Act infringed their rights of freedom of expression and freedom of assembly.

Section 24 of the Act reads as follows: E

> "(1) Subject to subsection (5), the organiser of a public gathering shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the gathering is to be held:
>
> Provided that the regulating authority may, in his discretion, permit F shorter notice to be given.
>
> (2) For the avoidance of doubt, it is declared that the purpose of the notice required by subsection (1) is —
>
> (a) to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or a breach of the G peace; and
>
> (b) to facilitate co-operation between the Police Force and the organiser of the gathering concerned; and
>
> (c) to ensure that the gathering concerned does not unduly interfere with the rights of others or lead to an obstruction of traffic, a breach of the peace or public disorder. H

Sandura JA

> A (3) Any Saturday, Sunday or public holiday falling within the four-day period of notice referred to in subsection (1) shall be counted as part of the period.
>
> (4) Where there are two or more organisers of a public gathering, the giving of notice by any one of them in terms of subsection (1) shall be a discharge of the duty imposed upon the other or others by that B subsection.
>
> (5) This section shall not apply to public gatherings of a class described in the Schedule.
>
> (6) Any organiser of a public gathering who fails to notify the regulating authority for the area of the gathering in accordance with C subsection (1) shall be guilty of an offence and liable to 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."

I now wish to set out the relevant provisions of ss 20 and 21 of the Constitution.

D The relevant part of s 20 reads:

> "(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference E with his correspondence.
>
> (2) 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, the economic interests of the state, public morality or public health; F
>
> (b) …; or
>
> (c) …;
>
> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

G The relevant part of s 21 reads:

> "(1) 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 H associations for the protection of his interests.

Sandura JA

> (2)… A

(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

(b)-(d) …;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(4) The provisions of subsection (1) shall not be held to confer on C any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

It is well established that in a democratic society the freedom of expression and the freedom of assembly and association are of great importance. D As this court stated in the case of In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 56G-H:

"The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man', E *per* European Court of Human Rights in *Handyside* v *United Kingdom* (1976) 1 EHRR 737 at para 49. See also *Whitney* v *California* 274 US 357 (1926) at 375; *Cox* v *Louisiana (2)* 379 US 559 (1965) at 574; *S* v *Turrell & Ors* 1973 (1) SA 248 (C) at 256G-H.

Freedom of expression, one of the most precious of all the guaranteed F freedoms, has four broad special purposes to serve: (i) it helps an individual obtain self fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See *Pandey Constitutional Law of India* 24 ed at p 118. In sum, what is G at stake is the basic principle of the 'people's right to know'. See *Indian Express Newspapers (Bombay)* v *Union of India* (1985) 2 SCR 287."

However, this court has recognised the need to reconcile the rights of freedom of expression and assembly with governmental responsibility to ensure the sound maintenance of public order. There must be a compromise which will accommodate the exercise of the protected rights within a H

Sandura JA

A framework of public order which enables ordinary people to go about their business without obstruction. See: In re *Munhumeso & Ors supra,* at p 58D-H.

Having said that, I now proceed to consider whether s 24 of the Act infringes the rights of freedom of expression and freedom of assembly. If it does, a B further issue to consider is whether a derogation from these protected rights is reasonably justifiable in a democratic society.

Section 24 of the Act provides that the organiser of a public gathering shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the meeting is to be held, and that if he fails to do that he commits an offence which renders him liable to C 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. I have no doubt in my mind that the section infringes the rights of freedom of expression and freedom of assembly. The right to assemble and the right to express one's views publicly are fundamental in a democratic society. The need to give notice of the intention to exercise those democratic rights D is an infringement of those rights.

However, that is not the end of the matter because s 20(2)(a) of the Constitution permits the enactment of a law, or anything done under the authority thereof, which derogates from the right to freedom of expression in the interests of public safety and public order to an extent which is reasonably E justifiable in a democratic F society.

Similarly, s 21(3)(a) of the Constitution permits the enactment of a law, or anything done under the authority thereof, which derogates from the right to freedom of assembly and association, in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society.

In order to succeed, therefore, the applicants had to show that this court should not accept that s 24 of the Act is reasonably justifiable in a democratic society on the grounds of public safety or public order. I am not convinced that they have succeeded in doing so.

G As can be seen from the provisions of s 24(2) of the Act, the notice required in terms of s 24(1) serves two main purposes. The first is to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or any breach of the peace, and the second is to ensure that the gathering concerned does not unduly interfere with the rights of other people or lead to an obstruction of traffic, a breach of the peace or public H disorder.

Sandura JA

In my view, the above objectives are covered by the provisions of s 20(2)(a) A and s 21(3)(a) of the Constitution.

What is reasonably justifiable in a democratic society is a concept which cannot be defined with precision. As this court said in *Munhumeso* case *supra*, at p 64B:

> "What is reasonably justifiable in a democratic society is an illusive B concept — one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily invades the enjoyment of a constitutionally guaranteed right. See, generally, *Commissioner of Taxes* v *CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C, 1990 (2) SA 260 (ZS) at 265B-266D." C

In my view, s 24 of the Act does not arbitrarily or excessively invade the enjoyment of the freedom of expression and the freedom of assembly and association. It merely requires the organiser of the public gathering to give the written notice to the regulating authority. Most importantly, it does not give the regulating authority the power to prohibit the gathering or to order D the persons taking part in the gathering to disperse. These powers are given to the regulating authority in terms of other sections of the Act which are not under consideration in the present application.

Incidentally, there is legislation in the United Kingdom which requires the organisers of a procession to give written notice to the police. Section 11 of the Public Order Act 1986, in relevant part, reads: E

> "(1) Written notice shall be given in accordance with this section of any proposal to hold a public procession intended —
>
> (a) to demonstrate support for or opposition to the views or actions of any person or body of persons;
>
> (b) to publicise a cause or campaign; or F
>
> (c) to mark or commemorate an event …
>
> (2)-(6) …
>
> (7) Where a public procession is held, each of the persons organising it is guilty of an offence if —
>
> (a) the requirements of this section as to notice have not been satisfied; G or
>
> (b) the date when it is held, the time when it starts, or its route, differs from the date, time or route specified in the notice."

In addition, s 2(1) of the same Act has the following provision:

> "Where three or more persons who are present together use or threaten H

Sandura JA

> A unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder."

In my view, the application cannot succeed.

B As far as costs are concerned, in line with previous decisions of this court such as *Hewlett* v *Minister of Finance & Anor* 1981 ZLR 571 (S), and *Bull* v *Minister of Home Affairs* 1986 (1) ZLR 202 (S), I think that there should be no order as to costs.

In the circumstances, the application is dismissed with no order as to costs.

C CHIDYAUSIKU CJ, CHEDA JA, ZIYAMBI JA and MALABA JA concurred.

Atherstone & Cook, applicants' legal practitioners

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

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REGISTRAR-GENERAL OF ELECTIONS & ORS v TSVANGIRAI 2002 (1) ZLR 204 (S)

Citation	2002 (1) ZLR 204 (S)
Case No	Judgment No. S-12-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	15 February 2002
Judgment	28 February 2002
Counsel	*M Majuru*, with him Ms *Chatukuta*, for the appellants *A de Bourbon*, SC, with him *T Matinenga*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — "common roll" — meaning — whether denotes single roll or sum total of constituency rolls*

Constitutional law — *Constitution of Zimbabwe 1980 — s 28(2) — presidential election — registration of voters — residential requirements for registration — poll at presidential election — whether voters must be permitted to vote outside their parliamentary constituencies*

Constitutional law — *Constitution of Zimbabwe 1980 —Schedule 3, para 3 — qualifications for voters — citizens who renounce their citizenship — whether they remain qualified to vote if they were resident in Zimbabwe at end of 1985*

Constitutional law —*interpretation of Constitution — background material — use of parliamentary debates in interpreting provisions of Constitution*

Elections — *Electoral Act [Chapter 2:01] — "common roll" — meaning —whether denotes single roll or sum total of constituency rolls*

Elections — *Electoral Act [Chapter 2:01] — s 25 — procedure for objecting to continued registration of voters — whether procedure applies when voter has renounced Zimbabwean citizenship*

Elections — *presidential election — registration of voters — residential requirements for registration — poll at presidential election — whether*

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voters must be permitted to vote outside their parliamentary constituencies

Words and phrases — *"common roll" — Constitution and Electoral Act [Chapter 2:01] — whether denotes single roll or sum total of constituency rolls*

Headnote

B The respondent obtained an order from the High Court requiring the first appellant to compile a single voters' roll for the purposes of the forthcoming Presidential election, rather than separate rolls for individual constituencies. The single roll was to contain the names of everyone eligible to vote in terms of para 3(1) of Schedule 3 to the Constitution C (i.e. citizens and persons who were permanently resident in Zimbabwe as at 31 December 1985) and was also to include the names of persons who had renounced their citizenship but who had been resident in the country at the end of 1985. The first appellant was further ordered to make arrangements to enable voters to vote outside their constituencies in the Presidential election. In an appeal to the Supreme Court against D that order:

Held, that the term "common roll", when used in the Constitution and the Electoral Act [*Chapter 2:01*], means the sum total of the constituency common rolls. In s 28(2) of the Constitution it does not denote a consolidated roll prepared for the election of a President.

E *Held*, further, that 28(2) of the Constitution, which states that the President is to be elected by voters registered on the common roll, does not give registered voters the right to vote outside the constituencies in which they are registered.

Held, further, that the direction by the Registrar-General, that each registered voter had to vote in his or her constituency in the Presidential election, F was within his powers under the Electoral Act [*Chapter 2:01*] and was not *per se* irrational. There was no basis on which the Supreme Court could interfere with it.

Held, further, that it is a requirement for registration on the common roll for the purpose of a Presidential election for a person to prove his residence in a particular constituency.

G *Held*, further (Sandura JA dissenting), that a person who ceases to be a Zimbabwean citizen loses his right to vote by virtue of para 3(3) of Schedule 3 to the Constitution, whether or not he is a permanent resident of Zimbabwe. Where the loss of citizenship is common cause, the consequent loss of the right to vote is by operation of the law, rendering H superfluous or non-applicable the procedures for objections to the

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registration of voters that are set out in s 25 of the Electoral Act A [*Chapter 2:01*].

Held, further, that the Constitution must be interpreted in its context, which includes its history and the background to its adoption, as well as parliamentary speeches made by responsible Ministers.

Cases cited B

Black-Clawson Ltd v Papierwerke AG [1975] AC 591; [1975] 1 All ER 810 (HL)

Grant & Uxor v Chief Immigration Officer 1976 (1) RLR 268 (A)

Hewlett v Minister of Finance & *Anor* 1981 ZLR 571 (S)

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42 (HL) C

S v Makwanyane & Anor 1995 (3) SA 391 (CC)

Legislation considered

Citizenship of Zimbabwe Act [*Chapter 4:01*], s 9(8)

Constitution of Zimbabwe 1980, s 28(2) and Schedule 3, para 3

Electoral Act [*Chapter 2:01*], ss 15 & 25 D

Case information

M Majuru, with him Ms *F Chatukuta*, for the appellants

A P de Bourbon, SC, with him *E T Matinenga*, for the respondent

Judgment

CHIDYAUSIKU CJ: The respondent in this case launched a court application in the High Court in which he sought the following relief: E

"IT IS ORDERED THAT:

1. In order to comply with Schedule 3 paragraph 3 of the Constitution of Zimbabwe, the first, second and fourth respondents shall make available forthwith to the third respondent all the records in their possession or under their control containing the full names and F particulars of all persons who have, as at the date of this Order, attained the age of 18 years or over and who:
   (a) Are citizens of Zimbabwe; or
   (b) Since 31 December 1985, have been regarded by virtue of a written law as permanent residents in Zimbabwe. G
2. The third respondent shall compile a Common Roll in compliance with section 28(2) of the Constitution of Zimbabwe within one (1) month of the date of this Order, containing a full list of all persons who have, as at the date of this Order, attained the age of 18 years or over and who:
   (a) Are citizens of Zimbabwe; or H

   (b) Since 31 December 1985 have been regarded by virtue of a written law as permanent residents in Zimbabwe;
3. The third respondent shall add to the Common Roll compiled in accordance with Clause (2) above all persons who provide reasonable proof to his office within one month of the date of this Order that since 31 December 1985 they have been permanent B residents in Zimbabwe.
4. The Common Roll to be compiled by the third respondent in accordance with Clauses (2) and (3) above shall be in the form of one roll and shall consist of all those persons entered on the Common Roll who shall be deemed to be registered on the Common Roll. C
5. Save as provided for in Clause (3) herein, it shall not be necessary for any person entitled to be placed on the Common Roll to apply to register themselves on the Common Roll.
6. The third respondent shall allow the following persons to vote at the forthcoming Presidential Election: D
   6.1 All persons issued with a voter's confirmation card or a certificate of registration as a voter in accordance with section 23(1) of the Electoral Act [*Chapter 2:01*];
   6.2 All persons issued with a provisional identity document in accordance with section 23(3)(a) of the Electoral Act [*Chapter 2:01*]; E
   6.3 All persons issued with an identity document in accordance with Section 23(3)(b) of the Electoral Act [*Chapter 2:01*].
7. All persons shall be entitled to vote at the forthcoming Presidential Election at any designated polling booth in Zimbabwe.
8. Section 158 of the Electoral Act be and is hereby declared ultra vires F of the Constitution of Zimbabwe and invalid.
9. The respondents 3, 6 and 10 shall pay the applicant's costs of suit, jointly and severally, the one paying the others, to be absolved."

The court application was opposed by the appellants. The learned judge in the court *a quo,* after submissions by counsel, made the following order: G

"1. In order to comply with section 28(2) of the Constitution of Zimbabwe, for the Presidential elections scheduled for 9 and 10 March 2002, the Registrar-General shall ensure that there is in place a Common Roll.
2. The Common Roll referred to in 1 above, shall contain the names and such other information as may be necessary, of all persons who H have attained the age of 18 years, are citizens of Zimbabwe or, since

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1985, have been regarded by a written law to be permanent residents A in Zimbabwe and who meet the residential requirements of any particular constituency or have satisfied the Registrar-General that for reasons related to place of origin, political affiliation or otherwise, it is appropriate that they be registered in a constituency in which they do not reside. B

3. The Registrar-General shall restore to the voters roll of any constituency, all voters who, on or before January 18, 2002, were on that roll or were eligible but were refused to be on that roll, who may have lost or renounced their citizenship of Zimbabwe, but who since 1985, have been regarded by a written law to be permanently resident in Zimbabwe. C
4. The third respondent shall make adequate and reasonable administrative arrangements for all voters registered on the common roll who will not be in their constituencies on the polling days, to exercise their vote; and
5. Each party shall bear its own costs." D

The appellants appealed against the judgment of the court *a quo* upon the following grounds:

"1. The High Court erred in law in finding that the common roll for the holding of Presidential Elections, as contemplated by the Constitution, consists of a single undivided document constructed without reference to delimited constituencies. E
2. The High Court correctly found that applicants for registration must satisfy the prescribed residential qualifications in order to be registered on their respective constituency rolls but erred in law in holding that registered voters are entitled to vote at any place outside their respective constituencies. F
3. The High Court erred in law in finding that registered voters who cease to qualify by virtue of having lost or renounced their citizenship remain eligible to vote as permanent residents even if they are not 'permanent residents' within the meaning of Schedule 3 to the Constitution.
4. The appellants pray that the appeal be allowed with costs and that the G decision of the court *a quo* be altered to one dismissing the application with costs."

The respondent also cross-appealed against the judgment upon the grounds set out in the notice of appeal which read:

"1. The learned judge erred in holding that it was in law a requirement H

Chidyausiku CJ

A for registration on the common roll for the purposes of a presidential election in Zimbabwe for a person to prove his residence in a particular constituency, and particularly to prove residence at a fixed address.

2. The learned judge erred and failed to properly apply her discretion by ordering each party to bear its own costs of the matter, more so B in that the respondent was substantially successful in the matter and no facts existed to deprive the respondent of the usual order for costs.

The respondent will pray that this cross-appeal be allowed with costs and that paragraph 2 of the order of the High Court be altered by C the deletion of all the words therein after the words in the fourth line 'to be permanent residents in Zimbabwe'. And furthermore that paragraph 5 be altered to read:

'5. The first, second, third and sixth respondents shall jointly and severally, the one paying the others to be absolved, pay the costs of the applicant'."

D It is apparent from the notice of appeal that the appellants are essentially appealing against paras 3 and 4 of the order of the court *a quo* while the respondent is appealing against part of para 3 of the same order.

The notice of appeal and cross-appeal reveal that the following are the issues that fall for determination by this court. E

1. The meaning or correct interpretation to be ascribed to s 28(2) of the Constitution. In particular, whether that section enjoins the first appellant to make certain administrative arrangements to enable voters away from the constituencies in which they are registered to vote in other constituencies. F
2. The correct meaning to be ascribed to para 3 of Schedule Three. In particular, whether a citizen loses his or her right to vote upon loss of citizenship.
3. Whether residence is an essential requirement for registration on a common roll for the election of a President.

Before dealing with the issues, I wish to dispose of the preliminary issue of G the application to lead further evidence. That application is dismissed because this matter can be determined without reference to the evidence sought to be introduced. That evidence is, therefore, irrelevant.

WHAT DOES SECTION 28(2) OF THE CONSTITUTION MEAN?

H Section 28(2) of the Constitution provides as follows:

2002 (1) ZLR p210

Chidyausiku CJ

> "28(2) The President shall be elected by voters registered on the A common roll."

The learned judge in the court *a quo* had this to say on the meaning to be ascribed to this section:

> "In terms of section 28(2) of the Constitution, the President shall be elected by voters on the common roll. Therefore in my opinion, all those B who are on the common roll have the right to vote for the President. There are no further requirements necessary for one to exercise their right to vote other than to show that one is on the common roll. If the intention of the legislature were to impose any further qualifications, it would have specifically made that provision in the Constitution. C
>
> The applicant has argued that those on the common roll are entitled to vote. The respondents have advanced a rather half-hearted argument against this contention. It has been suggested by the respondents that residence remains an essential qualification at the voting stage particularly as regards voters who qualify qua permanent residence. I have not been referred to any provision in the Constitution which has the effect of D derogating from the apparent right given voters on the common roll by section 28 of the Constitution. As such, I am reluctant to add a residential qualification to the right. For those who would have qualified to be on the roll by virtue of being permanent residents the law is quite clear that they lose their qualification when they cease to be residents. They therefore lose the right to be on the roll. E
>
> It is, therefore, my finding that the law provides that all voters registered on the common roll are entitled to vote and the third respondent has to put in place the administrative machinery to give effect to that law."

The learned judge was correct in observing that the section confers on the F voter registered on the common roll the right to vote for a President in a Presidential Election. The section however, does not provide for how, when and where that right to vote is to be exercised. The learned judge, purporting to act in terms of this section, ordered the first appellant to make adequate and reasonable administrative arrangements for all voters registered on the common roll who would not be in their constituencies on the polling days, to G exercise their votes in the constituencies they happen to be on the election day. My reading of the section is that it confers a constitutional right on a voter to vote for a President. The learned judge concluded that a voter has a constitutional right to vote outside his or her constituency. This is where the learned judge in the court a quo erred. I am fortified in my view by the provisions of s 28(4) which provides as follows: H

2002 (1) ZLR p211

Chidyausiku CJ

> " A 28(4) The procedure for the nomination of candidates for election in terms of subsection (2) and the election of the President shall be as prescribed in the Electoral Law."

The above subsection makes it clear that the procedures, that is how, when and where to vote, are to be provided for under the Electoral Law. The Electoral Act [*Chapter 2:01*] (hereinafter referred to as the "Act") B provides for the procedures to be followed in Presidential elections. Section 101(2) of the Act provides:

> "101(2) Where two or more candidates for President are validly nominated, a poll shall be taken in each constituency for the election of a President."

Whenever an election for a President is necessary by reason of there being C more than one candidate nominated, such election shall take place in each constituency.

It is common cause that the first appellant, in his capacity as Registrar-General of Elections, has directed that each voter on the common roll shall vote in his or her constituency in the forthcoming Presidential election. D The respondent is not, in any way, challenging this decision. It is the failure of the first appellant to make adequate and reasonable arrangements for all voters registered on the common roll who would not be in their constituencies on the polling days which he alleges is unconstitutional. Providing for as many people to vote as possible is highly commendable. Failure to provide in the manner alleged is, however, not unconstitutional. The contention that m E the failure to provide the above facility amounts to the disenfranchisement of a voter is simply untenable. The voter does not lose his right to vote. He is disabled from exercising the right by being in a wrong

constituency at the time he is expected to vote. The disability would not, in the circumstances, have resulted from any action by the Registrar-General.

F In my view, s 28(2) of the Constitution does not confer on a voter registered on the common roll the constitutional right to vote outside the constituency in which he is registered.

Having come to the above conclusion, it only remains to consider whether the first appellant's decision that registered voters would vote in the constituencies in which they are registered can be impugned on any other grounds.

G Section 15 of the Act confers certain powers on the first appellant. In the exercise of such powers, the first appellant is not subject to the direction of any person or authority except the Electoral Directorate. Section 15 of the Act provides as follows:

> "15(1) There shall be a Registrar-General of Elections whose office shall H be a public office and shall form part of the Public Service.

Chidyausiku CJ

> (2) The Registrar-General shall exercise such functions as are A imposed or conferred upon the Registrar-General by or under this Act and, in the exercise of his functions, the Registrar-General shall not be subject to the direction or control of any person or authority other than the Electoral Directorate, but shall have regard to any report or recommendation of the Electoral Supervisory Commission." B

The above provisions clearly empower the first appellant to make the decision that he made. The court can only interfere with that decision on any of the recognised grounds for review such as lack of compliance with the law or gross irrationality. I have already concluded that the decision was within the powers of the first appellant, see s 101 of the Act. The decision is not, *per se*, irrational. It is not unreasonable to require a person to vote in the C constituency in which he is registered as a voter. There is no evidence before the court on the number of voters who would be adversely affected by the requirement that people vote in the constituency in which they are registered as voters to enable the court to make an informed decision as to the reasonableness or otherwise of the first appellant's decision. Accordingly, no basis has been established on which this court can interfere with the decision D of the first appellant made in terms of s 15 of the Act. Accordingly, the first appellant succeeds on this ground.

WHAT IS THE CORRECT MEANING OF PARAGRAPH 3 OF SCHEDULE 3 OF THE CONSTITUTION OF ZIMBABWE?

Paragraph 3 of the order in the court *a quo* provides as follows: E

> "The Registrar-General shall restore to the voters roll of any constituency, voters who, on or before 18 January 2002, were on that roll or were eligible but were refused to be on that roll, who may have lost or renounced their citizenship of Zimbabwe, but who since 1985, have been regarded by a written law to be permanently resident in Zimbabwe." F

The first appellant appeals against this finding on the ground that the learned judge erred at law in concluding that registered voters who cease to qualify to be on the voter's roll by virtue of having lost or renounced their citizenship remain eligible to vote on the ground that they are permanent residents.

Paragraph 3(1) of Schedule 3 provides as follows: G

> "3(1) Subject to the provisions of this paragraph and to such residence qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who —
>
> (a) is a citizen of Zimbabwe; or H

Chidyausiku CJ A

> (b) since 31 December 1985, has been regarded by virtue of a written law as permanently resident in Zimbabwe;
>
> shall be qualified for registration as a voter on the common roll."

The above provision confers the right to vote on two distinct and separate categories or classes of people, "the citizen" and "the person who has since B 31December 1985 been regarded by virtue of a

written law as permanently resident in Zimbabwe".

It was common cause that the word "since" in subpara (1)(b) has to be read as meaning "as at", see para 25 of the respondent's heads of argument. I agree with the submission therein. What that means is that a person referred to in subpara (b) has to be regarded as a permanent resident as at that date and C not a day later.

After conferring the right to vote on the two categories of people, paras 3(3)(a)-(c) proceed to provide how each category would lose the right to vote. They provide as follows:

> "3(3) Any person who is registered on the electoral roll of a constituency D shall be entitled to vote at an election which is held for that constituency unless —
>
> (a) he has then ceased to be a citizen of Zimbabwe; or
>
> (b) …
>
> (c) in the case of a person who was registered on the electoral roll by E virtue of qualifications referred to in subparagraph (1)(b), he has ceased to be so qualified."

The above provisions explicitly state that a citizen loses his or her right to vote upon ceasing to be a citizen and a permanent resident upon losing the permanent resident status formerly possessed by him in terms of subpara (1)(b) of para 3. The plain and primary meaning of the words in the F enactment is, in my view, clear and unambiguous. The provisions confer on the citizen the right to vote, which he loses upon ceasing to be a citizen. Equally, the right to vote is conferred on the person regarded as a permanent resident, which he loses upon loss of residence.

It has been argued that a citizen is also a permanent resident and, therefore, G included in the persons referred to in para 3(1)(b). The argument is further that when such a person loses his citizenship he remains qualified as a voter by virtue of a residual permanent resident status. I am not persuaded by this reasoning. I see nothing in the language or the context of the legislation to justify such an interpretation. At best, this interpretation is secondary. There is no need to resort to a secondary meaning when the primary meaning H is clear.

2002 (1) ZLR p214

Chidyausiku CJ

The background to the enactment of Schedule 3, its history and the debates A during its passage in Parliament, clearly demonstrate that the legislature intended the primary meaning set out above.

Is it permissible to take into account the Parliamentary debates, history and background of an enactment in determining its meaning or the intention of the legislature?

In *Hewlett* v *Minister of Finance & Anor* 1981 ZLR 571 (S), it was held: B

> "… that in interpreting a Constitution the principles of interpretation are basically no different from those governing the interpretation of any other legislation, but recognition must be given to the character and origin of the document and interpretation must be guided by the principle C of giving full recognition and effect to those fundamental rights and freedoms set out in the Constitution. It is not permissible, however, to take into account proposals and discussions in the preparation of the Constitution" (*see headnote*).

The first proposition emerging from the decision in *Hewlett*'s case *supra*, is that the principles governing the interpretation of a Constitution are the same D as those governing the interpretation of a statute. The second is that it is not permissible to take into account the background to a Constitution in interpreting its meaning.

I have no difficulty with the proposition that the principles of interpretation of a Constitution and any other legislation are the same. However, the E proposition that it is not permissible to take into account proposals and discussions in the preparation of the Constitution is no longer good law. It might have been in 1981. That proposition is based on a case that has since been overruled. In *Hewlett*'s case *supra,* Fieldsend CJ reasoned as follows at 582:

> "There is one further point on the question of interpretation. It was argued F that we could have regard, particularly in relation to the significance of section 16(3) which dealt with pension rights, to an extract from proposals tabled by the British Government on 3October 1979, at a plenary session of the Lancaster House Conference that led to the settlement finally formalised by the present Constitution of 6 December 1979. There are G a number of reasons why I think it would be wrong and dangerous to rely on such material.
>
> In the first place, the general principle of our law is clearly stated in the speeches of the majority of the Law Lords in *Black-Clawson Ltd* v *Papierwerke AG* [1975] AC 591; [1975] 1 All ER 810 (H.L.) and

accurately reflected in the headnote in the following terms: H

2002 (1) ZLR p215

Chidyausiku CJ

> ' A In considering the report of the Foreign Judgments (Reciprocal Enforcement) Committee 1932 presented to Parliament before the passing of the Act of 1933 and containing a draft Bill which was substantially adopted in the subsequent legislation, the House, in construing the Act, was entitled to have regard to the statement contained in the report of the mischief aimed at and of the state of the B law as it was then understood to be, but it was not entitled to take into account the committee's recommendations or its comments on the draft Bill …'
>
> and:
>
> 'It is not proper to use the report of a committee or commission or any C official notes on a clause of a draft Bill for a direct statement of what a proposed enactment is to mean or what the committee or commission thought it means …'."

The exclusionary rule set out in *Hewlett*'s case *supra*, is derived from English law. The English courts have since modified the exclusionary rule.

D In *Pepper (Inspector of Taxes)* v *Hart* [1993] 1 All ER 42 at 43 the House of Lords held:

> "(1)(Lord Mackay LC dissenting) Having regard to the purposive approach to construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting courts from referring to parliamentary material as an aid to statutory E construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary materials where: (a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity; (b) the material relied on consisted of statements by a minister or other promoter of the Bill which lead to the enactment of the legislation together if necessary with such other parliamentary material F as was necessary to understand such statements and their effect; and (c) the statements relied on were clear. Furthermore, the use of parliamentary material as a guide to the construction of ambiguous legislation would not infringe s 1, art 9 of the Bill of Rights since it would not amount to a 'questioning' of the freedom of speech or parliamentary debate G provided counsel and the judge refrained from impugning or criticising the minister's statements or his reasoning, since the purpose of the courts in referring to parliamentary material would be to give effect to, rather than thwart through ignorance, the intentions of Parliament and not to question the processes by which such legislation was enacted or to criticise anything said by anyone in Parliament in the course of H enacting it …"

2002 (1) ZLR p216

Chidyausiku CJ

The exclusionary rule seems to me to be an affront to common sense. A It excludes the court from accessing what the legislator said was its intention in the process of enacting the legislation. I find myself in agreement with the following remarks of Lord Bridge of Harwich in *Pepper*'s case *supra* at p 49F:

> "Following the further arguments of which we have had the benefit, I B should find it very difficult, in conscience, to reach a conclusion adverse to the taxpayers on the basis of a technical rule of construction requiring me to ignore the very material which in this case indicates unequivocally which of the two possible interpretations of s 63(2) of the 1976 Act was intended by Parliament. But, for all the reasons given by my noble and learned friend Lord Browne-Wilkinson, with whose speech I entirely C agree, I am not placed in that invidious situation."

In *Pepper*'s case *supra* the court relied on extensive remarks made in the House of Commons during the passage of the Act under consideration in determining the intention of the legislature.

It is also clear that *Pepper*'s case *supra*, overrules *Black Clawson Ltd supra,* D upon which Fieldsend CJ relied for his conclusion in *Hewlett*'s case *supra*.

In South Africa, it is permissible, in interpreting the Constitution, to have regard to the purpose and background of discussions on the Constitution. It is also permissible in South Africa, in interpreting a statute, to have regard to the purpose and background of the legislation in question. In *S* v *Makwanyane & Anor* 1995 (3) SA 391 (CC), Chaskalson P had this to say at E pp 404F-405F:

> "*Legislative history*
>
> The written argument of the South African Government deals with the debate which took place in regard to the death penalty before the commencement of the constitutional negotiations. The information that F it placed before us was not disputed. It was argued that this background information forms part of the context within which the Constitution should be interpreted.

Our courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question. G

'Certainly, no less important than the oft repeated statement that the words and expression used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", H as here used, is not limited to the language of the rest of the

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A statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.'

Debates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new Bills have not been admitted as background material. It is, B however, permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining 'the mischief aimed at (by) the statutory enactment in question'. These principles were derived in part from English law. In England, the courts have recently relaxed this exclusionary rule and have held, in *Pepper (Inspector of Taxes)* v C*Hart* and related appeals that, subject to the privileges of the House of Commons,

'… reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to parliamentary material should only be permitted D where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.'

As the judgment in *Pepper'*s case shows, a similar relaxation of the exclusionary rule has apparently taken place in Australia and New Zealand. Whether our courts should follow these examples and extend E the scope of what is admissible as background material for the purpose of interpreting statutes does not arise in the present case. We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. F It defines the powers of the different organs of State, including Parliament, the executive, and the courts, as well as the fundamental rights of every person which must be respected in exercising such powers."

Thus, *Makwanyane*'s case *supra*, is clear authority that in South Africa Parliamentary proceedings are admissible as evidence of the meaning of the Constitution.

G The recently declared invalid General Laws Amendment Act expressly provided for the admissibility of Parliamentary debates in interpreting statutes. The above Act is not law. I only mention it as an indicator of the current thinking that courts should have regard to Parliamentary debates in interpreting statutes. In these proceedings, we are concerned with the H interpretation of the Constitution. I, therefore, intend to follow

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Makwanyane's case *supra,* and hold that the Third Schedule to the Constitution A "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, [and] other provisions of the Constitution itself": *per* Chaskalson P at p 403G-H.

What then is the history and the background to Schedule 3 of the Constitution?

It is very clear from successive Electoral Acts that in Rhodesia and thereafter B Zimbabwe the right to vote was and is accorded to citizens only. The right to vote has always been lost upon loss of citizenship. The need to extend the vote to a particular class of permanent residents was recognised for the first time in 1979 upon the introduction of a Constitution that extended the franchise to every adult citizen.

The Electoral Act [*Chapter 5*] which came into effect on 6 December 1969 C and has since been repealed provided that only citizens of the age of twenty-one had the right to vote. Section 17 of that Act provided as follows:

"17(1) Subject to the provisions of this Act, every person who —

(a) is a citizen of Rhodesia; and

(b) has attained the age of twenty-one years; and D

shall be entitled to be registered in a constituency as a voter."

Residents, permanent or otherwise, had no right to vote under this Act.

In terms of s 28(2) of the same Act, a voter was disenfranchised upon loss of citizenship. The section reads: E

> "28.2 A person shall be disqualified for registration as a voter if he ceases to be a citizen of Rhodesia, whether because of renunciation of citizenship, deprivation of citizenship or loss of citizenship, in terms of any enactment in force in Rhodesia relating to citizenship of Rhodesia."

The Electoral Act [*Chapter 5*] was repealed and replaced by the Electoral Act F 1979 (No. 14 of 1979). Act 14 of 1979 was necessitated by the introduction of the Zimbabwe-Rhodesia Constitution which extended the franchise to all adult persons.

Act 14 of 1979 was enacted in terms of s 17 of the Zimbabwe-Rhodesia Constitution which reads: G

> "17. A law of the legislature shall, subject to the other provisions of this Constitution, make provision for the election of Senators and of members of the House of Assembly for the purposes of this Constitution."

The Electoral Act 14 of 79 made it clear that only citizens were entitled to vote and those who lost citizenship also lost the right to vote. In this regard, s 19 of that Act provided as follows: H

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> A "19(1) Subject to the provisions of this Act, every person who —
>
> (a) is a citizen of Zimbabwe Rhodesia; and
>
> (b) has attained the age of eighteen years; and
>
> (c) has the requisite residence qualification in terms of section *twenty*; and
>
> (d) is not disqualified under this Act; B
>
> shall be entitled to be registered in a constituency as a voter."

The same Act also provided for the loss of the right to vote upon loss of citizenship. See s 21(2) of that Act which reads:

> "21(2) A person shall be disqualified for registration as a voter if he C ceases to be a citizen of Zimbabwe Rhodesia, whether because of renunciation of citizenship, deprivation of citizenship or loss of citizenship, in terms of any enactment in force in Zimbabwe Rhodesia relating to citizenship of Zimbabwe Rhodesia."

Permanent residence was not recognised in the Act as a basis for acquiring the right to vote. It was however recognised at the time that Act 14 of 1979 D was enacted that it was desirable to enfranchise a certain class of permanent residents. This class of residents was made up of people who were eligible to be registered as citizens but had not applied for citizenship and consequently were not citizens. It was felt that these people who had all the qualifications for citizenship should be enfranchised for the particular E election that was due in March 1979. This was, as I have already stated, the first election on the basis of adult suffrage. It was considered desirable that these persons who were not citizens but eligible for citizenship be allowed to vote.

In this regard, what Mr Walker, the then Minister in the Rhodesian government responsible for steering the Bill through Parliament, had to say in his second F reading speech is instructive. He said:

> "*Ordinarily, a person must be a citizen of this country before he is entitled to be registered as a voter.* However, as Hon. Members well know, there are in Rhodesia many thousands of foreign Africans who have come to this country to find employment and are now settled here, having been G resident in the country for many years. These people have not, in the main, taken advantage of the provisions of the Citizenship Act which entitle them to apply for registration as citizens. With the extension of the franchise to all persons over eighteen, it will not be possible, because of the numbers involved, to handle thousands of applications for registration as a citizen. *Accordingly, it has been decided that, for the purposes of the* H *first general election, any person who is not a citizen, but who is*

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> *ordinarily resident in Rhodesia, will be permitted to vote if he is qualified* A *to be registered as a citizen and is otherwise qualified to be registered as a voter.* This concession will, however, only apply for the first election because, after that, the persons concerned will be expected to apply to be registered as citizens and then to become registered voters" (2808 *Hansard*, 20 February 1979) (the emphasis is mine). B

It is quite clear from the above remarks that the extension of the vote was intended to be on a one-off basis, the first election after the introduction of adult suffrage and for the reasons stated.

In order to cater for this category of persons, who were not citizens but Parliament wished to enfranchise, provision was made in the Transitional C Provisions set out in Chapter XI of the Act to allow such people to vote. In particular, the proviso to s 175(10)(a) of the Electoral Act provided:

> "(10) At the election —
>
> (a) any person who is entitled to be registered as a voter for the Common Roll may vote in any electoral district and shall be entitled to cast at the election one vote for one registered party only: D
>
> Provided that in the case of the first *general election referred to* in paragraph (a) of subsection (1) of section *one hundred and sixty-seven any person who is entitled to apply for registration as a citizen of Rhodesia and, if he were so registered as a citizen, would be entitled to be registered as a voter on the Common Roll* shall be E entitled to cast at the election one vote for one registered party only" (emphasis is mine).

The intended beneficiaries did not register as citizens as expected and various statutory instruments were enacted to enable them to vote every time there was an election until 1990, when the legislature sought to resolve the issue once and for all. The legislature sought to resolve the issue by amending the F Third Schedule through the introduction of the present para 3(1) of the Third Schedule. The amendment was introduced by Act 30 of 1990. Again, the remarks of the then Minister of Justice, the Hon. Mr Mnangagwa, as he steered the Bill through Parliament are instructive:

> "With regards certain aspects of his question, since 1985, I think my G brother the Hon. Member, Mr Bhebhe, will remember that we allowed during the 1985 general election all those *permanent residents* who have been in this country for long periods, to vote *even if they had not taken citizenship* of this country, and so on. A Statutory Instrument made a provision for them to vote and after the election they could easily apply for citizenship. When the 1990 general elections came, we discovered H

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> A that none of them, not all of them, the majority of them had not exercised the privilege we had granted them by the instrument of either 1980 or 1985. So again, this year, we allowed them to vote. *We are saying those who have been allowed to vote in those two general elections, that is in 1980 and 1985 and are still permanent residents in this country shall be allowed henceforth to vote.* We shall not seek any further law each time B there is a general election. I hope this satisfies the hon. Member" (3044 *Hansard*, 12 December 1990) (the emphasis is mine).

The elections in 1979 were held in terms of the transitional arrangements referred above. The 1980 elections were also conducted in terms of a British Order-in-Council, the Southern Rhodesia (Constitution of Zimbabwe) C (Elections and Appointments) Order 1979, which provided for essentially the same qualifications for voting as was the case in the previous elections of 1979. Section 175(10)(a) of the Electoral Act allowing non-citizens to vote was repealed by Act 13 of 1985 thus effectively disenfranchising non-citizens. There were also other enactments that attempted to enfranchise the aliens who were eligible for citizenship but had failed to register as citizens D for one reason or other. Act 30 of 1990 was clearly intended to resolve that issue once and for all.

It is clear from the Third Schedule that a citizen loses his right to vote upon his loss of citizenship. This has been the case in successive Electoral Acts and para 3(1) of the Third Schedule does not seek to alter that principle.

E In the result, I am satisfied that a person who was a citizen as of 31 December 1985 loses his right to vote upon ceasing to be a citizen by operation of the law, namely, para 3(3) of the Third Schedule. I have already held that the common roll for the election of a President in terms of s 28(2) of the Constitution is the sum total of the various constituency rolls. A constituency roll must be taken to mean one and the same thing as the electoral roll for a F constituency referred in the Third Schedule. To hold otherwise would be absurd. The loss of vote or disenfranchisement upon cessation of citizenship is a loss by operation of law, namely, para (3)(3)(a) of the Third Schedule.

Where the loss of citizenship is common cause, the consequent loss of the right to vote is by operation of the law making the procedures set out in s 25 G of the Act superfluous or non-applicable. In such cases, the constituency registrar, or anybody else for that matter, cannot reverse such a loss nor does he have any discretion in the matter. The law has taken its course, the voter has lost his or her right to vote by operation of the law and the loss cannot be revived in any way.

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IS RESIDENCE IN A PARTICULAR CONSTITUENCY A A REQUIREMENT FOR REGISTRATION ON A COMMON ROLL FOR THE ELECTION OF THE PRESIDENT?

The respondent, in his cross-appeal, contends that the learned judge in the court *a quo* erred in holding that it was in law a requirement for registration on the common roll for the purposes of a Presidential election for a person to B prove his residence in a particular constituency. This issue of course raises the question of what constitutes the common roll for the purposes of electing a President. Put differently, is the common roll referred to in s 28(2) of the Constitution separate and distinct from the sum total of the constituency rolls?

In the court *a quo,* the respondent argued that for any person to qualify to be C registered on the common roll he or she must be eighteen years of age, a citizen of Zimbabwe or have been a permanent resident of Zimbabwe as at 31 December 1985. The respondent further argued that residence qualification was immaterial for one to be registered on the common roll referred to in s 28(2). He submitted that residence only becomes material or relevant if one D wished to be registered on the roll of a particular constituency. Essentially, the same argument has been advanced in this court in support of the cross-appeal. That argument did not find favour with the learned judge in the court a quo. The first appellant argued to the contrary. The first appellant maintained that residence in a particular constituency was a necessary qualification for enrolment on the common roll. This argument was accepted by the learned E judge. In this regard, she had this to say:

> "Residence qualification is immaterial for one to be registered on the common roll. It only becomes relevant if one wishes to be registered on the roll of a particular constituency, so the argument proceeds.
>
> In terms of this argument, the common roll gives universal suffrage to all F adult citizens or permanent residents in Zimbabwe. Thus a homeless vagrant in the shopping malls of Harare who cannot prove that he is resident in Harare by any of the conventional methods, is qualified to be on the common roll by virtue of his being a Zimbabwean Citizen who is over 18 years of age.
>
> The second interpretation of the subparagraph that has been urged upon G me is to the effect that for any person to qualify to be on the common roll, he/she must first meet the residential qualifications of any particular constituency. Thus, still using the example of the homeless vagrant who sleeps in the shopping malls of Harare, if he cannot qualify to be on any particular constituency roll by virtue of being of no fixed address, he cannot be registered on the common roll. He therefore cannot vote for the H

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> A President even if it is obvious that he resides in Zimbabwe, is over the age of 18 years of age and is a Zimbabwean. According to this argument, the Zimbabwean Constitution does not grant universal suffrage to the citizens and permanent residents, but limits the right to vote for the President only to those who can satisfy the residential requirements for a particular constituency as provided for in the Electoral Act.
>
> B The difficulty one has in interpreting subparagraph (3) of the Third Schedule is that it is in a Schedule that specifically provides for the qualification of Members of Parliament and voters. This reinforces the argument that the voters referred to herein can only be voters to be registered on a constituency roll from which Members of Parliament are C to be elected.
>
> The crisp issue that then falls before me for determination is what was the intention of the legislature in enacting subparagraph (3) of the Third Schedule. Was it to grant universal suffrage to all adult citizens and permanent residents without regard to where these are resident, as argued by the applicant or to grant qualified suffrage as argued by the D respondents.
>
> In determining the intention of the legislature, I am to be guided by the wording used in the enactment. I have to establish whether or not the interpretations urged upon me can be supported by the words used in the subparagraph.
>
> E *The applicant's argument is quite forceful but I am not persuaded that it finds a basis from the wording of the enactment.*
>
> I have been persuaded by the argument on behalf of the respondents. Counsel for the respondents argues that the true meaning of the provisions of the subparagraph is that, to qualify to be on the common roll, a F claimant must show that, in addition to being 18 years of age and a citizen or is regarded as a permanent resident since 1985, he or she meets the residence qualifications that are prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency.

In my view, the wording of the subparagraph (3) of the Third Schedule is clear that all three criteria listed therein must be met before one can be G registered on the common roll.

In my mind, for one to understand fully the provisions on who qualifies to be registered on the common roll, it is necessary to make reference to the provisions of the Electoral Act on the residential qualifications of voters. This is to be found in section 20(1), which provides:

`H in order to have the requisite residence qualifications to be registered as

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a voter in a particular constituency, a claimant must be resident in that A constituency at the date of his claim:

Provided that, if a claimant satisfied the Registrar-General that, for reasons related to his place of origin, political affiliations or otherwise, it is appropriate for the claimant to be registered as a voter in a constituency in which he is not resident, the claimant may be registered B as a voter in that constituency.'

The conclusion that I then come to is that it was the intention of the legislature that for one to be on the common roll, one has to be:

— over 18 years of age

— a citizen of Zimbabwe *or* has been regarded in terms of a written law as a permanent resident since 1985; and, C

— resident in a particular constituency *or* satisfies the Registrar-General that for reasons related to his or her place of origin, political affiliations or otherwise, it is appropriate for him/her to be registered in a constituency he/she is not resident (in).

The practical effect of the above in my view, is to grant suffrage to all D adult citizens and persons regarded as permanent residents who can prove residence in a particular constituency or can satisfy the Registrar-General that they have a link with some other constituency in Zimbabwe by reason of place of origin, political affiliation or otherwise. Those failing to prove residence in a particular constituency *and* links to any E other constituency by reason of place of origin or political affiliation or otherwise will fail to qualify to be on the common roll. This, to me, appears to have been the intention of the legislature in enacting subparagraph 3 of Schedule 3 of the Constitution" (the emphasis is mine).

I agree with the reasoning and the conclusion of the learned judge in this F regard. The history of the phrase "common roll" clearly shows that it was never used by Parliament to denote a consolidated roll, as it were, of the single constituency of Zimbabwe as contended for by the respondent. The various provisions of the Constitution and the Electoral Act suggest otherwise. Thus, as correctly submitted by Mr *Majuru* the term "common roll" derives from pre-independence colonial legislation which differentiated franchise G between "common roll" to denote the roll on which blacks were registered and "white roll" on which whites were registered.

Section 3 of the Electoral Act 14 of 1979 defined "common roll" thus:

"common roll means the rolls kept by the constituency registrars in terms of subsection (2) of section sixteen." H

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A Section 16(2) provided that "Each constituency registrar shall have charge and custody of the roll of voters on the common roll for his common constituency". "Common roll" constituency was defined in the Act as follows:

"Common Roll Constituency' means a constituency referred to in para (a) of subs (c) of section six be delimitated from time to time in B accordance with the provision of Chapter 1."

Thus, the history of the legislation clearly shows that the term "common roll" referred to the eighty common roll constituencies on which blacks were registered. Since the abolition of the racially segregated franchise system it would appear to me that the term "common roll" has referred to C and means the one hundred and twenty common roll constituencies. This view is reinforced by the various provisions in the Constitution which clearly link the term common roll to the constituency. Thus, s 38(1)(a) provides as follows:

"38(1)There shall be a Parliament which, subject to the provisions of section 76(3b), shall consist of one hundred and fifty members qualified D in accordance with Schedule 3 for election or appointment to Parliament, of whom —

(a) one hundred and twenty shall be elected by voters registered on the *common roll for one hundred and twenty common roll constituencies*;" (my emphasis).

E The use of the word "common roll" in the above section is inconsistent with one common roll for one constituency of Zimbabwe as a whole.

Section 60(2) and (4)(c) and (e) of the Constitution refer to the term common roll. They provide as follows:

"60(2) Zimbabwe shall be divided into one hundred and twenty common F roll constituencies.

…

60(4) In dividing Zimbabwe into constituencies the Delimitation Commission shall, in respect of any area, give due consideration to —

(c) the geographical distribution of voters registered on the common G roll.

…

(e) in the case of any delimitation after the first delimitation consequent upon an alteration in the number of constituencies, existing electoral boundaries;

H and whenever it appears necessary to do so in order to give effect to the

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provisions of this subsection, the Commission may depart from the A requirements of subsection (3), but in no case to any greater extent than twenty per centum more or less than the average number of registered voters in constituencies on the common roll."

Schedule 3(3)(1) also provides:

"(1) Subject to the provisions of this paragraph and to such residence B qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who —

(a) is a citizen of Zimbabwe; or

(b) since 31 December 1985, has been regarded by virtue of a written C law as permanently resident in Zimbabwe;

shall be qualified for registration as a voter on the *common roll*" (emphasis is mine).

Section 101(2) of the Act as read with s 28(4) of the Constitution provides that if more than one candidate is nominated for the Presidency a poll shall be taken in each constituency for the election of a President. D

It is quite clear from the above statutory provisions that Parliament used the term common roll to refer to the constituency common rolls, and the common roll referred to in s 28(2) of the Constitution is no more than the sum total of 120 constituency common rolls referred in the various provisions of both the Constitution and the Electoral Act. Thus, in my view, the learned judge was E correct in concluding that:

(a) the age of 18;

(b) citizenship or permanent residence; and

(c) residence in a constituency,

were necessary qualifications for registration on the common roll referred to F in s 28(2) of the Constitution. On this basis, the cross-appeal cannot succeed.

Finally, the court came to the following conclusion:

1. That the sum total of all the constituency rolls constitute the common roll in terms of s 28(2) of the Constitution of Zimbabwe.
2. That the court a quo had no legal basis for issuing the directive in para 4 G of its order, directing the Registrar-General of Elections to make adequate arrangements for persons away from their constituencies on the polling dates to cast their votes in other constituencies. Consequently, that directive is hereby set aside.
3. That it is in law a requirement, as the court *a quo* correctly held, for registration on the common roll for the purposes of a Presidential H

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A election in Zimbabwe for a person to prove his residence in a particular constituency.

4. That, by a majority of four to one, a person who ceases to be a citizen also ceases to be a voter by operation of law, namely para 3(3) of the Third Schedule of the Constitution of Zimbabwe. Consequently para 3 of the order of the court *a quo* is hereby set aside.

B In the result, the appeal is allowed. The cross appeal is dismissed. There will be no order as to costs.

CHEDA JA, ZIYAMBI JA and MALABA JA concurred.

C SANDURA JA: I have read the judgment prepared by Chidyausiku CJ and agree with the conclusions reached by him on all issues except the interpretation of the provisions of paras 3(1) and 3(3) of Schedule 3 of the Constitution of Zimbabwe ("the Schedule"). Paragraph 3(1) reads:

> "Subject to the provisions of this paragraph and to such residence D qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who —
>
> (a) is a citizen of Zimbabwe; or
>
> (b) since 31 December 1985 has been regarded by virtue of a written law E as permanently resident in Zimbabwe;
>
> shall be qualified for registration as a voter on the common roll."

In terms of subpara (1)(a), a citizen of Zimbabwe who has attained the age of eighteen years and who meets the residence qualifications prescribed in the Electoral Law is qualified for registration as a voter on the common roll. F That is clear and straightforward.

However, in terms of subpara (1)(b), and subject to the residence qualifications already referred to, any person who, since 31 December 1985, has been regarded by virtue of a written law as permanently resident in Zimbabwe is qualified for registration as a voter on the common roll. Thus, for example, G a person who lost the citizenship of Zimbabwe in November or December 1985 on the ground that he opted to retain his foreign citizenship falls into this category, provided that immediately before 1 December 1984 he was ordinarily resident in Zimbabwe and continues to be so resident.

Such a person has, since 31 December 1985, been regarded as permanently resident in Zimbabwe by virtue of s 9(8) of the Citizenship of Zimbabwe Act H [*Chapter 4:01*], which reads as follows:

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> "Notwithstanding anything to the contrary in any other enactment, but A subject to subsection (9), any person who was ordinarily resident in Zimbabwe immediately before the 1 December 1984, and who ceases to be a citizen of Zimbabwe in terms of subsection (3),(4), (5), (6) or (7), shall be entitled, on and after the date on which he ceased to be a citizen of Zimbabwe — B
>
> (a) to reside in Zimbabwe; and
>
> (b) -(d) …; and
>
> (e) generally, to do all such things as may be done by persons who are ordinarily resident in Zimbabwe."

The question which arises is whether a citizen of Zimbabwe, who qualified C for registration as a voter on the common roll in terms of subpara (1)(a), could also qualify for that registration in terms of subpara (1)(b). I have no doubt in my mind that he could, provided he had, since 31 December 1985, been regarded by virtue of a written law as permanently resident in Zimbabwe. The greater includes the lesser.

In my view, a citizen of Zimbabwe who, since 31 December 1985, has been D ordinarily resident in Zimbabwe is regarded by virtue of the written law of Zimbabwe as having been permanently resident in Zimbabwe since that date.

To substantiate that statement, I would like to examine the position of a foreigner who acquired the citizenship of Zimbabwe by registration before 1 December 1984. It is clear from the legislation in force at the time that it E was necessary for such a foreigner to have in his possession a permanent residence permit, issued in terms of the relevant Immigration Act, before he applied for the citizenship of Zimbabwe by registration.

The legislation then in force was the Citizenship of Rhodesia Act [*Chapter 23*]. The relevant part of s 7 of that Act reads as follows:

"7(1) If a person who is not a citizen of Rhodesia — F

(a) is of full age and capacity; and

(b) makes application in the manner prescribed; and

(c) is qualified to be registered as a citizen of Rhodesia; G

the Minister may … authorise the registration of the person as a citizen of Rhodesia.

(2) A person who makes an application in terms of subsection (1) shall be qualified to be registered as a citizen of Rhodesia if he satisfies the Minister that he —

(a) was lawfully admitted to Rhodesia for *permanent residence*; and

(b) is, at the date of his application, ordinarily resident in Rhodesia; and H

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(c) has, at the date of his application, been ordinarily resident in Rhodesia —

(i) in the case of a person who has not resided in Rhodesia before the date of his application for a period of more than five years or periods in the aggregate amounting to more than five years, for a period immediately preceding the date of his application B of not less than two years …;

(ii) in the case of a person who has resided in Rhodesia before the date of his application for a period of more than five years or periods in the aggregate amounting to more than five years, for a period immediately preceding the date of his application of not C less than six months …;

(d) -(e) …

(f) intends, after the grant of his application, to continue, subject to the exigencies of his employment, to reside in Rhodesia.

D (3) …

(4) No period during which a person who makes an application in terms of subsection (1) resided in Rhodesia as a visitor or in terms of a permit issued under an enactment permitting temporary residence in Rhodesia in force before, on or after the appointed day shall be counted for the purposes of subsection (2) as a period of residence in Rhodesia" E (the emphasis is mine).

It is clear from the above provisions that a person applying for citizenship of Rhodesia by registration had to satisfy the Minister that, *inter alia*, he had been lawfully admitted to Rhodesia for permanent residence. It is also clear that in computing the periods of residence set out in s 7(2)(c) any period F during which the applicant had resided in the country as a temporary resident was to be ignored. What that means is that the periods set out in s 7(2)(c) were periods during which the applicant was in the country as a permanent resident in terms of a permanent residence permit issued in terms of the relevant Immigration Act.

That conclusion is confirmed by the personal details of the applicant required G on the application form. The relevant application form is set out in the Schedule to the Citizenship (Amendment) Regulations, 1971 (No. 2), published in Rhodesia Government Notice 744 of 1971 at 998-999. The relevant part of the form reads as follows:

"13. Date and place of lawful entry into Rhodesia for permanent residence: H Date: Place:

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14. Permanent Residence Permit: No.: Date of Issue: A Place of Issue:

15.-17. …

18 (a) Have you been ordinarily resident in Rhodesia for an unbroken period of not less than two years from the date of issue of your Permanent Residence Permit to the date of this application? B

Yes ☐ No ☐ ; or

(b) Have you been ordinarily resident in Rhodesia for an unbroken period of not less than six months from the date of issue of your Permanent Residence Permit to the date of this application?

Yes ☐ No ☐ ." C

Similar information was required from an applicant in terms of the Citizenship C Regulations, 1963, published in Southern Rhodesia Government Notice 955 of 1963, the Citizenship Regulations, 1967,

published in Rhodesia Government Notice 609 of 1967, and the Citizenship Regulations, 1970, published in Rhodesia Government Notice 215 of 1970.

In the circumstances, it follows that a person who acquired the citizenship of D Zimbabwe by registration before 1 December 1984, for example, and who has been ordinarily resident in Zimbabwe since he acquired that citizenship is regarded by virtue of a written law as having been permanently resident in Zimbabwe since 31 December 1985. He is, therefore, qualified for registration as a voter on the common roll, not only in terms of para 3(1)(a), but also in E terms of para 3(1)(b) of the Schedule.

In my view, it cannot logically be argued that a person who was a permanent resident of Zimbabwe before he acquired the citizenship of Zimbabwe by registration ceased to be a permanent resident of Zimbabwe the moment he became a citizen of Zimbabwe. There is no such provision in our law. F

I now wish to examine the position of a citizen of Zimbabwe by birth. His status as a permanent resident of Zimbabwe is much stronger than that of a citizen of Zimbabwe by registration. He does not require a permanent residence permit in order to become a permanent resident of Zimbabwe.

His domicile, i.e. the country in which he ordinarily resides and which he regards as his permanent home, is Zimbabwe. This permanent home is his G domicile of origin, i.e. the domicile which he received at birth.

Our statute law equates domicile with permanent residence. In this regard, s 3(1) of the Immigration Act [*Chapter 4:02*] ("the Act") states as follows:

> "Subject to this section, a person shall be regarded, for the purposes of this Act, as being domiciled in a country if — H

(a) he resides permanently in that country; or

(b) that country is the country to which he returns as a permanent resident."

The section, therefore, equates domicile with permanent residence. See *Grant et Uxor* v *The Chief Immigration Officer* 1976 (1) RLR 268 (A) B at 269D.

What that means is that, in terms of s 3(1) of the Act, a person domiciled in Zimbabwe either resides permanently in Zimbabwe (i.e. as a permanent resident) or Zimbabwe is the country to which he returns as a permanent resident.

C In the circumstances, it follows that a citizen of Zimbabwe by birth who, since 31 December 1985, has been ordinarily resident in Zimbabwe, is regarded by virtue of a written law as having been permanently resident in Zimbabwe since 31 December 1985. He is, therefore, qualified for registration as a voter on the common roll, not only in terms of para 3(1)(a) but also in terms of para 3(1)(b) of the Schedule.

D If it had been the intention of the legislature that subpara (1)(b) should only apply to persons who were not citizens of Zimbabwe it would have said so, and para 3(1) would have been drafted so that it read as follows:

> "Subject to the provisions of this paragraph and to such residence qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular constituency, any person who has E attained the age of eighteen years and who —
>
> (a) is a citizen of Zimbabwe; or
>
> (b) not being a citizen of Zimbabwe, has since the 31 December 1985 been regarded by virtue of a written law as permanently resident in Zimbabwe;
>
> F shall be qualified for registration as a voter on the common roll."

In my view, the fact that subpara (1)(b) of the Schedule was not drafted in the form shown above is significant. Regardless of what was said in Parliament when the constitutional amendment was debated, I am satisfied that subpara (1)(b) includes citizens of Zimbabwe who have been ordinarily G resident in Zimbabwe since 31 December 1985. They are certainly not excluded by the wording of the subparagraph according to the plain meaning of the words used.

Finally, I wish to examine the provisions of para 3(3) of the Schedule. The paragraph reads as follows:

> H "Any person who is registered on the electoral roll of a constituency shall

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be entitled to vote at an election which is held for that constituency A unless —

(a) he has then ceased to be a citizen of Zimbabwe; or

(b) he is then, in accordance with the provisions of subparagraph (2), disqualified for registration; or

(c) in the case of a person who was registered on the electoral roll by B virtue of the qualifications referred to in subparagraph (1)(b), he has ceased to be so qualified."

In my view, a citizen of Zimbabwe who is registered as a voter on the common roll, and who qualifies for such registration in terms of both para 3(1)(a) and para 3(1)(b) of the Schedule, would not lose the right to vote C merely because he has lost one of the two grounds on which he qualified for registration as a voter.

In other words, if such a registered voter ceased to be a citizen of Zimbabwe, for whatever reason, but remained qualified for registration as a voter in terms of para 3(1)(b) of the Schedule, he would not lose the right to vote. He would only lose that right if he ceased to be a citizen of Zimbabwe and no D longer qualified for registration as a voter in terms of para 3(1)(b) of the Schedule.

That, in my view, is the correct interpretation of the provisions of para 3(3) of the Schedule.

The learned judge in the court *a quo*, therefore, correctly determined the E issue. It follows that the appeal against para 3 of the order of the court *a quo* is devoid of merit and must be dismissed.

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

Gill, Godlonton & Gerrans, respondent's legal practitioners

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MBERENGWA WEST ELECTION PETITION 2002 (1) ZLR 233 (H)

Citation	2002 (1) ZLR 233 (H)
Case No	Judgment No. HH-43-02
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	3 July 2001; 26 July 2001
Judgment	6 March 2002
Counsel	*S Hwacha*, for the petitioner *T Hussein*, for the respondent
Case Type	Election petition
Annotations	Link to case annotations

Flynote

Election — *election petition — allegations made in petition — must be stated with sufficient precision to enable the respondent to know what* D *case he has to answer*

Election — *election petition — allegation of undue influence and general violence — what must be shown*

Headnote

Following his defeat in the general election of June 2000, the petitioner, the E main opposition candidate for the Mberengwa West constituency, sought the nullification of the election of the governing party's candidate on the basis of alleged irregularities and other illegal and corrupt practices which, he claimed, rendered the election neither free nor fair. The illegal practice alleged was obstruction of voters. Several irregularities were also alleged. The real basis of the petition was F allegations of undue influence and general violence, to the extent that neither he nor his party were able to campaign freely, and negating freedom of choice. His evidence alleged such activities as abduction, kidnapping and torture of his party's supporters; destruction of their property; robbery, rape, assaults, and one murder; intimidation and threats. He alleged that the respondent had participated in, or issued G threats of violence, or condoned such actions.

Held, that although an election petition may, in terms of s 132(1) of the Electoral Act, be brought on very wide grounds, the petition itself must state the grounds with sufficient specificity to enable the respondent to know the case he has to answer. No respondent should be dragged into H court without being informed of the basis upon which his election is

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being challenged. The court must determine the matter in terms of what A is specifically pleaded, not on what was revealed by chance in the course of the inquiry.

Held, further, that this did not mean that other irregularities revealed during the course of the enquiry may be ignored. The Act has several provisions through which reports may be made to Parliament, to the Attorney- B General and to the Registrar-General. However, the reporting requirements are a completely separate exercise from the determination to be made on the petition.

Held, further, that where undue influence and general violence are relied upon, it must be shown that these were in the nature of pressure on the candidate or voters. It must also be shown that they pervaded the whole C constituency, and not just a portion of it. This the petitioner had failed to prove.

Held, further, that while a number of acts of violence were proved, it was not shown that they were connected to the election campaign rather than the land occupations that were taking place, nor was it shown that the respondent was responsible for them. The land occupations were a D separate issue from the conduct and validity of the election. The rapes that were proved were a result of deviant, criminal and immoral conduct on the part of the perpetrator.

Cases referred to

Charan Lal Sahu & Ors v Singh [1985] LRC (Const) 31 E

Drogheda Election Petition (1869) 1 O'M & H 252; 21 LT 402

Elima v Ohare & Anor Election Petition 64 of 1993 (Kenya)

Hurungwe East Election Petition 2001 (1) ZLR 285 (H)

Keyser v Conroy 1917 CPD 353

Mithilesh Kumar v Venktaraman & Ors [1989] LRC (Const) 1 F

Mutoko South Election Petition 2001 (1) ZLR 308 (H)

Nicholson v van Niekerk 1915 TPD 581

North Durham Election Petition (1874) 31 LT 321

Salford Election Petition (1869) 20 LT 120

Legislation considered G

Electoral Act [*Chapter 2:01*], ss 83, 105, 132(1), 136(3), 137

Case information

S Hwacha, for the petitioner

T Hussein, for the respondent

Judgment

HLATSHWAYO J: Mberengwa West Constituency lies deep in the rural H

A recess of Zimbabwe's Midlands province, some 400 km south of the capital city, Harare. It can be reached by tarred road via Gweru or Masvingo and thence to Zvishavane. From Zvishavane, the tarred road briefly enters the northern part of the constituency but abruptly peters out after Mberengwa, the administrative hub of the constituency. Thereafter, webs of dusty rural roads, most of which are impassable by small vehicles, service the rest of the B constituency. The court established these details as it contemplated an inspection *in loco* of the constituency. However, this exercise was later dispensed with when no serious disputes of fact remained by the close of the case and the prohibitive costs and logistical difficulties were adjudged to outweigh any benefits of such an exercise.

C The upper half of the constituency consists of rich private and State commercial farming land while the lower half consists of crowded, tired and overgrazed communal lands — a veritable microcosm of the land imbalances in Zimbabwe. In order to reach most of the more than 40 000 registered voters (actual total: 43 949) crammed in the communal areas, one has to travel through the sparsely populated private farmlands. And as if to contain or D sanctify this land imbalance, five Christian mission stations, Mnene, Don Bosco, Chegato, Masase and Wanezi, form a half-moon ring along the eastern, southern and western boundaries of the constituency.

The above is a brief geographical setting of this election petition, in which the petitioner, Mr Mufandaedza Hove, is challenging the election of the E respondent, Mr Joram Gumbo, in the 24-25 June 2000 Parliamentary election. A total of 24 691 votes were cast in this constituency where four candidates stood for election: the petitioner representing the newly formed political party, Movement for Democratic Change (MDC), polled 3 889, the respondent representing the ruling party, Zimbabwe African National Union — Patriotic Front (ZANU-PF), garnered 18 315 and two F independents, Lyton Shumba and Edvin Nyathi, got 968 and 667 votes, respectively. On 27 June 2000, the respondent was declared the duly elected Member of Parliament for the constituency of Mberengwa West. The turnout was 56.2 per cent, well above the Midlands provincial average of 51.33 per cent and the national average of 48.24 per cent. (calculations based on information contained in the report of the Electoral Supervisory G Commission entitled *Report on the 2000 General Elections Zimbabwe: 24-25 June 2000*).

In the petition filed on 17 July 2000, the petitioner seeks the nullification of the respondent's election on the basis of alleged "irregularities, and other illegal and corrupt practices" which he contends "rendered the election H neither free nor fair". However, in his closing address, Mr *Hwacha*, for the

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petitioner, sought to widen the basis upon which the court was being urged A to find for the petitioner.

He submitted that in terms of s 132 under which this petition was filed, as indeed is the requirement for all election petitions, the court may make a finding that the respondent was not duly elected on any of the reasons stipulated or implied in that section, even if such grounds are not specifically B pleaded in the petition. This, he suggested, is because an election petition is in fact an inquiry and that if in the process of inquiry certain irregularities are proved, the court should take the appropriate measures "to enforce electoral morality". Since this appears to be a rather unusual proposition, it bears some close examination.

Section 132 states in the relevant part as follows:

> "(1) 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, illegal practice, irregularity or other cause whatsoever may be presented to the High Court … "

My reading of the above provision is that it sets out wide grounds on the basis of which and election petition may be brought. However, it stands to reason that any petitioner must indicate specifically the grounds upon which he or she requires the respondent's election to be voided. Further, the very fact that the provision is so widely framed as to include "any other cause whatsoever" — though of course the ambit of this phrase must be understood in the light of the *ejusdem generis* rule — is additional reason to require that the petitioner should plead his case with specificity so that the respondent is put on sufficient notice concerning the case he has to answer. It is not fair for any respondent to be dragged into court without being informed of the basis upon which his election is being challenged.

Accordingly, when s 136(3) states, as it does, that, at the conclusion of an election petition, the court shall determine whether the respondent was duly elected, it is clear that such a decision must be arrived at in terms of what is specifically pleaded in the petition and not on what was revealed by chance in the course of the inquiry.

This is far from saying that irregularities exposed during the trial should be ignored. The Electoral Act itself has several provisions through which reports must be made to Parliament, to the Attorney-General and to the Registrar-General for the further consideration of matters, prosecution of individuals or rectification of administrative shortcomings. For example, in terms of s 137, if corrupt or illegal practices are proved or revealed at such a trial, then the court is required to submit a report to the Attorney-General

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for the proper prosecutions and to the Registrar-General for relevant administrative action. However, and this must be made abundantly clear — the reporting requirements are a completely separate exercise from the determination to be made upon the petition which to my understanding must be done according to the grounds specifically pleaded. My brother Devittie in *Mutoko South Election Petition* 2001 (1) ZLR 308 (H) at 310, emphasized this point as follows:

> "Procedure lies at the heart of the law. Its aim is to guarantee precision in order that the ends of justice may be achieved and unnecessary time and expense avoided. These ideals are placed in jeopardy where lack of precision leads to the person accused not knowing with sufficient clarity the case he has to meet. Much time and expense is wasted by the failure to set forth succinctly and according to law the charge raised and the particulars relied upon."

In the same vein, Chandrachud CJ observed in the Indian case of *Charan Lal Sahu & Ors* v *Singh* [1985] LRC (Const) 31 at 42 thus:

> "The importance of specific pleading in these matters can be appreciated only if it is realised that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says, 'connivance' here, or whether the petitioner has used that expression as meaning, 'consent'. It is remarkable that, in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of the consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word 'consent' for the word 'connivance' which occurs in the pleading of the petitioners."

Again, in *Mithilesh Kumar* v *Venkataraman & Ors* [1989] LRC (Const) 1, the petitioner had failed to set out in a succinct and clear narrative form all the facts necessary to enable the respondents and the court to understand the petitioner's case. There was neither an allegation that the first respondent had committed an act of undue influence nor that others had committed it with the consent of the first respondent. The petition was dismissed as disclosing no cause of action.

In both judgments, the Indian Supreme Court also took the opportunity to warn against possible political abuse of election petitions if specificity of pleas is not insisted upon. In *Charan Lal Sahu*, the warning was that "every

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kind of fanciful doubt or frivolous dispute under the sun will have to be A inquired into by this court and election petitions will become a fertile ground for fighting political battles".

In *Keyser* v *Conroy* 1917 CPD 353, it was held that the court would not allow an amendment to an election petition, in circumstances where the amendment contains additional charges. In *Nicholson* v *van Niekerk* 1915 TPD 581, it B was held that where the court, on application, allows an inspection of ballot papers, each party may only make use of and produce before the court the particular papers complained of by him, and is confined to the terms of the order of court allowing the inspection, and the court will not, after the inspection has taken place, allow an amendment of the petition, or the replying affidavit in order to rely upon the defective ballot papers discovered C at the inspection.

By the same logic, the petitioner in this case ought to be limited to the complaints as specified in para 5 of his founding affidavit thus:

> "The respondent, and his supporters, were responsible for the irregularities and other illegal and corrupt practices which rendered the election D neither free nor fair … I contend that s 81(2) of the Electoral Act was breached and the respondent is guilty of corrupt practices in terms of s 105 and illegal practices in terms of s 121."

However, the "irregularities, and other illegal and corrupt practices" as set out above are further elaborated upon in the petitioner's affidavit and witness evidence adduced in court in a manner which makes the complaint E imprecise, overarching and all-embracive and difficult to respond to precisely. There are numerous instances where Mr *Hussein*, for the respondent, was obliged to point out that the allegations raised by a particular witness had not been included or even alluded to in the petitioner's founding affidavit. The court could have taken a strict approach of simply F ignoring the new allegations, but that would have seriously adversely affected and truncated the petitioner's case. Rather, I took the view that the allegations which fell under the general complaints stated in the founding affidavit should be considered, unless they raised completely new grounds of challenge, but treated cautiously bearing in mind the risk of recent invention and fabrication in such cases. G

The imprecision in the formulation of the complaints cannot, of course, escape an appropriate order as to costs. In future, though, it should not come as a surprise to petitioners if the court adopted a stricter approach and based its decision only on allegations specifically stated in the petitioner's founding affidavit and no other. I shall now proceed to discuss the case under the headings of irregularities, illegal and corrupt practices. H

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A ILLEGAL PRACTICES

Only one form of illegal practice is relied upon in the petition, i.e., obstruction of voters as set out in s 121 which says that "[a]ny person who, at an election, willfully obstructs a voter, either at the polling station or on his way thereto or there from, shall be guilty of an illegal practice".

B In para 9.5, the petitioner claims that at Nyondoro Polling Station, his polling agent, Ernest Sigola, was denied entry into the polling station on the first day of polling. The petitioner further alleges that the Mberengwe District Chairman of the Zimbabwe National War Veterans Association, Mr Wilson Kufa, also known as Biggie Chitoro, (hereinafter referred to as "Chitoro") and six supporters had set up a roadblock not far from the polling station and C vetted all people intending to vote, turning away MDC supporters and all those unable to produce ZANU-PF cards.

Now, the petitioner did not call Sigola or any other witness to testify about the alleged obstruction, nor is it clear from the affidavit whether Sigola intended to vote or was proceeding on polling agent business. Having failed to make out a case in his affidavit and evidence in chief in this regard, it was D not open for the petitioner to try and do so in the cross examination of the respondent's witnesses. However, it bears noting, that in cross-examination, Chitoro denied ever setting up any roadblocks before or during the election.

The constituency registrar, Mr Lemon Sigauke Shumba, gave credible and convincing evidence that just before and during the election and in his E official capacity as constituency registrar, he traveled extensively in the constituency, but did not come across any roadblocks, nor were any reported to

him by his other officials. The petitioner's election agent, Lewellin Sibanda, did not make any complaints to the constituency registrar in this or other regard. The petitioner himself, who passed through the counting centre on the second day of voting and met with the constituency F registrar, did not raise this complaint.

The only matter that the petitioner raised then was a relatively minor one of two girls who had come to the counting centre riding on the back of an open truck. These girls were wearing Zimbabwe cricket team caps featuring the Zimbabwe flag, which it was argued are similar to the ZANU-PF insignia.

G The girls were already moving away on the instructions of the registrar when the petitioner came to complain. Had the respondent had any other serious complaints like the alleged obstruction, he would have raised them then. Finally, no reports were made to the police about this alleged roadblock.

IRREGULARITIES

H Some of the irregularities mentioned in the petition were either specifically

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abandoned or were not persisted in and shall be deemed to have been A abandoned, while others were not proved at all.

By the close of his case, the petitioner had not led any evidence in connection with the allegation contained in para 9.3 of the founding affidavit, *viz.*, that the ballot box from Choruvabvu Secondary School was tampered with in the absence of his polling agent who, "due to transport and security constraints B was unable to travel with the ballot boxes". Nevertheless, the constituency registrar gave clear evidence, which the petitioner did not challenge in cross-examination, that nothing of the sort occurred, that the procedures of confirming that the seals on the boxes were intact and of reconciling the ballot papers were strictly adhered to.

Other complaints by the petitioner pertaining to alleged irregularities were as C follows:

[*His Lordship detailed the allegations and evidence, and concluded:*]

Consequently, there are no irregularities that have been proved, which the D respondent or anyone for that matter can be held answerable for.

UNDUE INFLUENCE AND GENERAL VIOLENCE

The real basis of the petitioner's case appears to be allegations of undue influence and general violence. These are contained in the petitioner's affidavit and testimony, a brief summary of which follows immediately E below.

The petitioner gave evidence first. He said that he is a senior lecturer in accounting, Department of Accountancy, University of Zimbabwe. His candidature for the MDC party was approved in March 2000, but the party had already begun campaigning by January 2000 through a constituency F coordinating committee of eight people and several local committees.

He managed to hold seven rallies at which the attendance averaged 500 and regarded such a showing as "quite good for a new political party". After every rally, party structures were formed in the areas concerned. The local committees, who would then invite him to address them, organised these rallies. He himself operated from Harare, some 400 km away. He testified G that it was the strategy of his party to leave the mobilisation of supporters to local structures, while keeping the candidates out of the actual campaigning. The last rally organised by his party was held at Mwembe business centre on 23 April. Thereafter, he claims that his party was not able to campaign openly for the two-months period leading to the June 24-25 election because of intimidation by supporters of respondent's party and war veterans. H

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A The petitioner alleged that road blockades were mounted by war veterans and ZANU-PF youths on all roads leading into the constituency, making it too risky to venture in and campaign. However, he never personally witnessed any roadblocks as he had been warned by his supporters, friends and relatives to stay out of the constituency. Later on, he moved his base from Harare and established his "command post" just outside the constituency in the town of B Zvishavane, which was "quite safe". Some members of his campaign team fled from the constituency and took refuge in Bulawayo or joined him in Zvishavane. His party then resorted to night-time campaigns, painting messages on rocks and roads and an aeroplane distribution of leaflets was conducted a few days before polling.

C Under cross examination, the petitioner agreed that he was indeed related to both the respondent and to Chitoro and was on talking terms with both before the election campaign started, but that he had refrained from discussing the violence with either of them, preferring to report to his own party leadership. He had not lodged any formal complaint with the police either, nor had he petitioned the President to stop the elections in the constituency on account D of the violence he perceived, as he had left all that to the legal team of the MDC party.

The petitioner stated that he believed that the respondent was responsible for the violence and intimidation because he (the respondent) had, in a memorandum, listed Chitoro and war veterans in the district and constituency campaign team structures. This communication was addressed by the E respondent in his capacity as ZANU-PF provincial secretary for administration to one M E Hove, and was produced as Exhibit 1.

Using a computer-assisted presentation, the petitioner then went on to indicate the key areas, occurrences and evidence that he intended to adduce through fifteen witnesses. All in all, the petitioner's allegations and evidence F presented may be summed up under the following categories:

1. Abduction, kidnapping and torture of MDC members by the supporters and sympathizers of respondent and his party; the destruction of their property, robbery, assaults, rapes, including the murder of one MDC supporter;
2. Intimidation and threats directed at MDC officials, supporters and G members of their families, which made campaigning impossible in the constituency;
3. Approval and ratification by respondent of campaign methods used by Chitoro, war veterans and the ZANU-PF youths;
4. That the respondent himself participated in, or issued threats of, violence H or condoned the same; and

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5. That an atmosphere of general violence prevailed, thereby negating A freedom of choice.

Now, in terms of s 105 of the Electoral Act, undue influence is committed by 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
>
> (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 — C
>
> (i) to sign a nomination paper or refrain from signing a nomination paper; or
>
> (ii) to vote or refrain from voting."

Thus, in terms of the above definition, the violence and intimidation that is punishable under the Act is that which is directed at affecting the vote. In other words, "the act alleged as constituting undue influence must be in the D nature of pressure or tyranny on the mind of the candidate or the voter" (*Charan Lal Sahu & Ors* v *Singh supra) qua* voter and in connection with an election.

ABDUCTIONS AND ASSAULTS

[*His Lordship considered these allegations in detail, and continued:*] E

It is clear that the alleged rapes occurred not as a common purpose of punishment and humiliation shared by the captors, but as a separate deviant, criminal and immoral conduct of Ncube, which he

was determined to carry through by subterfuge and deception. This is borne out by the fact that Makoni who was apparently in charge of the farm in question, calmly F accepted the complainant's refusal.

[*The court then dealt with further aspects of the evidence and continued:*]

But one is still left with a nagging question, why these people were forcibly brought to the farm in the first instance. On the way, they are assaulted and humiliated by being dipped into the water and ordered to G chant gabbled slogans like: "MDC is bad, because it wants to bring white people. ZANU-PF kills!" But upon arrival, they are banqueted and treated to the best feast that could be scrounged from an occupied farm. The following morning there is more feasting, after which the captives are allowed to go. There is no political re-education at their destination. Instead, the two women become victims of the exploits of a depraved sex maniac. If one combines this H

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A picture with the petty thefts which accompanied most of the abduction incidents described in this court, one gains the impression that these were activities of miscreant elements with limited or confused political orientations or outright criminals taking advantage of the farm occupations and the political campaigns.

There is nowhere in which any of those assaulted are being warned to vote B for ZANU-PF or for the respondent or to refrain from voting in the then forthcoming election. Even the so-called "baptisms back to ZANU-PF" seem to have been focused more on changing the victims' attitudes towards land occupations than on increasing support for the ruling party.

[*His Lordship then dealt with further allegations of assault and contiued:*]

C Once again, there is nothing in this horrific incident that implicates the respondent or his agents in the attack. The witness and his colleagues are pursued by war veterans on suspicion of having brutally attacked a war veteran outside the constituency, caught and taken to an occupied farm in the constituency and are there beaten up and tortured. It cannot be said that the D respondent had knowledge of or approved this apparently spontaneous attack D and counter attack. Without delving into the goings-on in Mataga, all that the court could make of this incident was that both incidents were horrific criminal acts engendered or exacerbated by political polarisation and the misguided carrying of dangerous weapons.

E ALLEGATIONS AGAINST BIGGIE CHITORO

[*His Lordship dealt with the allegations in this regard and concluded:*]

In the light of the above, it is not necessary to go into the question of whether the respondent did adopt or ratify Chitoro's actions, for none have been shown to violate the provisions of the Electoral Act. The allegations relating to the assault on Mrs Ngwenya will be dealt with F separately below.

ALLEGATIONS LEVELED PERSONALLY AGAINST THE RESPONDENT

The allegations leveled personally against the respondent are that he incited his supporters to beat up opposition members, that he threatened to inflict G injury by supernatural means on those who did not vote for him by announcing that ZANU-PF had invisible "goblins" and that he ordered Mrs Josephine Ngwenya to be assaulted at a rally in Shauro. The respondent denies all these allegations, and I shall examine each one of them below.

The first two allegations of incitement and threats of supernatural harm are H contained in the testimonies of Gedsen Hove, Obey Siwela nd Dean Jama.

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According to Siwela, the following is what happened at a rally in Rengwe A addressed by the respondent:

> "Mr Chitoro talked about a very good thing that people were supposed to go to the farms. After that he said he knew who MDC people were and that if they lost the election they would monitor us. After his address I saw him sharpening his knife and heard him saying that he was a soldier B and could kill people … Mr

> Gumbo then stood up. I only remember a few things. He said we had surprised him to attend in such large numbers. He said it was because of fear of Chitoro. If we are going to continue supporting MDC they will give more power to Chitoro because a donkey will not get to the grinding mill unless beaten … He then said ZANU-PF has goblins that we can't see." C

Dean Jama's version of what took place at the same or similar rally is slightly different, thus:

> "While I sat close to the respondent, he did not talk to me. He said to the rally that we should stay together peacefully in our area. He then said that those who did not live well with others should be treated like cows which D refuse to get into a dip tank — beaten up."

The respondent maintained that he always preached peace at his rallies — a fact that a number of witnesses for the petitioner acknowledged — and that the witnesses must have misunderstood his reference to cows and donkeys. According to the respondent, his message, which he communicated at most of his rallies was: "Don't beat up people like you beat up cattle to jump into E the dip tank because you cannot make a donkey drink water by beating it up!" There is, of course, a well known English expression that you can take a horse to water, but you cannot make it drink, but how this could have been rendered in the Shona language to idiomatically convey the same meaning is difficult to imagine. On the face of it, the more usual example, in the experience of peasant farmers, would be of beating up animals, which refuse to get into the F dip tank. However, in the light of the accepted fact that the respondent did preach peaceful co-existence in the constituency, the worst that can be said is that the message that he conveyed was of two diametrically opposed assertions and that he must have confused his audience. There is no evidence of unequivocal incitement to violence. G

The allegation of threatening harm through supernatural forces like "goblins" or "hidden cameras" is the weakest of them all. Our society has participated in several regular national and local government elections since independence in 1980 and, given the generally high level of literacy, one of the highest in the world, such threats do not have any impact at all in negating voters' freedom of choice. In this case, it is difficult to imagine how, for example, an H

Hlatshwayo J

A ex-police officer like Siwela or an intelligence officer like Jama both with more than four years of secondary education could have been affected by a childish threat of goblins and hidden cameras. The provisions of s 105(b) were meant to prevent the threat of use of supernatural, religious and spiritual powers to influence the voting. This was done in recognition of the immense power and influence that religious organisations and spiritual leaders wield B over common folk.

The Kenyan case of *Elima* v *Ohare & Anor*, High Court of Kenya at Nairobi, Election Petition number 64 of 1993 is probably a good example of the kind of resort to dark supernatural forces that the statutory provision aims to forbid. Elima challenged the second respondent's (Kombo) election on the C basis that Kombo had organised and administered a traditional oath, called "Khulia Silulu" on voters, thereby causing fear amongst those voters that may not have wished to vote for him. The "oathing ceremony" involved the slaughter of a black ram and the mixing of the ram's skin, intestines, intestinal refuse and blood with special herbs, the bathing of the preferred candidate with the mixture and the incantation of oaths by both the candidate and D members of the community before consuming the meat. Kombo allegedly plucked a piece of meat and swore: "I Musikari Kombo swear that from now on I shall continue Masinde Muliro's journey without fear until President Moi is removed from power." Members of the community then came forward and in turn plucked pieces of meat and swore: "I swear that I shall vote for Musikari Kombo in the coming elections. If I do not, may I die", and then ate E the meat. The court found that respondent had indeed participated in the ceremony with a view to binding voters to vote for him and thus guilty of the offence of undue influence and nullified his election.

[*His Lordship then dealt with allegations of assault on a Mrs Ngwenya, and concluded:*]

F The fact that Mrs Ngwenya was assaulted cannot be disputed but it does not appear that this was done by or at the instance of the respondent or Biggie Chitoro. According to the evidence of Inspector Zvinawauya, Mrs Ngwenya reported a case of common assault and that her assailant was a Mr Tekere. When Tekere was called to the police station, Mrs Ngwenya failed to identify him and the matter was referred to CID for further investigation. Accordingly, G there is no credible evidence to hold either the respondent or Chitoro guilty of undue influence on this score.

GENERAL VIOLENCE

In the Electoral Act, there are no provisions focused on punishing general violence. Alive to this *lacuna*, Devittie J, in the *Hurungwe East Election Petition* 2001 (1) ZLR 285 (H) H at 288B said:

2002 (1) ZLR p246

Hlatshwayo J

> "Although the Electoral Act does not provide for general intimidation as A a ground of challenge I entertain no doubt at all that at the heart of the Act lies the principle of freedom of election. Accordingly, where the evidence establishes that due to intimidation and other corrupt practices, freedom of election ceases to exist, the court is bound to declare such election as a nullity even though the candidate or his agent may have had nothing to B do with the intimidation."

However, there is equally strong opinion tending against reading too much into the electoral legislation of certain common law rights:

> "The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statutes which create, confer or limit those rights. Therefore, for C deciding the question whether an election can be set aside on any alleged ground, the courts have to consult the provisions of the law governing the particular election. They have to function within the framework of that law and cannot travel beyond it" (*per* Chandrachud CJ in *Charan Lal Sahu & Ors* v *Singh supra* 39). D

I am of the respectful view that Devittie J's view above goes too far in implying certain common law rights without attempting to base them on specific provisions of the Act. The danger with such an approach is that the implied right then tends to assume a life of its own and significance far greater than what was intended by the legislature. In my view, general intimidation as understood at common law is imported into the statute by the wording of E s 132, which allows an election to be challenged on stated particular grounds, including "any other cause whatsoever". Even if one were to adopt a strict interpretation of the section, "general intimidation" would easily be found to be ejusdem generis specified corrupt practices mentioned in the section.

Furthermore, in terms of s 83 of the Act, it is acknowledged that general F violence might affect the electoral outcome and provision is made for the abrogation of elections by the President, after consultation with the Electoral Supervisory Commission, where he has reason to believe that, by reason of actual or threatened intimidation or violence or any other cause, it is unlikely that a free and fair election can be held in a given constituency.

Accordingly, even though certain complaints discussed above may not have G met the requirements of s 105, they still can be considered under the rubric of general intimidation. In fact, the petitioner's presentation was focused on illustrating that incidents of violence and intimidation covered the whole constituency. The respondent, on the other hand, argued that the violence and intimidation complained of related more to the occupation of farms than to the election itself, that the violence was limited to the Mwembe-Don Bosco H

2002 (1) ZLR p247

Hlatshwayo J

A corner of the constituency, which is not the area of the greatest concentration of the population. The petitioner maintained that this was where most of the electors are resident and that at any rate other areas were affected as well.

Undue influence at common law will render an election void only if it is "spread over such an extent of ground, it must permeate the community to such an extent, that freedom of election has ceased to exist": *per* Keogh J in B *Drogheda Election Petition* (1869) 1 O'M & H 252.

In the *North Durham Election Petition* (1874) 31 LT 321, a committee room was wrecked, the police station was stormed, and the prisoners liberated; the vicar's house and other houses were assailed, a conveyance was flung over the cliff, and several persons were ill-treated by the mob. Bramwell B, in C delivering judgment in the case, said:

> "First of all, there is statutory intimidation — the intimidation contemplated by the statute which avoids the seat in cases in which a candidate or his agent is guilty of it. But besides that there is a common law intimidation, and it applies to a case where the intimidation is of such a character, so D general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency. An election will not be set aside if the intimidation be local and partial, and does not affect the result of the election. But where it is of that general character which I have described, so that the

result *may have been affected*, in my judgment it is not part of the duty of a judge to enter into E a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence if that intimidation had not existed, the result would have been different. What he has to do in that case is to say that the burden of proof is cast upon the constituency incriminated, and unless it can be shown that the gross amount of intimidation could not possibly have affected the result of the election, F it ought to be declared void."

In the *Salford Election Petition* (1869) 20 LT 120, Martin B said:

> "It is not because riots, and violence, and assaults and beatings take place that that is to avoid an election, except it be of such a character as to render those persons who are to exercise the franchise reasonably unable G or reasonably unwilling to exercise their right."

Devittie J, in *Hurungwe East Election Petition supra*, also quoted the above English cases with approval and teased out the following requirements for an election to be set aside on the basis of general intimidation:

(a) The evidence must show that the intimidation is of a general character, H permeates the whole community and is not restricted to a small locality;

Hlatshwayo J

(b) Where the intimidation is of the general character stated, the court is not A MC required to inquire whether the result has been affected as a consequence. All that the court has to determine is whether the result may have been affected and in so deciding the court should have regard to whether the nature and extent of the intimidation may have affected "men of ordinary nerve and courage"; and B

(c) Where the court finds that the result may have been affected then the burden of proof is cast upon the respondent to show that the amount of intimidation could not possibly have affected the result of the election, and unless he can show that, the election ought to be declared void.

Following the above scheme, the first question to ask therefore is whether the violence alleged was of a general character and permeated the whole C community. It has already been pointed out that the violence alleged pertained more to the land occupations than to the election itself as such. If in Britain there has been a race riot towards an election in one or more of the constituencies, say Bristol and Liverpool, and such incidents have been recorded, it cannot and has never been suggested that such riots could form a basis for voiding the election in the affected areas, even though the race D issue may have constituted a key platform for the contesting political parties.

Similarly, the land demonstrations and occupations can be regarded as an issue apart from the actual conduct and assessment of the validity of elections. However, there are other grounds upon which the petition sought to convince the court that there was general violence in the constituency, *viz.*, E the alleged mounting of unofficial roadblocks and the prevention of its supporters from campaigning.

On the allegation that supporters of the respondent had mounted illegal roadblocks throughout the constituency, making it impossible for the petitioner and his supporters to campaign, the evidence of the constituency registrar has already shown that in his travels throughout the constituency, both before and F during the election, no such roadblocks were encountered. Neither the petitioner nor his supporters ever reported the alleged irregular roadblocks to the police or the election officials. The court also received the evidence of the campaign manager for an independent candidate, Lyton Shumba, Alson Janasi, who testified that he and his team traveled extensively throughout the G constituency during the campaign period and held rallies and door to door canvassing in such places as Mutwaidzi, Mavorovondo, Chingezi, Mwanezi, Keyara, Marirazhombe, Shauro, Mwembe, Mberengwa and Bare but never encountered any hindrance or intimidation.

The incidents of hindering the activities of the petitioner's campaign as related by his witnesses at best paint a mixed picture, but at times actually H

Hlatshwayo J

A support the respondent's contention that the election was peaceful. Lynett Dewa, was part of the petitioner's constituency campaign team. She told the court of the one rally her party held barely 100 metres away from a ZANU-PF rally. They were not molested by anyone except some drunkards

who passed by. Later, she says some ZANU-PF supporters walked past her home singing a song denouncing "sell-outs", and since some friends had B told her that ZANU-PF supporters were monitoring her, she went to Bulawayo, leaving behind other members of her party's constituency campaign team, who she claims never did any canvassing for her party after that. It is difficult to assess whether this alleged abandonment of the campaign was due to any real or perceived intimidation or lack of resources, for her team did not have any campaign plan, it had no vehicle, they were not provided with any bus C fares, they had no posters, no manifestos or any party material for distribution. The same impression is evident from the testimony of Stand Ncube and Dean Jama.

Dean Jama also ran away allegedly after hearing ZANU-PF youths singing threateningly near his home, but he never made any reports to the police of D any of his claimed ordeals, including alleged threats that he would be killed if he continued to support the MDC supposedly uttered in the presence of the respondent. Stand Ncube claimed that he was approached by war veterans at his carpentry shop and warned not to campaign for the MDC and to close his shop. When he reported the matter to the police, they came immediately and E ensured that the shop was reopened there and then.

The petitioner himself chose to conduct his campaign from the comfort of the University offices in Harare, some 400 km from the constituency and when he finally saw it fit to come closer to the constituency, he still, for no other apparent reason than comfort and convenience, based himself in nearby town of Zvishavane, still outside the constituency.

F If some members of his poorly-supported campaign team then saw it fit to join him in Zvishavane, it cannot be said with certainty that this was solely due to real or perceived intimidation as it could well have been a move dictated by the comfort and convenience of the petitioner's preferred "command centre".

G All in all, therefore, the petitioner failed to prove that there was any general intimidation, which permeated the whole constituency. He only managed to show isolated cases of real or imagined intimidation of his supporters and unfortunate or even tragic incidents involving some of his supporters but linked more to land occupations than the election campaign itself. In the circumstances, it is not necessary to examine the second and the third criteria H stipulated above, *viz.*, to place the burden on the respondent to prove that the

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alleged violence did not affect the outcome of the election. But even if the A court were to do so, out of excess of caution, the following factors would weigh heavily in favour of the respondent:

(a) The margin of the petitioner's defeat by 3 889 to 18 315 votes in a turnout of 56.2 per cent, well above the Midlands provincial average of 51.33 per cent and the national average of 48.24 per cent, indicates not B only overwhelming support for the respondent but that most of the voters did exercise their right to vote.

(b) The detailed and systematic campaign strategy of the respondent contrasts sharply to the petitioner's arm's length, haphazard and poorly resourced campaign.

(c) The allegations of violence and intimidation have been shown to have C been localised in the northeastern corner of the constituency and particularised on activities connected more with land occupations than with the election itself.

CONCLUSION

From the foregoing, it can be seen that not a single one of the grounds upon D which the election was impugned has been sustained. In terms of s 144 of the Act, I have discretion to depart from the normal rule that costs follow the outcome. However, as I indicated earlier in the judgment, I do not consider that the case for the petitioner was pleaded with precision and therefore see no need for departing from the normal rule. E

Accordingly, I hereby order as follows:

(a) The petition is dismissed, with the petitioner paying the costs.

(b) It be and is hereby declared that the respondent was duly elected for the Mberengwa West Constituency in the June 2000 Parliamentary election. F

(c) It be and is hereby declared that no corrupt practice or illegal practice has been proved to have been committed by or with the knowledge and consent of the respondent or by or with the knowledge and consent of his agents.

(d) It be and is hereby declared that there is no reason to believe that G corrupt practices or illegal practices prevailed in the Mberengwa West Constituency June 2000 election.

Kantor & Immerman, petitioner's legal practitioners

Hussein, Ranchod & Co, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/TSVANGIRAI & ANOR v REGISTRAR-GENERAL & ORS (2) 2002 (1) ZLR 251 (H)

TSVANGIRAI & ANOR v REGISTRAR-GENERAL & ORS (2) 2002 (1) ZLR 251 (H)

Citation	2002 (1) ZLR 251 (H)
Case No	Judgment No. HH-37-02
Court	High Court, Harare
Judge	Garwe JP
Heard	11 March 2002
Judgment	11 March 2002
Counsel	*E Matinenga*, for the applicants *L Matanda*-Moyo, for the respondents
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

D **Administrative law** — *administrative decision — limited grounds on which court may interfere with such decision — Registrar-General — independence of*

Election — *Registrar-General — discretionary powers of — limited grounds on which court may interfere with exercise of those powers*

Headnote

E Voting in the Presidential, council and mayoral elections for Harare and Chitungwiza had been extended to a third day. The applicants, dissatisfied with the way the voting had been conducted on that day, sought an order compelling the first respondent to extend the voting in the Presidential election to a fourth day.

F *Held*, that a court has no general jurisdiction to intervene in administrative decisions or to direct administrative authorities on how they should act. The discretion bestowed on an administrative

authority cannot be interfered with in the absence of illegality, irrationality or procedural impropriety. That the discretion of the Registrar-General should not lightly be interfered with is also clear from the provisions of the G Electoral Act itself, the intention of which was to create some degree of independence on the part of the Registrar-General except where he is given instructions by the Election Directorate. The court has no jurisdiction to give administrative directions to or to substitute its own decision for that of the Registrar-General except in the limited circumstances mentioned. The applicants had not established any basis H on which the court could interfere.

Garwe JP

Cases cited A

Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

Director of Civil Aviation v Hall 1990 (2) ZLR 354 (S)

Hama v NRZ 1996 (1) ZLR 664 (S)

Katiyo v Standard Chartered Zimbabwe Pension Fund 1994 (1) ZLR 225 (H)

Lindsay v Lindsay (2) 1995 (1) ZLR 296 (S) B

Legislation considered

Electoral Act [*Chapter 2:01*], ss 15, 94 & 149

Case information

E Matinenga, for the applicants

L Matanda-Moyo, for the respondents C

Judgment

GARWE JP: In this matter, the applicants seek an order declaring the first respondent to be in contempt of an order of this court and a further order extending by a further day the period of polling in respect of the Presidential, Council and Mayoral elections for Harare and Chitungwiza. The applicants D also seek ancillary relief. The application arises out of an order granted by Hlatshwayo J yesterday evening in which he ordered the first respondent to extend the poll by a further day and to do certain other things necessary for that poll to take place.

Both parties have addressed me at length on the matter. No opposing papers have been filed by the respondents. The respondents have indicated that they E were not able to do so owing to the short notice given for the hearing. In view of the fact that the present application was only filed at about 3.00 p.m. today, the failure by the respondents to file opposing papers is understandable. Having perused the founding affidavit, I find that the applicants have made bald and generalised allegations on the existence of long queues at polling stations. No specific detail has been provided. The respondents deny that F there were long queues of voters today and have submitted that those persons who were in queues had largely been processed by 5.00 p.m. today. Whilst there appears to be a dispute on the facts, it is apparent from the founding affidavit that the complaint by the applicants is based on observations made earlier today. I did not hear the applicants to say the same long queues were G still in existence at the time of the hearing. What is common cause, however, is that voting did continue today although for various reasons delays were encountered at various places.

I will deal firstly with the prayer that the first respondent be held to be in contempt of the order made by this court yesterday. From the submissions made, it is common cause that some stations did not open today at 7.00 a.m. H

Garwe JP

A as directed by Hlatshwayo J. The respondents say most of the polling stations had opened by 10.00 a.m. whilst the applicants say some stations only opened at 12.00 noon. The respondents have

explained why it was not possible to comply strictly with the order. Whilst the respondents say the order was made at 2045 hours, the applicants say the order was made at 2035 hours. The dispute is immaterial. At that stage some polling stations had closed and had B started transporting ballot material to counting centres. There were communication difficulties in getting all the officers back to the polling stations. Further, funds had to be sought for the extra day of polling. When polling resumed it was discovered thereafter that there were a number of cases of persons trying to vote for the second time. Additional equipment had to be sourced from other constituencies to deal with this problem.

C These averments were not really disputed by the applicants. Considering that the order by Hlatshwayo J was made just before 2100 hours, it seems to me that there are certain aspects of the order that would have been just about impossible to comply with, given the short period of time available. For example, the order that the first respondent was to publish a notice in the D Government *Gazette* and another notice in the newspaper advising of the extension of the poll to today would in all probability have been very difficult, if not impossible, to comply with.

The law on contempt is fairly well settled. Failure to comply with orders *ad factum praestandum* renders the defaulter liable to punishment for contempt E unless it is shown that such default was not wilful. In this regard, I refer to *Lindsay* v *Lindsay (2)* 1995 (1) ZLR 296 (S) at 299.

In the light of the particular circumstances of this case and regard being had to the explanation given by the respondent, which explanation remains uncontroverted, I am persuaded that the first respondent has shown that his failure to adhere to the order was not wilful. The prayer that the first F respondent be held to be in contempt of court must therefore fail.

The issue that further arises in this matter is whether this court should order the Registrar-General to extend the poll by an additional day as contended by the applicants. It is necessary to look at the law on this topic. As a general rule, a court has no jurisdiction to intervene in administrative decisions or direct G administrative authorities on how they should act. Various decisions of the courts in this country have stressed this principle. The discretion bestowed on an administrator cannot be interfered with in the absence of illegality, irrationality or procedural impropriety. In this regard, I agree with the remarks by McNally JA in *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at 21 that:

> " H The duty of the courts is not to dismiss the authority and take over its

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Garwe JP

> functions, but to ensure, as far as humanly and legally possible, that it A carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases, we reason backwards from the effect of B the cause. We say 'the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency'."

The learned Judge of Appeal went on to quote with approval comments in Baxter's *Administrative Law* that:

> "The function of judicial review is to scrutinise the legality of administrative C action, not to secure a decision by a judge in place of an administrator. As a general principle, the court will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the D public authority] by the legislature'. Thus, it is said that: '[t]he ordinary course is to refer back because the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances, this principle will be departed from. The overriding principle is that of fairness'." E

There can be no doubt that the above remarks correctly reflect the law as applied by the courts in this country. See also *Katiyo v Standard Chartered Zimbabwe Pension Fund* 1994 (1) ZLR 225 (H), *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S).

In *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (S) at 361, Gubbay CJ F also agreed that interference with a purely administrative decision is not justified except where one of four situations does arise. These situations are aptly described in the judgment as well as in the *Affretair* case *supra*. The general rule is that where circumstances so warrant an aggrieved party can ask this

court to review a decision in terms of s 27 of the High Court Act [*Chapter 7:06*]. In terms of that provision, a decision can be attacked on the G basis that the authority lacked jurisdiction, that the authority had an interest or bias in the matter or was corrupt, that there was gross irregularity in the proceedings.

That the discretion of the first respondent should not lightly be interfered with is also clear from the provisions of the Electoral Act [*Chapter 2:01*] itself. That Act provides in s 15 that in the exercise of his functions, the first H

Garwe JP

A respondent shall not be subject to the direction or control of any person or authority other than the Electoral Directorate, although he may have regard to reports or recommendations by the Electoral Supervisory Commission. Section 94 of the Electoral Act also empowers the Registrar-General, without reference to anyone, to publish a notice fixing the date of the poll and in subs (2) to alter the date, time and place of the poll.

B Clearly, the intention was to create some degree of independence on the part of the Registrar-General except where he is given instructions by the Election Directorate. As a corollary, this court therefore has no jurisdiction to give administrative directions to the Registrar-General except in the circumstances described in the case of *Director of Civil Aviation* v *Hall supra*.

C I do not understand this application to be one for review *strictu sensu*. The relief sought is to compel the first respondent to extend the poll by an extra day and to do certain other things consequential thereto.

It is common cause in this matter that voting did take place today, which is the third day of voting. The respondents say most voters had been able to cast their votes by 1700 hours whilst the applicants say they may still be some D voters who have not been able to cast their votes. As indicated at the outset, the applicants have made bald assertions and have not been able to provide more detail on the situation as at the time of hearing. In fact, the founding affidavit deals more with the situation that existed at about midday and not the situation shortly before the hearing of the application. It is difficult to E understand how in these circumstances I can be expected to order a further extension. I am not persuaded that on the available information there exists sufficient basis for me to intervene. The burden lies on the applicants. The claim by the respondents that all intending voters had voted as at the time of the hearing remained largely uncontroverted. The application for an extension must also fail.

F It is impossible in an election for all administrative arrangements to go smoothly and for every registered voter to vote. As events in this and other jurisdictions have shown there are unforeseen mishaps that arise and need to be tackled along the way. The intention is that as far as is humanely possible the outcome should reflect the will of the people. In other words, the G emphasis is on fairness so that the outcome can truly be described as representative of the will of the electorate. For this reason, the Electoral Act does accept in s 149 that mistakes can be made and that there can be instances where there is non-compliance with the provisions of the Act. It is only in the event that the election is not conducted in accordance with the principles of the Act and such mistake or non-compliance does affect the result of the H election that a court is entitled to interfere and set aside an election.

Garwe JP

Put differently, it is not every incident or act that would justify the nullification A of the result.

I am not persuaded on the facts before me that any basis has been shown for this court to interfere with the discretionary power of the Registrar-General not to extend the election. Had it been shown that his decision not to extend the polling was so grossly unreasonable that something else can be inferred B from it then this court would have been duty bound to intervene and provide relief. But that is not the position.

In the result, the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners C

Attorney-General's Office, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/UDC LTD v CHAWARA KAPENTA FISHING CO-OP LTD 2002 (1) ZLR 257 (S)

UDC LTD v CHAWARA KAPENTA FISHING CO-OP LTD 2002 (1) ZLR 257 (S)

Citation	2002 (1) ZLR 257 (S)
Case No	Judgment No. S-29-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	11 March 2002
Judgment	11 March 2002
Counsel	*A P de Bourbon* SC No appearance for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

D **Hire-purchase** — *Hire-Purchase Act [Chapter 14:09] — s 4 — application of Part II of Act — limit of $3 000 — inequity of limit — need for increase*

Headnote

Section 4 of the Hire-Purchase Act [*Chapter 14:09*], which limits the application of Part III of the Act to agreements for the sale of goods whose price is $3 000 or less, is no longer relevant to the needs of E present-day society. Not only can very little of value be purchased for $3 000, but the effect of the limit is to protect purchasers of goods of little value, leaving purchasers of goods of great value unprotected.

The respondent had purchased a truck on hire-purchase for a price of $374 943, including finance charges. The appellant repossessed the truck for non-payment of instalments and sold it in accordance with F the provisions of the hire-purchase agreement. The respondent, however, claimed damages from the appellant on the ground that the truck had been disposed of contrary to s 20 of the Hire-Purchase Act [*Chapter 14:09*], and was awarded damages on that basis by the High Court. On appeal:

G *Held*, that since the purchase price of the truck exceeded $3 000, s 20 of the Act did not apply to the agreement. Accordingly, the repossession, having been effected in terms of the agreement between the parties, had not been shown to be unlawful.

Case cited

H *Scotfin Ltd v Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (H)

Ziyambi JA

Legislation considered A

Hire-Purchase Act [*Chapter 14:09*] , s 4

Case information

A P de Bourbon SC

No appearance for the respondent

Judgment

ZIYAMBI JA: At the end of the hearing of this matter, we allowed the B appeal and indicated that our reasons would follow.

The respondent in this matter brought six claims against the appellant in terms of a summons issued in the High Court on 4 September 1996.

The claims were based on a hire-purchase agreement contracted between the C respondent and Zimbabwe Motor Assemblers and ceded to the appellant on 24 June 1991. The subject of the agreement was a certain Bedford Truck ("the truck"), the purchase price of which, including finance charges, was $374 943.00.

It was alleged by the respondent that the truck had been unlawfully repossessed and sold by the appellant allegedly for arrear instalments due and owing. It D was as a consequence of the unlawful repossession that the various claims for damages arose.

All the claims failed in the High Court except for one, namely that set out in para (e) of the summons, which partially succeeded and which reads:

> "(e) payment of the sum of $350 000 as and for damages together with E interest thereon at the prescribed rate of 25 per cent per annum from 8 May 1996, being the date of demand, to the date of payment."

It was alleged in para 16 of the declaration that:

> "As a result of the unlawful sale of the truck, the plaintiff would have to acquire a similar truck at a fair and reasonable cost of $350 000, which F sum also represents the fair and reasonable value of the truck at the time the plaintiff lost possession of same to the defendant."

The court awarded to the respondent damages in the sum of $100 000 and costs of suit. It is against these awards that the appellant appeals.

In coming to the conclusion in favour of the respondent, the court accepted G the argument by the respondent that the manner in which the vehicle was disposed of by the appellant after it was handed over contravened s 20 of the Hire-Purchase Act [*Chapter 14:09*] (referred to hereafter as "the Act") and was accordingly unlawful. However, by virtue of s 4 of the Act, the provisions of s 20 do not apply to the agreement the subject of this dispute.

Section 4 of the Act provides as follows: H

Ziyambi JA

> " A Except for sections five*, twenty-two* and *twenty-four*, which shall apply to every agreement or, as the case may be, to the parties to every agreement, this Part shall not apply to an agreement under which the purchase price exceeds the sum of three thousand dollars."

Thus, the provisions of ss 16 and 20 on which the court based its finding were not applicable to the agreement in this case, by virtue of the fact that the B purchase price exceeds $3 000. Accordingly, the repossession, having been effected in terms of the agreement between the parties, has not been shown to be unlawful.

It would appear from the record that, in the court below, the case was not argued on the basis of the provisions of s 4 and that the attention of the trial C court was not drawn to them. Had the

provisions of s 4 been brought to the attention of the court I have no doubt that the court's judgment would have been different.

Before concluding, I consider it necessary to make the following remarks.

The Act was enacted in 1957 and it would appear that the limit of $3 000 D prescribed in s 4 has outlived its usefulness. In *Scotfin Ltd* v *Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (H), a call was made by Robinson J for a revision of this limit. At p 185A of the judgment, the learned judge said:

> "At this point I feel constrained to say that I believe the time is long overdue for the limit of $3 000 prescribed in s 3 of the Hire-Purchase Act [now s 4 of the Act], to be increased to a much more realistic figure, E having regard to present-day prices for goods."

I would repeat the call with the added observation that the limit of $3 000 is no longer relevant to the needs of our present day society. Not only can very little of value be purchased for $3 000, but the effect of the statutory limit is to provide protection only for purchasers of goods of little value leaving, F purchasers of goods of great value unprotected.

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

CHIDYAUSIKU CJ and MALABA JA concurred.

G *Gill, Godlonton & Gerrans, appellant*'s legal practitioners

[*Editor's note:* Since this judgment was delivered, s 4 of the Hire-Purchase Act has been amended by Act 22 of 2001, giving the Minister responsible for finance, the power to prescribe an amount in excess of $3 000. Up to the date of publication of this volume, however, he had not done so, with the H result that the limit of $3 000 still stands.]

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S v NYONI 2002 (1) ZLR 260 (H)

Citation	2002 (1) ZLR 260 (H)
Case No	Judgment No. HB-22-02
Court	High Court, Bulawayo
Judge	Sibanda J and Cheda J
Heard	25 February 2002
Judgment	14 March 2002
Counsel	*T Moyo*, for the appellant *M Moya*-Matshanga, for the State
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *statutory offences — Prevention of Corruption Act [Chapter 9:16] — s 3(1)(b)(i) — attempting to bribe* D *police officers — whether community service should be imposed*

Headnote

The need for community service cannot be over-emphasised and it has become an integral part of our sentencing system. Convicted persons who might otherwise receive sentences of up to 12 months' imprisonment should as a general rule be considered for community service, except E where they have been convicted of serious offences.

The appellant had been convicted of two counts of offering bribes to policemen in contravention of s 3(1)(b)(i) of the Prevention of Corruption Act [*Chapter 9:16*] and sentenced to an effective 12 months' imprisonment. On appeal:

Held, dismissing the appeal, that corruption in our society is getting out of F hand and the appellant's offences were of such a serious nature as to remove him from the category of recipients of community service.

Case cited

S v Gumbo 1995 (1) ZLR 163 (H) G

Legislation considered

Prevention of Corruption Act [*Chapter 9:16*], s 3(1)(b)(i)

Case information

T Moyo, for the appellant

M Moya-Matshanga, for the State H

Cheda J

Judgment

A **CHEDA J**: This is an appeal against sentence of the trial magistrate Bulawayo. The historical background of the case is that the appellant, a 24-year-old man, was charged with two counts of contravening s 3(1)(b)(i) of the Prevention of Corruption Act [*Chapter 9:16*].

The first count is that the appellant was a passenger in a bus in the rural areas whereupon he noticed that there was a policeman (Cst Tshuma) who was in B the company of a suspect in handcuffs. The appellant was drinking alcohol and was drunk. The appellant was not amused by the sight of the suspect in handcuffs and questioned the policeman's mission of handcuffing the suspect. The policeman offered an explanation, apparently pointing out that it was his duty to do so. In response, the appellant insulted the policeman by C referring to his private parts. This, obviously, did not go down well with the policeman, who threatened to arrest the appellant for breach of the peace. Instead of pleading with the policeman, the appellant offered the policeman $100 to gain his freedom. The policeman would not have it but instead arrested the appellant and took him to the police station.

On the second count, the appellant was taken to the police station where he D was to be charged with bribery in the first count. He then offered $500 to Cst Mlilo, the investigating officer, in order to persuade him to drop the charge against him. The appellant pleaded guilty to both counts and was sentenced to the following:

Count 1: 6 months' imprisonment with labour.

E Count 2: 12 months' imprisonment with labour.

Of the total of 18 months' imprisonment with labour, six months' imprisonment with labour was suspended for five years.

The appellant noted an appeal against sentence and his grounds of appeal, although laid down as six, I find that they are basically two being that: F

(1) the sentence is so excessive as to induce a sense of shock and

(2) the trial magistrate did not give sufficient weight to the mitigatory features of the case and thus erred in law as he should have imposed a non-custodial sentence, namely community service.

This was the argument by Mr *Moyo*, his legal representative, to whom the G court is grateful for having gone to lengths in highlighting certain legal principles and case authorities in an attempt to persuade the court to uphold the appeal. Of particular note is that the introduction of community service into a sentencing system has reached such heights so much so that our courts should adopt a two-tier approach being that, first and foremost our courts should consider community service if the sentence they are about to impose H is anything between one month to 24 months. Only if the circumstances of

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the case will not justify such a sentence, they should then move into the A second stage of imposing a sentence other than community service. The court takes judicial notice that prisoners who serve short-term imprisonment do not benefit much from such incarceration; therefore sentencing them to such terms of imprisonment is counter-productive and hence is not in the interest of justice.

Mrs *Moya-Matshanga* for the respondent argued that the sentence imposed B does not in any way induce a sense of shock as the moral blameworthiness of the appellant was too high, in that he bribed a policeman on duty.

Mr *Moyo* further argued that in sentencing the appellant, the magistrate should have considered the mitigatory features of the appellant. He was of the view that it was not enough for the learned trial magistrate to merely say "I C will take into account that which you have said in mitigation". It is his argument that he should have gone through all the factors, in other words itemising them. This argument in my view has no merit as it is not legally desirable to do so. No case authority has been cited to back up this argument. It is in my view enough for the court to acknowledge the existence of the said mitigatory features as they are in the record anyway. Therefore, failure to go D through them in a parrot fashion is not a misdirection.

Mr *Moyo* further argued that the appellant should have been sentenced to a non-custodial sentence in view of the fact that he is a first offender and also that he acted stupidly and was drunk at the time. He was of the view that the appellant was a suitable candidate for community service. E

Community service is a new concept of sentencing in our legal system and indeed is a welcome alternative to imprisonment as it has more advantages than disadvantages to both the offender and society. It, therefore, ought to be the first option as Mr *Moyo* ably argued. In an attempt to assist magistrates in consideration of appropriate sentences geared towards community service, the Government has set up a National Committee on Community Service F which has laid down guidelines for assessing the suitability or otherwise of candidates for community service. The need for community service therefore, cannot be over emphasised and where appropriate, it should no doubt be applied. It has therefore become an integral part of our sentencing system. Bartlett J succinctly stated in *S* v *Gumbo* 1995 (1) ZLR 163 (H) at 168B-C: G

> "While community service sentences will still need to be approached with caution in order to ensure that public confidence in the system is not eroded by inappropriate offenders being sentenced to community service, it is also necessary for magistrates to actively take advantage of the new system wherever possible."

What I should consider is whether or not the offence of corruption by the H

A appellant is of such a serious nature as to remove him from the category of recipients of community service.

In the present case, I find that there are more aggravating than mitigatory features namely:

In count 1: B

— the appellant was drunk and obviously disorderly in a bus, which is a public place.
— interfered with a policeman carrying out his lawful duty.
— was remonstrated with but instead insulted the police officer in public, which conduct was likely to cause breach of the peace. C
— after he had been threatened with lawful arrest he bribed the arresting policeman with $100.

In count 2, he further offers the detaining detail a bribe of $500 to buy his freedom.

In short, any sentence up to 12 months' imprisonment with labour should as D a general rule be considered for community service, the exception being serious offences.

As of now, the court can take judicial notice that corruption in our society is getting out of hand as it is now regarded as a general rule and public officials also accept it save for a very few upright officers. The appellant's conduct is a clear display of arrogance as indicated by his persistent unlawful and E wrongful conduct towards police officers. This, in my view is a brazen abuse of laws of the country, which conduct deserves a harsh censure from the courts.

There has been of late, a high disregard of law and order in our society and it is the duty of these courts to whip offenders into the line. One of the ways F of doing so is by sentences which will send a clear message to both the appellant and would-be offenders.

In light of the above, I am of the view that the sentence imposed by the trial magistrate cannot be faulted, for doing so will result in shaking the confidence of society to the core.

G The appeal is accordingly dismissed.

SIBANDA J concurred.

Hwalima & Associates, appellant's legal H practitioners

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

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SIBANDA v NTINI 2002 (1) ZLR 264 (S)

Citation	2002 (1) ZLR 264 (S)
Case No	Judgment No. S-74-02
Court	Supreme Court, Bulawayo
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	26 March 2002
Judgment	26 March 2002
Counsel	*R Ndlovu*, for the appellant *C Mashoko*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Practice and procedure — *default judgment — rescission — late application for rescission — application for condonation required — application to* D *disclose date on which he had knowledge of judgment*

Headnote

Before considering the merits of an application for rescission of a default judgment in terms of Order 9 r 63 of the High Court Rules, 1971, the court must be satisfied either that the application has been made — that is, set down for hearing and not just filed with the Registrar — within E one month of the date on which the applicant had knowledge of the default judgment, or that an application for condonation of non-compliance with r 63(1) has been made and granted. If an application for rescission is made after that date, the application is not properly before the court. The applicant must disclose in his application the date on which he had knowledge of the judgment, failing which it will be F presumed in terms of r 63(3) to be the second day after the date of the judgment. G

Case cited

Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249 (S)

Legislation considered

High Court Rules, 1971 (SI 1047/1971), Order 9 r 63

Case information

R Ndlovu, for the appellant

C Mashoko, for the respondent H

Malaba JA

Judgment

A **MALABA JA:** This appeal is against a judgment of the High Court dated 16 September 1999 in which the appellant's application for rescission of a default judgment granted by the same court to the respondent on 11 June 1997 was dismissed with costs. We dismissed the appeal after hearing submissions by Mr Ndlovu, for the appellant, having found it unnecessary to hear counsel for the respondent. We indicated that our reasons for the decision would B follow. These are they.

The respondent (Josiah Ntini) owned premises known as Thandabantu Store situated at Sikombingo Business Centre in Lower Gweru. In June 1987, the appellant leased the shop at a monthly rental of $250 which he was to start paying as from 1 January 1990 after recovering costs of repairing a toilet at C the premises.

When the monthly rentals became due and owing after 1 January 1990 the appellant failed to pay them forcing Josiah Ntini to issue summons out of the magistrates court in Gweru on 23 October 1995 claiming against him an order of eviction from the shop and payment of the sum of $17 250 being arrear rentals for the period extending from 1 January 1990 to 30 September D 1995. The appellant did not enter an appearance to defend the action. Josiah Ntini, however, discovered that the claim for the payment of $17 250 was in excess of the Magistrates court jurisdiction. That claim was withdrawn on 17 January 1996, default judgment for the eviction order having been entered against the appellant on 19 December 1995. On 21 February 1996, the E appellant was evicted from the shop by the Deputy Sheriff.

On 11 April 1996, Josiah Ntini issued summons out of the High Court claiming from the appellant payment of the sum of $18 500 being arrear rentals from 31 January 1990 to 21 February 1996 when he was evicted from the shop. The summons was served on the appellant on 3 June 1996. He entered appearance to defend but failed to file his plea within the time limited F by the High Court Rules, 1971. A notice of intention to bar was served on the appellant's legal practitioners on 9

August but he failed to file the plea within four days of the service of the notice resulting in the bar being effected and default judgment granted against him on 11 June 1997.

On 17 November 1997, six head of cattle were attached at the appellant's G homestead following a writ of execution issued on 24 September. The return of the execution of the writ shows that the appellant was present when the cattle were attached. In para 9 of the founding affidavit, in support of the application for rescission of the judgment which he later made, he admits that he witnessed the attachment of the cattle by the Deputy Sheriff. The cattle were removed on 29 January 1998 to be sold at a public auction on H 17 February. On 16 February 1998, the appellant's wife obtained an interdict

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from the High Court stopping the sale, claiming that the cattle belonged to A her. The application for the interdict had followed a rejection by Josiah Ntini of an offer by the appellant in January to pay $1 000 per month towards the liquidation of the judgment debt.

The legal practitioner who had been dealing with the appellant's case was Mr Malunga. He left Wilmot and Bennett in October 1996. Mr Chitere took over B the case. Mr Chitere averred that the appellant approached him in the company of his wife after the removal of the cattle in January 1998. The appellant never instructed him to make an application for rescission of judgment. It was the appellant's wife who claimed that the cattle belonged to her. She later instructed him to apply for an interdict to stop the sale of the cattle by public auction. Wilmot and Bennett renounced agency in April 1998. C

The appellant made the application for rescission of the default judgment on 4 September 1998. The application was purportedly made in terms of Order 9 r 63 which provides that:

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court D application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to E the plaintiff to prosecute his action …"

It is clear from r 63(2) that before considering the question whether or not the application contains a "good and sufficient cause" for it to exercise the wide discretion conferred upon it in favour of the applicant, the court must be satisfied that the application has been made (that is set down for hearing and not just filed with the Registrar) within one month of the date when the F applicant had knowledge of the default judgment or that an application for condonation of non-compliance with r 63(1) has been made and granted. It must follow from the provisions of r 63(1) that an application for rescission of a default judgment would not be properly before the court if it is made after the expiry of one month from the date the applicant had knowledge of the G judgment, which date he must disclose in the application failing which it will be presumed, in terms of r 63(3), to be the second day after the date of the judgment. A similar observation was made by Sandura JA in *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251C-E:

> "In terms of r 63(1), a defendant against whom a default judgment has H

> A been granted has a period of one month, from the time he becomes aware of the judgment, within which to file an application for the rescission of that judgment. If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the B rule.
>
> If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation."

C The application for rescission of the default judgment was filed on 4 September 1998 but set down for hearing on 30 July 1999 which is the date when the application was made. *Theunissen* v *Payne* 1946 TPD 680 at 685. The appellant did not disclose the date when he had knowledge of the default judgment. Whilst admitting that he witnessed the attachment of the cattle by the Deputy Sheriff in

execution of the judgment on 17 November 1997 he did D not say that was the first time he became aware of the default judgment. The presumption that he had knowledge of the judgment two days after it was granted must apply. As the default judgment was granted on 11 June, the appellant ought to have made the application for rescission of judgment not later than 13 July 1997. There was no application for condonation of the E failure to comply with the provisions of r 63(1). The application which the court *a quo* heard on 30 July 1999 was not properly before it as it was not an application made in terms of r 63(1). Mr *Ndlovu*, for the appellant, conceded the application ought to have been dismissed for non-compliance with the rules.

F We accordingly dismissed the appeal with costs.

CHIDYAUSIKU CJ and ZIYAMBI JA concurred.

G *James, Moyo-Majwabu & Nyoni*, appellant's legal practitioners

Jumo Mashoko & Partners, respondent's legal practitioners

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Source:
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TSVANGIRAI v REGISTRAR-GENERAL & ORS (1) 2002 (1) ZLR 268 (S)

Citation	2002 (1) ZLR 268 (S)
Case No	Judgment No. S-20-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	8 March 2002
Judgment	4 April 2002
Counsel	*A P de Bourbon* SC, for the applicant *C Machaka*, for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* D *Rights — s 18(1) — right to protection of the law — legislation allegedly denying supporters of opposition candidate right to register as voters — candidate's right to protection of the law not infringed*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 20(1) — right to freedom of expression — legislation restricting right to postal ballot — not open to candidate to allege that* E *his right to freedom of expression being infringed*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24(1) — right of person to approach Supreme Court in respect of an alleged contravention of Declaration of Rights — locus standi — need to establish facts* F *which would show that Declaration of Rights has been infringed in respect of applicant*

Headnote

The applicant, the main opposition candidate in the Presidential election being held on 9 and 10 March 2002, applied to the Supreme Court on 8 March under s 24(1) of the Constitution, alleging that ss 18 and 20 of the Declaration of Rights were being infringed both in respect of G himself and his supporters.

In respect of s 18 (the right to the protection of the law), he alleged that subsidiary legislation, passed by the President on 5 March 2002 under s 158 of the Electoral Act [*Chapter 2:01*], denied his supporters the right to be registered as voters, while giving the President's supporters that right. This, he claimed, infringed his right to protection of the law. H

Chidyausiku CJ

A The election should have been conducted in terms of an Act of Parliament, as required by s 28 of the Constitution, not in terms of delegated legislation. He also alleged that the President could use the very considerable powers vested in him under s 158 to his own advantage and to the disadvantage of his opponents. The President was given an unfair advantage in which was supposed to be a fair election.

B In respect of s 20(1), the right to freedom of expression, the applicant alleged that legislation limiting postal ballots to members of the armed forces denied the right of freedom of expression to other voters. The first respondent averred that the applicant did not have *locus standi*.

Held (by the majority, Sandura JA dissenting), that the applicant, to have *locus standi*, had to show that the Declaration of Rights was being C infringed in respect of him. Assuming that the legislation did prevent his supporters from being registered as voters, it would be for them, not him, to approach the court for relief. Similarly, the applicant could only approach the court in respect of postal voting if he personally had been denied the right to a postal vote.

D *Held (per* Sandura JA, dissenting), that the Court has always taken a broad view of *locus standi* in order to determine the real issues raised where the applicant has a real and substantial interest in the matter. The right to the protection of the law embraces the right to require the legislature to pass laws consistent with the Constitution. Any person affected by a law inconsistent with the Declaration of Rights has the right to approach E the Supreme Court for relief. The section of the Electoral Act which gives the President the right to amend the Act was arguably inconsistent with the Constitution. The applicant was a person adversely affected by amendments made by the President and thus had the right to approach the court for relief.

Cases cited F

Biti & Anor v Min of Justice & Anor 2002 (1) ZLR 177 (S)

CCJP v A-G & Ors 1993 (1) ZLR 242 (S)

Chavunduka & Anor v Min of Home Affairs & Anor 2000 (1) ZLR 552 (S)

G *Law Soc, Zimbabwe & Ors v Min of Finance* 1999 (2) ZLR 231 (S)

Marumahoko v Chairman of the Public Service Commission & Anor 1991 (1) ZLR 27 (H)

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S)

United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 254 (S)

Legislation considered

H Constitution of Zimbabwe 1980, ss 18, 20, 24, 28, 113

Chidyausiku CJ

Electoral Act [*Chapter 2:01*], s 158 A

Case information

A P de Bourbon SC, for the applicant

C Machaka, for the respondents

Judgment

CHIDYAUSIKU CJ: The applicant in this matter has approached this court B in terms of s 24(1) of the Constitution seeking an order that s 158 of the Electoral Act be declared to be inconsistent with the Constitution and therefore invalid. Alternatively, that SI 41D of 2002 (the statutory instrument), be declared to be *ultra vires* s 158 and therefore invalid.

Various other orders were sought against the Registrar-General of Elections. These will be dealt with later in this judgment. C

The application was opposed by the respondents, the first respondent averring that the applicant has no *locus standi in judicio* to approach this court in terms of s 24(1) of the Constitution.

LOCUS STANDI

Section 24(1) of the Constitution provides: D

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him … then, without prejudice to any other action with respect to the same matter which is lawfully available, that person … may … apply to the Supreme Court for redress." E

The applicant alleged that "there has (*sic*) been and there continues (*sic*) to be serious breaches of the Declaration of Rights as set out in the Constitution of Zimbabwe in respect of myself and all the considerable amount of people in Zimbabwe who regard me as their political leader". He alleged further that "section 158 of the Electoral Act violates the Declaration of Rights contained in the Constitution of Zimbabwe in respect of myself and those considerable F amount of persons who support me in my presidential campaign". G Alternatively, it was alleged that "the Electoral Act (Modification) Notice 2002 (SI 41D of 2002) violates the Declaration of Rights as contained in the Constitution of Zimbabwe in respect of myself and those who support me in my Presidential campaign".

The preliminary issue to be decided is whether these allegations satisfy the requirements of s 24(1) for *locus standi in judicio* justifying the approach by the applicant to this court for redress. The first observation to be made is that a bald, unsubstantiated allegation will not satisfy the requirements of the section. The applicant must aver in his founding affidavit facts, which if proved, would establish that a fundamental right enshrined in the Declaration H

A of Rights has been contravened in respect of himself as opposed to some other person.

THE RIGHT ALLEGED TO BE INFRINGED

The applicant alleged in his founding affidavit that the first respondent in the organisation of the forthcoming general election "has repeatedly been B heavily biased in favour of the third respondent and against me and that this has resulted in serious breaches of the Declaration of Rights of myself and my supporters".

As against the third respondent, it was alleged that "the third respondent has all the State personnel and machinery at his disposal in order to assist him in C his campaign". In addition, the third respondent has the "very considerable powers vested in him as set out in section 158 of the Electoral Act in relation to the manner in which the election is conducted, all of which he is using to his own advantage and to my disadvantage". He went on to list the following complaints:

1. That in terms of s 4 of the Electoral (Presidential Election) Notice 2002 D (SI 3A of 2002) the voters' roll was regarded as closed with effect from 10 January 2002 "for the purposes of accepting the registration of voters who may vote at the election of a President". However, on 27 January and again on 3 March, further Notices were issued declaring the voters' roll closed. During the period 10 January to 3 March, certain persons continued to register as voters until 3 March 2002. It was alleged that E these persons were supporters of the ruling party and that

the first respondent had "secretly and substantially extended the voters' registration exercise for the total benefit of the third respondent". It was further alleged that the alleged extensions were made on the instructions of the third respondent and that the effect of them is to put the third F respondent at a major unfair advantage over him in the forthcoming election and so "seriously violate my rights as set out in the Declaration of Rights"; and

2. That the Electoral Act (Modification) Notice 2002 (SI 41D of 2002) violates the Declaration of Rights as contained in the Constitution in respect of "myself and those who support me in my presidential G campaign" and for this reason the Notice is invalid and of no legal force.

No specific fundamental right was alleged in his founding affidavit but in his heads of argument, Mr *de Bourbon, who* appeared for the applicant, submitted that the rights infringed were those enshrined in ss 18 and 20 of the H Constitution. These sections provide as follows:

Chidyausiku CJ

Section 18(1) A

"Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

Section 20(1)

"Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is B to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

SECTION 18: RIGHT TO PROTECTION OF THE LAW

This right has been held to embrace the right to due process of the law. C Thus, in *Biti & Anor* v *Minister of Justice & Anor* ZLR 2002 (1) ZLR 177 (S), the applicant's right as a member of Parliament to have Parliament follow its own laws in enacting legislation entitled him to approach this court for redress. And in *Chavunduka & Anor* v *Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S), the applicants, who were aggrieved by the failure of the D police to investigate a crime committed against them, were entitled to approach this court for the enforcement of their fundamental right to the protection of the law.

In the present case, however, the applicant has not shown that his right to protection of the law has been infringed by the enactments which he seeks to impugn, namely, s 158 of the Electoral Act and the statutory instrument. E What he has averred is that the members of the electorate who might vote for him were denied the right to register as voters after 10 January 2001, while those who supported the third respondent's party were allowed to register right up to 3 March. It might be that this last allegation, if shown to be true, would entitle those persons who were denied the right to register F to approach this court for redress in terms of s 24(1) but the applicant may not approach this court on their behalf unless they are detained. He cannot be a torch bearer for them. See *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S).

SECTION 20: THE RIGHT TO FREEDOM OF EXPRESSION G

The order sought is for a declaration that the statute, alternatively the statutory instrument, is invalid. The applicant's papers must allege that the effect of the impugned legislation is to contravene a constitutional right in respect of himself. *In casu*, he must allege that his fundamental right to freedom of expression has been contravened by the enactments in question.

"A constitutional right that invalidates a law may be invoked by a person H

Chidyausiku CJ

A affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law."

See *Retrofit (Pvt) Ltd* v *PTC & Anor* 1995 (2) ZLR 199 (S) at 207G-H.

The question arises whether the applicant has shown that his right to freedom B of expression has been affected by the legislation sought to be impugned. None of the jumbled and vague allegations

made in the applicant's affidavit satisfy this court that the applicant's fundamental right to freedom of expression has been, or is likely to be, contravened. It seems that it has become the practice of legal practitioners to throw in whatever information is available in the applicant's founding affidavit with little regard to the C relevance of the allegations or the requirements of s 24(1). What must clearly be set out in the applicant's affidavit is that a fundamental right enshrined in the Declaration of Rights has been or is likely to be infringed in respect of him, as well as the material facts which establish this allegation.

The applicant took issue with s 4 of the statutory instrument, which provides:

> D "(1) Notwithstanding Part XV of the Act, no voter shall be entitled to receive a postal ballot paper unless his absence from his constituency or inability to attend a polling station, as the case may be, is or will be occasioned by —
>
> (a) duty as a member of a disciplined force or as a constituency registrar, E presiding officer, polling officer or counting officer; or
>
> (b) absence from Zimbabwe in the service of the Government of Zimbabwe; or
>
> (c) being a spouse of a person referred to in paragraph (a) or (b) who accompanies that person outside Zimbabwe."

He attached to his affidavit a newspaper article telling of the "manner in F which the disciplined forces were voting" and an affidavit by one John Stewart Matthews, who alleged that he had tried unsuccessfully to obtain a postal vote as officials of the first respondent's office advised him that he ought to have applied ten days before polling and that his application was out of time. In order to establish an infringement of his right to freedom of G expression, one would have expected the applicant to allege that he had applied to the first respondent for a postal ballot and was denied because of the provisions of s 4 of the statutory instrument, which restrict postal ballots to members of the disciplined forces or some similar allegation. In the absence of any allegation establishing the infringement of a fundamental right of the applicant, he has no *locus standi in judicio* to impugn the statutory H instrument.

Chidyausiku CJ

THE OTHER ORDERS SOUGHT A

These are orders directing the first respondent as to the manner in which he should execute the duty assigned to him by the Electoral Act of conducting the elections. Section 15 of the Act provides that in the exercise of his functions conferred "by or under this Act" the first respondent "shall not be subject to the direction or control of any person or authority other than the B Electoral Directorate …". Thus, however desirable the remedies sought might appear to be, this court has no power to grant them as to do so would be contrary to the provisions of the Act. The applicant's remedy in this regard would lie in review proceedings before the High Court.

JOINDER C

At the hearing, Mr *de Bourbon* made an application for joinder of the deponents of three affidavits which he tendered to the court. There was no prior service on the respondents of the affidavits and Miss *Machaka* objected to the joinder on the grounds that the respondents had had no opportunity to respond to the allegations made therein and, insofar as Paul Themba Nyathi was concerned, his affidavit contained allegations not made in the founding D affidavit and which altered the character of the application served on the respondents. Mr *de Bourbon*, in answer to a question from the court, advised the court that these affidavits were produced so that this court would not decline jurisdiction. However, this court having declined jurisdiction in respect of the main application, the applications for joinder must necessarily fall away. E

Accordingly, the application fails on the preliminary issue and it is therefore unnecessary to decide the question of the validity of the enactments in question.

COSTS

There will be no order as to costs. F

CHEDA JA, ZIYAMBI JA and MALABA JA concurred.

SANDURA JA: I have read the judgment prepared by Chidyausiku CJ but G respectfully disagree with the conclusion that the applicant did not have the locus standi to bring this urgent application in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution").

In the application, which was filed in this court on 7 March 2002 and was heard on the following day, i.e. 8 March 2002, the day before the H

Chidyausiku CJ

A commencement of the 2002 presidential election, the applicant sought the following relief, *inter alia*:

> "IT IS DECLARED THAT:
>
> 1. Section 158 of the Electoral Act [*Chapter 2:01*] is invalid and of no legal force, and accordingly the Electoral Act (Modification) Notice, B 2002, published in SI 41D of 2002 on 5 March 2002, is invalid and of no legal force.
>
> Alternatively, the Electoral Act (Modification) Notice, 2002, published in SI 41D of 2002 on 5 March 2002, is invalid and of no legal force …"

The background facts are as follows. The applicant is the President of the C Movement for Democratic Change ("the MDC"), the main opposition party in Zimbabwe. At the relevant time, he was the principal challenger to the third respondent in the 2002 presidential election due to be held on 9 and 10 March 2002.

On 5 March 2002, the third respondent, acting in terms of s 158 of the D Electoral Act [*Chapter 2:01*], promulgated the Electoral Act (Modification) Notice, 2002, published in SI 41D of 2002 ("the Notice").

The Notice was issued three days before the presidential election commenced and dealt with vital and important issues relating to the manner in which the election E was to be conducted. It altered the provisions of the Electoral Act in material respects and, consequently, the conditions under which the election was to be conducted.

The applicant was aggrieved by the provisions in the Notice because he believed that they gave the third respondent an unfair advantage over him in the election. Accordingly, acting in terms of s 24(1) of the Constitution, he brought this urgent application directly to this court challenging the F constitutionality of s 158 of the Electoral Act and the Notice.

The issue which arises for consideration is whether the applicant had the *locus standi* to bring this application in terms of s 24(1) of the Constitution. That section reads as follows:

> "(1) If any person alleges that the Declaration of Rights has been, is G 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 H (3), apply to the Supreme Court for redress."

Chidyausiku CJ

In paras 9, 10, 12 and 19 of his founding affidavit, the applicant averred as A follows:

> "9. It is my respectful submission that section 158 of the Electoral Act violates the Declaration of Rights contained in the Constitution of Zimbabwe in respect of myself and those considerable amount of persons who support me in my Presidential campaign. I, therefore, B respectfully submit that section 158 of the Electoral Act is invalid and of no legal force.
>
> 10. Alternatively, it is my respectful submission that the Electoral Act (Modification) Notice, 2002 (SI 41D of 2002) violates the Declaration of Rights as contained in the Constitution of Zimbabwe in respect of myself and those who support me in my Presidential campaign. I C therefore respectfully submit that the Notice is invalid and of no legal force on that basis as well.
>
> 12. However, I humbly request this Honourable Court, as a citizen of Zimbabwe and as a candidate at the forthcoming Presidential election, to safeguard the Declaration of Rights as set out in the D Constitution of Zimbabwe for myself and my supporters.
>
> 19. In addition, the third respondent has the very considerable powers vested in him as set out in section 158 of the Electoral Act in relation to the manner in which the election is conducted, all of which he is using to his own advantage and to my disadvantage." E

Although in his founding affidavit the applicant did not specify which section of the Declaration of Rights was contravened by s 158 of the Electoral Act, I do not think that the failure to do so was fatal. However, the omission was remedied by the heads of argument filed by counsel for the applicant and by the oral argument advanced by counsel in support of the application. It was made clear that the provisions of the Declaration of F Rights allegedly contravened by s 158 of the Electoral Act were s 18(1) and s 20(1).

Before dealing with the relevant provisions of the Declaration of Rights, I would like to refer to s 158 of the Electoral Act. It reads as follows:

> "(1) Notwithstanding any other provision of this Act but subject to G subsection (2), the President may make such statutory instruments as he considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.
>
> (2) Statutory instruments made in terms of subsection (1) may provide for — H

(a) suspending or amending any provision of this Act or any other law insofar as it applies to any election;

(b) altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done; B

(c) validating anything done in connection with, arising out of or resulting from any election in contravention of any provision of this Act or any other law;

(d) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from any election; C

(e) penalties for contraventions of any such statutory instrument, not exceeding the maximum penalty referred to in section *one hundred and fifty-five*."

It was the applicant's contention that the section gave the third respondent immense powers in terms of which he had radically altered the Electoral law D passed by Parliament and, consequently, the conditions under which the election was to be held, thereby giving the third respondent an unfair advantage over him in what was supposed to be a fair election.

In other words, the applicant's contention was that the election should be conducted in terms of the Electoral Law passed by Parliament (i.e. the E Electoral Act), as required by s 28(4) of the Constitution, and not in terms of regulations promulgated by the third respondent under s 158 of the Electoral Act.

In this regard, the relevant provisions of s 28 of the Constitution, which deal with the election of the President, read as follows:

> "(1) …
>
> F (2) The President shall be elected by voters registered on the common roll.
>
> (3) …
>
> (4) The procedure for the nomination of candidates for election in terms of subsection (2) and the election of the President shall be as G prescribed in the Electoral Law."

"Electoral Law" is defined in s 113 of the Constitution as follows:

> "'Electoral Law' means the Act of Parliament having effect for the purposes of section 58(4) which is for the time being in force."

Section 58(4) of the Constitution, referred to in the definition of "Electoral H Law", reads as follows:

> "An Act of Parliament shall make provision for the election of members A of Parliament, including elections for the purpose of filling casual vacancies."

What all this means is that the legislation which comprises the Electoral Law must be an Act of Parliament. That Act of Parliament is the Electoral Act [*Chapter 2:01*]. B

In the circumstances, it was submitted by counsel for the applicant that in terms of the Constitution Parliament did not have the power to delegate to any person its constitutional function to make the

Electoral Law, and that the power given by Parliament to the President to amend the Electoral Law by regulations in terms of s 158 of the Electoral Act was unconstitutional. I think there is merit in counsel's submission. However, that is not an issue to be C determined at this stage as I am only concerned with the question of the applicant's *locus standi.*

In this regard, it was further submitted that s 158 of the Electoral Act contravened s 18(1) of the Constitution, which reads as follows:

> "(1) Subject to the provisions of this Constitution, every person is D entitled to the protection of the law."

It is well established that the right to the protection of the law enshrined in s 18(1) of the Constitution includes the right to due process of the law. See: *Marumahoko v Chairman of the Public Service Commission & Anor* 1991 (1) ZLR 27 (H) at 42-44; and *Biti & Anor* v *Minister of Justice, Legal and Parliamentary Affairs & Anor* 2002 (1) ZLR 177 (S). E

Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in s 18(1) of the Constitution, embraces the right to require the legislature, which in terms of s 32(1) of the Constitution consists of the President and Parliament, to pass laws which are consistent with the Constitution. F

If, therefore, the legislature passes a law which is inconsistent with the Declaration of Rights, any person who is adversely affected by such a law has the *locus standi* to challenge the constitutionality of that law by bringing an application directly to this court in terms of s 24(1) of the Constitution.

Thus, in the present case, the applicant had the right to demand that the G presidential election be conducted in terms of the Electoral Law passed by Parliament as required by s 28(4) of the Constitution. In the circumstances, he had the right to approach this court directly in terms of s 24(1) of the Constitution and had the *locus standi* to file the application.

Finally, I wish to say that in the past this court has taken a broad view of "*locus standi*" in applications of this nature in order to determine the real issues H

Chidyausiku CJ

A raised where the applicant has a real and substantial interest in the matter. See, for example, *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General & Ors* 1993 (1) ZLR 242 (S) at 250A-E; and *Law Society of Zimbabwe & Ors* v *Minister of Finance* 1999 (2) ZLR 231 (S) at 233G-234G.

In the circumstances, as the applicant had *locus standi*, the court should have B determined the real issues raised in this application before the presidential election was held.

Gill, Godlonton & Gerrans, applicant's legal practitioners

C *Civil Division of the Attorney-General's Office*, respondents' legal practitioners

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Source:
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S v MUSASA 2002 (1) ZLR 280 (H)

Citation 2002 (1) ZLR 280 (H)

Case No Judgment No. HH-52-02

Court	High Court, Harare
Judge	Hlatshwayo J
Heard	9 April 2002
Judgment	9 April 2002
Counsel	*B Mufadza*, for the applicant *N Mushangwe*, for the respondent
Case Type	Bail application
Annotations	Link to case annotations

Flynote

Evidence — *credibility — child witness — sexual offence — approach to be taken to — very young child unlikely to make serious allegations without* D *any basis*

Headnote

The applicant had been convicted in the regional court on a charge of rape, the victim being a four year old child. He was sentenced to 10 years' imprisonment, of which part was suspended. He sought bail pending E appeal against conviction and sentence. It was argued, in submitting that the prospects of success on appeal were good, that children have a tendency to fantasize. Other factual grounds for casting doubt on the complainant's evidence were also put forward.

Held, that while the evidence of child witnesses must be approached with caution, such caution must be creative or positive caution, where a F judicial officer uses knowledge of psychology or other relevant disciplines in order to maximise the value of such testimony. Psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but that their fantasies and play are characterised by their ordinary daily experiences. It is highly unlikely for very young complainants to make G serious allegations without any basis at all.

Cases cited

S v Benatar 1985 (2) ZLR 205 (H)

S v Dzawo 1998 (1) ZLR 536 (S)

S v Machowe S-14-99 (unreported) H

Hlatshwayo J

A *S v Madzomba* 1999 (2) ZLR 214 (H)

S v Mashave HH-96-01

S v Svova S-20-99 (unreported)

S v Williams 1980 ZLR 466 (A)

Case information

B Mufadza, for the applicant

B *N Mushangwe*, for the respondent

Judgment

HLATSHWAYO J: This is an application for bail pending appeal. The applicant, Edmore Musasa, is an unmarried male adult aged 25 at the time of his conviction. He was charged and convicted on one count of rape of a 4-year-old girl in a case heard by a regional magistrate sitting at C Chitungwiza. He was sentenced, on 2 April 2002, to 10 years' imprisonment of which one year was conditionally suspended for five years, and has since commenced serving his sentence at Harare Central Prison. An appeal against both conviction and sentence has been noted. In support of his application for bail pending appeal, the applicant submitted the notice and grounds of appeal D and the trial magistrate's judgment, forming part of the record of proceedings. Both Mr *Mufadza* and Mr *Mushangwe*, submitted, and I agreed with them, that it was accepted, though probably not invariably acceptable, for an application for bail pending appeal to be decided on the basis of the trial court's opinion but without the benefit of the full record, which might take too long to obtain. A full record, would, of course, be required for any appeal.

E Mr *Mufadza,* on behalf of the applicant, submitted that bail pending appeal should be granted basically on two grounds: firstly, that there is no danger of abscondment and, secondly, that there are prospects of success on appeal on both conviction and sentence. Mr *Mushangwe*, for the respondent, was of the view that there are prospects of success on appeal against conviction only, and thus did not oppose the granting of bail. I shall deal with the two grounds F in turn below.

DANGER OF ABSCONDMENT

It was contended that the applicant is a person of fixed abode, was gainfully employed at the time of his sentence, that while he was on bail pending trial G he abided by the bail terms to the letter and that from this the court should draw the conclusion that he will abide the outcome of his appeal and will not abscond. While it is true that decisions on granting or refusing bail are premised on an estimation of an applicant's likely future conduct and that therefore past conduct is relevant in such an assessment, the value of past conduct must be weighed in the light of the reality of the changed circumstances H presented by the conviction and sentence.

Hlatshwayo J

In this case, the applicant has been convicted of a serious offence and A sentenced to a long term of imprisonment, and the temptation on his part to abscond is likely to be very high indeed, and the imposition of the suggested usual monetary and reporting conditions is unlikely to be an effective deterrence. Of course, the likelihood to abscond is closely related to the prospects of success on appeal, to which I will turn shortly. I have examined B the line of cases referred to in the applicant's heads of argument — *S* v *Williams* 1980 ZLR 466 (A), *S* v *Dzawo* 1998 (1) ZLR 536 (S), *S* v *Hollington & Anor* HB-751-00 (unreported) and *S* v *Benatar* 1985 (2) ZLR 205 (H) — but I am satisfied that they do not negate the approach I have outlined above.

PROSPECTS OF SUCCESS ON APPEAL C

I shall only deal with the prospects of success on appeal against conviction only, for it appears to me that assuming that the conviction was proper, the sentence imposed would appear to be appropriate, if not slightly on the lenient side.

The applicant made the following submissions in his grounds of appeal: D

(a) That the trial magistrate erred in fact by finding that reference to a "stick" by the complainant necessarily meant a "penis" without contexualising it within the broader factual set-up;

(b) That the trial court erred in fact by finding that the appellant could have abused the complainant from a standing position when the complainant E herself was in a sitting position according to her testimony; and

(c) The trial court erred in fact and law in finding that there was enough corroboration of the complainant's story.

The factual matters raised by the applicant in points (a) and (b) above are addressed in the magistrate's judgment as follows:

> "The mother also indicated that the complainant had reported to her that F the accused had placed a paper around his penis and since the complainant was of a tender age, she assumed that the accused might have worn a condom before he raped the complainant. The complainant gave her evidence in the victim friendly court. The court had to take into account that she was aged 4 when she was sexually abused. By

the time she gave G her evidence, several months had already passed. The complainant indicated that she knew the accused and that the accused had touched her on her vagina. She went further to say that the accused had used a 'stick' to touch her private parts. The child then indicated that she was in a seated position when this happened. The complainant went further to say that the accused had applied some oil on her private parts." H

Hlatshwayo J

A The reference to the applicant's "penis" as a "stick" is discussed again further on in the judgment, thus:

> "The investigating officer in this case also testified and told the court that she interviewed the complainant about the case. She then revealed that she was in the accused's room when the accused removed her pant and B injured her private parts using a stick. The complainant went further to tell the officer that the stick she was referring to was his penis and that the accused used a paper to wrap around the penis. He first applied Vaseline on her vagina and raped her. The police officer understood the child's language well when she referred to the stick. She also assumed that the accused had used a condom because the complainant referred to C a plastic paper which the accused used to wrap his penis (in)."

Now, considering the above narration in the trial magistrate's judgment, it cannot be said that she misdirected herself in anyway in concluding that by "stick" the child meant the applicant's "penis". The child's evidence that this "stick" was first wrapped in a plastic paper (condom) before it was applied to her vagina, clearly shows that the child is not referring to an ordinary D "stick". As to the exact positions of the complainant and the applicant when the offence was committed, it would require the examination of the complete record to determine whether any serious inconsistencies arise. However, at any rate it is not inconceivable that the complainant could have been abused while seated on a table or window sill or any higher object while the applicant E was in a standing position.

As far as corroboration is concerned, the credible evidence of the mother, the investigating officer and the medical report strongly corroborated the complainant's story. The complainant was in the accused's room at the relevant time. The mother beat up the child precisely for having been "in other people's homes" contrary to her specific instructions not to. Talent F Nkoma told the court that on the alleged date and time she was at home with the complainant, that when the complainant's mother had gone to the shops, the complainant entered the accused's room and that when the mother came back, she found the complainant in the accused's room and so she beat up the complainant. Dr Illif, who examined the complainant six days later, confirmed that the child had been sexually molested because her hymen was stretched G and attenuated. She found some bruising on the urethra and concluded that these findings were "highly suggestive of penile penetration" and discounted the possibility that the child could have inserted an object into her vagina to injure herself.

The applicant's suspicious response when asked by the mother about what H he had done to the child is further corroboration, as it is inconsistent with

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Hlatshwayo J

his innocence, because he replied: "Did you take the child to the doctor?" A It would appear that he must have done something to her that would require the mother to take the child to a doctor. His explanation that he was referring to the beatings the mother had inflicted on the child is not convincing since the question by the mother was what he, the accused, had done to the child B .

Therefore, on the basis of the applicant's grounds of appeal, I found that there was absolutely no prospect of success on appeal, and accordingly I would have declined bail on that basis. However, in his response to the application, Mr *Mushangwe*, conceded that there were prospects of success and highlighted other considerations than the ones the applicant had sought to rely upon, thus:

(a) In rape cases, children have a tendency to fantasize– *see S* v *Svova* C S-20-99 at p 4 of the cyclostyled judgment. See also the *Prosecutor's Handbook* 2 ed Legal Resources Foundation at p 59. The magistrate does not appear to have paid careful regard to this possibility.

(b) There were two other young men who were staying with the complainant who are brothers to the complainant's mother, so it is possible or cannot D be ruled out that one of them ravished

the complainant. It follows therefore, that the applicant could have been falsely incriminated in order to shield the real culprit.

(c) After the complainant left the applicant's room, she did not show any sign of having been ravished. It was only two days later that her mother noticed that she had difficulties in walking. Upon being interrogated by E her mother, the complainant refused to disclose what had happened to her. It was only a day later after further probing by her mother that she came up with the name of the applicant.

(d) It is said that during the act, the complainant cried but surprisingly although there were people at the house nobody heard the cries. F

I will consider first the respondent's grounds (b), (c) and (d) above, which deal with factual issues and consider lastly ground (a) which deals with a possible legal misdirection.

The possibility that one of the complainant's mother's two brothers could have committed the rape leading to the false incrimination of the accused G would have been a very strong defence if it had any basis at all. The fact that the applicant does not raise it at all in his grounds of appeal tends to show that the applicant never placed any much weight in such a possibility. At any rate, the magistrate does deal with the point adequately in her judgment, thus:

> "She (the complainant) even dismissed the suggestion by the defence that she could have been raped by her mother's brothers. She was clear and H

> A she confirmed this to the investigating officer. From the beginning, she maintained that it was the accused person who sexually molested her."

The second issue raised by the respondent that the complainant did not show any signs of having been molested on the first day does not even bear scrutiny. The mother found the child in the applicant's room and immediately chastised her for disobeying her specific instructions not to "enter into other B people's homes". The last thing she suspected at that point was that what she had feared most might happen to her child if she disobeyed had already tragically and brutally occurred. It is not also inconceivable that the discomfort the child felt in walking became progressively worse with time and thus, on the second day, she was observed to be having difficulties in walking. And C when she eventually revealed what had happened to her, she mentioned both the abuse and the fact that the applicant was the perpetrator.

The last factual doubt raised by the respondent is if the complainant cried during the ordeal, as alleged, then Nkoma who was outside the house should have heard her. There appears from the opinion to have been lack of clarity on whether the allegation was that the child had "cried out", "screamed" or D merely flinched and sobbed with pain. Without examining the full record, one is not in a position to resolve this apparent difficulty. However, the point is not a very strong one. Nkoma was outside the house and the accused and the complainant were in a room inside the house. Whatever expression of distress the child may have made, the child is unlikely to have had the E presence of mind of an adult to raise alarm and seek help as she could not fully appreciate what was being perpetrated upon her.

The respondent's final concern is the allegation that in rape cases children have a tendency to fantasize and that the magistrate does not appear to have paid careful regard to this possibility. However, in point of fact, the magistrate did address her mind to this much-abused and ill-understood theory and F discounted it in the specific facts of this case in the following words:

> "Considering her age, unlike a juvenile who is now conscious of her sexuality, it would be unfair to say that a four-year-old child was fantasizing and romancing about the case …The complainant in this case, though of tender age, was clear. Although she lacked the vocabulary to say some of the things, she had the knowledge and ability to describe G the sexual abuse she was subjected to."

Many judgments of this court and the Supreme Court have underlined the fact that it is highly unlikely for very young complainants to make serious allegations without any basis at all. See, for example, the *dicta* of Muchechetere JA in *S* v *Machowe* S-14-99 at p 9 and Chinhengo J (with H the concurrence of Garwe J) in *S* v *Madzomba* 1999 (2) ZLR 214 (H) at

222, where it was said in respect of rape allegations made by a five-year-old A twenty months after the abuse:

> "It is, of course, quite possible that a child of so tender an age can make without much thought, generalised and damaging allegations against the only person at the place she is to be removed. That must, however, be balanced against the consideration why and whether a girl of so tender B an age could make so serious an allegation against the appellant and Abias if nothing of the sort had taken place. The fact of the matter is that her hymen was found missing which tended to confirm her evidence that she had been sexually abused."

Furthermore, psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but C that their fantasies and play are characterised by their daily experiences. In this regard, J R Spencer and Rhona Flin *The Evidence of Children: The Law and the Psychology* 2 ed (Blackstone Press Ltd, 1993) at pp 317-318 made the following observation:

> "There is certainly no psychological research or medical case study D material which suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Children's fantasies and play are characterised by their daily experience and personal knowledge, and unusual fantasies are seen by psychiatrists as highly suspicious: 'The cognitive and imaginative capacities of three E -year-olds do not enable them to describe anal intercourse and spitting out ejaculate, for instance. Such detailed descriptions from small children, in the absence of other factors, should be seen as stemming from the reality of the past abuse rather than from the imagination' Vizard, E, Bentovim, A and Tranter, M (1987) *Interviewing sexually abused children*." F

Similarly, the complainant's description in this case of how the applicant pricked her vagina with his "stick", that he first wrapped it in a plastic paper (condom) and that he applied Vaseline on her vagina before he ravished her is not the stuff that young children's fantasies are made of. The trial magistrate was therefore correct in the manner she dealt with the evidence of G the child complainant. She also raised pertinent points on how the prosecution and defence council should approach the evidence of young children. In support of that view, I can do no better than quote from the opinion I expressed, with the concurrence of Chatikobo J, in the case of *S* v *Mashave* HH-96-01 at pp 4-5:

> "In our law children, on the other hand, are not suspect witnesses in the H

Hlatshwayo J

> A same way as are accomplices, but it has been said that their evidence must be approached with caution. One must add, however, that the caution referred to here is not morbid or negative caution but what one might call creative or positive caution. The latter approach would be where a judicial officer (or any other person dealing with the testimony of a child) uses knowledge of psychology or other relevant disciplines in B order to maximise the value of such testimony, while negative caution would be adherence to the old approach of treating the evidence of a child with suspicion and instinctively seeking its corroboration.
>
> A refreshing approach to child witnesses was ably set out by Ebrahim JA in *S* v *Sibanda* 1994 (1) ZLR 394 in which the learned appeal judge, after C summarising the key findings from the useful study by Spencer and Flin *The Evidence of Children: The Law and Psychology* 2 ed (Blackstone Press Ltd, 1993) and creatively applying them to the case before him, observed as follows:
>
> ' A rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means D of testing it against likely shortcomings in such evidence in the manner suggested by Spencer and Flin *op cit*. To reach an intelligent conclusion in such an analysis it is necessary to apply, as they do, a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers E and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society'."

Accordingly, I have come to the conclusion that there are no prospects of success on appeal against conviction and, given my comments on the danger of abscondment, the application for bail pending appeal must fail and is F hereby dismissed. The applicant indicated his desire to appeal to the Supreme Court against this decision, and I have granted him leave to appeal.

T H Chitapi & Associates, applicant's legal practitioners

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

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Source:
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SCOTFIN LTD v POLKA NOMINEES (NINETEEN) (PVT) LTD & ORS 2002 (1) ZLR 288 (H)

Citation	2002 (1) ZLR 288 (H)
Case No	Judgment No. HH-58-02
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	5 June 2001
Judgment	10 April 2002
Counsel	*A P de Bourbon* SC, for the plaintiff *R H Wood*, for the second defendant
Case Type	Civil exception
Annotations	No case annotations to date

Flynote

Contract — *characterisation — onus of proof that contract is not what it* D *purports to be*

Hire-purchase — *contract of hire-purchase — nature — distinction between such contract and financial lease*

Headnote

The plaintiff, a finance company, entered into two agreements with the first E defendant for the hire of heavy vehicles. Under each agreement, the first defendant was required to pay the plaintiff a monthly rental and, upon the expiry of the agreement, had to deliver the vehicles to the plaintiff, who was to sell them to best advantage. If the price at which the vehicles were sold exceeded their residual value, the plaintiff had to pay the excess to the first defendant; if, on the other hand, the price realised was F less than their residual value, the first defendant had to pay the shortfall to the plaintiff. The second and third defendants bound themselves as sureties for the due performance of the first defendant's obligations under the agreements. The first defendant defaulted on paying rent so the plaintiff cancelled both agreements, repossessed the vehicles and sold them, and claimed the balance from all three defendants. The G second defendant excepted to the plaintiff's particulars of claim on the ground that the agreements were really hire-purchase agreements, and since they did not state the cash price of the vehicles as required by the Hire-Purchase Act [*Chapter 14:09*] the suretyship agreements were unenforceable in terms of that Act.

Held, that although in characterising a contract a court is not bound by what H

A the parties choose to call their transaction, the court will assume that its nature is what it purports to be, and the onus of showing the contrary is on the party who asserts the transaction

is something else.

Held, further, that a hire-purchase agreement arises when a purchaser concludes an agreement either with a financial institution or with a seller of goods, which is then financed through a specific arrangement B of hire-purchase. When the agreement is fully performed on both sides ownership in the goods passes or reverts to the purchaser. A financial lease agreement, on the other hand, is a form of financial arrangement whereby either the lessor or the lessee sources the goods, which are paid for by the lessor but delivered to the lessee on payment of an agreed C lease fee. Ownership of the goods vests at all times in the finance company as the lessor, and at the end of the contract ownership remains vested in the company. Where the lease agreement allows the finance company to sell the goods to a third party it can exercise that right or may allow the goods to remain in the lessee's possession; but this is done outside the terms of the agreement and the company cannot be compelled D to act in this manner.

Held, further, that the second defendant had failed to prove on a balance of probabilities that the two agreements fell under the definition of hire-purchase agreements. Indeed, properly construed they were probably leases: the provision for the lessor to sell the vehicles to best advantage at the end of the lease and to pay the lessee any receipts above the E vehicles' residual value was meant to reward the lessee for careful use and preservation of the leased goods and was in line with the basic principles of a lease.

Cases cited

Garlicks Store v Caplan 1934 CPD 355

F *Helby v Matthews & Ors* [1895] AC 471 (HL)

Khan v Stuart & Ors 1942 CPD 386

Scharfeneker v Duly & Co Ltd 1940 SR 222

Legislation considered

G Hire-Purchase Act [*Chapter 14:09*], s 2 (definition of "hire-purchase agreement")

Case information

A P de Bourbon SC, for the plaintiff

R H Wood, for the second defendant

Judgment

H **HLATSHWAYO J**: The plaintiff, Scotfin Ltd, is a company incorporated

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with limited liability according to the laws of Zimbabwe, as is the first A defendant, Polka Nominees (Nineteen) (Pvt) Ltd. The second and third defendants, John Duncan Gentlemen and Paul Maxwell Gore, respectively, are company directors. The plaintiff claims as against the three defendants, jointly and severally, various amounts the origins of which appear in the following extract from the plaintiff's particulars of claim (I have left out the narration relating to the "first agreement" and the "first goods" as it is not B relevant for this opinion):

> "On 18 January 1994, at Harare, Plaintiff and first defendant entered into an agreement of lease ("the second agreement") in terms of which first defendant hired from plaintiff two used Crane Fruehauf refrigerated trailers for a total rental of $841 707.50. The goods were delivered to the C first defendant. It was a term of the second agreement that the total rental would be payable as to a first rental of $25 000 upon the signing of the agreement and the balance thereafter by way of thirty-five monthly payments of $23 334.50.
>
> The further terms of the second agreement were, inter alia, that in the event that the first defendant defaulted in the payment of any rental or D other sum due in terms of the second agreement the plaintiff would be entitled to terminate the second agreement and have returned to it by first defendant the second goods without prejudice to the plaintiff's right to claim damages arising from the default.
>
> The first defendant defaulted in the payment of the rentals due. As a E result, the plaintiff repossessed and resold the goods by public auction realising the net sum of $110 000 which was credited to the first

defendant, leaving a balance outstanding in respect of rentals in the sum of $780 927.79 plus interest at the rate of 36 per cent per annum calculated from the date of service of summons.

On 18 January 1994, the first defendant leased from plaintiff in terms of F a written lease agreement ("the third agreement") two used Scania Tractor Units and six Twin Steer ("the third goods") for a total rental of $1 385 013.60. The total rental was to paid as to a first rental of $40 000 upon the date of signing the third agreement and the balance thereafter by way of thirty-five monthly instalments of $38 429.96 each. The first G defendant defaulted in the payment of the rentals and plaintiff terminated the third agreement and recovered possession of one Scania Tractor which was sold by public auction realising the sum of $117 946, and leaving a balance outstanding at the time of $1 410 822.21.

On 15 December 1993, the second and the third defendants bound themselves jointly and severally as sureties and co-principal debtors H

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A with first defendant for the due fulfillment of its obligations and punctual payment of all sums due by it."

The second defendant excepted to the plaintiff's particulars of claim in relation to the second and third agreements (henceforth "the two agreements") outlined above basically on the grounds that the agreements, properly construed, were hire-purchase contracts which must have complied with the B provisions of s 25(1)(a) of the Hire-Purchase Act for the underlying agreements to be fully enforceable and for the suretyship to be enforceable at all. The actual terms of the two agreements are attached as Annexures "D" and "E" of the applicant's further particulars, and both contracts are titled, "Agreement of Lease".

C In reply, Mr *de Bourbon*, for the plaintiff, submitted *in limine* firstly that the second defendant adopted the wrong procedure as the point it seeks to make does not arise *ex facie* the pleadings, and should therefore be the subject of a plea and not an exception. Secondly, that an exception has to be decided on the allegations made by the plaintiff in its pleadings, without the need for any additional evidence. The second defendant's defence that the document, D which the plaintiff describes as an agreement of lease, is in fact to be treated as a hire-purchase agreement is based on allegations of fact, which have to be separately pleaded.

I would like to make two observations pertaining to the points raised *in limine*. Firstly, regarding when an exception should be taken, it is settled E that the remedy of an exception is available where the complaint goes to the root of the opponent's claim or defence. The position is stated by Davis J in *Kahn* v *Stuart & Ors* 1942 CPD 386 at 392 as follows:

> "In my view, it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. It there is not, then it must see if F there is any embarrassment, which is real and such as cannot be met by the asking of particulars, as a result of the faults in pleading to which exception is taken. And, unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed."

G In this case, the exception appears to have been well taken in that if the second defendant proves that the two agreements fall under the Hire-Purchase Act, then the collateral contract of suretyship will not be enforceable and that would dispose of the matter as far as the second and third defendants are concerned. Nonetheless, the court still does retain a discretion, on grounds of convenience, to reserve decision on the exception until it has had full H argument on the merits where either the point of law is purely academic or

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where a proper decision on exception is bound up with the merits of the A dispute (s*ee* Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed, and the authorities quoted therein). In my view, the grounds for the exercise of the discretion seem to be absent here as the point of law is not purely academic and there appears to be no other dispute than the subject matter of the exception.

Secondly, and conversely, where an exception is taken, but additional B evidence would have been required to sustain it, the party raising the exception runs the risk of having the matter decided without the hearing of such additional evidence. Accordingly, I propose to proceed to consider the merits of the exception.

Although it is trite that the court will not be bound by what the parties choose C to call their transaction (see Blakeway J in *Scharfeneker* v *Duly & Co Ltd* 1940 SR 222 at 235), it is equally true that the court will assume that the nature of a transaction is what it purports to be and the onus of showing the contrary will be on the party who asserts that the transaction is something else (see Diemont, Marais and Aronstam *The Law of Hire-Purchase in South Africa* 4 ed at p 20). D

In this case and on face value, the two agreements are leases, described as such by the parties. Significantly, the first agreement was described and understood by the same parties as a hire-purchase agreement. Now, there was no evidence given to show why the parties who had earlier conducted their transaction on a hire-purchase basis would describe their subsequent (second and third) transactions as lease agreements if they still intended to continue E on a hire-purchase basis. There may well have been some valid reasons for this change in form, if indeed it was that, including the usual one of wanting to avoid the requirements of the Hire-Purchase Act, but the defendant was not in a position to lead any such evidence because of the option he adopted of responding by way of an exception instead of a plea. Yet again, there may well have been no sinister motive, the parties having genuinely for valid F economic reasons decided to change from a hire-purchase to a lease arrangement.

The exception taken by the second defendant relies on the application of s 25(3)(b) as read with s 25(1)(a) of the Hire-Purchase Act in that the two agreements are compromised by the fact that each does not contain a G statement of the cash price and that the suretyship agreement is consequently unenforceable. It is not disputed that the subject of each agreement was a used heavy commercial vehicle having a cash value in excess of $125 000, that each agreement failed to comply with the requirement of s 25(1)(a) as read with the Second Schedule to the Act, as it applied at the time the agreements were entered into and that at that time, the exclusion of a H

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A "financial lease" from the definition of "hire-purchase agreement" had not yet been introduced under legislation amending the Hire-Purchase Act. But do the agreements fall within the concept of a hire-purchase agreement as understood then?

The term "hire-purchase" is defined in s 2(1) of the Hire-Purchase Act [then B Chapter 284 and now *Chapter 14:09*] which then read as follows:

> "hire-purchase agreement" means —
>
> (a) any contract whereby goods are sold subject to the condition that, notwithstanding delivery of the goods, the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more instalments; C
>
> (b) any contract which provides for the hiring of goods whereby the hirer has the right —
>
> (i) to purchase such goods after two or more instalments have been paid in respect thereof; or
>
> (ii) after two or more instalments have been paid in respect thereof, D to continue or renew from time to time such hiring at a nominal rental, or to continue or renew from time to time the right to be in possession of the goods without any further payment or against payment of a nominal amount periodically or otherwise; whether or not the payment may at any time be terminated by either party or one of the parties; E
>
> (c) any other contract which has, or contracts which together have, the same import as either or both the contracts defined in paragraph (a) or (b) of this definition, whatever form such contract or contracts may take."

Mr *Wood* suggested usefully that there are alternative three rungs to the F above definition, the first of which refers to "a contract whereby goods are sold", the second of which refers to "a contract which provides for the hiring of goods" and the third, which refers to any other contract "which has, or contracts together which have, the same *import* as either or both contracts defined in (a) or (b) of this definition whatever form such contract or G contracts may take". I shall not endeavour to test the two agreements against each of the three alternative definitions of a hire-purchase agreement. Rather, I will examine whether the two agreements satisfy the broad effect of the definition of hire-purchase, which covers every contract under which the price is payable in two or more instalments and the seller has the right to the return of the property if the price is not paid.

H Mr *Wood* further submitted that in arriving at the characterisation of the

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contracts one must look not so much at the incidents of a cancellation of the A contract (clause 5 of the Lease Agreements, Annexures "D" and "E") or its premature termination (clauses 6 and 7), but to the position pertaining with the contracts being duly performed by the parties as originally contemplated when they entered into the agreement, and running to their expiry dates, when there are no unperformed obligations of the parties, and accordingly suggested B that the important provisions are those contained in the subparagraphs of clause 8 of each contract.

While I agree that it is useful to have a bird's eye view of the agreement as a whole in order to ascertain its true nature, I am of the opinion that its individual clauses must also be examined for conformity to the basic understanding of the whole contract, unless they are shown to be merely C formal clauses intended to deceive, otherwise a completely misleading picture might emerge. (see *Scharfeneker* v *Duly & Co supra* at 235.) To use a homely example, a bird's eye view of a mermaid is that of a dazzling damsel until one realises on closer examination the presence of fins in the place of legs and feet. Yet again, the inspection of the fins on their own may lead to a completely erroneous conclusion that the subject matter was some kind of D fish. The best approach, therefore, is to examine both the bigger picture and the individual components thereof.

Now, applying the bird's eye view or holistic approach, a hire-purchase agreement arises when a purchaser concludes an agreement either with a financial institution or with the seller of goods, which is then financed E through a specific arrangement of hire-purchase. Or as Russell CJ in *Scharfeneker* v *Duly & Co Ltd supra* put it:

> "The authorities on hire-purchase agreements deal with contracts that differ considerably in their terms. A number of features are common to all. The parties to these agreements may be styled the trader and the customer. The trader, to protect himself, invariably stipulates that during F the continuance of the agreement the ownership of the goods is to remain in him. To meet the customer, it is provided that periodical payments are to be made. These payments are commonly designated as rent. The sum total of the payments correspond with the value of the car, and it is always provided that when all the payments have been made the customer may G become owner of the car without further payment, except perhaps a nominal sum" (at p 228).

A lease agreement, on the other hand, is no more than a form of financial arrangement whereby either the lessor or the lessee sources goods, which are paid for by the lessor, but delivered to the lessee for use upon payment of an agreed lease fee. At the end of the hire-purchase agreement, i.e., when the H

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A contract is fully performed on both sides, the ownership in the goods passes or reverts to the purchaser who would have ceded ownership for the duration of the hire-purchase to the finance company or the seller. In a lease agreement, the ownership of the goods vests at all times in the finance company as the lessor, and at the end of the contract of lease, the ownership remains vested in the finance company. Where the lease agreement allows B the finance company to sell the goods to a third party, it can exercise that right. On the other hand, it can determine not to exercise its rights of ownership and to allow the goods to remain in the possession of the lessee, without demanding any further rental; but this is done outside the terms of the agreement and the finance company cannot be compelled to act in this manner.

C I concur with Mr *de Bourbon*'s submission that there is nothing in the two agreements to show that the first defendant, as the hirer, had the *right*, and I must add, much less the *duty*, (*Helby* v *Matthews & Ors* [1895] AC 471 (HL), *Garlicks Store* v *Caplan* 1934 CPD 355) to purchase the goods after two or more instalments had been paid, or to renew the lease agreement at a nominal D rental.

Firstly, if the lease was prematurely terminated, the goods had to be returned to the lessor (clause 6), and the lessor could then sell the goods to make up any deficiency in the sums due by the lessee to it. Those are not rights consistent with the legislation deeming the matter to be a hire-purchase agreement, and it cannot be said that these were merely formal provisions E intended to deceive third parties.

When the lease terminated, not prematurely but upon due date, then the lessee was obliged to deliver the goods to the lessor, and the lessor required to sell the goods for the best offer obtainable

(clause 8(a)). If the goods were sold for more than the residual value, then the excess was paid to the lessee, if they F were sold for less, then the lessee had to pay the shortfall to the lessor.

Mr *Wood* put forward the view that contrary to the position under a true agreement of lease in which the event of the hirer's return of the goods in good condition restores the lessor to his full rights of dominium in the goods hired, this event does not discharge the obligations of the parties under the two agreements. However, as has already been noted, it is equally true that G nowhere does the lease agreement allow the hirer, much less impose upon him the duty, to purchase the goods or to continue in possession in the circumstances contemplated in the Hire-Purchase Act.

Authors Diemont, Marais and Aronstam state the ultimate test for the resolution of this matter, thus:

> " H The true test for determining whether or not the agreement is a sale is the

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> genuine intention of the parties. This intention may be determined, for A instance, by the amounts of the instalments being paid. If they bear a value that is proportionate to the use- or enjoyment-value of the goods being let, and are not proportionate to the sale- or exchange-value, the agreement should be construed as a lease. On the other hand, if the instalments are equivalent to the sale or exchange value — which is the case in the ordinary hire-purchase agreement — the contract should be B regarded as a sale, no matter what the parties may choose to call it." (*The Law of Hire-Purchase in South Africa* 4 ed pp 24-25 fn 85).

Once more, because of the manner in which the defence of this matter was conducted, no evidence was, or could, be led to show the relationship between the use-value or the exchange-value on the one hand and the lease C payments, on the other. According to the above opinion, if the aggregate instalments were proportionate to the use-value, then the agreements would be taken as leases, but if the instalments were equivalent to the exchange value, the contracts would be regarded as sales. I have my own doubts though, as to the accuracy of such a test, given that in the modern age, the use and exchange values of goods most traded under lease and hire-purchase D arrangements, such as heavy motor vehicles, tend to converge, especially given such concepts as planned obsolescence.

Be that as it may, the onus was on the second defendant to prove on a balance of probabilities that the agreements fell under the definition of hire-purchase. This they have failed to do. In fact, the probability that the agreements E properly construed were lease agreements is more compelling. I have arrived at this conclusion because it appears to me that the unusual arrangements contained in clause 8 requiring the lessor to sell the goods at the end of the lease to best advantage and to pay the lessee any receipts above the residual value of the goods and enjoining the lessee to make up the difference where a deficiency arises, are in line with the basic principles of a lease because they F are meant to reward the lessee for careful use and preservation of the leased goods which would then fetch a price above their residual value and to penalise the lessee for careless and excessive depreciation of the goods, which would then fetch a price far below their expected residual value. G

As far as costs are concerned, I see no reasons for departing from the normal rule that costs follow the outcome.

Accordingly, the exception is dismissed with costs.

Gill, Godlonton and Gerrans, plaintiff's legal practitioners

Atherstone & Cook, second defendant's legal practitioners H

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S v GARANDE 2002 (1) ZLR 297 (H)

Citation	2002 (1) ZLR 297 (H)
Case No	Judgment No. HH-46-02
Court	High Court, Harare
Judge	Bartlett and Ndou JJ
Heard	31 January 2002
Judgment	10 April 2002
Counsel	*Z M Kamusasa,* for the appellant *N J Mushangwe,* for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure — *trial — conduct of — fairness — unrepresented* D *accused — duty of judicial officers to ensure trial is fair, particularly when accused is unrepresented*

Criminal procedure — *witness — calling of — defence witness sitting in court while accused testifying — whether ground for refusing to allow witness to be called*

E **Evidence** — *sexual cases — complaint — evidence of — statement of complaint elicited by leading question — inadmissibility of*

Headnote

It is a fundamental principle of our law, and indeed of any civilised society, that an accused person is entitled to a fair trial. Fairness to the accused should be an overriding requirement to which all rules of evidence in F criminal trials have to conform. Over the years, the courts have fashioned rules to mitigate the harshness of putting unrepresented persons on trial, particularly for serious offences, and these rules require positive conduct by judicial officers to assist unrepresented accused persons in a variety of ways. They are all judge-made rules and have G their origin in the fundamental principle of fairness which is the bedrock of law that requires trials to be fair and justice to be equal.

The appellant was convicted by a magistrate of raping a four-year-old girl. Although the appellant was unrepresented at the trial, the magistrate allowed the prosecution to put unduly leading questions to the little girl and to adduce evidence that she had implicated the appellant after her H father asked her what had been done to her. The magistrate also refused

Ndou J

the appellant's request to call two witnesses, namely the doctor who had A examined the complainant and produced an inconclusive report, and the appellant's wife, who had been sitting in court while the appellant gave his evidence.

Held, that the evidence that the girl had made a statement implicating the appellant was inadmissible because it had been elicited by a leading B question from her father.

Held, further, that the magistrate's refusal to allow the two witnesses to be called was improper and unfair. The doctor could have shed light on the question whether the complainant had been sexually abused, and the fact that the appellant's wife was in court while he testified would have affected the weight to be attached to her testimony, but was not a valid C reason for turning down the appellant's request to call her.

Cases cited

Argersinger v Hamlin 407 US 25 (1972)

Powell v Alabama 287 US 45 (1932)

S v Alexander & Ors (1) 1965 (2) SA 796 (A) D

S v Davids, S v Dladla 1989 (4) SA 172 (N)

R v Hepworth 1928 AD 265

S v Khanyile & Anor 1988 (3) SA 795 (N)

S v Manyani HB-36-90

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

S v Mushimba & 'n Ander 1977 (2) SA 829 (A) E

S v Mutimhodyo 1973 (1) RLR 76 (A)

S v Nyoni HB-248-86

S v Rall 1982 (1) SA 828 (A)

S v Rudman & Anor 1992 (1) SA 343 (A)

S v Sabawu & Anor 1999 (2) ZLR 314 (H) F

S v Torongo S-206-96

S v Tyebela 1989 (2) SA 22 (A)

S v Wall 1981 ZLR 261 (G)

Case information

Z M Kamusasa, for the appellant

N J Mushangwe, for the respondent G

Judgment

NDOU J: The appellant was convicted by a Harare regional magistrate of raping a four-year-old girl. He denied the charge but despite his protestations he was convicted and sentenced to undergo eight years' imprisonment of which two years' imprisonment was suspended on condition of good behaviour. The appellant appeals against both conviction and sentence. H

Ndou J

A The State does not support the conviction in this matter. I hold the view that the concession was properly made by the State, although I differ with counsel on the basis of arriving at this conclusion. My grave concern is that the learned trial regional magistrate, in her judgment, makes no reference to the glaring inconsistencies in the prosecution case. It is also clear that the manner in which the trial was conducted was less than fair to an unrepresented B accused person.

The facts of this case are that the appellant is married to the complainant's aunt. The complainant is normally resident with her father and stepmother at Lochnivar in Harare. On 15 May 2000, she went to visit her mother in the Domboshava area. Due to circumstances not relevant to this case the C complainant's mother left the complainant in the custody of her sister, i.e. appellant's wife. On 3 June 2000, the complainant's mother took the complainant back to her father in Harare. In this regard, it is stated in state outline:

> "8. On the date complainant arrived at her father's place both the stepmother and father discovered that the child was not feeling well D as she appeared to be ill.
>
> 9. The complainant was further observed by bith (*sic*) Eurita and Jonathan whilst scratching her vagina an indication that the vagina was itching.
>
> 10. Eurita then examined complainant and discovered that she had rash E on her vagina. The complainant was asked by Eurita what had happened to her and she disclosed that she had been raped by the accused."

In his defence, the appellant stated that he never saw the complainant from 1 May until the date of the trial (1 August 2000). He further stated that the complainant left his home on 1 May and came back on 10 June. The appellant, F in the circumstances, put two issues of a triable nature before the trial court. Firstly, the trial court had to make a finding on whether or not the appellant and the complainant met during the period 15 May 2000 to 20 June 2000. Secondly, in the event that the trial court made a finding that they indeed met, then it had to decide whether there was credible evidence that the appellant sexually abused the complainant.

G The first prosecution witness was the complainant's father, Jonathan Satuku. His evidence was that he and the complainant's mother were on separation at the material time. On 15 May, the complainant's mother requested to take the complainant away. He initially refused but eventually accepted her request after persuasion by his landlord. The complainant's mother brought H her back on 3 June 2000. He looked at the complainant and she appeared sick.

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He asked her mother, who assured him that the complainant was not sick. He A said he was really concerned about the complainant and, according to the record, he further stated "… I really looked at her again and I was still convinced that she was not feeling well". The prosecutor made valiant attempts to establish the witness's basis for his conclusion that the complainant looked sick. This witness further testified: "On the following morning, I noticed that the child was scratching her private parts. I asked the other B stepmother to examine her since she had spent almost the whole day scratching." The record of the proceedings reveals further:

(Examined by Public Prosecutor)

> "Q. What is the name of the stepmother?
>
> A. Urita Garanewako. She asked what I could probably suspect when C the child was coming from the mother. I just told her to examine her since the way she was scratching was not normal. She urged with me and after some days I told her again to examine the child since she was continuously scratching. I asked her for the third time to examine the child and she kept on ignoring me. On 26 June, I went D to Botswana. I came back in July … I eventually called the child and asked her what has been done to her and why she kept on scratching her private parts. She said that she had been poked by Masimba's father."

It seems to me that this previous consistent statement was not spontaneous. It is trite that such previous consistent statements need not necessarily have E been spontaneous. The statement was , however, induced by leading questions from her father. His testimony in this regard is as follows: "I … and asked *what has been done to her* and why she was (*sic*) kept on scratching her private parts" (the emphasis is mine). Generally, previous consistent statements are excluded because they are insufficiently relevant. This is called the rule against narrative or self-corroboration — see *The South* F *African Law of Evidence* 4 ed by LH Hoffmann and DT Zeffertt pp 119-121. A complaint in a sexual case is admitted as an exception to this general rule. Author John Reid-Rowland, in *Criminal Procedure in Zimbabwe*, stated the rule in following terms (p 21-8):

> "To be admissible, the complaint must have been made at the first G opportunity after the offence which reasonably offers itself. What is reasonable will depend on the circumstances. A great deal will depend on such factors as the complainant's age and the opportunity he or she had to complain to a person to whom he or she could reasonably be expected to complain.
>
> The complaint must not have been induced by threats or by leading H

Ndou J

> A questions, though it need not necessarily have been spontaneous. The terms of the complaint have to be proved as well as the fact that a complaint was made, but the contents of complaint may not be used as independent evidence of the facts alleged. The complaint must give evidence of those."

Before previous consistent statement is admitted in a sexual case the court B has to be satisfied that it meets these requirements. *In casu*, the statement by the complainant does not meet these requirements. It was induced by a leading question from her father.

With minimal articulation, the appellant cross-examined the witness on the question of dates. In so doing, he, however, sufficiently established that the C issue of dates was in dispute.

The next witness was the complainant's stepmother Eurita Garanewako. She confirmed her husband's testimony that when the complainant's mother returned with her on 3 June 2000 the father asked her mother three times if the child was well. She further confirmed that her husband asked her to D examine the complainant. She did not examine the complainant until her husband left for Botswana. This is where the major confusion in the prosecution case lies. The complainant's father testified that he went to Botswana on 26 June 2000 and returned in July 2000. This witness stated that she only examined the complainant when her father was in Botswana. In this regard the record reflects: E

"Q. Where was the child scratching?

A. On her private parts. Some time passed and I did not examine the child until the father went away to Botswana.

Q. Why did you not examine the child? F

A. I told the father what he honestly thought could be done to the child after she had been from her mother. When the father went to Botswana, I remained with the child. The child got serious in her father's absence.

Q. How did the child get serious?

A. She was continuously scratching. I examined the child. I cannot tell G whether a child has been raped or not."

When questioned by the court the witness had this to say:

"Q. Did you see this child scratching?

A. I had not really taken note of it. H

Q. Why were you not examining her?

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Ndou J

A. I just said to him that what did he think could possible happen to the A child when the child was coming from the mother.

Q. What did you mean by that?

A. I did not take it seriously. I just say to him I would examine her."

The dates on the medical affidavit exacerbate the confusion. The medical report shows that the complainant was examined by a medical doctor on B 5 June 2000. There can be no mistake as far as this date is concerned because the report was reduced into affidavit form on 8 June 2000 before the member-in-charge of Harare Hospital Police Post, who even date-stamped next to his signature. If one accepts the dates on the medical report then the complainant was only examined by her stepmother long after she had been examined by C the doctor. As indicated earlier on, the appellant has put the issue of the dates as triable. The prosecution has adduced dubious and confusing evidence on this material issue. There was no attempt by the prosecutor to clear the confusion during the trial. I am concerned that the learned trial regional magistrate equally did not make any reference to this material discrepancy in her judgment. D

In the heads of arguments, Mr *Mushangwe,* for the respondent states: "The above exchange reveals a totally confused approach by the young complainant in answering questions. To some extent, I agree with this submission. In my view, as indicated above, there is, however, more serious and material confusion in the testimony of the adult witnesses i.e. her father E and stepmother. I agree with Mr *Mushangwe*'s observation that the complainant seems to suggest that she was not raped yet the trial magistrate did not see it appropriate to address these issues in the judgment. The other triable issue raised by the appellant was whether or not he raped the complainant. The identity of the appellant as the assailant was not properly established during the trial. Further, the learned trial magistrate let the trial F prosecutor ask unfair and leading questions. By way of illustration, I will cite a few examples:

"Q. Rumbi do you know Masimba Garande?

A. Yes I know him.

Q. Who is it (*sic*) to you or how do you know him? G

A. He is Tendai …

Q. Do you know "baba Masimba?

A. Yes."

It is not clear from this exchange as to whether "Tendai" and "baba Masimba" both refer to the appellant. This trial was characterised by unfairness to the H

Ndou J

A appellant. I have already alluded to the fact that he was not legally represented during the trial. The trial court allowed another unfair leading question from the prosecutor in the following terms:

> "Who put it in your pants or how did it get in your pants?"

Prior to this question, the complainant had never mentioned anything being B put into her pants. The prosecutor asked another, leading question:

> "Q. Where was the pain?"

Prior to this question, the complainant had never mentioned anything about pain. It is not safe to rely on such improperly obtained evidence. In any event, the quality of this evidence is not high.

C Another unfairness highlighted by Mr *Mushangwe* is that the appellant requested that his wife and the doctor who examined the complainant be called to testify. This request was refused by the trial court. In light of contents of the medical report, one would have expected a prudent prosecutor to have called the doctor. Be that as it may, this request coming as it did from an unrepresented accused ought to have been given adequate consideration, D but the learned trial magistrate appeared not to be aware that the unrepresented accused needed her assistance. Such conduct on the part of judicial officers came under attack in the case of *S* v *Manyani* HB-36-90 wherein at pp 4-5 of the cyclostyled judgment Muchechetere J (as he then was) had the following to say:

> " E Another matter which is of concern is that the trial magistrate appeared not to have been sensitive to the fact that the accused before him was unrepresented. See *S* v *Mutimhodyo* 1973 (1) RLR 76; *S* v *Wall* GS 190/81 and *S* v *Kambani Nyoni* HB-248-86. It is clear that in the end the accused who appeared to be a simple person was facing the prosecutor and an unsympathetic court. Lastly, pressure of work and the need to F reduce backlog should not excuse the wanton disregard of proper procedures during and after trial. These procedures are laid down for the purpose of ensuring that justice is being done in all cases."

The Zimbabwean system of criminal is essentially adversarial in nature. The essential characteristic of the adversary system is that the presiding officer G appears as an impartial arbiter between the parties. Although, according to the well-known dictum of Curlewis JA in *R* v *Hepworth* 1928 AD 265 at 277, a judge must ensure that "justice is done", it has been held to be "equally important" that the judge must ensure that "justice is seen to be done" — see *S* v *Rall* 1982 (1) SA 828 (A) at 831H-832A. When the accused is unrepresented, the judicial officer is then in the invidious position of being H an arbiter and, at the same time, an adviser of the accused because he must

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Ndou J

explain the rules of procedure and evidence to the accused. Over the years, A there has been a steady progression in the fashioning of rules by the courts in order to mitigate the harshness of putting an unrepresented accused on trial, particularly on serious offences. These rules require positive conduct by judicial officers to assist unrepresented accused in a variety of ways. They are all judge-made rules, and have their origin in the fundamental principle of B fairness which is the bedrock of law that requires trials to be fair and justice to be equal.

Such a refusal by the trial court was improper and unfair. In this case, although lacking in legal sophistication, the appellant was able to recognise the need to call the doctor. The appellant's request was justified, as a perusal of the affidavit deposed to by the doctor reveals that there are aspects that C needed clarification. In the affidavit, it was not clear as to whether the complainant was sexually abused or not. On whether penetration was effected, the doctor opined "Inconclusive". The doctor could have shed light on whether her observations of the hymen, vestibute, vagina, etc. had anything suggestive of sexual abuse. It is trite that for the purposes of rape, D penetration is effected if the male organ is in the slightest degree within the female body and that it is not necessary to prove that the hymen was raptured — see *S* v *Mhlanga* 1987 (1) ZLR 70 (S) at 72F, *S* v *Sabawu & Anor* 1999 (2) ZLR 314 (H) and *S* v *Torongo* S-206-96. In this case, however, no evidence was led from the complainant herself or from the doctor to establish, if penetration, in the legal sense, was effected. The appellant's request to call E his wife was turned down on the basis that she was sitting in court when he testified. This does not seem to be a valid reason for turning down his

request. There is no legal basis as this fact only affects the weight to be attached to her testimony. In any event, the learned trial magistrate should have asked the appellant at the commencement of his defence case and ensured that any such defence witnesses wait outside during his testimony. There are too many F loose ends in this case.

It is a fundamental principle of our law, and indeed of any civilised society, that an accused is entitled to a fair trial. The basic concept is that the accused must be fairly tried — see *S* v *Alexander & Ors (1)* 1965 (2) SA 796 (A) at 809C-D; *S* v *Tyebela* 1989 (2) SA 22 (A) at 29G-H; *S* v *Khanyile & Anor* G 1988 (3) SA 795 (N); *S* v *Mushimba 'n Ander* 1977 (2) SA 829 (A) and *S* v *Davids*, *S* v *Dladla* 1989 (A) SA 172 (N). I associate myself with the jurisprudential validity of the above rule laid down in these South African cases notwithstanding the fact that latter judgments were overturned on appeal — see *S* v *Rudman & Anor* 1992 (1) SA 343 (A) at 377. I, with respect, differ with South African Appellate Division in their decision that H

Ndou J

A a criminal trial is not required to be fair, but is required merely to adhere to "the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted".

Although we do not have a provision similar to s 35(3) of the Constitution of the Republic of South Africa, 1996, * I hold the view that fairness to the accused should be an overriding requirement to which all rules of evidence B in criminal trials will have to conform. (Section 35(3) reads "Every accused person has a right to a fair trial …") In my view, this is the point that being emphasised in the Manyani case and in *S* v *Mutimhodyo* 1973 (1) RLR 76 (A), *S* v *Wall* 1981 RLR 261 (G) and *S* v *Nyoni* HB-248-86. I do not think that we necessarily need a constitutional provision similar to the South C African s 35(3) of their Constitution. All we need is the changing of concepts of justice by insisting that criminal court proceedings involving unrepresented accused persons should be fair in substance as well as in form. This is how fairness and justice to the accused was achieved in the United States of America — see the classical judgments in *Powell* v *Alabama* 287 US 45 (1932) at 68-9 and *Argersinger* v *Hamlin* 407 US 25 D (1972) at 43.

The criminal proceedings *in casu* were not fair in substance or in form.

It is clear from the foregoing that the conviction is unsafe. The conviction is therefore quashed and the sentence set aside.

E BARTLETT J concurred.

Nduna & Partners, appellant's legal practitioners

* With respect, s 18(2) of the Constitution of Zimbabwe states that every criminal case "shall be afforded a fair hearing …" — *Editor.*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/NATIONAL SOCIAL SECURITY AUTHORITY v CHAIRMAN, NATIONAL SOCIAL SECURITY AUTHORITY WORKERS' COMMITTEE & ORS 2002 (1) ZLR 306 (H)

NATIONAL SOCIAL SECURITY AUTHORITY v CHAIRMAN, NATIONAL SOCIAL SECURITY AUTHORITY WORKERS' COMMITTEE & ORS 2002 (1) ZLR 306 (H)

Citation 2002 (1) ZLR 306 (H)

Case No	Judgment No. HH-51-02
Court	High Court, Harare
Judge	Smith J
Heard	27 April 2002
Judgment	10 April 2002
Counsel	*A P de Bourbon* SC, for the applicant *P Nherere*, for the respondents
Case Type	Application for review
Annotations	Link to case annotations

Flynote

Arbitration — *arbitrator — award — setting aside of — procedure — may not be brought on review under High Court Act — failure by arbitrator to comply with formal requirements for issue of award — how such failure should be rectified*

Headnote

The third respondent was arbitrator in a wages dispute between the E applicant and the second respondent, the workers' committee. Arbitration had been resorted to after the applicant's works council had failed to reach agreement on two matters under negotiation, the general salary increase and the amount of the transport allowance. He made an award, but did not give reasons for the award. The employer F did not ask him for his reasons, but brought an application for review in terms of the High Court Act [*Chapter 7:06*] on the grounds of arbitrariness, irrationality and failure to comply with the requirements of the Article 31(2) of the UNCITRAL Model Law, which is applied by the Arbitration Act. That article requires that the award must state the reasons on which it is based. G

The applicant argued that the arbitrator's award was devoid of reasoning and thus arbitrary and irrational. An award can be set aside on the grounds that it is contrary to public policy. An award that did not comply with the requirements of article 31 was a nullity; and a document that did not comply with the requirements of the law could not be said to be within public policy. The respondents argued, among other things, that the H

Smith J

A application was misconceived, as an arbitrator's award was not subject to review. The fact that no reasons were given was not sufficient reason to set aside the award. The applicant could have requested reasons. Irrationality was not a ground for setting aside an award.

Held, that an arbitrator's award may not be taken on review in terms of s 26 of the High Court Act. That section gives the power to review the B proceedings of inferior courts of justice, tribunals or administrative authorities. An arbitrator does not fall within any of these categories.

Held, further, that the narrow grounds on which an arbitral award may be set aside are set out in article 34 of the Model Law, and recourse to the courts against an award may only be made by way of an application C under that article. The legislature had, in enacting the Model Law, deprived the court of its inherent jurisdiction to review the conduct of an arbitrator. For failure to use the correct procedure, the application would have to fail.

Held, further, that in any event, the only ground that could have been raised was that the award was contrary to public policy by reason of its D irrationality, and there were no grounds for making such a finding. The arbitrator was clearly aware of the issues and his award was midway between what the parties wanted.

Held, further, that the fact the award did not comply with the formal requirements of Article 31 did not mean that it was a nullity. To take that approach would be to go against the spirit of the Model Law. Where a E formal requirement was lacking, a dissatisfied party could approach the court for an order requiring the arbitrator to remedy the omission. If the arbitrator failed to comply with the order, then the award might be set aside.

Cases cited

F *Benjamin v Sobac South African Bldg & Construction* 1989 (4) SA 940 (C)

Dickinson & Brown v Fisher's Exors 1915 AD 166

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Legislation considered G

Arbitration Act [*Chapter 7:13*], Articles 31 and 34

High Court Act [*Chapter 7:06*], s 26

Case information

A P de Bourbon SC, for the applicant

H *P Nherere*, for the respondents

Judgment

SMITH J: This is a review application in connection with an award made by A the third respondent (hereinafter referred to as "Chigwendere") as an arbitrator in the dispute between the applicant (hereinafter referred to as "NSSA") and the second respondent (hereinafter referred to as "the Workers Committee"). The background to the dispute is as follows. During the period 5 January 2001 to 29 June 2001, the Works Council of NSSA convened B various meetings for the purpose of negotiating and bargaining on the general salary increase, schooling assistance for employees' children, long service awards and transport allowances. The Works Council failed to reach agreement on the various issues and recommended that the matter be referred to arbitration. On 30 April 2001, it was decided that the matter should be referred to the Ministry of Labour for compulsory arbitration. However, on C 31 May the Works Council reached agreement on the issue of the schooling allowance for employees' children. That narrowed down the issues for arbitration to the general salary increase and the amount of the transport allowance. Both NSSA and the Workers Committee made written submissions to Chigwendere.

[*His Lordship outlined the parties' submissions and continued.*] D

Chigwendere issued his award on 3 October 2001. In his award, he set out the background to the disagreement, the issues on which the parties agreed and then the details of his determination. He awarded, on the wages and salary increment, a further 50 per cent increment, back-dated to January 2001. That was in addition to the 17 per cent interim award. On the transport allowance, E he awarded an additional 5 per cent increment on wages and salaries. The award was dated and signed by Chigwendere but no reasons for his determination were given.

NSSA has applied for a review of the award. The grounds of review are as follows. Firstly, the award does not comply with the provisions of Article 31(2) of the UNCITRAL Model Law which is applied by the F Arbitration Act [*Chapter 7:13*]. That article requires that the award must state the reasons on which it is based. Secondly, the award is arbitrary and improper. It is not based on reason. Thirdly, the award is irrational. It is excessive and so outrageous in its defiance of logic that no reasonable arbitrator who has applied his mind to the dispute could have arrived at it. G Fourthly, Chigwendere had no rational reasons for the determination. The award is therefore contrary to public policy.

The respondents oppose the application. The first respondent says that he has been dragged into the dispute unnecessarily and that the application against him should be dismissed with costs on the higher scale. On behalf of the Workers Committee, the Chairman expressed surprise at the attitude adopted H

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Smith J

A by NSSA. When the award was made on 3 October, the Assistant General Manager (Human Resources) authorised payment of the arrears due in terms of the award, which totalled just over $107 million, and the money was actually deposited in the NSSA salary account. The Chairman further submitted that if NSSA wanted Chigwendere's reasons, it should have requested that he supply the reasons. The function of Chigwendere was to B determine the quantum of the award to be given to the workers. The reasons for his determination are implicit in the award. The award was reasonable having regard to the desperate general economic malaise prevailing in this country and, in particular, the prohibitive levels of inflation. NSSA can well afford the increase awarded. It is one of the largest institutional investors in C Zimbabwe. The arrear salaries payment of $107 million represents less than a week of NSSA's gross profit on investments.

Mr *de Bourbon* argued that the decision of Chigwendere is devoid of reasoning and thus, by its very nature, is arbitrary and irrational. Article 34 of the UNCITRAL Model Law sets out the grounds on which an award may be set aside. One of the grounds is public policy, the ambit whereof is dealt with in D *ZESA* v *Maposa* 1999 (2) ZLR 452 (S). Article 31 thereof sets out in peremptory terms the form and contents of an award. An award which does not comply with those requirements is a nullity. A document which does not comply with the provisions of the Model Law cannot be said to be within the public policy of Zimbabwe. The failure by Chigwendere to give reasons for the E award leads inevitably to the conclusion that the award is not a rational one. Chigwendere merely split the difference between the position of NSSA and that of the Workers Committee and made an award mid-way between the two.

Mr *Nherere* submitted that there was no reason why the first respondent should have been cited as a party and that he is entitled to his costs on the higher scale. As regards the Workers Committee, he submitted that the F application is misconceived. The application was made in terms of ss 26 and 27 of the High Court Act [*Chapter 7:06*] as read with Order 33 of the High Court Rules. However, in our law, the award of an arbitrator is not subject to review. Such an award can only be set aside on the limited grounds set out in Article 34(2) of the UNCITRAL Model Law. Mr *Nherere* agreed G that no reasons for the award were given by Chigwendere, but he argued that such failure was not sufficient reason to set aside the award. If NSSA required the reasons it should have requested them. The mere fact that reasons were not given does not mean that the award was irrational. Even if it was irrational, which he did not accept, irrationality was not a ground for setting aside an arbitral award. The spirit of the Arbitration Act is to uphold the H finality of arbitral awards. It is only where the arbitrator has misconducted

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2002 (1) ZLR p310

Smith J

himself, in the sense of wrongful, dishonest or improper conduct, that the A award can be set aside. There is no basis for holding that the award is contrary to the public policy of Zimbabwe.

I agree with Mr *Nherere* that the award of an arbitrator cannot be set aside by way of an application for review in terms of s 26 of the High Court Act [*Chapter 7:06*]. That section provides: B

> "Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

Section 27 thereof then sets out the grounds for such a review. C

An arbitrator cannot, by any stretch of the imagination, be regarded as a court of justice, tribunal or administrative authority. Clearly, therefore, s 26 of the High Court Act does not purport to cover the proceedings and decisions of arbitrators. Furthermore, s 26 of that Act clearly states that it is subject to the provisions of any other law. The Arbitration Act [*Chapter 7:02*], which was the law in force in this country prior to 13 September 1996 when the D UNCITRAL Model Law was introduced, provided in s 12 thereof for the circumstances in which the court could set aside an arbitral award. The grounds were much narrower than those specified in s 27 of the High Court Act. Likewise, the

UNCITRAL Model Law specifies, in Article 34 thereof, the grounds on which an arbitral award may be set aside. They are very specific and differ from the grounds specified in s 27 of the High Court E Act. Clearly, it was the intention of the legislature that, in the case of arbitral awards, the High Court could only set aside awards in terms of the specific provisions of the Arbitration Act and not in terms of the general powers conferred by ss 26 and 27 of the High Court Act.

A similar situation applies in South Africa. In *Dickinson & Brown* v *Fisher's* F *Executors* 1915 AD 166, Solomon JA, with whom the rest of the court concurred, said at 175:

> "it is clear that the legislature intended to provide by statute that all awards to which the Act applies should be final and conclusive and that there should be no appeal therefrom. Provision is, however, made that in certain circumstances an award may be set aside by the court. Section 18 G provides as follows:
>
> Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set the appointment or award aside.'
>
> Now in my opinion that section must be read to be exhaustive, and to H

Smith J

> A provide that it is, in these cases and in those only that it is competent for a court to set aside an award. That, of course, would not debar a court from interfering where an arbitrator has made his award extend to matters which have not been submitted to him, for to that extent his award would be null and void, as has been decided in many cases in England. Moreover s (o) of the Schedule to the Act of 1898, to which I B have already referred, provides that the award shall be final and binding upon the parties 'if made in terms of the submission'. I have no doubt, therefore, that an award could always be challenged if the arbitrator has exceeded his powers, but where he has made his award in terms of the submission, I am of the opinion that the court has jurisdiction to set it C aside only in cases which can be brought under the provisions of para 18 of the Act, that is where it has been proved either that the arbitrator has misconducted himself or that the award has been improperly procured."

In *Benjamin* v *Sobac South African Building & Construction* 1989 (4) SA 940 (C), Selikowitz J referred with approval to the determination in the *Dickinson & Brown* case *supra*, that an arbitral award could only be set aside D by the court in cases which can be brought under the relevant provision of the Arbitration Act.

It may well be that under its inherent jurisdiction the High Court had the power to review proceedings before an arbitrator prior to the introduction of the UNCITRAL Model Law on 13 September 1996. Section 12 of the E Arbitration Act [*Chapter 7:02*] conferred powers on the High Court to remove an arbitrator and to set aside an arbitral award, but the grounds therefor were very circumscribed. An award could only be set aside where the arbitrator had misconducted the proceedings or the arbitration or award had been improperly procured. There is nothing in that section from which it can be implied that the legislature intended to deprive the High Court of its F inherent jurisdiction to review the actions of an arbitrator or the award given. However, Article 34 of the UNCITRAL Model Law is a very different kettle of fish. It states very clearly that recourse to a court against an arbitral award may be made only by way of an application in accordance with paras (2) and (3) of that article. That makes it very clear that the legislature intended to deprive the court of its inherent jurisdiction to review the conduct of an G arbitrator. The grounds on which an arbitral award may be set aside are very clearly expressed.

Mr *de Bourbon* submitted that the application should be treated as an ordinary court application for the purposes of Article 34 of the UNCITRAL Model Law and not as an application for review. However, NSSA has nailed H its colours to the mast. It has applied for the award of Chigwendere to be

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Smith J

reviewed and has specified the grounds therefor, as required by r 257 of the A High Court Rules. No reference is made in the application to Article 34 of the UNCITRAL Model Law. As the procedure adopted is not applicable to arbitration awards, the application cannot succeed.

Article 34 of the UNCITRAL Model Law provides as follows in para (1) thereof: B

> "Recourse to a court against an award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."

Paragraph (2) thereof sets out a number of grounds on which the High Court may set aside an arbitral award. The only one which could be relevant for the C purposes of this case is para (b)(ii) which provides that an arbitral award may be set aside by the High Court if it finds that the award is in conflict with the public policy of Zimbabwe. In *Maposa*'s case *supra*, at p 464D-F, Gubbay CJ said:

> "Public policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions. See, generally, *Sasfin (Pty) Ltd* v *Beukes* 1989 (1) SA 1 (A) D at 7I-9G for a useful survey of the authorities dealing with the problem. In order to ascertain the meaning of this elusive concept, in the context of the Model Law, regard is to be had to the structure of Articles 34(5) and 36(3), which deal with two aspects:
>
> (a) *Circumstances connected with the making of the award:* E
>
> As mentioned earlier, Articles 34(5)(a) and 36(3) of the Model Law put it beyond doubt that if:
>
> '… the making of the award was induced or effected by fraud or corruption, the award would be in conflict with the public policy of Zimbabwe.' F
>
> This means that if, for example, the arbitrator was fraudulently misled or bribed by a party, the award, however innocuous *ex facie,* would be contaminated in the process of making and contrary to public policy."

At 465B-D, the learned Chief Justice went on to deal with the other aspect as follows: G

> "*The substantive matter of the award:*
>
> The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after a consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe. H

2002 (1) ZLR p313

Smith J

> A What has to be focused upon is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign forum would be prepared to recognise and enforce it.
>
> In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, B restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated."

The conclusion reached in that matter by the learned Chief Justice was expressed as follows at 466E-G:

> " C Under Article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable D inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the concept of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his E mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

To my mind, there is no indication in the award that Chigwendere did not apply his mind to the question or that he totally misunderstood the issue. He was clearly aware of the issues. He decided to make an award of an increase F that was midway between what NSSA offered and what the Workers Committee wanted. Then, in addition, he awarded a further 5 per cent increase in lieu of a transport allowance.

I fail to see how it can be said that his award is so far reaching and outrageous in its defiance of logic or accepted moral standards that it cannot be accepted by a sensible, fair-minded person.

G Article 31 of the UNCITRAL Model Law deals with the form and contents of an award. Briefly they are as follows : it must be in writing and signed by the arbitrator; it must state the reasons on which it is based, unless the parties have agreed that no reasons are to be given; the award must state its date and the place of arbitration; after it is made it must be signed and delivered to each H party. Article 32 of the UNCITRAL Model Law provides that the arbitral

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2002 (1) ZLR p314

Smith J

proceedings are terminated by the final award. Mr *de Bourbon* argued that, A if an arbitral award does not comply with the requirements of Article 31, then it is null and void. As the arbitral proceedings are terminated by the final award, it is not possible for the court to order that the arbitrator furnish his reasons for the award. It would be against public policy to enforce an award that is a nullity. B

I consider that it would go against the spirit of the UNCITRAL Model Law to hold that, if an award did not comply with all the requirements of Article 31, it was a nullity. That would mean that if the arbitrator did not state the date of the award or the place of arbitration, the award would be a nullity. That, to my mind, would be too formalistic an approach. Likewise, I cannot accept that because Article 32 provides that arbitral proceedings are terminated C by the final award, the court cannot thereafter order that the arbitrator must do a particular thing to ensure compliance with Article 31. If an arbitrator has failed to state the date or place of arbitration, and it is important that that should be done, why should the arbitrator not be permitted to remedy the omission? It is not uncommon for a court to deliver judgment and then state that the reasons therefor will be delivered later. It cannot be doubted that, D once the judgment is handed down, the proceedings before that court have terminated. The handing down or delivery of reasons for the judgment at a later date does not affect the actual judgment or date thereof. It does not extend the proceedings before the court. If an arbitrator fails to comply with the requirements of Article 31 of the UNCITRAL Model Law then a party E aggrieved by the omission may approach the court for an order of *mandamus*.

Article 34 (4) of the UNCITRAL Model Law provides as follows:

> "(4) The *High Court*, when asked to set aside an award, may, when appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to F take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

Where an arbitrator fails to comply with the requirements of Article 31, and the omission is a mere technicality, such as failure to state the date or place of arbitration, the court could, in terms of para (4) set out above, suspend the G setting aside proceedings in order to permit the arbitrator to remedy the defect. That would be much more appropriate than setting aside the award and compelling the parties to start the arbitration proceedings afresh.

In Christie's *Business Law in Zimbabwe* at 463, the learned author mentions the advantages of arbitration over court proceedings. Two that he mentions are that the procedure can be simplified and finality can be reached more H

Smith J

A quickly. I agree with him that these two elements are objectives which must be aimed for in arbitration proceedings. An insistence on an unnecessary degree of formalism would frustrate the achievement of those objectives and should be avoided wherever possible. Thus, in a case like this, where the main objection by one of the parties to the arbitral award is that the arbitrator failed to give reasons for the award, that party should have applied, as a matter of B urgency, for the arbitrator to furnish his reasons within a specified period. If the arbitrator failed to furnish his reasons or furnished reasons which indicated that there were grounds for setting aside the award in terms of Article 34, then the requisite application could be filed.

The application is dismissed, as against the first respondent, with costs on the C legal practitioner and client scale, and as against the second and third respondents, with costs on the party and party scale.

Sawyer & Mkushi, applicant's legal practitioners

D *Honey & Blanckenberg*, first and second respondents' legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v NGULUBE 2002 (1) ZLR 316 (H)

S v NGULUBE 2002 (1) ZLR 316 (H)

Citation	2002 (1) ZLR 316 (H)
Case No	Judgment No. HH-48-02
Court	High Court, Harare
Judge	Ndou J
Heard	10 April 2002
Judgment	10 April 2002
Counsel	Details not supplied
Case Type	Criminal review
Annotations	Link to case annotations

Flynote

Criminal procedure — *sentence — general principles — unrepresented accused — need for court to canvass with accused person all aspects* D *relative to sentence — importance of accused's reasons for committing offence and circumstances of offence*

Headnote

In order to find a punishment that will fit both the crime and the offender, it is essential that magistrates should equip themselves with sufficient information in each case to enable them to assess sentence humanely E and meaningfully, and to reach a decision based on fairness and proportion. Whilst the accused person's age, marital and family status employment, savings and assets are important aspects in the assessment of sentence, magistrates should always bear in mind that the reason why the accused person committed the offence and the circumstances of the F offence are of equal importance. Where these are not evident from the facts of the case, the magistrate must canvass them with an unrepresented accused. Such an accused person will often be unaware of the sort of things that are relevant when it comes to sentence, so the court must offer some guidance to him or her. Without such assistance from the court the unrepresented accused may be hindered in his or her endeavour G to adduce sufficient and meaningful information to enable the court to assess the sentence humanely and meaningfully, and to reach a decision based on fairness and proportion.

Cases cited

Belchem v Jarvis NO & Garnett NO 1952 SR 140 H

Ndou J

A *S v De Jager* 1965 (2) SA 612 (A)

R v Haya 1957 R & N 645 (SR)

S v Jabavu 1969 (2) SA 466 (A)

S v Joseph 1969 (4) SA 27 (N)

S v Manwere 1972 (2) RLR 139 (A)

S v Maponga HH-276-84

S v Maxaku, S v Williams 1973 (4) SA 248 (C)

R v Mbuyase & Ors 1939 (2) PH H 159 (N)

R v Mokwena 1948 (2) PH H 203

S v Moyo 1984 (1) ZLR 74 (H)

R v Ngombe 1964 RLR 231 (A); 1964 (3) SA 816 (RA)

S v Ngombe & Ors HH-504-87

S v Rabie 1975 (4) SA 855 (A)

S v Sparks & Anor 1972 (3) SA 396 (A)

R v Taurayi 1963 R & N 109 (SR), 1963 (3) SA 109 (SR)

S v Zinn 1969 (2) SA 537 (A)

Judgment

NDOU J: This matter is before me by way of automatic review as provided for in s 57 of the Magistrates Court Act [*Chapter 7:10*]. The accused was charged and convicted of contravening s 13(1)(c) of the Public Order and Security [*Chapter 11:17*]. Nothing turns on the conviction. The essential elements were fully canvassed with the accused and as such the propriety of conviction cannot be doubted.

The accused was sentenced to pay a fine of $100 000 or, in default of payment, to five years' imprisonment. The offensive weapon was declared forfeited to the State without the learned trial magistrate carrying out any investigations whatsoever in respect of its ownership.

The maximum penalty provided for in this legislation for this type of contravention is a fine not exceeding $200 000 or imprisonment not exceeding 10 years. The sentence imposed, *in casu*, is 50 per cent of the maximum penalty i.e. both the fine and the alternative term of imprisonment.

The salient facts of this case are that the accused is aged 44. He is a member of the Zimbabwe National Army stationed at Mechanised Brigade, Inkomo Barracks Harare. On 28 February 2002 at about 0100 hours, he was at Nharira Business Centre in Chivhu where he was arrested by some ZANU-PF youths on suspicion of causing violence in the area. He was handed over to a Const Mutodzi. The latter searched the accused and recovered one CS tear smoke canister from his trouser pocket. In brief, mitigation, the accused indicated that he was earning $26 000 per month

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in the Army. *Ex facie,* the record does not show whether this is a gross or nett salary. He indicated that he had $20 000 in savings. He also indicated that he is widowed and has six children to look after. He lastly indicated that he owns a motor vehicle. This is a cursory way of canvassing the personal circumstances of an accused and the circumstances under which the offence was committed. The accused was not legally represented during the trial. The learned trial magistrate should have fully enquired into the circumstances under which the accused, a member of the Army, came into possession of the tear smoke canister. Since the accused is based in Harare it was necessary to investigate how he ended up in Chivhu with the canister. It is clear that the learned trial magistrate imposed an unusually heavy fine of $100 000 based on very scant information about the accused and the circumstances and nature of the offence. The decision on sentence must be made on a rational and informed basis. This is an example of intuitive approach to sentencing. This approach has drawn criticism from academics in the legal fraternity e.g. R Graser in an article entitled "Sentencing as a Rational Process" (in *Crime, Punishment and Correction)* Journal of June 1975 26 at 30 cited and criticised the approach as crafted by United States of America Appeal Judge, Irving Kaufman in the following terms:

> "The experienced judge, like any good craftsman, does the right thing without constant awareness of his motivations. He may call it a 'feel of sentencing'."

There is certainly no room for such instinctive sentencing in our jurisdiction. It is trite that our courts have over the years followed the rational approach to sentencing. In this approach, the sentencing judicial officer determines the limits set by the legislature as far as type and quantum of punishment is concerned and then, within this, the limits set by the culpability of the offender. He then carefully considers the differing purposes of punishment F and, if they conflict, rationally balances them against each other, according to each its due in the final sentence he imposes — see *Sentencing* by D P van der Merwe at paras 1-14.

Judgments in our jurisdiction have always emphasised that the sentencing court, in deciding upon the appropriate punishment, must strive to find a G punishment which will fit both the crime and the offender. The sentence must be fair and just instead of excessive, savage and draconian — see G Feltoe *A Guide to Sentencing in Zimbabwe* at p 1. The punishment must fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy — see *S* v *Sparks & Anor* 1972 (3) SA 396 (A). H

2002 (1) ZLR p319

Ndou J

A In the light of the above sentencing principles, it is essential that magistrates should equip themselves with sufficient information in any particular case to enable them to assess sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. "The needs of the individual and the interests of society should be balanced with care and understanding" — see *S* v *Moyo* 1984 (1) ZLR 74 at 77F. Pre-sentencing information is very B important. Whilst the age, marital and family status, employment, savings and assets are important aspects in the assessment of sentence, magistrates should always bear in mind that the reason why the accused committed the offence and the circumstances of the offence are of equal importance. In some cases, the reason is evident from the facts of the case. In other cases, C it is not. In such cases, the magistrates must canvass these aspects with an unrepresented accused. Generally, all the mitigatory and aggravating factors must be canvassed and the court must be aware of the full facts of the case, including the offender's reasons for committing the crime. It seems to me that in some instances sentences imposed by magistrates are getting harsher whilst the quantum of pre-sentencing information is diminishing. Such a D situation is not conducive to rational and fair sentencing of unrepresented accused persons.

In similar circumstances, in the case of *S* v *Maponga* HH-276-84, Reynolds J on p 6 of his cyclostyled judgment stated as follows:

> "Turning to his second contention, however, which is to the effect the E magistrate's failure to consider factors relevant to sentence amounted to a gross irregularity, there is far more room for criticism of the magistrates court proceedings. Here, as in every criminal trial, it was vitally necessary for the magistrate to be fully informed of all factors relevant to sentence before attempting to assess an appropriate penalty. It is simply not possible for any judicial officer to determine a fitting punishment unless F he is apprised of all the facts of the case, including the personal circumstances of the accused.
>
> In the present case, the magistrate appears to have made no inquiry as to what factors led up to the commission of the offence, and it seems doubtful that he afforded the accused the opportunity of explaining matters either … To pass sentence in the dark, as it were, to my mind G constitutes a gross irregularity within the meaning of s 27 of the High Court of Zimbabwe Act, 29 of 1981.
>
> Certainly, to rely only on the perfunctory inquiry that was made here could result in grave prejudice to the accused. In my view, it is important that magistrates must not regard the procedure provided in s 255 [now H s 271] of the Criminal Procedure and Evidence Act [*Chapter 59*] as a

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2002 (1) ZLR p320

Ndou J

> warrant to hasten pell-mell through cases. Indeed, as this form of trial is A so truncated, and the possibility of error, as a result, is so great, magistrates should be at particular pains, and should exercise every caution to avoid injustices occurring (see *S* v *Zindonda* AD 15-79)."

The accused, *in casu,* was not legally represented and as such the trial magistrate had a duty to ensure that factors of mitigation are fully canvassed B because the accused himself will often be unaware of the sort of things which are relevant when it comes to sentence (see p 81 of *A Guide to Sentencing in Zimbabwe supra*). The reason why the court must do this is because the accused himself will often be ignorant about what sort of things are salient and may influence the court to impose a less severe sentence. The court must thus offer some guidance to the accused in this

regard. Without such C assistance by the court the unrepresented accused may be hindered in his/her endeavour to adduce sufficient and meaningful information to enable the court to assess the sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. As pointed out earlier on, the needs of the individual and the interests of society should be balanced with care and understanding. (See *S* v *Moyo supra* at 77F; *S* v *Manwere* D 1972 (2) RLR 139 (A); *S* v *Zinn* 1969 (2) SA 537 (A) and *S* v *Rabie* 1975 (4) SA 855 (A)).

All available information that would be of assistance in assessing an appropriate penalty should be before the court. If necessary, and if the presiding magistrate cannot elicit this information by questions, the case E should be postponed for the necessary enquiries to be made — (see *S* v *Ngombe & Ors* HH-504-87 at pp 2-3).

The sentencing process is as distinct and vital a factual enquiry as the determination of the guilt of an accused. Punishment should as far as possible be individualised by conducting meaningful pre-sentence investigations. As indicated above, the record demonstrated clearly that the F trial magistrate decided this matter upon the minimum of evidence, which presented a picture which was so incomplete that it cried out for further investigation and elucidation. The trial court should not leave the assessment of punishment to a haphazard guess based on no or inadequate information — see *S* v *Jabavu* 1969 (2) SA 466 (A); *R* v *Taurayi* 1963 R&N 252 (SR); G 1963 (3) SA 109 (R); *S* v *Maxaku*, *S* v *Williams* 1973 (4) SA 248 (C); *R* v *Mbuyase & Ors* 1939 (2) PH H 159 (N) (at p 167) and *S* v *Joseph* 1969 (4) SA 27 (N).

In the circumstances, I find that the manner in which the trial magistrate conducted the proceedings (as far as sentencing is concerned) constitute a gross irregularity. The finding that there was a gross irregularity in these H

Ndou J

A proceedings does not necessarily require remittal of this case. It is only in exceptional cases that a remittal will be ordered. Remittal will be ordered only in those matters where it appears that if the conviction or sentence were left undisturbed there would be a possibility, amounting almost to a probability, that a miscarriage of justice would take place — see *S* v *Maponga supra*; *R* v *Haya* 1957 R&N 645; *R* v *Mokwena* 1948 (2) PH H203; *Belchem* v *Jarvis & Anor NNO* 1952 SR 140 B .

Generally, the interests of justice are not served by lightly requiring the re-opening of a case that has already been adjudicated upon — see *R* v *Boshoff* 1956 R&N 61 (SR). In the light of these strictures, basic requirements must normally be met before a remittal is ordered. These are: C

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial (see *R* v *Ngombe* 1964 RLR 231 (A); 1964 (3) SA 816 (RA));

(b) There should be a *prima facie* likelihood of the truth of the evidence; D

(c) the evidence should be materially relevant to the outcome of the trial — see *S* v *de Jager* 1965 (2) SA 612 (A) at 613.

Specifically, no conviction or sentence may be quashed or set aside by reason of irregularity or defect in the record of proceedings unless the reviewing judge considers that a substantial miscarriage of justice has actually occurred — E see s 29(3) of the High Court Act [*Chapter 7:06*]. I agree with the observation of author John Reid Rowland in *Criminal Procedure in Zimbabwe* para 26-10(h) that the object of this section is to prevent proceedings being set aside on technical grounds. The test is whether there has been substantial prejudice to the accused.

As far as sentence is concerned, I am of the view that a remittal is justified F and necessary. The trial magistrate must carry out investigations on why the accused committed the offence. The Act under which the accused was charged has just been promulgated. Two characteristics worth noting is that, firstly, the Act provides for very harsh and severe penalties. Secondly, the Act gives all levels of magistrates special jurisdiction to impose sentences G well above their ordinary jurisdiction as provided for in s 50 of the Magistrates Court Act [*Chapter 7:10*]. In such circumstances, the magistrates are enjoined to equip themselves with sufficient pre-sentencing information before exercising their newly-found jurisdiction. The moral blameworthiness of the accused and the circumstances under which the offence was committed must be carefully examined before such harsh sentences are imposed. The H magistrates should not be overzealous to reach the maximum sentence or to

Ndou J

get as close to the maximum as possible. In deserving cases, such severe A punishment may be imposed. From the scant information, I am unable to say whether this is such a deserving case. It is, unfortunately, not just for this court to substitute what I consider to be an appropriate sentence in view of the inadequacy of the pre-sentencing information.

The reviewing court has wide powers to remit the case to trial court with B instructions about the further proceedings to be had in the case. These wide powers would entitle the reviewing court or judge, in appropriate circumstances, to confirm the conviction entered by the trial magistrate but send the case back for sentence to be passed afresh in light of further information or evidence which the trial magistrate is instructed to hear — see *Criminal Procedure in Zimbabwe supra* — paras 26-9(f)(iii). I hold that C this is an appropriate case where I should take this exceptional route.

In the circumstances, the conviction is confirmed and sentence set aside, and the matter is remitted to the magistrates court for sentence *de novo* before the same magistrate. At the subsequent trial, the trial magistrate shall not pass sentence in excess of that already imposed upon the accused, and he shall take D into account, in assessing sentence, the purport of this judgment, and the length of the time the accused has served in prison.

MUNGWIRA J concurred.

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ZIMBABWE CONGRESS OF TRADE UNIONS v OFFICER COMMANDING, ZIMBABWE REPUBLIC POLICE, HARARE DISTRICT & ANOR 2002 (1) ZLR 323 (H)

Citation	2002 (1) ZLR 323 (H)
Case No	Judgment No. HH-56-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	11 April 2002
Judgment	11 April 2002
Counsel	*A P de Bourbon* SC, for the applicant *G Zengeni*, for the respondents
Case Type	Urgent application
Annotations	Link to case annotations

Flynote

D **Statutes** — *Public Order and Security Act [Chapter 11:17] — s 24 — notification to police of public meeting — meeting of trade union — no requirement to notify police of such meeting — public meeting — what is — meeting of trade union council not such a meeting*

Headnote

E The applicant, a registered trade union, organised a routine meeting of its General Council members to discuss the organisation's business. The meeting was to be held at a hotel in Harare. The police claimed to be entitled under the Public Order and Security Act [*Chapter 11:17*] to attend the meeting and to prohibit the meeting if they were denied entry. The police also claimed that they were entitled to attend to see whether F the General Council's deliberations conformed with the requirements of the Labour Relations Act. The General Council objected to the presence of the police, and aborted the meeting when the police persisted in their demand that they should be able to attend. The applicant sought an order confirming that it were entitled to hold the meeting and excluding the police from attending.

G *Held*, that while notification of a public meeting had to be given to the police, the purpose of giving such notification was for the limited reasons stated in s 24 of the Public Order and Security Act. The purpose which the police wished to pursue — to be able to establish whether the meeting was *bona fide* — was not included. In any event, under s 24(5), H certain classes of public meetings were exempt from the requirements

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of the section, among them a public gathering held by a registered trade A union.

Held, further, that the meeting was not in any case a "public meeting", as defined. Such a meeting was one held in a public place or one to which the public was permitted to attend and which was held to discuss matters of public interest. Even if the applicant was not specifically exempted by s 24, its meeting would not be one to which s 24 applied. B

Held, accordingly, that the respondents and their representatives would be prohibited from attending the meeting of the applicant's General Council on the planned date or any other similar meeting to be held in the future.

Cases cited C

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

R v Chisanga (2) 1964 RLR 575 (A)

Legislation considered

Public Order and Security Act [*Chapter 11:17*], ss 2 & 24 D

Case information

A P de Bourbon SC, for the applicant

G Zengeni, for the respondents

Judgment

CHINHENGO J: This application was brought before me as an urgent matter on 9 April 2002. I directed that the respondents could file their notices of E opposition and opposing affidavits by 2.00 p.m. on 10 April and that the respondent could file its answering affidavit by 9.00 a.m. on 11 April. I also directed that the matter be set down before me in chambers at 10.30 a.m. on 11 April 2002. The Attorney-General's Office had received the application on 8 April and, despite my directions, it had not done anything until 8.45 a.m. on the date of the hearing, when the application was given to Miss *Zengeni.* F I sympathise with Miss *Zengeni* in her predicament because she had to be ready to argue the matter within about two hours.

The applicant (hereinafter called "the ZCTU") is registered as a trade union in terms of s 33 of the Labour Relations Act [*Chapter 28:03*] ("the Act"). To it are affiliated no less than twenty nine trade groups or unions. The ZCTU G represents the interests of workers and it champions and protects

their interests. Its highest organ is the General Conference, which meets once every five years to elect the organisation's office bearers and to appoint its auditors. In between these meetings of the General Conference, the powers of the ZCTU are exercised by its General Council, which is a representative body of the unions affiliated to the ZCTU. In terms of the ZCTU Constitution, H

A the General Council must meet three times in a year but it in fact meets more frequently to discharge its functions.

On 14 March 2002, the General Council organised a meeting of its members in order to attend to the business of the ZCTU. The meeting was aborted because the Zimbabwe Republic Police (ZRP), represented by one Assistant Insp Ndou, insisted that police officers should attend the meeting for the B purpose of assessing whether the General Council's deliberations conformed with the requirements of the Labour Relations Act [*Chapter 28:03*]. The said Ndou is said to have stated that he and his fellow police officers were entitled, in terms of the Public Order and Security Act [*Chapter 11:17*] (POSA), to attend the meeting and if denied that entitlement he was to close C the meeting by force and prevent it from taking place. According to the applicant, this attitude by the police was the first time that it had been displayed. The General Council objected to the police sitting at, or attending, its meeting but because Ndou and his team of police officers persisted in their demands the meeting was called off. The applicant averred that it incurred wasted costs of bringing delegates to the venue of the meeting and that it D incurred other costs as well.

On 25 March 2002, the applicant's legal practitioner sought from the first respondent a written assurance that the police would not interfere with, or demand attendance at, another meeting of the General Council set for 27 March. The letter by the applicant's legal practitioner, which E comprehensively expressed the ZCTU's concerns, reads as follows:

> "Zimbabwe Congress of Trade Unions — General Council Meeting at Quality International Hotel on Wednesday 27 March 2002 at 10.00 a.m.
>
> We have been instructed by and act for and on behalf of our above referred client.
>
> Our client is a policy making organ of the Zimbabwe Congress of Trade F Union, an umbrella body of registered trade unions.
>
> Our client wishes to hold a meeting on 27 March 2002 at 10.00 a.m. at Quality International Hotel.
>
> The meeting is a purely and strictly trade union meeting convened to discuss and debate on ZCTU union affairs and business.
>
> G In the past, your officers and in particular Assistant Inspector Ndou and two others insisted that a meeting of the ZCTU Council was necessarily a political meeting and had to be convened and regulated in terms of the Public Order and Security Act [*Chapter 11:17*] (POSA).
>
> On 14 March 2002 and at the said venue, Assistant Inspector Ndou H advised our clients that they should in future seek police clearance,

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> direction and regulation of their meetings and if they should proceed A without such clearance they would face, head on, the full weight of the penalty provisions of POSA.
>
> He went on to state that if they did apply for clearance, such clearance would not be denied unreasonably but conditions would be set for the minimum of which would be the presence of at least two police officers B in plain clothes within the meeting room.
>
> With respect, the position adopted by Assistant Inspector Ndou is wrong.
>
> The following are the reasons why:
>
> i. The ZCTU Council Meeting is exempt from POSA police regulations C by paragraph (j) of the schedule to the said Act.
>
> ii. The ZCTU Council Meeting is not and cannot be a political meeting as unions are formed by and represent workers of diverse political affiliation and inclination.
>
> iii. The ZCTU Council Meeting is not and cannot for the purposes of D POSA be a public gathering because it is held by council members *inter se* to the exclusion of members of the public who have no access to it at all.
>
> iv. It is an internal meeting of a lawful organisation which is entitled in terms of the Constitutional rights and freedom of the citizen, to pursue discussions and debate without undue interference and

or E regulation.

It is not a public gathering.

v. In terms of the African Charter on Human Rights, the United Nations Declaration of the Human Rights and various labour conventions to which Zimbabwe is a signatory the right of citizens F to participate in trade union activities and the right of associations of such unions to free assembly is paramount and may not be interfered with or subtracted from without good cause.

We have been assured and instructed that the meeting does not and cannot pose a threat to the public order, peace or security of any of G the citizen and is purely private trade union business.

We have been instructed to notify you of the meeting not in accordance with the provisions of POSA, because they do not apply, but out of abundance of caution and for *courtesy* as there have been threats to interfere or ban any future meetings purportedly in terms of section 26 of POSA. H

Chinhengo J

A Please be advised that the organiser of the private labour meeting for 27 March 2002 is the Secretary General of the ZCTU.

We have been instructed to demand as we hereby do that you kindly confirm in writing that your officers will not, as threatened, prohibit or interfere in any way or make a forced attendance within the meeting room on the date, place and time herein above specified.

B We will be most obliged to receive, by return of fax, your position by 4.30 p.m. today.

If we should not hear from you, it will be assumed the threats by your officers still stand and an application will be made to the High Court on an urgent basis for relief as may be appropriate in the C circumstances."

A written response to this was received and it reads:

"With reference to your letter dated 25/03/2002 I wish to state that your meeting scheduled for 27/03/2002 at Quality International Hotel has not been prohibited. The meeting is held exclusively for bona-fide trade D union purposes for the conduct of business in accordance with the Labour Relations Act [*Chapter 28:01*].

It is against this background that I doubt your sincerity. Why should you wish to exclude the Police in your deliberations if the issues to be discussed are purely labour issues. The Police are empowered to enter any such buildings where public gatherings are in progress in order to E ascertain whether the deliberations being done thereat are in conformity with the requirements of POSA."

It was not clear from the papers filed of record whether the meeting of 27 March was held. At the hearing, however, it was confirmed that that meeting was held and that the police did not interfere with it by attending.

F The General Council intends to hold another meeting to deliberate on the business of the applicant on 12 April 2002. It is concerned that unless the legal position is clarified, the ZRP would again insist that its officers must enter the venue of the meeting, listen to the discussion thereat and ascertain whether or not the deliberations at the meeting conform to the Labour G Relations Act.

The position of the applicant is clearly outlined in the founding affidavit. It believes that it is entitled to the fundamental rights and freedoms enshrined in the Constitution of Zimbabwe and in particular the freedoms of expression, assembly and association as set out in ss 11, 20 and 21 of the Constitution. It believes that the restrictions on public meetings contained in POSA do not H apply to it at all, and that there is no other law which derogates from the

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Chinhengo J

fundamental rights and freedoms aforementioned and which allows the A respondents to attend its meetings. It believes that its freedom of expression, assembly and association would be compromised and prejudiced if persons who are not members of the applicant's General Council and other uninvited persons such as members of the ZRP attend their meetings perforce.

The applicant averred that the first respondent has again indicated that she B will arrange for her subordinates to attend the meeting of the General Council to be held on 12 April, whether or not the applicant has invited members of the ZRP, and further that the first respondent has threatened that if police officers are prevented from attending she will stop the meeting from taking place. The

respondents did not dispute these averments. The applicant is concerned that if that should happen and the meeting is not held, it will have C again incurred wasted costs of organising the meeting.

The applicant has thus sought a provisional order with the following interim relief:

> "That the respondents and their representatives are hereby prohibited from attending the meeting of the General Council of the applicant to be D held on Friday 12 April 2002."

It appeared to me that the interim relief sought by the applicant is not really interim in respect of the meeting of 12 April. If the interim relief were granted the meeting will be held without the rights of the respondents having been finally determined. And the same meeting cannot be held again. Once held, E it is the end of the matter. To grant the interim relief would be contrary to the decision of this court in *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H) where it was held that, because interim relief can be obtained on the mere showing of a *prima facie* case, if the effect of the interim relief is to obtain the substantive relief sought, then the litigant would obtain final relief without proving his case. In my view, the substantive relief sought by the F applicant in respect of the meeting of 12 April is to have it held without police interference. And if that is correct, then quite clearly the applicant will have obtained the substantive relief it sought on the basis of only a *prima facie* case established. But I think a closer scrutiny of the final relief sought by the applicant reveals that the applicant's main and abiding concern is that it should be able to hold its meetings now and in the future without police G interference. The final relief sought is that:

> "Terms of Final Order sought
>
> 1. It is declared that:
>
> 1.1 By virtue of paragraph (j) of the Schedule to the Public Order and Security Act [*Chapter 11:17*] (No. 1/2002), section 24 of H

Chinhengo J

> A the said Act does not apply to any public gathering of the applicant.
>
> 1.2 The first and second respondents are not empowered in terms of the Public Order and Security Act (No. 1/2002) [*Chapter 11:17*] or any other law to enter any public place, as defined in section 2 of the Public Order and Security Act, where the B applicant is holding a public gathering in order to ascertain whether the deliberations being done thereat are in conformity with the requirements of the said Act.
>
> 2. It is ordered that:
>
> 2.1 The respondents and their representatives be and are hereby prohibited from attending the meeting of the General Council of C the applicant to be held on Friday, 12 April 2002 or any other such similar meeting to be held in the future.
>
> 2.2 That the first and second respondents jointly and severally, the one paying the other to be absolved, shall pay the costs of this application."

D At the hearing, the parties agreed that, in order to avoid the difficulty I have mentioned, this matter should be dealt with to finality. With this agreement, even if I were to be wrong that the interim relief has final effect, that becomes irrelevant.

The applicant's main contention is that it may hold its meetings without police interference because, as a registered trade union, its meetings are E exempted from the provisions of s 24 of POSA.

It is necessary to analyse s 24 of POSA. It provides as follows:

> "24 Organiser to notify regulating authority of intention to hold public gathering
>
> (1) Subject to subsection (5), the organiser of a public gathering F shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the gathering is to be held:
>
> Provided that the regulating authority may, in his discretion, permit shorter notice to be given.
>
> G (2) For the avoidance of doubt, it is declared that the purpose of the notice required by subsection (1) is —
>
> (a) to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or a breach of the peace; and
>
> (b) to facilitate co-operation between the Police Force and the organiser H of the gathering concerned; and

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(c) to ensure that the gathering concerned does not unduly interfere with A rights of others or lead to an obstruction of traffic, a breach of the peace or public disorder.

(3) Any Saturday, Sunday or public holiday falling within the four-day period of notice referred to in subsection (1) shall be counted as part of the period. B

(4) Where there are two or more organisers of a public gathering, the giving of notice by any one of them in terms of subsection (1) shall be a discharge of the duty imposed upon the other or others by that subsection.

(5) This section shall not apply to public gatherings of a class C described in the Schedule.

(6) Any organiser of a public gathering who fails to notify the regulating authority for the area of the gathering in accordance with subsection (1) shall be guilty of an offence and liable to 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." D

The first respondent is the regulating authority in Harare where the applicant's meeting is to be held. Subsection (2) above specifically provides that, for the *avoidance of doubt*, the regulating authority is notified of any public meeting for the following purposes: to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or a breach of E the peace; to facilitate co-operation between the police and the organiser of the meeting; to ensure that the gathering concerned does not unduly interfere with the rights of others or lead to an obstruction of traffic, a breach of peace or public disorder. These purposes are, in my view, exhaustively listed and no other purpose can be included in the list. The purpose which the respondents' representatives wish to pursue, i.e. to be able to ascertain F whether the meeting is *bona fide,* is not covered by s 24 of POSA. Parliament must have recognised that the powers of the regulating authority must, for the public good, be strictly circumscribed by exhaustively listing the purposes for which the regulating authority is notified of any public meeting or gathering. G

Subsection (5) of s 24 specifically exempts certain classes of public gatherings from the application of that section. Among them, as provided in para (j) of the Schedule to s 24(5), is any public gathering:

"held by a registered trade union for *bona fide* trade union purposes of the conduct of business in accordance with the Labour Relations Act [*Chapter 28:01*]." H

Chinhengo J

A The respondents have not shown that the meeting to be held by the applicant, a registered trade union, on 12 April is not for *bona fide* trade union purposes. They made an unsubstantiated allegation that the meeting is not *bona fide* as required. It is apparent that they have nothing more than a suspicion. That is not adequate reason for the regulating authority to want to act and interfere with the applicant's meeting.

B Another basis on which this matter may be examined are the definitions of "public gathering", "public meeting" and "meeting" in s 2 of POSA. POSA does not require that persons who intend to hold meetings which are not meetings as defined in that Act, or which are not public in nature, should give notice to the regulating authority in terms of s 24. In so providing Parliament C appreciated that the law would be so draconian as to be a blatant contravention of the rights and freedoms enshrined in the Constitution, hence, it did not require any notice to be given in respect of such meetings. The three definitions in s 2 of POSA which are relevant in this regard are formulated thus:

"public gathering" means a public meeting or a public demonstration;

D "public meeting" means any meeting in a public place or meeting which the public or any section of the public is permitted to attend whether on payment or otherwise;

"meeting" means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such E matters;

These definitions put it beyond any doubt that the public gathering referred to in s 24 of POSA is a meeting held in a public place or one to which the public is permitted to attend and which is held to discuss matters of public interest. The applicant's affidavit indicates that the meeting of the General Council is not one at which matters of public interest are to be discussed. It is F only a public gathering because it is to be held in a hotel. But it is in fact a meeting of the General Council of the

applicant. In my view, therefore, even if the applicant was not exempted from the application of s 24 of POSA, which I have found it is, its meeting would still not be a meeting to which those provisions apply. The definitions I have referred to were uprooted G verbatim from the Law and Order (Maintenance) Act [*Chapter 11:07*] which was repealed by POSA. An instructive case on the meaning of "public gathering", and the test as to what constitutes a "meeting" as defined in POSA, is to be found in *R* v *Chisanga (2)* 1964 RLR 575 (A) where the court held that a meeting of persons who belonged to the PCC, a political party, for the purpose of forming a local executive of the party and of H informing the executive what their work would be and also of teaching the

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Chinhengo J

members of the executive party songs was held not to be a meeting as defined A in the Act. Beadle CJ at 577D-F said that:

> "Before this gathering can be held to be a 'meeting' within the meaning of that word as defined in the Act, the Crown must satisfy the court that the purpose of that meeting was to 'discuss matters of public interest' or for the purpose of 'the expression of views on such matters'. As I have B said, the purpose of the meeting was to form in that area an executive of the PCC to tell them what their work was and to teach them party songs. It seems to me that while this might be a matter of great interest to that particular section of the PCC who attended these two gatherings, the formation of this executive and the due instruction of the PCC in the Sabi North Area of Southern Rhodesia is hardly a matter of public interest C within the meaning of the expression where it occurs in the definition of the word 'meeting'."

I have stated that the meeting of the applicant's General Council cannot be classified as a meeting within the meaning of that word as defined in POSA, nor can it be described as a public gathering to which s 24 of POSA applies. D

I am quite satisfied that the relief sought by the applicant must, subject to what I shall state hereunder, be granted.

It is not necessary for me to deal with the issue of the applicant's entitlement to enjoy the fundamental rights of freedom of expression, assembly and association. Those freedoms are a right granted to the applicant by ss 20 and 21 of the Constitution. Unless it is shown that an authority is acting on the E basis of a law which curtails that freedom as provided in the said sections of the Constitution, then the applicant's rights may not be interfered with.

I do not think that the declarator sought by the applicant should be granted on the facts of this matter. Paragraph 1.1 of the draft declarator is too widely cast or worded. It would be a declaration to the effect that s 24 of POSA does F not apply to any public gathering of the applicant, even if a meeting held by the applicant is not held for bona fide trade union purposes as mentioned in para (j) of the Schedule to POSA and the respondents were able to show that this was so. Paragraph 2.1 thereof is also inappropriately worded for the same reason. Additionally, the declarator would be superfluous where an order favourable to the applicant is to be made. But I find that the terms of the order, G not the declarator, sought are an appropriate relief to be granted because the General Council meetings are not meetings within the meaning of the definition of the word "meeting" in s 2 of POSA. I am also satisfied that the applicant's meetings are exempt from the provisions of s 24 of the POSA by virtue of the exclusion in subs (5) of that section, as read with para (j) of the Schedule to POSA. H

Chinhengo J

A In the result, it is ordered that:

1. The respondents and their representatives be and are hereby prohibited from sitting at or attending the meeting of the General Council of the applicant to be held on Friday 12 April 2002 or any other similar meeting to be held in the future. B
2. That the first and second respondents jointly and severally, the one paying the other to be absolved, shall pay the costs of this application.

Gill, Godlonton & Gerrans, applicant's legal practitioners

C *Attorney-General's Office*, respondents' legal practitioners

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Source:
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MUZENGI v STANDARD CHARTERED BANK ZIMBABWE LTD & ANOR 2002 (1) ZLR 334 (S)

Citation	2002 (1) ZLR 334 (S)
Case No	Judgment No. S-129-01
Court	Supreme Court
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	22 October 2001
Judgment	12 April 2002
Counsel	Appellant in person *L T Biti*, for the first respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Administrative law — *review — domestic remedies — exhaustion of before* D *institution of review proceedings in High Court — when application for review may be made before exhaustion of domestic remedies*

Employment — *contract — termination — resignation — when amounts to constructive dismissal — what must be shown — unilateral nature of resignation* E

Employment — *labour relations officer — decision of — review or appeal — when application for review may be instituted before exhaustion of appeal procedures under Labour Relations Act [Chapter 28:01]*

Headnote

The appellant's employer decided to conduct an inquiry into his conduct as F an employee, but before the inquiry could be held he submitted a letter of resignation. He submitted another such letter after the committee of inquiry concluded he should be suspended pending an application to a labour relations officer for his dismissal. Two months later he lodged a complaint with a labour relations officer, alleging that he had been forced to resign through fear, and praying reinstatement. The labour G relations officer conducted a hearing into the matter and dismissed his complaint. Instead of following the appeal procedures laid down in the Part XII of the Labour Relations Act [*Chapter 28:01*], he applied to the High Court for a review of the labour relations officer's decision, but the High Court dismissed his application. On appeal:

Held, that the appeal procedures set out in the Labour Relations Act were H

Ziyambi JA

A capable of providing the appellant with effective redress, and he had shown no special circumstances or good reason for not exhausting those domestic remedies before approaching the High Court. On that ground alone, the High Court should have dismissed his application for review.

Held, further, that to establish his allegation that he had been coerced into resigning through fear, the appellant had to aver clearly and distinctly B the material circumstances giving rise to his fear. He had made no such averments, and the record disclosed none.

Held, further, that by his resignation the appellant terminated his contract of employment, and it was of no consequence that his employer purported to accept it some two weeks later. The notice of resignation was a unilateral act and required no acceptance or concurrence on the part of C the employer.

Cases cited

Muzengi v Standard Chartered Bank & Anor 2000 (2) ZLR 137 (H)

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

D *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S)

Kanonhuwa v Cotton Co of Zimbabwe 1998 (1) ZLR 68 (H)

Tutani v Minister of Labour & Ors 1987 (2) ZLR 88 (H)

Musandu v Chairperson Cresta Lodge Disciplinary & Grievance Cttee HH-115-94

Moyo v Forestry Comm 1996 (1) ZLR 173 (H)

E *Steiger v Union Govt* 1919 NPD 75

Legislation considered

High Court Rules, 1971, Order 33 r 257

Case information

Appellant in person

F *L T Biti*, for the first respondent

Judgment

ZIYAMBI JA: This is an appeal against a judgment of the High Court dismissing an application for review made by the appellant. * The appellant was employed by the first respondent in 1979 as a bank clerk. He rose through G the ranks and, by successive promotions, became a branch manager. In 1994, he was transferred to Chiredzi in that capacity.

On 16 November 1998, the regional support manager of the first respondent, having paid a visit to the Chiredzi branch, wrote a letter to the regional sales and services manager for the Eastern region (Gweshe), expressing his

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misgivings regarding the manner in which the branch was run. A He recommended that an enquiry be held in respect of the appellant, whose performance was rated to be poor. Gweshe in turn wrote to the appellant on 19 November 1998 requesting a written report explaining why controls in certain areas were allowed to deteriorate under his management. The report was to be submitted by 1 p.m. on the following day. On the following day, B 20 November 1998, the appellant submitted his written response and on 24 November was notified by Gweshe of an enquiry to be held on 26 November. Meanwhile, on 25 November, the appellant submitted (it is not clear to whom) a letter of resignation.

Despite the letter of resignation, the first respondent held a formal enquiry on 26 November. The appellant was found to be guilty of misconduct and C was suspended without pay pending a decision of the labour relations officer in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, (SI 371 of 1985). The option to resign was given to

the appellant, who opted to resign and, once again, submitted his resignation, which was accepted. Thereafter the appellant cleared his office of all his personal belongings and subsequently D was paid his terminal benefits but refused to move out of the company house which he occupied by virtue of his employment with the first respondent.

On 20 January 1999, the appellant lodged a complaint with the second respondent ** alleging that he had been forced to resign and praying for E reinstatement to his employment with the first respondent with full pay and benefits. On 26 February 1999, the day appointed for the hearing, the appellant with his legal practitioner appeared before the second respondent and made submissions. Thereafter, following written submissions made by the first respondent's legal practitioners, the second respondent gave a determination dismissing the application. F

Aggrieved by the determination, the appellant filed with the High Court an application for review. Before the High Court, the appellant averred that his alleged forced resignation was tantamount to constructive dismissal and that the second respondent was "guilty of causing a great miscarriage of justice" when he dismissed the appellant's claim against the first respondent. He also G alleged bias on the part of the second respondent in the handling of his application. The application was dismissed by the High Court, which found that the appellant's resignation was voluntary and that the attack on the impartiality of the second respondent was unjustified. In any event, the court

A took the view that the question of bias was irrelevant as the appellant had resigned and was no longer an employee of the first respondent at the time he filed the complaint with the second respondent.

It was submitted by Mr *Biti*, who appeared for the first respondent, that the application for review was not properly before the court *a quo* as the Rules of the High Court, which require an applicant to state clearly and concisely B the grounds of review, had not been complied with. In addition, the appellant had not exhausted his domestic remedies and the High Court had been generous in entertaining the application. However, since the trial court had adjudicated on the merits of the matter, he submitted that this court should address the question of duress.

C **NON-COMPLIANCE WITH THE RULES**

Rule 257 of the High Court Rules, 1971, provides 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."

D The appellant did not comply with this requirement. It is noteworthy that he was, at the time of filing the application for review, represented by a legal practitioner. The learned judge did not comment on the non-compliance with the rule in question but, in view of the fact that the appellant was unrepresented at the hearing, it is reasonable to assume that the learned judge condoned the departure from the Rules as he is permitted to do in terms of r 4C of the Rules E of the High Court.

DOMESTIC REMEDIES

It is common cause that there is a registered code of conduct which sets out the grievance procedures to be adopted by employees of the first respondent. Despite the averments in the first respondent's opposing affidavit that the F appellant had not exhausted its domestic remedies, no explanation was given by the appellant as to why the laid down procedures were not followed. Nor did he explain why, having taken the matter for a determination by the second respondent, he did not follow the appeal procedures provided in Part XII of the Labour Relations Act [*Chapter 28:01*]. The learned trial judge G made no ruling on this issue. A ruling was necessary since the point was argued before him and the relevant authorities referred to him. See *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S) at p 249.

This is not to say that an aggrieved party may not approach the High Court for relief where special circumstances exist for doing so. The *locus standi* of an aggrieved party where such special circumstances are shown to exist is H well established. See *Girjac Services (Pvt) Ltd supra*; *Cargo Carriers (Pvt)*

Ziyambi JA

Ltd v *Zambezi & Ors* 1996 (1) ZLR 613 (S); and *Kanonhuwa* v *Cotton Co of* A *Zimbabwe* 1998 (1) ZLR 68 (H). However:

> "… where domestic remedies are capable of providing effective redress in respect of the complaint and, secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the B courts unless there is good reason for not doing so."

See *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D; *Girjac Services (Pvt) Ltd* v *Mudzingwa supra* at 249D, citing *Musandu* v *Chairperson Cresta Lodge Disciplinary and Grievance Committee* HH-115-94; and *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H).

In the present case, the first respondent's code of conduct does not form part C of the record but the appeal procedures set out in the Labour Relations Act were capable of providing the appellant with effective redress in respect of the alleged unlawful termination of his employment with the first respondent. No special circumstances or good reason having been shown by the appellant to exist justifying his approach to the High Court, the appellant's obligation D to exhaust his domestic remedies was peremptory. Accordingly, the application ought, on this ground alone, to have been dismissed.

I may say, that on the merits, the conclusion arrived at by the High Court was inescapable. The appellant's allegation that he was forced to resign by officers of the first respondent and that the said forced resignation was tantamount to constructive dismissal was not substantiated. On the contrary, E in his statement of appeal to the first respondent 22 days after his resignation, he said, referring to the commission of enquiry held on 26 November 1998:

> "At the end of the enquiry, the regional manager, Fidelis Gweshe, handed out his findings as 'Warranting Dismissal, resulting in forfeiting all my personal benefits, suspension without pay pending application to Labour, F and have a bad record, etc., or to have a clear record I could alternatively tender a letter of resignation as I had commitment by way of school-going children and enjoy my terminal benefits'. *These words were just echoing in my mind with no meaning. All I could focus on was the school-going children and what I would do with them so I opted for a resignation. I handed them my letter of resignation and left the Office* G *about 13.00 hours.* At 14.00 hours, someone else had taken over my seat. Customers were 'phoning asking what had taken place.
>
> As each day passed by, I found the whole process unfair and harsh. I decided to take the matter up as this decision to resign was taken *under duress.* The committee made up of Senior Personnel honest and reliable should be able to narrate exactly what took place and the issue of duress H

Ziyambi JA

> A should show. We do not expect any deviation as they must be convinced they took the right decision" (the emphasis is mine).

The learned judge relied, correctly in my view, on the following passage from *Steiger* v *Union Government* 1919 NPD 75 at 79-80:

> "Force and fear will annul an engagement when the fear is not vain or B foolish, but such as to overcome a mind of ordinary firmness. The true ground of the annulment is extortion through the influence of fear induced in various ways: and it is really a question for the court or jury whether in all the circumstances the consent was in fact extorted by coercion. It is therefore very necessary that the material circumstances giving rise to the fear should be clearly and distinctly averred. As de C Villiers CJ said in the leading case of *White Brothers* v *Treasurer General* (2 *Juta*, at p 350):
>
> 'It is clear from what has been said by him (i.e. *Voet*) and other Dutch writers on this point, that it is the want of free consent on the part of the person entering into the contract or making the payment which lies at the root of the rule which invalidates contracts or payments extorted by D force or intimidation',
>
> and the principle must be the same where the intimidation has procured the rescission of a contract, and it is sought to annul the rescission.
>
> 'It is equally clear, however, that the absence of free consent will not be lightly presumed, and that where the circumstances do not clearly E disclose an absence of free consent no restitution will be allowed.'
>
> Now, the difficulty which I have in the present case is in seeing that such circumstances are averred. True, the plaintiff says he was 'compelled' to elect to resign, but it seems to me that the facts which he alleges may be read as amounting to no more than that he preferred, in the exercise of F his own free will, to do so rather than to be dismissed, even although he may have known that the dismissal would be illegal, as may

be taken to be suggested by the reference to his 'protests', the nature of which is, however, not disclosed in the declaration."

He found that there were no averments as to the "material circumstances" which gave rise to the fear which allegedly induced the appellant to resign. G Indeed the record discloses none. What is clear on the record is that the appellant, faced with the prospect of suspension without pay and, eventually, dismissal and having been given the option to resign and receive his terminal benefits, opted for resignation.

The effect of the resignation

H By his resignation, again tendered on 26 November, after the enquiry, the

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Ziyambi JA

appellant terminated his contract of employment with the first respondent. A It is of no consequence thatx the first respondent purported to accept the resignation on 11 December. In this regard, the following passage from the judgment of the court *a quo*[***] is apposite and I respectfully endorse it:

> "In *Rustenberg Town Council* v *Minister of Labour & Ors* 1942 TPD 220, Murray J dealt with the effect of a notice of termination of a contract of B employment. At p 244, the learned judge said:
>
> 'The giving of notice is an unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. If so, it seems to me to follow that notice once given is final, and cannot be withdrawn — except obviously by consent — during the time C in excess of the minimum period of notice. In the present case, the position was undisputed, and I think undisputable, the town clerk is the authorised agent of the applicant council empowered to receive communications to it: once therefore the resignation in question had been lodged with him, it constituted a final act of termination by the D third respondent, the effects whereof he could not avoid without the permission of the applicant council.'
>
> This statement as to the effect of a letter of resignation has been cited with approval in many cases, including *Potgietersrust Hospital Board* v *Simons* 1943 TPD 269; *de Vos* v *Monnick & Visser* 1944 CPD 31; *Bulawayo Municipality* v *Bulawayo Indian Sports Ground Committee* E 1955 SR 114; 1956 (1) SA 34 (SR); and *Kadada* v *City of Harare* HH-26-94. Therefore, even though the Bank purported to accept the resignation on 11 December, it really had no option. The resignation was effective on 26 November. All the Bank could do was to decide whether or not to permit Muzengi to withdraw his resignation." F

Accordingly, the appeal is without merit and it is dismissed with costs. G

CHIDYAUSIKU CJ and MALABA JA concurred.

*Honey & Blanckenberg, fir*st respondent's legal practitioners

* The judgment is reported in 2000 (2) ZLR at 137. — *Editor.*
** The labour relations officer, Chiredzi. — *Editor.*
*** 2000 (2) ZLR at 141G-142C. — *Editor.*

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UNITED BOTTLERS (PVT) LTD v SHAMBAWAMEDZA 2002 (1) ZLR 341 (S)

Citation 2002 (1) ZLR 341 (S)

Case No	Judgment No. S-130-01
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	25 October 2001
Judgment	12 April 2002
Counsel	*P Nherere*, for the appellant *H Mazonde*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

D **Delict** — *causation — novus actus intervemiens — what is — foreseeable consequence of negligent act — whether novus actus*

Delict — *negligence — apportionment of liability — contributory negligence — need for there to be contributory negligence before liability can be* E *apportioned*

Headnote

A mechanic employed by the appellant to service a paraffin-powered refrigerator in the respondent's tuck-shop lit the burner on the refrigerator's fuel tank but failed to position the tank correctly beneath its chimney. As a result, heat generated by the burner melted solder on F the burner, which ignited paraffin that the mechanic had spilled on the tank and omitted to wipe off. When the respondent — unaware of what had happened — opened the cover of the tank in order to adjust the flame of the burner, he was engulfed in flames and suffered severe burns. A judge of the High Court found that the appellant's mechanic G had been negligent, but apportioned liability between the parties on the ground that the respondent's conduct had contributed to his injuries. On appeal:

Held, that the appellant's mechanic was negligent in incorrectly placing the tank with a lit burner under the refrigerator without having wiped the paraffin from the top of the tank. It was reasonably foreseeable H that the kind of harm that the respondent suffered would occur as a

consequence of the mechanic's negligence, and a reasonable man A would have taken precautions to guard against that kind of harm occurring.

Held, further that the respondent's act in opening the cover of the B tank was one of the foreseeable consequences of the mechanic's negligence, and was not a *novus actus* affecting the chain of causation.

Held, further, that although the respondent's act in opening the cover of the tank was a contributory factor to the causation of his injuries, before there could be an apportionment of liability, it had to be shown that by opening the cover, he failed to take the reasonable care which a prudent man in the circumstances would have taken for his own safety. There was no such evidence. C

Cases cited

AA Mutual Insurance Assoc Ltd v Maqula 1978 (1) SA 805 (A)

Cape Town Municipality v Paine 1923 AD 207

Davies v Swan Motor Co (Swansea) Ltd [1949] 1 All ER 620 (CA)

Enslin v Meyer 1960 (4) sa 520 (T) D

GDC Hauliers (Pty) Ltd v Chirundu Valley Motel 1988 (Pvt) Ltd 1998 (2) ZLR 449 (S)

Heath v Le Grange 1974 (2) SA 262 (C)

Hyett v Great Western Rly Co [1947] 2 A11 ER 264 (CA)

Jones v Livox Quarries Ltd [1952] 2 QB 608

Lazarus v Rand Steam Laundries (1946) (Pty) Ltd 1952 (3) SA 49 (T) E

Lewis v Mushangi & Anor 1999 (1) ZLR 506 (H)

Lomagundi Sheetmetal & Engineering (Pvt) Ltd v Basson 1973 (1) RLR 356 (A), 1973 (4) SA 523 (R,AD)

Malamba & Anor v Matambanadzo S-3-94

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

S v De Waal 1966 (2) PH H362 (GW) F

Legislation considered

Damages (Apportionment and Assessment) Act [*Chapter 8:06*], s 4(1) G

Case information

P Nherere, for the appellant

H Mazonde, for the respondent

Judgment

MALABA JA: The respondent, to whom I shall refer as the plaintiff, sued the appellant, to whom I shall refer as the defendant, in the High Court for damages arising from bodily injuries under the following heads: H

Malaba JA

A **SPECIAL DAMAGES**

(a) Medical and Hospital Expenses.....$15 000
(b) Costs of Replacing Burnt Stocks, Fixtures and Fittings.....$5 000
(c) Future Medical and Hospital Expenses.....$420 000
(d) Loss of Earnings.....$20 000

B **GENERAL DAMAGES**

(e) Shock, Pain and Suffering and Loss of Amenities.....$98 000

The plaintiff's case in the court *a quo* was that the sole cause of the bodily injuries and *ipso facto*, the damages he suffered was the negligence of the defendant's employee. The particulars of negligence were stated as being C that in the course of carrying out repairs to a refrigerator used by the plaintiff in his tuck-shop, defendant's employee, one David Marange, omitted to wipe off paraffin he had spilled on the paraffin tank and in the reservoir and lit the burner from which heat ignited the spilled paraffin causing the fire which burnt the plaintiff. The defendant's defence was a complete denial. It put in D issue the *quantum* of general damages and future medical and hospital expenses.

The court *a quo* found the defendant's employee guilty of negligence which partly caused the harm suffered by the plaintiff. It found that the defendant was liable for 80 per cent of the damages suffered by the plaintiff. The court found that the latter had proved general damages in the sum of $98 000 and E future medical and hospital expenses in the amount of $300 000.

The plaintiff was found guilty of contributory negligence and liable for 20 per cent of the damages he suffered. Both parties have appealed against the judgment of the High Court. The defendant appeals against the finding of negligence and the assessment of general damages, future medical and F hospital expenses. The plaintiff cross-appeals against the finding of contributory negligence against him.

I now consider the evidence adduced before the court *a quo*. The defendant is a bottling company involved in the business of manufacturing and distributing beverages throughout Zimbabwe. It owns paraffin powered refrigerators which it hires out to retailers of its products. The plaintiff is a G businessman who ran a tuck-shop outside Chitungwiza General Hospital. He sold soft drinks from his tuck-shop.

On 20 March 1993, the plaintiff entered into an agreement with the defendant in terms of which he hired one of its paraffin powered refrigerators. It was a term of the agreement that the defendant would keep the refrigerator in a good H state of repair and working order.

2002 (1) ZLR p344

Malaba JA

The refrigerator was one metre high and its base 30 cm above ground. At the A back and underneath the freezer was a chamber which housed a paraffin tank. The tank, which had an inlet for pouring paraffin, was suspended over a reservoir by means of clips. Over the tank was a chimney through which heat from the burner was distributed quickly to the outside. A wick sucked paraffin from the tank to a burner with a solder. The burner was at the tip of B the tank. When the top end of the wick in the burner was lit, the flame could be seen through the top of the chimney.

The burner had to be positioned in the centre of the chimney for the heat to be distributed to the outside. When the burner was correctly positioned under the chimney, a light blue flame emerged. When the burner was wrongly positioned a yellowish flame emerged. A yellowish flame was evidence of C the fact that heat was being congested in the burner.

There was a knob which, when turned clockwise, increased the size of the wick in the burner and therefore the flame. The flame was reduced by lowering the wick by turning the knob anti-clockwise. The tank was covered by a metal sheet. To access the knob used to increase or reduce the flame one D had to lift the metal cover.

At the beginning of October 1996, the refrigerator stopped working. The plaintiff reported the problem to the defendant who did not send a mechanic to repair the refrigerator until after three weeks. On 24 October, David Marange, a mechanic, arrived at the tuck-shop at 3 p.m. to repair the E refrigerator. He examined the refrigerator in the presence of the plaintiff's daughter, Eugenia, who was the tuck-shop attendant. The examination revealed that the cause of the problem was a burnt out wick. The mechanic decided to remove the burnt out wick and put in a new one.

Eugenia Munemo was 15 years old at the time. Her evidence was to this effect. The mechanic removed the paraffin tank from underneath the F refrigerator. He told her to go and buy three 750 ml containers of paraffin. She did as she was told. Mr Marange poured all the paraffin into the tank. He asked her to go back and buy two more 750 ml containers of paraffin. She brought the paraffin. Mr Marange filled the tank to the brim with paraffin. He lit the burner and put the tank underneath the chimney. G

Mr Marange asked her to look into the chimney and advise him as to the colour of the flame. She did as told. The flame was yellowish in colour. On being advised, Mr Marange tried to correct the situation so that the flame assumed a light blue colour. When there was no change in the colour of the flame, Mr Marange left the tuck-shop saying he would return after attending to another refrigerator in the neighbourhood. He did not return. H

2002 (1) ZLR p345

Malaba JA

A She noticed that the flame was getting bigger. There was an unusually large amount of smoke coming out of the chimney. The roof of the tuck-shop was getting affected. As she went out of the tuck-shop intending to make a report to her father, she met him outside. Following her report to him, the plaintiff knelt at the back of the refrigerator. Suddenly the plaintiff was engulfed by a huge flame and smoke. She denied the allegation that she poured paraffin B into the tank after Mr Marange left.

The plaintiff confirmed that he arrived at the tuck-shop at about 6 p.m. Following the report made to him by Eugenia, he noticed that the refrigerator was producing an unusually large amount of smoke. He said he thought the wick had been turned too high. He decided to reduce the wick by turning the C knob anti-clockwise. To access the knob, he had to lift the metal cover over the tank. He knelt near the refrigerator and lifted the metal cover. Fire burst out of the chamber and engulfed him. He lost consciousness. When he came to, he had been seriously burnt on the head, face, chest, hands and abdomen. He was hospitalised for three months.

An operation was carried out on the left arm which could not stretch. D He needed plastic surgery on the lips and ears. He was in pain for 4 1_2 years. Before the accident, he used to drive a bus. He could not do so any more. He could no longer take walks which he enjoyed taking over long distances.

A report compiled by a plastic reconstruction surgeon who had attended to the plaintiff revealed that he had healed with contractures of axilla, ectropion E of the angles of the mouth and loss of the external ears. His total disability was estimated at 50 per cent. He had developed keloids as well. The surgeon said the plaintiff needed the following operations to be carried out in future:

(a) Ear reconstruction, usually done in three stages;

(b) Correction of ectropion of the mouth; F

(c) Release of contractures of the axilla in two stages;

(d) Management of keloids.

These involved surgery and radiotherapy as well as certain medicines or injections for long periods of up to 18 months if the keloids do not recur. They usually recur. He estimated the cost of the above surgical and medical treatments to be about $350 000.

G [*The learned Judge thus analsed the evidence and continued:*]

The facts found proved for the purposes of establishing the factual causation of the harm sustained by the plaintiff, are these. The defendant's employee omitted to wipe off the paraffin he had spilled on the tank and in the reservoir. With the spilled paraffin unwiped, he lit the burner and placed the tank H underneath the refrigerator. The burner was not properly positioned in the

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centre of the chimney. The heat generated was enclosed in the burner instead A of being distributed to the outside. As a result, the heat melted the solder. The heat which caused the solder to melt ignited the paraffin on the tank causing the fire. The paraffin in the reservoir also caught fire. The intense combustion was compressed underneath the metal cover. When the plaintiff opened the cover intending to have access to the knob, the fire burst out with severe force B and burnt him on the front part of the body causing serious injuries.

The next question to be decided by the learned judge was one of fault. It was whether the defendant's employee negligently caused the damage suffered by the plaintiff. It has been said that negligence is a question of fact and the onus of proving it is on the party alleging it. A person is negligent if he did not act as a reasonable man would have acted in the particular circumstances. C He will be held liable for the actual consequences of his negligence which are reasonably foreseeable.

In *Cape Town Municipality* v *Paine* 1923 AD 207 at 216-7, Innes CJ said:

> "It has repeatedly been laid down in this court that accountability for unintentioned injury depends upon culpa — the failure to observe that D degree of care which a reasonable man would have observed. I use the term reasonable man to denote the diligens paterfamilias of Roman law — the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another — and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen E the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligens paterfamilias the duty to take care is established, and it only remains to ascertain whether it has been discharged."

See also: *Lomagundi Sheetmetal & Engineering (Pvt) Ltd* v *Basson* 1973 (1) RLR 356 (A) F at 362-3; 1973 (4) SA (R AD) 523 at 524.

The evidence established that it was negligent conduct on the part of the defendant's employee to incorrectly place the tank with a lit burner in the chamber underneath the chimney where heat would be generated, without having wiped off paraffin, which is a highly inflammable liquid, from the top G of the tank and the reservoir where he had spilled it. Having introduced a new source of danger into the chamber in the form of spilled paraffin a reasonable man would have foreseen the possibility of heat generated in the burner melting the solder and igniting the paraffin causing fire. The risk of the spilled paraffin being ignited from a melting solder was very high.

The likelihood of the kind of harm suffered by a person in the position of the H

Malaba JA

A plaintiff occurring as a consequence of the negligence of the defendant's employee was reasonably foreseeable. A reasonable man would have taken precautions to guard against that kind of harm occurring. All that was required to be done, in the circumstances, was to wipe the spilled paraffin off the tank and reservoir.

I do not think that the act of lifting the metal cover by the plaintiff rendered B the harm he sustained as a result of the fire unforeseeable. The act was done in response to the fire. It was one of the foreseeable consequences of the negligence of the defendant's employee. The harm to a person in the position of the plaintiff was foreseeable as a consequence of the negligence of the defendant's employee, in the context of him or her opening the metal cover. C The act of the plaintiff was not, in my view, a novus actus affecting the chain of causation but was the kind of act which the defendant might reasonably have anticipated as likely to follow from its employee's act of negligence in leaving spilled paraffin on the tank and reservoir with a lit burner likely to generate a lot of heat if incorrectly positioned under the chimney: *S* v *De Waal* 1966 (2) PH.H 362 (GW); *Hyett* v *Great Western Railway Co* [1947] 2 All ER 264 (CA) D at 266F.

The learned judge was justified in holding the refrigerator mechanic and therefore the defendant liable to the plaintiff for negligence.

I turn to consider the question of quantum of damages put in issue during the trial. Mr *Nherere*, in the heads of argument, said that the plaintiff placed E insufficient evidence on the quantum of damages before the court. He said the court *a quo* should have granted absolution from the instance because it was impossible for it to assess the damages in financial terms on the evidence placed before it. See *Enslin* v *Meyer* 1960 (4) SA 520 (T) at 523-4; *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T) at 51; *Heath* v *Le Grange* 1974 (2) SA 262 (C); *GDC Hauliers (Pty) Ltd* v *Chirundu Valley Motel 1988 (Pvt) Ltd* 1998 (2) ZLR 449 (S) F .

Mr *Nherere* accepts that the evidence of future medical and hospital expenses that would be required to be met by the plaintiff for surgical operations was in the form of a report by a surgeon who is an expert in the field of plastic surgery. The report which was produced in court with the consent of the G defendant set out clearly the parts of the plaintiff's body that required plastic surgery, the procedures to be undertaken and the estimated costs of the operations. The cost of the operation was estimated at $350 000.

Not only did the court have before it evidence proving that the surgical operation was necessary but it also had evidence from an expert to the effect that the estimated cost of the operation was reasonable. The case of *Malamba* H *& Anor* v *Matambanadzo* S-3-94 relied upon by the defendant is clearly

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Malaba JA

distinguishable on facts. In that case, the evidence given by a lay plaintiff as A to the amount of money he had expended upon repairs to different parts of his motor vehicle was not supported by invoices. The plaintiff did not call someone who was qualified as an expert in the trade to testify that the cost of repairing the items in question was reasonable. In this case, the learned judge, in the exercise of his discretion, considered that the amount of B $300 000 would reasonably cover the plaintiff's future medical and hospital expenses.

In *AA Mutual Insurance Association Ltd* v *Maqula* 1978 (1) SA 805 (A) at 809B-C, Joubert JA said:

> "It is settled law that a trial court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate C compensation to the injured party for his bodily injuries and their

sequelae. It follows that this court will not, in the absence of any misdirection or irregularity, interfere with a trial court's award of damages unless there is a substantial variation or a striking disparity between the trial court's award and what this court considers ought to D have been awarded, or unless this court thinks that no sound basis exists for the award made by the trial court."

None of the grounds upon which this court can interfere with an award of damages by a trial court are present in this case.

I also do not think it can seriously be contended that an award of damages of E $98 000 for pain and suffering and loss of amenities of life is excessive in light of the seriousness of the injuries sustained by the plaintiff, the period he remained in pain and the physical deformities he has suffered. I agree with what is said in the plaintiff's heads of argument that regard being had to the fall in the value of our currency and damages awarded in other cases, the amount awarded as damages for pain and suffering and loss of amenities of F life in the present case is on the lenient side. *Minister of Defence & Anor* v *Jackson* 1990 (2) ZLR 1 (S) at 7G-8H.

It seems to me that the appeal must fail.

The matters raised by the cross-appeal are more difficult. In holding the plaintiff guilty of contributory negligence the learned judge said: G

"The plaintiff by his conduct in attempting to investigate the incorrect functioning of the device as reported to him and attempting to regulate the flame, was the final link in the chain. A chain which either began or was created by the negligence of Marange. The plaintiff's intervention as described contributed to his injuries. I consider that it would be appropriate that there be an apportionment of liability." H

Malaba JA

A The first question which the learned judge ought to have posed for himself but did not was whether there was evidence that the plaintiff was guilty of negligence contributing to the damages he suffered? The learned judge did not find the plaintiff guilty of negligence. Compliance with the provisions to s 4(1) of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] requires that a court should first find as a fact fault on the part of the plaintiff B before considering its causal link to the damage he has suffered: *Lewis* v *Mushangi & Anor* 1999 (1) ZLR 506 (H). A finding that the plaintiff's conduct of opening the metal cover to access the knob for the adjustment of the height of the wick in the burner was a contributory factor to the causation of his injuries did not necessarily mean that the plaintiff's conduct constituted C negligence.

To find the plaintiff guilty of negligence, it would have to be shown that in doing what he did he failed to take the reasonable care which a prudent man in the particular circumstances would have taken for his own safety. Where there is antecedent negligence by the defendant the evidence must show, on a balance of probabilities, that a reasonable man in the position of the plaintiff D would have foreseen the likelihood of injury to himself as a consequence of the defendant's negligence and taken precautions to avoid its occurrence.

In *Davies* v *Swan Motor Co (Swansea) Ltd* [1949] 1 All ER 620 (CA) at 623H-624A, Bucknill LJ said to constitute contributory negligence:

"It is sufficient to show lack of reasonable care by the plaintiff for his own E safety. That is set out clearly in the speech of Lord Atkin in *Caswell* v *Powell Duffryn Associated Collieries Ltd* [1939] 3 ALL ER 730 as follows:

'The injury may, however, be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the F part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances'."

In *Jones* v *Livox Quarries Ltd* [1952] 2 QB 608 at 615, Denning LJ (as he then was) said:

" G Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself; and in his reckonings H he must take into account the possibility of others being careless."

Malaba JA

The onus was on the defendant to prove contributory negligence on the part A of the plaintiff. The defendant did not plead plaintiff's contributory negligence as a defence. The facts on which the question whether the plaintiff was guilty of negligence is to be answered are contained in his own evidence. The facts show that the plaintiff approached the situation on the belief that the flame was from a wick which had been raised too high. He was, of course, mistaken. B But his mistake was not shown to have been unreasonable.

There was no information before the plaintiff from which he would have known of the nature and extent of the danger to which he was about to expose himself. A reasonable man in his position would not have known that the defendant's employee had omitted to wipe off the paraffin he had spilled from the tank. In other words, the plaintiff, like an ordinary prudent man C would not have foreseen that what lurked underneath the metal cover was a ferocious fire much bigger than a flame from a wick raised too high.

For a reasonable man to have taken steps to avoid the harm that befell the plaintiff in the circumstances, he would have had to have foreseen the true nature and extent of the fire as a consequence of the negligence of the D defendant's employee. No evidence was adduced to show that the opening of the metal cover to access the knob used to adjust the flame was a dangerous act. I come to the conclusion that the plaintiff was not guilty of contributory negligence. The cross-appeal must succeed.

In the result, the appeal is dismissed with costs whilst the cross-appeal succeeds with costs. That part of the order of the court *a quo* apportioning the E damages awarded to the plaintiff is set aside.

CHIDYAUSIKU CJ AND ZIYAMBI JA concurred. F

Scanlen & Holderness, appellant's legal practitioners

Mutumbwa, Mugabe & Partners, respondent's legal practitioners

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HEATING ELEMENTS ENGINEERING (PVT) LTD v EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK 2002 (1) ZLR 351 (S)

Citation	2002 (1) ZLR 351 (S)
Case No	Judgment No. S-13-02
Court	Supreme Courts
Judge	Sandura JA, Cheda JA & Ziyambi JA
Heard	19 March 2002
Judgment	12 April 2002
Counsel	Appellants in person *A P de Bourbon* SC, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

D **Practice and procedure** — *default judgment — validity of judgment granted after party improperly barred — rescission of judgment improperly granted — whether Order 9 r 63 of High Court Rules, 1971, applies to rescission of such judgment*

Headnote

E In an action between the parties in the High Court, the plaintiff gave the defendants notice of intention to bar them for failure to file a plea and then purported to bar them by filing a copy of the notice with the registrar in terms of Order 12 r 81 of the High Court Rules, 1971. The endorsement on the filed copy was not dated, however, and the F notice was not accompanied by a certificate of service as required by Form No. 9 of the rules. Thereafter, the plaintiff obtained a default judgment against the defendants on the ground that they had been barred. The defendants applied for rescission of the default judgment, which was refused, and appealed to the Supreme Court against the refusal.

G *Held*, that the provisions of r 81 were not complied with so the appellants (defendants) were not barred; in the circumstances the application for a default judgment was not in order and should not have been granted. The default judgment was a nullity and Order 9 r 63 of the rules, which provides for rescission on good and sufficient cause, H did not apply.

2002 (1) ZLR p352

Sandura JA

Cases cited A

Lees Import & Export (Pvt) Ltd v Zimbank 1999 (2) ZLR 36 (S), 1999 (4) SA 1119 (ZS)

Legislation considered

High Court Rules, 1971, Order 9 r 63 and Order 12 r 81 B

Case information

Appellants in person

A P de Bourbon SC, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with osts the appellants' application for the rescission of a default C judgment granted against them. The appellants appeared in person, with the first and second appellants appearing through their chief executive and *alter ego,* in accordance with the principles laid down by this court in *Lees Import and Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S); 1999 (4) SA 1119 (ZSC).

The relevant facts are as follows. In October 1997, the respondent issued a D summons against the appellants claiming payment of the sum of US$447 488.85 together with interest, collection commission and costs of suit. The appellants duly entered appearance to defend the action and, on 4 November 1997, requested further particulars to the respondent's claim. After the further particulars had been furnished, the appellants requested E further and better particulars on 30 March 1998. The respondent refused to furnish the further and better particulars sought, alleging that in order to plead the appellants did not require such particulars. That was on 2 April 1998. Subsequently, on 28 April 1998 the respondent filed a notice of intention to bar and, in response, the appellants, who were not legally represented, filed a further request for further and better particulars on 7 May 1998. In response, F the respondent wrote to the Registrar of the High Court advising her that the request for further and better particulars was null and void and should be ignored. Thereafter, in June 1998 the respondent filed a chamber application in the High Court seeking a default judgment, which was granted on 11 September 1998, on the ground that the appellants had failed to file their plea and had been barred. G

The appellants subsequently filed a court application in the High Court seeking the rescission of the default judgment. That application was dismissed with costs. Aggrieved by that decision, the appellants appealed to this court.

In my view, this appeal may be disposed of by determining one issue only. H

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Sandura JA

A That issue is whether the default judgment was properly granted. If it was not properly granted, *cadit quaestio*, (that is the end of the matter) and the appeal must be allowed.

Whether the default judgment was properly granted in this case depends upon whether the appellants were barred in terms of the High Court Rules, 1971.

B The procedure for barring a party is set out in rules 80 and 81 of the High Court Rules, 1971, which read as follows:

> "80. A party shall be entitled to give five days' notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the C address for service of the party in default.
>
> "81. On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the registrar. *The endorsement on Form No. 9 shall be duly completed before filing and it shall be signed by the party who* D *has given the notice or his attorney*" (the emphasis is mine).

The endorsement on Form No. 9 referred to in Rule 81 above reads as follows:

> "To: The Registrar of the High Court,
>
> at ……
>
> E The time limited by this notice having expired, we hereby bar the plaintiff/defendant in terms thereof.
>
> DATED at ……. this …… day of ……, ……"

F After the endorsement appears the following note:

> "[*Note:* When a copy of this form is filed with the Registrar in terms of r 81, it should be accompanied by proof of service in the form of an endorsement or return of service (if it was served by the Sheriff or his deputy) or a certificate of service in Form No. 6 or 7, as the case may be]."

Form number 6 referred to in the above note is a certificate of service by a legal practitioner. This should accompany the copy of the notice filed with the Registrar in terms of r 81 where the notice was served on the other party by a legal practitioner.

However, Form number 7, which is referred to in the note, is a certificate of service by a person in the employ of a G legal practitioner. This should H accompany the copy of the notice filed with the Registrar in terms of r 81

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Sandura JA

where the notice was served on the other party by a person in the employ of A a legal practitioner.

When the appeal was argued I drew the attention of Mr *de Bourbon*, who appeared for the respondent, to the fact that the photocopy of the copy of the notice of intention to bar, which formed part of the record of the proceedings in the court *a quo*, and which was filed with the Registrar in terms of r 81, in B order to bar the appellants, showed that the endorsement on the notice was not duly completed before filing, contrary to the provisions of r 81.

The relevant part of the endorsement in question reads as follows:

> "The time limited by the Notice set out above having expired we hereby Bar the Defendants in terms thereof. C
>
> DATED AT HARARE this …… day of …… 1998."

Quite clearly, the endorsement was not duly completed as required by r 81. The date on which the appellants were allegedly barred was not entered.

In addition, I indicated to Mr *de Bourbon* that as the notice of intention to bar had not been served on the appellants by the Sheriff or his deputy, a certificate D of service should have been filed with

the Registrar and that no such document formed part of the record of the proceedings in the court *a quo*.

Mr *de Bourbon* undertook to bring the two matters raised by the court to the attention of his instructing legal practitioners, and expressed the hope that the required documents would be sent to the Registrar of this court as soon as possible. E

After the court had reserved its judgment and adjourned, the Registrar of this court, at the request of the court, obtained from the High Court the copy of the notice of intention to bar filed with the Registrar of the High Court in terms of r 81. It clearly showed that the endorsement was not duly completed.

However, Mr *de Bourbon*'s instructing practitioners subsequently sent to the F Registrar of this court a copy of the notice of intention to bar whose endorsement was duly completed. This must have been a copy which they had kept for themselves, and not the one filed with the Registrar of the High Court in terms of r 81.

As far as the service of the notice on the appellants was concerned, the instructing legal practitioners had this to say in their letter to the Registrar of G this court:

> "Service was effected by one John Mupereri, a messenger in the employ of Sawyer and Mkushi, and not by the Deputy Sheriff. No certificate of Service was filed at court."

Thus, the endorsement on the copy of the notice of intention to bar filed with H

Sandura JA

A the Registrar of the High Court in terms of r 81 was not duly completed, and no certificate of service was filed with the Registrar as required by r 81. The provisions of r 81 were not, therefore, complied with.

In the circumstances, the chamber application for a default judgment was not in order because the respondent did not comply with the barring procedure set out in r 81. The appellants were, therefore, not barred, and the learned B Judge President should not have granted the default judgment.

That being the case, the provisions of r 63 of the High Court Rules, 1971, do not apply. The Rule reads as follows:

> "63(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court C application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to D the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

I say that this rule does not apply to the rescission of the default judgment granted in this case because the rule only applies to a default judgment granted "under these rules or under any other law".

E I am satisfied, for the reasons already given, that the default judgment granted in this case should not have been granted. It cannot, therefore, be described as a default judgment granted "under these rules or under any other law". It is, in fact, a nullity.

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

1. The default judgment granted against the applicants on 11 September 1998 is set aside.
2. The respondent shall pay the costs of this application."

G CHEDA JA AND ZIYAMBI JA concurred.

Sawyer & Mkushi, respondent's legal practitioners

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SITHOLE v CITY OF HARARE 2002 (1) ZLR 356 (H)

Citation	2002 (1) ZLR 356 (H)
Case No	Judgment No. HH-60-02
Court	High Court, Harare
Judge	Ndou J
Heard	17 January 2002
Judgment	17 April 2002
Counsel	*A Manase,* for the applicant *L T Biti,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure — *review — late noting of application for — condonation — what must be shown — applicant establishing good* D *grounds for delay — prospects of success poor — application refused*

Headnote

The applicant had been dismissed by the respondent on disciplinary charges. Some 19 months later, she brought an application for review. In seeking condonation, she argued that the delay was caused by her E attempts to seek redress through domestic remedies. On the merits, it was argued that the procedures provided by the relevant legislation had not been observed, and that the decision to dismiss was grossly unreasonable.

Held, that the principles that guide a court in an application for condonation F are well settled. They include the degree of non-compliance with the rules; the explanation therefor; the prospects of success on the merits; the importance of the case; the convenience of the court; and the avoidance of unnecessary delay in the administration of justice. These factors are not individually decisive: they are interrelated and must be weighed one against the other. G

Held, further, that although the explanation for the delay was reasonable, this was not decisive. The prospects of success were poor. The legal point she had raised was untenable, having been settled by the Supreme Court. The decision to dismiss could not be described as unreasonable, let alone grossly unreasonable. There had been a proper exercise by the relevant authorities of their discretion when they decided to dismiss the H

Ndou J

A applicant. The cumulative effect of these findings was that the applicant had failed to establish a case for condonation.

Cases cited

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1947] 2 All ER 680, [1948] 1 KB 223 (CA)

B *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H)

Clan Tpt Co (Pvt) Ltd v Road Svcs Bd 1956 R & N 322; 1956 (4) SA 26 (SR)

Clan Tpt Co (Pvt) Ltd *v* Swift Tpt Svcs & Ors 1956 R&N 120; 1956 (3) SA 480 (FS)

PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S)

C *Sithole v City of Harare* S-116-01

United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A)

Union Government v Union Steel Corp (SA) Ltd 1923 AD 220

Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors 1991 (1) ZLR 323 (S)

D *Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H)

Case information

A Manase, for the applicant

L T Biti, for the respondent

Judgment

E **NDOU J**: In this matter, the applicant seeks condonation of the filing of the application for review. The facts are that the applicant was at the material time employed by the respondent in the Municipal Police Section in the Chamber Secretary's Department. On 24 June 1999, she was suspended from duty on an allegation of acting contrary to clause 18(1), 18(2)(l), 18(m) and 18(d) of SI 66 of 1992 (General Conditions of Service F Agreement). It was alleged that she operated an unauthorised bar (colloquially known as a shebeen) and a canteen using Council facilities, vehicles and staff during working hours. She was alleged to have used Council vehicles to collect and deliver alcoholic drinks to and from the said bar. During her suspension, the respondent referred her matter to an G inquiries committee. The inquiries committee heard the matter between 5 and 17 December 1999. On the latter date, it delivered its findings. The inquiries committee found the applicant guilty of contravening clause 18 of SI 66 of 1992 *supra* and recommended dismissal of the applicant from the employ of the respondent. The Chamber Secretary, as head of the department where the applicant worked, concurred to the recommendation. H This recommendation was, on 21 December 1999, subsequently adopted

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2002 (1) ZLR p358

Ndou J

by the commission running the affairs of the City of Harare. The applicant A was dismissed from the employ of the respondent by way of a letter dated 22 December 1999. On 30 December 1999, she lodged an appeal with the Review Board in terms of SI 1992 (as amended by SI 329 of 1993). The applicant's understanding is that in terms of these instruments once one refers the matter to the Review Board the dismissal is therefore deemed B suspended. The applicant submits that she could not bring proceedings for review in this court before she had exhausted avenues for domestic remedies or relief through the Review Board. She states that despite persistent enquiries on her part she had not yet received the findings of the Review Board at the commencement of this application. In other words, the applicant's explanation for the delay is her purported attempt to exhaust C domestic remedies through reference of the matter to the Review Board. The applicant did not bring a *mandamus* compelling the Review Board to entertain her application in the face of obvious dilatoriness on the part of the Review Board. The applicant did not approach a labour relations officer for redress. This appears to be the easier, cheaper and more timeous remedy

available to the applicant in the circumstances of this case. Be that as it may, D review proceedings must be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. However, the court may extend the time if good cause is shown for doing so — see Order 33 r 259. In this case, the applicant was terminated on 24 December 1999 and the present application was only launched in June 2001 i.e. about 19 months from the date of termination. E The eight-week period fixed by r 259 runs from the time at which the Board or tribunal notified the parties of its decision even though the Board or tribunal may in fact have come to its decision some considerable time before then: see *Clan Transport Co (Pvt) Ltd* v *Road Services Board* 1956 R&N 322; 1956 (4) SA 26 (SR). *In casu,* the applicant stated that she received the letter of dismissal on 24 December 1999 (as per para 2 of her F founding affidavit in HC 5547). Rule 259 would not apply at all if the applicant did not know of the decision to dismiss her: see also *Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors* 1991 (1) ZLR 323 (S).

The issue that falls for decision is whether good cause has been shown to G justify the court in extending the time or condone the delay in bringing the application for review. The principles that guide the court in an application for condonation were set out in the case of *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A). In that case, Holmes JA had this to say at 720F-G:

> "It is well settled that, in considering applications for condonation, the H

> A court has a discretion, to be exercised judicially upon a consideration of all the 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 on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court, and the B avoidance of unnecessary delay in the administration of justice. This 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 C not strong."

This decision was cited with approval by Chidyausiku J (as he then was) in *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H). Chidyausiku J had this to say at 242H-243A-C:

> "Holmes JA's approach has been approved and followed in a number of D subsequent cases. Among these cases are *Hermansburg Mission & Anor* v *Sugar Industry Central Board & Anor* 1981 (4) SA 278 (N) and *Vereniging van Bo-Grondse Mynamptenare van Suid-Afrika* v *President of the Industrial Court & Ors* 1983 (1) SA 1143 (T). These authorities establish that the following are the factors to be taken into account in considering whether good cause has been shown: E
>
> (a) the degree of non-compliance with the rules;
>
> (b) the explanation therefor;
>
> (c) the prospects of success on the merits;
>
> (d) the importance of the case; F
>
> (e) the convenience of the court;
>
> (f) the avoidance of unnecessary delay in the administration of justice."

In the present case, about 19 months elapsed after the review should have been launched. Such a delay is clearly inordinate. The desire to exhaust domestic remedies seems to be a satisfactory explanation for the delay in G approaching this court for review. This factor is, however, not individually decisive. It must be weighed, in this case, specifically against the prospects of success on the merits and other factors stated in the *Bishi* case *supra*. On the merits, the application for review is based on two grounds. First, that the procedures under s 141 of the Urban Councils Act [*Chapter 29:15*] were not observed, and second, that the decision was grossly unreasonable. The H important fact of this case is that at the relevant time the City of Harare was

governed, not by a normally elected council, but by a commission appointed A by the relevant Minister in terms of s 80 of the Act.

The legal points raised in the first ground were settled in the decision of *Sithole* v *City of Harare* S-116-01. On pp 3-4 of the cyclostyled judgment, McNally JA stated as follows:

> "The Act does not make specific provision for the way in which a B commission should conduct itself in running the affairs of the City. We cannot therefore find fault with the commission's decision that, in effect, it should combine the functions of the full Council and the executive committee. The commission took the place of the Council, and the commissioners-as-executive committee took the place of the executive committee. C
>
> Once that is accepted, as it must be accepted, the appeal becomes unarguable on this point. There is, in fact, no longer a Council and an executive committee. There is a commission, and an executive committee of the commission which consists of all the commissioners. The two are indistinguishable. It is pointless for the executive committee to seek the D approval of itself under another guise."

In light of this legal certainty, the first ground raised falls away as the point is obviously unarguable.

I turn next to consider the second point — that the decision to dismiss was grossly unreasonable. For a decision to be interfered with on the ground of E unreasonableness, the unreasonableness must be gross: see *Union Government v Union Steel Corp (SA) Ltd* 1923 AD 220 at 237; *Clan Transport Co* v *Swift Transport Services & Ors; Clan Transport Co* v *Rhodesia Railways & Anor* 1956 (3) SA 480 (FS); *Zambezi Proteins (Pvt) Ltd & Ors* v *Ministry of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H) and *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1947] 2 All ER 680. F *In casu,* the decision I am concerned with is that of the commission. I am not concerned with the correctness, or reasonableness, of the various *personae* who made their recommendations to the commission. Disciplinary proceedings presided over by a magistrate were conducted and concluded in accordance with the legislation. The presiding officer recommended dismissal based on the following findings: G

> "(a) The canteen was unauthorised because there was no Council resolution to legitimise its operations;
>
> (b) It was operated for personal interests or gains not authorised by Council;
>
> (c) She could not account proceeds from illegal activity; H

> (d) Council property was extensively used without Council authority;
>
> (e) Mrs Sithole was employed in a fairly senior position. She clearly breached the trust placed in her by Council to properly administer its properties; and
>
> (f) The prejudice to Council although not quantified was substantial."

B The recommendation of the inquiries committee cannot be faulted. This is a case of a serious abuse of public property for personal gain by a fairly senior and long standing employee of a local government. The illegal activities were carried out in contravention of the legislation that are important in the sphere of local government i.e. the Public Health Act [*Chapter 15:09*] and the Liquor Act [*Chapter 14:12*]. In light of all the facts of this case, a decision C to dismiss applicant is not unreasonable, let alone grossly unreasonable. The recommendation of the inquiries committee to dismiss and the action taken by the commission in the face of such serious act of misconduct is not grossly unreasonable. In any event, this court is not imbued with the same broad discretion as was enjoyed by the commission. An attack on the reasoning process and determination of a lower court or tribunal is not lightly D to be entertained: see *PF ZAPU* v *Minister of Justice (2)* 1985 (1) ZLR 305 (S). In this case, Dumbutshena CJ at pp 325-6 referred with approval to an English case as follows:

> "More recently the House of Lords laid down the grounds upon which administrative actions are subject to judicial review. These grounds E appeal to me not only because they were pronounced by an eminent Law Lord, but also because they made clear the wide extent of the theatre of operation in which courts can test the validity of prerogative actions. Lord Diplock, in *CCSU* v *Minister of the Civil Service* [1984] 3 All ER 935 at 950J-951D, put and described the three grounds as follows:
>
> 'The first ground I would call "illegality", the second "irrationality" and F the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow member of the European Economic Community … By "illegality" as a ground for judicial G review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether

he has or not is *par excellence* a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

H By 'irrationality' I mean what can by now be succinctly referred to as

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Ndou J

> "Wednesbury unreasonableness" (see *Associated Provincial Picture* A *Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their B training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes)* v *Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an C inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review'."

There was proper exercise of discretion when the respondent decided to dismiss the applicant. In passing, I would comment on a submission made by the applicant which is as follows: D

> "In particular, the applicant was suspended and dismissed on allegations that she operated a personal and private unauthorised bar and canteen using Council facilities furtherance of her private business operations. To dismiss the applicant on these allegations actually *borders on irrationality* given the fact that the canteen was approved by council E through the Town Clerk and I was instructed by my seniors to operate it on behalf of the Municipal Police" (the emphasis is mine).

It is apparent from the portion that I have highlighted that even the applicant considers the action of respondent as merely "bordering on irrationality". In any event, the finding of the inquiries committee is that no such unlawful instruction was given by applicant's superior. There was no credible F evidence to support this contention. In any event, I doubt whether applicant would escape liability by alleging that she followed an unlawful instruction of superiors outside military type command structure at her workplace. What I find incredible, however, is that her superiors would instruct her against her will to be involved in an unlawful activity where she is the main G beneficiary.

In the final analysis, I am persuaded to find that the applicant had a good explanation for the delay. As indicated above, this finding is not individually decisive, but must be weighed against the prospects of success on the merits and other factors. From my above analysis, it is clear that my finding is that the applicant has no prospect of success on the merits. The cumulative effect H

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Ndou J

A of my findings is that the applicant has failed to establish a case for condonation in terms of the principle in *Bishi* v *Secretary for Education supra.*

I, accordingly, dismiss the application with costs.

B *Manase and Manase,* applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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SIBANDA & ANOR v INTERNATIONAL COMMITTEE OF THE RED CROSS 2002 (1) ZLR 364 (H)

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Citation	2002 (1) ZLR 364 (H)
Case No	Judgment No. HH-54-02
Court	High Court
Judge	Chinhengo J
Heard	30 January 2002
Judgment	17 April 2002
Counsel	*S Hwacha*, for the applicants *P Nherere*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

International law — *sovereign immunity — doctrine of restricted immunity* D — *application of — issue of immunity to be decided in relation to nature of dispute between parties — foreign organisation employing local staff — whether termination of such employment covered by sovereign or diplomatic immunity*

Headnote

The applicants had been employed as local staff by the respondent, an E international organisation that enjoyed immunity from suit or legal process under the Privileges and Immunities Act [*Chapter 3:03*]. In a dispute over the termination of their employment, the applicants applied to the High Court for an order that the respondent was bound by the labour laws of Zimbabwe. The respondent maintained that the court F had no jurisdiction because its actions were part and parcel of its official mission.

Held, that since Zimbabwe espouses the doctrine of restricted immunity (i.e. foreign governments and organisations do not enjoy immunity in respect of their commercial or private-law transactions) an organisation or government claiming immunity must submit itself to the jurisdiction G of the court so that a determination can be made whether or not it enjoys immunity and, more importantly, whether or not the particular issue in dispute is covered by the immunity. This depends on the nature of the dispute and on whether or not the dispute is properly cognisable by our courts.

Held, further, that except in very clear cases it is futile or pointless for a H

Chinhengo J

A foreign state or organisation to raise the issue of sovereign or diplomatic immunity as a complete bar, and equally futile or pointless for the court to consider the issue at the start of the proceedings, since such immunity depends on factors such as the nature of the dispute. The question of the court's jurisdiction must always be in the background and the nature of the dispute in the forefront, because the latter determines the former.

B *Held*, further, that the engagement of local staff in Zimbabwe by a foreign state or organisation is a commercial transaction which, under the doctrine of restricted immunity, is cognisable by our courts.

Cases cited

Barker McCormac (Pvt) Ltd v Government of Kenya 1983 (2) ZLR 72 (S)

C *Barker McCormac (Pvt) Ltd v Govt of Kenya* 1985 (1) ZLR 18 (H)

I Congreso del Partido [1981] 2 All ER 1064 (HL)

Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Moçambique 1980 (2) SA 111 (T)

Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia 1980 (2) SA 709 (E) D

Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd & Ors [1976] 1 All ER 78 (PC)

Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues 2001 (1) SA 1285 (W)

Rahimtoola v Nizam of Hyderabad & Anor [1958] AC 379; [1957] 3 All ER 441

E *S v Muchindu & Ors* 1995 (2) SA 36 (W)

Thai-Europe Tapioca Service Ltd v Govt of Pakistan & Ors [1975] 3 All ER 961 (CA)

Legislation considered

Privileges and Immunities Act [*Chapter 3:03*], s 7 and Third Schedule, F Part I

Case information

S Hwacha, for the applicants

P Nherere, for the respondent

Judgment

G **CHINHENGO J**: The applicants were employed by the ICRC and their contracts of employment were terminated following upon events that are in dispute between the parties. The applicants contend that the ICRC should have complied with the Labour Relations (Retrenchment) Regulations, 1990 (SI 404 of 1990) as amended by SI 252 of 1992 ("the Regulations"). The ICRC maintains that the termination was by agreement and there was H therefore no requirement for it to comply with the Regulations.

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More importantly, however, the ICRC maintains that it is an international A organisation which, in terms of the Privileges and Immunities Act [*Chapter 3:03*] ("the Act"), enjoys immunity from suit and legal process. In other words, the ICRC's position is that this court has no jurisdiction in respect of civil or administrative proceedings instituted against it by its former employees because its actions were part and parcel of its official B mission.

I will examine the issue of this court's jurisdiction first, because if this court has no jurisdiction then that is the end of the matter.

The privileges and immunities of foreign States and diplomatic and consular representatives of foreign States and of certain international organisations and courts and certain persons connected with them, are governed by the C provisions of Part IV of the Act. Section 7(1) in particular provides for the privileges and immunities of international organisations such as the ICRC and these are specified in Part I of the Third Schedule to the Act. Of relevance to this application is the immunity from suit and legal process of the ICRC which is specified in para 1 of Part I of the said Third Schedule. In terms of D s 7(1) of the Act an international organisation which enjoys the immunity mentioned above must be notified by the President, by notice in the *Gazette,* which notice must specify as applicable to the organisation any or all the privileges and immunities set out in Part I of the Third Schedule. It was not in issue in these proceedings whether or not the President acted in terms of s 7(1) of the Act in respect of the ICRC. I must therefore accept that the ICRC E enjoys the immunity from suit or legal process and that such immunity was duly accorded or conferred on it by the President.

The fact that immunity from suit and legal process was conferred on the ICRC does not, by itself, shed any light on the nature and extent of that immunity. This is a matter which I must determine in these proceedings. F The ICRC, though an international organisation, cannot be treated any

differently from a foreign sovereign where immunity is involved and the position at international law must be the same for it as it is for a foreign sovereign. The position as I understand it is that international law is part of our law (*Barker McCormac (Pvt) Ltd* v *Govt of Kenya* 1983 (2) ZLR 72 (S) at 79G) and that it is now accepted that the doctrine of absolute immunity G applies only in respect of *jure imperii* and not *jure gestionis*: in the latter case the doctrine of restricted immunity applies (see *Barker McCormac supra)*. England, which along with Russia espoused the doctrine of absolute immunity for longer than most other countries, apart from South Africa, changed course following the decision in *Rahimtoola* v *Nizam of Hyderabad & Anor* [1958] AC 379 at 418; [1957] 3 All ER 441 at 461 where Lord Denning said: H

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> " A It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilised countries, there has been a progressive tendency towards making the sovereign liable to be sued in his own courts … foreign B sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognisable by them."

C This position was followed in *Thai-Europe Tapioca Service Ltd* v *Govt of Pakistan & Ors* [1975] 3 All ER 961 (CA); *The Philippine Admiral* v *Wallem Shipping (Hong Kong) Ltd & Ors* [1976] 1 All ER 78 (PC) and *I Congreso del Partido* [1981] 2 All ER 1064. In South Africa, the acceptance of the restricted doctrine of sovereign immunity was made in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Moçambique* 1980 (2) SA 111 (T) D and other cases after it such as *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709 (E). The rationale for the adoption of the restricted doctrine of sovereign immunity was well articulated by Lord Wilberforce in *I Congreso del Partido* supra at 1070G-H where he said:

> " E The relevant exception, or limitation, which has been engrafted on the principle of immunity of states, under the so-called restrictive theory, arises from the willingness of states to enter into commercial, or other private law, transactions with individuals … (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a F state to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its sovereign functions."

In *Rahimtoola*'s case *supra* the test for deciding in which case the doctrine of restricted sovereign immunity was to apply was laid down in the following G words by Denning at 422 (AC) 463 (AER):

> "Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether 'conflicting rights have to be decided' but on the nature H of the conflict. Is it properly cognisable by our courts or not? If the

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> dispute brings into question, for instance, the legislative or international A transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns for instance the commercial transactions of a foreign government B (whether carried on by its own departments or agencies or by setting up separate legal entities) and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

A more eloquent formulation of the test was given in *I Congreso del Partido* again by Lord Wilberforce at 1070J where he said:

> "When … a claim is brought against a state … and state immunity is C claimed, it is necessary to consider what the relevant act is which forms the basis of the claim: is this, under the old terminology, an act '*jure gestionis*' or is it an act '*jure imperii*'; is it (to adopt the translation of these catchwords used in the Tate letter) a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of D a private law character such as a private citizen might have entered into?"

In *Barker McCormac supra*, Georges JA held that the appellant's claim against the Government of Kenya for damages arising from a lease agreement could not be regarded, on the face of it, as one in regard to which sovereign immunity could successfully be raised. The court granted the appellant leave to serve the summons and declaration so that the issue of the right to E immunity could be fully canvassed in court.

What emerges from the decision in *Barker McCormac supra* is that an organisation or government claiming immunity in any given case must raise the defence and, after fully canvassing it in court, the court may then decide whether immunity may validly be raised. In terms of the Act, as I have said, F the position of the ICRC is no different from that of a foreign government. It enjoys immunity from suit and legal process, but subject to international law. It must be made clear that *Barker McCormac supra* did not decide the question whether, on the facts before the court, immunity availed the respondent. The case, however, decided the question of jurisdiction on the same basis as laid down in *Rahimtoola*'s case *supra*. The considerations are G that, because immunity is not absolute, then the foreign sovereign, and in this case the ICRC, must submit itself to the jurisdiction of the court so that a determination can be made whether or not the foreign sovereign or the organisation concerned enjoys immunity and, more importantly, whether or not the particular issue in dispute is covered by the immunity. This to me means, as stated in *Rahimtoola*'s case *supra*, that the question of immunity H

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A depends on the nature of the dispute or on the nature of the conflict and on whether or not the dispute is properly cognisable by our courts. If upon investigation, the court is satisfied that immunity avails to the foreign sovereign, then that is the end of the matter. But if it finds that immunity does not attach in respect of the dispute in question because of its nature, then the matter must be determined on its merits. When the question whether the B Government of Kenya enjoyed immunity in respect of the dispute between it and Barker McCormac (Pvt) Ltd was eventually brought to the High Court it was decided by Samatta J in *Barker McCormac (Pvt) Ltd* v *Govt of Kenya* 1985 (1) ZLR 18 (H), who relied on all the cases I have cited and at 29C-F said:

> " C It is not in dispute that the defendant purchased the property for the purpose of using it as its High Commission. Mr *Mkushi* submitted that, this having been the purpose, the purchase was an act *jure imperii*. I think this contention may well be valid, but it is not helpful to the defendant in this case as far as its plea to immunity is concerned. Its purchase of the property did not in any way interfere with the rights of the plaintiff as a D lessee and, therefore, that act could not be the subject matter of complaint by the plaintiff. The act which forms the basis of the plaintiff's claim is the alleged breach by the defendant of the lease and not the purchase of the property. Assuming that the alleged breach did take place, it is clear that it happened because the defendant wanted to use the premises as part E of its High Commission. Does this reason make the refusal by the defendant to allow the plaintiff to continue occupying the leased premises an act *jure imperii*? I do not think so. The purpose for which a breach is committed cannot alter its character. The defendant's act of entering into a landlord/lessor and tenant/lessee relationship with the plaintiff was, in my judgment, a non-sovereign act. The fact that the defendant found it F necessary, for security or other reasons, not to have tenants in the building cannot, in my opinion, convert the non-sovereign act into a sovereign act."

The learned judge went on to quote with approval from *I Congreso del Partido* at 1102E-G and decided that the plea to jurisdiction had no merit. This disposes of the ICRC's objection *in limine,* to wit, that because it enjoys G diplomatic immunity it is *ipso facto* immune from the jurisdiction of this court. In *Barker McCormac supra*, the difficulty arising from deciding whether our courts have jurisdiction was aptly summarised at 82G-H. Georges JA said:

> "In the view which I take of this matter, it is unnecessary to rule on that H issue (whether the court should on its own raise the issue of immunity).

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> It can be argued that the municipal court has jurisdiction over a claim by A reason of the nature of the claim and that such jurisdiction is barred only when the defendant raises the issue of sovereign immunity. On the other hand, it can be argued that the jurisdiction is barred once it appears on the record that the defendant can raise the issue of sovereign immunity and that the court should not proceed unless satisfied that the defendant B consents or that the claim does not fall within the category of claims in regard to which sovereign immunity can be raised."

He declined to rule on this issue without hearing further argument. I think, however, that the espousal of the restricted doctrine of sovereign immunity by itself means that the foreign sovereign is, *prima facie*, subject to the jurisdiction of the domestic tribunal. He must appear and plead the defence C and, depending on the court's finding, his immunity may be confirmed or decided against, and in the latter case, the matter will be dealt with on its merits. It seems to me futile, therefore, to raise the issue of sovereign immunity as a complete bar except in obviously clear cases. It seems to me equally futile or pointless, except in very clear cases, for the domestic court to have to be seized with this question at the start of the proceedings. To raise D the issue of immunity is to invite the court to determine its applicability in any given case depending on other factors such as, in particular, the nature of the dispute. The question of jurisdiction of the domestic court must always be in the background and the nature of the dispute in the forefront, because the latter is determinant of the course to be followed by the court. E

The present dispute arises from employment contracts. The applicants were employed by the ICRC from 1985 and 1991 respectively. The first applicant's contract of employment was terminated on 31 December 1998 and that of the second applicant on 31 December 1997. Their contracts of employment were standard form contracts which they were required to sign upon taking up employment. They provided in clause 7 that: F

> "Any dispute arising in the application of the conditions (of employment) mentioned above shall be settled in conformity with the labour legislation in force in the country (Zimbabwe) or, in default of such legislation, in accordance with local custom and usage."

The applicants construed this clause to apply to any dispute over termination G of the contract and not only to the conditions of employment during the subsistence of the contract. The ICRC on the other hand construed the above clause as a choice of law clause, which specifies the law to be applied to the interpretation of the "conditions mentioned above" in the contract and not as a submission to jurisdiction. I will return to this matter later on. For the moment, it is necessary that I pronounce on the nature of the dispute. H

Chinhengo J

A When a foreign organisation establishes itself in Zimbabwe it necessarily must, and usually does, employ local personnel to carry out certain of its functions. The employment contract is a commercial arrangement of master and servant. It entails the provision of a service by the employee and the payment for the service by the organisation concerned. In my view, such an arrangement falls to be determined, so far as the question of the organisation's B immunity is concerned, as an *actus jure gestionis*, a commercial transaction. And, should a dispute arise from the employer/employee relationship established by such a commercial arrangement, then the doctrine of restricted sovereign immunity should apply. A local person who finds employment with an international organisation is not likely to know, or to be concerned about, the immunity from suit or legal process of his prospective employer. C The contract which he enters into with such an employer is not likely to allude to that issue. The contracts *in casu* did not advert to the issue of immunity at all. I think that it would be grossly unjust to the individual concerned if our courts were to accept that an employer such as the ICRC can invoke its immunity in a purely civil or commercial dispute with its local employee. D It would indeed conduce to injustice. And I think the organisation concerned would have no reason to take the view that the challenge brought up by the employee interferes with its official functions for which the immunity is conferred in the first place. The employment of the local person by the organisation has, as its purpose, the efficient discharge of its functions by that organisation. But the relationship it establishes with the local employee is E purely a private act, the kind which the employer can enter into with any other employee. It is simply a master and servant relationship which must be subject to the local laws. Additionally, when the organisation breaches the laws which apply to such a relationship then that breach cannot be protected by the invocation of an immunity which is conferred for a purpose different from that for which the organisation invokes it.

F Coming to the correct interpretation of the clause in the contract of employment cited above, it is my view that the parties agreed that, in the event of a dispute arising, not only in regard to the conditions of employment narrowly defined as other than conditions of termination of employment but also in regard to actual termination, the laws of Zimbabwe would apply. I do not agree that the G clause was not a waiver of immunity or that it was not a submission to the jurisdiction of the local courts. The immunity granted by the Act is in respect of suit and legal process. If the ICRC accepted

that the laws of Zimbabwe would apply to any dispute arising from the contract of employment, can it then be said that the parties contemplated that the law of Zimbabwe would be applied other than by a domestic tribunal or court? If the ICRC was of this H view, the same cannot be said of the applicants. It is only reasonable to hold

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that the parties, or at least the applicants, had in mind the resort to Zimbabwean A laws in Zimbabwean courts in the event of any dispute arising in their relationship with the ICRC. I am satisfied that, in the context of the contract of employment, the parties agreed not only that the laws of Zimbabwe would apply, but also that those laws would be applied by Zimbabwean courts. The ICRC, to that extent, waived its immunity. This is not surprising as such B waiver accords with my earlier finding that the nature of the dispute is commercial; that it is cognisable by our courts and that it is subject to the restricted view of immunity.

The ICRC's counsel submitted that a distinction must be made between immunity from jurisdiction and immunity from legal liability and that the ICRC enjoys an immunity from jurisdiction and not necessarily from legal C liability. I acknowledge that distinction, but in view of my finding on jurisdiction what remains to be considered, therefore, is the question of legal liability. In view of the above, it must be clear that in my view the ICRC cannot successfully argue that its immunity is a procedural bar or that in regard to the present dispute it is exempt from local jurisdiction. Equally, the attempt by the ICRC's counsel to distinguish *Barker McCormac supra* on the D basis that that case was concerned not with diplomatic immunity but with sovereign immunity is not sustainable. Immunity, whether diplomatic or sovereign, has the same consequence and it does not matter that it is conferred by virtue of international law or by virtue of an enactment. The Act *in casu* is merely a vehicle for giving effect, in Zimbabwe, to the provisions of E international law as codified in the relevant international treaties. The case of *S* v *Muchindu & Ors* 1995 (2) SA 36 (W), cited by the ICRC's counsel in his heads of argument is not helpful to the ICRC. That case was concerned not with the rights of the ICRC as an organisation and in the context of a commercial or employment relationship, but with whether a member of staff of the ICRC who enjoys diplomatic immunity can be subpoened in a court F of the receiving State. The decision that he could not is correct, but that case is distinguishable from the present, which is concerned with an entirely different matter. I cannot comment on the other case cited by counsel, *Portion 20 of Plot 15 Athol (Pty) Ltd* v *Rodrigues* 2001 (1) SA 1285 (W), as I have not been able to obtain it.

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

Dube, Manikai & Hwacha, applicants' legal practitioners

Kantor & Immerman, respondent's legal practitioners

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FAYE TRUST v ZHANJE & ANOR 2002 (1) ZLR 373 (H)

Citation 2002 (1) ZLR 373 (H)

Case No Judgment No. HH-57-02

Court High Court, Harare

Judge Smith J

Heard 10 April 2002

Judgment 17 April 2002

Counsel *H Shenje*, for the applicant
P Nherere, for the respondent

Case Type Application for interdict

Annotations Link to case annotations

Flynote

Practice and procedure — *application — when appropriate — order for* D *eviction of applicant from property previously granted despite noting of appeal by applicant — subsequent application for order preventing sale of property — effect of such order — correct course of action*

Headnote

The applicant had bought a piece of land from the respondent. It defaulted E on its payments. The respondent cancelled the sale, and sought the eviction of the applicant. An order confirming the cancellation of the sale and for the eviction of the family occupying the property was granted. The applicant noted an appeal against the order. The respondent then filed an application for leave to execute pending the appeal. Another judge granted the application. Two months later, the applicant F sought an order preventing the respondent from selling the property to a third party. It was argued that the applicant had a *prima facie* right or interest in the property, and if the property were sold, the applicant would suffer irreparable harm.

Held, that the order sought would have the effect of reinstating the effect of G the noting of the appeal. The court was now being asked to reconsider the ruling by the second judge, granting leave to execute. In considering the application, the judge would have had to inquire into such issues as the potentiality of irreparable harm, the prospects of success on appeal, and whether the appeal was frivolous. She must have considered that the respondent had better chances of success on appeal. The doctrine of H issue estoppel meant that the issue could not be revisited and the court

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Smith J

could not now interfere. What the applicant should have done was A appeal against the order granting leave to execute.

Per curiam: consideration should be given to altering the rule that the effect of noting an appeal is to suspend the judgment pending the outcome of the appeal. Where a party notes an appeal, he should seek leave for the judgment to be suspended. B

Cases cited

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

Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njainjai & Ors 2000 (1) ZLR 85 (S)

Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd 1998 (1) ZLR 149 (H) C

Galante v Galante (1) 2002 (1) ZLR 144 (H)

Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quarries (Pvt) Ltd 1997 (2) ZLR 436 (H)

Setlogelo v Setlogelo 1914 AD 221

Watson v Gilson Entprs & Ors 1997 (2) ZLR 318 (H)

Whata v Whata 1994 (2) ZLR 277 (S) D

Willowvale Mazda Motor Industries (Pvt) Ltd v Sunshine Rent-a-Car (Pvt) Ltd 1996 (1) ZLR 415 (S)

Case information

H Shenje, for the applicant

P Nherere, for the respondent E

Judgment

SMITH J: The applicant (hereinafter referred to as "the Trust") has applied for an interdict to prohibit thefirst respondent (hereinafter referred to as "Zhanje") from selling a certain piece of land in Greendale (hereinafter referred to as "the Property"). The background to the application is as follows. Zhanje is the registered owner of the Property. On 6 May 2000, he sold it to the Trust. F The Trust paid the deposit on the signing of the agreement of sale but failed to pay the balance of the purchase price when called upon to do so. It was placed *in mora* and given notice of cancellation but the balance of the purchase price was still not paid. Zhanje then cancelled the sale. He then instituted an application seeking confirmation of the cancellation and the eviction of the family that was occupying the Property — case HC 3840/01. G The order sought was granted by Blackie J on 6 November 2001. An appeal was noted on 19 November. The appeal had the effect of suspending the order granted by Blackie J. Zhanje then filed an urgent application for leave to execute pending the appeal — case HC 11197/01. That application was opposed. On 14 December 2001, Gowora J granted leave to execute. The present application was then filed on 25 February this year. H

Smith J

A Mr *Shenje* submitted that the order sought should be granted. The Trust has a *prima facie* right or interest in the Property and, pending the determination of the appeal, Zhanje should be precluded from selling the Property. Once the Property was sold, the Trust would suffer irreparable harm. The Trust is seeking an interdict *pendente lite*, the requirements for which are well settled: see *Setlogelo* v *Setlogelo* 1914 AD 221 and *Charuma Blasting & Earthmoving* B *Services (Pvt) Ltd* v *Njainjai & Ors* 2000 (1) ZLR 85 (S). The Trust bought the Property for $3 million and Zhanje has now sold it for $17 million. If that sale is allowed to go through and the appeal against the order of Blackie J is successful, the Trust is unlikely to be able to get compensation for its loss. On the other hand, Zhanje will not suffer any prejudice if the appeal is not successful because he will be able to go ahead with the sale of the Property. C The balance of convenience is clearly in the Trust's favour. The court's discretion, which was mentioned in *Watson* v *Gilson Enterprises & Ors* 1997 (2) ZLR 318 (H), should be exercised in favour of the Trust.

Mr *Nherere* argued that the relief sought by the Trust *in casu* would reinstate the effect of the noting of the appeal against the order of Blackie J. When D Gowora J granted leave to execute, she must have been satisfied that the prospects of success on the appeal were remote. In effect, this court is now being asked to reconsider her ruling. The Trust should have appealed against the order granted by Gowora J instead of instituting this application. Leave would have had to be obtained before such an appeal could be noted: see *Gillespies Monumental Works (Pvt) Ltd* v *Zimbabwe Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H) E and *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H). As Gowora J has already determined that the Trust's prospects of success on the appeal are remote, the issue cannot be revisited because of the doctrine of issue estoppel: see *Willowvale Mazda Motor Industries (Pvt) Ltd* v *Sunshine Rent-a-Car (Pvt) Ltd* 1996 (1) ZLR 415 (S). As regards the prospects of success an appeal, the papers filed in case F HC 3840/01 clearly demonstrate that the Trust had failed to pay the balance of the purchase price or to raise a loan to enable it to do so. Moreover, even if the Trust were successful on appeal, the damages it would obtain would be an adequate remedy. Mr *Nherere* went on to argue that Zhanje should be awarded costs on the higher scale as this application was filed purely for the G purpose of causing delays whilst the beneficiaries of the Trust remained in occupation. It constitutes an abuse of the process of the law.

It is the rule in Zimbabwe that the effect of noting an appeal against a judgment is to suspend that judgment pending the outcome of the appeal. That used to be the rule in England, but the position has now been changed. Thus, where a court in England hands down a judgment, the judgment takes H effect immediately but the unsuccessful party may then apply to court to have

Smith J

the judgment suspended. The Law Development Commission, in its report A 34 of 1994, made the proposal that our law on this issue should be amended to bring it into line with the law in England. The reason why the proposal was put forward was expressed as follows at p 4 of the report:

> "if a party has obtained the judgment of a court of law, which is an institution that has been set up under our system of justice to make B determinations, then *prima facie* that party should be entitled to the benefit of the judgment and the unsuccessful party should have to seek leave for the judgment to be suspended if an appeal is noted and he should be required to show that special circumstances exist which justify suspension."

It was further submitted in the report that the equities favour the English C approach and that the present system encourages the losers to appeal simply in order to buy time. If the system was changed in the manner proposed, it would mean that the party who loses in the first instance could still appeal, but if he wants execution of the judgment to be suspended, he would have to apply therefor and make out a good case. D

I would recommend that consideration be given to adopting the proposals set out in the report.

Be that as it may, the position now is that any judgment handed down by a court is suspended once an appeal is noted. However, the successful litigant is entitled to apply to court for leave to execute the judgment. That is what happened in this case. Leave to execute the judgment was granted by E Gowora J. In considering the application for such leave, the learned judge would have had to inquire into factors such as the potentiality of irreparable harm being suffered by either party and, if by both, then the balance of convenience; the prospects of success on appeal; whether the appeal is frivolous or vexatious. See *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H), F*Whata* v *Whata* 1994 (2) ZLR 277 (S) and the *Econet* case *supra*. Clearly, she was satisfied that Zhanje had better prospects of success on the appeal or else she would not have granted leave to execute. As Mr *Nherere* pointed out, this is not an application by the Trust for an interdict *pendente lite*, where the applicant merely has to establish that he has a *prima facie* right, even though open to some doubt. In this case, Blackie J, G after hearing the parties, determined that the Trust had no rights in the Property, since the sale had been validly cancelled, and Gowora J has determined that the Trust's prospects of success on appeal are minimal.

Mr *Shenje* argued that the issue before this court differs from that under consideration by Gowora J, which was case HC 11197/01. In that case, Zhanje was seeking the eviction of the beneficiaries of the Trust and that was H

Smith J

A effected. Now, however, the Trust is merely seeking an interdict preventing Zhanje from selling the Property. In my view, the relief sought by the Trust would, if granted, reinstate the effect of the noting of the appeal. Blackie J held, in case HC 3840/01, that Zhanje had validly cancelled the sale of the Property. That means that Zhanje is entitled to sell the Property to another buyer. The fact that he sold it on 6 May 2000 for $3 million and then was able B to sell it, less than 2 years later, for $17 million shows how the value of the Zimbabwe dollar has plunged in that period.

The question of whether or not the judgment of Blackie J should be suspended has been determined by a court of competent jurisdiction. By virtue of the doctrine of issue estoppel, this court cannot revisit that B issue. See the *Willowvale Mazda Motor Industries* case *supra*, and *Galante* v *Galante (1)* HH-31-02. *

As regards costs, I can see no justification for ordering that they be awarded on the higher scale.

D The application is dismissed with costs.

Ziumbe & Mtambanengwe, applicant's legal practitioners

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

* See p 144 of this volume. — *Editor.*

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V SAITIS & CO (PVT) LTD v FENLAKE (PVT) LTD 2002 (1) ZLR 378 (H)

Citation	2002 (1) ZLR 378 (H)
Case No	Judgment No. HH-65-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	30 January 2002
Judgment	24 April 2002
Counsel	*T Biti*, for the applicant *K Renzva*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure — *default judgment — rescission — ground for — wilful default — meaning — extent to which justifies refusal of* D *rescission*

Headnote

The test for rescission of judgment, whether under r 63 of the High Court Rules, 1971, or Order 30 of the Magistrates Court (Civil) Rules, 1980, is but one: the applicant has to establish good and sufficient cause or, E more simply, sufficient cause for the relief he seeks. Under Order 30 of the Magistrates Court (Civil) Rules, rescission cannot be granted if the applicant was in wilful default, but absence of wilful default does not necessarily mean that rescission must be granted: the applicant must still establish good and sufficient cause for rescission. Under r 63 of the High Court Rules, which applies to the rescission of judgments under F the common law and under any enactment other than the Magistrates Court Act [*Chapter 7:10*], wilful default is only one of the factors, including *bona fides* and a *prima facie* case, to be considered in deciding whether the applicant has established good and sufficient cause for rescission.

Where a party, deliberately and with full knowledge of the legal consequences, G refrains from defending an action because he genuinely believes that a defence is not called for, as where he believes that the other party's claim is ill-founded in law or that he has discharged the obligation giving rise to the other party's claim, his default cannot be regarded as wilful. H

Chinhengo J

Cases cited A

Arab v Arab 1976 (2) RLR 166 (A)

Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86

Barker McCormac (Pvt) Ltd v Government of Kenya 1985 (1) ZLR 18 (H)

Brits v Coetzee 1967 (3) SA 570 (T)

B *Chetty v Law Society, Tvl* 1985 (2) SA 756 (A)

Deweras Farm (Pvt) Ltd & Ors v Zimbank Corp Ltd 1997 (2) ZLR 47 (H)

Deweras Farm (Pvt) Ltd & Ors v Zimbank Corp Ltd 1998 (1) ZLR 368 (S)

Du Preez v Hughes NO 1957 R & N 706 (SR)

G D Haulage (Pvt) Ltd v Mumurgwi Bus Service (Pvt) Ltd 1979 RLR 447 (A) C

Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk 1980 (4) SA 775 (A)

Gollub v Trotter HB-95-82

Gundani v Kanyemba 1988 (1) ZLR 226 (S)

D *Karimazondo v Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S)

Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C)

Muller v Braes S-51-86

Munhira v Phiri S-52-84

E *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1976 (2) RLR 257 (G)

Neuman (Pvt) Ltd v Marks 1960 R&N 166 (SR)

Roland & Anor v McDonnell 1986 (2) ZLR 216 (S)

Shinga Express (Pvt) Ltd v Hubert Davies (Pvt) Ltd 1989 (2) ZLR 45 (H)

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S)

Swart v Vosloo 1965 (1) SA 100 (A)

F *Ver Elst v Sabena Belgian World Airlines* 1983 (3) SA 637 (A)

Zimbabwe Banking Corp Ltd v Masendeke 1995 (2) ZLR 400 (S)

Legislation considered

High Court Rules, 1971, O 9 r 63

G Magistrates Court (Civil) Rules, 1980, Order 30 rr 1 & 2

Case information

T Biti, for the applicant

K Renzva, for the respondent

Judgment

CHINHENGO J: This is an application for the rescission of a judgment H entered against the applicant at the instance of the respondent. The judgment

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Chinhengo J

was entered in default after the applicant failed to oppose an application for A summary judgment instituted by the respondent. The application is based on two assertions — that the applicant was not in wilful default of filing a notice of opposition and opposing affidavit to the application for summary judgment and that it has, on the merits, a strong defence to the respondent's claim. As such the applicant prays for the setting aside of the judgment, for leave to B defend the respondent's claim

and consequently for an order that it should file its notice of opposition and opposing affidavit within ten days from the date of the order which this court may make in its favour. It also prays for the costs of this application.

The applicant's counsel, Mr *Biti*, has raised a general point of law which I must address at this stage. That point is essentially concerned with the C requirements for the setting aside of a judgment entered in default under r 63 of the High Court Rules. He pointed out that our courts have been ambivalent in their approach to the question of rescission of judgment. He submitted that they have in certain cases adopted what he described as the traditional approach — one that requires the applicant to show that he was not in wilful default or requires him to give a reasonable explanation for the default. D He submitted that the courts have also adopted in other cases what he described as the liberal or modern approach — one where the applicant for rescission need only show that he has "good and sufficient cause" for such rescission.

Rule 63 of the High Court Rules provides as follows: E

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make an application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) If the court is satisfied on an application in terms of subrule (1) F that there is *good and sufficient cause* to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action on such terms as to costs and otherwise as the court considers just" (my emphasis).

Subrule (2) above is clear that a judgment entered in default may be set aside G by the court on a showing of good and sufficient cause by the applicant. How then have our courts approached the issue of good and sufficient cause?

In *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S), the approach to rescission of judgment was stated by McNally JA at 211E-F as follows:

> "While the courts are inclined to frown upon plaintiffs who 'snatch at their judgments' the impression must not be gained that the Rules may be H

Chinhengo J

> A flouted with impunity and that as long as you are only a day or two late rescission will be granted on request. *A reason for the delay must be given and it must be an acceptable reason. A defendant who admits that he was negligent in his tardiness may nonetheless be found to merit rescission if he shows* bona fides. But one who puts forward a 'reason' which is an insult to the intelligence of the court may have more difficulty B in satisfying the court of his good faith" (my emphasis).

The learned Judge of Appeal went on at p 213A-B to say:

> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence. *If I were convinced that the* C *defendant in this case was bona fide and had a* prima facie *defence, then I might be unjustified in condemning him for so short a delay, despite the inadequacy of his explanation.* I turn therefore to consider his defence, and I bear in mind Mr *Carter*'s reference to the decision of Beadle CJ in *Stevenson* v *Broadley NO* 1972 (2) RLR 467 where the learned Chief Justice said that in view of the delay of only four or five days "I would D not consider that the application should be refused unless I thought the applicant's case was hopeless" (my emphasis).

It may seem, on a cursory reading of the above passages, that McNally JA was laying down a different test for the rescission of a judgment. It may seem that he was laying down (1) that the applicant for rescission must show that E he was not in wilful default or that he had an acceptable explanation for his default and (2) that he was *bona fide* and had a *prima facie* defence. The learned judge, however, referred in his judgment at 211C-D to r 63 of the High Court Rules and adverted to the meaning of "good and sufficient cause" in that rule. He referred to the interpretation given to that clause in *Barclays Bank of Zimbabwe Ltd* v *CC International (Pvt) Ltd & Anor S-16*-86; *Muller* F v *Braes* S-51-86 and *Roland & Anor* v *McDonnell* 1986 (2) ZLR 216 (S). He was therefore quite alive to the overall requirement of r 63 that an applicant for rescission must show "good and sufficient cause".

A judgment of a court must be read as a whole:

> "A statement in a judgment of a court of law should not be construed as G if it were a provision in a statute. A judgment has to be construed as a whole, and in the light of the facts of the particular case and

the issues which were to be determined by the court."

(See *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1985 (1) ZLR 18 (H) at 23G).

H Thus, when McNally JA in the *Songore* case *supra* examined the issues of

wilful default, *bona fides* and a *prima facie* defence, he was not in fact laying A down different considerations for the setting aside of a judgment given in default. He was in fact giving content to the phrase "good and sufficient cause" and, as it were, laying down those factors which may assist the court in arriving at whether "good and sufficient cause" has been shown to exist. At 216A in the *Songore* case *supra* the learned judge also said: B

> "In my view, the court *a quo* properly concluded that the defendant had failed to show good and sufficient cause. I would dismiss the appeal with costs."

This statement was a confirmation that, whilst the learned judge had examined factors which constitute "good and sufficient cause", he was in fact not laying down any different test for the setting aside of a judgment by C default. He was, on the contrary, merely examining the building blocks of "good and sufficient cause".

In *Zimbabwe Banking Corp Ltd* v *Masendeke* 1995 (2) ZLR 400 (S), the judge in the court *a quo* had, in an application for the rescission of a judgment, ruled that there had been a wilful default; that no explanation had been D offered for that default and that therefore the application for rescission was to be refused regardless of whether there was any defence on the merits. The Supreme Court (*per* McNally JA) found that the judge in the court *a quo* had erred both as to the concept of wilful default and as to the fact that no explanation had been proffered. The court did not directly advert to the requirement of good and sufficient cause as provided in r 63 and it did not E have to do so. It however quoted with approval *Songore*'s case *supra*. It found that the ingredients of "good and sufficient cause" existed, i.e. an acceptable explanation for the default, *bona fides* and a *prima facie* defence. Thus, although the court did not say so in so many words, the reference to *Songore*'s case and other authorities and the very fact that the court was seized with an appeal in a case where rescission of judgment was sought, would indicate that F what in fact it held was that good and sufficient cause for rescission had been established to its satisfaction.

Mr *Biti* referred to these two cases, *Songore* and *Masendeke supra* as exemplifying the traditional approach which, in his view, was not only inconsistent with r 63, but was an approach that was developed from a failure G to distinguish between r 63 of the High Court Rules and Order 30, rules 1 and 2 of the Magistrates Court (Civil) Rules, 1980 (SI 290 of 80). He submitted that, in terms of the Magistrates Court (Civil) Rules, if wilful default was established then, without further ado, rescission would be refused. He referred in this regard to the decisions in *Neuman (Pvt) Ltd* v *Marks* 1960 R&N 166 (SR); *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) and *Karimazondo* v H

A *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S).

Order 30 of the Magistrates Court (Civil) Rules provides as follows in rr 1 and 2 —

> "1. (1) Any party against whom a default judgment is given may, not later than one month after he has knowledge thereof, apply to the court B to rescind or vary such judgment.
>
> (2) An application in terms of subrule (1) shall be on affidavit stating shortly —
>
> (a) the reasons why the applicant did not appear or file his plea; and
>
> (b) the grounds of defence to the action or proceedings in which the C judgment was given or of objection to the judgment.
>
> …
>
> 2. (1) The court may on the hearing of any application in terms of rule 1, unless it is proved that the applicant was in wilful default —
>
> (a) rescind or vary the judgment in question; and D
>
> (b) give such directions and extensions of time as necessary for the further conduct of the action or application."

The corresponding provisions in the rules in force prior to 1980 were set out in Order XXIX of those rules and in *Neuman (Pvt) Ltd* v *Marks supra* at 168A-C, Murray CJ said:

> " E Order XXIX provides for the rescission of default judgments and rule 2 of that Order states that on the hearing of an application to rescind or vary a default judgment the court may, unless it is proved that the applicant was in wilful default, review and rescind or vary the judgment, and give necessary directions regarding the future conduct of the litigation. The rule, unlike the corresponding Union rule, does not require good cause F to be shown. It is indisputable that though the court has a discretion to rescind in the absence of proof of wilful default (a discretion which the authorities indicate should generally be exercised in the applicant's favour) there is no such discretion, and rescission cannot be directed, if the applicant's default is proved by the respondent to have been wilful. The principal question is therefore whether such proof is present here."

G Similar views were expressed in *Gundani*'s case *supra,* where the court was also dealing with an appeal against the dismissal of an application in terms of Order 30 for the rescission of a default judgment. At p 228F-G, Gubbay JA said:

> "As I understand the argument of Mr *Rajah,* who appeared for the H appellant, it was conceded that if the court *a quo* was correct in finding

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> that the default was wilful this appeal cannot succeed. That concession A must undoubtedly be regarded as proper, for the refusal to grant the requisite indulgence in such a situation is based on the sound premise that public policy dictates that as far as possible there should be finality in litigation."

In *Gundani*'s case *supra*, the court indeed accepted that if there was wilful B default then in terms of r 2(1) of Order 30 of the Magistrates Court (Civil) Rules a rescission could be refused without further ado. Order 30 r 1(2) of the Magistrates Court (Civil) Rules requires the applicant to establish two things if he is to succeed in an application for rescission — the reason for default and the grounds of defence or of objection to the judgment. Rule 2(1)(a) of that Order states that, on the hearing of any application for rescission the court C may rescind the judgment unless it is proved that the applicant was in wilful default. I do not however read Order 30 of the Magistrates Court (Civil) Rules as laying down that once an applicant for rescission has established that he was not in wilful default then rescission will automatically be granted. Not at all. The applicant must still show that there is good and sufficient cause for rescission. The applicant is required by r 1(2)(b), as I have shown, to state D shortly the grounds of his defence or of objection to the judgment. This is an allusion to "good and sufficient cause". Why else would an applicant, besides giving his explanation for the default, be required to state his grounds of defence or objection? I do not read *Gundani*'s case *supra* as rejecting the proposition that in the magistrates court, a party who has shown that he is not E in wilful default may on that basis alone obtain rescission even if he cannot show that he has a valid ground of defence or objection to the judgment, i.e. if he cannot overall establish good and sufficient cause for rescission.

It is therefore, axiomatic that where the applicant for rescission of a default judgment given in the magistrates court establishes that there was no wilful default on his part, then the court may, not shall, rescind or vary the judgment F in question. Subrule (2)(b) of r 1 of Order 30 requires that the application for rescission must state the grounds of defence to the action or proceedings. Clearly, that means that the court must have regard to the grounds so stated in determining whether or not to rescind the default judgment. To my mind, that requires the court to decide whether or not there is "good and sufficient G cause" to do so. Therefore, the applicant must establish that he is *bona fide* and has a *prima facie* defence.

Another case cited by Mr *Biti* in support of his submission that in the magistrates court the showing of wilful default alone is sufficient to defeat an application for rescission of judgment is the *Karimazondo* case *supra*. This submission is correct because the court was dealing with an appeal from H

A a judgment in the magistrates court. But again, I do not read that decision as laying down any proposition that if the applicant has shown that he was not in wilful default then he obtains a rescission automatically. In that judgment, at 408D and 412B, very clear reference is made to the

requirement that "good and sufficient cause" is the general test in rescission applications. McNally JA at 408D adopted this view when he said:

> " B Even if the default were, despite the absence of any claim in that regard, to be seen as the default only of the attorney and not of the appellants, then still no good cause has been shown for the rescission of judgment."

The requirements of *bona fides* and a *prima facie* case, together with that of C wilful default, are but just factors which go to show that the establishment of "good and sufficient cause" is the real test in these matters. Statements such as "Wilful default disqualifies an applicant from obtaining rescission of judgment" appearing at 407E of *Karimazondo*'s case *supra* must not be construed out of context. To correctly appreciate their meaning, the judgment must be read as a whole, having regard to the facts of the case and the issues D which were to be determined by the court (*Barker McCormac supra*).

I do not therefore, agree with Mr *Biti* that the test in the magistrates court for rescission of judgment has been "superimposed" on High Court applications under r 63, resulting in what he referred to as the "strict test" that,"if the explanation for default is not acceptable then one does not embark on the E second inquiry and the application is dismissed". *Shinga Express (Pvt) Ltd* v *Hubert Davies (Pvt) Ltd* 1989 (2) ZLR 45 (H) was cited by Mr *Biti* in support of his submission that what he called the "strict test" was superimposed on High Court applications for rescission. I do not agree. The *Shinga Express* case *supra* was concerned with rescission of a default judgment in terms of the common law. Blackie J, the judge concerned in that case, referred to F *Chetty* v *Law Society, Transvaal* 1985 (2) SA 756 (A) where the requirement of a reasonable and acceptable explanation for the default and the *bona fides* of the defence which *prima facie* carries some prospect of success were, correctly in my view, referred to as "two essential elements of sufficient cause" for rescission of a judgment entered in default. Blackie J went on to consider whether "sufficient cause" had been shown. It seems to me that for G the proposition he made Mr *Biti* must have relied on the following statement by Blackie J in the *Shinga Express* case *supra* at 51D-E:

> "In the light of that finding, it is unnecessary to make any findings or to consider any arguments relating to the applicant's prospects of success. The applicant must establish both a reasonable explanation and a *bona* H *fide* defence. If one of the two requirements are not met, the applicant has

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> not shown 'sufficient cause'. See *Chetty*'s case *supra* at 765A-F and A 767J-768C."

To my mind, Blackie J was not saying that the test for "good and sufficient cause" or "sufficient cause" was "wilful default" alone. He was in fact simply stating that if one fails to establish the existence of an essential element of "sufficient cause" then he is unlikely, and does usually fail, to establish "sufficient cause". B

The conclusion I have come to is that the test for rescission of judgment whether in the High Court (under r 63) or the Magistrates Court (under Order 30) (unless it is a refusal of rescission because wilful default exists) is but one: the applicant has to establish good and sufficient cause or, simply put, sufficient cause for the relief he seeks. That this is so, and has C always been so, is evident from McNally JA's words in *Deweras Farm (Pvt) Ltd & Ors* v *Zimbank Corp Ltd 199*8 (1) ZLR 368 (S) where at 369F he said:

> "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 D discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause."

I would, at this stage, point out that the provisions of r 63 are very widely cast in so far as the classes of default judgment that are covered. It provides that an application under that rule may be made by any party against whom judgment has been given in default, "whether under these rules or under any E other law". Section 3(3) of the Interpretation Act [*Chapter 1:01*] provides that in every enactment the use of the word "law" means "any enactment and the common law of Zimbabwe. Therefore, if judgment is granted in default under the common law or under any enactment other than the Magistrates Court Act [*Chapter 7:10*], then an application for rescission thereof must be made in terms of r 63. My reason for excluding default judgments granted F under the Magistrates Court Act or rules made thereunder from the ambit of r 63 is because of s 2(1)(a) of the Interpretation Act. That provides that the provisions of the Interpretation Act extend and apply to every enactment, except in so far as such provisions are inconsistent with the intention or object of such enactment. As the Magistrates Court (Civil) Rules provide in G Order 30 for applications for

rescission of a judgment granted in default by a magistrates court, clearly it would be inconsistent to apply the provisions of r 63 to the same class of default judgments.

I therefore do not, with respect, agree entirely with Gillespie J's conclusion in *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corp* 1997 (2) ZLR 47 (H) at 56D, which he reached after analysing several cases. Gillespie J H

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A said that some of those cases contain apparently clear statements that wilful default necessarily involves a refusal of rescission. He himself said that *du Preez* v *Hughes NO* 1957 R & N 706 (SR), A*rab* v *Arab* 1976 (2) RLR 166 (A); *Mvaami (Pvt) Ltd* v *Standard Finance Ltd* 1976 (2) RLR 257 (G); *G D Haulage (Pvt) Ltd* v *Mumurgwi Bus Service (Pvt) Ltd* 1979 RLR 447 (A); *Munhira* v *Phiri* S-52-84 and *Gollub* v *Trotter* HB 95-82 did not, in B substance, lay down any such proposition. If he was correct that the other cases which he referred to did lay down that proposition, I would venture to say that those cases, unless they were concerned with Order 30 of the Magistrates Court (Civil) Rules, were wrongly decided in so far as the situation under the High Court Rules is concerned, because they would not be in accord with the many cases I have referred to. I am of the view that the C test for rescission has always been that the applicant must establish good and sufficient cause. Those cases where it may have been suggested that wilful default alone was sufficient to refuse rescission were not against the established test. They were really a finding that because "wilful default" is an essential element for rescission, a failure to establish it meant, on the facts in issue, that D it was not possible to establish good and sufficient cause anyway. I have also said that in my view, even the Magistrates Court (Civil) Rules require that "good and sufficient cause" should be established for rescission to be granted, although for it to be refused the existence of wilful default will suffice. There is therefore no traditional or modern approach to speak about as set out by Mr *Biti* in his heads of argument. The test has always been, and E remains, that of establishing good and sufficient cause if an applicant is to be granted a rescission of a judgment entered against him in default. And that is the test which I will apply in this case. And I do not agree, as submitted by Mr *Biti,* that "the modern approach lays more emphasis on the defence than on the explanation for default". That is not my understanding of the *Deweras* case *supra (per* McNally JA). Each element of the test of good and sufficient F cause may be decisive on its own in any particular case but that does not mean that it becomes the only element or that the court has lost regard of the other elements of establishing good and sufficient cause.

The facts of the present case are as follows. A summons and later, in fact much later, a declaration was issued and served by the respondent on the G applicant. In that suit, the respondent claimed the payment of arrear rentals and service charges amounting to $755 237 in respect of the applicant's occupation on lease of certain premises known as Shop G1A, Stand 1829 Travel Plaza, Mazowe Street, Harare. The rental charges included an amount which the respondent had levied for the positioning of a container by the applicant on the said premises. The respondent also claimed for the H applicant's eviction from the premises and for interest at the rate of

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30 per cent *per annum* which had accrued on the arrears as well as for the A costs of suit.

The applicant entered an appearance to defend and, on three occasions, requested further particulars and further and better particulars. The summons had been issued on 7 September 2000 and the declaration was filed on 2 March 2001 after the three requests for particulars had been made. After it B filed its declaration, the respondent applied for summary judgment. Gowora J granted the following order in default:

> "1. That summary judgment be and is hereby entered against the respondent company in the sum of $755 237 together with interest thereon at the rate of 30 percent *per annum* from 31 July 2000, up to date of full payment. C
>
> 2. That the respondent and all persons claiming occupation through it shall vacate the premises known as Shop G1A on Stand 1819A Travel Plaza, 29 Mazowe Street, Harare, failing which the Deputy Sheriff is hereby authorised to within seven (7) days of service of this order take all the necessary steps to remove them from the D premises.
>
> 3. That the respondent company pays costs of suit."

Whilst the pleadings were being filed in this matter the parties entered into some discussions and written communication between themselves, without involving their legal practitioners. The discussions resulted in the applicant E paying off most of the money claimed by the respondent except for a sum in respect of the monthly charges for the container positioned at the respondent's premises, which it was agreed was to be further negotiated upon between the parties. When summary judgment was granted against the applicant because it did not oppose the application (and this is not in dispute), the respondent's monetary claim had been settled in that no F moneys were due to the respondent at that stage. But summary judgment was granted in respect of the whole claim made by the respondent in its summons and declaration, that is to say, judgment in default was entered for the payment by the applicant of $755 237 B plus interest at 30 per cent per annum from 31 July 2000 to the date of payment and costs of suit and G for the applicant's eviction from the premises.

The two elements of an application for rescission of judgment—wilful default and the existence of *bona fide* defence which has some prospect of success — are relied upon by the applicant in this application—to show that C there is a "good and sufficient cause" to rescind the judgment. I will deal with each element separately. H

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A **1. WILFUL DEFAULT**

The applicant averred that before the summary judgment application was made, it entered into discussions with the respondent's director, Barry Deacon. The applicant said that it did not believe that the respondent had any legal basis to take it to court. On 8 March 2001, the applicant sent a letter to the respondent in which it pointed out that the service charges were arbitrarily B levied and that the charges in respect of the container had not been agreed upon. Significantly, in that letter the applicant conceded that "services have fallen into arrears during our period of conflict and will be paid at the rate of $50 000 per month with effect from March 2001 in addition to the monthly service charges raised by your office of +/-$23 000".

C In respect of the container charges, the applicant complained that the charges at $20 000 were too high and arbitrary. It offered to pay $10 000 per month for the positioning of the container with effect from January 2001 and not retrospectively from the date of positioning the container or the date indicated in the respondent's letter of 1 November 2000. The offer in respect of the container charges was made on a without prejudice basis.

D The applicant averred that, as a result of the discussions which it believed had resolved all the issues in dispute, it instructed its legal practitioners not to pursue its defence of the application for summary judgment. It averred that Barry Deacon had assured it that there was no need for the matter to proceed to court as all the issues had been settled except for the container charges E which were to be negotiated between the parties. The applicant said that it insisted that Barry Deacon should confirm the results of the negotiation in writing. This, it said, resulted in a letter by the respondent dated 17 April 2001. The applicant said that by 1 April 2001, the charges for the container had been reduced to $10 000. It said that it believed that the matter had been finalised and that it was no longer necessary to pursue the summary F judgment application because, by its letter of 17 April, the respondent had acknowledged that all the arrears had been cleared and that therefore the rentals were up to date.

The applicant said that the summary judgment application was nonetheless proceeded with by the respondent, who then obtained judgment on 9 May 2001. The applicant's position is that, because it believed that the G matter had been settled, it cannot therefore be held to have wilfully defaulted in opposing the application for summary judgment.

The respondent averred that the discussions between the parties commenced just before the summary judgment application was lodged and that the subject matter of those discussions was how the applicant was to liquidate its H indebtedness to the respondent. It averred that on 2, 12, 15 and 17 April 2001

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the applicant paid various sums which cleared the arrears, except the arrears/ A amounts with respect to the container, which were to be the subject of separate negotiations. The several payments came to $600 000. The respondent sent a letter to the applicant on 17 April 2001 in which it stated:

> "This letter serves to advise you that following receipt today of $200 000 in payment for outstanding Rentals and Operating Costs due on B Shop G1A, these arrears are now settled to date. The ZESA bill as you are aware is due upon receipt of our monthly statement. Charges for the storage container are still outstanding and a settlement for this must be reached by Monday 23 April 2001."

The respondent said that this letter was not in response to the applicant's letter of 8 March but a response to the several payments which were effected by the C applicant and which had settled the arrears. It was to confirm the settlement of rental and service charges and to record that negotiations were to continue on container charges because the applicant had said they were too high. The respondent denied that it, or its Barry Deacon, gave the applicant any assurance other than that it would not pursue its monetary claim. It averred that the issue of interest and costs and eviction were not discussed at all and, D as far as the respondent was concerned, they remained live for pursuit in the litigation. In the respondent's view, the applicant was mistaken to instruct its legal practitioners not to defend the application for summary judgment because that application involved other matters which had not been discussed or agreed upon by the parties. E

The respondent averred that the applicant was wrong that the respondent had no legal basis for its claims in the summons and declaration or for that matter in the application for summary judgment. It averred that the applicant had been in arrears until he paid the sum of $600 000 in April 2001 and that it had remained liable to the respondent for costs, interest and for eviction after that payment. The respondent said that it had resolved to exercise its rights in F terms of clause 24(1) of the lease agreement which provided:

> "That in the event that the Lessee fails to pay the rent or any other sum of money due by it to the lessor on due date then without derogating from any other rights or remedies which the Lessor may have either in terms hereof or at common law, the Lessor may at its option cancel this G agreement without further notice to the Lessee and evict the Lessee from the leased premises forthwith."

It said that the claim for eviction did not fall away merely because the applicant had paid the arrears claimed in the summons and declaration. The respondent admitted that the applicant was not in wilful default on its monetary claim and the claim for the container charges as at the date of the H

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A judgment. The former had been satisfied by payment and the latter were still to be negotiated. It however, contended that the applicant was in wilful default in respect of the claim for eviction, costs and interests because no discussion or assurances had been given in respect of them.

"Wilful default" has been interpreted in several cases, among them *Songore, Shinga Express, Masendeke, Mvaami* and *du Preez* (all cited above). B In *Masendeke*'s case, McNally JA said at 402D:

> "Wilful default occurs where 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; *Simbi* C v *Simbi* S-164-90 at p 6; *Mdokwani* v *Shoniwa* 1992 (1) ZLR 269 (S) at 271."

The same interpretation was quite aptly stated in *Maujean t/a Audio Video Agencies* v *Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803H where King J said:

> "More specifically in the context of a default judgment 'wilful' connotes D deliberateness in the sense knowledge of the action and of its consequences, 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 *Kouligas & Spanoudis Properties (Pty) Ltd* v *Boland Bank Bpk* 1987 (2) SA 414 (O) at 417 E and authorities there cited. In other words, the additional element of perverseness or obstinacy is not required."

These authorities do not, in my view, include in the meaning of "wilful" a mistaken belief that the action may not require the applicant to defend the action. That belief must of course be genuine or *bona fide* and must be established as a matter of fact. So where a party, deliberately and with full F knowledge of the legal consequences of the default, refrains from defending the action because he genuinely believes that such defence is not called for, as where he believes that the respondent's

claim is either ill-founded in law or that he has discharged his obligation giving rise to the claim, his refraining from defending the action cannot be wilful within the meaning of the word "wilful" as given to it in the cases I have cited — see *Neuman supra* at 168G.

G In this case, it is quite clear that the respondent claimed payment of the arrears in respect of rent and service charges as well as the eviction of the respondent and interest and costs. The claim for eviction was predicated on the fact that the applicant was in arrears with respect to the rentals and the other charges. Clause 24(1) of the lease agreement which the respondent relied on for the H eviction claim predicated such a claim, not on the fact that the applicant was

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in arrears in respect of the rental or other charges, but on the cancellation of A the agreement of lease. In its summons and declaration, the respondent did not allege or aver that it had cancelled the lease agreement. It did not seek the cancellation of the lease agreement or confirmation that the lease agreement had been cancelled. That left the issue of eviction limply hanging onto, or dependent upon, the issue of the rentals and other charges being in arrears. B The respondent pleaded its case in a faulty manner with the result that, once the bedrock of the claim for eviction was removed or fell away, that claim could not remain alive. It could not stand on its own. Its substratum — the claim for rentals (and not cancellation of the lease agreement) — had been removed. Thus when the applicant instructed its legal practitioners not to defend the summary judgment application, it not only believed that there was C no longer any reason to do so, but it was also correct that the respondent no longer had a legal basis for seeking rescission of the judgment and in particular its eviction. Even if the applicant was mistaken in its belief, (which I find to be otherwise) it still could not be held to have been in wilful default because there was no legal basis for the respondent to proceed and obtain judgment either for the monetary claim or for eviction. To me, the dispute of D fact as to whether the discussions encompassed the issues of eviction, costs and interest would be irrelevant to my disposition of the matter, because even if those discussions had taken place and the respondent had not given any assurances relative thereto and the applicant could be adjudged to have been in wilful default, with the substratum of the claim for eviction having been E removed, the applicant must obtain the relief which it seeks in this application. But for what it is worth, it must be mentioned that the claim for the unpaid rentals having been settled there was no basis for the respondent to seek judgment. Eviction was available only if the plaintiff pleaded cancellation of the lease agreement. The only reason why judgment was obtained, and this is admitted by the respondent, is that the respondent failed to communicate F with its legal practitioners and advise them that no money was owing to it from the applicant. The evidence clearly establishes that the rentals for the shop for January 1999 and June and July 2000 had been paid by 14 July 2000, well before the summons was issued in September 2000. The evidence also shows that when the application for summary judgment was granted on 9 May 2001, there was no money due by the applicant to the respondent. This G was acknowledged by the respondent in its letter of 17 April 2001. The evidence also shows that the applicant was disputing the service/operating costs and the charges for the container. That was the reason that he refused to pay them. These charges (operating costs and charges of the container) were either not liquidated (as provided in clause 6 of the lease agreement for operating costs) or else no agreement had been reached in respect of the H

A container charges. It was unlikely that the respondent would have succeeded in its claim as framed. It had no proper foundation for it.

2. Defence on the merits

This brings me to a consideration of the other main element of "good and sufficient cause" — a *bona fide* defence which *prima facie* carries some B prospect of success. I have already dealt somewhat with the applicant's defence on the merits. The summons issued on 7 September claimed:

> "payment of a total sum of $755 237 being arrears for the month of January 1999 to 31 July 2000 in respect of shop G1A which is leased by the plaintiff to the defendant which amount is now due and payable."

C The cause of action was clearly one for arrear rentals for the period January 1999 to July 2000. The respondent's declaration which, as I have said, was only filed on 20 March 2001, some six months later, made the following claim:

"Payment of a total sum of made up as follows:.....$755 237
Arrear rental for March 1999.....$ 71 000
D Arrear rentals for June & July at $85 000 a month.....$170 000
Arrear charges for operating costs 1999 and 2000.....$333 837
9 months arrear charges for the container at $20 000.....$180 000
Total.....$755 237"

The causes of action in the summons and the declaration are different, but in E terms of r 115 of the Rules of this Court a claim made in the summons may be altered, modified or extended by a declaration and such summons shall be deemed to have been amended by such declaration. In this case, therefore, when the summary judgment application was heard the claim had been altered or modified by the declaration. Mr *Biti* raised the point that it is inappropriate to grant summary judgment in default where the summons and F declaration are different in their definition of the cause of action. I will return to deal with this point when I address generally the question when it is inappropriate to grant an application for summary judgment in default.

The applicant averred that at the time that summary judgment was granted it had paid whatever amount was owing by it to the respondent. Of the several G amounts claimed in the summons, the amounts in respect of the rentals for February and March 1999 had been paid (see Annexure "C" to opposing affidavit); the arrears for June and July 2000 had also been paid (see Annexure "D" to opposing affidavit); the operating costs for 1999 and 2000 were still outstanding but they were not sufficiently liquid to warrant the entering of judgment for a specific sum; the arrears in respect of the H container were not agreed upon because the agreement for the monthly

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charge was only reached subsequently. I shall not be detained by having to A make a finding as to whether or not the applicant had paid the amount claimed in the summons because the respondent admitted that the applicant had paid all the amounts due: In paragraphs 9 and 10 of the opposing affidavit, the respondent stated:

"9. Save to admit that the applicant was not in wilful default in respect B of the claim for $755 237 since part of it had been paid and the other part was still the subject of negotiations, it is disputed that the applicant was not in wilful default in respect of the other claims. No discussion was entered into in respect of them and no assurance was made that they would not be pursued.

10. It is admitted that the sum of $755 237 was made up as stated. It is C also admitted that the March rental was paid … It is admitted that at the time the declaration was filed, the June and July rental had been paid on 14 July 2001 as indicated by the applicant. However, this fact was regrettably not brought to the attention of our legal practitioners to enable them to abandon the claim for that amount and to pursue the claim for service charges, the container and D eviction only."

In paragraph 14 of the opposing affidavit, the applicant makes the concession that the judgment entered in default should be varied by omitting the amount in respect of the container "since same was settled and negotiated before the date of judgment only that respondent's legal practitioners were not made E aware of the settlement". It proceeded to state in the same paragraph that:

"… the order of interest, eviction and costs should remain intact as they were all properly sought and properly obtained. The applicant was in breach of clause 3.2 and clause 6 of the Lease Agreement by failing times without number to pay rentals in advance on or before the first day of F each month and by failing to pay its share of the operating costs as agreed. The respondent was rightly entitled to evict the applicant in terms of clause 24:1 of the Agreement."

The respondent has conceded that the court should rescind the judgment in respect of the entire monetary claim in the sum of $755 237 but not in respect of the claim for interest, costs and eviction. The justification it puts forward G for such a proposition is that the applicant was entitled to bring the dispute to court because of the applicant's refusal to pay the operating costs and because the sums in respect of rent and the container attracted interest charges for as long as they remained unpaid. So even if the applicant had paid the arrear rentals and the operating costs by the time judgment was entered, and even if it is admitted that a compromise was reached in respect of the H

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A container charges, the applicant remained liable to pay the costs and interest. The applicant's argument against the respondent's contention in respect of the operating costs was that those costs were not sufficiently liquid to found the claim. I am satisfied that the operating costs were not liquid enough to justify their payment. The respondent claimed payment from the applicant on the basis of estimated expenditure for the years 1999 and 2000. No actuals B were submitted to the applicant. In terms of clause 6.2 of the lease agreement, the applicant was required to pay monthly a share of the operating costs being 7.85 per cent of the overall operating costs for each month. These costs covered the costs of cleaning, maintenance, external maintenance, rates and taxes, common area, electricity and lighting, ablution upkeep, water supply, staff costs and security and other costs relating to the communal area. It seems C to me that in terms of this clause the applicant was entitled to receive from the respondent a bill reflecting his share of the operating costs. That kind of bill, it was admitted by the respondent, was not furnished until the applicant formally requested it by the letter of 8 March 2001. I am satisfied that for purposes of an application for rescission of judgment the applicant's defence D in respect of the operating costs has a reasonable prospect of success. The same goes for his defence in respect of the respondent's claim for the container charges — some agreement as to the appropriate charge (from $20 000 to $10 000 per month) was only reached after further negotiations. The amounts relating to these claims must therefore fall away at this stage because they are dependent on a finding that the claims for E operating costs and for the container were properly made.

What remains is the issue of eviction and any costs associated with it. It not in dispute that the respondent did not seek the cancellation of the lease agreement. The summons and the declaration do not make such a claim. I have already stated that the claim for eviction was predicated on the failure to pay the various sums making up the claim for $755 237. The claim for F eviction was not predicated on cancellation of the lease agreement. I have already said that once the foundation of the claim for eviction fell away, then it was not correct for the respondent to proceed to obtain judgment against the applicant, whether for the monetary claim or for eviction, interest and costs. It must be apparent that the respondent's case was badly pleaded from G the outset. A lessor who seeks eviction must allege a breach of the contract and that the contract was cancelled. *In casu*, the breach alleged is non-payment of certain amounts for rental and other charges. But those amounts were paid before judgment was obtained. The claim for eviction was not based, as required by clause 24:1 of the lease agreement, on cancellation of the lease agreement. A lessor must allege and prove his right to cancellation — H see *Goldberg* v *Buytendag Boerdery Beleggings (Edms) Bpk* 1980 (4)

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SA 775 (A) and *Ver Elst* v *Sabena Belgian World Airlines* 1983 (3) SA 637 (A) A . He must allege and prove cancellation — see *Brits* v *Coetzee* 1967 (3) SA 570 (T) and *Swart* v *Vosloo* 1965 (1) SA 100 (A). Without having cancelled the lease agreement as required by clause 24:1 thereof, I do not see how the respondent would be entitled to an eviction order. Clause 24:1 of the lease agreement excludes any implication that if the rental is in arrears, then B the respondent automatically becomes entitled to evict the applicant. The said clause 24:1 requires a cancellation of the lease agreement as a prerequisite for eviction. In my view, the applicant seems to have a defence to the plaintiff's claim which is *prima facie* valid and which has a good prospect of success at the trial.

Having considered the main elements of good and sufficient cause, as I have C done, I have no doubt at all that the relief sought by the applicant should be granted. It has established to my satisfaction that it has good and sufficient cause for rescission.

Before concluding this judgment, I think it is necessary to address the point raised by Mr *Biti* that summary judgment should not have been granted in default. I think that a judge before whom such an application is brought D must analyse very closely the pleadings filed of record. In this case, it was clear that the claim for the operating costs and for the container charges were not sufficiently liquid. The summons and the declaration, as well as the further particulars sought, should have alerted the court to the deficiencies in the respondent's application for summary judgment. The lease agreement E was attached to the application and clause 6 thereof should have alerted the court

to the need to ascertain whether or not the claim for operating costs was liquid enough to entitle the respondent to judgment. clause 24:1 of the lease agreement should also have alerted the court to the need to ascertain whether cancellation had been alleged and proved, which it had not. I think that even where an application for summary judgment is unopposed, the F court must scrutinise the pleadings to satisfy itself that such a judgment is warranted because Order 10 r 64(2) of the Rules of this court requires the applicant for summary judgment to swear positively to the facts set out in his founding affidavit and to verify the cause of action and the amount claimed. Although, in terms of r 234, a respondent who fails to file a notice of opposition and an opposing affidavit shall be barred, which means that G the matter becomes unopposed, I think that in an application for summary judgment which is not defended, the court has greater latitude to refuse judgment where the founding affidavit does not accord with r 64 of the Rules of this court. In my view, summary judgment must be refused, even when the application is not opposed, where the applicant does not verify the cause of action or the amount claimed. Any statement by the applicant that H

A he verifies the cause of action and the amount claimed should not be accepted at face value. It should accord with the pleadings filed of record. Returning to Mr *Biti*'s point about the summons and the declaration being different in their identification of the cause of action as a basis for refusing summary judgment in an undefended case, I think that that on its own is not correct. As I have already said, r 115 cures any defects that may exist in the to have amended the B summons. As such, therefore, there would be no merit in the argument by Mr *Biti*. I think that in this case summary judgment should not have been granted even though the application was not opposed.

In an application for rescission, the normal rule that costs follow the event C does not apply. The applicant, by his conduct, has put himself in a position where he has to seek the indulgence of the court. Therefore it is only right that he should bear the costs of the application. The fact that the respondent has opposed the application and his opposition has not been successful, does not automatically mean that he should pay the applicant's costs. Where the court has to establish whether there is good and sufficient cause to justify the grant D of the application, it is not unreasonable for the respondent to put forward its side of the case. In the *Masendeke* case *supra,* the judge in the court *a quo* had refused an application for rescission. The Supreme Court decided that he had been wrong to do so and set aside his order and substituted an order setting aside the default judgment and ordering that the applicant pay Masendeke's E costs on an opposed basis. At 403C, McNally JA said:

> "We were in no doubt that the appeal should succeed with costs, but we were in more difficulty about the costs of the application for rescission. We may have been over generous in allowing Mr Masendeke his costs. On the other hand, it is difficult to say that he should not have opposed the application when in the event the learned judge found his opposition F to be not only reasonable but compelling."

In this case, I feel that having regard to its conduct, the respondent should not have opposed the application. Therefore, I am satisfied that the applicant should be awarded its costs on an opposed basis. Had I not so found, then I would have either made no order as to costs or else ordered that the applicant G pay the costs.

In the result, I make the following order.

1. That the judgment entered against the applicant on 9 May 2001 in case HC 9690/2000A be and is hereby set aside.
2. That the applicant be and is hereby granted leave to defend the H respondent's claim in case HC 9690/2000A and shall file its Notice of

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Opposition and opposing affidavit within 10 days from the date of this A order.

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

Wilmot & Bennett, applicant's legal practitioners B

Tizirai-Chapwanya & Mabukwa, respondent's legal practitioners

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CENTRAL AFRICAN PROCESSED EXPORTS (PVT) LTD & ORS v MACDONALD & ORS 2002 (1) ZLR 399 (S)

Citation	2002 (1) ZLR 399 (S)
Case No	Judgment No. S-40-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	7 March 2002
Judgment	6 May 2002
Counsel	*A P de Bourbon* SC, for the appellants *J C Andersen* SC, for the first and second respondents *J B Colegrave*, for the third and fourth respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

D **Contract** — *option — right of first refusal — offeree exercising right by refusing to buy at price offered — right of first refusal thereby falling away*

Headnote

The appellant company, represented by the second appellant, leased a property with an option to renew the lease. There was no clause E giving the tenant the right of first refusal to purchase the property should the owner wish to sell it. Nonetheless, after the second appellant had been occupying the property for nearly two years, he wrote to confirm whether he had the right of first refusal, as he had been verbally told by the estate agents that he had such a right. A few months later, the owner, represented by the first respondent, put the F property on the market. The estate agent representing the owner wrote to the second appellant, giving him the right of first refusal once the highest offer for the property had been made. Another person made a higher offer which the second appellant was not willing to match. He said that he did not want to increase the amount of his offer. He did, G however, exercise the option to renew the lease and the other person subsequently withdrew his offer to buy. The second appellant then offered to buy the property, but the first respondent said he had withdrawn it from the market.

Later, the property was put back on the market again. After several prospective buyers had visited the house (which was still occupied by H the second appellant, who did not tell any of them that the house had

Malaba JA

already been sold), the third and fourth respondents bought it. The A second appellant sought to interdict the first and second respondents from transferring the property, pending determination of proceedings to have the property transferred to him on payment of the price he had offered. The High Court discharged the provisional order, and the appellants appealed.

Held, that by declining to buy the property at the higher price offered by the B other buyer, the second appellant had exercised his right of first refusal. Once he had exercised his right, it fell away. The owner was not obliged to keep the offer open and was no longer bound by any right of first refusal in favour of the second appellant.

Cases cited C

Crossroad Properties (Pvt) Ltd v A1 *Taxi Svc Co (Pvt) Ltd* 1954 SR 152; 1954 (4) SA 514 (SR)

Sawyer v Chioza & Ors 1999 (1) ZLR 203 (H)

Soteriou v Retco Poyntons (Pty) Ltd 1985 (2) SA 922 (A)

Case information

A P de Bourbon SC, for the appellants D

J C Andersen SC, for the first and second respondents

J B Colegrave, for the third and fourth respondents

Judgment

MALABA JA: On 5 May 1999, the third and fourth respondents entered into an agreement of sale with the first respondent, in terms of which they bought E Stand number 65 Crowhill Road, Borrowdale, Harare, for $2 million. The first respondent acted on behalf of the second respondent, the owner of the property. The third and fourth respondents had paid the full purchase price and transfer fees when, on 27 September 1999, the first and second appellants obtained from the High Court a provisional order interdicting the first and second respondents, jointly and severally, from transferring or in F any way encumbering the property pending determination of proceedings to be instituted against them by the appellants claiming the transfer of the property. On 24 November 2000, the High Court discharged the provisional order with costs. This appeal is against that judgment.

The essential facts of the case are as follows. The second and third G appellants are husband and wife. So are the third and fourth respondents. The second appellant is the director of the first appellant (hereinafter referred to as "Central African"). I will refer to the second and third appellants as "Mr Gullan" and "Mrs Gullan" respectively. The first respondent ("Mr MacDonald") is the second respondent's son. They both resided in England and were represented in the agreement of sale with the H

Malaba JA

A third and fourth respondents by the estate agent, Tony Baker & Co ("the estate agent").

On 1 July 1994, Central African, represented by Mr Gullan, leased Stand number 65 Crowhill Road, Borrowdale, ("the property") from the second respondent, through the estate agent, for a period of six months with an option B to renew the lease. The written lease did not contain a clause granting Central African a right of first refusal to purchase the property should the owner decide to sell it.

On 15 February 1996, Mr Gullan wrote to the estate agent enquiring whether such a right existed. The letter, which was addressed to Mr P Scallan, reads:

> "We told Mr Holmes and others of your staff, on numerous occasions in C the past, that we would be interested in buying the property if the landlord were to consider selling it. We were told that we 'would have the first option to buy it'. The lease makes no mention of this option. Is it in fact a right of first refusal and does it operate by law? If yes, on what terms? For example, is there a time limit after which the right becomes D inoperative? We should be grateful if you would let us have full details."

Mr Gullan admitted in the founding affidavit that he did not receive a reply to the letter.

In July 1996, Mr MacDonald put the property on the market. A price of $1.35 million had been suggested by the estate agent but his legal practitioner advised that a second valuation be done.

E In the meantime, Mr Gullan went to England where he met with Mr MacDonald. He expressed interest in purchasing the property for $1.15 million. The offer was rejected. Mr Gullan alleged that he increased the price at which he offered to purchase the property to $1.15 million plus £5 000. The balance of £5 000 was to be obtained from his employer. F He said Mr MacDonald accepted the offer and an agreement of sale was reached on condition he obtained the loan of £5 000 from his employer. It was Mr Gullan's averment that his employer agreed to give him the money. He said on his return to Zimbabwe he communicated the news to Mr MacDonald's secretary.

G Mr MacDonald denied that he reached an agreement of sale of the property with Mr Gullan. A few days after his meeting with Mr Gullan, he instructed the estate agent to sell the property for $1.6 million. A second valuation of the property had been done. Mr MacDonald's secretary denied that she received a telephone call from Mr Gullan to the effect that the latter had been offered a loan of £5 000 by his employer towards the purchase of the H property.

Malaba JA

Mr MacDonald, however, instructed the estate agent to give Mr Gullan an A option to purchase the property at a price of £100 000. On 6 November 1996, one Rozalind Baker ("Roz Baker") wrote to Mr Gullan on behalf of the estate agent as follows:

> "I have validated that you have a first refusal once the highest offer was formally made." B

On 18 November 1996, Roz Baker told Mr Gullan over the telephone that a third party had made an offer to purchase the property for $1.6 million. She offered the property to him at that price. The following day Mr Gullan wrote to the estate agent, saying:

> "With reference to our telephone conversation yesterday morning, during which you advised that another party had tabled a higher offer for the C purchase of the house, please be advised that we do not wish to increase the amount of our offer."

On 29 November 1996, the estate agent advised Mr Gullan that the seller was keen to conclude an agreement of sale with a third party as he had refused the offer to purchase the house. He was asked to state when his family would D vacate the property.

On 6 December 1996, Mr Gullan wrote back to the estate agent, drawing the attention of its officials to the fact that his family had an option to renew the lease and that they intended to exercise that right. The intended sale to the third party fell through because of the disclosure by Mr Gullan of the intention to exercise the option to renew the lease when it expired on E 31 December 1996.

On 25 February 1997, Mr Gullan made an offer to purchase the property for $1.45 million. He was advised by the estate agent on 25 March 1997 that the owner had decided to withdraw the property from the market. He went on to renew the lease for another period of six months. F

When negotiating the terms of the new lease, Mr Gullan asked to have a clause included in the written lease granting the first appellant a right of first refusal to purchase the property in the event that the lessor decided to sell the property to a third person. In a fax message dated 16 July 1997, Mr MacDonald made it clear that the lessor did not want to grant the first appellant a right of first refusal. He said: G

> "… the tenant does not have any right of first refusal to purchase the property or to match any such offer made to us by a third party. As such there is no need to amend clause 30."

Mr MacDonald, in the company of Mr Coventry from the estate agent, visited the property on 13 April 1999. He told Mr Gullan that the property H

Malaba JA

A was to be put on the market again. The visit was followed by a letter dated 14 April 1999, confirming the decision to sell the property. Mr Gullan was advised to contact the estate agent if he was interested in purchasing the property. He did not remind Mr MacDonald that they had entered into an agreement of sale; nor did he protest against the decision to put the property on the market. Mr Coventry said he took fifteen prospective B purchasers to view the property after his visit to the house with Mr MacDonald. Each time he went to the house Mr Gullan or his wife was at home.

Neither of them mentioned to him that an agreement of sale had been reached between Mr Gullan and Mr MacDonald in respect of the property.

C The first question to decide is whether or not the learned judge was correct in holding that the appellants had failed to show a prima facie right of first refusal.

In *Soteriou* v *Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 932B-G, Nicholas JA said:

> "A right of first refusal is well known in our law. In the context of sale, D it is usually called a right of pre-emption. The grantor of such a right cannot be compelled to sell the property concerned. But if he does sell, he is obliged to give the grantee the preference of purchasing, and consequently he is prevented from selling to a third person without giving the first refusal. (See *Van Pletsen* v *Henning* 1913 AD 82 at 95; *Owsianick* v *African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 E (A) at 321F). So, a right of pre-emption involves a negative contract not to sell the property to a third person without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies …
>
> F 'Refusal' imports an offer. As Farwell J said in *Manchester Ship Canal Co* v *Manchester Racecourse Co* [1900] 2 Ch 352 at 364:
>
> 'Now, a refusal, to my mind, implies an offer. A thing is not in ordinary parlance refused before it is offered'."

The facts show that no right of first refusal was granted to Central African by G the owner of the property in any of the numerous written leases the parties entered into.

I am prepared, in the circumstances of this case, to accept that the letter from Roz Baker to Mr Gullan dated 6 November 1996 granted him a right of first refusal and an offer to exercise that right. Mr Gullan exercised the right by refusing to purchase the property at the price of $1.6 million which the seller H was prepared to accept from a third person.

2002 (1) ZLR p404

Malaba JA

The offer of first refusal could not remain open after it had been refused. The A right fell away. In *Crossroads Properties (Pvt) Ltd* v *A1 Taxi Service Co (Pvt) Ltd* 1954 SR 152; 1954 (4) SA 514 (SR), Stand 2346, Salisbury, was on 2 February 1950 leased to the respondent by its owners, Patel & Co. The lease agreement contained a right of first refusal granted to the respondent by the owners of the leased property. In March 1952, Patel & Co received an offer B of purchase which was duly communicated to the respondent. The respondent was asked to indicate whether it accepted the offer to purchase the property at the price offered by the applicant. To the letter of offer dated 29 March 1952, the respondent had replied:

> "We thank you for offering us the first option to purchase Stand 2346 Salisbury. We wish to inform you that this company is not interested in C I agree with Mr *Oshry*, for the applicant, that having rejected the March the purchase of the above Stand."

The question for the decision of the court was whether the seller was obliged to keep the offer open to the respondent to purchase the property after it had refused the offer to purchase the property at the price offered by a third person. Quènet J at 516B said:

> "I agree with Mr *Oshry*, for the applicant, that having rejected the March D offer the respondent was not entitled to be kept advised of every subsequent offer received by Patel and Company. As I read clause 4, it means that once an offer has been submitted and has been refused, the lessors were at liberty to sell to 'whomsoever' they pleased."

The learned authors of *Norman's Purchase and Sale in South Africa* 4 ed at E 98 support the view that the grantor of a right of first refusal is not bound to keep on offering the property to the grantee if he refuses to purchase "because on refusal by the grantee, the grantor could immediately sell and even if he does not do so, the grantee's right must fall away". See also *Sawyer* v *Chioza & Ors* 1999 (1) ZLR 203 (H) at 208C-E.

It must follow from the falling away of the right of first refusal exercised by F Mr Gullan on 19 November 1996 that, at the time Mr MacDonald entered into the agreement of sale with the third and fourth respondents in respect of the property, he was not bound by a right of first refusal in favour of any of the appellants. The learned judge was correct in holding that the appellants had failed to show a *prima facie* right of first refusal to justify confirmation of the G provisional order granted to them.

The second question for determination is whether or not the learned judge erred in holding that the appellants had also failed to show a *prima facie* right of purchase of the property in Mr Gullan.

If there was an agreement of sale reached between Mr Gullan and Mr MacDonald in August 1996 in respect of the property, the former could H

2002 (1) ZLR p405

Malaba JA

A not on 19 November 1996 have talked about an offer he was not prepared to increase to match the offer made by a third person to purchase the same property.

It would have been clear to Mr Gullan at the time that Mr MacDonald was offering the property for sale to a third person. The sale to the third party fell through, not because Mr Gullan protested against the sale of the property on B the ground that he had purchased it. The third party withdrew from the sale because Mr Gullan and his family refused to vacate the property on the ground that Central African had an option to renew the written lease, which option it intended to exercise. If Mr Gullan had a right of purchase he would have asserted it against Mr MacDonald.

C In the letter of 6 December 1996, Mr Gullan indicated that he had accepted the decision by Mr MacDonald to sell the property to a third party. That was a clear statement of the acceptance by him of the fact that he did not have a right of purchase based on an agreement of sale. As late as 25 February 1997, Mr Gullan was making an offer to purchase the property for $1.45 million. As a businessman he would have known that an offer was an invitation to the D other party to contract. The offer could be rejected.

The withdrawal of the property from the market by Mr MacDonald on 25 March 1997 shows that he enjoyed the seller's rights over it. When Mr MacDonald told Mr Gullan on 13 April 1999 that he had decided to put the property on the market, the latter accepted the decision without demur. E There was no protest based upon the alleged agreement of sale. Mr Gullan agreed, instead, to let prospective purchasers view the property. True to his word, Mr Gullan allowed fifteen prospective purchasers, including the third and fourth respondents, into the house to view it. The prospective purchasers were not told by Mr Gullan or his wife, one of whom was on the premises, that the property had been bought. It would have become apparent to F MrGullan or his wife that one of the prospective purchasers could make an acceptable offer to purchase the property.

The absence of an agreement of sale between Mr MacDonald and Mr Gullan, at the time the third and fourth respondents bought the property, was confirmed by the willingness on the part of Mr Gullan to enter into new G written leases on behalf of Central African after August 1996. No explanation was given for the decision to continue to occupy the property as a tenant if Mr Gullan was a *bona fide* purchaser. It is hard to believe that for a period of two-and-a-half years Mr Gullan failed to see the need to assert the rights of a purchaser against Mr MacDonald. I agree with Mr *Andersen* that Mr Gullan's conduct after August 1996 was not that of a person who believed he had a H right of purchase in respect of the property.

2002 (1) ZLR p406

Malaba JA

Mr *de Bourbon* properly conceded that he was unable to advance any A argument against the submission by Mr *Colegrave* that the agreement of sale would, in any case, have prescribed by the time the appellants made the application for the provisional order interdicting the first and second respondents from transferring the property to the third and fourth respondents. As I hold the view that no agreement of sale was reached between B Mr MacDonald and Mr Gullan in August 1996, it is not necessary to consider the question of prescription in detail.

It is also not necessary to consider the legal effect of the defence raised by the third and fourth respondents that they are *bona fide* purchasers for value without notice.

The appeal is accordingly dismissed with costs. C

SANDURA JA AND CHEDA JA concurred.

Atherstone & Cook, appellants' legal practitioners D

Wintertons, first and second respondents' legal practitioners

Coghlan, Welsh & Guest, third and fourth respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/TODD v REGISTRAR-GENERAL OF CITIZENSHIP & ANOR 2002 (1) ZLR 407 (H)

TODD v REGISTRAR-GENERAL OF CITIZENSHIP & ANOR 2002 (1) ZLR 407 (H)

Citation	2002 (1) ZLR 407 (H)
Case No	Judgment No. HH-76-02
Court	High Court, Harare
Judge	Mungwira J
Heard	7 May 2002
Judgment	7 May 2002
Counsel	*B Elliot*, for the applicant *N Mutsonziwa*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

D **Constitutional law** — *citizenship — prohibition of dual citizenship — renunciation of foreign citizenship — whether Zimbabwean citizen who is entitled to foreign citizenship required to renounce such entitlement — onus of proof that Zimbabwean citizen holds foreign citizenship*

Headnote

The applicant was a Zimbabwean citizen by birth whose parents had come E to this country from New Zealand. The first respondent refused to renew her Zimbabwean passport on the ground that she had yet to renounce her New Zealand citizenship in terms of s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], which required Zimbabwean citizens who were also citizens of a foreign country to renounce their foreign citizenship effectively in accordance with the law of that foreign F country before 6 January 2003, failing which they would lose their Zimbabwean citizenship. The applicant countered by saying that though she had a claim to New Zealand citizenship through her parents she had never been a citizen of that country, and that s 9(7) of the Act did not require her to renounce a mere claim to foreign citizenship. She applied G to the High Court for a declaration that she was a Zimbabwean citizen.

Held that under s 9(7) of the Citizenship of Zimbabwe Act, only persons who actually hold foreign citizenship are obliged to renounce that citizenship; the section is not concerned with a mere entitlement or claim to foreign citizenship (*Tsvangirai* v *Registrar-General & Ors* HH-29-02, followed).

H *Semble* that s 9(7) of the Act does not oblige a Zimbabwean citizen to prove

Mungwira J

that he or she does not hold foreign citizenship; the onus of proving that A he or she does so is on the person alleging it.

Cases cited

Chirwa v Registrar-General 1993 (1) ZLR 1 (H)

Registrar-General v Chirwa 1993 (1) ZLR 291 (S) B

Tsvangirai v Registrar-General & Ors HH-29-02

Legislation considered

Citizenship of Zimbabwe Act [*Chapter 4:01*], s 9(7)

Case information

B Elliot, for the applicant C

N Mutsonziwa, for the respondents

Judgment

MUNGWIRA J: The applicant has been prompted into instituting the present proceedings by the refusal of the first respondent to renew her Zimbabwean passport, which has expired. The reason tendered for such refusal is that she has a claim to New Zealand citizenship as both her parents were born in New D Zealand.

The applicant in her papers challenges the respondents' requirement that she first make under oath a declaration renouncing foreign citizenship as a prerequisite to her obtaining her citizenship of this country, which will in turn entitle her to renew her passport. E

The applicant submits that in her belief she is not a citizen of any country other than Zimbabwe and that although she may have a claim to foreign citizenship because her parents were born in New Zealand, s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*] does not require her to renounce that claim. She further avers that the wording of paras 4-6 of the Form of Declaration of Renunciation of Foreign Citizenship contained in the F Schedule to the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations, 2001 (SI 217 of 2001) is such that if she complies therewith she will be deposing to a lie.

In the applicant's words, the requirement that she sign the form is demeaning and such act compromises her status as a citizen of Zimbabwe and flies in the G face of her constitutional rights. She concludes by stating that to her understanding the effect of the interpretation of s 9(7) of the Citizenship Act adopted by the first respondent is that if she did not by 6 January 2002 renounce her claim to New Zealand citizenship, she would lose her Zimbabwe citizenship.

The applicant therefore, seeks a declaratory order pertaining to her status as H

Mungwira J

A a Zimbabwe citizen and, in addition, that the first respondent be ordered to renew her passport. Although the notice of opposition reflects that the Civil Division of the Attorney-General's Office was acting on behalf of both respondents, * * only an affidavit deposed to by the first respondent was filed.

In the opposing affidavit, the first respondent agrees that the applicant is a citizen of Zimbabwe. The essence of the opposition is that applicant does not B need to apply for citizenship of New Zealand as she acquired such citizenship at birth by descent, she being born of a New Zealand father and mother. According to the first respondent, the applicant automatically qualifies "for benefits of New Zealand by virtue of descendance".

In support of this argument, reliance is placed on a copy of an extract from C the passport document of one Speedy, who is said to be an individual who was born in New Zealand in 1946 and who

acquired Zimbabwean citizenship and enjoyed the benefits thereof until December 2001, when he was issued with a New Zealand passport whilst he was still the holder of a valid Zimbabwe passport, as did his daughter who was born in Zimbabwe.

The first respondent avers that it is not his duty to prove that an individual is D not a citizen of a foreign country, and that it is incumbent upon the individual to obtain confirmation of no claim to citizenship of the foreign country. This view, he states, is supported by the requirement in the Citizenship of Zimbabwe Amendment Act, 2001 (No. 12 of 2001) that there be renunciation of foreign citizenship of the foreign land. In his opinion, the applicant is E required to make the declaration on the strength of the documentary evidence obtained from New Zealand Authorities. According to the first respondent, in acting as he has done in the present case, he is merely implementing the provisions of the Citizenship Act and is as such acting lawfully. In as far as he is concerned, it is for the applicant to comply with the requirements of the Act by regularising her citizenship status.

F The applicant, in her answering papers, persists in her assertion that she is a citizen of Zimbabwe and that she does not fall into the category of persons who are required to undergo the renunciation exercise. I note in passing that first respondent appears to be somewhat confused in his affidavit as he in one breath states that the applicant automatically acquired New Zealand citizenship G by birth and in the next breath he talks of applicant's claim or entitlement to New Zealand citizenship. This he says whilst confessing to his not being competent to dispute the provisions of the foreign law.

In the intervening period between the date of the filing of this application and the date of hearing was handed down, the judgment of my learned brother,

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Mungwira J

Adam J in *Tsvangirai v Registrar-General & Ors* HH-29-02. In that A judgment, the learned judge addressed extensively similar issues to those which are raised in the present application. It is common cause that only a portion of his judgment was appealed against but that his determination of issues relevant to this application was not made the subject of the appeal. In light of that judgment, it is not necessary for me to revisit the issue. B

At p 46 of the cyclostyled judgment, the learned judge states:

> "It is apparent that the specific wording in section 9, in its subsections (3), (4), (5) by deliberately using 'acquires' and in its subsections (6) and (7) by deliberately using 'becomes', demonstrates that the clear intention of the legislature is to prevent a citizen of Zimbabwe having another citizenship. C It is the 'acquisition' and 'becoming' of a foreign citizenship that is required to be renounced so as to retain one's citizenship of Zimbabwe. These provisions in subsections (3), (4), (5), (6) and (7) are not concerned with any entitlement or claim to foreign citizenship."

He goes on to say at p 50:

> "It appears that, without any basis whatsoever, the first respondent made it a presumption that citizens of Zimbabwe by birth born to foreign-born D parents, are foreign citizens or have an entitlement or claim to foreign citizenship. None of the countries in his examples grant automatic citizenship to children born abroad to foreign-born parents. The adage that a little knowledge is dangerous is appropriate here. In terms of s 25(2) of the Civil Evidence Act only a person who in the opinion of the court is suitably qualified shall be qualified to give expert evidence on E foreign law. It would seem that the rule in most countries is against dual citizenship. The first respondent if he has been demanding from Zimbabwe-born citizens, one or both of whose parents were born in a foreign country that they renounce their foreign citizenship, then he is flagrantly acting *ultra vires* s 3(2) of the Citizenship of Zimbabwe Act. His conduct would certainly be unlawful. The first respondent, a mere F public functionary, seems to have arrogantly and unashamedly arrogated to himself the functions of the legislature and the powers of the judiciary. Section 21 of the Citizenship of Zimbabwe Act sets out that the use of a current Zimbabwean passport or a current foreign passport contrary to its provisions is an offence. It is for the police and the Attorney-General to determine whether or not a person has committed an offence in terms G of s 21. The attitude of the first respondent shows that he has taken it upon himself to require Zimbabwean-born citizens of foreign born parents to renounce their foreign citizenship, as if they have been committing an offence under section 21. In his capacity as Registrar-General, it is not his responsibility to grant citizenship under the Citizenship of Zimbabwe Act. The Act falls under the administration of the Minister of Home Affairs. Section 11 empowers that Minister with the discretion to deprive H

Mungwira J

A a citizen of Zimbabwe by registration of his citizenship, and s 9(9) also gives him a discretion relating to certain rights of those citizens of Zimbabwe that ceased to be citizens."

Adam J in that judgment made the following declaration:

"that the provisions of s 9(7) of the Act do not apply to citizens of Zimbabwe by birth in terms of s 4 or 5 of the Constitution of Zimbabwe B either of whose parents were born in a foreign country except to the extent that any such citizen of Zimbabwe actually holds a foreign citizenship."

The applicant in this case has averred that she does not hold foreign citizenship and that has not been disproved.

C Mr *Mutsonziwa* initially attempted to introduce an extract of s 16 of the Citizenship of New Zealand Act but later accepted that no weight could be attached to this submission in the absence of expert evidence. When confronted with the judgment of Adam J he conceded that he was unable to make any meaningful submissions to counter the learned judge's line of reasoning. He in short accepted that the grounds of opposition advanced are not D sustainable and that the applicant is in the circumstances entitled to a grant of the order which she seeks.

From the papers before me and based on the authority of the Tsvangirai judgment (*supra*) and in the absence of evidence to the contrary, it would appear that the applicant is a citizen of Zimbabwe and that the first respondent E cannot on the grounds set out in his opposing affidavit refuse to issue her with a Zimbabwe passport: *Chirwa v Registrar-General* 1993 (1) ZLR 1 (H) and 1993 (1) ZLR 291 (S).

In the result, it is declared that:

1. The applicant is a citizen of Zimbabwe.

F Accordingly, it is ordered that:

1. The first respondent shall renew the applicant's passport within 14 days of the submission of an application by the applicant for such renewal.
2. The first respondent shall pay the costs of this application.

G *Gill, Godlonton & Gerrans*, applicant's legal practitioners

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

* The second respondent was the Minister of Home Affairs. — *Editor*.

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Source:
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RIVA v NATIONAL SOCIAL SECURITY AUTHORITY 2002 (1) ZLR 412 (H)

Citation	2002 (1) ZLR 412 (H)
Case No	Judgment No. HH-68-02
Court	High Court, Harare
Judge	Blackie J
Heard	6 November 2001

Judgment 8 May 2002

Counsel *L T Biti*, for the applicant
D M Foroma, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Employment — *contract — termination — resignation — effect — a unilateral act, requiring neither acceptance nor rejection by the employer — notice* D *of resignation — interpretation of — letter stating employee wished to resign — not an offer to do so*

Headnote

After disciplinary proceedings were started against him by the respondent, his employer, the applicant wrote to the respondent, stating that "as per his contract", he wished to give three months' notice to terminate his E employment and to make use of the benefits normally due on resignation. Ten days later, he wrote to say that as he had received no confirmation of his letter, he was retracting his notice of resignation. The respondent wrote at the same time agreeing that he be allowed to terminate his services by resignation. The applicant claimed that his letter was not a F formal act of resignation, but an offer which could be accepted or rejected by the respondent.

Held, that the giving of notice is a unilateral act, which requires no acceptance or rejection by the party receiving the notice. That party is not entitled to refuse to accept such notice and decline to act on it. Notice, once given, is final and can only be withdrawn with the consent G of the employer. The applicant's letter was not expressed as an offer but as a statement, and as such his resignation could not be withdrawn except with the respondent's consent.

Cases cited H

Blackie J

A *Muzengi v Standard Chartered Bank & Anor* 2000 (2) ZLR 137 (H)

Rustenburg Town Council v Min of Labour & Ors 1942 TPD 220

Case information

L T Biti, for the applicant

D M Foroma, for the respondent

Judgment

B **BLACKIE J:** The respondent (NSSA) employed the applicant (Riva) as an assistant general manager. In what he says was "a moment of weakness", Riva wrote and sent a letter to NSSA tendering his resignation. In this application, Riva seeks an order declaring that the letter of resignation be of no legal effect and that he is still employed by NSSA.

C The background and facts of this case are as follows. NSSA suspended Riva, alleging misconduct by him, and started disciplinary proceedings against him. A committee was established to hear the allegations against him. After the disciplinary committee had heard the evidence but before it had given its decision, Riva wrote and sent his letter of resignation.

The dispute in this case revolves, in particular, around Riva's letter of D resignation and the correspondence that followed between the parties arising from that letter.

Riva's letter of resignation stated that, "I wish to give three months notice to terminate my employment with NSSA as per my contract. I wish to buy the car, cell phone and cell line as per my contract". NSSA did not immediately reply E to Riva's letter. On 22February 2001, ten days after the letter of resignation had been sent, Riva and NSSA wrote letters to each other. Riva's letter said, "I have not received confirmation of (my letter of resignation) to yourselves, I accordingly retract my letter of notice to resign with immediate effect". NSSA wrote saying, "on a purely without prejudice basis, the Authority has considered and agreed to allow you to terminate your services by resignation. The F Authority accepts that your services be terminated immediately and that you be paid in lieu of notice …". Thereafter, it set out the benefits to which it said Riva was entitled on resignation. Riva did not agree with the contents of the letter sent to him by NSSA. He replied thereto saying, "Your conditions of accepting my offer of resignation are in complete violation of my contract and G are accordingly unacceptable. In any event, as you may be aware by now, I had already retracted my resignation offer". Finally, on 29March 2001, NSSA wrote to Riva saying, "We refer to your letter concerning the terms on which the Board had offered to accept your resignation. You have not to date accepted the conditions on which your resignation was accepted. In the circumstances, you are given until 4 p.m. on Tuesday 13 April 2001 to H communicate your position after which the Board's offer shall be deemed to

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be withdrawn. In that event, we shall immediately serve on you the A determination of the disciplinary committee on the charges of misconduct".

It is common cause between the parties that "the giving of notice is a unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. It seems to me to follow that notice once B given is final and cannot be withdrawn except obviously with consent …" *Rustenburg Town Council* v *Minister of Labour & Ors* 1942 TPD 220 at 224; *Muzengi* v *Standard Chartered Bank & Anor* 2000 (2) ZLR 137 (H)*

Riva, however, submits that the principle set out in the *Rustenburg* case *supra* is not an absolute one and may be qualified. It can be subject to certain distinctions and exceptions. In particular, it can be modified by the facts of C the case, the manner in which the resignation is framed and the subsequent behaviour of the parties.

Riva says that his letter of resignation was not a formal act of resignation, but an offer to resign which was open to acceptance or rejection by NSSA. Further, that he had withdrawn that offer before NSSA purported to accept D it. In addition, and in any event, NSSA's reply to his offer of resignation was not an acceptance of his resignation but a conditional offer to him, which in law is a counter offer, and which he, in turn, has rejected. Finally, he submits that, even if his resignation was formal and final resignation in the sense set out in the *Rustenburg* case *supra*, NSSA has subsequently given its consent to the withdrawal of his notice of resignation. E

NSSA disputes the existence and legal validity of the exceptions and distinctions to the *Rustenburg* case *supra* which Riva claims. It also disputes the factual basis on which Riva submits those distinctions apply to his case.

It is not necessary in this case to decide whether the principle set out in the *Rustenburg* case *supra* is too narrowly expressed to deal with all cases F involving resignation and whether the factors mentioned by Riva in his submission may be taken into account in determining the true intention and relationship of the parties on resignation. This is a case in which the principle set out in the *Rustenburg* case *supra* applies.

Riva relies on the wording of the letter — "I wish to give three months notice G …" — to show that this was an offer and not a statement of intention. To express a wish, he says, is not to express an intention. It is merely an expression of desire. It does not make or break any legal obligation or relationship.

A Riva's letter of resignation is not expressed as an offer but as a statement. Riva himself refers to it as "my notice of intention to resign" in his letter to NSSA of 22 February 2001. Furthermore, he

invokes the right given to him in his contract to resign. He claims the benefits that he considers due to him in terms of his contract on resignation. Having expressed and communicated that intention, the principle set out in the *Rustenburg* case *supra* comes into B effect.

Riva also relies on the subsequent correspondence between himself and NSSA to show that he intended his letter of resignation to be an offer and that NSSA interpreted it, and treated it, as such. That correspondence does not affect the issue. The letter of 22 February from NSSA to Riva is expressed C as being on "a purely without prejudice basis". As such, it cannot form the basis for any legal claim by Riva. The letter of 29March 2001 does not purport to support his claim to a right of withdrawal from his letter of resignation. Riva relies heavily on three passages in that letter. These passages are, in sequence, "you have not accepted the conditions on which your resignation was accepted", "after which the Board's offer shall D be deemed to have been withdrawn" and "In that event, we shall immediately serve on you the determination of the disciplinary committee on the charges of misconduct". The letter as a whole, and the particular passages to which Riva refers, all relate to the without prejudice offer made in the letter of 22February and again do not affect the issue.

E In addition to the remarks already made concerning the wording of the letters between the parties, there is a distinction to be drawn between the fact of the resignation itself and the terms on which Riva is to depart. Until the letter of 29March, NSSA did not dispute Riva's right to terminate his services by way of resignation. The only points at issue between Riva and NSSA were when he was to depart and the terms on which he would go. Although the parties F loosely use the terms "offer", "acceptance" and "withdrawal", it is clear that, except for Riva's letter to NSSA dated 22 February, where he talks about withdrawing his resignation, what was being discussed was the terms of that resignation.

Accordingly, Riva's letter of resignation could not be withdrawn without the consent of NSSA.

G Riva submits, as an alternative argument, that NSSA has by correspondence and by conduct consented to the withdrawal of his notice of resignation. Again, he relies, in particular, on NSSA's letter of 29March. In that letter, so Riva says, NSSA "agreed to view the resignation as withdrawn if the applicant had not communicated his position". That interpretation of the H letter of 29March does not accord with the actual wording of the letter. What

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was being withdrawn was the offer of the conditions which would flow from A Riva's resignation.

On the findings already made in this judgment, the only way that Riva could withdraw his resignation was with the consent of NSSA. NSSA has not given that consent. Accordingly, the application is dismissed with costs. B

Honey & Blanckenberg, applicant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

* Confirmed on appeal: see *Muzengi v Standard Chartered Bank ante* p 334 — *Editor*.

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EASTERN HIGHLANDS ELECTRICAL (PVT) LTD v GIBSON INVESTMENTS (PVT) LTD 2002 (1) ZLR 417 (S)

Citation	2002 (1) ZLR 417 (S)
Case No	Judgment No. S-26-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ebrahim JA & Ziyambi JA
Heard	26 February 2002
Judgment	9 May 2002
Counsel	*R M Fitches*, for the appellant *G S Wernberg*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

D **Appeal** — *court's powers on appeal — Supreme Court's wide powers in civil appeal — making order which lower court should have made and remitting matter for further hearing*

Practice and procedure — *admission — withdrawal of — when admission may be withdrawn — admission made by mistake and contrary to facts — such admission may be withdrawn*

Headnote

E The appellant company had brought an action against the respondent demanding payment for work done. The respondent disputed that the work had been done as required, and counter-claimed for for money it said had been spent on what was essentially repairing damage caused by and cleaning up after work done by the appellant. During the course of F evidence, it emerged that the appellant should not have been the plaintiff; another company should have. The confusion arose because the individual with whom the respondent dealt with was the same person throughout. He was, at the time of contract, managing director of the other company, which was trading under the name of Eastern G Highlands Electrical. It was only much later that the appellant company was incorporated. The appellant applied to withdraw the admission made in the pleadings that it was the plaintiff, and to have the correct company joined or substituted. The application was opposed on the grounds that the appellant was estopped from doing so and that no good reason had been shown for withdrawing the admission. The respondent H suggested joinder of the other company instead. The application to

Ebrahim JA

withdraw the admission was refused and the respondent thereafter A abandoned the suggestion of joinder. Absolution was granted at the end of the appellant's case on the grounds that the appellant was non-suited, there being no juristic link between the parties.

Held, that the application to withdraw the admission should have been granted. An admission may be withdrawn where it is clear that it is B contrary to the facts and where injustice would result from an adherence to the admission. The admission that the appellant was the plaintiff was unquestionably contrary to the facts and injustice would result, because the wrong party would be plaintiff.

Held, further, that joinder or substitution of the correct company would have been the obvious course. There could have been no prejudice C to the respondent, and the matter could have been

decided on the merits.

Held, further, that although there had been no appeal against the trial judge's refusal to allow an amendment to the plea, no was there an application to amend the pleadings on appeal, to take one of those courses could cause no prejudice to do the respondent. This would have the effect of D remitting the matter to the trial court, where the case could be concluded on its merits.

Held, further, that the Supreme Court's powers on appeal in a civil case are very wide, and it would be appropriate to order that the application to withdraw the admission should be granted and that the matter be remitted to the lower court for further hearing. E

Cases cited

Bulford v Bob White's Svc Station (Pvt) Ltd 1972 (2) RLR 224 (A)

Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor 1994 (1) ZLR 310 (H) F

DD Tpt (Pvt) Ltd v Abbot 1988 (2) ZLR 92 (S)

Neethling v Weekly Mail & Ors 1995 (1) SA 292 (A)

Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd 1996 (2) ZLR 565 (S)

Legislation considered G

Supreme Court Act [Chapter 7:13], s 22(1)

Case information

R M Fitches, for the appellant

G S Wernberg, for the respondent

Judgment

EBRAHIM JA: The considerable bulk of the record in this case is not H

Ebrahim JA

A indicative of the complexity of the issues involved which are, in my view, relatively straightforward.

The facts are simple. During the period April 1995 to June 1996, electrical work was carried out for the respondent (the defendant in the court a quo), who was having a building constructed on Vumba Road, Mutare. I refrain at this stage from saying who carried out the work, because that is the essence B of the matter. However, what is clear is that a Mr Michael Russell, who stated in evidence that he was the managing director of the appellant company (the plaintiff in the court *a quo*), negotiated with a Mrs Susan Peters, representing the defendant, to carry out the work in question. The plaintiff's declaration alleged that the work was duly carried out in terms of the written C quotation (except as varied after oral instruction from the defendant) and that the cost was reasonable. (The sum claimed could now be sued for in the magistrates court, such has been the decline in the value of money since this matter began.)

The declaration was issued in November 1996 in the name of the appellant. The respondent disputed that the work was done as required, and counter D claimed for money it said was expended in what was essentially repairing damage caused by and cleaning up after the work done by the appellant.

At the pleadings stages of the proceedings, and even at the pre-trial conference in July 1998, there was no dispute about the identity of the respondent. Both sides initially accepted that the respondent was Eastern Highlands Electrical E (Pvt) Ltd, now the appellant.

In mid-November 1998, the trial began. At the trial, it emerged during Mr Russell's evidence that he was managing director of another company, Maltman Construction (Pvt) Ltd, trading as Eastern Highlands Electrical, and it was with Maltman Construction (Pvt) Ltd that the defendant contracted. The name of Maltman Construction (Pvt) Ltd was later changed to Russell F Hunt (Pvt) Ltd. The present appellant company was incorporated in April 1996 or thereabouts. Mr Russell stated that he

closed down the electrical side of Maltman Construction and opened up Eastern Highlands Electrical (Pvt) Ltd when he was joined by a Mr O'Donovan, an electrical contractor.

It was after Mr Russell had given his evidence that Miss *Miles*, who appeared G for the defendant in the court *a quo*, sought leave to withdraw the admission made that the plaintiff was the present appellant and to amend the defendant's plea to allege that the contract was entered into with Maltmann Construction (Pvt) Ltd. She argued that until Mr Russell had given his evidence the defendant had been under the misapprehension that it had contracted with the appellant. Mr *Fitches*, who appeared for the appellant in the court *a quo* as H well as in this court, opposed the application. It is not easy to follow his

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Ebrahim JA

argument, largely because the person transcribing the record clearly had little A understanding of what was being said, and much of what appears is quite garbled and in some respects unintentionally amusing. For instance, Mr *Fitches* is quoted at one point as saying "Elements of a stop will now arise", which I assume is meant to read "Elements of estoppel now arise". Mr *Fitches* also suggested a joinder of Russell Hunt (Pvt) Ltd, but the main B thrust of his argument was that an admission had been made and no goo reason had been shown for withdrawing it. Miss Miles indicated that a joinder of Russell Hunt would not be opposed.

The learned judge a quo dismissed the application. Again, it is not easy to follow the reasoning because of the garbled transcript, but essentially it seems that the learned judge could not find that a reasonable explanation had C been given for seeking the amendment or that prejudice would be caused to the defendant if the amendment were not granted.

After the ruling had been made, Mr *Fitches* pursued the question of joinder. Miss Miles indicated that joinder seemed pointless, in view of the dismissal of the application to amend the pleadings, and Mr *Fitches*, after argument, D abandoned the application for joinder.

At the close of the plaintiff's case, Miss *Miles* sought absolution from the instance on the grounds that the plaintiff was non-suited, there being no juristic link between the parties. The learned judge *a quo* granted absolution on this ground. It is against this order that the appeal has been brought.

In my view, the learned judge was wrong in the first place to dismiss the E application to withdraw the admission of what was the plaintiff.

The grounds on which an admission made in error may be withdrawn have been stated many time, most recently in this jurisdiction by Gubbay JA (as he then was) in *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) at 98, where he said: F

> "An amendment which involves the withdrawal of an admission will not be granted by the court simply for the asking, for it is an indulgence and not a right. See *Zarug v Paravathie NO* 1962 (3) SA 872 (D) at 876C. Before the court will exercise its discretion in favour of the desired amendment, it will require a reasonable explanation, of both the G circumstances under which the pleader came to make the admission and the reasons why it is sought to resile from it. If persuaded that to allow the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him, it will refuse the application."

However, this is not just a case of an admission made in error or inadvisedly. H

Ebrahim JA

A This was a situation where the defendant mistakenly admitted something that was simply not so, and I cannot see how such an admission can be validly made or how a party can be held to that admission. An admission may be withdrawn where it is clear that it is contrary to the facts and where injustice would result from an adherence to the admission. See *Chimutanda Motors Spares (Pvt) Ltd* v *Musare & Anor* 1994 (1) ZLR 310 (H) at 318D. In this B matter, the admission was unquestionably contrary to the facts. Injustice would result, because the wrong party would be the plaintiff.

Joinder or substitution of Russell Hunt (Pvt) Ltd as the plaintiff would have been the obvious course. There could have been no possible prejudice to the defendant, and the case could have been decided on its merits. It is unfortunate C that Mr *Fitches* did not persist with his application for joinder of

Russell Hunt (Pvt) Ltd. As Gubbay CJ pointed out in *Stewart Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S) at 572:

> "There are very many cases in which the court has granted applications for substitution involving the introduction of a new persona upon being satisfied that no prejudice would be caused to the other side. See, for D instance, *Curtis-Setchell & McKie* v *Koeppen* 1948 (3) SA 1017 (W) at 1021; *Pillay* v *South British Insurance Co Ltd* 1959 (4) SA 248 (W) at 250A; *Waikiwi Shipping Co Ltd* v *Thomas Barlow & Sons (Natal) Ltd & Anor* 1978 (1) SA 671 (A) at 678G; *Samente* v *Min of Police & Anor* 1978 (4) SA 632 (E) at 634H; *Min of Defence, Namibia* v *Mwandinghi* 1992 (2) SA 355 (NmS) E at 368G-H; *Devonia Shipping Ltd* v *M V Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G-370B; *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) at 255A-F."

However, joinder or substitution did not take place, and the inevitable result was absolution. I say that result was inevitable because there is no question F on the facts that the appellant was to the party with whom the respondent contracted. Judgment could never have been given for it. I do not think that this is a situation as in *Stewart Scott Kennedy supra* where the proceedings were held to be a nullity because they were instituted in the name of a non-existence plaintiff. The appellant certainly exists, but it should not have been the plaintiff. Russell Hunt (Pvt) Ltd should have been. Despite the many G common features between the appellant and Russell Hunt (Pvt) Ltd they are different legal personae. There never was a contract between the appellant and the respondent, and the debt was not ceded by Russell Hunt (Pvt) Ltd to the appellant. There was thus no basis on which the appellant could make a claim against the respondent.

H The confusion was understandable, in my view. Contrary to Mr *Wernberg's*

Ebrahim JA

submission, I do not think there is any significance in the apparent admission A by Mr Russell that he appreciated the legal nature of corporate identity. The reality is more likely to be that Mr Russell thought that because the original contract was entered into by Maltmann Construction trading as Eastern Highlands Electrical, it was perfectly in order for Eastern Highlands Electrical (Pvt) Ltd, which had taken over the electrical side of Russell B Hunt's business, to make the claim. After all, he was there throughout and ran the businesses. Unfortunately for him, he was wrong in this. It is a pity, because by now the costs involved will have escalated to the point where the value of the original claim is relatively small.

The respondent also argued that, on the facts, absolution should have been granted, even if the appellant was entitled to make the claim. I do not consider C there is substance in this submission. If the appellant was entitled to bring this action, the respondent should have been put on its defence. It cannot be said that there is no case whatever for the respondent to answer. In any event, the respondent had a counter-claim, and it would have had to lead evidence in support of that counter-claim.

The question now is what to do. There has been no appeal against the learned D judge's refusal to allow the amendment to the plea. Nor has there been an application to amend the pleadings on appeal. If there had been, I would have had no hesitation in allowing that appeal, or allowing the pleadings to be amended. There would be no prejudice whatever to the respondent. See *Bulford* v *Bob White's Service Station (Pvt) Ltd* 1972 (2) RLR 224 (A). Either E course would have had the effective result of remitting the matter to the court a quo. There, no doubt, an application for joinder or substitution would be made and granted and the case could then proceed to finality on the merits. This is what I believe is the just course, one that will allow the matter to be determined on the merits and one that will minimise costs to the parties.

Can this court give effect to such a course? I believe that it can. The powers F of this court on appeal in a civil case are wide. The relevant provisions of s 22 of the Supreme Court Act [*Chapter* 7:13] read as follows:

> "(1) Subject to any other enactment, on the hearing of a civil appeal the Supreme Court —
>
> (a) Shall have power to confirm, vary, amend or set aside the judgment G appealed against *or give such judgment as the case may require*;
>
> (b) may, if it thinks it necessary or expedient in the interests of justice —
>
> …
>
> (iv) *having set aside the judgment appealed against, remit the case to the court or tribunal of first instance for further hearing, with* H

Ebrahim JA A

(iv) *such instructions as regards the taking of further evidence;*

…

(viii) make such order as to costs as the Supreme Court thinks fit;

(ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case; B

(c) may, if it appears to the Supreme Court that a new trial or fresh proceedings should be held, set aside the judgment appealed against and order that a new trial or fresh proceedings be held.

(2) When the Supreme Court receives further evidence or gives instructions for the taking of further evidence, it shall make such order as will secure an opportunity to the parties to the proceedings to examine C every witness whose evidence is taken" (my emphasis).

See *Neethling v Weekly Mail & Ors* 1995 (1) SA 292 (A), where the power of the Appellate Division to give any judgment or make any order which the circumstances may require, was held to include the power to determine damages.

D On other question of costs, neither party can be said to have been substantially successful. I consider that this appeal could have been avoided if the parties' legal practitioners, knowing that the appellant should not have been cited as the plaintiff, had acted in the court *a quo* to substitute the correct plaintiff.

Accordingly, I would make the following order: E

(1) The ruling of the learned judge, refusing the application for the amendment of the respondent's pleadings, is set aside, and the following is substituted —

"The application is granted."

(2) The matter is remitted to the court *a quo* for further hearing in the light F of the granting of the application to amend the pleadings.

(3) There will be no order as to costs.

CHIDYAUSIKU CJ AND ZIYAMBI JA concurred.

G *Henning, Lock, Donagher & Winter*, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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SEDCO v CHIMHERE 2002 (1) ZLR 424 (S)

Citation	2002 (1) ZLR 424 (S)
Case No	Judgment No. S-23-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ebrahim JA & Ziyambi JA
Heard	28 February 2002
Judgment	9 May 2002

Counsel *P Nherere*, for the appellant
E Matinenga, for the respondent

Case Type Civil appeal

Annotations Link to case annotations

Flynote

Appeal — *court's powers on appeal — interference with discretionary power of court a quo — limited grounds for interference — decision not* D *irrational — interference not possible*

Headnote

The acting Chairman of the Labour Relations Tribunal had granted condonation of the late noting of an appeal. He was of the view that the delay, though inordinate, was not wilful or deliberate; and that E there was an arguable case. The appellant argued on appeal that the acting Chairman's ruling was so unreasonable as to amount to an improper exercise of his discretion and that relevant considerations were not properly taken into account.

Held, that the exercise of a discretion in respect of condonation can only be interfered with where it is grossly unreasonable, capricious or *mala fide*. F It could not be said that the acting Chairman's decision was grossly unreasonable, even if the Supreme Court might have decided the matter differently, and there were no other grounds for interfering with his decision.

Cases cited G

Chikonye & Anor v Peterhouse 1999 (2) ZLR 329 (S)

Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg en 'n Ander 1983 (4) SA 146 (W)

ZFC Ltd v Geza 1998 (1) ZLR 137 (S) H

Ebrahim JA

Case information

A *P Nherere*, for the appellant

E Matinenga, for the respondent

Judgment

EBRAHIM JA: Until 1 April 1999, the respondent was employed by the appellant. In June 1998, he was charged with acts of misconduct. Disciplinary proceedings were taken under the appellant's code of conduct. The proceedings B before the disciplinary committee were concluded in December 1999 and the decision was that the respondent was guilty as charged and should be demoted. The respondent appealed to the appellant's appeal board which held a fresh hearing in March 1999. It confirmed the finding of guilt, but altered the penalty to one of dismissal. The respondent was advised of the decision on 26 March 1999.

C In terms of s 10(1) of the Labour Relations (Settlement of Disputes) Regulations, 1993 (SI 30 of 1993), an appeal to the Labour Relations Tribunal "shall be noted within fourteen days of the receipt of the decision, determination, order or direction appealed against". The respondent should thus have noted an appeal to the Tribunal by 9 April 1999. He did not do so, D but instead brought the Board's decision on review to the High Court. He was within the time limits for doing so. The matter was heard on review on 7 October 1999. The application for review was dismissed on the grounds that the respondent had:

"Not discharged the onus on him to show that this is a proper case to this court to deal with the matter on review without him having resorted to E his domestic remedies."

The merits of the matter were thus not dealt with by the High Court.

On 7 January 2000, nearly three months after the High Court's decision was handed down, an application was filed with the Labour Relations Tribunal, seeking condonation of the late noting of an appeal against the appeal board's F decision. Seven months later, the acting Chairman of the Tribunal granted the condonation sought. In doing so, he acted under s 26 of the Regulations previously referred to. He expressed the view that the delay, though inordinate, was not wilful or deliberate. On the prospects of success, he was of the view that because the penalty imposed by the disciplinary committee was not an G issue that had been placed before the appeal board, the board arguably should not have interfered with the penalty. No opinion is expressed about the prospects of success on the facts.

The appellant argues that while the Acting Chairman's decision was a discretionary one, it was so unreasonable as to amount to an improper exercise of his discretion and that relevant considerations were not properly H taken into account. Mr *Nherere* rightly cited *ZFC Ltd* v *Geza* 1998 (1) ZLR

Ebrahim JA

137 (S), where it was held that the exercise of a discretion in respect of A condonation can only be interfered with where it is grossly unreasonable, capricious or *mala fide*. There is no suggestion of *mala fides*, nor could there be.

Mr *Nherere* argues that the application for review did not preclude the respondent from noting his appeal, or vice versa. He cited *Chikonye & Anor* v *Peterhouse* 1999 (2) ZLR 329 (S) B at 331 as authority for this submission. In that case, though, the facts were to some extent reversed: the employer had noted an appeal to a senior labour relations officer against a ruling by a labour relations officer, but then, while the appeal was still pending, had applied to the High Court for a declaration that the contracts had been terminated by the effluxion of time. The High Court judge heard the application and decided C in the employer's favour. The Supreme Court was of the view that it would have been preferable for the High Court to have declined jurisdiction, on the grounds that the parties' domestic remedies had not been exhausted. It did state, though, that the employer was obliged to note an appeal, to keep its position open while it applied to the High Court. The case of *Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg en 'n Ander* D 1983 (4) SA 146 (W) was cited as authority for the proposition that the noting of an appeal does not deprive the applicant of his right to take the same decision on review.

The respondent argues otherwise: that one cannot both note an appeal against a decision and take the decision on review; one must elect one course or the E other.

I do not believe it is necessary to decide this point. It must be accepted that the respondent, on legal advice (which may have been in error), elected to pursue the avenue of review rather than appeal. It is not clear to me why this advice was given. However, the application for review was dismissed, but F not on the merits. The High Court, in effect, held that the respondent should have appealed. This he proceeded to do, although there was a delay of some three months after the date of the dismissal of the application for review. The respondent gives an explanation for it. This explanation relates to the confusion that seems to occur all too often when the legal practitioner who has been handling a matter leaves the firm and his cases are allocated to other G practitioners in the firm. Matters get overlooked, and things are not completed as expeditiously as they should be, or might have been had the original practitioner not left. The Acting Chairman considered that the explanation given was an acceptable one. I do not consider that he acted grossly unreasonably in so holding, even if I might have been inclined to be less generous to the respondent. H

Ebrahim JA

A As to the prospects of success, without having sight of the appellant's disciplinary code, it is not easy to state whether the appeal board could increase the penalty. Assuming it could, though, it seems to have done so without any request by the appellant and without asking the respondent to make representations on the matter. My *prima facie* view is that if the board was minded to

increase the penalty, it should have so indicated, and allowed B representations to be made. The finding by the Acting Chairman that there is a reasonable prospect of success cannot, in the circumstances, be said to be irrational.

In the result, therefore, I cannot hold that the Acting Chairman acted irrationally, even if I would not have condoned the late noting of the appeal. C The appeal against his decision must, therefore, be dismissed with costs.

CHIDYAUSIKU CJ and ZIYAMBI JA concurred.

D *Scanlen & Holderness*, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

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NKOMO & ORS v RUBBER & ALLIED PRODUCTS (PVT) LTD & ANOR 2002 (1) ZLR 428 (S)

Citation	2002 (1) ZLR 428 (S)
Case No	Judgment No. S-14-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, McNally JA, Muchechetere JA, Ziyambi JA and Malaba JA
Heard	21 January 2002
Judgment	14 May 2002
Counsel	*L T Biti,* for the appellants *E K Mushore,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *contract — alienation — assets of one employer being* D *alienated to another — employees of first employer thereby becoming employees of second — notice of retrenchment by first employer — such notice falling away when assets alienated*

Headnote

The appellants were employed by the first respondent, which decided to sell E its assets and business to another company. As the other company would not be able to absorb all the first respondent's employees, notice of retrenchment was given to them by the first respondent. Three days later the first respondent's assets and business were sold to the other company. The

appellants objected to the proposed retrenchment and the normal processes were followed under the labour legislation to deal F with their objection. The first respondent told the appellants that they were to take paid leave for the duration of any accumulated leave and thereafter go on unpaid leave until the matter was finalised. An application to the High Court by the appellants to compel the first respondent to pay salaries and benefits failed on the grounds that the parties should have complied with a determination by a labour relations officer to continue G negotiations or let the retrenchment committee determine the matter. The appellants appealed.

Held, that the application was misconceived. When the first respondent's assets were transferred, the appellants became employees of the other company. The notice of retrenchment by the first respondent H

Sandura JA

A fell away at that time. If the new employer wished to retrench the appellants, it should have given notice in terms of the relevant regulations. Any obligation to pay salaries and benefits had also become that of the new employer, and relief should have been sought against the other company.

Legislation considered B

Labour Relations Act [*Chapter 28:01*], s 16(1)

Case information

L T Biti, for the appellants

E K Mushore, for the respondents

Judgment

C **SANDURA JA**: This is an appeal against a judgment of the High Court which dismissed with costs the appellants' application for an order directing the first respondent to pay to them the salaries and benefits due to them with effect from 1 September 1999.

The background facts are as follows. The appellants were employed by the first respondent, a wholly owned subsidiary of Dunlop South Africa. In 1998, D Dunlop decided to sell the business and assets of the first respondent to Dunlop Zimbabwe Ltd ("Dunlop Zimbabwe"). As the appellants could not be absorbed by Dunlop Zimbabwe, the first respondent decided to retrench them.

Accordingly, on 28 June 1999, the first respondent gave written notice of the E proposed retrenchment to the works council in terms of s 3(1)(a)(i) of the Labour Relations (Retrenchment) Regulations, 1990, published in SI 404 of 1990 ("the Regulations"). The notice was copied to the chairman of the retrenchment committee in the Ministry of the Public Service, Labour and Social Welfare as required by s 3(1)(c) of the Regulations.

F The first respondent's business and assets were sold and transferred to Dunlop Zimbabwe on 1 July 1999, i.e. three days after the notice of the proposed retrenchment was sent to the works council.

The appellants objected to the proposed retrenchment and, after two meetings of the works council, the workers' representatives on the council refused to participate in the retrenchment negotiations, alleging that the provisions of G the Regulations had not been complied with.

Thereafter, on 30 July 1999, the first respondent wrote to the principal labour relations officer alleging that by refusing to participate in the retrenchment negotiations the appellants and their representatives on the council were acting in bad faith and were indulging in an unfair labour practice.

H Subsequently, on 25 August 1999, a hearing was conducted by a labour

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relations officer, who issued a determination directing the parties to continue A with the retrenchment negotiations. The determination further provided that in the meantime, the appellants could go on paid leave.

When the appellants' attitude to the retrenchment negotiations did not change, the first respondent wrote to each appellant in August 1999 informing him that he was to go on paid leave for the duration of his accumulated leave, B and that thereafter, he would go on unpaid leave until the proposed retrenchment was finalised.

About two weeks later, on 7 September 1999, the works council referred to the dispute to the retrenchment committee. In the result, the Minister of the Public Service, Labour and Social Welfare ("the Minister"), acting on the advice of the retrenchment committee, refused to approve the proposed C retrenchment.

However, the Minister's decision was taken after the appellants had filed the court application in the court *a quo* seeking the relief already referred to. Neither party knew of the Minister's decision when the application was heard. The application was prompted by the first respondent's decision to D place the appellants on unpaid leave.

The learned judge who heard the matter in the court *a quo* was of the view that the appellants should have complied with the labour relations officer's determination issued on 25 August 1999, directing the parties to continue with the retrenchment negotiations or let the retrenchment committee determine the matter. He, therefore, dismissed the appellants' application E with costs. Aggrieved by that decision, the appellants appealed to this court.

What happened in this case shows that both the first respondent and the appellants overlooked the provisions of s 16(1) of the Labour Relations Act [*Chapter 28:01*]. That section reads as follows:

> "Subject to this section, whenever any undertaking in which any persons F are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted." G

When the provisions of this section are applied to the facts of the present case, the legal position is as follows. When the first respondent's assets and business were transferred to Dunlop Zimbabwe on 1 July 1999 the appellants became employees of Dunlop Zimbabwe with effect from that date, and with conditions of service not less favourable than those which applied to them before the transfer of the undertaking. H

Sandura JA

A This also means that with effect from 1 July 1999, the appellants ceased to be employees of the first respondent and, consequently, the written notice of the intention to retrench them which was given by the first respondent to the works council on 28 June 1999 fell away. If the new employer, Dunlop Zimbabwe, wanted to retrench the appellants, it was obliged to give written notice of its intention to do so to its works council in terms of s 3(1)(a)(i) of B the Regulations.

In the circumstances, the appellants' application in the court *a quo* was misconceived. As already stated, in that application, the appellants sought an order directing the first respondent to pay to them the salaries and benefits due to them with effect from 1 September 1999. However, payment of those C salaries and benefits was no longer the first respondent's obligation because it was no longer the appellants' employer. It was in fact the obligation of Dunlop Zimbabwe, the new employer, to pay the appellants' salaries and benefits with effect from 1 July 1999. The application should, therefore, have been brought against Dunlop Zimbabwe.

In my view, the appeal cannot succeed. However, as far as the costs of the D appeal are concerned, I shall make no order because all the parties laboured under a misapprehension as to who the appellants' employer was. By persisting with the retrenchment exercise after 1 July 1999, the first respondent must have led the appellants to believe that it was still their employer.

E In circumstances, the appeal is dismissed with no order as to costs.

ZIYAMBI JA and MALABA JA concurred

F *Honey & Blanckenberg*, appellants' legal practitioners

Coghlan, Welsh & Guest, respondents' legal practitioners

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CHAKRAS v CHAKRAS 2002 (1) ZLR 432 (S)

Citation	2002 (1) ZLR 432 (S)
Case No	Judgment No. S-30-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	4 March 2002
Judgment	14 May 2002
Counsel	*A Ebrahim*, for the appellant *L Uriri*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court — *High Court — maintenance order by — not an order of a "maintenance court"* D

Family law — *husband and wife — divorce — maintenance — order by High Court — not an order of a maintenance court*

Headnote

The parties, who were husband and wife, were divorced in the High Court. The court ordered the appellant to pay maintenance to the respondent. E The appellant appealed against the maintenance order. He did not pay any maintenance pending the appeal. At the appeal hearing, the respondent's counsel raised a point *in limine*, arguing that the appellant should not be heard as he was in contempt of court. It was argued that in terms of s 27(3) of the Maintenance Act [*Chapter 5:09*], the obligation to pay maintenance in terms of a maintenance order was not F suspended unless the court *a quo* ordered otherwise.

Held, that s 27(3) applied only to maintenance orders made by a "maintenance court". The High Court was not a "maintenance court" as defined in s 3 of the Act, and s 27(3) did not apply to orders made by the High Court.

Cases cited G

Laxman v Laxman S-177-90

Lindsay v Lindsay 1993 (1) ZLR 195 (S)

Legislation considered

Maintenance Act [*Chapter 5:09*], ss 3 & 27(3) H

Sandura JA

Case information

A *A Ebrahim*, for the appellant

L Uriri, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which dissolved the parties' marriage and ordered the appellant to pay maintenance to the respondent in the sum of $4 000 per month until her death or B remarriage. The appeal is in respect of the maintenance order only.

The background facts are as follows. The parties started living together in 1984 when both of them were divorcees. They subsequently got married in 1988 by civil rites and separated in December 1997. No children were born of the marriage.

C In February 1998, the appellant issued a summons against the respondent claiming a decree of divorce on the ground that the marriage had irretrievably broken down. In her counter-claim, the respondent claimed, *inter alia*, maintenance at the rate of $4 000 per month until her death or remarriage.

When the matter came up for trial, the learned judge in the court *a quo* D dissolved the marriage and ordered the appellant to pay to the respondent, who was aged forty-nine at the time, maintenance in the sum of $4 000 per month until her death or remarriage. She made it clear in her judgment that should the respondent's circumstances change and she became self-sustaining the maintenance order could, on application, be varied or discharged. E Aggrieved by the order to pay maintenance to the respondent, the appellant appealed to this court.

At the commencement of the hearing of this appeal, counsel for the respondent raised a point *in limine* and submitted that as the appellant had not complied with the order to pay maintenance, he was in contempt of court and should not be heard. After hearing both counsel on the point *in limine*, we reserved F our decision and proceeded to hear the appeal.

I shall first of all deal with the point *in limine*. In making the submission that the appellant was in contempt of court, counsel for the respondent relied upon the provisions of s 27(3) of the Maintenance Act [*Chapter 5:09*] ("the Act").

However, I shall set out the provisions of both subs (1) and subs (3) of s 27. G They read as follows:

> (1) Any person who is aggrieved by the decision of a maintenance court in respect of any direction, order or award made in terms of this Act … may appeal against such decision to the High Court.
>
> (2) …
>
> H (3) The noting of an appeal in terms of this section shall not, pending

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> the determination of the appeal, suspend the decision appealed against A unless the maintenance court, on application being made to it, directs otherwise …"

It was submitted by counsel for the respondent that once the High Court ordered the appellant to pay maintenance to the respondent, that order became an order issued in terms of the Act, and that in terms of s 27(3) of that B Act the obligation to pay the maintenance was not suspended by the noting of an appeal against the order to pay the maintenance. I disagree with that submission.

I say so because both subss (1) and (3) of s 27 concern an appeal against the decision of a maintenance court, and "maintenance court" is defined in s 3 of the Act as follows: C

> "Every magistrate's court shall, within its area of jurisdiction, be a maintenance court for the purposes of this Act."

It is, therefore, clear that the provisions of s 27(3) apply only to appeals against maintenance orders issued by the magistrates court. The enforcement of a maintenance order made by the High

Court, notwithstanding the noting D of an appeal, is done in terms of the inherent jurisdiction of the High Court upon application, and not in terms of s 27(3) of the Act. See *Laxman* v *Laxman* S-177-90 (not reported) at p 6 of the cyclostyled judgment.

There is, therefore, no merit in the point *in limine* raised by counsel for the respondent. E

I now wish to deal with the merits of the appeal. The respondent claimed the sum of $4 000 per month as maintenance for herself. She did not break down that amount, nor did she give any indication of how she had arrived at that figure. However, in my view, that is not relevant in determining this appeal. I say so because the appellant did not dispute the *quantum* of the maintenance required, nor did he contend that he could not afford to pay the sum claimed. F Instead, he contended that the respondent was employable and, therefore, capable of supporting herself.

In her evidence, the respondent stated that she had held several jobs before and after the parties separated, but that at the time of the trial she had been unemployed for several years. Because of that, she had relied on the charity G of some members of her family, particularly her daughter, her son-in-law, her sister and her brother. She added that she lived with her daughter and son-in-law, for whom she did "odd jobs" for no pay. She said she had little education, having completed only two years of secondary school education.

In addition, she said that she was certain that the appellant had the ability to pay her $4 000 per month because when he left employment with Trinidad H

Sandura JA

A Industries (Pvt) Ltd, that company paid him a lot of money and gave him a motor vehicle. She added that he was also in receipt of a monthly pension of $3 000 from Old Mutual, after that company paid him a lump sum.

That evidence was not challenged by the appellant. Commenting on it, the learned judge in the court *a quo* said:

> B "The plaintiff challenges the defendant's claim for maintenance on the ground that she is employable and capable of supporting herself. He has not challenged the *quantum* of maintenance claimed, nor contended that he cannot afford it. The plaintiff did not challenge the defendant's assertion that he received the lump sum payments alluded to above, nor that he was in receipt of a monthly pension of $3 000 from Old Mutual
>
> C … The plaintiff has also not challenged the defendant's evidence that she is currently unemployed."

After considering all the evidence before her, the learned judge concluded that the respondent had made out a case for the maintenance claimed. She indicated, however, that if the respondent's circumstances changed and she could support herself, the maintenance order could, on application, be D varied or discharged.

I am in complete agreement with the learned judge. The respondent was married to the appellant for about ten years. Before the marriage, the parties had lived together as husband and wife for about four years. During the subsistence of the marriage, the respondent was periodically employed. E She and the appellant attained a standard of living which, on the evidence before the learned judge, was fairly comfortable. The respondent played a significant role in the attainment of that standard of living.

In any event, it is important to recall that in granting the maintenance order the learned judge was exercising a judicial discretion in terms of s 7(1)(b) of F the Matrimonial Causes Act [*Chapter 5:13*]. This court has, in a number of cases, stated that the exercise of a judicial discretion can only be interfered with on very limited grounds.

In *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S) at 201C-E, Korsah JA said:

> "In making an award of $2 000 per month in favour of the respondent, the learned judge was exercising a judicial discretion. As stated by G Asquith LJ in *Bellenden (formerly Satterthwaite)* v *Satterthwaite (2)* [1948] 1 All ER 343 at 345:
>
> 'We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is H only where the decision exceeds the generous ambit within which

Sandura JA

> reasonable disagreement is possible, and is, in fact, plainly wrong, that A an appellate body is entitled to interfere'."

Subsequently, in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62F-63A, Gubbay CJ said:

> "The … determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first — one B 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 C 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 D materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

Applying those principles, I am satisfied that there is no basis whatsoever, upon which this court can interfere with the decision of the learned judge in the court *a quo*.

In the circumstances, the appeal is devoid of merit and is dismissed with E costs.

CHEDA and MALABA JA concurred. F

Ali Ebrahim, appellant's legal practitioner

Honey & Blanckenberg, respondent's legal practitioners

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S v SIFUYA 2002 (1) ZLR 437 (H)

Citation	2002 (1) ZLR 437 (H)
Case No	Judgment No. HH-77-02
Court	High Court, Harare
Judge	Garwe JP & Guvava J
Heard	17 May 2002
Judgment	17 May 2002
Counsel	*S Phiri*, for the appellant *M Nemadire*, for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure (sentence) — *general principles — multiple counts — D approach to be adopted by court — aggregate sentence to be realistic*

Criminal procedure (sentence) — *suspended sentence — lengthy effective period of imprisonment imposed — inappropriate to suspend portion on condition of good behaviour*

Criminal procedure (sentence) — *suspended sentence — restitution — E multiple accused — need to apportion restitution between accused.*

Headnote

The appellant was convicted by a magistrate of four counts of armed robbery, which he had committed with five accomplices, and was sentenced to a total of 34 years' imprisonment of which four years were suspended on conditions of good behaviour and a further five years on F condition that he repaid the complainants the whole amount which he and his accomplices had stolen. On appeal:

Held, that it is an accepted principle that where an offender is convicted of multiple counts the approach is either to take all the counts as one for sentence or to impose an appropriate sentence on each count and then G order that the sentence on some of the counts should run concurrently in order to attain a realistic total.

Held, further, that in this case the magistrate had adopted the second approach and imposed proper sentences on the individual counts but had erred in failing to palliate the aggregate sentence in order to come up with a realistic total. The sentence was manifestly excessive and in H excess of the outer limit which our courts would ordinarily impose.

Guvava J

Held, further, that in view of the lengthy effective period of imprisonment A the appellant would have to undergo, the trial court erred in suspending a portion of the sentence on condition of good behaviour.

Held, further, that where several offenders participated in a crime, a sentence suspended on condition of restitution must ensure that all of them make restitution to the extent they benefited from the crime. If there is no evidence on record of the amount that each offender received B as his share, they must be taken to have benefited equally.

Cases cited

A-G v Paweni Trade Corp (Pvt) Ltd & Ors 1990 (1) ZLR 24 (S)

S v Chikanga S-123-93 C

S v Chirwa HH-79-94

S v Dongo & Anor HB-37-95

S v Gorogodo 1988 (2) ZLR 378 (S)

S v Moyo & Anor 1996 (1) ZLR 5 (H)

S v Razaro 1979 RLR 353 (G)

S v Sawyer 1999 (2) ZLR 390 (H) D

S v Sharma S- 117-84

Case information

S Phiri, for the appellant

M Nemadire, for the respondent

Judgment

GUVAVA J: The appellant pleaded guilty and was convicted of four counts E of armed robbery by the regional magistrate sitting at Harare on 17 April 2001. He was sentenced as follows:

Count 1 — 10 years' imprisonment

Counts 2-4 — each count eight years' imprisonment F

> Of the total of 34 years' imprisonment, four years were suspended for five years on condition that the accused person does not during that period commit any offence involving dishonesty and for which he will be sentenced upon conviction to imprisonment without the option of a fine. A further five years were suspended on condition that the accused pays restitution to the first complainant Aroma Bakery in the sum of $12 000, G $13 545 to the second complainant Bakers Inn and $12 652 to the fourth complainant Lobels Bakery to be paid through the Clerk of Court on or before 31 December 2001.

The facts upon which this matter is based, were that on three different occasions the appellant and five accomplices approached bakery delivery H

Guvava J

A vans belonging to Aroma Bakery, Bakers Inn and Lobels. Acting in concert, they threatened the drivers and assistants with firearms and thereafter robbed them of different amounts of money. In the first count, the appellant and his accomplices took the delivery van belonging to Aroma Bakeries and drove it away after robbing the driver of $12 000. It was recovered after it had been abandoned by the appellant and his accomplices. In count two, they robbed B the driver and his assistant of $13 545 belonging to Bakers Inn. In count three, the appellant and his accomplices robbed a security guard of his pistol and ammunition whilst he was carrying out his guard duties at the premises of Meat Pride; and in count 4 they robbed Lobels Bakery of $23 697.20.

Soon after the commission of these offences, the appellant ran away and was C only arrested in South Africa on 14 April 2001. His accomplices were also arrested in connection with these matters.

The appellant appeals against the sentence imposed upon him by the trial magistrate on two grounds. The appellant submits firstly that in assessing sentence the trial court did not take sufficient account of the fact that he pleaded guilty to the offence and secondly that the trial court misdirected D itself in its approach to sentence when dealing with multiple counts, thereby imposing an excessive sentence.

The respondent has in our view properly conceded that the sentence imposed is excessive and should be interfered with.

It is now an accepted principle in our law that where an offender is convicted E of multiple counts the approach is to either take all the counts as one for sentence or to impose an appropriate sentence on each count and thereafter order that the sentence on some of the counts run concurrently to attain a realistic total.

In the case of *S* v *Chirwa* HH 79-94, Garwe J (as he then was) said at p 3 of F the cyclostyled judgment:

> "The position is now fairly well settled that in cases involving multiple counts, the correct approach to sentence is either to take all counts as one for purposes of sentence and then impose a globular sentence which the court considers appropriate in the circumstances or alternatively to determine an appropriate sentence for each count taken singly so that the G seriousness of each offence is properly reflected. The court should then determine a realistic total which it considers appropriate in the circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others."

H This view is in accordance with the approach which was taken in *S* v *Razaro*

Guvava J

1979 RLR 353 (G) at 254D. This is the approach that must be adopted by trial A magistrates in dealing with cases involving multiple counts.

In this case, the court *a quo* decided to impose individual sentences on each count. Taking into account the gravity of each count, the court proceeded to impose a sentence of 34 years' imprisonment. Although this first stage was correct, the trial magistrate then erred by failing to palliate the aggregate B sentence in order to come up with a realistic total. This sentence is

manifestly excessive and is in excess of the outer limit which our courts would ordinarily impose. In the case of *S* v *Sawyer* 1999 (2) ZLR 390 (H), the accused, who was an accountant in a construction firm, committed 11 counts of fraud involving $1 665 210. He was sentenced to 22 years' imprisonment of which five years were suspended on condition of good behaviour and six years on C condition of restitution. Gillespie J attacked not only the approach the trial court had used in sentencing the accused but the total number of years imposed and reduced the sentence to 18 years' imprisonment. In considering the sentence, he cited the remarks by McNally JA in the case of *S* v *Sharma S*-117-84 at p 6 of the cyclostyled judgment, where he said:

> "How does one begin to measure the outer limits of a sentence in a case D of this magnitude? One may say that even murder with actual intent often attracts a sentence of 16-18 years. One may ask — what sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate where five or six million dollars is involved? These considerations and comparisons suggest to me that a twenty year sentence for a crime of dishonesty E unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such a crime."

In *S* v *Chikanga* S-123-93, the Supreme Court commented that it knew of no reported case in South Africa or Zimbabwe, whether for only one offence or more, where a man has been sentenced to more than 25 years' imprisonment. F The court took the view that life imprisonment rarely exceeds 16 years in Zimbabwe and by statute more than one term of life imprisonment is served concurrently. Clearly, therefore, the approach by the trial court was wrong in determining the sentence to be imposed in this case as it was in excess of the outer limit generally accepted by our courts.

The trial court also fell into the error of suspending a portion of the sentence G on condition of good behaviour. This approach has been criticised by the Supreme Court on numerous occasions.

In *S* v *Gorogodo* 1988 (2) ZLR 378 (S), Gubbay JA, as he then was, remarked:

> "And I do not believe that it is appropriate to suspend any portion thereof. There is no rule that every first offender who is to be imprisoned is H

Guvava J

> A entitled to have a portion of the period suspended. See *S* v *Moyana & Anor* 1980 ZLR 460 (AD) at 464E-F. The main purpose of a suspended sentence is rehabilitative. Where, in consequence of the nature of his wrongdoing, the offender is required to undergo very lengthy incarceration (as in this instance), if that punishment does not induce him to settle down to a useful life, it is unlikely that upon his release from gaol a B further period of imprisonment hanging over his head will deter him from future crime."

See also *Attorney-General* v *Paweni Trade Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S) at 43.

The trial court also erred in its approach to the issue of restitution. It cannot be said that the magistrate was wrong in ordering restitution in this case, C however where an offence is committed by more than one offender it is necessary for a court to apportion the amount which is payable by each accused. In this regard, attention is drawn to *S* v *Moyo & Anor* 1996 (1) ZLR 5 (H). The trial magistrate in this case ordered that all the amounts which were not recovered should be paid by the appellant and yet the state D outline clearly states that the offences were perpetrated by six offenders, five of whom were arrested prior to the arrest of the appellant. The approach enunciated in *S* v *Moyo supra*, encourages offenders to pay back to the complainant the amount equivalent to the extent to which each offender has benefited. If the court does not order that each accused pay back his *pro rata* share it would mean that those that are wicked and cunning would benefit E from the proceeds of crime while those complying with the terms of the suspension would pay back more than they benefitted. Therefore, a sentence suspended on condition of restitution must ensure that all the offenders restitute to the extent to which they benefitted. If there is no evidence on record of the amount that each accused received as his share, it must be taken that the accused benefited equally (see *S* v *Dongo & Anor* HB-37-95).

F In this regard, the appellant in this case should be ordered to pay back only one-sixth of the amount of money which was robbed as it is not clear to what extent he benefited from the proceeds.

For the above reasons, the court is at large to consider the sentence afresh.

Although this court differs with the overall sentence of 34 years' imprisonment G imposed for the four counts in this case, it does not appear that the individual sentence imposed on each count can

be faulted. The trial court took into proper account the mitigatory and the aggravating circumstances of the case. This is after clearly seen by the fact that in count 1 the trial court imposed a sentence of 10 years taking into account that in addition to the money a motor H vehicle was also stolen. It also took into account that the accused had pleaded

Guvava J

guilty in the reasons for sentence. However, the robbery involved the use of A a firearm, which makes it an extremely serious offence. On that basis, this court will not interfere with the sentences imposed on the individual counts.

Accordingly, the appeal is allowed to the following extent:

> "It is ordered that the sentence of eight years' imprisonment imposed in count 2 is to run concurrently with the sentence of 10 years' imprisonment B imposed in count 1.
>
> It is further ordered that, of the sentence of eight years' imprisonment imposed in count 4, six years' imprisonment is to run concurrently with the sentence of eight years imposed in count 3.
>
> This brings the sentence to a total of 20 years' imprisonment. C
>
> Of the total sentence of 20 years' imprisonment, 6 months' imprisonment is suspended on condition the appellant pays the sum of $6 716 through the Clerk of Court, Harare Magistrates Court on or before 30 June 2002."

GARWE JP concurred. D

S J Phiri & Partners, appellant's legal practitioners

Criminal Division, Attorney-General's Office, respondent's legal practitioners E

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UDC LTD v DORBA DORBA TRANSPORT (PVT) LTD & ORS 2002 (1) ZLR 443 (S)

Citation	2002 (1) ZLR 443 (S)
Case No	Judgment No. S-32-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	5 March 2002
Judgment	20 May 2002
Counsel	*A P de Bourbon* SC, for the appellant *E W W Morris*, for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

D **Hire-purchase** — *Hire-Purchase Act [Chapter 14:09] — s 27 — time-limit for institution of proceedings for return of goods or recovery of price — when prescriptive period commences to run*

Headnote

Section 27 of the Hire-Purchase Act [*Chapter 14:09*] limits the period within which a seller may institute proceedings for the return of goods E or the recovery of moneys due under a hire-purchase agreement, to a prescribed number of days calculated from "the last day of the appropriate period within which this Act [i.e. the Hire-Purchase Act] requires the full purchase price to be paid". The period begins to run from the date on which the full purchase price is payable under the agreement F concerned, even where the price is to be paid within a shorter time than the maximum period allowable by the Schedule to the Act.

Cases cited

Expedite Haulage (Pvt) Ltd v Scotfin Ltd 2000 (2) ZLR 113 (H)

Legislation considered G

Hire-Purchase Act [*Chapter 14:09*], s 27

Hire-Purchase (Limitation of Time) (Variation) Notice, 1984 (SI 149/1984), s 2

Case information

A P de Bourbon SC, for the appellant

H *E W W Morris*, for the respondents

Sandura JA

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which A upheld with costs the respondents' special plea to the appellant's claims of the sum of $761 954.70 and the sum of $1 326 214.54 together with interest, costs of suit and collection commission.

The background facts are as follows. On 28 September 1993, the first respondent entered into a hire-purchase agreement with Turnpan Zimbabwe B Ltd in respect of two tractors. The purchase price was payable by way of a deposit and nineteen instalments, the last of which was due on 27 September 1995. The hire-purchase agreement was ceded to the appellant. Subsequently, on 14 March 1994, the first respondent entered into another hire-purchase agreement with Goya Enterprises (Pvt) Ltd, in respect of two caterpillar dozers. The purchase price was payable by way C of a deposit and twenty-seven instalments, the last of which was due on 13 March 1997. This agreement was also ceded to the appellant. The second, third and fourth respondents stood as sureties and co-principal debtors to the first respondent.

Subsequently, the first respondent defaulted in its payments under the D agreements, and a summons claiming the outstanding amounts under both agreements was issued by the appellant on 4 September 2000. The summons was served on the respondents on 20 September 2000.

Thereafter, on 15 November 2000 the respondents filed a special plea of prescription which was subsequently upheld by the learned judge in the court *a quo.* Aggrieved by that decision, the appellant appealed to this court. E

The issue between the parties in the court *a quo* was whether on a proper interpretation of subss (1), (2) and (3) of s 27 of the Hire-Purchase Act [*Chapter 14:09*] ("the Act"), as read with s 2 of the Hire-Purchase (Limitation of Time) (Variation) Notice, 1984 ("the Notice"), published in Statutory Instrument 149 of 1984, the appellant's claims were prescribed. F

Section 27 of the Act, in relevant part, reads as follows:

> "(1) A seller shall have no right to institute a suit or action for —

(a) the return of goods to which an agreement relates; or

(b) the recovery of a portion of the purchase price due under an agreement; G

after the lapse of the period prescribed by subsection (2).

(2) The period after the lapse of which no suit or action referred to in subsection (1) may be brought shall be the period, fixed by or under subsection (3), which was so fixed at the time the right to institute the suit or action first accrued.

(3) The period to which subsection

(4) relate(s) shall be — H

2002 (1) ZLR p445

Sandura JA A

(a) such number of days, being not less than one hundred and fifty, as the Minister may, by notice in a statutory instrument, fix; or

(b) if no period is fixed in terms of paragraph (a), three hundred and sixty-five days;

commencing on the day following the last day of the appropriate period within which this Act requires the full purchase price to be paid."

B In terms of s 2 of the Notice, the period fixed by the Minister in terms of s 27(3)(a) of the Act is seven hundred and thirty days.

I should add that there is a Schedule to the Act which specifies maximum periods within which the full purchase prices of various classes of goods are payable. According to that Schedule, the maximum period within which the C full purchase price of the goods which were the subject of both hire-purchase agreements in this case must be paid is sixty months.

Mr *de Bourbon*, who appeared for the appellant, submitted that on a proper interpretation of s 27 of the Act the appellant's right to institute its action only prescribed after the expiration of a period of sixty months plus seven hundred D and thirty days, reckoned from 28 September 1993 in respect of the first agreement and from 14 March 1994 in respect of the second agreement. He added that as the appellant's summons was issued and served on the respondents before that period expired, the appellant's claims were not prescribed.

E On the other hand, Mr *Morris*, who appeared for the respondents, submitted that the appellant's right to institute its claims in respect of each agreement prescribed after the expiration of the period within which the full purchase price was payable in terms of the agreement plus seven hundred and thirty days. In other words, he submitted that the seven hundred and thirty days were to be added, not to the period of sixty months, as submitted by F Mr *de Bourbon*, but to the period within which the full purchase price was payable in terms of the agreement. He added that as the appellant's summons was issued and served after the expiration of the period of prescription, the appellant's claims were prescribed.

Nevertheless, both counsel agreed that the critical words in s 27(3) are "the appropriate period within which this Act requires the full purchase price to G be paid". However, the question which arises is whether that period is the period of sixty months specified in the Schedule to the Act, as submitted by Mr *de Bourbon*, or the period within which the full purchase price is payable in terms of the agreement, as submitted by Mr *Morris*.

The learned judge in the court *a quo* followed the decision in *Expedite Haulage (Pvt) Ltd* v *Scotfin Ltd* 2000 (2) ZLR 113 (H) H and concluded that

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2002 (1) ZLR p446

Sandura JA

the appropriate period referred to in s 27(3) of the Act was the period within A which the full purchase price was payable in terms of the agreement, and not the period of sixty months specified in the Schedule.

In my view, that decision is correct. In the first place, though the maximum period within which the full purchase price is payable is sixty months, as specified in the Schedule, the parties may agree upon a period shorter than B that. In this regard, s 25(1)(b), in relevant part, reads as follows:

> "… the period within which the full purchase price is payable shall *not exceed* the period specified in the third column of the Schedule for the particular class of goods sold under the agreement" (the emphasis is mine).

Thus, in the present case the Act requires that the full purchase price be paid C within any period not exceeding sixty months. In my view, that period is the period agreed upon by the parties as the period within which the full purchase price should be paid, provided it does not exceed sixty months.

The wording of s 2 of the Notice supports that conclusion. Its reads as follows: D

> "2 With effect from 1 May 1984, *the number of days from the end of the period within which the full purchase price is payable under an agreement* within which a suit or action shall be instituted for the return of any goods to which the agreement relates or for the recovery of any portion of the purchase price due under the agreement is hereby increased E to seven hundred and thirty days" (the emphasis is mine).

The wording of this section has remained substantially the same since 1958. See: Hire-Purchase (Limitation of Time) (Variation) Notice, 1958 (No. 2), i.e. Federal Government Notice 224 of 1958.

In order to show that the intention of the legislature was that the seven hundred and thirty days should be added to the period within which the full F purchase price is payable in terms of the agreement concluded by the parties, and not to the maximum period specified in the Schedule, I propose to redraft s 2 of the Notice, by re-arranging the words therein but without changing its meaning, so that it reads as follows:

> "With effect from1 May 1984, the number of days within which a suit or G action shall be instituted for the return of any goods to which an agreement relates or for the recovery of any portion of the purchase price due under the agreement is hereby increased to seven hundred and thirty days, from the end of the period within which the full purchase price is payable under the agreement."

It is, therefore, clear beyond doubt that the period of seven hundred and thirty H

Sandura JA

A days is to be added to the period within which the full purchase price is payable in terms of the agreement concluded by the parties. This is the most telling argument in favour of the respondents.

Another reason why I say that the decision by the learned judge in the court *a quo* is correct is that, subject to certain qualifications, the prescription period begins to run as soon as there is a complete cause of action, with a B plaintiff who can sue, and a defendant who can be sued.

In this regard, Professor Loubser, in his book entitled *Extinctive Prescription*, first published in 1996, states the following at p 47:

> "Certainty requires that the prescription period should begin to run as soon as there is a completed cause of action, with a plaintiff who can sue C and a defendant who can be sued … In South African law, as in many other systems of law, there is a general rule that the prescription period begins to run as soon as the cause of action is complete, but this general rule is subject to certain qualifications, most importantly the requirement of knowledge on the part of the creditor."

D I entirely agree. In my view, the above comments apply to our law.

In the present case, the cause of action is founded upon the agreement between the parties that the full purchase price shall be paid within a certain period, and not on the maximum period within which the full purchase price should be paid, as specified in the Schedule.

E In the circumstances, the appeal is dismissed with costs.

CHEDA JA and MALABA JA concurred.

F *Gill, Godlonton & Gerrans*, appellant's legal practitioners

Wickwar & Chitiyo, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/DAIRIBORD ZIMBABWE LTD v MUYAMBI 2002 (1) ZLR 448 (S)

DAIRIBORD ZIMBABWE LTD v MUYAMBI 2002 (1) ZLR 448 (S)

Citation	2002 (1) ZLR 448 (S)
Case No	Judgment No. S-22-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Cheda JA
Heard	21 March 2002
Judgment	20 May 2002
Counsel	*J C Anderson SC*, for the appellant *A P de Bourbon SC*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *wrongful dismissal — remedies for — reinstatement — relationship between parties making reinstatement inappropriate* D *— need for proof that relationship between parties has broken down*

Headnote

Although an employee's demand for reinstatement following unlawful dismissal may be resisted by the employer on the ground that the relationship between the parties has broken down to such an extent that reinstatement is inappropriate, the employer must produce evidence E that their relationship has indeed broken down to that extent.

Cases cited

Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (S) F

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Winterton, Holmes & Hill v Paterson 1995 (2) ZLR 68 (S)

Case information

J C Anderson SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which G granted the respondent's application for an order declaring that he was an employee of the appellant.

The relevant facts are as follows. The respondent was employed by the appellant as an auditor with effect from 1 January 1985. He rose through the ranks and became the appellant's Chief Internal Auditor. Subsequently, with H

Sandura JA

A effect from 1 January 1998, the respondent was seconded to Dairibord Malawi Limited (DML) as that company's Managing Director. The terms and conditions of the secondment were set out in a

contract of assignment entered into by the appellant and the respondent which was due to expire on 31 December 1999. However, in June 1999, the appellant ordered the respondent to go on paid leave for an indefinite period pending the completion B of what it called "extensive investigations into the operations of Dairibord Malawi". The respondent was also ordered to return to Zimbabwe in order to facilitate the investigations.

Thereafter, on 3 September 1999, the respondent was summoned to a hearing on 14 September 1999. Although the hearing was convened, it did not deal C with any substantive issues. Instead, it dealt with preliminary issues such as the composition of the disciplinary committee and whether or not the respondent was entitled to legal representation.

Then, on 24 September 1999, the appellant's Chief Executive Officer withdrew the proceedings, which had been instituted against the respondent in terms of the appellant's code of conduct. Instead, he gave the respondent D three months' notice of the termination of the contract of assignment ("the notice"). What this meant was that the contract of assignment would end on 31 December 1999, the date when the contract would have terminated in any event.

However, shortly after receiving the notice, the respondent, through his E lawyers, sought confirmation from the appellant's Chief Executive Officer that the notice applied to the contract of assignment only, and that with effect from 1 January 2000 the respondent would revert to the position of Chief Internal Auditor of the appellant. When that confirmation was not forthcoming, the respondent filed a court application in the High Court on 24 November 1999, seeking the declaratur already referred to. The learned F judge in the court *a quo* granted the order sought. Aggrieved by that decision, the appellant appealed to this court.

The main issue in this case is whether the notice was intended to terminate the contract of assignment as well as the respondent's 1985 contract of employment with the appellant. I do not think so. I say so for two reasons.

G The first reason is that the appellant's Chief Executive Officer made it quite clear in his letter to the respondent dated 24 September 1999 that the notice only affected the contract of assignment. The letter, in relevant part, reads as follows:

> "It was overlooked that there exists between yourself and Dairibord H Zimbabwe Limited a written Contract of Assignment in terms of which

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> you were assigned as Managing Director of Dairiboard Malawi Limited A under certain conditions …
>
> In terms of the contract aforesaid, either party is entitled to three calendar months' notice in writing of any intention to terminate the employment.
>
> I consider that the employer/employee relationship between yourself and the company has completely broken down to such an extent that it B is no longer possible for you to remain in your employment.
>
> In terms of the Contract of Assignment, I hereby give you the requisite three months' notice to terminate your contract of employment. The period of notice shall run from 1 October and expire on 31 December 1999 … C
>
> I advise that all proceedings in terms of the Code of Conduct have been revoked and abandoned as it was obviously a mistake to proceed with them in the face of (the) contract of employment …"

This letter was written after the aborted disciplinary proceedings of 14 September 1999. In my view, it is clear beyond doubt that the notice D affected the contract of assignment only. Any contention that the termination of the contract of assignment automatically meant the termination of the 1985 contract of employment cannot be sustained.

I say so because the contract of assignment was for a period of two years only, after which the respondent was to return to Zimbabwe and continue working for the appellant. In this regard, the clause in the contract of assignment E dealing with the respondent's remuneration states as follows:

> "The amounts included in this contract have been increased by an expatriate supplement of 20 per cent *which will not apply when the incumbent returns to work for the company in Zimbabwe*" (the emphasis is mine). F

Quite clearly, the two contracts were separate. The termination of the contract of assignment did not affect the 1985 contract of employment. At the end of the contract of assignment, the respondent was to return to Zimbabwe and resume his usual duties.

The second reason why I say that the notice did not affect the 1985 contract G of employment is that when the respondent's lawyers wrote to the appellant's Chief Executive Officer, on 28 September 1999, seeking his confirmation that the notice affected the contract of assignment only, there was no response from him. The relevant part of the letter written by the respondent's lawyers reads as follows:

> "As was indeed pointed out in our letter dated 15 September 1999, it is H

Sandura JA

> A correct that our client was assigned as Managing Director of Dairiboard Malawi Limited for a fixed period … The giving of three months' notice therefore only applies to the assignment contract in terms of which you have acted. As a result, our client will resume his original position as at 1 January 2000 …
>
> We further note your reference to the processing of terminal benefits and B believe this refers to those benefits that arose out of the contract of assignment and this will not in any way affect benefits under our client's position which he reverts to on 1 January 2000, as that position remains secure and intact …"

The fact that the appellant's Chief Executive Officer did not respond to this C letter is significant. If his understanding of the position was that the notice extended to the 1985 contract of employment, he should have said so.

In the circumstances, it cannot be doubted that the only employment terminated by the notice is that which was governed by the contract of assignment. The respondent's main contract of employment with the appellant D remained intact. It was not terminated in terms of the appellant's code of conduct, nor was it terminated in terms of the Labour Relations Act [*Chapter 28:01*]. That being the case, it follows that the respondent remains an employee of the appellant. This conclusion is confirmed by the appellant's failure to produce any evidence indicating that it had terminated the contract in question.

E If on 1 January 2000, the post of Chief Internal Auditor was still occupied by some other person, the appellant should have given the respondent an equivalent post or paid him the salary of Chief Internal Auditor, in the event that it had no other work for him.

Mr *Andersen*, who appeared for the appellant, submitted that the learned F judge in the court *a quo* should have found that the relationship between the parties had broken down to the extent that it was wholly inappropriate for the respondent to be reinstated in employment. With respect, I disagree with that submission for two reasons.

The first reason is that no issue of reinstatement arises in this case. As already stated, the appellant did not produce any evidence to show that the contract G of employment entered into in 1985 was terminated.

The second reason is that even if reinstatement were in issue, the appellant did not produce any evidence indicating that the relationship between the parties to the 1985 employment contract had broken down to the extent alleged. On the papers, the only complaint of a breakdown in the relationship H between the parties was made by the appellant's Chief Executive Officer in

Sandura JA

his letter to the respondent, dated 24 September 1999, which I have already A set out above. The relevant part reads:

> "I consider that the employer/employee relationship between yourself and the company has completely broken down to such an extent that it is no longer possible for you to remain in your employment."

As already stated, the letter was written for the purpose of terminating the B contract of assignment by giving the respondent three months' notice, and the reason given for that termination was that the relationship between the parties had broken down to the extent alleged. The allegation that the relationship had broken down had nothing to do with the 1985 contract of employment.

In any event, when the respondent's lawyers, in a letter dated C 28 September 1999, asked the appellant's Chief Executive Officer to state the basis on which he had reached the conclusion that the relationship had broken down to the extent alleged, they received no response. In my view, the fact that the Chief Executive Officer did not respond to that query is significant. It might mean that, upon reflection, he could not substantiate the allegation which he had made. D

Furthermore, all that appeared to be in issue was the allegation that on one occasion, as the appellant's Chief Executive Officer and the respondent discussed the operations of Dairiboard Malawi Ltd, the respondent's attitude towards the Chief Executive Officer was disrespectful. In my view, that incident alone would not justify the conclusion that the relationship between the appellant and the respondent had broken down to the extent alleged. E

It is true that in *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis* 1989 (1) ZLR 344 (S) at 349F, this court said:

> "It is easy to conceive of a situation in which, albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer had broken down to the F extent that trust in one another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, *solely because an employee unreasonably and out of wounded pride seeks it*, would be to permit the continuation of an intolerable personal relationship — one which would make it impossible for the employee to perform his duties either to his own satisfaction or to that of his employer" (the G emphasis is mine).

The above principle was subsequently applied by this court in *Winterton, Holmes & Hill* v *Paterson* 1995 (2) ZLR 68 (S). At 75F, the court said:

> "In dealing with the issue of reinstatement, the learned judge *a quo* was alive to the breakdown in the relationship between the appellants and H

> A the respondent, with no degree of trust or respect remaining on either side."

The respondent in that case was a professional assistant in the appellants' law firm.

The principle was again applied by this court in *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S) B . The respondent in that case had been caught stealing his employer's property but the charge had subsequently been withdrawn after plea. At 250A-B, this court said:

> "The respondent was a fairly senior employee. He was a person in whom the appellant reposed trust. He held a position which imported a close association with its manager. It cannot be doubted that from the appellant's C viewpoint the personal relationship between it and the respondent had broken down to the extent that confidence in the respondent's honesty had been lost; there was no prospect of restoring a normal employer-employee relationship. Therefore, to have ordered the respondent's reinstatement — to have thrust him back upon the appellant, a relatively small organisation, against its will — was to create for it an intolerable D situation."

However, whilst the principle is well established I do not think it applies to the facts of the present case. I say so because, apart from the bald statement made by the appellant's Chief Executive Officer that the relationship between the parties had broken down to the extent alleged, the appellant E produced no evidence of the alleged breakdown of the relationship and what caused it. There was no evidence indicating, for example, that the relationship between the parties had broken down to the extent that trust in one another had been lost, or that the appellant had lost confidence in the respondent's *honesty*.

F Thus, if the respondent's reinstatement had been an issue in the court *a quo,* the learned judge would have been entitled to exercise her discretion in favour of the respondent by ordering his reinstatement. However, the issue of reinstatement did not arise because the learned judge found, correctly in my view, that the 1985 contract of employment had not been terminated.

In the circumstances, the appeal is devoid of merit and is, therefore, G dismissed with costs.

CHIDYAUSIKU CJ and CHEDA JA concurred.

Scanlen & Holderness, appellant's legal practitioners

H *Kantor & Immerman*, respondent's legal practitioners

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Source:
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PANGETI v GRAIN MARKETING BOARD 2002 (1) ZLR 454 (H)

Citation	2002 (1) ZLR 454 (H)
Case No	Judgment No. HH-78-02
Court	High Court, Harare
Judge	Makarau J
Heard	27 February 2002
Judgment	22 May 2002
Counsel	*F Mutamangira*, for the applicant *A Maguchu*, for the respondent
Case Type	Application for review
Annotations	No case annotations to date

Flynote

Employment — *code of conduct — proceedings under — composition of disciplinary tribunal — not constituted as required by code — proceedings* D *invalid*

Employment — *contract — termination — illegal — contract induced by misrepresentation — employer's remedy — should dismiss employee — proceedings under disciplinary code creating status of employee* E

Review — *domestic remedies — exhaustion of before review is brought — no requirement for party to exhaust domestic remedies*

Headnote

The applicant joined the respondent as a typist in 1990. In 1991, an employment form was filled out in which it stated that the applicant had certain educational qualifications. In 1999, she was asked to provide F proof of those qualifications. When she failed to do so, she was charged with misconduct, found guilty and dismissed. An appeal to the respondent's chief executive officer was dismissed. An application for review was brought before the High Court. The applicant argued that the disciplinary committee was improperly constituted in terms of the respondent's code of conduct. She also argued that the decision to G dismiss her was grossly unreasonable.

It was argued, for the respondent, that the applicant should have exhausted her domestic remedies first, by appealing to the Labour Relations Tribunal.

Held, that the court will not ordinarily close its doors to any litigant who is entitled to relief, but, in the exercise of its inherent jurisdiction to H

Makarau J

A regulate and control its proceedings so as to prevent injustice or abuse of its process, the court may withhold its jurisdiction. Its discretion in this respect should be sparingly exercised, as the courts should be open to all. There were no grounds advanced or shown as to why the court's jurisdiction should be withheld, and the application would be heard.

B *Held*, further, that where a disciplinary committee is established in terms of a code of conduct, and the composition of the committee is not as provided for in the code, the deviation from the code constitutes a procedural irregularity which renders the proceedings voidable at the instance of the employee.

C *Held*, further, that the dismissal was illegal. The applicant had obtained her employment with the respondent on the strength of her alleged qualifications. Had the respondent known at the time that she did not have those qualifications, she would not have been employed. By charging the applicant with misconduct, instead of simply dismissing her, the respondent had clothed her with the status of an D employee.

Held, further, that for a charge of misconduct to be sustainable, the respondent must have ordered the applicant to perform the duties and responsibilities required of her by her contract of employment. The production of educational certificates is not such a duty or responsibility; it is singular act required to bring the contract of employment into being.

E *Held*, therefore, that the applicant's dismissal should be set aside.

Cases cited

Fikilini v A-G 1990 (1) ZLR 105 (S)

Madoda v Tanganda Tea Co Ltd 1999 (1) ZLR 374 (S)

Sec for Transport v Makwavarara 1991 (1) ZLR 18 (S)

Zikiti v United Bottlers 1998 (1) ZLR 389 (H) F

ZUPCO v Mabande & Anor 1998 (2) ZLR 150 (S)

Case information

F Mutamangira, for the applicant

A Maguchu, for the respondent

Judgment

G **MAKARAU J**: This is an application for review brought in terms of Order 33 of the High Court Rules. The facts of the matter are not in dispute. They are as follows. The applicant joined the respondent in 1990 as a typist. This appears to have been on a temporary basis for in 1992, she was confirmed as a permanent employee of the respondent. On some date in 1991, the H applicant, or someone purporting to be her, filled out an employment form

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in which it was represented that the applicant had attended Lord Malvern A High School between 1977 and 1980 and had passed three subjects at 'O' level. The form was not signed nor dated.

On 18 November 1999, the respondent's personnel manager requested the applicant to furnish proof of her qualifications. This the applicant failed to do. She was then charged with misconduct before a disciplinary committee. The B charges that were preferred against her were communicated to her by a letter dated 15 June 2000 that read in part as follows:

> "RE MISCONDUCT CHARGES
>
> (a) Insubordination — wilful and unreasonable disobedience of a lawful order from a superior. Category I section I C
>
> (b) Theft, fraud, forgery, involvement in bribery, misappropriation, falsification of documents. Category I section 3.
>
> (c) Incitement, intimidation, indulging in disorderly behaviour or activities inconsistent with the express or implied conditions of his/her contract of employment. Category 1 section 5. D
>
> In the letter dated 18 November 1999 from the Human Resources Manager, you were advised that the Chief Executive had requested that you submit proof of the 3 'O' level passes that you had claimed to possess on joining the Board in 1991; and also in the interviews of 1996, by 26 November 1999. You, however did not submit these or offer an explanation by the due date. The Regional Personnel Officer (Northern) E then wrote to you on 4 January 2000, reminding you to respond in writing to the Chief

> Executive's request by 12 January 2000; which she set as the new deadline. However, you did not respond in writing as had been required. Your failure to respond as required is considered to be insubordination." F

The disciplinary committee found her guilty of the alleged act of misconduct and recommended that her employment be terminated. The applicant appealed against this decision. In accordance with the provisions of the respondent's code of conduct, her appeal was noted to the Chief Executive who dismissed the appeal. The applicant then filed the above application for review.

The applicant alleged as her grounds for review, firstly, that the Disciplinary G Committee that sat to hear her matter was not properly constituted and, secondly, that the decision of the respondent to dismiss her is grossly unreasonable.

The application was duly opposed.

In opposing the application, the respondent raised three preliminary issues. H

2002 (1) ZLR p457

Makarau J

A Firstly, the respondent argued that the applicant has approached the wrong forum for relief. The respondent contended that the applicant ought to have noted an appeal to the Labour Relations Tribunal in terms of s 101(7) of the Labour Relations Act [*Chapter 28:01*].

The issue of whether or not in labour issues this court has concurrent jurisdiction with the Labour Relations Tribunal has exercised this court B before. In my view, Gillespie J put the issue to some rest in *Zikiti* v *United Bottlers* 1998 (1) ZLR 389 (H). I can do no better than quote from the learned judge's judgment. This is what he had to say:

> "The particular point concerning the bringing of review proceedings in the High Court, in connection with an employment dispute not yet C resolved in a lower authority, is generally raised as an instance of a suggested obligation to exhaust domestic remedies before approaching this court. The Labour Relations Act does not expressly require that the domestic or statutory procedures and remedies be exhausted before an approach is made to this court. The question whether an intention to this effect is to be necessarily implied from the legislation has therefore D exercised the court on occasion. It would appear from the authorities that in employment disputes the court does not hold its common law jurisdiction in principle to be ousted or suspended pending the exhaustion of domestic remedies."

In my view, the point made by Gillespie J is that the court will not ordinarily E close its doors to any litigant who is entitled to relief from it but, in the exercise of its inherent jurisdiction to regulate and control its proceedings so as to prevent an injustice or abuse of its process, the court may withhold its jurisdiction. A caution is, however, sounded in the judgment that the courts should sparingly exercise this equitable discretion to withhold its jurisdiction, as the courts of law should be open to all. I agree with this view. The F jurisprudential basis supporting this view is obvious and has its foundation in the universally acclaimed right of every one to an effective remedy by the competent national tribunals for acts violating rights granted him or her by the laws of the land.1

In the matter before me, no reason was advanced as to why I should withhold G the court's jurisdiction. It has not been shown that recourse to the machinery set up under the Labour Relations Act will confer a more effective remedy to the applicant. I, therefore, decline the invitation to withhold my jurisdiction in the matter.

The second preliminary issue raised by the respondent relates to the late filing

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2002 (1) ZLR p458

Makarau J

of the application for review. The point was first raised in the respondent's A opposing affidavit. Thereafter, the applicant filed an answering affidavit together with an affidavit headed "Affidavit of Condonation". It has been argued on behalf of the respondent that because the affidavit explaining the delay was not filed before the main application and was not accompanied by a formal application, the application for condonation must be denied.

I find this objection frivolous especially in view of the provisions of r 4(c) of B the High Court Rules. In terms of this rule, the court is empowered to authorise departures from the strict observance of its own rules where the court it is satisfied that such departure is required in the interests of justice.

The departure from the rules by the applicant was very slight, in my view. Further, it did not occasion any prejudice to the respondent who, before the C hearing, was aware that an application

for condonation would be made and the grounds thereof.

In terms of r 259, a party intending to institute review proceedings must do so within 8 weeks from the date of the decision to be reviewed. If he or she does not do so within the prescribed period, he or she must first make an D application for the extension of the period.

In considering an application for the extension of the period within which the review proceedings may be instituted, the court will have regard to the period of delay, the explanation for such delay, the importance of the case, the prospects of success, the respondent's interests in the finality of his judgment, E the convenience of the court and the avoidance of unnecessary delay in the administration of justice. This, in my view, grants the court wide discretion to come up with a value judgment that best serves the interests of justice. The consideration of an application for condonation for late filing of a review application is not a hurdle course where the applicant has to pass certain hurdles before their application can be granted. In my view, it is a consideration F in which all or some of the factors I have referred to above are taken into account to enable the court to make a determination in the best interests of justice.

I have taken into account all the factors referred to above. In particular, I have been influenced by the respondent's attitude that the period of delay is not unreasonably long. While the reason for the delay may not be termed G impressive, I have taken into account the strong merits of the applicant's case and regard this as pivotal in tipping the scales in favour of the granting of the application for condonation.

I now turn to the merits of the application.

The applicant has advanced, as one of the grounds for review, the fact that the H

Makarau J

A Disciplinary Committee that sat to determine the charges of misconduct against her was improperly constituted. She alleges that no member of the Workers Committee, who are also members of the Works Council, sat on the committee when the code stipulates that three should sit. Relying on the Supreme Court judgment in *Madoda* v *Tanganda Tea Co. Ltd* 199 (1) ZLR 374 (S), the applicant argued that the decision of the committee was therefore B a nullity by virtue of the non-compliance. I agree. The judgment in *Madoda*'s case binds me to hold that where a disciplinary committee is established in terms of a registered code of conduct and the composition of the committee is not as provided for in the code, the deviation from the provisions of the code constitutes a procedural irregularity, which, if not vitiating the proceedings, C renders them voidable at the instance of the employee.

Assuming that I am wrong in holding that the decision of the committee was a nullity by reason of non-compliance with the provisions of the code of conduct, in my view, the applicant would succeed in her application on another basis. This is as follows.

The applicant has alleged as one of the grounds for review that the decision of D the respondent was grossly unreasonable. This, in my view, brings under the spotlight the content of the decision of the respondent to dismiss the applicant.

The powers of the High Court on review have been extensively discussed: See *Fikilini* v *Attorney-General* 1990 (1) ZLR 105 (S); *Secretary of Transport* v *Makwavarara* 1991 (1) ZLR 18 (S).

E In *Secretary for Transport* v *Makwavarara supra*, the Supreme Court accepted as correct the concession by both counsel that administrative action is subject to control by judicial review under three heads: illegality, irrationality and procedural impropriety. It is with the first ground that we are concerned with in these proceedings. In my view, the respondent made an error in law F in arriving at its decision.

According to the facts of the application, it is not in dispute that the applicant did not furnish the respondent with proof of her qualifications. It is further not in dispute that she obtained her employment with the respondent on the strength of the alleged qualifications.

G In my view, it cannot be disputed that if the respondent had known way back in 1991 that the applicant was not possessed of the qualifications she purported to hold, she would not have been employed. The misrepresentation by the applicant, therefore, induced the contract between the two parties. This point has not escaped the respondent's legal practitioner. He correctly notes in his

supplementary heads of argument that the question of the applicant's H qualifications was a pre-requisite to employment.

2002 (1) ZLR p460

Makarau J

In the circumstances of this matter, the remedy pursued by the respondent in A charging the applicant with an act of misconduct was, in my view, ill conceived. By charging the applicant with an act of misconduct, the respondent has pushed itself into a legal conundrum. It is this: the applicant is either an employee of the respondent or she is not. If she is an employee, then the question of her qualifications falls away. But only employees of the respondent B can be charged with misconduct. Therefore, by charging the applicant with an act of misconduct, the respondent has elected to clothe the applicant with the status of an employee. However, once it has accepted that the applicant as an employee, the effect of any misrepresentations inducing the contract of employment falls away. In other words, the respondent, in my view, can only use the misrepresentation to terminate the contract of employment and not to C discipline the applicant.

If I were wrong in my above finding, I still would have upheld the applicant's application on another basis.

It is common cause that the applicant was employed as a clerk/typist. Although her duties were not given in the application, one would assume that D these were the ordinary duties normally associated with this post. For the charge of misconduct against the applicant to be sustainable, the respondent must have ordered her to perform those duties and responsibilities required of her by her contract of employment: see *ZUPCO* v *Mabande & Anor* 1998 (2) ZLR 150 (S). The production of educational certificates is a singular act that is expected of most people joining employment at whatever level. It is E not a duty or responsibility expected in terms of any contract of employment. It is a duty or responsibility expected of all employees, to bring into being the contract of employment, unless the employer decides to overlook or waive its right to this requirement.

In my view, failing to produce educational certificates should rightfully result in no contract at all and cannot found ground for dismissal once the F contract has come into being.

On the basis of the foregoing, I make the following order:

1. The purported dismissal of the applicant from employment is hereby set aside. G
2. The respondent is to pay the applicant's costs.

Mudambanuki & Associates, applicant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v HWETE 2002 (1) ZLR 461 (H)

S v HWETE 2002 (1) ZLR 461 (H)

2002 (1) ZLR p461

Citation	2002 (1) ZLR 461 (H)
Case No	Judgment No. HH-75-02
Court	High Court, Harare
Judge	Smith J
Heard	22 May 2002

Judgment 22 May 2002

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Criminal law — *statutory offences — Public Order and Security Act* D *[Chapter 11:17] — s 32(4) — failure to produce an identity document to police — no offence created by section*

Headnote

The accused was charged with contravening s 32(4) of the Public Order and Security Act [*Chapter 11:17*]. It was alleged that he had, when being arrested for common law offences, failed to produce an identification E document.

Held, that the section does not create an offence or provide a penalty. What it provides is that a person who, in any of the circumstances stated in the subsection, fails to produce an identification document may be detained until his identity is established. The police must, however, give him F every reasonable facility to establish his identity.

Legislation considered

Public Order and Security Act [*Chapter 11:17*], s 32(4)

Judgment

SMITH J: The accused was charged with 2 counts of housebreaking with G intent to steal, one count of contravening s 44(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (escaping from custody) and one count of contravening s 32(4) of the Public Order and Security Act [*Chapter 11:17*] (hereinafter referred to as "POSA"). The facts are as follows. In October 2001, the accused broke into a hut and stole some property. A few days later he was arrested and taken to St Mary's police station. He was then H taken to the Dema police station and he managed to escape. In February 2002,

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Smith J

he broke into another hut and stole some property. He was subsequently A arrested and taken back to the Dema police station. When he was there he was asked to produce his identification particulars but he failed to do so. These actions resulted in the 4 charges being put to him. He pleaded guilty to all the charges and was convicted on each. He was sentenced to 12 months' imprisonment on count 1, 3 months' imprisonment on count 2, 3 months' imprisonment on count 3 and, on count 4, to a fine of $500 or, in default of B payment, 30 days' imprisonment. It was ordered that the sentence on the first three counts were to run concurrently.

The convictions and sentences on the first three counts are in order. However, that is not the case with count 4. Section 32 of POSA reads as follows:

> "32 Persons to carry identity documents C
>
> (1) In this section —
>
> 'arrestable offence' means an offence specified in the First Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*];
>
> 'identity document' means —
>
> (a) a document issued to a person in terms of subsection (1) or (2) of D section 7 of the National Registration Act [*Chapter 10:17*], or a passport or drivers licence issued by or on behalf of the

Government of Zimbabwe; or

(b) any visitors entry certificate or other certificate or permit issued to a person in terms of the Immigration Act [*Chapter 4:02*], or in terms E of any enactment relating to refugees; or

(c) any passport, identity document or drivers licence issued by a foreign government.

(2) Subject to this section, every person of or above the age of sixteen years shall, when in a public place, carry an identity document F on his person.

(3) Subject to this section, a police officer may at any time require a person of or above the age of sixteen years in a public place to produce an identity document.

(4) Any person who fails to produce his identity document G immediately on being required to do so by a police officer —

(a) acting in good faith in the course of investigating or preventing an arrestable offence; or

(b) at the scene or in the immediate vicinity of the commission of an arrestable offence committed within the preceding forty-eight hours; or H

2002 (1) ZLR p463

Smith J A

(c) within a police condon; or

(d) at a police road block; or

(e) in the immediate vicinity of any area controlled or protected in terms of the Defence Act [*Chapter 11:01*], the Protected Places and Areas Act [*Chapter 11:12*] or the Parks and Wild Life Act [*Chapter 20:14*]; B or

(f) at a public gathering or a public meeting of a political nature;

may be detained by the police officer until such time as his identity is established or verified to the satisfaction of the police officer:

Provided that the police officer shall afford the person detained every C reasonable facility to enable him to establish or verify his identity.

(5) Any person who is found without an identity document on his person in circumstances other than those specified in subsection (4) shall be afforded an opportunity, within seven days thereafter, of producing his identity document at a police station specified by notice in writing issued by the police officer who required him to produce his identity D document.

(6) Any person who, on being required to do so in terms of subsection (5), fails to produce his identity document at a police station specified in terms of that subsection, may be detained by a police officer until such a time as his identity is established or verified to the satisfaction of the E police officer."

It is significant that nowhere in s 32 is it provided that, if a person fails to carry an identity document on his person as required by subs (2) thereof or to produce his identity document when so required in terms of subs (4) thereof, he shall be guilty of an offence. That is in contrast to the many other sections of the Act which clearly describe specific acts or conduct which constitute offences. Not F only does s 32 not specify that failure on the part of any person to comply with the provisions of that section shall be an offence, but it also does not specify the penalty that may be imposed when a person is convicted of failing to comply with the provision. Every other section of POSA which creates an offence goes on to specify the penalty to which a person who is found guilty of the offence G shall be liable. What s 32 does specify is that if a person fails to produce his identity document when required to do so in terms of subs (4), he or she may be detained by a police officer until such time as his or her identity is established or verified. Subsection (6) of s 32 contains a similar provision. It follows, therefore, that the accused should not have been convicted of contravening s 32 of POSA because he did not commit any offence by virtue H of the fact that he was not carrying an identity document on his person.

2002 (1) ZLR p464

Smith J

I asked the Attorney-General if he supported the conviction and he replied as A follows:

"It is not in dispute that the police officer who asked the accused to produce his identity card was in the course of investigating offences that had allegedly been committed by the accused. The police officer was therefore entitled to ask the accused to produce his identity document in B terms of this Act.

The police officer is also entitled to detain the accused until such a time that the accused's identity is verified.

There is however a proviso to s 4 of the Act. The proviso states that 'Provided that the police officer shall afford the person detained every C reasonable facility to enable him to establish or verify his identity'.

It is my submission that this provision was not utilised by the officer. There is no indication that the accused was given the opportunity to have his identity established or verified. The arresting police officer simply proceeded to charge the accused with not being in possession of an identity card without giving him an opportunity to establish his identity. D Further, the magistrate, in convicting the accused, did not enquire into whether the accused had been afforded the opportunity to have his identity established or verified. The magistrate simply convicted the accused on the basis that he had no identity document on his person at that time.

The proviso to s 4 was ignored, which was an irregularity on the part of E the trial magistrate.

It is, therefore, respectfully submitted that the conviction is not supported in the circumstances."

The convictions and sentences on counts 1, 2 and 3 are confirmed but the conviction and sentence on count 4 is set aside. F

BLACKIE J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/NESTOR INVESTMENTS (PVT) LTD v COMMISSIONER OF TAXES 2002 (1) ZLR 465 (S)

NESTOR INVESTMENTS (PVT) LTD v COMMISSIONER OF TAXES 2002 (1) ZLR 465 (S)

Citation	2002 (1) ZLR 465 (S)
Case No	Judgment No. S-132-01
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA & Malaba JA
Heard	15 November 2001
Judgment	23 May 2002
Counsel	*P Nherere*, for the appellant *H Zhou*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Revenue and public finance — *sales tax — rates applicable — rate applicable* D *to video tapes for "public viewing" — tapes hired to individuals for their private use not for public viewing*

Headnote

The appellant's business was to acquire video tapes and hire them to members of the public. Any member of the public was eligible, on payment of a fee, to hire the tapes. The appellant was

obliged to pay sales tax on the sales value of the tapes hired out. The rates of tax were set out in the Schedule to Chapter IV of the Finance Act [*Chapter 23:04*]. Where video tapes were "for public viewing", a lower rate of tax applied. The appellant paid this rate of tax, but the Commissioner considered that the a higher rate should have applied, as the tapes were not for public viewing.

Held, that in order to qualify as being for public viewing, the tapes had to be open to the public to view as the public, as opposed to being available to individual members of the public for hire and private viewing. When a member of the public hired a tape, it did not thereby become available for the public to view, but for that person to view privately, either on his own or with members of his family or friends. The tapes were hired out for the private use of the person who hired them, not for public viewing.

Legislation considered

Finance Act [*Chapter 23:04*], Chapter IV, Schedule, Parts I and III

Case information

P Nherere, for the appellant

H Zhou, for the respondent

Malaba JA

Judgment

MALABA JA: This is an appeal from a judgment of the President of the Fiscal Court of Appeal delivered on 14 February 2000, dismissing an appeal against the decision of the respondent disallowing an objection by the appellant to the assessment of payable sales tax.

The facts of the matter are as follows. The appellant (hereinafter referred to as "Nestor") is a private company, incorporated in terms of the laws of Zimbabwe in 1995, to acquire video tapes on various topics and hire them to members of the public. The video tapes are displayed for hire at Nestor's three shops in Harare. Any member of the public was eligible, on payment of a fee, to hire the video tapes.

Nestor was liable under s 4(1) of the Sales Tax Act [*Chapter 23:08*] to charge sales tax on the sales value of the video tapes it hired out to members of the public in the course of its business. The rates at which the sales tax was to be calculated were prescribed under Part I and Part III of the Schedule to Chapter IV (Section 29) of the Finance Act [*Chapter 23:04*] (the Act). Part I provided that the rate of sales tax applicable to goods classified under the tariff headings specified thereunder was twenty *per centum*. Under tariff heading 85:24 were listed the following goods:

> "Records, tapes and other recording media for sound or other similarly recorded phenomena, including matrices and masters for the reproduction of records, but excluding products listed in Chapter 37 of the customs tariff prescribed in terms of the Customs Act and *video tapes for public viewing*" (my emphasis).

Part III provided that the rate of sales tax in respect of goods other than those specified in any other Part of the Schedule was fifteen *per centum*. The lower and higher rates of sales tax specified were applicable during the period August 1995 to November 1996 (the first period). For the period December 1996 to July 1998 (the second period), the lower and higher rates of sales tax applicable were 17 1_2 per cent and 25 per cent respectively.

It is common cause that Nestor collected sales tax on the leases of the video tapes to members of the public at the lower rates of 15 per cent during the first period and 17 1_2 per cent in the second period. In 1998, the Commissioner of Taxes caused Nestor's books of account to be inspected for purposes of sales tax assessment. The result of the assessment was that Nestor ought to have charged sales tax at the higher rates during the two periods. In respect of the first period the amount by which Nestor underpaid sales tax was $132 093.63 plus a penalty of 25 per cent. The total amount of sales tax not paid by Nestor was $165 117.03. For the second period it underpaid the sales tax by an amount of $199 702.69 plus a penalty of 50 per cent bringing the total to $299 554.03.

Malaba JA

A On 29 July 1998, Nestor lodged an objection to the assessment in writing to the Commissioner of Taxes. The ground of the objection was that the assessment was wrong because the video tapes Nestor leased to members of the public were "video tapes for public viewing" and, therefore, excluded from the higher rate applicable to the calculation of sales tax on the other goods listed in tariff heading 85:24 of the Schedule to Chapter IV of the Act. B Nestor argued that the applicable rate of sales tax was that prescribed under Part III of the Schedule.

The Commissioner of Taxes disallowed the objection in respect of the amount by which Nestor had underpaid sales tax but allowed it in respect of the penalties. The reason the Commissioner of Taxes gave for his decision C was that the video tapes leased by Nestor in the course of its business were not for public viewing. He found that they were hired and used privately by members of the public. For that reason, a higher rate of sales tax should have been applied.

Dissatisfied with the decision of the Commissioner of Taxes, Nestor appealed to the Fiscal Court of Appeal on the same ground, that it was entitled to apply D the lower rates of sales tax to the leases of the tapes because they were for public viewing.

In dismissing the appeal, the learned President said:

> "In order to qualify as being for public viewing the tapes must be open to the public to view as the public, as opposed to being available to E individual members of the public for hire and private viewing. When a member of the public hires a tape from Nestor it does not become available for the public to view but for that person to view it privately, either on his own or with members of his family or friends. The business of Nestor differs from that of a person whose business is to play the tapes in a shop or other place open to members of the public where any person F may enter and watch the tapes being played whether for a fee or otherwise. The business of Nestor is to hire out the tapes and not to play the tapes for members of the public to watch at its premises …
>
> The phrase used in relation to customs tariff heading 85:24 is 'video tapes for public viewing'. To my mind, that connotes viewing by G members of the public. Obviously, the video tapes hired out by Nestor could be used for public viewing in that once a member of the public has hired the tape he or she may use it for whatever purpose he or she wishes, which may include public viewing. However, when Nestor hires out any particular video tape that tape is hired out for the private use of the person who has hired it. It is not hired out for public viewing, it is for viewing H by the individual concerned and those whom he permits to view it."

Malaba JA

I respectfully associated myself with the reasoning of the learned President. A

Nestor was obliged, in terms of s 4(1) of the Sales Tax Act [*Chapter 23:08*] to charge sales tax on sums paid for the hire of the video tapes at the rate prescribed from time to time under Part I of the Schedule of Chapter IV of the Act unless they were being hired for public viewing. The charging of the sales tax at the lower rate prescribed under Part III of the Schedule was an B exception to the obligation to charge sales tax at the higher rate.

The onus was on Nestor to prove that the video tapes were hired for public viewing. In my view, it failed to discharge that onus. It produced no direct evidence of a transaction in which video tapes were hired for public viewing. What Nestor did was to ask the Commissioner of Taxes and the court *a quo* to infer from the circumstance of the video tapes being hired by members of C the public the fact that they were hired for public viewing.

The transaction which gave rise to the statutory obligation to charge the sales tax on the sums paid as hiring fees did not, *per se,* involve the viewing of the video tapes. Nestor had no control over the type of viewing to which the hirer put the video tapes. It could not say at the time of hire whether the video tapes D were in fact for public viewing.

I would, accordingly, dismiss the appeal with costs.

EBRAHIM JA and MUCHECHETERE JA concurred. E

Coghlan, Welsh & Guest, appellant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/MUKUNDU v CHAIRMAN, MUTASA RURAL DISTRICT COUNCIL & ANOR 2002 (1) ZLR 469 (S)

MUKUNDU v CHAIRMAN, MUTASA RURAL DISTRICT COUNCIL & ANOR 2002 (1) ZLR 469 (S)

Citation	2002 (1) ZLR 469 (S)
Case No	Judgment No. S-25-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	12 March 2002
Judgment	23 May 2002
Counsel	*F G Gijima*, for the appellant *N Machingauta*, for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

D **Employment** — *Labour Relations Act [Chapter 28:01] — application of to suspension and dismissal of employee of rural district council*

Headnote

The provisions of the Labour Relations Act [*Chapter 28:01*] apply to the suspension and termination of employment of employees, including E senior employees, of rural district councils.

Cases cited

City of Mutare v Matamisa 1998 (1) ZLR 512 (S)

Gumbo v Norton-Selous Rural Council 1992 (2) ZLR 403 (S)

Masasi v Posts & Telecommunications Corp 1991 (2) ZLR 73 (H)

Legislation considered F

Labour Relations Act [*Chapter 28:01*], ss 3 & 17(2)

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371/85), ss 2 & 3

Case information

G *F G Gijima*, for the appellant

N Machingauta, for the respondents

Judgment

MALABA JA: This is an appeal from a judgment of the High Court delivered on 15 February 2001 dismissing with costs an application by way of review H for an order setting aside the decision by the second respondent to suspend

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Malaba JA

the appellant from work and directing that he be reinstated to the post of chief A executive officer.

The relevant facts placed before the court *a quo* may be summarised as follows. The appellant, to whom I will refer as "Mukundu", was employed by the second respondent (hereinafter called "the Council") as chief executive officer. In a report dated 5 January 1998, internal auditors who had examined B the Council's books of account made certain allegations of financial mismanagement against Mukundu. They alleged in particular that he —

1. Awarded himself increments in salary and allowances without authority from the Council;
2. Obtained cement blocks from Council premises for private purposes on C credit without Council's authority. At the time of audit he had not paid for 1 300 cement blocks;
3. Failed to account for $16 000 that went missing from Council funds;
4. Failed to keep records of the collection and use of the development levy so that it was not known what contributions were being made by wards and individuals; and D
5. Sold Council assets to private individuals on credit after they had won tender without Council's authority. At the time of audit the full purchase price of a motor vehicle sold on credit after a successful tender had not been recovered.

On 10 February 1998, the Council appointed a committee in terms of s 62 of E the Rural District Councils Act [*Chapter 29:13*] ("the Act") to investigate the allegations of misconduct made against Mukundu in the internal audit report. At the proceedings held by the committee Mukundu was asked to comment on the allegations made in the audit report. In addition to the verbal explanation, Mukundu submitted written comments.

At the end of the inquiry on 18 February 1998, the committee was of the view F that there were grounds to believe that Mukundu was guilty of misconduct, dishonesty and negligence in the performance of his duties as chief executive officer. It recommended that he be suspended from work without pay and an application made to a labour relations officer in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) G Regulations, 1985, SI 371/85 ("SI 371/85"). A letter was written to Mukundu by the first respondent ("the chairman") on 28 February 1998, notifying him that he was on suspension without pay as from that date. The letter advised him that an application was to be made to a labour relations officer for an order terminating his contract of employment and outlined the grounds the Council would rely upon in making the application. H

Malaba JA

A On 6 March 1998, the Council ratified and adopted the decision of the committee and approved the suspension of Mukundu. On 11 March 1998, an application was made to the labour relations officer in terms of s 3 of SI 371/85 for an order terminating Mukundu's contract of employment. On 26 March 1998, the labour relations officer notified the parties that the application for the dismissal of Mukundu was to be heard on 8 April B 1998.

A day before the application for the order terminating his contract of employment was to be heard, Mukundu made an application to the High Court for the review of the decision of the Council to suspend him from work. He alleged that the suspension was unlawful because the Council had no right C to refer the matter of the termination of his contract of employment to the labour relations officer. The argument was that the Council ought to have discharged Mukundu in terms of s 36(2)(b) of the Conditions of Service 1993 ("the Conditions of Service").

The Conditions of Service were fixed by the Council with the approval of the Minister responsible for the administration of the Act in terms of s 67(1). D Section 36(1)(e) of the Conditions of Service provided that the Council could discharge an officer without notice on the ground of misconduct. Section 36(2) then provided that:

"Where an officer … is liable to dismissal without notice in terms of paragraph (e) of subsection (1) of section 36 of these Conditions of E Service, the Council —

(a) may suspend him from duty pending the outcome of an inquiry, which the Council shall carry out, and, unless the Council directs otherwise, his salary or wages shall terminate with effect from the date of his suspension;

(b) on receipt of the report of the inquiry referred to in paragraph (a), the F Council may, if it thinks fit, discharge such officer … with effect from the date of suspension …"

The argument advanced on behalf of the appellant in the court *a quo* was that, having found that Mukundu had committed acts of misconduct which rendered him liable to dismissal without notice, the Council had to act in G terms of s 36(2)(b) of the Conditions of Service and discharge him. It was said that the application to the labour relations officer was a nullity because it was not the sequel of a suspension in terms of s 36(2)(a) of the Conditions of Service. In other words, the submission was that the provisions of the Labour Relations Act [*Chapter 28:01*] and SI 371/85 were not applicable to the termination of Mukundu's contract of employment with the Council. H The learned judge rejected the argument, holding instead that the Council

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Malaba JA

was obliged to apply the provisions of the Labour Relations Act and A SI 371/85 to the dismissal of the appellant.

Section 3 of the Labour Relations Act provides that it:

"… shall apply to all employers and all employees except those whose conditions of employment are otherwise provided for by or under the Constitution." B

It is common cause that conditions of employment of employees of rural district councils are not provided for by or under the Constitution. (See *Gumbo* v *Norton-Selous Rural Council* 1992 (2) ZLR 403 (S).)

Section 2(1) of SI 371/85 provides that:

"… no employer shall, summarily or otherwise, terminate a contract of C employment with an employee unless —

(a) he has obtained the prior written approval of the Minister to do so; or

(b) …

(c) … D

(d) the contract of employment is terminated in terms of section 3."

Section 3 provides that where an employer has:

"… good cause to believe that an employee is guilty of —

(a) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract; … E

the employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment."

Statutory Instrument 371/85 contains regulations made in terms of s 17(1) of the Labour Relations Act. The regulations are, by virtue of s 3(1) of the F Interpretation Act [*Chapter 1*], part of the Labour Relations Act. Section 17(2) provides that unless such regulations otherwise provide, they shall prevail over any other Statutory Instrument or any agreement or arrangement whatsoever.

Before considering the issue debated in the appeal, I must mention that the G application for an order terminating Mukundu's contract of employment with the Council was subsequently heard by the labour relations officer. He found that the grounds for the suspension of the appellant from duty had been proved and had an order terminating his contract of employment served on him. Mr Mukundu appealed to the senior labour relations officer who, on 10 April 2000, upheld the decision of the labour relations officer. On 8 May H

Malaba JA

A 2000, an appeal was noted to the Labour Relations Tribunal ("the Tribunal") against the decision of the senior labour relations officer. The appeal is pending hearing by the Tribunal.

I turn now to consider the issue raised on appeal in this court.

It is clear from the papers that the Council carried out the inquiry into the B allegations of misconduct levelled against the appellant in the internal audit report in order to satisfy itself that there were grounds for suspending him from duty pending an application to the labour relations officer for an order or determination terminating his contract of employment. If the application was null and void the suspension was equally unlawful. In that event, the order of the labour relations officer terminating the appellant's contract of C employment would not have effect from the date of his suspension. It would have effect from the date it was made.

I am, however, in agreement with the decision of the learned judge in the court *a quo* that the provisions of the Labour Relations Act and SI 371/85 were applicable to the termination of the appellant's contract of employment. An examination of the Act shows that there is no provision making the D Labour Relations Act and SI 371/85 inapplicable to the termination of a contract of employment of a chief executive officer of a rural district council. Unlike the Urban Councils Act [*Chapter 29:15*], which contains ss 139 and 140 prohibiting an urban council from discharging a town clerk and a senior official respectively without the approval of the Local E Government Board, the Rural District Councils Act has no specific provision relating to the discharge of a senior official such as a chief executive officer.

The cases in which the question of the applicability of the Labour Relations Act and SI 371/85 to the termination of a contract of employment has been raised and resolved show that an employer is obliged to obtain the approval F of the Minister of Public Service, Labour and Social Welfare ("the Minister") to discharge an officer or apply to the labour relations officer for an order or determination terminating the contract of employment, unless the statute under consideration has an express provision allowing the employer to obtain permission to dismiss the officer from a specific body or some other Minister or makes the Labour Relations Act and SI 371/85 inapplicable. See *Masasi* v *Posts and Telecommunications Corporation* 1991 (2) ZLR 73 (H) G ; *Gumbo* v *Norton-Selous Rural Council, supra*; *City of Mutare* v *Matamisa* 1998 (1) ZLR 512 (S).

It must follow from the application of the general principle to the facts of this case that even if the Council had decided to discharge Mukundu in terms of H s 36(2)(b) of the Conditions of Service, the dismissal would have been

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Malaba JA

unlawful for failure to obtain prior written approval of the discharge from the A Minister.

In the circumstances, it is a contradiction in terms to talk of a valid discharge of the appellant in terms of s 36(2)(b) of the Conditions of Service without the acknowledgement of the applicability of s 2(1) of SI 371/85 to the termination of his contract of employment. B

The judgment of the court *a quo* was, in my opinion, correct.

The appeal is, accordingly, dismissed with costs.

CHIDYAUSIKU CJ and ZIYAMBI JA concurred. C

F G Gijima & Associates, appellant's legal practitioners

Bere Brothers, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v BANDA 2002 (1) ZLR 475 (H)

S v BANDA 2002 (1) ZLR 475 (H)

Citation	2002 (1) ZLR 475 (H)
Case No	Judgment No. HB-34-02
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	23 May 2002
Judgment	23 May 2002
Counsel	Details not supplied
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Criminal procedure — *review — irregularity justifying setting aside of* D *conviction — legal practitioner giving evidence, having previously interviewed State witnesses and accused — all interviewed as clients — a serious irregularity*

Headnote

The accused, a police officer, was charged with contravening the Prevention of Corruption Act. He pleaded not guilty but was convicted. He engaged E a new legal practitioner after conviction. The matter was forwarded for review at the request of the new practitioner.

It was alleged against the accused that he had taken a bribe from three foreigners whom he had arrested on suspicion of car theft. A legal practitioner had interviewed the foreigners. Thereafter, when the F allegations of corruption were made against the accused, the same legal practitioner interviewed the accused, who had sought his advice. The legal practitioner was called as a State witness during the accused's trial, at which the accused was represented by another member of the practitioner's firm.

Held, that the practitioner's testimony was as a result of the privileged G position he enjoyed from consulting the three foreigners and interviewing the accused. He should have decided who to represent. Representing the three foreigners and the accused was improper. The conflict of interest in this matter culminating in the practitioner giving evidence against the accused amounted to an irregularity actually resulting in a substantial H miscarriage of justice. The proceedings should be set aside.

Kamocha J

Cases cited A

Mhene v Teubes 1986 (2) ZLR 179 (S)

S v Mathe 1996 (1) SACR 456 (N)

Judgment

KAMOCHA J: The accused was a member of the Zimbabwe Republic Police stationed at Victoria Falls. He was charged with contravening s 3(1)(a)(i) as B read with s 2(b) of the Prevention of Corruption Act [*Chapter 9:16*]. He pleaded not guilty but was nevertheless convicted. He changed legal practitioners after conviction. His new legal practitioner forwarded the matter for review on

the ground that the trial of the accused was conducted so irregularly that a failure of justice resulted from the irregularity.

In brief, the circumstances are these. On 10 October 1999, while he was C performing his duties, he had occasion to stop three foreigners, namely, Dumisani Buku, Stephen Dhlamini and Andrew Themba Mashuku, who were travelling together in one vehicle. He had reason to suspect that the vehicle they were travelling in had been stolen. His suspicions were vindicated, as it turned out that the vehicle had indeed been stolen from South Africa. D

The three foreigners were detained. But the following day the first two were released. The circumstances under which the two were released gave rise to the allegations that a bribe was solicited by the accused and that payment to him was subsequently made.

Before the two foreigners were released on 11 October 1999, a legal E practitioner known as Mr Joseph Mahamba, practising under the name and style of Sibusiso Ndlovu and Partners, interviewed all the three foreigners. When allegations of corruption were levelled against the accused, he sought legal advice from Mr Joseph Mahamba — "Mahamba" — the same legal practitioner who represented the three foreigners who later levelled corruption charges against him. What comes out clearly from the evidence on record is F that Mahamba firstly represented the three foreigners. When the accused was arrested he also sought the services of Mahamba who interviewed him. But when the accused appeared in the magistrates' court applying for bail, Mahamba instructed one of his juniors, known as Makamanzi, to deal with the bail application. Makamanzi also practises under the name of Sibusiso G Ndlovu and Partners but was stationed at their Hwange offices.

Makamanzi was going to represent the accused at his trial but on learning that Mahamba, who had initially interviewed him, was going to be a State witness testifying against him, the accused sought the services of another legal practitioner. Mahamba indeed testified against the accused during the trial. The accused was consequently found guilty as charged. H

Kamocha J

A Was the conduct of the proceedings in this matter evidenced by Mahamba testifying against the accused of serious conflict of interest on the part of Mahamba as to amount to a serious irregularity vitiating the proceedings? Mahamba was privy to the communication between the three foreigners and the accused. He was made aware of the nature of the communication by the three foreigners. He, however, went on to accept instructions from the B accused's wife. There is even evidence to the effect that he in fact interviewed the accused for a period of at least 30 minutes.

After Mahamba had withdrawn his services from the accused, the firm continued to represent him. A junior practitioner in the law firm was instructed by Mahamba to handle the matter.

C He testified against the accused. Quite clearly, the testimony was as a result of the privileged position he enjoyed from consulting the three foreigners and interviewing the accused. He should have decided who to represent. Representing the three foreigners and the accused was improper, in my view. In *Mhene* v *Teubes* 1986 (2) ZLR 179 (S), the court expressed grave concern against a legal practitioner who, after interviewing opposing parties to a D potential suit, subsequently testified in the same suit on behalf of one of the parties he had interviewed. The evidence of the lawyer concerned was ignored.

In *S* v *Mathe* 1996 (1) SACR 456 (N), one of the two accused persons changed his story in evidence. The attorney who had represented both withdrew his E services from one of the accused and proceeded to cross-examine him on behalf of the other accused whom he continued to represent. The court, commenting on the irregularity, said at pp 459H-460A:

> "There is no doubt that the irregularities in this matter are associated with the trial in a degree imperilling the basic concept that the accused must be fairly tried. (See *S* v *Alexander & Ors (1)* 1965 (2) SA 796 (A) at F 809D).
>
> There is thus no doubt that the irregularities in this matter pass the 'sufficient actual connection' test. Once an irregularity sufficiently connected with the trial has been shown to exist, a failure of justice will be held to have occurred if the irregularity constitutes so gross a departure from the established rules of procedure and the requirements G which the fundamental principles of law and justice lay down for proceedings that the accused cannot be said to have had a fair trial. In that event, the conviction is set aside despite the presence of convincing evidence which might be present to the effect that the accused is guilty."

A reviewing judge is endowed with powers to set aside a conviction, by H s 29(3) of the High Court Act [*Chapter 7:06*], where he considers that an

Kamocha J

irregularity or defect in the record or proceedings has actually resulted in a A substantial miscarriage of justice. There can be no doubt the conflict of interest in this matter culminating in Mahamba giving evidence against the accused amounted to an irregularity envisaged by the above section.

In my view, the irregularity was so gross as to vitiate the proceedings which must be accordingly set aside and the matter be left to the Attorney-General B to decide whether or not to institute fresh proceedings against the accused.

CHEDA J concurred.

Webb, Low & Barry, accused's legal practitioners C

Office of the Attorney-General, legal practitioners for the State

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/GEDDES LTD v TAWONEZVI 2002 (1) ZLR 479 (S)

GEDDES LTD v TAWONEZVI 2002 (1) ZLR 479 (S)

Citation	2002 (1) ZLR 479 (S)
Case No	Judgment No. S-34-02
Court	Supreme Court, Harare
Judge	Ebrahim JA, Sandura JA & Malaba JA
Heard	10 January 2002
Judgment	27 May 2002
Counsel	*AG Matika*, for the appellant Respondent in person
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Practice and procedure — *application — declaratory order — when* D *application may be treated as such rather than as application for review — allegation that proceedings under consideration were a nullity and prayer that proceedings be declared void — not an application for review of the proceedings*

Headnote

Thirty-three months after he was dismissed from his employment, the E respondent applied to the High Court for relief. His application sought an order setting aside his dismissal and the proceedings on which they were based as being null and void. He alleged several procedural irregularities and failures by the appellant to comply with the applicable code of conduct. The appellant responded that the respondent was out of time to lodge an application for review and that, as there was no F application for condonation, the application was not properly before the court. The respondent averred that he was seeking a declaratory order, for which no time limit was provided. The trial judge upheld the application. On appeal:

Held, that in deciding whether an application is one for a declaration or G review, the court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. The court should look at the grounds on which the application is based, rather than the order sought. The respondent alleged that the proceedings against him were a nullity because the person conducting H them had no jurisdiction to do so, not having been properly appointed.

Malaba JA

In highlighting the lack of jurisdiction on the part of the person who A carried out the investigation against him, the person's actions as such were not being reviewed. Even though the proceedings were described by the respondent in terms suggesting that the application was for review, the court having found that the proceedings were a nullity, the matter could be treated as an application for a declaratory order. The B trial judge had correctly exercised his discretion in favour of the respondent.

Cases cited

Bayat & Ors v Hansa & Anor 1955 (3) SA 547 (N)

Mugwebe v Seed Co Ltd 2000 (1) ZLR 93 (S) C

Musara v Zinatha 1992 (1) ZLR 9 (H)

Mutare City Council v Mudzime & Ors 1999 (2) ZLR 140 (S)

Case information

AG Matika, for the appellant

Respondent in person D

Judgment

MALABA JA: This is an appeal from a judgment of the High Court delivered on 24 July 2001 granting the respondent the following order:

> "1. THAT misconduct proceedings instituted against the applicant, together with his suspension, preferment of misconduct charges, determination of these charges and meting (out) of penalty be set E aside as null and void.
>
> 2. THAT the respondent pay to the applicant the salary and other benefits due to him from the date of his suspension, being 10 August 1998, minus whatever sum he is proved to owe the respondent and any deductions required by law. F
>
> 3. THAT the respondent shall pay the costs of this application."

The historical events forming the background to the case are these —

The respondent was employed by the appellant. Their relationship as employer and employee was governed in matters of discipline by a registered Code of Conduct for the Commercial Sector ("the Code"). The Code defined G the acts of misconduct and prescribed the disciplinary procedure to be followed should an employee be accused of committing misconduct. It also specified the person to investigate the allegations, prefer charges and conduct disciplinary hearings. The disciplinary action to be taken in the event of an employee being found guilty of misconduct was also specified.

In clause 3.3 of the Code it was provided that: H

Malaba JA

> A "…the employer, after consultation with the Works Council, *shall appoint in writing* one or more persons in his employment to be the 'Designated Officer' for the purpose of administering this Code" (the emphasis is mine).

Clause 4 provided that where it appeared to a "designated officer" that an employee had committed an offence he had to investigate the circumstances B of the alleged commission of the offence forthwith. He was obliged to:

> "4.1 Notify the employee, in writing, of the nature of the alleged offence and of the impending investigations;
>
> 4.2 In the event of an offence warranting dismissal in terms of Part IV, SUSPEND the employee with or without pay as the officer shall C stipulate, pending his decision on the matter in terms of paragraph 5.2;
>
> 4.3 Gather and record all evidence to the alleged misconduct;
>
> 4.4 Afford the employee the chance of presenting his or her case either personally or by a chosen representative, and of calling witnesses in D his defence, the employer shall release such witnesses to enable them to attend the hearing for the purpose of giving evidence;
>
> 4.5 Conduct his investigation in accordance with the principles of natural justice;
>
> 4.6 Prepare a comprehensive summary of his investigation, including such summary of any decision made and action taken in terms of E paragraph 5; and
>
> 4.7 Give a decision within fourteen (14) days of receipt of such case."

Paragraph 5.2 provided that if, after having conducted the investigation, the designated officer was satisfied that the employee had committed an offence for which the appropriate penalty was dismissal, he had to submit all the F evidence, in whatever form, assembled by him together with the summary referred to in para 4.6 to the employer for his decision.

On receipt of the evidence, the employer was obliged under clause 6.1 to examine such evidence in detail. The employer had the discretion to take such further evidence in whatever form he considered appropriate. If he decided G to call for further evidence the employer was obliged to afford the employee the opportunity of appearing before him. If the employer was satisfied that the employee was guilty of an offence he could impose the appropriate penalty in relation to that offence as set out in Part IV of the Code. If the penalty was dismissal, the employer was obliged to advise the employee in writing indicating the date of termination of employment and of the employee's H right to appeal.

2002 (1) ZLR p482

Malaba JA

It so happened that on 10 June 1998 an order was purportedly made by Lesel A Cosmetics to the appellant to supply goods valued at $16 427.43. An invoice 221144, was raised in respect of the order and its details recorded in the computer. Although the goods were dispatched they were never delivered to Lesel Cosmetics. It was discovered, upon investigation, that there was no record of the order in the computer. The respondent's password had been B used, the same day, to delete all information relating to the order. As a result of the fraud, the appellant lost goods valued at $16 427.43.

On 19 August 1998, Mrs G K Madyara, who was the operations director, wrote the respondent a letter of suspension in these terms:

> "RE: BREACH OF EMPLOYMENT CONTRACT; DISHONESTY AND OTHER RELATED OFFENCES; EMPLOYMENT CODE OF C CONDUCT AND GRIEVANCE PROCEDURE FOR THE COMMERCIAL SECTOR, GROUP IV OFFENCES
>
> On the 10 June 1998, an order for Lesel Cosmetics was generated, shipped and dispatched. Later on the same day, your password was used to delete all the quantities on invoice No. 221144 so that the computer D record would show that nothing went out on that invoice. Unfortunately, that order was not delivered to Lesel and the company lost goods worth $16 427.43.
>
> As a result, you are hereby suspended without pay from the 10th August 1998." E

The letter did not charge the respondent with any particular offence. It was not alleged in the letter that the respondent personally used his password to delete the information relating to the order from the computer or that he permitted another person to use his password to delete the information with the intention of causing prejudice to the appellant. Mrs Madyara signed off as a "Designated Officer". F

On 19 August 1998, Mrs Madyara wrote to the respondent, requesting him to attend a disciplinary hearing on 25 August 1998. Present at the hearing was Mrs Madyara, Mr J Chifokoyo, the appellant's human resources manager, his assistant and the respondent. No record of the proceedings was produced.

The respondent disclosed in the founding affidavit that it was alleged at the G hearing that he had deleted the information from the computer because his password was used. He said he vehemently denied the allegation. It was his uncontradicted averment that Mrs Madyara admitted at the hearing that she had at the time authorised one H Mundwa to use his password. He said Mrs Madyara also admitted that H Mundwa had confessed to using his password on the day the information relating to the order purportedly made H

Malaba JA

A by Lesel Cosmetics was erased from the computer. The disciplinary hearing was adjourned, ostensibly to give management time to investigate the allegations by the respondent that someone else could have used his password unlawfully to delete the order from the computer.

When the hearing resumed, the respondent was told that management considered it a waste of time to investigate the truthfulness of his allegations. B He was told that no further hearing would take place but that a determination would be sent to him.

In the meantime, Mrs Madyara forwarded all the evidence gathered at the hearing to the employer. On 25 September 1998, the employer found the respondent guilty of misconduct and dismissed him from employment. C The letter notifying him of the termination of the contract of employment read:

> "We refer to hearings held on 25August 1998 regarding allegations of misconduct levelled against yourself.
>
> You are advised of management's decision to terminate your employment D contract with Geddes Ltd with effect from 10August 1998. This decision has been taken in accordance with the Code of Conduct for the Commercial Sector Part IV Offences paragraphs 5 and 8. Management believes that you were involved in the fraudulent activities that resulted in substantial prejudice to the company. Your computer password was used to delete computer records of invoices for orders, which later disappeared. E Management has therefore acted accordingly."

The evidence on which the employer found that the respondent was guilty of misconduct has up to now remained a secret, known to management only.

On 27 October 1998, the respondent lodged an appeal with the Labour F Relations Tribunal. Thirty-three months after he was notified of the termination of the contract of employment, he made an application to the High Court for an order setting aside his suspension, preferment of the charges, misconduct proceedings, determinations and dismissal as being null and void. The grounds for his application were stated in the founding affidavit as being: G

> "— Absence of jurisdiction in that the proceedings were dealt with by an official who was not the designated officer and were continued after fourteen days from their commencement.
>
> — The charges were not properly framed in that the factual allegations did not disclose any misconduct. The suspension was not founded H on allegations disclosing misconduct. The determination has no

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Malaba JA

> basis in evidence or factual allegations in the charge. The procedure A of the Code was not followed."

In the opposing affidavit, the appellant took as a point *in limine* that in making the application to the High Court thirty-three months after his dismissal, the respondent was in breach of Order 33 r 259 of the High Court Rules 1971, which requires that a decision should be brought on review within eight B weeks of it having been made. It alleged that as there was no application for condonation of the late institution of the application for review, the application was not properly before the court. On the merits, Mr Chifokoyo, who deposed to the opposing affidavit on behalf of the appellant, baldly stated that Mrs Madyara was a "designated officer". He did not produce a letter of her appointment as such, even at the eleventh hour. He averred that the letter of C suspension sufficiently informed the respondent of the nature of the offence he was accused of having committed.

The respondent indicated in the answering affidavit that he was applying for a declaratory order. It was his contention that the time limit within which an application for review had to be brought to the High Court was not applicable to his application. He persisted in the allegation that the disciplinary D proceedings which led to his dismissal were a nullity. He said if Mrs Madyara had been properly appointed a designated officer in terms of clause 3.3 of the Code, she would have been given her own letter of appointment. The employer and the Works Council would each have kept a copy of the letter of appointment. Up to the time, the application was heard by the High E Court, the appellant had failed to produce the letter appointing Mrs Madyara as a designated officer.

The learned judge correctly decided that the question whether or not the application was not properly before the court depended on the nature of the application. He held that the application was for a declaration of rights. It was not for a review of the decision of Mrs Madyara or that of the appellant F finding him guilty of the alleged misconduct and terminating his contract of employment. I am unable to find fault with the learned judge's decision.

In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself G proof that the application is not for review. In *City of Mutare* v *Mudzime & Ors* 1999 (2) ZLR 140 (S), Muchechetere JA quoted with approval from *Kwete* v *Africa Publishing Trust & Ors* HH-216-98, where at p 3 of the cyclostyled judgment Smith J said:

> "It seems to me, with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful H

2002 (1) ZLR p485

Malaba JA

> A dismissal from employment, the provisions of r 259 of the High Court Rules, 1971 should be complied with, one should look at the grounds on which the application is based, rather than the order sought … It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one B species of relief available on review."

In this case, the respondent was not attacking Mrs Madyara's decision to suspend him from work, the disciplinary proceedings she presided over or the decision of the employer to dismiss him from employment. He was in fact treating these decisions and proceedings as a nullity. In other words, they C were as good as not having happened and there was no route leading to them upon which they could be reviewed. The ground on which he was treating these decisions and proceedings as a nullity, was that Mrs Madyara had no legal authority or jurisdiction to make the decisions and institute disciplinary proceedings against him.

In highlighting the want of jurisdiction on the part of Mrs Madyara to do what D she did, the respondent did not need to review her actions. The approach adopted by the respondent receives authority from the decision in *Bayat & Ors* v *Hansa & Anor* 1955 (3) SA 547 (N) where at 552C-D, Caney J said:

> "… the situation, as I see it, is that if the second respondent did decide the question of contractual rights adversely to the applicants, it remained E open to them either to review the decision of the second respondent, notwithstanding that they had taken part in a contest before the second respondent on the very question, or *ignoring the second respondent's decision on that question and treating it as a nullity as being beyond the powers of the second respondent, to bring proceedings for a declaration of rights …*" (my emphasis).

F I accept that there are terms used by the respondent in the application which could suggest that the application was for review. The notice of the court application stated that it was a "review court application". In para 20 of the founding affidavit, he said he did not pursue the appeal before the Labour Relations Tribunal because he believed that it did "not have power to deal with irregularities of a reviewable nature". He went on to attack the failure G by Mrs Madyara to properly frame the charge levelled against him. The draft order prayed for the setting aside of his suspension and the disciplinary proceedings.

Setting aside of a decision or proceeding is a relief normally sought in an application for review. When one looks at the grounds on which the H application was based and the evidence produced in support of them, there

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2002 (1) ZLR p486

Malaba JA

is, however, just enough information to support the learned judge's decision A that the application was for a declaration of rights. In *Musara* v *Zinatha* 1992 (1) ZLR 9 (H), Robinson J at 14C-D said:

> "At the outset, I would observe that the bulk of the petitioner's petition raises matters, such as malice, gross irrationality, the application of the *audi alteram partem* principle and bias, which relate to the subject of B review and which would only render the act in question voidable and not void. Consequently, those issues are not properly before this court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as C one seeking a declaratory order in regard to the petitioner's suspension …"

The next question is whether the learned judge was correct in holding that this was a case in which a declaratory order ought to be granted. The learned judge was entitled on the evidence before him to exercise the broadest judicial discretion in deciding whether a declaratory order should be granted. It cannot be said he did not exercise his discretion properly. The D ground on which the application was based was that the appointment of Mrs Madyara by the appellant as a designated officer was null and void because the mandatory provisions of clause 3.3 of the Code had not been complied with.

It was made very clear to Mr Chifokoyo, who deposed to the opposing E affidavit on behalf of the appellant, that the gravamen of the respondent's case was that only an appointment of Mrs Madyara as a designated officer in writing would have invested in her the jurisdiction to deal with the allegations of misconduct levelled against the respondent. The respondent filed an affidavit from Gibson Mutukwa, who was a member of the Works Council at the material time. He averred that the Works Council never sat to consider F an application by the appellant to appoint Mrs Madyara as a designated officer.

Mr Chifokoyo did not deny that Mr Mutukwa was a member of the Works Council at the relevant time. Even at the eleventh hour, the appellant failed to produce the letter in terms of which it appointed Mrs Madyara as a G designated officer. It is clear from the provisions of the Code that only a person appointed a designated officer by the employer *in writing* could investigate allegations of misconduct against an employee, suspend him from work and institute disciplinary proceedings.

In *Mugwebe* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S), the company had the same Code of Conduct as *in casu*. The appellant in that case was H

Malaba JA

A suspended by the company's marketing manager, who was not the company's designated officer. Sandura JA at 96H-97A had this to say about the appellant's suspension:

> "The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. In this respect, I can do no better than B quote what Lord Denning said in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I:
>
> ` If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. *There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes* C *convenient to have the court declare it to be so.* And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse'" (my emphasis).

Having found that what Mrs Madyara did when she was not a designated officer was null and void, the learned judge properly exercised his discretion D in favour of the respondent and granted the declaratory order.

The appeal is accordingly dismissed with costs.

E EBRAHIM JA and SANDURA JA concurred.

Hussein, Ranchod & Co, appellant's legal practitioners

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Source:
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CHASE MINERAL (PVT) LTD v MADZIKITA 2002 (1) ZLR 488 (H)

Citation	2002 (1) ZLR 488 (H)
Case No	Judgment No. HB-44-02
Court	High Court, Bulawayo
Judge	Sibanda J
Heard	2 February 2001
Judgment	30 May 2002
Counsel	*J Tshuma*, for the applicant *T A Cherry*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Mines and minerals — *rights — holder of registered block of claims — exclusive right to mine ore or deposit — person working on such claim* D *without consent of holder — theft committed by such person*

Practice and procedure — *execution — stay of execution pending appeal — stay having the effect of condoning criminal conduct — stay not permissible — risk of irreparable harm if execution stayed*

Headnote

The applicant was registered owner of certain mining claims. The respondent E had been working on the applicant's claims and refused to leave when asked to do so. The respondent, in an action against a third party, sought the transfer to himself of the claims. The applicant obtained an order for the ejectment of the respondent from them and applied for leave to execute the order. The respondent sought to prevent execution pending F appeal.

Held, that as registered owner of the claims, the applicant had exclusive rights to mine the ore there. For anyone else to take it constituted theft, in terms of s 379 of the Mines and Minerals Act [*Chapter 21:05*]. By preventing execution of the order of ejectment, the court would not only be condoning but authorising the respondent's criminal conduct. G The common law provision that notice of appeal had the effect of staying execution could not have been intended to operate in circumstances where such stay would have the effect of perpetrating the commission of an offence. It could only have been intended to come into effect where both parties had rights lawfully pending final determination and resolution by the court of appeal. The applicant H

Sibanda J

A could be irreparably damaged if execution were stayed, and leave to execute would be granted.

Legislation considered

Mines and Minerals Act [*Chapter 21:05*], ss 172 and 379

Case information

J Tshuma, for the applicant

T A Cherry, for the respondent

Judgment

SIBANDA J: In this application, the applicant seeks an order couched in the following terms:

The applicant be and is hereby granted leave to execute the judgment in case HC 1225/2000 entitling it to evict the respondent pending the hearing of the appeal noted by the respondent in case HC 1225/2000 with costs at an attorney and client scale.

When the matter came up for the hearing I granted the order sought. The legal practitioner for the respondent has written seeking reasons for my order. He explains that he seeks those reasons in order to explain to his client, presumably why the respondent lost. My reasons are set out hereinunder.

The applicant is the registered title holder of the following mineral claims:

(a) Stella City A 10336BM

(b) Stella City B 10337BM

(c) Stella City C 10338BM

(d) Stella City D 10339BM

On 29 May 2000, the applicant instituted proceedings under case HC 1225/2000 seeking an order for the eviction of the respondent from its registered claims *supra,* with costs. The application was heard jointly with other matters involving the same parties in cases HC 879/2000 and HC 1314/2000. Judgment was handed down by this court in which, *inter alia*, the court granted an order of eviction against the respondent from the applicant's registered claims *supra*.

Pursuant to the judgment, the applicant issued a writ of ejectment following the respondent's refusal to move out of the claims voluntarily. The main reason advanced by the respondent for his refusal is that he noted an appeal against the eviction order (granted in case HC 1225/2000) which is sought to be enforced. The eviction order should await the outcome of the appeal, so goes the argument, as at common law an appeal has the effect of staying the execution of a judgment or order appealed against.

The disputes between the parties relate to the ownership and mining claims

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of minerals set out *supra*. It is not in dispute that the mineral claims are all registered in the name of the applicant, nor that the respondent has in fact instituted proceedings seeking an order for specific performance in respect of the same claims against a third party that is for the transfer of "Stella claims" to himself in case HC 3209/99.

The rights of parties for the ownership of minerals are governed by the provisions of the Mines and Minerals Act [*Chapter 21:05*]. Section 172 of the Act provides:

> " … every holder of a registered block of claims other than precious metal reef claims shall possess the following rights —
>
> (a) the exclusive right of mining any ore or deposit of the mineral in respect of which the block is registered which occurs within the vertical limits of his block."

It will be seen, therefore, that the applicant, as the holder of the registered claims, has the exclusive rights of mining the claims under dispute. Such rights are protected by s 379 of the Act which provides:

> "Any person who breaks, severs or removes any mineral from any mining location, reef or deposit, or who takes, removes or conceals any mineral, slags, slimes, amalgam, residues, tailings or concentrates, the product of any mining location, reef or deposit, with intent to deprive the lawful owner or holder thereof, shall be guilty of theft and liable to be prosecuted and punished accordingly."

It is thus submitted that the respondent has been, in fact, working on the applicant's claims, he is therefore guilty of contravening s 379 of the Act. To suggest that the eviction order be suspended or stayed pending appeal in case 1225/2000, so as to enable the respondent to continue mining,

amounts to authorising the contravention of s 379 of the Act. That would create an untenable situation in which this court would not only be condoning but F authorising the criminal conduct of the respondent in breach of the provisions of the Act.

The provision at common law — that notice of appeal has the effect of staying a writ of execution — could not, in my respectful view, have been intended to operate or come into effect in circumstances where such stay of execution G had the effect of perpetrating the commission of an offence or criminal conduct. It could only have been intended to come into effect where both parties had, in the dispute, rights lawfully pending final determination and resolution by the court of appeal. That situation does not obtain in the instant case. In this case, if the eviction were to be stayed pending appeal, that would create a judicial anomaly where the court becomes party to the respondent's H

2002 (1) ZLR p491

Sibanda J

A unlawful conduct in breach of the provisions of the Act. Further, such unlawful conduct and operations of the respondent would be highly prejudicial to the applicant, because the minerals that would be extracted by the respondent could not be recovered and the applicant would sustain considerable and irreparable loss.

It follows, therefore, that it is highly improper for the respondent to seek the B sanction of this court in respect of his criminal conduct. I would for these reasons grant the order.

Accordingly, the applicant be and is hereby granted leave to execute the judgment in case 1225/2000 entitling it to evict the respondent pending the hearing of the appeal noted by the respondent in the case above referred. The C respondent shall pay the costs of this application at an attorney and client scale.

Webb, Low & Barry, applicant's legal practitioners

D *Hwalima & Associates*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/SANSOLE NO & ORS v NCUBE & ORS 2002 (1) ZLR 492 (S)

SANSOLE NO & ORS v NCUBE & ORS 2002 (1) ZLR 492 (S)

2002 (1) ZLR p492

Citation	2002 (1) ZLR 492 (S)
Case No	Judgment No. S-133-01
Court	Supreme Court
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	27 November 2001
Judgment	30 May 2002
Counsel	*E W Sansole*, for the first and second appellants *G Nyoni*, for the respondents
Case Type	Civil appeal

Annotations No case annotations to date

Flynote

Succession — *will — revocation — destruction of copy of will — whether may amount to revocation of will* D

Headnote

Whether the destruction of a copy of a will, rather than the original, constitutes revocation of the will is essentially a question of fact and evidence, not one of law.

A testator executed a will leaving most of his estate to his wife, but shortly afterwards his wife left the matrimonial home and commenced E acrimonious divorce proceedings against him, and he married another woman according to customary law. He then retrieved a copy of his will from his legal practitioners, almost certainly believing it was the original will, and told his son that he had done so in order to revoke it. He subsequently took steps to draft a new will but died F before it could be executed. After his death the copy that he had taken from his legal practitioners could not be located — he had presumably destroyed it — but the practitioners found the original will in their files.

Held, that in the circumstances the deceased must be held to have revoked his earlier will. G

Cases cited

Davis v Steel & Erikson NO 1949 (3) SA 177 (W)

Marais v the Master & Ors 1984 (4) SA 288 (D)

Nelson v Currey & Ors (1886) 4 SC 355

Redgrove, ep Est 1941 (2) PH G50 H

Chidyausiku CJ

A *Slade, ep* 1922 TPD 220

Warren, ep 1955 (4) SA 326 (W)

Wynne *v* Est Wynne & Anor (1908) 25 SC 951

Case information

E W Sansole, for the first and second appellants

B *G Nyoni*, for the respondents

Judgment

CHIDYAUSIKU CJ: The first appellant is the executor of the estate of the late Francis Mwene Nehwati (hereinafter referred to as "the deceased"). The validity of the will, in terms of which the appellant was appointed executor, was successfully challenged in the court *a quo*. The second C appellant is the wife of the deceased and the main beneficiary, in terms of the will being challenged, of the deceased's estate. The respondents are relatives of the deceased who successfully applied for the setting aside of the deceased's will.

The respondents, the applicants in the court *a quo*, contended that the deceased revoked the disputed will before his death. The learned judge in the D court *a quo*, having agreed with the above contention, concluded as follows:

> "In my view, the second respondent is still entitled to benefit as if there was no will because although the previous will was revoked, there was not yet a valid will to replace it at the time of the deceased's death.
>
> Accordingly, I make the following order: E

1. The will of the deceased Francis Mwene Nehwati executed on 14 December 1990 is declared to have been revoked by the deceased prior to his death.
2. The estate of the deceased is to be distributed in terms of the Deceased Estates Succession Act [*Chapter 6:02*]. F
3. The second respondent's rights to the estate are to be regulated by section 3 of the Deceased Estates Succession Act.
4. The Assistant Master is to convene the usual meeting of the parties and consider appointing an independent executor and administrator of the estate. G
5. The costs of these proceedings are to be borne by the estate."

The appellants were dissatisfied with the judgment of the court *a quo* and now appeal against it.

The facts of the case are as follows:

The deceased signed and executed a will on 14 December 1990. The will was H prepared by the first appellant, who is a legal practitioner and a former friend

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Chidyausiku CJ

of the deceased. In terms of the will, the first appellant is the executor of the A deceased's estate and the second appellant is the main beneficiary.

Shortly after the signing of the will, the second appellant left the matrimonial home and commenced divorce proceedings against the deceased. According to the pleadings in the divorce case, it was common cause that the marriage had broken down irretrievably. The parties, however, disagreed on how the B matrimonial assets should be distributed. Negotiations over the distribution of the matrimonial property were protracted and acrimonious. The deceased died on 24 February 1999 before the negotiations were concluded and the divorce could be granted.

When the second appellant left the matrimonial home she went to live at the first appellant's house and later moved to his farm just outside Bulawayo. C The deceased and the first appellant were the best of friends and this development soured that friendship.

The first respondent averred in his founding affidavit that the deceased had advised him that he, the deceased, had withdrawn his will from the first appellant with the intention of formally cancelling it and executing another D will excluding the second appellant as a beneficiary of his will. He also avers that he was advised by Sansole & Senda, the first appellant's firm of legal practitioners, which firm had drafted the will, that the deceased had taken his original will and that they did not believe it to be in their possession. This turned out to be incorrect, as the original will was subsequently found at the offices of Sansole and Senda. E

The first appellant's response to the averment that the deceased had retrieved the original will from his firm of legal practitioners is contained in para 10 of the first appellant's replying affidavit. It reads as follows:

> "The correct position is that it is not a copy of the deceased's will which I could not locate. It was the original. The safety of all original wills of F my clients are kept in a separate cabinet which is under the care and control of my secretary. When I retrieved the file, I saw there on the copy of the will … an entry made by me on the copy that the deceased had taken his will. Subsequently, my secretary, Mrs Constance Ngwenya, advised me that the original was, in fact, in the cabinet. As a result, I G informed the applicant of this discovery. If the applicant is challenging the validity of this will, he has not said so."

On this evidence, the probabilities are that both the first appellant and the deceased believed erroneously that the copy given to the deceased was the original will.

The first appellant also initially agreed to withdraw as executor upon the H

Chidyausiku CJ

A request of the respondents. The second appellant objected and the first appellant withdrew his resignation as the executor.

It has also been averred, and not seriously disputed, that while the deceased was in Hwange Hospital he sent for Mr Justice Kamocha. Mr Justice Kamocha did visit the deceased and, upon the

deceased's request made B during this visit, prepared a draft will for the deceased to sign. The deceased succumbed to his illness and died before signing the will prepared by Mr Justice Kamocha.

The deceased, after separating from the second appellant, married Jessie Ncube in accordance with African custom.

The appellants' contention, which was rejected by the court *a quo*, is that the C will executed by the deceased on 14 December 1990 is valid, was never revoked and accordingly the deceased's assets should be distributed in accordance with that will.

The learned judge in the court *a quo*, as I have already stated, rejected the contention and concluded that the will had been revoked. The learned judge D also rejected the unsigned will as the new will and ordered that the estate of the deceased be distributed on the basis that he had died intestate. I find myself in agreement with the reasoning and conclusion of the learned judge in the court *a quo*.

It is common cause in this case that a will can be revoked by a testator. I agree E with this proposition. It is also common cause that the onus to prove revocation rests upon the party alleging such revocation and such onus is discharged on a balance of probability – see *Marais* v *The Master & Ors* 1984 (4) SA 288 (D); *The Law of Succession in South Africa* by Corbett, Hahlo, Hofmeyr and Kahn p 86.

The issue that fell for determination in the court *a quo*, and which this court F has to decide, is the sufficiency of the evidence adduced by the respondents to prove that the deceased revoked the disputed will before his death.

The respondents relied on both direct and circumstantial evidence as proof of the revocation. In particular, the respondents relied on the following direct and circumstantial evidence: G

(a) the deceased's withdrawal or repossession of his will from his erstwhile legal practitioner, the first appellant;

(b) the pending divorce between the deceased and the second appellant and the deceased's customary law marriage to Jessie Ncube before his death;

(c) the deceased's instruction to Kamocha J to draft him another will.

H I will deal with the above *seriatim*.

2002 (1) ZLR p496

Chidyausiku CJ

The deceased withdrew his will from the first appellant, who had prepared A it and obviously kept it for safe-keeping. The court can take judicial notice of the fact that most people keep their wills with their legal practitioners, bankers and such like people held in trust. Why then would the deceased seek to withdraw his will from the first appellant? No explanation by the first appellant has been proffered. The first appellant was not only the deceased's legal practitioner but his personal friend. B

After withdrawing the will, the deceased did not take it to another lawyer or institution for safe-keeping. Given this situation, the inescapable inference is that he repossessed the will from the first appellant with the intention of altering it. Indeed, there are numerous other factors pointing in the same direction. It is virtually undisputed that the deceased told his son, the first C respondent, that he repossessed his will because he wished to revoke it.

Apart from this, where a will that was known to be in the possession of the testator cannot be found after his death, there is a presumption that it was lost or destroyed by the testator *animo revocandi* — see *Nelson* v *Currey & Ors* (1886) 4 (S) 355 at 356; *Wynne* v *Estate Wynne & Anor* (1908) 25 SC 951 at 960; Ex parte *Slade* 1922 TPD 220; Ex parte *Est Redgrove* 1941 (2) PH G.50; D and *Davis* v *Steel and Eriksen NO* 1949 (3) SA 177 (W) at 183. This presumption is based on the probability that a testator will take steps to preserve his last will and that if it is lost or destroyed he would become aware of the loss and would take the necessary steps to restate his disposition in a new will. See Ex parte *Warren* 1955 (4) SA 326 (W). E

In casu, the deceased was not only aware of the loss of his will but took steps to draft a new will which, if it had been properly executed, would have effectively revoked the disputed will.

The unaccounted for will was a copy and not the original. According to *Voet* 28.4.1 and *van der Linden* Inst 1.9.11., the destruction of a copy of a will will not constitute a revocation of the will. The accuracy of this wide and F sweeping proposition is doubtful. The learned authors Corbett, Hahlo,

Hofmeyr and Khan in their book *The Law of Succession in South Africa* at p 90 comment on this statement of the law by *Voet* and *Van der Linden* as follows:

> "While it is true that the destruction of a copy of a will does not ordinarily G give rise to the inference that the testator intended to revoke his will, it would seem wrong to elevate the views of the above authorities into an immutable rule. There may be clear evidence as to why the original will was not destroyed and that the testator destroyed the copy *animo revocandi*. In these circumstances, the destruction of the copy should result in an effective revocation." H

2002 (1) ZLR p497

Chidyausiku CJ

A The above view of the learned authors is in accord with commonsense. Whether the destruction of a copy of a will constitutes revocation or not is essentially a question of fact and evidence and not law.

In casu, both the first appellant and the deceased erroneously believed that the will repossessed by the deceased was the original and not a copy. The deceased must have believed the will that he had was the original. I have B some difficulty in accepting that the destruction of a copy in the belief that it was the original could be critical to the determination of the existence or otherwise of the *animo revocandi*.

Turning to the relationship between the deceased and the second appellant at the time, the will was repossessed, it is apparent from the pleadings in the C divorce proceedings that the marriage had irretrievably broken down. The parties were locked in a serious tussle over who should get what matrimonial property. The second appellant was the main beneficiary in terms of the contested will. It is highly improbable that the deceased would vigorously refuse to give his assets to the second appellant upon divorce but seek to let her have the same upon his death. It is equally improbable that the D deceased would marry another woman and bequeath his estate to the woman he was divorcing. All these factors are supportive of the respondents' contention that the withdrawal of and the unaccountability of the will in the possession of the deceased establishes *animo revocandi*.

Finally, the deceased instructed Mr Justice Kamocha to draft another will for E him shortly before he died. That will was not properly executed. The court *a quo* was quite correct in rejecting it as the will of the deceased. That invalid will, however, provides explicit evidence of the deceased's state of mind. That document explicitly reveals that the deceased intended to revoke the disputed will. Indeed, if that will had been properly executed, the issue of the deceased's *animo revocandi* in respect of the disputed will would not have F arisen. That *animo revocandi* of the deceased cannot be given effect to, not because it did not exist, but because it was not expressed in the form and manner prescribed by law. It certainly provides evidence to enable the court to determine the state of mind that accompanied the deceased's withdrawal and subsequent loss of the contested will.

G In the result, I am satisfied that this appeal is devoid of merit and it is hereby dismissed with costs.

ZIYAMBI JA and MALABA JA concurred.

Sansole & Senda, first and second appellants' legal practitioners

H *James, Moyo-Majwabu & Nyoni*, respondents' legal practitioners

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STEVENSON v MINISTER OF LOCAL GOVERNMENT & ORS 2002 (1) ZLR 498 (S)

2002 (1) ZLR p498

Citation 2002 (1) ZLR 498 (S)

Case No	Judgment No. S-38-02
Court	Supreme Court, Harare
Judge	Ebrahim JA, Sandura JA & Ziyambi JA
Heard	18 February 2002
Judgment	30 May 2002
Counsel	*A P de Bourbon SC*, for the appellant *Y Dondo*, for the first respondent No appearance for the other respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Local government — *appointment of commissioners to run city in absence of* D *councillors — maximum period for which may be appointed — no provision for re-appointment — requirement to hold mayoral and council elections in spite of appointment of commissioners*

Practice and procedure — *parties — locus standi — need for plaintiff to show an interest or special reason entitling him to sue — resident of city — such person having an interest in whether affairs of city should be run* E *by an elected mayor and council*

Headnote

The appellant, a resident of and registered voter in Harare, brought an application in the High Court to compel the holding of mayoral and council elections. In mid-1996, mayoral elections had been held. F The elected mayor resigned in mid-1999, but no fresh mayoral elections were held within 60 days, as required by the Urban Councils Act. Elections for city councillors were held in August 1995, and should have been held again in August 1999. The entire city council was suspended by the Minister in February 1999. No elections were held in August 1999, as required by the Act. G

The city had been run for from March 1999 by commissioners appointed by the Minister, although the commissioners should have held office for six months only. The applicant brought the action in her personal capacity, but also alleged *locus standi* on other grounds. The trial judge (Hlatshwayo J) considered that she did not have *locus standi* and declined to hear the application. H

2002 (1) ZLR p499

Sandura JA

A *Held (per* Sandura JA and Ebrahim JA, Ziyambi JA dissenting), that the trial judge had erred. To prove *local standi*, the appellant had to show that she had a "real or substantial interest" or a "direct and substantial interest" in the matter. As a resident of and a registered voter in Harare, the appellant had an interest in the issue of whether the affairs of the City of Harare should be run by a commission appointed by the Minister or B by an elected mayor and an elected council. The fact that she made other allegations as to her interest in making the application, such as being a member of Parliament, did not affect her basic interest which arose by virtue of being a registered voter in and a resident of Harare. The trial judge should have dealt with the issues raised in the application.

C *Held*, further, that, on the merits of the matter, there were no grounds for not holding mayoral and council elections as required by the Urban Councils Act. The dates for election stipulated by the Electoral Act had passed. Commissioners could only be appointed for a maximum period of 6 months, and there was no provision for re-appointment. Their term of office expired in

September 1999. The appointment of commissioners D did not entitle the Minister to postpone the holding of elections. The power given to the Minister to appoint commissioners was intended for use, as a temporary measure, during the period preceding the holding of elections. The re-appointment of commissioners was unlawful, and did not in any way affect the obligation to hold a general election of councillors every fourth year.

Cases cited E

Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A)

P E Bosman Tpt Works Cttee & Ors v Piet Bosman Tpt (Pty) Ltd 1980 (4) SA 801 (T)

Stevenson v Min of Local Govt & Ors 2001 (1) ZLR 321 (H)

F *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C)

Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR 48 (H)

Legislation considered

G Urban Councils Act [*Chapter 29:15*], s 51(1), 80, 103I, 103J, 103K

Case information

A P de Bourbon SC, for the appellant

Y Dondo, for the first respondent

No appearance for the other respondents

Judgment

H **SANDURA JA:** This is an appeal against a judgment of the High Court

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Sandura JA

which dismissed the appellant's application for an order directing the A holding of mayoral and council elections for the City of Harare within sixty days. The relevant facts are adequately set out by Ziyambi JA in her judgment.

The second respondent did not oppose the appeal, and the third to the eleventh respondents indicated that they would abide by the court's decision. This B appeal therefore, concerns only the appellant and the first respondent.

The appellant's application was dismissed on the ground that she did not have the *locus standi* to bring the application. I respectfully disagree. In my view, the appellant had the requisite *locus standi in judicio*, and the learned judge in the court *a quo* should have determined the real issues raised in the application. C

Whilst it is well established that a party who initiates legal proceedings, whether by application or summons, should indicate in the commencing papers that he has the *locus standi* to bring such proceedings, what he has to show in order to satisfy that requirement is that he has an interest or special reason which entitles him to bring such proceedings. D

Thus, in Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 401, the learned authors have this to say on the issue of *locus standi* to institute legal proceedings by means of a summons:

> "It must appear from the summons that the plaintiff has an interest or E special reason entitling him to sue, i.e. that he has *locus standi* in the matter."

Similarly, on the issue of *locus standi* to file an application, the learned authors say the following at p 364:

> "As in the case of a summons, it must appear from the application that the applicant has an interest or special reason entitling him to bring the F application — that he has *locus standi* in the matter."

In many cases, the requisite interest or special reason entitling a party to bring legal proceedings has been described as "a real and substantial interest" or as "a direct and substantial interest". See,

for exampleUnited Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another *1*972 (4) SA 409 (C) G at 415; *P E Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B; *Zimbabwe Teachers Association & Ors* v *Minister of Education* 1990 (2) ZLR 48 (H); and *Jacobs en 'n Ander* v *Waks en Andere* 1992 (1) SA 521 (A).

In her founding affidavit, the appellant specifically dealt with her *locus standi* and averred as follows: H

Sandura JA

" A *LOCUS STANDI*

1. I am a resident of the City of Harare and I am a registered voter in the constituency of Harare North, which falls within the boundaries of the Urban Council of the Harare City Council.

2-5 …"

B Because the appellant specified other grounds in addition to the one set out above, the learned judge in the court *a quo* declined to hear her application on the ground that she had badly formulated the issue of *locus standi*. I have no doubt in my mind that the learned judge erred in this regard.

I say so because, in reply to a question put to him by the learned judge, counsel for the appellant in the court *a quo* made it quite clear that the appellant had C brought the application in her personal capacity. It was, therefore, unnecessary for the learned judge to consider the issue of the appellant appearing in a representative capacity.

The appellant's *locus standi* arose from the admitted facts that she resided in Harare and was a registered voter within the area falling under the D jurisdiction of the Harare City Council. As a resident of Harare and as a registered voter, the appellant had an interest in the issue of whether the affairs of the City of Harare should be run by a commission appointed by the Minister or by an elected mayor and an elected council.

In my view, the fact that the appellant made other allegations as to her interest E in making the application, such as being a Member of Parliament, did not affect her basic interest which arose by virtue of her being a registered voter and a Harare resident.

It was, therefore, understandable that Miss *Dondo*, who appeared for the first respondent, could not support the learned judge's view on the issue of the appellant's *locus standi* in this matter.

F In the circumstances, the learned judge in the court *a quo* should have dealt with the issues raised in the appellant's application.

However, it is pertinent to note that after the appeal in this matter had been noted, mayoral and council elections for Harare were held in March 2002. It follows, therefore, that the reason for the appellant's application has now G fallen away.

Nevertheless, a determination of the issues raised in the application is essential for the purpose of determining which party should pay the costs of the application in the court *a quo*. However, the issue which arises is whether the matter should be remitted to the High Court.

H Mr *de Bourbon*, who appeared for the appellant, submitted that in view of the

Sandura JA

fact that the issues to be determined are matters of law, and bearing in mind A the failure by the High Court to deal with the appellant's application promptly, this court should determine the application. On the facts of this case, I agree with counsel's submission in order to avoid any further delay in concluding this matter.

The relief sought by the appellant in her application was an order directing B the first and second respondents to hold mayoral and council elections within sixty days from the date of the order, and setting aside the appointments of the commissioners who were running the affairs of the City of Harare. The terms of the order sought have been set out in full by Ziyambi JA at the beginning of her judgment. The application was not opposed by the second respondent. C

In her founding affidavit, the appellant averred as follows:

"EXECUTIVE MAYOR

18-19 …

20 The last time elections for the office of Mayor of Harare were held was in June or July 1996 and Mr Solomon Tawengwa was duly D elected as the mayor. In terms of s 51 of the Urban Councils Act [*Chapter 29:15*], his term of office expired after a period of four years from the date he took office. That means it was due to expire in about July 2000.

21 However, in or about May 1999 and certainly before 9 June 1999 E Mr Solomon Tawengwa resigned from his office of mayor, and the office of mayor has been vacant since that date.

22 Despite the post being vacant, and contrary to the requirements of s 103J of the Electoral Act, no elections were held within the sixty- day period of the post of Executive Mayor becoming vacant. In fact, such elections have still not been held. F

23 …

COUNCILLORS

24 Elections for the office of councillor for the then 42 wards (now 45 wards) of the City of Harare were last held in August 1995. In terms of s 103I of the Electoral Act, elections for councillors were G accordingly to be held during the month of August 1999. No such elections have been held.

25-26 …

27 … Since August 1999, the second respondent has held no elections for the councillors for the City of Harare. H

Sandura JA A

28 …

COMMISSIONERS

29 On 8 March 1999, and in terms of s 80(1) of the Urban Councils Act, the first respondent appointed the third to the eleventh respondents to act as commissioners to run the affairs of the City of Harare. B

30 By virtue of s 80(3) of the Act, the commissioners should have held office for only six months, and should have in that period arranged elections in the various wards of the City of Harare for the election of councillors. The commissioners, including, and headed by, the third respondent, have made no arrangements whatsoever to hold elections for the positions of councillors … C

31 …

32 The first respondent has purported to extend the term of office of the commissioners, such extensions having taken place on two occasions, the dates of which are unknown to me, but which have now been extended until 31 December 2000 … D

33 I contend that such extensions are unlawful …"

In my view, the appellant's argument is unassailable.

In terms of s 51(1) of the Urban Councils Act [*Chapter 29:15*] ("the Urban Councils Act"), the term of office of a mayor is a period of four years, but the mayor is entitled to continue in office until the person elected as mayor E at the next election of mayor assumes office.

However, it is common cause that Mr Tawengwa did not complete his term of office. He resigned in May 1999, more than twelve months before the expiry of his term of office.

In terms of s 103J of the Electoral Act [*Chapter 2:01*] ("the Electoral Act"), F the election for the executive mayor of Harare should have been held not later than sixty days after the office of mayor became vacant. However, no such election was held, and when the appellant filed her application in the High Court in October 2000, the period for which the first respondent ("the Minister") could have postponed the election in terms of s 103K of the Electoral Act had long passed. The election was therefore long overdue and G no cogent reason was given by the respondents for the failure to comply with the Electoral Act.

With regard to the election of councillors, s 103I of the Electoral Act requires a general election of councillors to be held in every fourth year on any day in the month of August fixed by the second respondent in terms of s 103L of H the Electoral Act. Since the councillors, all of whom were suspended by the

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Sandura JA

Minister in February 1999, had been elected in August 1995, a general A election of councillors should have been held in August 1999.

Although s 103K of the Electoral Act allows the Minister to postpone the election of councillors for a period not exceeding one year, when the appellant filed her application in the High Court in October 2000 that year had already passed. The election of councillors was, therefore, long overdue B and, again, no cogent reason was given by the respondents for their failure to comply with the law.

That conclusion leads to the next issue, which is whether the Minister could avoid having a general election of councillors by continually re-appointing the commissioners. It was common cause that the commissioners were first appointed in March 1999 and that they were subsequently re-appointed on C two or three occasions.

Before determining that issue, I wish to set out the relevant provisions of s 80 of the Urban Councils Act. They are as follows:

"(1) If at any time —

(a) there are no councillors for a council area; or D

(b) all the councillors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors;

the Minister may appoint one or more persons as commissioners … to act as the council … E

(2) …

(3) A commissioner appointed in terms of subs (1) shall hold office during the pleasure of the Minister, but his office shall terminate —

(a) as soon as there are any councillors for the council area who are able to exercise all their functions as councillors; or F

(b) six months after the date of his appointment;

whichever occurs sooner.

Provided that, if the period of six months expires within three months before the date of the next succeeding general election, the commissioner shall continue to hold office until such general election. G

(4) Before the termination of office of a commissioner appointed in terms of subsection (1), otherwise than at a general election or in the circumstances referred to in paragraph (a) of subsection (3), the commissioner shall cause an election to be held on such date as may be fixed by the commissioner to fill the vacancies on the council as if they were special vacancies. H

2002 (1) ZLR p505

Sandura JA A

(5) the Minister is satisfied that, after the termination of the office of a commissioner appointed in terms of subsection (1), there will be no councillors for the council area who will be able to exercise all their functions, the Minister may re-appoint the commissioner in terms of subsection (1)."

As already stated, s 103I of the Electoral Act provides that a general election B of councillors shall be held in every fourth year on any day in the month of August fixed by the second respondent. When the Minister appointed the commissioners in March 1999 he must have been aware that the next general election of councillors was due in August 1999. Since the appointment of the commissioners did not mean that the election was postponed, it should have C been held in August 1999, on a date fixed by the second respondent in terms of s 103L of the Electoral Act.

In any event, in terms of s 80(4) of the Urban Councils Act, before the termination of office of a commissioner, the commissioner is obliged to cause an election to be held on such date as he may fix to fill the vacancies on the council as if they were special vacancies. As the commissioners were D appointed in March 1999, their term of office was due to expire in September 1999. Before the expiration of their term of office, they should have caused an election to be held to fill the vacancies on the council as if they were special vacancies. However, they did not do so.

In my view, the first respondent, being the Minister to whom the President E assigned the administration of the Urban Councils Act, should have ensured that the commissioners whom he had appointed carried out their obligation to cause an election to be held before their term of office expired in September 1999.

Having said that, it is clear beyond doubt that s 80(5) of the Urban Councils Act, in terms of which the commissioners were re-appointed, on two or three F occasions, was not meant to be a vehicle for the postponement of a general election of councillors. In fact, the re-appointment of the

commissioners did not in any way whatsoever affect the legal obligation to hold a general election of councillors every fourth year.

I say so because there is no provision in the Electoral Act or the Urban Councils Act which states that once commissioners are appointed or G re-appointed any general election of councillors which is due is postponed indefinitely.

Consequently, the Minister could not avoid having a general election of councillors by continually re-appointing the commissioners. In my view, s 80(5) of the Urban Councils Act was not enacted for that purpose. H The power given to the Minister by that section was intended for use, as a

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Sandura JA

temporary measure, during the period preceding the holding of elections as A required by the Electoral Act. The re-appointments of the commissioners were, therefore, unlawful.

The appeal must, therefore, succeed with costs. Those costs will be borne by the first respondent because he was the only respondent who opposed the appeal. B

However, the costs in the court *a quo* will be borne by the first respondent for a different reason. Although the appellant's draft order indicated that the costs were to be borne by the first and second respondents, the second respondent did not oppose the application and there is, therefore, no basis for ordering him to pay the costs of the application.

In the circumstances, the following order is made: C

1. The appeal is allowed with costs, which costs shall be borne by the first respondent.
2. The order of the court *a quo* is set aside and the following is substituted —

   "The application is granted in terms of the draft order, with the costs D being borne by the first respondent."

EBRAHIM JA: I have read the judgment prepared by Sandura JA and the dissenting opinion of Ziyambi JA. I agree with the views expressed by Sandura JA. E

In my view, the appellant's *locus standi* to seek relief from the courts was patently apparent from the fact "that she resided in Harare and was a registered voter within the area falling under the jurisdiction of Harare …" She was dissatisfied as a resident voter that a proper election of a body of persons, elected for the purpose of administering her interests, had not taken F place. Clearly, against this background, commonsense dictates that she was entitled to seek the assistance of the courts to rectify what she considered to be improper treatment of her, as a voter and a resident in the area.

My brother Sandura has meticulously outlined the legal provisions pertinent in support of the appellant's rights and his reasoning in reaching the conclusion he has arrived at cannot be faulted. G

I therefore, respectfully associate myself with his judgment and agree with the order he makes.

ZIYAMBI JA: The appellant, in a court application, applied to the High H

ZIYAMBI JA

A Court for the following order, as set out in the draft order, namely:

"THAT:

1. The first respondent and the second respondent shall make all necessary arrangements to hold an election for the office of Mayor of the City of Harare, so that any polling will take place within sixty B days of the date of this order.
2. The first respondent and the second respondent shall make all necessary arrangements to hold elections in each of the wards of the City of Harare for the election of a councillor for each such ward, so that any polling will take place with sixty days of the date of this order. C
3. The continuation in office of the third to the eleventh respondents appointed by the first respondent in terms of section 80 of the Urban Council Act [*Chapter 29:15*] to run the affairs of the City of Harare is declared invalid, and their appointments are hereby set aside.
4. The first respondent and the second respondent, jointly and severally, D the one paying the other to be absolved, shall pay the costs of this application."

The application was dismissed by the High Court on the grounds that the appellant had no *locus standi in judicio* to bring the application.

Against this judgment, the appellant now appeals on the following grounds:

> "1. The court *a quo* erred in finding that the appellant did not have the E necessary *locus standi* in her personal capacity to bring the present application.
>
> 2. The court *a quo* erred in finding that it was necessary for the appellant to show that she had suffered some direct injury as a result of the unlawful continuation in office of the commission running the F affairs of the City of Harare."

In addition, it was submitted by Mr *de Bourbon* that the trial judge ought not to have raised the question of *locus standi* when that issue was not raised by either of the parties.

THE REASONS FOR THE APPLICATION

G The appellant summarised her averments thus:

> "I bring this application for an order mandating the holding of an election for the office of Executive Mayor of Harare and for the election of councillors for each of the wards within the City of Harare. As will be seen hereunder, it is my contention that those elections H should have been held some considerable time ago, and that the first

> and second respondents are responsible for the failure to comply with the A law in that regard."

She went on to aver as follows:

(1) that, after the resignation of the previous Executive Mayor, Mr Solomon Tawengwa, in May 1999, and, contrary to the requirements of s 103J of the Electoral Act, no elections were held for an Executive Mayor within B sixty days of the post becoming vacant;

(2) that the last elections for the office of Councillors for the City of Harare were held in August 1995. In terms of s 103I(1) of the Electoral Act, elections for councillors were to be held during the month of August 1999 but that as at the date of filing the application, no elections had been C held;

(3) that on 8 March 1999, and in terms of s 80 of the Urban Councils Act, [*Chapter 29:15*], the first respondent appointed the third to the eleventh respondents to act as Commissioners to run the City of Harare. By virtue of s 80(3) of the Act the Commissioners should have held office for only six months and should have, within that period, D arranged for elections for councillors in the various wards of the City of Harare. Yet, notwithstanding their duty in this regard, no such arrangements were made. Instead, the first respondent had extended, at least twice, the term of office of the respondents — extensions which she contended were illegal — and that, as at the date of filing the E application, the third to the eleventh respondents had been running the affairs of the City of Harare for eighteen months.

Accordingly, it was her contention that:

> "*… the persons living in Harare are entitled to be governed by elected representatives, and not be governed by appointees of the first respondent. I contend that the electorate and residents of the City of Harare are being* F *severely prejudiced by the failure to hold elections as required by law"* (my emphasis).

It will be seen that no averments as to any personal interest or damage to the appellant was made.

> "In order to seek judicial redress in respect of unlawful administrative G action, a litigant must have *locus standi* or 'standing' to sue. In the context of administrative law, this entails:
>
> (i) that the litigant have the necessary capacity to sue; and
>
> (ii) that he have a legally recognised interest in the administrative complained of." H

A See Lawrence Baxter *Administrative Law* at p 644.

The learned judge, at pp 1-5 of the cyclostyled judgment, reasoned as follows:

> "The manner in which the applicant sought to establish her *locus standi* in the founding affidavit bears quoting in full: B

'1. I am a resident of the City of Harare and I am a registered voter in the constituency of Harare North which falls within the boundaries of the Urban Council of the Harare City Council.

2. I was elected as the Member of Parliament for the Harare North constituency at the general election held in June 2000. I was elected C as a candidate for the Movement for Democratic Change party.

3. Candidates for the Movement for Democratic Change won all the parliamentary constituencies within the City of Harare, and, accordingly, it is correct to say that the majority of the electorate in Harare support my party.

4. My party intends to field candidates for Mayor and Councillors in D the next local elections in Harare. Because of our recent success in the general election it is likely that we will win most, if not all, of the seats.

5. *Thus, I feel entitled to bring this application to assert the rights of the majority of persons in Harare who are registered voters in any* E *local government elections affecting the City of Harare*" (my emphasis).

In his notice of opposition on his own and other commissioners' behalf, the fourth respondent and deputy chairman of the Commission, James Chitauro, challenged the applicant's *locus standi* thus:

F "The feeling of entitlement by the applicant that she has the mandate of the majority of persons in Harare who are registered voters is misplaced. As I said earlier, people who vote in national elections are spurred by considerations which do not always coincide with those in local government elections although the electorate is the same. It is not uncommon for a ruling party to win in central government elections and G lose in local government elections. I, therefore, put the applicant's *locus standi* in issue."

However, in his heads of argument on behalf of the commissioners, Mr *Matinenga* abandoned the issue of standing and appeared only to place on record that it had been agreed as between the applicant and the H commissioners that each party would bear its own costs.

2002 (1) ZLR p510

ZIYAMBI JA

At the hearing of the matter on 14 February 2001, the court questioned, as it A is entitled to, the exact capacity in which the applicant wished to be heard, *viz*, whether in her individual capacity as a resident and voter, as a Member of Parliament, as a representative of her political party, or as a representative of the Harare residents? Mr *Girach*, who appeared in the place of Mr *de Bourbon*, maintained that the applicant was suing in her personal capacity.

Counsel for the first and second respondents, at the hearing, agreed that the B applicant's standing should indeed be put to issue. The matter was then postponed *sine die* to allow the court to make a determination on this preliminary issue of *locus standi*.

The way in which the applicant pleaded locus standi raises a unique problem different from the usual ones of outright lack of standing. *The problem* C *raised here is one of contradictory or incomplete assertions, so that although the applicant could have had standing on the basis of any of the grounds she avers, she, for some strange reasons not apparent on the papers, fails to make the necessary averments that would entitle her to be heard in any of the capacities.* D

Thus, she fails in her founding affidavit to allege any personal injury to herself entitling her to the relief sought. (And, as has been said repeatedly, an applicant must stand or fall by his founding affidavit and the facts alleged in it. See Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed 1997 p 366). Instead, she seeks to be heard in capacities for which she does not have the necessary authorisation; *viz*, to bring the E application on behalf of the residents and voters of Harare municipality and/or supporters of her political party resident in Harare. But in neither case does she prove that she has been so mandated by her political party or is legally entitled to bring a representative action on behalf of Harare residents and/or has otherwise complied with the requirements of the Class Actions Act [*Chapter 8:17*]. F

In *Basset* v *Platt* 1954 (1) SA 264 (N), summons were held to be irregular and set aside where the plaintiff had not made it clear to the defendant whether he was being sued in a representative or personal capacity.

If the court agrees with Mr *Girach* that the applicant is suing in her personal capacity, then she was required to allege the violation of a direct, personal and G recognised interest in order to establish her right to institute the proceedings. The learned author Lawrence Baxter *Administrative Law* (Juta & Co Ltd 1984) p 655 observes as follows in this regard:

> "The complainant's interest must be personal to him. In other words, the interest must be capable of individuation. The complainant must be able to claim that it is his interest that is at stake …" H

2002 (1) ZLR p511

ZIYAMBI JA

A As has already been noted above, the applicant makes no attempt at all to allege that she herself is entitled to choose who represents her in the municipal government. Her whole application is premised on vindicating 'the rights of the majority of persons in Harare who are registered voters'.

Her other concern is the interest her political party has in fielding candidates B for mayor and councillors in Harare as soon as possible to take advantage of the mood that ensured its success in the June 2000 national general election. But not only does she lack a mandate from her own party to pursue such an action, the interest in question more directly concerns the party itself than her.

Now, at common law, her failure to allege personal injury is fatal not only to her personal standing but also to her attempt to vindicate a public right.

C In *Wood & Ors* v *Ondangwa Tribal Authority & Anor* 1975 (2) SA 294, it was held that under Roman-Dutch Law, no private person may proceed by a popular action (*actio popularis*), that the *actiones populares* had become obsolete in the sense that a person is not entitled to protect the right of the public or to 'champion the cause of the people'. Similarly, in *National Party,* D *SWA* v *Konstitutionale Raad* 1987 (3) SA 544, it was held that a person asserting the rights of the general public has to show a personal interest, that is, personal prejudice to satisfy the requirements of standing.

The law pertaining to *locus standi* is summarised by another learned author, L A Rose Innes, *Judicial Review of Administrative Tribunals in South Africa* E (Juta & Co Ltd, 1963) at p 23 as follows:

> "An applicant has *locus standi* to bring on review the breach by an administrative tribunal or official of a statutory prohibition or duty enacted in the public interest only if he shows damage. If the breach is of a common law duty, the applicant must show a sufficient interest. If the breach is of a statutory duty enacted in the interest of the applicant F or of a class of persons of whom he is one, he has *locus standi* to bring a review without proof of damage."

Another exception to the prohibition of the vindication of a general right is where the applicant is a ratepayer. Ratepayers are presumed to have a legitimate interest in the legality of actions taken by their local authorities. As a resident and a registered voter in the City of Harare qualified in terms G of s 24 of the Act, it will be assumed that the applicant is a ratepayer or enjoys a standing equivalent to it. Consequently, she would have automatic standing to bring any action, without proof of injury, against the local authority.

The right of a ratepayer to challenge the validity of decisions taken by a local authority has been recognised in our law. Devittie J in *Binza* v *Acting Director of Works & Anor* 1998 (2) ZLR 364 (H) H at 368 said:

2002 (1) ZLR p512

ZIYAMBI JA

> "I have not found any reported cases in this country, but our law recognises A the right of a ratepayer to challenge the validity of decisions taken by a local authority. The rationale is that local authorities are accountable to the ratepayer, for the proper and efficient use of public funds."

However, the present application is not directed to the local authority but, rather, it seeks to challenge the policy decisions of the Ministries responsible B for local government and elections, i.e., the policy decisions of central government. Therefore, the special rules governing the standing of ratepayers *vis-à-vis* their local authorities do not apply in this case" (my emphasis).

See Stevenson v Minister of Local Government & Ors 2001 (1) ZLR 321 (H).

I can find no fault with the reasoning of the learned judge. It is quite apparent that the (appellant's) *locus standi* was "so badly formulated" that C the court was left with no choice but to decline to hear the rest of the application.

We were not referred to any authority in support of the submission by Mr *de Bourbon* that the court was not entitled to look into the question of *locus standi* unless it was raised by the parties. The submission is a curious D one since:

> "… the rules of standing constitute one of the major ways in which the law restricts the number and controls the nature of cases going to court. Since the rules are largely 'judge-made', they enable the courts themselves to decide which applicants are deserving of judicial review and which are not; which interests are worthy of protection and which are not." E

See Boulle, Harris & Hoexter *Constitutional and Administrative Law* at p 268.

The entire purpose for the rules concerning standing would be defeated if the courts were to take the view that they could not inquire into *locus standi* unless it was raised by one of the litigants. It seems to me that where an applicant clearly has no *locus standi* to bring an application or suit and no F party to the proceedings has challenged the standing of the applicant, a court would be failing in its duty if it did not raise the issue *mero motu*.

In any event, the issue of *locus standi* was raised by the third to the eleventh respondents and it was agreed by counsel to be an issue for determination.

COSTS G

By the time this matter was argued before us, dates had already been set for the elections for mayor and councillors for the city of Harare. Mr *de Bourbon* persisted in the appeal, indicating that the appellant was entitled to an order of costs in her favour if the appeal was successful. The learned judge in the court *a quo* made no order as to costs as "sight should not be lost of the fact that it was a genuine, though ill-advised, attempt to vindicate a public interest H

ZIYAMBI JA

A in legality". The approach by the learned judge commends itself to me and I would make no order as to costs.

Accordingly, I would dismiss the appeal and make no order as to costs.

B *Kantor & Immerman*, appellant's legal practitioners

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

Chihambakwe, Mutizwa & Partners, third to the eleventh respondents' legal practitioners

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Source:
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HIGHLINE MOTORS SPARES (1933) (PVT) LTD & ORS v ZIMBANK CORP LTD 2002 (1) ZLR 514 (S)

Citation	2002 (1) ZLR 514 (S)
Case No	Judgment No. S-37-02
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza AJA
Heard	16 May 2002
Judgment	30 May 2002

Counsel *P Kawonde*, for the appellants
F Girach, for the respondents

Case Type Civil appeal

Annotations Link to case annotations

Flynote

Practice and procedure — *judgment — default judgment — rescission — application — late application — need to apply for condonation as well — effect of failure to do so*

Headnote

In April 1999, the respondent bank issued summons against the appellants, who entered appearance to defend. Six months later, they were barred for failure to file a plea, and the following month default judgment was taken against them. In March 2000, their property was attached in execution of the default judgment. Two weeks after their property was attached, the appellants briefed their current legal practitioner. An application for rescission of the default judgment was filed in mid-July 2000. No application for condonation of the late application for rescission was filed. The trial judge dismissed the application for rescission on two grounds: firstly, that there was no acceptable explanation for their default; and, secondly, that the appellants had no *bona fide* defence to the claim. The appellants appealed against the ruling.

Held, that, assuming that the appellants were aware of the default judgment by late December 1999, as shown by the correspondence, they had one month from that date to apply for rescission. The application for rescission was made in July 2000, without there also being first an application for condonation of late filing of the application for rescission. The court *a quo* should not have entertained the application for rescission at all.

Held, further, that even if an application for condonation had been made, the

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Sandura JA

appellants did not establish that they were not in wilful default. They could not rely on their lawyers' dilatoriness or lack of diligence. In any event, it was clear on the facts that the appellants did not have a *bona fide* defence to the claim.

Cases cited

Beitbridge RDC v Russell Construction Co (Pvt) Ltd 1998 (2) ZLR 190 (S)

Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249 (S)

Legislation considered

High Court Rules 1971, r 63(1)

Case information

P Kawonde, for the appellants

F Girach, for the respondents

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellants' application for the rescission of a default judgment granted against them on 15 November 1999.

The relevant facts are as follows. In April 1999, the respondent issued a summons against the appellants claiming payment of the sum of $2 124 250.08 together with interest and costs of suit.

After the summons E was served on them, the appellants entered appearance to defend.

Subsequently, on 26 October 1999, the respondent's legal practitioner served on the appellants' legal practitioner a notice of intention to bar, which gave the appellants five days within which to file their plea. When that period expired and no plea had been filed the respondent, through its legal practitioner, F barred the appellants on 3 November 1999.

Two days later, the respondent's legal practitioner filed an application for a default judgment in the High Court, which was granted on 15 November 1999. Thereafter, a warrant of execution was issued and the appellants' property was attached on 15 March 2000.

About two weeks later, the appellants briefed their current legal practitioner, G and an application for the rescission of the default judgment was later filed in the High Court on 13 July 2000. That application was subsequently dismissed with costs. Aggrieved by that decision, the appellants appealed to this court.

The learned judge in the court a quo dismissed the appellants' application on H two grounds. The first was that the appellants had not given an acceptable

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explanation for their default, and the second was that the appellants did not A have a *bona fide* defence to the respondent's claim.

Rule 63 of the High Court Rules 1971 ("the High Court Rules"), in terms of which the application for the rescission of the default judgment was made, reads as follows:

> "(1) A party against whom judgment has been given in default, B whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> "(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned …" C

Commenting on subrule (1), I said the following in *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251B-E:

> "In terms of r 63(1), a defendant against whom a default judgment has been granted has a period of one month, from the time he becomes aware of the judgment, within which to file an application for the rescission of D that judgment. If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rule. E
>
> If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation. As Steyn CJ said in *Saloojee & Anor NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) at 138H:
>
> 'What calls for some acceptable explanation, is not only the delay in F noting an appeal and in lodging the record timeously, but also the delay in seeking condonation.'
>
> There are, therefore, two hurdles to overcome. The same view was expressed by Centlivres CJ in *CIR* v *Burger* 1956 (4) SA 446 (A) at 449F-G …" G

As already stated, the default judgment in this case was granted on 15 November 1999. The appellants alleged that they first became aware of the judgment on 15 March 2000 when the warrant of execution was served on them and their property was attached. I do not think that there is any truth in that allegation, as an examination of the correspondence between the parties will show. H

A After the appellants' legal practitioner filed a request for further and better particulars, the respondent's legal practitioner wrote to him on 16 November 1999 as follows:

> "Your Request for Further and Better Particulars in the above matter was received at our offices on 9November 1999.
>
> B We advise you that we had already barred you from filing any further pleadings in this matter and our Application for Default Judgment was lodged with the High Court on 5November 1999."

In reply, the appellants' legal practitioner wrote to the respondent's legal practitioner on 14 December 1999. The relevant part of the letter reads as follows:

> " C In view of the importance of this matter and the amounts involved, may your client consider the upliftment of the Bar by consent."

The letter was copied to the appellants.

A week later, on 21 December 1999, the respondent's legal practitioner replied as follows:

> " D Indeed, default judgment was entered in favour of our client against yours on 15November 1999.
>
> Pursuant thereto, we issued our Writ of Execution against property on 9December 1999 …
>
> In order for us to advise our client further in this matter, we would need E to hear further from you regarding the basis of your client's defence, for as we understand the position, your client has no *bona fide* defence to this claim."

Thus, the appellants' legal practitioner was informed on or about 21 December 1999 that the default judgment had been granted on 15 November 1999. In F my view, it is unlikely that he did not inform his clients about the granting of the default judgment.

In any event, the appellants must have known, on or about 29 December 1999, that the default judgment had been granted. I say so because of the contents of a letter which was written by their legal practitioner to the respondent's legal practitioner on 29 December 1999, and which was copied G to them. The relevant part of the letter reads as follows:

> "Our client thus disputes the claimed amount of $2 859 299.96 but accepts its liability in respect of $1 569 882 …
>
> We therefore, look forward to hearing from you with regards to whether or not your client will consent to the recision (*sic*) of judgment by H consent."

Sandura JA

I am, therefore, satisfied that the appellants knew about the default judgment A long before their property was attached in March 2000.

In terms of r 63(1) of the High Court Rules, the appellants had one month, from 29 December 1999, within which to make a court application for the rescission of the default judgment. However, no such application was made within that period. Instead, the application was filed on 13 July 2000, without B first of all making an application for the condonation of the late filing of the application. In the circumstances, the court a quo should not have entertained the appellants' application.

However, even if the appellants had made an application for the condonation of the late filing of the application, and it had been granted, I do not think that they would have succeeded in establishing that they were not in wilful C default. Their argument was that the failure to file a plea in response to the notice of intention to bar was not their fault but that of their legal practitioner.

In my view, that is not a valid argument. In a number of cases, this court has stated that a litigant cannot escape the consequences of the lack of diligence on the part of his legal practitioner. Thus, in the *Viking Woodwork* case *supra*, D I said the following at 252H-253C:

> "Although the fault was most probably that of the appellants' legal practitioners, the appellant cannot escape the consequences of the lack of diligence on the part of its lawyers. As Steyn CJ said in the *Saloojee* case *supra* at 141B-E: E
>
> 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court. Considerations F *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to negligence on the part of the attorney. The attorney, after all, is the representative whom the G litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'
>
> This passage was quoted with approval by Dumbutshena CJ in *S* v *McNab* 1986 (2) ZLR 280 (S) at 284A-D." H

Sandura JA

A See also *Beitbridge Rural District Council* v *Russell Construction Co (Pvt) Ltd* 1998 (2) ZLR 190 (S) at 192H-193A-D.

In the circumstances, I am satisfied that the appellants did not give a reasonable and acceptable explanation for their default. That, in fact, should be the end of the matter.

B However, I shall briefly consider whether the appellants have a *bona fide* defence to the respondent's claim. I do not think they have. I say so for three reasons.

Firstly, in its opposing affidavit the respondent avers as follows:

> "It is denied that the applicants have a *bona fide* defence, as follows:
>
> The applicants enjoyed letter of credit facilities for the importation of C electrical equipment. They were supposed to fund their current account in local currency pending the drawdown of the three letters of credit payments. There were, however, at the time of drawdown, insufficient funds in the current account which resulted in an unauthorised overdraft coming into existence. The local balance on the account attracts penalty D rates of interest which at the time was 52 per cent per annum compounded monthly."

Dealing with the above averments, the appellants averred that the agreed interest rate was 11 per cent per annum. In my view, the suggestion that at the relevant time an overdraft attracted interest at the rate of 11 per cent per annum does not deserve serious consideration.

E Secondly, in his letter to the respondent's legal practitioner dated 29 December 1999 the appellants' legal practitioner stated that the appellants admitted liability in the sum of $1 569 882 (which was later altered to $1 656 419.50) together with interest at the rate of 11 per cent per annum. However, in their letter dated 31 May 2000, which was written to the respondent, the appellants F did not state that their liability was for a sum less than that claimed. The letter reads as follows:

> "*Re: $200 000 Repayment For Month Ending May 2000*
>
> We write to advice (*sic*) that we will be in a position to remit the above mentioned payment combined with the month ending June 2000 payment G making a total remittance of $400 000.
>
> There has been a delay by Central Payments Office, a government wing, in paying out creditors including our company. However after checking with Government we will have assured of a payment in our favour on 30 June 2000. Please see attached two copy debit invoices and two copy Government requisitions both totaling (*sic*) $721 182.96 for your H information and record.

Sandura JA

> We hope for your understanding and hope to hear from you at your A earliest."

If the appellants were denying liability for the full sum they should have said so in their letter. The fact that they did not is significant.

Finally, as already stated, the respondent issued and served its summons on the appellants in April 1999, and yet by 21 December 1999 the respondent's B legal practitioner still did not know the basis of the appellants' defence. That prompted her to write to the appellants' legal practitioner on 21 December 1999 as follows:

> "In order for us to advise our client further in this matter, we would need to hear further from you regarding the basis of your client's defence, for C as we understand the position, your client has no *bona fide* defence to this claim."

That letter was written eight months after the summons had been issued and served upon the appellants. If the appellants had a *bona fide* defence to the respondent's claim, one wonders why, by 21 December 1999, the basis of that defence had not been disclosed. D

In my view, the conclusion that the appellants do not have a *bona fide* defence to the respondent's claim is inescapable.

In the circumstances, the appeal is devoid of merit and is dismissed with costs. E

Ziyambi JA and Gwaunza AJA concurred.

Kawonde & Company, appellants' legal practitioners

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

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GALANTE v GALANTE (2) 2002 (1) ZLR 521 (H)

Citation	2002 (1) ZLR 521 (H)
Case No	Judgment No. HH-89-02
Court	High Court, Harare
Judge	Smith J
Heard	3 June 2002
Judgment	3 June 2002
Counsel	*V H Fitzpatrick*, for the applicant *A P de Bourbon* SC, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure — *postponement — principles on which application* D *for postponement to be granted or refused*

Headnote

The applicant applied for the postponement of the parties' divorce action pending the determination of an appeal she had lodged against the court's dismissal of her special plea to the jurisdiction of the court. The action had already been postponed once at her request, and this application E was filed only three court days before the date of the hearing even though her appeal had been lodged nearly three months earlier. The grounds which she advanced to support her application suggested that she was not bo*na fide* and was trying to ensure that the divorce action was tried in a foreign court.

F *Held* that the following principles are relevant to an application for postponement:

1. The court has a discretion, to be exercised judicially, to grant or refuse such an application.
2. The court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained and G is not a delaying tactic, and where justice demands that the party should have further time for the purpose of preparing his or her case.

3. An application for postponement must be made as soon as the circumstances justifying the application become known to the applicant, though the court may in an appropriate case allow an H application that has not been made timeously.

2002 (1) ZLR p522

Smith J

4. An application for postponement must always be *bona fide* and not A merely a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not entitled.
5. Prejudice is the main consideration. The court must weigh the prejudice to the respondent if the applicant is granted a postponement against the prejudice to the applicant if a B postponement is refused, and must consider is whether any prejudice caused to the respondent can fairly be compensated by an appropriate order of costs or in some other way.
6. No party to an action can claim a postponement as of right, on the ground that any prejudice to the other side can be remedied by an appropriate order of costs. C
7. Where an application for postponement is not made timeously or the applicant is otherwise to blame, but a postponement is nevertheless justified in the circumstances of the case, the court may in its discretion allow a postponement but direct the applicant to pay the wasted costs on the higher scale.

Held, further, that in the circumstances of the case the applicant should be D granted a short postponement, even though her application was not made timeously and the reasons she advanced were neither full nor satisfactory.

Cases cited

Carephone (Pty) Ltd v Marcus NO & Ors 1999 (3) SA 304 (LAC) E

Myburgh Trpt v Botha 1991 (3) SA 310 (Nm SC)

National Coalition for Gay & Lesbian Equality & Ors v Minister of Home Affairs & Ors 1999 (3) SA 173 (C)

National Coalition for Gay & Lesbian Equality & Ors v Minister of Home Affairs & Ors 2000 (2) SA 1 (CC) F

National Police Service Union & Ors v Minister of Safety & Security & Ors 2000 (4) SA 1110 (CC)

Case information

V H Fitzpatrick, for the applicant

A P de Bourbon SC, for the respondent

Judgment

SMITH J: The applicant (hereinafter referred to as "Ronnie") has filed an G urgent application seeking an order that the divorce action between her and the respondent (hereinafter referred to as "Edward") in case HC 12886/00 (hereinafter referred to as "the divorce action") be postponed pending the determination of the appeal she has lodged and that, in the intervening period, a moratorium be placed in respect of the filing of further pleadings, amendments H

2002 (1) ZLR p523

Smith J

A to pleadings, the making or requiring of discovery and any other preliminary procedures, including the holding of a pre-trial conference. The application was filed on Wednesday 29 May 2002. The hearing of the divorce action was initially set down for 25 February 2002 but, on the application of Ronnie, was postponed to 3 June 2002. The application is based on the following grounds. Ronnie's previous legal practitioners renounced agency on 29 April and her B present legal practitioner only assumed agency on 13 May. An appeal had been noted against the dismissal of Ronnie's special plea that Edward is not domiciled in Zimbabwe. It would be inequitable for the court to proceed with the divorce action before the appeal is determined. The divorce action would entail great time and

expense and, if the Supreme Court upheld the appeal and ruled that the High Court had no jurisdiction, enormous wasted costs would C have been incurred. Mr Weinkove, Senior Counsel from Cape Town, who had appeared at the hearing of the special plea in December 2001, would not be available on 3 June and, as he has been appointed a judge of the Cape Provincial Division, he will not be available thereafter. That means that another Senior Counsel has to be sourced in South Africa. At present Ronnie D is in California, in the United States of America, with the two children of the marriage. She has been unwell. After her flight to the United States, she was diagnosed on 27 January 2002 as having pulmonary embolism and advised not to travel until her condition stabilises. She is fearful of her personal safety if she returns to this country. She is afraid that she may be imprisoned and her right to freedom of movement curtailed. Her sister was arrested on a E *tamquam suspectus de fuga* application and detained overnight at Chikurubi Maximum Security Prison. The pleadings in the divorce action have not been finalised as Edward was given leave to amend his declaration and Ronnie has not responded to the amended declaration. As Ronnie's circumstances have changed, since she is now living in the United States and intends to stay there, her pleadings will have to be amended considerably. Discovery has not been F properly effected. Ronnie is currently financially disadvantaged. She and the children are living on welfare in California. She was advised by Senior Counsel not to apply for a contribution towards her legal costs while the question of jurisdiction is pending. Consequently, she is without funds to defend the action or engage legal counsel. In 1999, Bartlett J issued an order G granting her $50 000 as a contribution towards costs and the taxed bill of costs for which she is liable is in the region of $480 000. (In the founding affidavit, the figure is given as $480 000 000 but I presume that is a mistake). The parties were married in California and the law in California regarding the rights of parties married in community of property is complex, and so evidence of an expert witness will be required at the hearing of the divorce H action. Finally, an expeditious divorce might well aggravate the rift that has

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developed between the children and their father. It is imperative that the A divorce action is fair and is seen to be fair.

Edward opposes the application. He claims that it would not be inequitable if the divorce action proceeded despite the appeal. It was Ronnie herself who instituted proceedings claiming a decree of divorce and other relief in case HC 13661/98. The issues in that case are substantially the same as those in B the current case and it was Ronnie that specifically averred that this court had jurisdiction. The reason why Ronnie is not prepared for trial is because she has embarked on a deliberate course of conduct to procure the removal of the resolution of the divorce and other ancillary matters, including custody and access, support and division of the property, from this court to the courts in California. The reason for her so doing is that she believes that she will C receive a more favourable financial package in the California courts.

Mrs *Fitzpatrick* submitted that it would be inequitable for the divorce action to commence before the appeal is determined. Ronnie is not ready for the trial. Her case is in disarray. Mr Weinkove is not available to represent her. She has financial problems. The $50 000 she was awarded as a contribution D towards her costs is nowhere near what she needs for that purpose. Although Bartlett J awarded her maintenance *pendente lite* in the sum of $100 000 a month, that was in 1999. Even then, that was probably insufficient to enable her to maintain the family's life style. As at January 2002, that amount is being paid meticulously but it does not take into account the devastating effects of inflation. E

Mr *de Bourbon* submitted that the application had little merit. The appeal was noted on 6 March but the application for postponement of the divorce action was not made until 29 May. There is no explanation for the delay. No steps have been taken by the appellant to try to get the appeal heard expeditiously. The appeal is *mala fide* and has been noted purely for the purposes of delay. F Ronnie has a misconceived notion that she will be better off financially if the divorce case is heard and decided in California. Ronnie applied for an order that Edward make further discovery when Adam J was dealing with the matter last year. No attempt has been made since then to get further discovery. Ronnie complains of lack of funds, yet she will not apply to court for the requisite order. Edward obtained an order from Chinhengo J that she G return the children to this country but she has refused, and is still refusing, to comply with his order. She is making a mockery of the order by this court in February that the hearing of the divorce action will commence on 3 June 2002. The

application for a moratorium is clear evidence that her intention is to delay the proceedings for as long as possible. She is trying to manipulate the court. H

2002 (1) ZLR p525

Smith J

A Mr *de Bourbon* strongly opposed the postponement of the hearing. He submitted, however, that if the court was disposed to grant a postponement, it should attach certain conditions thereto; namely, that Ronnie should be required to plead to the amended declaration within 10 days and that if she wished to make an application for an increase in her maintenance *pendente lite* or for a further contribution towards costs or for B discovery or further particulars, such application should also be made within 10 days.

In my judgment on 25 February, when I postponed the hearing to 3 June, I said that I considered it desirable, especially in the interests of the children, that the dispute between the parties be settled as expeditiously as possible. C I gave Ronnie three months to put her house in order but she has made no attempt to do so. I said that if Mr Weinkove was not available on 3 June, she should make an application, within 10 court days, for an earlier date that would suit Mr Weinkove and I would change the date. No such application was made until a few days of the date set down for the hearing. I concluded my judgment by saying that if Ronnie does not appear at the hearing on 3 D June, it may well be that judgment would be granted in default. Despite that clear statement, I feel constrained to grant a further postponement, although I do so with great reluctance. I agree with many of the submissions made by Mr *de Bourbon*. It is clear that Ronnie decided long ago that she would not be coming to court today. Possibly that has been her stance from the very beginning. Yet the application for postponement was not filed until 29 May, E less than a week ago. Why was it not filed two weeks ago so that, if a postponement was granted, that would be known to the parties before the day set for the actual hearing of the divorce action? The reasons given in the certificate of urgency accompanying the application as to why the matter is urgent, are not at all convincing. The fact that an appeal had been lodged was F known weeks ago. The fact that Ronnie was not prepared for trial must have been known as soon as the present legal practitioner assumed agency. She must also have realised that Ronnie would not be returning to this country before 3 June.

In *Myburgh Transport* v *Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmSC), Mahomed AJA laid down the legal principles relevant to an G application for the postponement of a trial and to an appeal against the trial court's decision on such an application. They are set out in the headnote as follows:

> "(1) The trial judge has a discretion as to whether an application for a postponement should be granted or refused;
>
> H (2) The discretion must be exercised judicially. It should not be

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2002 (1) ZLR p526

Smith J

> exercised capriciously or upon any wrong principle, but for substantial A reasons;
>
> (3) An appeal court is not entitled to set aside the decision of a trial court granting or refusing a postponement in the exercise of its discretion merely on the ground that if members of the court of appeal had been sitting as a trial court they would have exercised their discretion B differently;
>
> (4) An appeal court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial court granting or refusing a postponement where it appears that the trial court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in C the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles;
>
> (5) A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice D demands that he should have further time for the purpose of presenting his case;
>
> (6) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Where, however, fundamental fairness and justice justifies a postponement, the court may in an appropriate case E allow such an application for postponement even if the application was not so timeously made;
>
> (7) An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled; F

(8) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant can fairly be compensated by an appropriate order for costs or any other ancillary mechanisms; G

(9) The court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not;

(10) Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the H

2002 (1) ZLR p527

Smith J

A procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to B proceed with his action or defence in the action, as the case may be."

The fact that no party to an action can, as of right, claim a postponement on the grounds that any prejudice suffered by the other side can be remedied by an appropriate order as to costs is clearly set out in the judgment of Davis J in *National Coalition for Gay & Lesbian Equality & Ors* v *Minister of Home Affairs & Ors* 1999 (3) SA 173 (C) C . At 181B-G he said:

"The principle on which Mr *Hodes* relied was that an application for postponement should be granted, notwithstanding that it was not made timeously or that the proper procedures had not been followed, but where justice nevertheless justifies such a postponement in the particular circumstances of the case, *Myburgh Transport* at 315H.

D In this case, the respondents were served with the applicants' papers some seven months before the matter came before this court. Persistent efforts were made by the applicants to remind the respondents of their obligations not only to this court but ultimately to the Constitutional Court. No explanation was provided as to why the respondents had E chosen to ignore the proceedings for more than seven months. Mr Mokoena's affidavit simply states that the Cabinet decided the day before the hearing that the application should be opposed and that important matters were raised. An affirmation of an intention to defend cannot serve as an explanation for tardy behaviour. Furthermore, an applicant cannot as of right claim a postponement on the ground that any F prejudice his opponent might suffer can sufficiently be overcome by an appropriate order as to costs. On the authority of the judgment in *Estate Norton* v *Smerling* 1936 OPD 44, the authors of Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 667 submit that the discretion of the court is far more limited when an application for postponement is brought by the defendant than in the case G where the plaintiff, as *dominus litis*, brings such an application.

The implication of Mr *Hodes*' argument is that when the State is involved the court should show greater latitude in granting such postponements, particularly in the case of an important constitutional dispute. This argument loses sight of the consideration that no litigant, whether the H State or a subject of the State, is entitled to a postponement if no reason

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2002 (1) ZLR p528

Smith J

whatsoever for its failure to observe the rules of court has been shown. A The date for this hearing had been arranged between the parties early this year in consultation with the Judge President. That special arrangement has, without explanation, been ignored. Much as this court would have wished to have the views of government before it, it cannot condone the disdain with which the respondents have treated their obligations to the court." B

When the judgment of Davis J was appealed against, the Constitutional Court in *National Coalition for Gay & Lesbian Equality & Ors* v *Minister of Home Affairs & Ors* 2000 (2) SA 1 (CC) upheld the decision by Davis J to refuse the application for postponement. At p 14B-D, Ackermann J said:

"[11] A Court of Appeal is not entitled to set aside the decision of a lower C court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles D or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. On its face, the complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court.

Even assuming, however, E that such ground correctly formulates the test which would permit interference by this court, the respondents have got nowhere near to establishing such a ground on the facts before the High Court. No such vitiating error on the part of the High Court was contended for by the respondents in their written or oral argument before this Court and none can, on the papers, be found. In fact I am of the view that the High court F correctly dismissed the application for good and substantial reasons and that both the applications in this court relating to such dismissal ought to be refused."

Similar views were expressed by Froneman DJP in *Carephone (Pty) Ltd* v *Marcus NO & Ors* 1999 (3) SA 304 (LAC) at 320 (para 54): G

"(54) In a court of law, the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the H

2002 (1) ZLR p529

Smith J

A lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised."

Finally, I will refer to *National Police Service Union & Ors* v *Minister of Safety and Security & Ors* 2000 (4) SA 1110 (CC) where at p 1112 paras 4 and 5, Mokgoro J said:

B "[4] The Constitutional Court has the inherent power to protect and regulate its own process. The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the court. Such postponement will not be granted unless this court is satisfied that it is in the interests of justice to do so. In this respect, the applicant must show C that there is good cause for the postponement. In order to satisfy the court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement between the parties. In exercising that discretion, this court will take into account D a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the court to determine whether it is in the E interests of justice to grant the postponement.

[5] What is in the interests of justice will in turn be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this court finalised without F undue delay."

As I have stated earlier, the application for postponement was not made timeously. It could and should have been made at least a week earlier than it was made. The explanation given for postponement can hardly be described as full and satisfactory. The only valid reason put forward is the fact that Ronnie G suffered a pulmonary embolism and was apparently advised not to fly for six months. As regards her financial position, I cannot agree with the advice she purportedly received, that if she applied for a contribution towards costs it would imply that she accepts that the court has jurisdiction to deal with the divorce action. The grounds on which the court exercises jurisdiction in the two cases are entirely different. If she fears that the court may imply anything from H her application, she can make an express disclaimer in her application.

2002 (1) ZLR p530

Smith J

Whilst I am prepared to grant a postponement to enable Ronnie, or at least A her legal practitioner, to get her house in order, I am not prepared to order the moratorium sought. It has been held in many cases that, in the interests of justice, there must be a finality to litigation. Cases should not be allowed to drag on from year to year. They must be finalised as expeditiously as possible. To this end, I will order that Ronnie must plead over to the amended B declaration within 10 court days, which means that the pleadings must be filed on or before 17 June. If she requires from Edward further particulars or further discovery or if she wishes to make further discovery, that too should be requested or made on or before 17 June. If she wishes to apply for a contribution towards costs or for an increase in the maintenance *pendente lite*, that should be done as soon as possible. C

As regards costs, the indulgence is being sought by Ronnie and the application therefore was brought at the last possible moment. Accordingly, I feel that she should bear the costs.

It is ordered that —

(1) the hearing of case HC 12886/00 be postponed to 22 July, 2002. D

(2) The applicant pay the respondent's costs.

V H Fitzpatrick, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners E

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Source:
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LOGAN v SIBIYA 2002 (1) ZLR 531 (H)

Citation	2002 (1) ZLR 531 (H)
Case No	Judgment No. HH-88-02
Court	High Court, Harare
Judge	Hungwe J
Heard	27 November 2001
Judgment	5 June 2002
Counsel	*J C Andersen* SC, for the applicant *C T Mafukidze*, for the respondent
Case Type	Court application
Annotations	No case annotations to date

Flynote

Contract – *illegality – par delictum rule – departure from – considerations* D *– unjust enrichment of one party at experiences of one party at experience of the other*

Headnote

The parties entered into an illegal agreement under which the applicant paid the respondent $54.5 million and the respondent was to pay the applicant an equivalent sum in foreign currency overseas. The respondent E failed to do so and the applicant sought the return of the $54.5 million he had paid. The respondent raised the defence of illegality.

Held, that the applicant was not seeking to enforce an illegal agreement, but rather a return of money delivered in pursuance of one. If he was not granted the relief he sought the respondent would be unjustly enriched by $54.5 million and the applicant correspondingly impoverished. This

F was an appropriate case in which to relax the *par delictum* rule. The order was accordingly granted.

Cases cited

Dube v Khumalo 1986 (2) ZLR 103 (S)

G *Petersen v Jajbhay* 1940 TPD 182

Case information

J C Andersen SC, for the applicant

C T Mafukidze, for the respondent

Judgment

HUNGWE J: The applicant seeks an order for return of $54.5 million paid H to respondent in March 2001. It is the applicant's case that an agreement

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Hungwe J

was entered into between the parties whereby respondent received the A proceeds of various cheques totalling Z$54.5 million on the understanding that he would deposit in an off-shore account held under the name MultiChoice US$500 000. The respondent, whilst admitting that he has, to date, not deposited the foreign currency as agreed, disputes liability on the grounds that he dealt with Sakhile Masuku, a MultiChoice agent, and not the B applicant; he had up to six month within which to provide the foreign currency; that the amount paid to him was not refundable should MultiChoice withdraw from the transaction; and that the payment of US$500 000 is not yet due.

These averments by respondent took the applicant by surprise. He had not anticipated that a person with whom he had come to a fist fight over the issue C would deny dealing with him in the manner respondent did. In reply, he filed further affidavits by one Sitholakele Shakile Dewa, also known as Sakhile Masuku and one Ali Omershah.

It is apparent from the papers that both Sakhile Masuku Ali Omarshah were acting as agents in this matter but when the respondent gave one excuse D after another for his secure the promised US$500 000, they arranged for applicant to meet the respondent and resolve the matter. This led to a fist fight.

Clearly, the respondent knew, when he received the money, that the applicant had paid it through the two conduits or agents. He cannot be heard to say he did not know the applicant as the source of the Z$54.5 million. E

As to the terms which he alleges were agreed upon, the period by which payment of the US$ 500 000 was expected and the non-refundability of the Z$54.5 million it is highly improbable that the applicant would have agreed that he would pay to a stranger Z$54.5 million but expect its equivalent in foreign currency only after six months. F

It seems to me that from onset, the respondent knew that he had no access the US$500 000. He designed this scheme so as to steal the applicant's money.

The respondent has raised the defence of illegality.

The question therefore is whether the applicant's claim for relief, based as it is upon an agreement which involved a contravention of the Exchange G Control Regulations, should be entertained.

In *Dube* v *Khumalo* 1986 (2) ZLR 103 (s) at 109D-G, dealing with a similar case Gubbay JA (as he then was) stated:

> "There are two rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no H

Hungwe J

> A exception. See *Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128.

It is expressed in the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto potior est conditio possidentis*, which may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail'. The effect of B this rule is that where something has been delivered pursuant to an illegal agreement, the loss lies where it falls. The objectives of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases, the courts will relax the *par delictum* C rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy 'should properly take into account the doing of simple justice between man and man'. As was pointed out by Straford CJ in *Jajbhay* v *Cassim* 1939 AD 537 at 544-545:

'The courts of law are free to reject or grant a prayer for the restoration of something given under an illegal contract, being guided in each case D by the principle which underlies and inspired the maxim ...'."

I associate myself with the learned Judge of Appeal's pronouncements above. What inspired the maxim is equity. As the Roman maxim *goes iure naturae aequum est neminem cum alterius detrimento ... fieri locupletiorem* or "it is fair according to natural law that nobody be enriched at the expense E of another".

In *Petersen* v *Jajbhay* 1940 TPD 182, Greenberg JP emphasised that in determining where the justice of the matter lay, it was proper to consider that if the relief were refused to the applicant, the respondent would be justly enriched at his expense.

To my mind, the applicant is not seeking to enforce an illegal agreement. He F seeks a return of money delivered in pursuance of what clearly an illegal transaction.

Mr *Andersen* asked me to take judicial notice of the fact that currently such transactions, although still illegal, do not attract the same opprobrium as they did say ten years ago. Whilst that may well be the case, I am not prepared to G express that sympathy for the applicant simply because that may be mistaken for judicial policy. The transaction aimed at illegal. However, should I not grant the relief sought, clearly the respondent will be enriched to the tune Z$54.5 million and the applicant impoverished to that extent. He has been prosecuted for this. Without effort, the respondent is suddenly a multi-millionaire. I am satisfied that this is an appropriate case in which to relax the H *par delictum* rule.

2002 (1) ZLR p534

Hungwe J

In the result, it is ordered: A

1. That judgment in the sum of ZW$54.5 million together with interest thereon at the prescribed rate calculated from 23 March 2001 to date of payment in full be and is hereby entered in favour of the applicant.
2. The sum of ZW$23 million held in the respondent's personal savings account with Time Bank of Zimbabwe Limited be declared specially B executable and be released to the applicant failing which the Deputy Sheriff be and is hereby ordered to attach and cause the release of the ZW$23 million held in the aforesaid personal savings account in favour of the applicant.
3. That the respondent pays the costs of a suit on an attorney/client scale. C

Madanhi & Associates, applicant's legal practitioners

Chibune & Associates, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/MUSONZOA (PVT) LTD v STANDARD FIRE & GENERAL INSURANCE CO (PVT) LTD & ANOR 2002 (1) ZLR 535 (H)

MUSONZOA (PVT) LTD v STANDARD FIRE & GENERAL INSURANCE CO (PVT) LTD & ANOR 2002 (1) ZLR 535 (H)

Citation	2002 (1) ZLR 535 (H)
Case No	Judgment No. HH-85-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	31 January 2002
Judgment	5 June 2002
Counsel	*P Nherere*, for the applicant *F Girach*, for the first respondent *R Y Phillips*, for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

D **Arbitration** — *arbitrator — challenge to impartiality of — procedure for — must be in terms of Arbitration Act — relief that can be obtained — failure by arbitrator to respond to challenge — effect*

Arbitration — *arbitrator — duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence — effect of failure to do so — bias — when an arbitrator is disqualified on* E *grounds of bias — test to be applied*

Headnote

The applicant was a producer of agricultural products. It had some 60 hectares under paprika. This crop was insured with the first respondent against loss from hail, wind and fire. A hail storm struck the crop and caused extensive damage. As there was a dispute about the amount of F damage caused and the compensation to be paid, an assessor was appointed by the first respondent. The applicant was dissatisfied with the two assessments he made. Two independent assessors arrived at much higher figures. The first respondent did not accept these figures, and the parties appointed the second respondent to act as arbitrator.

G The arbitration proceedings began. On the last day of the proceedings, the applicant's legal practitioner received information about prior associations between the arbitrator and the first respondent's general manager and between the arbitrator and the assessor appointed by the first respondent. He stated, that because of these associations, the arbitrator could not possibly be impartial and that the applicant would H not be bound by the arbitrator's findings or award. The arbitrator

Chinhengo J

nevertheless completed the proceedings and made an award. He did not A in clear terms make a decision on the challenge.

The first respondent, its general manager and the arbitrator did not deny a previous association, but stated that it was purely professional and would not have influenced the arbitrator.

The applicant brought the matter on review. It sought an order that the award B be set aside and that fresh arbitration proceedings be held.

Held, that a challenge to an arbitrator in respect of his impartiality is made in terms of Articles 12 and 13 of the Model Law. It can also be made in terms of Article 34(2) as read with Article 34(5)

of the Model Law if the grounds upon which a challenge could have been made emerge after an award has been handed down. C

Held, further, that any such challenge may be made if circumstances exist that give rise to justifiable doubts as to the impartiality of the arbitrator. Such a challenge must be filed, in writing, within 15 days from the date after the challenging party becomes aware of the existence of those circumstances. Unless the arbitrator resigns, or the other party acquiesces to the challenge, the arbitrator must decide on the challenge. If the D arbitrator decides against the challenge, the challenging party may, within 30 days, request the High Court to decide on the challenge. If the challenge is successfully made in the High Court under articles 12 and 13, the mandate of the arbitrator is terminated; any hearings previously held shall be repeated; the award made after the challenge will be set aside as being a nullity; and the arbitrator is not entitled to a fee, the E proceedings being a nullity.

Held, further, that if, after an award has been made, a party discovers that the arbitrator was disqualified by reason of his failure to disclose any circumstances that were likely to give rise to justifiable doubt as to his impartiality, that party may proceed only in terms of Article 34 of the F Model Law and will have to establish that the arbitrator was actually biased or that the award was otherwise in conflict with the public policy of Zimbabwe.

Held, further, that the facts showed that the first respondent, its general manager, the arbitrator and the first assessor had been professionally associated on other occasions and that the arbitrator had been hired as G a consultant previously by the assessor.

Held, further, that where the arbitrator has a prior association with one of the parties, the test to be applied is an objective one where, after investigating the actual circumstances of the case, the court must impute knowledge of those circumstances to the reasonable man and decide whether there was a real danger on the part of the arbitrator unfairly to regard with H

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A favour the case of a party to the issue before him. The arbitrator' view of his own ability to be impartial, or the fact that others may consider his standing in society to lend him an air of impartiality, is immaterial to a determination of the issue of bias.

Held, further, that it is mandatory for the arbitrator to disclose to the parties any circumstances which give rise to justifiable doubts as to his B impartiality. Failure by an arbitrator to disclose a prior association and to decide on a challenge to his impartiality would be grounds for setting aside an award under art 34 as being contrary to public policy. However, the application was not, and should not have been, founded on art 34. The arbitrator's mandate would be terminated in terms of art 13 and the C proceedings declared to be a nullity.

Cases cited

Catering Employers' Assn of Zimbabwe v Zimbabwe Hotel & Catering Workers' Union & Anor 2001 (2) ZLR 388 (S)

Dally NO v Galaxie Melodies (Pty) Ltd 1975 (2) SA 337 (C)

D *Galaxie Melodies (Pty) Ltd v Dally NO* 1975 (4) SA 736 (A)

Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S)

Parys Municipality v Ahier & Anor 1991 (2) SA 608 (W)

R v Gough [1993] 2 All ER 724 (HL)

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Legislation considered E

Arbitration Act [*Chapter 7:15*], arts 12, 13 & 34

Case information

P Nherere, for the applicant

F Girach, for the first respondent

F *R Y Phillips*, for the second respondent

Judgment

CHINHENGO J: The applicant is a producer of agricultural products including paprika. In early November 1998, it had about sixty hectares under paprika and it insured this crop with the first respondent against loss from G hail, wind and fire. A hailstorm did indeed strike the crop and caused damage which the applicant considered to be extensive. About fifty-five hectares were affected. A dispute arose between the applicant and the first respondent as to the amount of damage caused by the hailstorm and the compensation to be paid by the first respondent. The first respondent appointed one Paul Falkenberg (hereinafter called "Falkenberg") to assess the loss. His first H assessment was that the applicant had suffered a nett loss of 23 tonnes of

paprika. The applicant was dissatisfied with this assessment of its loss. A Discussions followed with Falkenberg. Falkenberg re-assessed the loss and determined it at 46.6 tonnes. The applicant was still dissatisfied with this assessment. It contracted two independent assessors who put the loss at 99 tonnes and at between 70 and 90 tonnes respectively. Without going into further details, the applicant's dissatisfaction with Falkenberg's assessment B was in its mind confirmed by the independent assessors and a dispute as to the amount of the damage and of compensation payable arose between it and the first respondent. The applicant and the first respondent agreed to submit the dispute to arbitration. They appointed the second respondent to conduct the arbitration proceedings. I shall henceforth refer to the second respondent as "Dr Campbell". The arbitration proceedings were held over a number of C days, the last of which was on 18 September 2000. At this last meeting of the proceedings, the applicant's legal practitioner, who had that morning received information that Dr Campbell had a prior association with the first respondent, the first respondent's general manager, Mr Guy Adams and the loss assessor, Falkenberg, raised the issue that because of the prior association Dr Campbell could not possibly be impartial. He in effect alleged that Dr Campbell was or D would be biased in favour of the first respondent. He specifically stated that because of the possibility of Dr Campbell's bias, the applicant would not be bound by Dr Campbell's findings and his award. Against this background, Dr Campbell completed the proceedings on 18 September 2000 and later handed down his award. In this application, the applicant seeks an order that Dr Campbell's award be set aside and that a fresh arbitration be held within E a fortnight of the order which I may make in its favour and that such arbitration be presided over by an arbitrator appointed by the President or Chairman of the Commercial Arbitration Centre. The respondents have opposed the application and prayed for its dismissal with costs.

PRELIMINARY ISSUES RAISED BY THE PARTIES F

The applicant's founding affidavit consisted of two parts. The first part was an application for condonation for the late institution of these review proceedings. The second part dealt with the merits of the application. I am not enamoured with the procedure where such a combined application is filed because the costs of preparing the application on the merits may be G unnecessarily incurred if condonation is not granted. The applicant stated that the application for condonation was made out of an abundance of caution in case the court found that the present proceedings should have been instituted immediately after 18 September 2000 or within eight weeks therefrom as provided in r 259 of the rules of this court. The applicant did not persist with the application for condonation at the hearing. Mr *Nherere* H

A submitted that there was no need for the application for condonation because the review application had been brought within eight weeks of the applicant becoming aware of the procedural irregularity about which it complains. I shall deal with this submission later on in this judgment. For the moment, however, it suffices to state that the first respondent opposed the application for condonation. Mr *Girach* submitted that the explanation B given by the applicant was not sufficient to warrantthe grant of the application. If I thought (which I do not) that the issue of condonation was

properly to be dealt with under the said r 259, I would have condoned the late institution of the proceedings for the reasons given by the applicant. I could even have found that this application was not instituted out of time C because it was made within eight weeks of the applicant becoming aware of the irregularity about which it complains. The issue however must, in my view, be examined against the provisions of the Arbitration Act [*Chapter 7:15*], in particular the First Schedule thereto which I will refer to as "the Model Law". I say so because the Model Law, in Article 13, prescribes the procedure and time limits where a party to an arbitration wishes to D challenge the impartiality of the arbitrator. In addition, the relief sought by the applicant in these proceedings, i.e. to set aside an arbitral award, can only be obtained by proceeding in terms of Article 34(2) of the Model Law. See *Catering Employers Association of Zimbabwe* v *Zimbabwe Hotel and Catering Workers Union & Anor* S-112-2001 where Sandura JA at p 5 of the cyclostyled judgment said:

> " E The sole grounds on which an arbitral award may be set aside by the High Court are set out in Article 34(2) of the Model Law contained in the First Schedule to the Arbitration Act [*Chapter 7:15*] …"

and again, at p 8

> "In my view, Article 34(2) of the Model Law sets out the sole grounds on F which an arbitral award may be set aside by the High Court. That is what Article 34(2) says and that is what this court said in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S) at 458F."

In his heads of argument and in oral submissions, Mr *Nherere* appeared to have appreciated this stricture in the law, hence he abandoned the application G for condonation and relied entirely on the provisions of the Arbitration Act.

I will set out the provisions of the Model Law which are relevant to this application first and then the facts of this case and finally my conclusions on the law.

Articles 12, 13 and 34(2) of the Model Law, the last in so far as it is relevant H to this application, provide as follows:

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> *"Article 12* A
>
> *Grounds for challenge*
>
> (1) Where a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the B arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
>
> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess the qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment C he has participated, only for reasons of which he becomes aware after the appointment has been made.
>
> *Article 13*
>
> *Challenge procedure*
>
> (1) The parties are free to agree on a procedure for challenging an D arbitrator, subject to the provisions of paragraph (3) of this article.
>
> (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the E reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
>
> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received F notice of the decision rejecting the challenge, the *High Court* to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.
>
> *Article 34* G
>
> *Recourse against award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the *High Court* only if H —
>
> (a) the party making the application furnishes proof that —

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(i) (not relevant);

(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) (not relevant); B

(iv) (not relevant);

(v) (not relevant.

(b) the *High Court* finds, that

(i) (not relevant);

(ii) the award is in conflict with the public policy of *Zimbabwe.*

C (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

D (4) (not relevant).

(5) For the avoidance of doubt, and without limiting the generality of paragraph 2(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if —

(a) (not relevant). E

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

The following are some of the propositions which emerge from the above provisions of the Model Law:

(1) the challenge to an arbitrator in respect of his impartiality is made in terms of Articles 12 and 13 of the Model Law. It can also be made in F terms of Article 34(2) as read with Article 34(5) of the Model Law if, as I shall show later, the grounds upon which a challenge could have been made emerge after an award has been handed down;

(2) any such challenge may be made if circumstances exist that give rise to justifiable doubts as to the impartiality of the arbitrator; G

(3) it is mandatory for the arbitrator to disclose to the parties any circumstances which give rise to justifiable doubts as to his impartiality;

(4) the challenge, if made in terms of Article 13, must be filed in writing within fifteen days from the date after the challenging party becomes aware of the existence of the circumstances specified in (2) above; H

(5) short of the arbitrator resigning his office upon being challenged or the

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other party acquiescing to the challenge, it is mandatory for the arbitrator A to decide on the challenge;

(6) if the arbitrator decides against the challenge, the challenging party may, within thirty days of receiving the decision, request the High Court to decide on the challenge; and

(7) no appeal shall lie against the decision of the High Court on the B challenge.

I will deal with the provisions of Article 34 later for what it is worth in the circumstances of this case. But it is necessary at this stage to try and reconcile the procedure under Articles 12 and 13, as read with Article 15 of the Model Law on the one hand, and Article 34 on the other hand. If in terms C of Article 13(3) the High Court decides that the challenge was merited, that decision, in my view, has the following consequences:

(a) the mandate of the arbitrator is terminated;

(b) if he was a sole arbitrator and the parties do not otherwise agree, any hearings previously held shall be repeated; D

(c) the decision of the High Court may not be appealed against;

(d) the award made after the challenge falls away. In view of the decision in *Catering Employers Association of Zimbabwe* v *Zimbabwe Hotel and Catering Workers Union & Anor supra*, I am not certain whether I could say that that award can be "set aside". To "set aside", as defined in Bouvier's *Law Dictionary*, means to "annul; to make void; as to set E aside an award". To "set

aside" therefore connotes an act of intervention by a court of law invalidating something which was otherwise valid. The words "set aside" may be used in relation to other situations and not be confined to cases where a court intervenes to invalidate something otherwise valid. See *Dally NO* v *Galaxie Melodies (Pty) Ltd* 1975 (2) SA 337 (C) F at 340 and *Galaxie Melodies (Pty) Ltd* v *Dally NO* 1975 (4) SA 736 (A). In my view, if an arbitrator makes an award in the circumstances contemplated by Articles 12 and 13 (as in the present case) the award would have to be "set aside" within the wider meaning of that phrase and not in the sense which Sandura JA was concerned with in *Catering Employers Association supra*. Such setting aside G would not be a determination in law as to the status of the award (which it would be under Article 34) but more in the sense that it is declaration that the award was a nullity. This interpretation seems to me to be consistent with the general purport of Articles 12 and 13 of the Model Law, which make it mandatory for an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality H

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A or independence. A failure to make such a disclosure where it should have been made renders the proceedings a nullity and the award consequent thereon liable to be "set aside" for that reason and not for the reasons specified in Article 34 of the Model Law which are applicable where the award is otherwise valid until it is invalidated by a court. B

(e) the arbitrator may not, upon termination of his mandate, be entitled to any fees because the proceedings which he conducted are a nullity.

I must observe, for clarity, that it seems to me that if after an award has been made and a party to the arbitral proceedings concerned discovers at that stage that the arbitrator was disqualified by reason of his failure to disclose any C circumstances that were likely to give rise to justifiable doubt as to his impartiality, such party may proceed only in terms of Article 34 of the Model Law and will in that event have to establish that the arbitrator was actually biased or that the award was otherwise in conflict with the public policy of Zimbabwe or establish any other appropriate grounds specified in that Article.

D From the foregoing, it is apparent to me that there is no basis for the application of the High Court Rules in so far as the issues addressed by the above-mentioned Articles of the Model Law are concerned, and in particular in so far as the time limits for making the challenge are concerned. Thus, if an applicant fails to comply with Article 13 in respect of the time limits for E challenging an arbitrator, he cannot bring the same action on the basis that the eight weeks prescribed in r 259 of the High Court Rules have not elapsed. And if the relief sought by the applicant is to set aside the award, he can only do so in compliance with Article 34 of the Model Law, which also provides that an application in terms thereof can only be made within three months from the date on which the party making that application received the award. F It is important to appreciate that if an application to the High Court is based on a challenge to the arbitrator as to his impartiality, then such application must be made within thirty days after receiving the decision rejecting the challenge. Otherwise, every other application for setting aside an award of an arbitrator must be lodged within three months as provided in Article 34(3) G of the Model Law.

ISSUES FOR DETERMINATION

The issues for determination in this application are the following. First, whether the procedures I have outlined above were complied with. Second, whether there were in this case such circumstances as were "likely to give rise H to justifiable doubts" as to the arbitrator's impartiality and independence.

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Third, whether the arbitrator had an obligation to disclose those circumstances. A Fourth, whether a challenge was made to the arbitrator and, if so, whether he decided on the challenge; and if he did not, what was the effect of his failure to do so.

WHETHER CHALLENGE WAS MADE TO ARBITRATOR

On the last day of the arbitral hearings on 18 September 2000, the applicant B notified the first respondent (through Mr Adams) and Dr Campbell that it did not believe that Dr Campbell would be impartial because of his prior association with the first respondent, the first respondent's Mr Adams and Falkenberg. The applicant averred that, when he so notified them, both Mr Adams (for himself and on behalf of the first respondent) and C Dr Campbell denied that there had been any prior association between them.

The first respondent, Mr Adams and Dr Campbell averred that they did not deny or dispute that they had a prior association but that they in fact admitted a prior association but pointed out that that association was purely professional and was not of such a nature as would have influenced Dr Campbell in the D arbitration. From the evidence before me, I would find in favour of the applicant that Mr Adams and Dr Campbell denied that they had a prior association when they were confronted by the applicant's legal practitioner on 18 September 2000. This finding is supported by the fact that the association had not been disclosed voluntarily and also by the very belief E entertained by both Mr Adams and Dr Campbell that the association was immaterial. These factors are likely to have led the two to deny the prior association on 18 September 2000. Their subsequent conduct, whether in writing or otherwise, would also seem to indicate that they had denied the existence of a prior association between them.

After conveying the challenge verbally on 18 September, the applicant sent F a letter to the first respondent and copied it to Dr Campbell on 2 October 2000. The letter, in the relevant part, reads:

> "We wish to confirm our client's disquietitude with Dr Campbell's handling of the matter, more particularly in that our client is no longer confident of Dr Campbell's being impartial. We raised this particular G point with yourself and we confirm that we agreed that the meeting (of 18 September) would go ahead for the purpose of obtaining Dr Campbell's input irrespective of the suspicions harboured by our client. We further confirm the position we took that our client, given its suspicions, had vowed not to be bound by Dr Campbell's verdict.
>
> The reasons advised by our client for challenging Dr Campbell's H

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> A impartiality, which reasons we advanced both to yourself and to Dr Campbell are as follows:
>
> (a) our client advised that Dr Campbell acted for both Unity Insurance Co. Ltd and Standard Fire & General Insurance in a consultancy capacity with regard to Zimtobac Insurance Scheme that both insurance companies operated. Our client advised that your Mr B Adams was working initially for Unity Insurance Co Ltd whilst it was running the Zimtobac scheme and the said Mr Adams is now currently employed by Standard Fire & General Insurance Company. It is confirmed that Doctor Campbell did not disclose his prior association with Standard Fire & General Insurance, or with Mr C Adams in the capacity aboveto alluded.
>
> (b) Dr Campbell has not disclosed that Mr Falkenberg, the assessor employed by Standard Fire & General Insurance Company, was a contemporary school colleague of his. In our client's view, this has clouded Dr Campbell's approach to the matter.
>
> The above notwithstanding, we are still awaiting Dr Campbell's opinion D for purposes of further negotiations in the matter. Our instructions are, however, to the effect that we should commence liaising with the Commercial Arbitration Centre with a view to obtaining possible names of individuals to act as arbitrators in this case."

On 3 October 2000, the first respondent responded to the applicant's letter of E 2 October as follows:

> "We refer to your fax of 2 October 2000, the contents of which are noted.
>
> We fail to understand why your client is of the view that any decision made by the Arbitrator would not be impartial or independent as the main reason for such opinion put forward by your client is not correct.
>
> F On the first point, I would advise that Dr Campbell has never been employed by either AIG Zimbabwe, Standard Fire and General or myself in any consultancy capacity on the Zimtobac Insurance Scheme. In recent years, Dr Campbell was called upon as an expert witness in a tobacco claim by AIG Zimbabwe and AIG Zimbabwe and ourselves were on the receiving end of a claim that Dr Campbell had on his own G tobacco crop. These are not relationships that would in my mind draw a person to conclude that any award would be biased towards us.
>
> On the second point, we fail to understand how this is of concern to your client. Your client's accusation that Dr Campbell's approach/dealings in the arbitration have been clouded due to his school association with Mr H Falkenberg is totally unfounded and unjustified, as you yourself would

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agree that Dr Campbell has conducted the arbitration in a professional A manner. I have not noted any tendency to lean in any particular direction and have found that the issues and questions raised by the Arbitrator have been technically sound and would result in a fair assessment of what your client's loss was due to the insured peril.

Dr Campbell is known to the writer as being a very principled, fair, B honest and upstanding professional in the agricultural sector and I know that he has acted in similar arbitration matters involving cotton and tobacco crops. He is a renowned expert on cotton. In my dealings with him and against him with regard to his own claim I found him to be highly principled and honest and I believe he could not act in any way other than being impartial. C

Will your client reconsider its stance on the matter on the basis that we have cleared up what we consider to be your client's major concern?

Turning now to your last paragraph in which you advise that your client has instructed you to look for possible candidates to act as a new arbitrator, we advise that in terms of Article 12 of the Arbitration Act D , 1996 we are not satisfied that your client had provided sufficient justifiable doubts as to Dr Campbell's impartiality or independence. We have cleared up your client's misunderstanding in terms of point one which basically leaves us with the old school friend issue which we contend is not a real issue as to warrant a fresh arbitration. If an arbitrator is to be replaced then the hearings etc will then have to be repeated which E is not only time consuming but also costly.

We understand that in terms of Article 13 of the said Arbitration Act, 1998, we can reject the challenge that your client has made and ask the High Court to decide on the matter. We also understand that the arbitrator can continue with the proceedings and make an award even though the matter is being referred. F

We are not at all satisfied that your client is justified in its assertion that the Arbitrator will not act in an impartial and independent manner and we have requested our own Legal Practitioners to advise on the matter. We will communicate with you once we have heard from them in this regard." G

The above letters clearly indicated that the applicant was challenging the arbitrator as to his impartiality and that it stated its grounds for the challenge. The reply in the third paragraph thereof was a denial of any association, which denial was well crafted in terms of phraseology. It was cryptic as well because it restricted the denial to an employment relationship. The reply also disputed the materiality of the association. Later, as I shall show, the first H

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A respondent admitted an association which it was not prepared to admit in the letter of 3 October. The applicant's letter of 2 October was clearly a challenge to the arbitrator. Although the first respondent has contended in this application that a written statement challenging the arbitrator was not sent to the arbitrator, other correspondence emanating from Mr Adams indicates that the first respondent was in no doubt that a challenge had been mounted.

B On 1 November Mr Adams, writing on behalf of the first respondent, advised the Commercial Arbitration Centre as follows:

"We are at present awaiting legal advice from our legal practitioners with regard to the aborted arbitration undertaken by Dr B Campbell and once we have heard from them we will get back to you. For your information, C Dr Campbell was challenged on his impartiality to arbitrate on the matter as he was an old school chum of the Loss Adjuster even though he was more than qualified to arbitrate on the case. We are sure that if we choose someone from the legal profession that person will undoubtedly be known to the legal practitioner acting for Musonzoa Farm.

In the meantime, we would request that you supply other possible D candidates who are not from the legal profession as we believe that the issues to be resolved are more to do with the practical growing of crops and the assessment of hail damage on such crops. As far as we are concerned the insurance policy interpretation is a minor issue.

We would ask you to note that Mr A Musonziwa is in fact our legal E counsel so we would not like to end up with another aborted arbitration on the ground that he was not impartial.

By copy of this letter, we are asking Mr Kanongovere (applicant's attorney) if he agrees with our view on the selection of a suitable arbitrator."

F The above letter was a response to a letter which the first respondent had received from the Commercial Arbitration Centre in which the names of possible fresh arbitrators were suggested following the applicant's approaches to the Centre in that regard. The letter clearly indicates not only that the first respondent considered that Dr Campbell's impartiality had been challenged and

that the proceedings he had conducted had aborted, G but also that the first respondent was amenable to the appointment of a new arbitrator. The first respondent put its final position on the issue of the challenge to Dr Campbell in its letter to the applicant's legal practitioners on 17 November 2000. It said:

"*Arbitration — Musonzoa Farm — Paprika Loss*

H We have now received confirmation back from our Legal Practitioners

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of our views with regard to the challenge brought forward by your client A concerning the impartiality of the arbitrator namely Dr Brian Campbell.

Once again, we would like to point out that Dr Campbell was never employed by either Unity Insurance or myself as a consultant in relation to a tobacco crop insurance scheme and also Dr Campbell whilst attending the same school as the Loss Adjuster was something like six B years the Loss Adjuster's junior. The Loss Adjuster advises that he does not have any personal relationship with Dr Campbell save as to see him watching a school rugby game. We contend that your client has obviously been misguided and misinformed in this matter and we are not at all happy with these assertions made by your client and we would add that most of the parties involved in the arbitration proceedings have taken it C as a slur on their professional reputations.

Turning now to the actual challenge of the arbitrator and his subsequent award, we are advised by our legal practitioners that your client has no legal grounds to do so in that your client has failed to adhere to the procedure laid down in the Arbitration Act, No. 6 of 1998. In this regard, we would point out that our client is in breach of Article 13 of the said D Act in that your client did not inform the arbitral tribunal within the stipulated time and nor did your client send a written statement of the reasons for the challenge to the arbitral tribunal. Your client merely made a unilateral decision that he wanted the arbitration to cease without referring to all the parties sitting together at the same meeting. It is laid E down in the arbitration procedures that the arbitral tribunal can decide on the merits of the challenge. Your client's actions were not done in accordance with the laid down procedures as set out in the said Arbitration Act.

Due to your client's action referred to in the previous paragraph, the next procedure laid down in Article 13 could not be adhered to. The arbitral F tribunal sitting as a group was not given the necessary opportunity to make a decision on the challenge. Had the arbitrator decided that the challenge was not justified then your client could then have approached the High Court to decide on the matter. As you know the proceedings could still have proceeded pending the ruling from the High Court.

Our legal practitioners have also advised on Article 34 of the Arbitration G Act and they have commented that they believe your client has no grounds to challenge the arbitration under this article either.

We now turn to item (c) of the Memorandum of Agreement made between your client and ourselves in that we both agreed to abide by the decision of the arbitrator and accepted that it would be final and binding H

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A on both parties with no rights of appeal. We contend that the arbitrator has made his award which we believe was done in a professional manner without any bias whatsoever and we would advise that we are bound by it in terms of the Memorandum of Agreement that we both agreed to.

We would request you to advise on your client's final position on the matter. If your client still wants to persist in its challenge even though we B believe he may be barred from doing so as your client was in breach of the laid down procedures in the Arbitration Act you would leave us with no choice but to make an application to the High Court to decide on the merits of your client's challenge as we are not at all enamoured with the idea that we should start all over again with a fresh arbitration.

C We await your further comments in due course."

In this letter, the first respondent was, among other things, challenging the procedure adopted by the applicant. All the correspondence emanating from the first respondent which I have quoted extensively had one thing in common. They were quite evasive as to the nature of the association between the first respondent, Mr Adams, Mr Falkenberg and Dr Campbell. D The common thread running through them was that these parties had no prior association at all or at best their association was of no consequence in any respect whatsoever.

THE NATURE OF THE PRIOR ASSOCIATION

The nature of the prior association became clear only after the applicant E lodged the present proceedings following upon further information being made available to it to prove that the association was not merely fleeting or inconsequential but that it was substantive in its own way. In the opposing affidavits, the first respondent and Dr Campbell could no longer deny the prior association. They, in fact, admitted it. The evidence on the nature of the F association was revealed by the applicant in paragraphs 19 to 24 of the founding affidavit. I will quote from them:

"19. In due course, the applicant's legal practitioner received a fax from "the first respondent advising that first respondent would be abiding by the finding of the second respondent, and reiterating that Dr Campbell had never had any dealings with Unity Insurance, nor with G Mr Guy Adams. I annex same hereto as Annexure 'I'.

20. It was at this juncture that the applicant's legal practitioner requested that the applicant furnish tangible proof of a connection between the first respondent, second respondent, Falkenberg and Guy Adams. In our endeavours to provide such information, we had occasion to H liaise with one R J Cary who advised as follows:

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20.1 He advised that during the period 1996/97 agricultural season, A he grew tobacco;

20.2 He advised that the crop was insured under the Zimtobac Scheme through the insurance brokers AGI;

20.3 He advised that the insurance certificate he received reflected Unity Insurance Co Ltd as a participant in the Zimtobac B Scheme;

20.4 Further upon suffering hail strikes, he advised that the hail assessor appointed by the insurance company was Falkenberg. For the record, Falkenberg is the same gentleman who was appointed assessor by first respondent in this instance;

20.5 He advised that Dr Brian Campbell of Agricultural Services C was appointed to see to the recovery of the crop and he further advised that in so rendering services, Dr Campbell had occasion to liaise with Falkenberg;

20.6 He also advised that he had occasion to contact Mr Guy Adams who at that time was employed by Unity Insurance. D

I annex hereto as Annexure 'J' a letter from R J Cary as well as the application form for Insurance for the Zimtobac Scheme [annexed as Annexure 'J']. I draw this Honourable Court's attention to the insignias on the top left and top right hand corners of the said application form, which clearly illustrate that Unity Insurance Co Ltd and first respondent E were participants thereof; I further annex as Annexure 'K' a certificate from Zimtobac where there is the insignia of Unity Insurance Co Ltd and which certificate was issued on 2 December 1996.

22. As Annexure 'L' hereto is a report prepared by Dr Campbell on 12 February 1997 *vis-à-vis* Mr Cary's farm.

23. As Annexure 'M' hereto, is a letter prepared by Mr Cary dated F 19 July 1997, the contents of which are self explanatory. However, more particularly *vis-à-vis* the second, third and fourth paragraphs thereof, it becomes clear that Falkenberg, Mr Adams and Dr Campbell were all involved in the Scheme. This Honourable Court's attention is further drawn to the letter's destination, being Agricultural and G General Insurance Brokers (Pvt) Ltd.

24. In spite of the clear evidence linking Dr Campbell, Mr Adams and Falkenberg to one Scheme at the same time, first respondent has continuously insisted that there are no past business ties between the first and second respondents. The falsity of this assertion is quite patent. H "

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A In its opposing affidavit, the first respondent virtually admitted all the averments made by the applicant in paras 19-24 of the founding affidavit. I quote from the opposing affidavit paras 28-33.

"28. *Ad para 19*

Annexure '1' did not state that second respondent had never had any B dealings with Unity Insurance Co Ltd or with myself. It states that the second respondent was never employed either by Unity Insurance Co Ltd or myself as a consultant, and in this respect I refer to paragraph 23 above.

29. *Ads para 20*

I have no knowledge of the applicant's dealings with his legal C practitioner.

Ad paras 20.1-20.4

These are not disputed.

Ad para 20.5

Mr Falkenberg was appointed as the assessor in this matter. He, in D turn, appointed the second respondent to oversee the recovery of the crop. The second respondent was not appointed by Unity Insurance Co Ltd.

Ad para 20.6

I cannot recall Mr Cary contacting me directly, but he may have had E cause to do so.

30. *Ad para 21*

The application form presented in annexure 'J1' covers the 1998/99 season and not the 1996/97 season, as alleged, as first respondent was not operating in the 1996/97 season. I confirm that in the F 1998/99 season first respondent and AIG (Zimbabwe) Ltd jointly underwrote the tobacco scheme, but in 1996/97 Unity Insurance Co Ltd was the sole insurer, as indicated in the certificate of insurance presented in annexure 'K'. These facts are not disputed. The letter from RJ Cary at annexure 'J' is disputed as to the sixth paragraph thereof in that I reiterate that the second respondent was not G appointed by the insurance company but by the assessor.

31. *Ad para 22*

It is not disputed that the second respondent tendered the report annexed to the application and marked 'L', but this would have been done in accordance with instructions from the assessor, Mr H Falkenberg.

Chinhengo J

32. *Ad para 23* A

It is not disputed that Mr Falkenberg, second respondent, and myself were involved in the scheme. What is disputed is the nature of that involvement. I reiterate that the second respondent was never employed by myself personally, by Unity Insurance Co Ltd, or by the first respondent. I had never met second respondent when he was B appointed by Paul Falkenberg to oversee the Cary crop damage, and when second respondent was consulted to Paul Falkenberg in respect of the Idube Farm claim I had already left Unity Insurance Co Ltd and the first respondent was not involved in that claim.

33. *Ad para 24* C

I have never denied past business ties between the second respondent, myself, and Mr Falkenberg, and I refer to my above averments in this respect. I have dealt with Mr Falkenberg in his professional capacity as an assessor, and with second respondent indirectly through Mr Falkenberg. My dealings with second respondent could never be described as a close business relationship. I cannot agree that such D a tenuous business relationship would or could in any way influence second respondent's judgment and award in the arbitration."

These admissions confirm that throughout the earlier exchanges between the parties, the first respondent had been evasive and cagey about the true nature of the prior association. It was, however, unable to dispute the evidence E presented to it in the applicant's founding affidavit. This also confirms my earlier finding that when confronted about the prior association, the first respondent had denied any such association.

Dr Campbell did not respond to any of the correspondence copied to him by either the applicant or the first respondent. That correspondence however shows that Dr Campbell was aware, not only that his impartiality was being F challenged, but also that efforts were being made to commence fresh proceedings before a new arbitrator.

Dr Campbell filed an opposing affidavit as did the first respondent, but his affidavit did not deal with the merits of the dispute between the applicant and the first respondent: it dealt only with the allegations made against him. G The preambular part of the affidavit gave his resumé. He highlighted that he has practised as an agricultural consultant (being a holder of a doctorate in agriculture) in Zimbabwe for over 37 years. During that period, he has associated with a large number of persons in agriculture in Zimbabwe and has conducted many arbitrations and came to know many persons involved on one side or the other and sometimes on both sides. He said that he has always H

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A conducted these arbitrations impartially and professionally and that "until this case no-one has ever questioned my impartiality in any way".

Dr Campbell confirmed that on 18 September 2000, he had been approached by the applicant's legal practitioner about his association with the first respondent, Adams and Falkenberg, and that he was asked to withdraw as the arbitrator in the matter. His response, he said, was that his association with B Falkenberg and Adams was solely professional and that he had been at school together with Falkenberg as his junior by about six years which was immaterial. He said that he had told the applicant's legal practitioner that he had not disclosed the prior association because he did not believe it was a close one and, in any case, he was a professional who conducted arbitrations, C whatever the association with the parties, professionally and objectively. He averred that when confronted with the allegation of the prior association he had not denied it. Dr Campbell admitted most, if not all, of the averments in paras 19-24 of applicant's founding affidavit in the same way as did the first respondent. He however disputed that he had breached any provision of the Arbitration Act. He stated his belief that there was no reason for his award D to be set aside and prayed that the application should be dismissed with costs.

From the foregoing, the prior association between Dr Campbell, the first respondent and Adams and Falkenberg was a fairly close business association. They had been involved with each other in at least three insurance claims. Falkenberg had hired Dr Campbell as his consultant, no doubt for a fee, which E in one or two cases was in reality paid by the first respondent. I find as accurate the applicant's description in its answering affidavit of the nature of the association between first respondent, Dr Campbell, Adams and Falkenberg. I may in brief describe the relationship as follows.

The first respondent, Mr Adams, Dr Campbell and Mr Falkenberg knew each other well. They had associated with each other on more than three occasions F at least. The relationship between Falkenberg and Dr Campbell in particular was even closer, in that the former had hired the latter as a consultant before. The relationship arising out of their business contacts was, in my view, such that it can properly be concluded that Dr Campbell enjoyed Falkenberg's patronage in their business dealing. There were business dealings or activities which definitely connected Mr Adams, and through him, the first respondent, G Mr Falkenberg and Dr Campbell. I do not think that the schoolboy connection by itself is material, but it is not inconsequential when viewed against the business liaison which developed between Falkenberg and Dr Campbell later in their adult lives. The prior association was indeed largely a business relationship which, was by any criteria, a close one.

H What I have stated above answers several of the issues which I have identified

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for determination. Answered is the question whether the applicant challenged A Dr Campbell as to his impartiality. Clearly, the applicant did so, as is amply demonstrated by the verbal exchange on 18 September and the correspondence which later passed between the parties and in particular between the applicant and the first respondent.

DID PRIOR ASSOCIATION GIVE RISE TO JUSTIFIABLE B DOUBTS AS TO ARBITRATOR'S IMPARTIALITY?

I turn now to decide whether the prior association was such as was likely to give rise to justifiable doubts as to Dr Campbell's impartiality or independence. If it was, it called for disclosure.

The test to be applied in such a determination was expounded upon by C Korsah JA in *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S). The learned judge of appeal referred to many authorities and accepted that the test to be applied was an objective test where, after investigating the actual circumstances of the case, the court must impute knowledge of those circumstances to the reasonable man and decide whether there was a real danger on the part of the arbitrator unfairly to regard D with favour the case of a party to the issue before him. He quoted with approval *R* v *Gough* [1993] 2 All ER 724 (HL) and in particular the passage at 737J where Lord Goff said:

> "Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having E ascertained the relevant circumstances, there was a real danger on the part of the relevant

> member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …"

It is clear from the authorities that the applicant's view of his own ability to F be impartial, or the fact that others may consider his standing in society to lend him an air of impartiality, is immaterial to a determination of the issue of bias. It is also clear that the court should not concern itself with an investigation as to whether or not bias has been established, nor should it concern itself with an inquiry into the state of mind of the arbitrator. In its answering affidavit, the applicant attempted to show in para 36 how in reality G Dr Campbell may have been biased. That was not called for: it is sufficient in a case such as the present to adduce reasonable evidence to satisfy the court that there was a real danger of bias. That evidence has been adduced to my satisfaction in this case. That evidence has established that the first respondent, Mr Adams, Dr Campbell and Mr Falkenberg had a close business relationship. It also established that in the arbitration Dr Campbell was called upon to H

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A decide on the adequacy or otherwise of the assessment of the hailstorm damage made by Falkenberg. In my own view, a reasonable man, having knowledge of the prior association I have found existed, not only between Dr Campbell and Falkenberg, but also between the two of them and the first respondent and Mr Adams, would conclude that there was a real danger of bias. Dr Campbell was at pains to say that he could not possibly have been B biased. But as stated in *Leopard Rock supra* at 275A-B:

> "One does not inquire into the mind of the person challenged to determine whether or not he was or would be actually biased. Thus, the character, professionalism, experience or ability to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of C some conflict of interest, that he would yield to infamy, do not fall for consideration."

What must be appreciated is that bias operates in an insidious manner and that the person being challenged may be quite unconscious of it — *Gough*'s case *supra* at 740a. Another case on the applicable test — that of the reasonable man — is *Parys Municipality* v *Ahier & Anor* 1991 (2) SA 608 (W) at 619B. D The law therefore requires that arbitrators must not place themselves in such a position that the reasonable man might assume that they may be biased. They must be above any such assumption. The provisions of Article 12 of the Model Law are designed to ensure that arbitrators are above any such assumption. I construe the phrase — "circumstances likely to give rise to justifiable doubts as to his impartiality or independence" in the said E Article 12 — to be subject to the same test as the one I have outlined above — the reasonable man test. The duty of the court under the said Article 12 is to inquire into the circumstances (as I have done) and to determine whether those circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence. The test to be applied therefore, is whether a F reasonable man would entertain a reasonable (justifiable) doubt as to the impartiality or independence of the arbitrator. I am satisfied that the relationship which existed between the first respondent, Mr Adams, Dr Campbell and Mr Falkenberg gives rise to such doubts.

DID DR CAMPBELL DISCLOSE HIS ASSOCIATION WITH THE OTHER PARTIES

G Article 12 of the Model Law enjoins an arbitrator to disclose any circumstances which may give rise to justifiable doubts as to his impartiality or independence. The arbitrator may elect not to disclose any such circumstances if he does not think that the circumstances give rise to justifiable doubts as to his impartiality or independence. Reasonableness, I H think, is the standard which the arbitrator is required to apply in determining

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whether he should disclose the circumstances or not. Where the circumstances A are such that a reasonable man would disclose them, then the failure by an arbitrator to disclose them would be in breach of Article 12 of the Model Law. It is not in dispute that Dr Campbell did not disclose his prior association with Mr Adams, the first respondent and Falkenberg despite the fact that the association, as I have determined it to have been, was a circumstance that B gave rise to justifiable doubts as to Dr Campbell's impartiality. He should have disclosed the prior association. He did not. His belief that

the prior association was inconsequential and immaterial was unreasonable. His failure to disclose the association serves only to heighten the reasonable man's apprehension of a real danger of bias.

DID THE ARBITRATOR DECIDE ON THE CHALLENGE C

Dr Campbell was, as I have already shown, challenged as to his impartiality. He however did not decide on the challenge as required of him under Article 13(2) of the Model law. His decision would have triggered further action by the party challenging him if that decision was against the challenge. In terms of Article 13(2) of the Model Law, if the challenge is unsuccessful D then the challenging party may, within thirty days of his receipt of the decision rejecting the challenge, request the High Court to decide on the challenge.

Dr Campbell appears to have simply ignored the fact that he had been challenged as to his impartiality. He proceeded to make an award.

The applicant appears to have been quite uncertain whether it could be said E that Dr Campbell rejected the challenge or that he simply did not decide on it. Article 13(2) of the Model Law may be construed to mean that a challenge is unsuccessful only if the arbitrator has rejected it. A rejection, in context, would follow a consideration of the merits and the making of a decision that the challenge has no merit. Dr Campbell did not consider the challenge at all. F He merely proceeded with the arbitration proceedings as if no challenge had been made and in circumstances where the challenger thought he would decide on the challenge. I agree with the submission made in the applicant's heads of argument that Dr Campbell did, indeed, reject the challenge because he made an award without considering it, which, in other words, is a suggestion that he rejected the challenge by implication. Viewed from this G perspective the challenge was unsuccessful.

THE APPLICANT'S SUBMISSIONS ON ARTICLE 34

Mr *Nherere* submitted that the consequence of the failure by Dr Campbell to decide on the challenge was that the trigger for the applicant to request the High Court to decide on the challenge was not set off, as the applicant could H

Chinhengo J

A not proceed in terms of Article 13(3) of the Model law until it was clear that the challenge had been unsuccessful. That only occurred when the award was handed down. In my view, Mr *Nherere* had to make alternative submissions based on Article 13 as read with 34 because of a lack of clarity as to procedure. I am, however, satisfied that it was the appropriate course of action to proceed only in terms of Article 12 and 13 in the circumstances of this case.

B The relevant provisions of article 34 have been cited above. Mr *Nherere* submitted that Dr Campbell's failure to decide on the challenge made it impossible for the applicant to pursue his remedy in terms of Article 13(2) of the Model Law and that the only option that remained for the applicant to adopt was that of applying to set aside the award in terms of Article 34 of the C Model Law. He also submitted that Article 34(2) provides that the High Court may set aside an award if a party to any arbitral proceedings was otherwise unable to present his case and that, by refusing to decide on the challenge, Dr Campbell disabled the applicant from presenting his case. I do not think that these are relevant or correct submissions. In my view, the inability to present his case must relate to some aspect of a party's case which is intrinsic D to the proceedings and not to the making of a challenge as to the arbitrator's lack of impartiality. I would therefore, without being firm on this construction of the phrase "unable to present his case", not find favour with this submission.

Mr *Nherere* further contended that the award was in conflict with the public policy of Zimbabwe in that a breach of natural justice occurred in connection E with the making of the award. This, as a ground for the setting aside of an award, is provided for in Article 34(2)(b)(ii) as read with 34(5) of the Model Law. In *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S), Gubbay CJ discussed the meaning of "public policy of Zimbabwe" and said at 464F:

> "Articles 34(5)(b) and 36(3)(b) also make it clear that if:
>
> F 'a breach of the rules of natural justice occurred in connection with the making of the award'
>
> that would render the award in conflict with the public policy of Zimbabwe."

And at 464H-465A he went on and said:

" G It is also a rule of natural justice that the arbitrator must not be a judge in his own cause; nor must he act with bias against a party. He should scrupulously disclose any interest he has in the dispute or might reasonably be thought to have. See *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 at 270E-G; and generally Christie *Business Law in Zimbabwe* at 474; Butler and Finsen *Arbitration* H *in South Africa* at 165."

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Mr *Nherere*'s submissions based as they were on Article 34 of the Model Law A would have been appropriate only if the applicant had not made a challenge in terms of Articles 12 and 13. I have dealt with his submissions on Article 34 only for the purposes of emphasising the difference in procedure under that article on the one hand and under Articles 12 and 13 on the other hand.

In this case, I have shown that Dr Campbell did not disclose his prior B association with the other parties. I have also shown how he laid himself open to a reasonable suspicion that he may have been biased. His failure to disclose the prior association was compounded by the failure to decide on the challenge which was also a failure to comply with Article 13(2) of the Model Law. Although I do not have to decide that Dr Campbell was actually biased, I think that his failure to disclose his association and to decide on the C challenge would have been sufficient grounds for setting aside his award under Article 34 on the reasoning that his award was, within the meaning of Article 34(5)(b), in conflict with the public policy of Zimbabwe because he also breached the rules of natural justice. But the application was not and, should not, have been founded on Article 34 of the Model Law. As such, therefore, Mr *Nherere'*s submissions on this score were superfluous. D

COSTS

The question of costs is one in respect of which Mr *Phillips* submitted that, whatever the outcome, Dr Campbell should not be ordered to pay them. It is the approach of these courts that an arbitrator who "takes a backseat and leaves the fight to the two protagonists" (*Leopard Rock supra* at 283A) E should not be mulched with costs. In this case, however, I found that Dr Campbell did not immediately admit his prior association with the other parties. I found that he in fact initially denied the existence of such an association, as did the first respondent. He has also, in effect, opposed the relief sought by the applicant and, in fact, in para 29 of his affidavit he prayed F for the dismissal of the application with costs. In my view, contrary to Mr *Phillips*'s submissions in this regard, Dr Campbell descended into the arena and, as stated by Korsah JA in *Leopard Rock supra* at 283B, he "joined in the battle, he cannot pray to be spared 'the slings and arrows of outrageous fortune'".

DISPOSITION OF CASE G

Accordingly, it is ordered that:

1. The second respondent's mandate is hereby terminated in terms of Article 13 of the First Schedule to the Arbitration Act [*Chapter 7:15*] ("the Model Law").
2. For the avoidance of doubt, the award made by the second respondent, H

Chinhengo J

A which appears as Annexure "D" to the applicant's founding affidavit be and is hereby set aside as being a nullity.

3. A fresh arbitration be held within a fortnight of the granting of this order, to be presided over by an arbitrator to be appointed in terms of Article 15(1) of the Model Law and, in the event of failure to do so, by an arbitrator to be appointed by the President or Chairman of the B Commercial Arbitration Centre.
4. A copy of this order shall be served upon the President or Chairman of the Commercial Arbitration Centre by the applicant's legal practitioners.
5. The first and second respondents, jointly and severally, the one paying C the other to be absolved, shall pay the costs of this application.

Coghlan, Welsh & Guest, applicant's legal practitioners

Atherstone & Cook, first respondents' legal practitioners

D *Wintertons*, second respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/MARUFU v WINTERTONS & ORS 2002 (1) ZLR 560 (H)

MARUFU v WINTERTONS & ORS 2002 (1) ZLR 560 (H)

Citation	2002 (1) ZLR 560 (H)
Case No	Judgment No. HH-83-02
Court	High Court, Harare
Judge	Ndou J
Heard	7 March 2002
Judgment	5 June 2002
Counsel	*E T Matinenga*, for the applicant *M K Chikuni*, for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administration of estates — *judicial sale of deceased's property — writ of* D *execution issued before death of deceased — sale not barred*

Practice and procedure — *execution — sale — judgment debtor dying — writ of execution issued before death — sale not barred*

Headnote

The applicant had bought a property at a sale in execution conducted by the Sheriff. The writ of execution was issued in July 1999. The judgment E debtor died in February 2000. The sale in execution took place in May 2001. Letters of administration in respect of the deceased estate were granted in June 2001.

A month before the sale in execution, the first respondent, a firm of legal practitioners representing the judgment creditor, had erroneously F instructed the Sheriff to stop the sale. Their letter to the Sheriff was contrary to the judgment creditor's instructions, as the judgment debt had not been satisfied. The sale went ahead. Although the applicant paid the purchase price and the transfer fees, the first respondent, instead of registering transfer in favour of the applicant, purported to cancel the sale. The applicant sought an order compelling the transfer to him of the G property.

The second respondent opposed the application, arguing that by virtue of s 44 of the Administration of Estates Act [*Chapter 6:01*], the writ of execution should not have been progressed, and

accordingly that the judicial sale should have been stayed after the death of the judgment debtor. H

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A *Held*, that s 44 only bars the issuing out and not the subsequent progress of a writ of execution. The writ was issued more than seven months before the judgment debtor died, so the sale in execution in such circumstances was legal.

Cases cited

B *du Toit & de Waal v Heydenrych & Ors* (1894) 11 SC 197

Erasmus v Michael James (Pty) Ltd 1994 (2) SA 528 (C)

Falconer's Exor v Drewitt (1899) 16 SC 512

Gibson NO v Iscor Housing Utility Co Ltd & Ors 1963 (3) SA 783 (T)

Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S)

Maponga v Jabangwe 1983 (2) ZLR 395 (S)

C *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91

Sookdeyi & Ors v Sahadeo & Ors 1952 (4) SA 568 (A)

SA Assn v Knocker 1931 OPD 135

Van der Berg v Transkei Development Corporation 1991 (4) SA 78 (Tk)

van Reenen v Pearson (1864) 1 Roscoe 236

Legislation considered D

Administration of Estates Act [*Chapter 6:01*], s 44

Case information

E T Matinenga, for the applicant

M K Chikuni, for the second respondent

Judgment

E **NDOU J:** The applicant seeks an order in the following terms:

"THAT:

1. the first respondent attend to registering transfer in favour of the applicant of Stand 13655 Salisbury Township of Salisbury Township Lands also known as 90 Palmer Road, Milton Park, Harare within F seven (7) days of the date of the granting of this order;
2. the fourth respondent be and is hereby directed to register the transfer in accordance with paragraph 1 above.
3. the first respondent bears the costs of this application."

G The first respondent, Wintertons, do not oppose the relief sought. They properly concede that the letter of 9 April 2001, which apparently emanate from their office and purported to instruct the Sheriff to stop the sale of second respondent's property scheduled for 4 May 2001, was contrary to the instructions of the judgment creditor. The judgment debtor was still in arrears and the instructions should never have been given. The third H respondent, the Sheriff, does not oppose the chief sought. The second

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respondent opposes the relief sought on the basis that: "Even though the A judgment authorising the sale of the property in question may have been properly obtained, execution must have been stayed by reason of the second respondent's death".

The salient facts of this matter are that on 4 May 2001 the fifth respondent (Eagle Estate Agent) conducted a public auction sale of immovable properties B in Harare. The fifth respondent was duly instructed to conduct this sale on behalf of the third respondent (the Sheriff of Zimbabwe). At the aforementioned public auction sale, the applicant purchased Stand 13656 (as defined in para 1 of the relief sought) for a purchase price of $3 000 000. Accordingly, the Sheriff duly declared the applicant to be the highest bidder and also to be the purchaser for a purchase price of $3 000 000. The Sheriff confirmed this fact C in writing by a letter dated 8 June 2001. The first respondent, and in particular one Miss Y Mahlunge, was the legal practitioner who attended to the foreclosure of a mortgage bond registered in favour of the sixth respondent by the second respondent.

On 6 July 2001, the Sheriff again wrote to the first respondent advising that D no objections had been raised to the sale by public auction and that the applicant had been duly confirmed to the purchaser. The first respondent was also duly instructed to pass transfer in favour of the applicant.

The first respondent thereafter sent the applicant a *pro forma* account on 25 July 2001. The applicant duly paid the purchase price in the sum of $3 000 000 to the third respondent and he also paid all the transfer costs in E the sum of $222 622.50. The applicant complied with all his obligations as the purchaser and it was now incumbent upon the first respondent to proceed to register transfer in favour of the applicant. Instead, the first respondent purported to cancel the sale through a letter dated 24 August 2001. This letter of cancellation was sent to the Sheriff but not to the applicant. On 6 September 2001, the first respondent wrote a letter to the applicant F enclosing a cheque in the sum of $222 622.50. This cheque was accepted by the applicant on a "without prejudice" basis. In later correspondence, the first respondent seems to say that the sale was cancelled on 9 April 2001. This seems strange in light of the fact that the first respondent sent the applicant a *pro forma* account on 25 July 2001, and also accepted payment G of the transfer costs on 31 July 2001.

The second respondent's opposition is based on the interpretation of s 44 of the Administration of Estates Act [*Chapter 6:01*]. The section reads:

> "(1) No person who has obtained judgment of any court against any deceased person in his lifetime or against his executor in any suit or action commenced against such executor, or which, having been pending H

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> A against the deceased at the time of his death, has thereafter been continued against the executor of such person, may sue out or obtain any process in execution of any such judgment before the expiration of the period notified in the *Gazette* in manner in this Act provided.
>
> (2) No such person as aforesaid shall sue out and obtain any process B in execution of any such judgment as aforesaid within six months from the time when letters of administration have been granted to the executor against whom execution of such judgment is sought without first obtaining an order from the court or some judge thereof for the issue of such process."

Mr *Matinenga,* for the applicant, contends that this provision applies to the C execution issued after the death of the judgment debtor and not before. He relies on *Falconer's Executor* v *Drewitt* (1899) 16 SC 512 as authority. He quotes the headnote from this case which states:

> "Where property has been attached in execution of a writ before the death of the debtor, the Sheriff may proceed with the sale after the death of the debtor before the expiration of six months from the time when letters of D administration were granted to his executor."

He also referred to *du Toit and de Waal* v *Heydenrych & Ors* (1984) 11 SC 197 as authority. In these cases, it was held that s 31 of Ordinance 104, equivalent to s 44 *supra*, only bars the issuing out and not the subsequent progress of a writ of execution. *In casu*, it is common cause that the writ of execution was E issued out on 15 July 1999. The judgment debtor passed away on 20 February 2000. The judgment debtor's property was sold at a judicial sale on 4 May 2001. The letters of administration were granted on 12 June 2001.

The central issue for determination is whether the judicial sale should have been stayed after the death of the judgment debtor — in other words, F whether the sale was barred by the provisions of s 44 *supra.*

The position in South Africa law changed in 1965 when legislation specifically prevented the sale in execution of any property of a debtor whether attached in terms of a writ issued out before or after his death — *Civil Practice of the Supreme Court of South Africa* 4ed by Van Winsen, Cilliers & Loots

at pp 792-793. Mr *Matinenga* submits that Zimbabwe law is as what obtained in G South Africa before 1965 (i.e. before the enactment of s 30 of Act 66 of 1965) and that, indeed, our s 44, is virtually reproduced in the *du Toit and de Wall* v *Heydenrych & Ors* case *supra.*

In this case, it is beyond dispute that the applicant participated at a public auction sale which was properly conducted. The applicant was declared the H highest bidder and was confirmed as such by the Sheriff. Once confirmed by

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the Sheriff in the compliance with r 360, the sale is no longer conditional. A

That being so, a court would be even more reluctant to set aside the sale pursuant to application in terms of r 359 for it to do so — see *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at 260D-E and *Naran* v *Midlands Chemicals Industries (Pvt) Ltd* S-220-91 at pp 6-7. Under common law, immovable property sold by judicial decree after B transfer has been passed cannot be impeached in the absence of an allegation of bad faith or knowledge of the prior irregularities in the sale by execution, or fraud — see *Maponga* v *Jabangwe* 1983 (2) ZLR 395 (S) at 396D-E, *Gibson NO* v *Iscor Housing Utility Co Ltd & Ors* 1963 (3) SA 783 (T) at 787A-B; *Sookdeyi & Ors* v *Shadeo & Ors* 1952 (4) SA 568 (A) at 571H-572A; *Van der Berg v Transkei Development Corporation* 1991 (4) SA 78 (Tk) at 80G-J C and *Eramus* v *Michael James (Pty) Ltd* 1994 (2) SA 528 (C) at 552F. As alluded to earlier on, the determination of this matter lies on the interpretation of s 44 of the Administration of Estates Act [*Chapter 6:01*].

I hold the view that s 44 only bars the issuing out and not the subsequent progress of a writ of execution, and therefore the sale in execution under such D circumstances is legal — see *van Reenen* v *Pearson* (1867) 1 Roscoe 236; *du Toit and de Waal* v *Heydenrych & Ors supra*; *Falconer's Executor* v *Drewitt supra*; *SA Association* v *Knocker* 1931 OPD 135. Section 44, in my view, bars the suing out or the obtaining of any process: "may sue out or obtain any process in execution of any such judgment …" This section does not the applicant in the circumstances of this case. Whatever may be said of E the spirit and intention of s 44, in terms it does not apply to the circumstances of this case. Our position is similar to that pertaining in South African prior the enactment of s 30 of their Administration of Estates Act 66 of 1965. In this case, the writ of execution was issued more than seven months before the death of the judgment debtor.

It is accordingly, ordered that: F

1. the first respondent attend to the registering transfer in favour of the applicant of Stand 13655 Salisbury Township of Salisbury Township Lands also known as 90 Palmer Road, Milton Park, Harare within seven (7) days of the date of the granting of this order.
2. the fourth respondent be and is hereby directed to register the transfer in G accordance with para 1 above;
3. the first respondent bears the costs of this application.

Guti & Chikowore, applicant's legal practitioners

Scanlen & Holderness, second respondent's legal practitioners H

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INTERNATIONAL CAPITAL CORPORATION (PVT) LTD v CLAIRSON (PVT) LTD 2002 (1) ZLR 565 (H)

Citation	2002 (1) ZLR 565 (H)
Case No	Judgment No. HH-86-02
Court	High Court, Harare
Judge	Ndou J
Heard	30 May 2002
Judgment	5 June 2002
Counsel	*T Chinyoka*, for the applicant *F Girach*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

D **Company** — *judicial management — nature and requirements*

Headnote

Judicial management is a means of affording a company time to surmount a temporary setback it has suffered in the repayment of its debts or the performance of its obligations, thereby avoiding its dissipation through winding up. Judicial management is not intended to be an alternative E method of liquidation. It is a special dispensation which can be granted only in exceptional cases, and implies a temporary reconciliation of conflicting interests: those of the company and those of its creditors. Because of these conflicting interests the Companies Act [*Chapter 24:03*] requires the court to be satisfied both that there is a reasonable probability that if judicial management is ordered the F company will be able to pay its debts or meet its obligations and become a successful concern, and that it is just and equitable to afford the company the opportunity to do so. As such, judicial management cannot be instituted merely on the ground that it would improve the efficiency of the company's management or increase the profitability of its G operation.

The court will invariably direct that while the company is under judicial management there should be a moratorium on all proceedings against the company for repayment of its debts, for otherwise the whole purpose of judicial management would be defeated.

The requisites for the grant of an order of provisional judicial management H under s 300 of the Companies Act are:

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1. The cause of the company's predicament must be identified, though A the court may grant an order whatever the nature of the cause, even where the company's difficulties are attributable to disputes or disagreements among those controlling it which may be overcome under the company's domestic procedures.
2. The company must in fact be unable to pay its debts or it must be B likely that it will be unable in fact to pay them.
3. There must be a reasonable probability — not a strong probability but not a mere possibility — that the company is viable and capable of ultimate solvency and that it will become a successful concern. While there is no onus to show that payment of the company's debts will be effected with a specific time, payment must occur within C what,

in the circumstances, is a reasonable time otherwise judicial management would not be just and equitable in regard to the company's creditors.

4. Judicial management must be just and equitable with reference to the rights and interests of the members and the creditors in all the circumstances of the case. The overriding consideration is that D judicial management should be instituted where it is shown to be the interests of all members and creditors.

Cases cited

Bahnemann v Fritzmore Exploration (Pty) Ltd 1963 (2) SA 249 (T)

Clarke v Protein Foods (Pvt) Ltd 1970 (2) RLR 278 (A), 1971 (1) PH E 1 (R, AD) E

De Jager v Karoo Koeldranke & Roomys (Edms) Bpk 1956 (3) SA 594 (C)

Irvin & Johnson Ltd v Oelofse Fisheries Ltd 1954 (1) SA 231 (E)

John Thompson Africa (Pty) Ltd v Denpas Construction (Pty) Ltd 1978 (2) PH E 9 (O) F

Kotzé v Tulbryk Bpk & Andere 1977 (3) SA 118 (T)

Ladybrand Hotel (Pty) Ltd v Segal & Anor 1975 (2) SA 357 (O)

Little & Sons v Niven NO 1965 RLR 198 (A), 1965 (3) SA 517 (SR, AD)

Makhuva & Ors v Lukoto Bus Svc (Pty) Ltd & Ors 1987 (3) SA 376 (VSC) G

Mannatt v M M De Kock & Sons Ltd 2000 (1) ZLR 543 (S)

Mayhew, Ep 1959 (1) R&N 133 (SR), 1959 (1) PH E 9 (SR)

Millman NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd intervening 1972 (1) SA 741 (C)

Noordkaap Lewendehawe Ko-op Bpk v Schreuder & 'n Ander 1974 (3) SA 102 (A) H

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A *Onus (Edms) Bpk, ep* 1980 (4) SA 63 (O)

RAG (Pvt) Ltd v Huizenga NO 1986 (2) ZLR 203 (S)

Repp v Ondundu Goldfields Ltd 1937 CPD 375

Silverman v Doornhoek Mines Ltd 1935 TPD 349

Tenowitz & Anor v Tenny Invstms (Pty) Ltd 1979 (2) SA 680 (E)

Tobacco Auctions Ltd v A W Hamilton (Pvt) Ltd 1966 RLR 190 (G), 1966 (2) SA 451 (R) B

Venter v Williams & Anor 1982 (2) SA 310 (N)

Legislation considered

Companies Act [*Chapter 24:03*], s 300(a)

Case information

C *T Chinyoka*, for the applicant

F Girach, for the respondent

Judgment

NDOU J: The applicant seeks a provisional order for the appointment of a provisional judicial manager in terms of the Companies Act [*Chapter 24:03*]. The applicant, International Capital Corporation (Pvt) Ltd, is a shareholder D in the respondent with 32,5 per cent stake and at the time of the commencement of this application was also owed direct loans in the sum of $320 500 dating back to 1998.

The authorised share capital of the respondent initially was $20 000 consisting of 20 000 ordinary shares of a nominal value of $1 each. The entire authorised E share capital was initially issued as

follows:

(a) The applicant International Capital Corporation (Pvt) Ltd (ICC) 8 500 shares

(b) BK Flora BV (NKF) 5 100 shares

(c) Tamba Distributors (Pvt) Ltd (TAD) 4 000 shares F

(d) Casa Investments (Pvt) Ltd (CASA) 2 400 shares

The present altered shareholding structure of respondent is as follows:

ICC (App)	6 500	32,50%
NKF	5 100	25,50%
G TAD	4 000	20,00%
CASA	2 400	12,00%
VIV	2 000	10,00%
	20 000	100,00%

The main object for which respondent was established was to acquire the H property, plant and equipment of an entity called Hortex Farming Enterprises

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(Pvt) Ltd and Ivanhoe Farm and carry out a business involving the growing A and dehydration of flowers for export as well as carry out other agricultural and horticultural activities. In addition, the respondent owns two wholly owned subsidiaries, *viz.* Ivanhoe Foods (Pvt) Ltd and Salshire Farming (Pvt) Ltd. These operate dehydrated food/canning plant and the rose/agricultural projects respectively. B

The applicant's case is that due to serious shortcomings on the part of its managing director, the respondent has not performed to its full potential. The applicant avers that these shortcomings have manifested themselves in various facts including technical and ethical ones. Key among these, it is alleged, is that the respondent is persistently short of working capital, resulting in unbridled borrowings without sanction from the Board of C Directors and in flagrant violation of the precise provisions of the shareholders' agreement. In other words, it is being alleged that this deliberate mismanagement, apart from sabotaging applicant's. investment in the respondent, has prevented the respondent from becoming a successful concern. The applicant avers that apart from other creditors, the respondent is indebted to First Merchant Bank (FMB) in the sum of $7 000 000 and to D Zimbabwe Development Bank (ZDB) in the sum of US$78 428 as at 30 June 2001. Further, FMB has in fact called in its loan and full payment is expected on or by 8 August 2001 and that the respondent is not in a position to effect the payment. The two loans were guaranteed by all the shareholders. Since the applicant appears to be the only one with assets, it E would be to its door that recompence is going to be visited by the two institutions. The applicant, in the circumstances, believes that there is a real and reasonable probability that if the company is placed under judicial management it would be enabled to pay its debts and meet its obligations and become a successful concern as it is involved in a mostly export and therefore, potentially lucrative business, with definite customers, and thus E not subject to supply and demand factors of the local market. Accordingly, the applicant seeks the appointment of a provisional judicial manager on the grounds that:

(a) there has been mismanagement of the respondent such that it has become unable and is probably unable to pay its debts and has not become a successful concern; G

(b) there is a reasonable probability that if the respondent is placed under judicial management, it will be able to meet its obligations; and

(c) it is just and equitable to place the respondent under judicial management.

The respondent opposes the application. The respondent avers that the H

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A forming the basis of its application for placing respondent under provisional judicial management.

The respondent avers that the applicant has not placed any evidence before the court of what debts are due and unpaid. The respondent also undertook that by the time this application is heard, it Will have repaid any loan due to applicant. The respondent produced documentary proof which evinced that B the amount owed to FMB (but not due) is $4 000 000. The respondent avers that respondent borrowed US$313 712 from ZDB on 31 July 1998. The term of the loan is five years and as such respondent has up to 31 October 2002 to settle the debt. The respondent produced documentary proof which shows that as at 17 September 2001 respondent was indebted to ZDB in the sum of C US$58 821.04. The respondent also produced correspondence from ZDB which indicates that the respondent's financial position and the conduct of its account with them is healthy. The respondent's case is that it has been and continues to be in a position to settle all its debts. Accordingly, the respondent's case is that applicant has not even demonstrated a *prima facie* case for the respondent to be placed under judicial management.

D The requirements for a provisional judicial management order are set out in s 300 of the Companies Act. The applicant submits that it relies only on the provisions of s 300(a) which reads:

> "The court may grant a provisional judicial management order in respect of a company — E
>
> (a) on an application referred to in paragraph (a) of subsection (1) of section *two hundred and ninety-nine*, if it appears to the court —
>
> (i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and F
>
> (ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and
>
> (iii) that it would be just and equitable to do so."

G Section 300(b) is clearly not applicable to the circumstances of this case.

These requirements must, *inter alia*, be read with the provisions of s 205(c) of the Act which define inability to pay debts in the following terms:

> "If it is proved to the satisfaction of the court that the company is unable H to pay its debts and, in determining whether a company is unable to pay

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> its debts, the court shall take into account the contingent and prospective A liabilities of the company."

South Africa has a provision similar to our s 300(a) in the form of s 427(1) of their Companies Act. Generally, a company should not be permitted to be dissipated by winding-up and dissolution because it has suffered a setback with regard to the repayment of its debts or the performance of its obligations B which, if it were to be given time, it would be able to surmount and become successful. The procedure of judicial management is intended to be a means for affording it such time. Judicial management should not be instituted or continued merely on the basis that while it subsists the company's assets may be sold more advantageously than they would be in winding-up: judicial management is not intended to be an alternative method of liquidation: C see *Millman NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd intervening* 1972 (1) SA 741 (C) at 744-745 and *Tenowitz* v *Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) at 684 and *Henochsberg on the Companies Act* vol. 1, 5 ed by PM Meskin, p 923.

Judicial management is a special dispensation which can be granted to a D company only in exceptional cases — see *Silverman* v *Doornhoek Mines Ltd* 1935 TPD 349 at 353; *Bahnenn* v *Fritzmore Exploration (Pty) Ltd* 1963 (2) SA 249 (T) at 250 — 251; *Ladybrand Hotel (Pty) Ltd* v *Segal & Nor* 1975 (2) SA 357 (O) at 359. Judicial management implies that there be a temporary reconciliation of conflicting interests — those of the company in being unable despite its difficulties to continue its operations in the ordinary course E and those of its creditors in not being prevented from enforcing their rights, including the way of winding-up. It is because of these conflicting interests that the Act requires the court to be satisfied both that there is a reasonable probability

that if there were to be judicial management the company would be able to achieve the goals envisaged by s 300(a) and that it is just and equitable to afford it the opportunity to attempt to do so. As such, judicial F management cannot be instituted merely on the ground that it would improve the efficiency of the company's management or increase the profitability of its operation — see *Henochsberg on the Company Act supra* at p 924 and *Makhuva & Ors* v *Lukoto Bus Service (Pty) Ltd & Ors* 1987 (3) SA 376 (VSC) at 397. G

Essentially, the consequences of judicial management are that the control of the company's affairs by its directors is replaced by that of the judicial manager and that there is granted to the company a moratorium, i.e. if the court directs accordingly, which it invariably would — for otherwise the whole purpose of the judicial management would be defeated. The consequences of winding-up do not ensue — see *Zimbabwe Company* H

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A *Law* 2 ed by Tett & Chadwick p 168; *Little & Sons* v *Niven NO* 1965 RLR 198 (A), 1965 (3) SA 517 (SR, AD); *Venter* v *Williams & Anor* 1982 (2) SA 310 (N) at 315.

There is a need to consider the requisites of judicial management, as enshrined in s 300(a), in some detail:

" B *Mismanagement or for any other cause"*

Previously, the approach, based on the principle of non-interference by the court in the internal affairs of company, was that the institution of judicial management is inappropriate where the company's difficulties are attributable to disputes or disagreements among those controlling it and the company can itself overcome those difficulties under its domestic C procedures — see *Repp* v *Ondundu Goldfields Ltd* 1937 CPD 375 at 379-381. Under s 300, however, the court may grant a judicial management order whatever the nature of the cause of the company's predicament. That cause must, however, be identified — see Ex parte *Onus (Edms) Bpk 198*0 (4) SA 63 (O) at 66. The fact that the company's domestic D procedures could be invoked is not of itself a ground for refusing the order: indeed the moratorium may be required for the very purpose of putting the company into a position where upon the termination of the judicial management those procedures can effectively operate. In practice the usual cause is exclusively or substantially, the company's lack of, and inability to borrow, money.

" E *Unable to pay its debts; probably unable to pay its debts"*

The company must be unable in fact to pay its debts or it must be likely that it will be unable in fact to pay them.

"Reasonable probability that ... a successful concern"

In *Kotzé* v *Tulbryk Bpk* & *Andere*, 1977, (3) SA 118 (T), it was held that " F a reasonable probability" does not mean a "strong probability" as previously held — (cf. *Silverman* v *Doornhoek Mines Ltd supra* at 353). There must be a probability not a mere possibility — see *Noordkaap lewendehawe Ko-op Bpk* v *Schreuder* & *'n Ander* 1974 (3) SA 102 (A) at 109-110. Essentially, in relation to s 300(a), what must be reasonably probable is that the company is viable and capable of G ultimate solvency and that it will become a successful concern, by which is intended, and that it will be able to effectively carry on its operations in accordance with its main object and yield a return to its shareholders — see *Millman NO* v *Swartland Huis Muisbileerders (Edms) Bpk supra* at 744. There is no onus to show that the payment will be effected H within any specific period of time: but unless it will occur within what,

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in the circumstances, is a reasonable time the application should fail A because its grant would not be just and equitable in relation to creditors — see Ex parte *Mayhew* 1959 (1) R&N 133 (SR), 1959 (1) PH E9 (SR) and *Irvin and Johnson Ltd* v *Oelofse Fisheries Ltd* 1954 (1) SA 231 (E).

"It would be just and equitable"

The intention is that the justice and equity is to be determined with B reference to the rights and interests of the members and creditors in all the circumstances of the case. The overriding consideration is that judicial management should be instituted where it is shown that it is the interests of all members and creditors — see *Tobacco Auctions Ltd* v *AW Hamilton (Pvt) Ltd* 1966 RLR 190 (G), 1966 (2) SA 451 (R) at 452-3; *Clarke* v *Protein Foods (Pvt) Ltd* 1970 (2) RLR 278 (A), 1971 (1) PH E1 (R, AD); C *John Thompson Africa (Pty Ltd* v *Denpas Construction (Pty)* 1978 (2) PH E9 (O) and *De Jager* v *Karoo Koelddranke & Roomys (Edms) Bpk* 1956 (3) SA 594 (C) at 602.

In this case, with the leave of the court, the respondent filed a supplementary affidavit with additional documents on the recent viability position of the respondent. D

Section 300(a) of the Companies Act sets out three criteria, all of which must be satisfied before a court may make an order of judicial management— see *Mannatt* v *MM De Kock & Sons Ltd* 2000 (1) ZLR 543 (S) at 544A. It is in my view, standard practice for companies operating in business similar to that of the respondent, i.e. exports of agricultural produce, to obtain E large loans in order to operate.

I propose to make findings on each of criteria set out in s 300 i.e. whether the applicant satisfied each of the three criteria.

The applicant has failed to satisfy me that the requirements of subpara (i) — that respondent "is unable to pay its debts or … probably unable to pay its F debts" have been fulfilled. The applicant cites failure by managing director to draw up a contract between himself and the respondent as an indication of mismanagement. This factor alone would not necessarily result in inability to pay debts by the respondent. For mismanagement or "any other cause" to be relevant for purposes of subparagraph (i), it must lead to inability, or probable inability to pay debts by the respondent. Be that as it may, the G respondent produced documentary proof showing that such an employment contract was in fact in place and was approved at the Board of Directors meeting held on 9 March 1998. Thereafter salary increases have also been approved by the Board of Directors from time to time. These facts should be within the knowledge of the applicant through its representatives who attended and received minutes of such Board meetings. On the one hand, the H

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A applicant did not place any meaningful evidence in support of its allegation. On the other hand, the respondent produced, *inter alia*, a copy of the Financial Projections for 1999-2001 as an indication of ability to manage. The applicant must show that the respondent company is in fact unable to pay its debt or it must be likely that it is in fact unable to pay them — see *Mannatt* v *MM de Kock supra* at p 545E. This the applicant has not been able to do. B On this finding alone, the application has to fail in light of the wording of s 300. I, however, propose to consider whether the applicant satisfied the requirements set out in subparagraph (ii). From the financial statements produced by the respondent, it is apparent that the respondent always made a profit save for the first six months of operation. The applicant avers that if the respondent is placed under judicial management it will perform better as C it is involved in a "mostly export and therefore potentially lucrative business with definite customers". Beyond this bare allegation, there is no further proof on how the judicial manager would deal with the viability of the respondent. Since the launch of this application the applicant's loan has been repaid in full. The ZDB has been repaid in full. The respondent, from the D papers before me, seems to be a successful concern with a demonstrated ability to pay its debts. This is demonstrated by the minutes of the meeting of directors held on 19 December 2001.

As far as subparagraph (iii) is concerned, I am satisfied that it is in the interests of all the members of respondent (including the applicant) that I refuse the application. The applicant failed to show that justice and equity E demand that I interfere in the running of the respondent company. It seems to me that although the respondent raised loans in the course of its business, it was not crippled to such an extent that it could not reasonably carry on the business for which it was established — see *Irvin and Johnson Ltd* v *Oelofse Fisheries Ltd supra* at 239 and *RAG (Pvt) Ltd* v *Huizenga NO* 1986 (2) ZLR 203 (S) 206B. F These loans did not affect the ability to pay debts. They did not prevent respondent from being a successful concern.

I am satisfied that the criteria set out in subparas (i), (ii) and (iii) of s 300(a) of the Companies Act have not been fulfilled by the applicant. The applicant did not adduce reliable and convincing evidence to support its allegations.

G I, accordingly, dismiss the application with costs.

Chinyoka & Gunye, applicant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

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S v MUGWANDA 2002 (1) ZLR 574 (S)

Citation	2002 (1) ZLR 574 (S)
Case No	Judgment No. S-19-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ebrahim JA & Ziyambi JA
Heard	26 February 2002
Judgment	6 June 2002
Counsel	*L Uriri*, for the appellant *M Gurure*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law — *specific common - law offences — murder — intent — actual and constructive intent — distinction between — culpable homicide* D — *intent required*

Headnote

For a court to return a verdict of murder with actual intent, the court must be satisfied beyond reasonable doubt either that the accused desired to bring about the death of his victim and succeeded in completing that purpose, or that while pursuing another objective the accused foresaw E the death of his victim as a substantially certain result of that activity and proceeded regardless. A verdict of murder with constructive intent, on the other hand, requires the foreseen result to be possible as opposed to being substantially certain, making it a question of degree more than anything else. In the case of culpable homicide, the test is whether the F accused ought, as a reasonable man, to have foreseen the death of the deceased.

Following a quarrel over a small sum of money, the appellant called out to his two sons that the deceased and his companion should be beaten up. The appellant was carrying an axe and was also in possession of a knife. In the fight that followed, the appellant used the knife to stab the G deceased once in the chest below the right breast. The deceased ran away but was later found dead from the wound. The appellant was convicted of murder with actual intent and sentenced to death. His sons were convicted of murder with constructive intent, though it was not proved they were aware that their father was in possession of the knife.

Held, that it could not be said that the only reasonable inference to be drawn H

Chidyausiku CJ

A from the facts was that the appellant foresaw the deceased's death as a substantially certain consequence of his action. The facts did however establish beyond reasonable doubt that the appellant foresaw the possibility of the deceased's death as a consequence of the assault and persisted with the assault regardless. He should therefore have been found guilty of murder with constructive intent.

B *Held*, further, in regard to sentence, that the appellant's constructive intent constituted an extenuating circumstance, since the foreseeability of the possibility of death was rather remote.

Held, further, that the appellant's sons should have been convicted of culpable homicide since it could not be inferred that they did foresee the deceased's death though they ought to have done so. Their convictions C and sentences were altered accordingly in terms of s 25(1) & (2) of the Supreme Court Act [*Chapter 7:13*].

Case cited

S v Sigwahla 1967 (4) SA 566 (A)

Legislation considered D

Supreme Court Act [*Chapter 7:13*], s 25(1) & (2)

Case information

L Uriri, for the appellant

M Gurure, for the respondent

Judgment

E **CHIDYAUSIKU CJ:** The appellant in this case together with his two sons Gilbert Mugwanda and Casper Rice (hereinafter referred to as Gilbert and Casper respectively), were charged with the murder of one Simba Muringanzara. All the accused pleaded not guilty but were found guilty. The appellant and Gilbert were found guilty of murder with actual intent F while Casper was found guilty of murder with constructive intent. The court found that extenuating circumstances existed in respect of Gilbert and Casper. The court sentenced each of them to twelve years' imprisonment with labour. The sons have not appealed against the conviction and the sentence imposed on them. The court found no extenuating circumstances in respect of the appellant and sentenced him to death. He now appeals against G both conviction and sentence.

The State case was as follows: On 26 December 1997, the deceased Simba Muringanzara and the appellant were at Kahobo business centre in Gokwe. Also present at the business centre were Gilbert and Casper as well as some relatives and friends of the deceased who gave evidence for the State. H At some stage during the day, Gilbert and Casper confronted the deceased

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and Kuwirirana accusing them of having taken $50 from them. Casper kicked A the deceased whilst making the above accusation. After this incident, the appellant and his sons went and sat under a tree. Later in the day, when it was about to get dark the deceased and his companions left the business centre to go home. As they were leaving, the appellant and his B sons followed them. When the appellant and his sons caught up with the deceased and his companion, the appellant shouted that they should be beaten up. After the appellant's shout, Gilbert and Casper ran forward and started assaulting Kuwirirana, a brother of the deceased. Casper struck Kuwirirana with a fist. Gilbert then stabbed Kuwirirana with a knife on the back. The deceased, who had been walking ahead, noticed that his brother Kuwirirana was under attack and had fallen down, and returned in order to rescue him. When the C deceased got to Kuwirirana, the appellant who had remained behind arrived at the scene and stabbed the deceased with a knife on the chest below the right breast. The deceased started running away and the appellant and his sons chased after him. The deceased turned to look back and the appellant struck him with an axe above the right eye. The deceased ran away and the appellant declared that the fight was over and he walked back to the business centre D with his sons.

The deceased was found dead the following morning. The post mortem report showed that death was caused by haemorragic shock and heamothorax due to a chest stab wound.

The defence case is essentially the same as the State case. The only difference E is that the appellant denies stabbing the deceased. He suggests it was Gilbert who stabbed the deceased. Gilbert himself is evasive about whether he is the one who stabbed the deceased. The court *a quo* accepted the evidence of the State witness that it was the appellant who inflicted the fatal stab wound. That conclusion cannot be faulted. The court *a quo* found that the State witnesses were better witnesses and accepted their evidence in preference to that of the F accused. This court, as an appeal court, will not readily interfere with the finding of a trial court on issues of credibility. In the result, I am satisfied that the evidence establishes the following facts:

(1) that the appellant and his sons followed the deceased and his companion and engaged them in a fight as described by the State witnesses; G

(2) that it was the appellant who fatally stabbed the deceased;

(3) that the deceased sustained the injuries set out in the post mortem report following the attack by the appellant and his sons.

The injuries sustained by the deceased are set out in the post mortem report. It reads in part as follows: H

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Chidyausiku CJ

" A INTERNAL EXAMINATION:

There is a 6 mm stab wound in the left mid elavisular line of the fifth intercostal space. The stab wound traverses the intercostal muscles into the percardium. There is an associated haemothorax and haemopericardium of about 2000 mls.

…

B CAUSE OF DEATH:	HAEMORRHAGIC SHOCK
File (2)	Haemothorax
Police (1)	Chest Stab
IJ/cn	MURDER"

The State witnesses alleged that the appellant struck the deceased with an axe C on the face. This evidence is not corroborated by the post mortem report. The post mortem report does not reveal any injury on the deceased that is consistent with the deceased having been struck by an axe. The doctor was not called to explain this so the issue remains unresolved. The probabilities are that the injury caused by the axe was insignificant and did not warrant D mentioning. There is no doubt that if such injury, assuming it was there, had in any way contributed to the death of the deceased the doctor would have mentioned it.

On these facts, the court *a quo* convicted the appellant and Gilbert of murder with actual intent or *dolus directus*. The learned judge, in his reasons for judgment, had this to say on this issue:

E "Having regard to all the evidence that I have dealt with, our finding is that the three of them were ready, armed to attack this group. It is clear also and we accept the evidence of the witnesses that earlier in the day, accused three had kicked the deceased in the Shop, and accused one had threatened Kuwirirana with the axe. This suggests that they were ready F to fight, but on realising that they could not do it at the Shops, that explains why they spent the rest of that afternoon sitting under a tree and waiting. And when they saw them leave the business centre, they then followed and attacked.

Accused one and two were armed with knives. They then attacked with the knives. Knives are dangerous weapons. Stabbing into one's body G with a knife one cannot say whether there could be limits to the extent of the injury or not. *When you stab on the chest in particular, you cannot say that you did not intend to kill when you know what vital organs are inside that part of body.*

Accused one delivered a blow into exactly that portion of the deceased's H body. He stabbed him on the chest below the right breast. And having

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done that much, he still chopped him with the axe Exhibit 9 above the A right eye. Accused two armed similarly with a knife which is exactly the same as that of his father, except for the colour, attacked Kuwirirana and stabbed him on the back.

It is not clear what satisfaction accused one had when he decided that the fight was over and asked his sons to stop so that they could go. It would B seem, he was then aware that he had caused serious injuries on the deceased" (the emphasis is mine).

The reasoning of the learned judge leading to the conclusion that the appellant and Gilbert had actual intent is not easy to follow. In this case there is no direct evidence on the *mens rea* of the appellant. The appellant's avowed intention was not to kill the deceased but to assault him. It follows, therefore, C that the *mens rea* of the appellant has to be inferred from the circumstances of the case. It is not an easy task to determine an accused's *mens rea* in a case such as this one where a single stab wound inflicted to a vital part of the body results in death. It would appear from the above quoted remarks of the learned trial judge that because death ensued the appellant must have positively D intended to bring about such a result. This approach is erroneous. The correct approach, in my view, is that set out *S* v *Sigwahla* 1967 (4) SA 566 (A). The facts in *Sigwahla*'s case *supra*, bear a very striking resemblance to the facts of this case. In *Sigwahla*'s case *supra*, the facts were that one Simon, the main State witness, the deceased and the appellant, all employees of the same construction company met at a nearby shopping centre where they E bought and ate chips on pay day. When it was almost dark the deceased and his companion left. Simon followed them shortly thereafter. The deceased, his companion and Simon were each pushing a bicycle. This was on a foot path across open veld. Someone grabbed Simon's bicycle. He turned and saw four men including the appellant, who had been at the shopping centre. The appellant grasped Simon's bicycle and threatened him with a long knife. F Simon stood still. One of the men with the appellant took the bicycle. The appellant robbed him of R8 which was in his pocket and also of a coat. At that point the deceased, who was ahead, turned back and approached the scene. The four robbers went towards him with the appellant in the lead. When they reached the deceased, who appeared to want to pass by, the G appellant sprang forward and, with an upraised arm, struck the deceased on the left front of his chest. The deceased jumped and fell. Simon fled but came back again and found that the deceased was lying there dead.

According to the medical report on the deceased, the cause of death was a stab wound of the heart. The medical report described the wound as follows:

"There is a ½" incised wound over the second interspace 1" to the left of the H

2002 (1) ZLR p579

Chidyausiku CJ

A sternal midline on the anterior chest wall. The track of the wound passes downwards, medially and backwards into the chest cavity through the second interspace, enters the pericardial sac, incises the right ventricle of the heart, and terminates, Total depth is about 4"."

Holmes JA at pp 569G-571A, on these facts considered the issue of the B appellant's *mens rea* and concluded as follows:

"The next question is whether the State proved beyond reasonable doubt that the appellant intended to kill the deceased. At this stage, I use the word intention in the sense of *dolus directus*, i.e. where the will is directed to compassing the death of the deceased. It is sometimes said that a person is presumed to intend the reasonable and probable C consequences of his act. As to that, I had occasion to point out in *R* v *Sacco* 1958 (2) SA 349 (N) at pp 351H-353C, that it is simpler to speak of inferences of fact than of presumptions; that the practical approach is to eschew piecemeal processes of reasoning, and to look at all the facts at the end of the case, and from that totality to ascertain whether the inference in question can be drawn; and that inferences do not affect the D incidence of the onus or proof — they assist its discharge.

Stabbing cases are usually a matter of degree, and intention must not be inferred by hindsight from the fact of death. The part of the body injured is relevant, but in the present case the deceased was walking and the appellant jumped forward as he struck. Hence, it cannot be inferred beyond reasonable doubt that he actually aimed at the heart as distinct E from the general area of the upper body. Accordingly, the fact that the thrust did land with fatal consequences above the heart does not, in all the circumstances,

necessarily give rise to the inevitable inference that the appellant intended to kill, in the sense of directing his will towards the bringing about of the death of the deceased.

F That, however, does not conclude the enquiry because the following propositions are well settled in this country:

1. The expression 'intention to kill' does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of G such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.
2. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what H would have gone on in the mind of a *bonus paterfamilias* in the

---

position of the accused. In other words, the distinction between A subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus,* not *culpa*. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt, the inference B must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so.

See *S* v *Malinga & Ors* 1963 (1) SA 692 (A) at p 694G-H; and *S* v *Nkombani & Anor* 1963 (4) SA 877 (A) at pp 883A-C, 890B and 895F. C

In the present case, the salient facts are that the appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration of four inches and D to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion, the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal. In other words, I hold that there exists no reasonable E possibility that it never occurred to him that his action might have fatal consequences, as he was advancing on the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body. It is true that he had consumed six bottles of 'Kaffir beer'; but this did not prevent him from knowing what he was doing following after Simon and F robbing him of money and clothing, and in responding to the deceased's turning back to see what was going on. (I shall deal later with the question whether the consumption of liquor reduces his moral culpability.) And there can be no question but that the appellant was reckless whether or not death ensued from his action. In the result, the State proved the required legal intention to kill (*dolus eventualis)*; and the conviction was G justified."

I respectfully find myself in agreement with the learned judge of appeal's approach set out above.

Professor G Feltoe, in his book *A Guide to Zimbabwean Criminal Law* discusses the distinction between positive or actual intent, and constructive H

A intent or legal intent in a manner that is very lucid and instructive. The learned author characterises the distinction as follows:

"*Actual Intention*

(a) Desires death. Death is aim and object.

or B

(b) Death is not aim and object but in process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether this consequence ensues.

Legal Intention

Does not mean to bring about death but foresees it as possibility whilst C engaged in some activity and proceeds with the activity regardless as to whether death ensues.

(a) subjective foresight

(b) as to possibility not probability

(c) recklessness."

D On the basis of the above authorities, it follows that for a trial court to return a verdict of *murder with actual intent* it must be satisfied beyond reasonable doubt that:

(a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or E

(b) while pursuing another objective foresees the death of his victim as a *substantially certain* result of that activity and proceeds regardless.

On the other hand, a verdict of murder with constructive intent requires the foreseeability to be *possible* (as opposed to being substantially certain, F making this a question of degree more than anything else). In the case of culpable homicide, the test is: he ought to, as a reasonable man, have foreseen the death of the deceased.

In the present case, the following salient facts are relevant to the determination of the appellant's *mens rea*: G

(a) It is common cause that the avowed intention of the appellant was to assault the deceased and his companions. It follows therefore that the death of the deceased was not the desired objective. It occurred while the appellant was engaged in the desired activity of assaulting the deceased and his companion. The fight was over $50. There is nothing to suggest that the appellant desired to kill, as opposed to punishing, the deceased H for the theft of $50.

Chidyausiku CJ

(b) In pursuance of the appellant's activity, the assault of the deceased, one A stab wound was inflicted. The degree of force and depth of the wound is unknown. While the stab wound was certainly inflicted to a vital part of the body there is no conclusive evidence that it was deliberately aimed at that part of the body or fatuously landed there in the course of the assault on the deceased. B

On these facts, I am satisfied that it cannot be said that the only reasonable inference to be drawn is that the appellant did foresee the death of the deceased as a *substantially certain consequence* of his activity. These facts however, in my view, are sufficient to establish beyond reasonable doubt that the appellant did foresee the *possibility* of the death of the deceased as a consequence of the assault and persisted with the assault regardless. On this C basis, the appellant should have been found guilty of murder with constructive and not positive intent. Accordingly, the verdict of the court *a quo* is altered to one of guilty of murder with constructive intent. To that extent, the appeal against conviction succeeds.

SENTENCE D

The appellant was sentenced on the basis of having been found guilty of murder with actual intent. That verdict has been altered. It follows therefore that this court is at large on the question of sentence. The issue of the existence or otherwise of extenuating circumstances has to be determined on the basis that the appellant is guilty of murder with constructive intent. E

It is now accepted that constructive intent on its own or taken together with other factors can constitute extenuation. There is no evidence that the appellant's actions were influenced by drink. The influence of alcohol, therefore, is not a factor in this case. The stab wound was inflicted in the course of an assault largely pursued by the appellant and his sons over a petty issue, namely the alleged theft or robbery of $50. Given these facts, does the F constructive intent on its own in this case constitute a circumstance of extenuation justifying the imposition of a sentence other than a death sentence? In my view it does. I hold this view because the foreseeability of the possibility of death in this case was rather remote. If the foreseeability of death was close I might have concluded otherwise, see *S* v *Sigwahla supra.* G

This is a very serious case of murder deserving of a very serious punishment. As I have already stated there was no provocation. The appellant was not under the influence of alcohol. In my view, taking all the factors of this case into account, the appellant should be sentenced to life imprisonment.

Section 25(1) and (2) of the Supreme Court Act [*Chapter 7:13*] confers on this court jurisdiction to rectify any irregularity in the proceedings of an H

Chidyausiku CJ

A inferior court that might come to its attention. What I have said in respect of the conviction of the appellant applies with equal if not greater force to Gilbert and Casper. Their role in the assault of the deceased does not sustain the inference that they foresaw the death of the deceased. There is no evidence that they were aware that their father was in possession of the knife used to stab the deceased although they must have seen the axe which may B or may not have been used in the assault. On the facts of this case, Casper and Gilbert ought to have foreseen the possibility of death and should both have been convicted of culpable homicide and not murder with constructive intent. In their case, the verdict of murder is hereby set aside and substituted with culpable homicide.

C They both were sentenced on the basis of a conviction for murder which has been set aside. Consequently, that sentence cannot stand and is hereby set aside. In my view, taking into account all the aggravating and mitigating circumstances of this case, the justice of this case can be met by the setting aside of twelve years' imprisonment with labour imposed on each of them and substituting a sentence of seven years' imprisonment with labour.

D In the result, the appeal succeeds to the following extent. The appellant's conviction of murder with actual intent is altered to one of murder with constructive intent and the sentence of death is set aside and substituted with life imprisonment.

The convictions of Gilbert and Casper are hereby altered from murder to E culpable homicide. The sentence of twelve years' imprisonment with labour is reduced to seven years' imprisonment with labour in respect of both.

EBRAHIM JA and ZIYAMBI JA concurred.

F *Pro Deo.*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v CHIHWAI & ORS 2002 (1) ZLR 584 (H)

S v CHIHWAI & ORS 2002 (1) ZLR 584 (H)

Citation	2002 (1) ZLR 584 (H)
Case No	Judgment No. HH-93-02
Court	High Court, Harare
Judge	Smith J & Chinhengo J
Heard	12 June 2002
Judgment	12 June 2002
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *Control of Goods (Price Control) Regulations, 2001 — s 39 — sale of commodities at excessive price* D *— whether s 39 imposes minimum penalty — how penalty to be assessed*

Words and phrases — *"liable" — penalty provision — whether provision stating that offender is "liable" to fine creates mandatory minimum penalty*

Words and phrases — *"value" — price control legislation — penalty fixed* E *according to value of commodity — how value determined*

Headnote

The accused were convicted in separate trials of selling commodities for more than the maximum prices fixed in orders made under the Control of Goods (Price Control) Regulations, 2001. The section of the F regulations under which they were convicted stated that anyone guilty of such an offence was liable, in the case of an offence involving a commodity, to a fine not exceeding the value of the commodity or five thousand dollars, whichever was the greater. The accused were sentenced on the basis that the section fixed a minimum penalty for the offence. On review: G

Held, that the section fixed a maximum penalty, not a minimum one. The use of the word "liable" made it clear that the section did not create a mandatory penalty.

Held, further, that the phrase "the value of the commodity" in the section refers to the selling price of the commodity as fixed in the order concerned, and is to be determined by reference to a single packet of the H

2002 (1) ZLR p585

Smith J

A commodity even where the accused person is found with more than one packet in his or her possession.

Cases cited

S v Ngonga HH-61-94

S v Sigauke HH-108-00

Legislation considered B

Control of Goods (Price Control) Regulations, 2001 (SI 334/2001), s 39

Judgment

SMITH J: These three cases were submitted for review. In each case, the C accused was charged with contravening s 39(3)(a) of the Control of Goods (Price Control) Regulations, 2001 (SI 334 of 2001) (hereinafter referred to as "the Regulations"). Each accused pleaded guilty and was convicted accordingly.

The accused should have been charged with contravening s 39(1)(b) of the Regulations, not s 39(3)(a). Section 39(1)(b) provides that no person shall, D without lawful excuse, refuse or fail to comply with any order or direction of the Minister. The power of the Minister to make orders or directions is conferred by s 5 of the Regulations. Where a person sells any commodity at a price in excess of that fixed by the Minister in a price control order, he or she is contravening subs (1)(b) of s 39 and not subs (3) thereof. E Subsection (3) makes such a contravention an offence and fixes the penalties that may be imposed. Therefore, the charge should allege a contravention of s 39(1)(b), as read with s 39(3), of the Regulations.

In the first case, according to the outline of the State case, police details were doing routine checks on prices at the business centre and they discovered the accused selling 19 x 500 grams of fine salt at a price of $30 each, instead of F the gazetted price of $23.12. The outline of the State case then went on to state: "The total value of the salt which was being offered for sale is $438.28 and hence accused was given a ticket to pay $5 000, *the minimum penalty prescribed in the regulations*" (emphasis added). In the second case, where the accused was also selling fine salt, but at a price of

$41, instead of the G gazetted price of $23.12, it was stated in the outline of the State case: "The total value of the salt that was being offered for sale was $1 479.65 hence accused was given a ticket to pay $5 000 *the minimum penalty prescribed in the regulations*". In the third case, the police details found the accused with 39 packets of 100 grams of surf which she was selling at $69 each, instead of the gazetted price of $35.33. In the outline of the State case, H para 5 reads:

Smith J

> "The accused was issued with a form 265 to that effect which she was to A pay a fine of $5 382."

The three cases were dealt with by three different magistrates, each of whom is a senior magistrate. The accused were all first offenders who pleaded guilty. The sentences imposed were as follows: in the first case a fine of $5 000 or, in default of payment, three months' imprisonment with labour; B in the second case, a fine of $5 000 or, in default of payment, five months' imprisonment with labour; in the third case, a fine of $5 382. In the third case, in his reasons for sentence the magistrate said:

> "The value of the commodity you were selling was $5 382: since this is greater than $5 000 you pay that fine."

Subsection (3) of s 39 of the Regulations provides as follows: C

> "(3) Any person who contravenes any provision of these regulations shall be guilty of an offence and liable —
>
> (a) in the case of an offence which involves any commodity, to a fine of an amount not exceeding the value of such commodity or five thousand dollars, whichever is the greater; or D
>
> (b) in any other case, to a fine not exceeding five thousand dollars."

A careful reading of subs (3) will show that it fixes the maximum penalty that may be imposed where a person is convicted of contravening s 39(1)(b), for example where he or she sells goods for a price exceeding the prescribed E maximum selling price. In the case of an offence which involves any commodity, the *maximum* penalty is either the value of the commodity or $5 000, whichever is the greater.

In these three cases, the magistrates erred in several respects. Firstly, they considered that the value of the commodity or $5 000 was the minimum or F specified penalty that they were required to impose. That is not the case. It would appear that the police details who have been doing the routine checks to enforce the price control regulations are labouring under a similar misapprehension, because in the outline of the State cases in two of the cases it is stated or implied that the accused was issued with a form 265 and has not paid the fine. Secondly, they are all senior magistrates and so, in terms of G s 50 (2) of the Magistrates Court Act [*Chapter 7:10*], their maximum jurisdiction as to punishment for any contravention of s 39(1) of the Regulations is a fine of $3 000. Their jurisdiction as to punishment was purportedly increased in terms of the General Laws Amendment Act, 2002 (No. 2 of 2002), but as that Act was declared by the Supreme Court to be a nullity, the increase did not become effective. Accordingly, the sentences H

Smith J

A imposed must be set aside and a penalty falling within the jurisdiction of a senior magistrate substituted.

Before dealing with the question of the appropriate sentence to be substituted, I would comment on a number of issues. In the first and second cases, there was an alternative sentence of three months' imprisonment with labour and B five months' imprisonment with labour, respectively. Having regard to the diminished value of the dollar and the level of salaries fixed as minimum wages for domestics and other lower-level employees, a period of five months' imprisonment, or even three months' imprisonment, is excessive as an alternative to a fine of $5 000. A term of one month's imprisonment, or at most two months, would be more appropriate. Furthermore, the jurisdiction C as to punishment conferred on magistrates in terms of ss 50 and 51 of the Magistrates Court Act [*Chapter 7:10*] is to impose a period of imprisonment, *simpliciter*. Originally, the relevant legislation did empower magistrates and the High Court to impose a punishment of imprisonment with hard labour. However, that is no longer the case. Under existing legislation, a magistrate or judge can sentence a convicted person to undergo a sentence of D imprisonment, but he or she cannot specify

that the imprisonment must be with labour. The only discretion that a judicial officer has in that regard is that, when he considers that a particular convicted persons should not be required to perform any labour, he may direct that the imprisonment is to be without labour. Section 76 of the Prisons Act [*Chapter 7:11*] specifically E deals with the question of the employment of convicted prisoners.

As I have mentioned earlier, s 39(3)(a) of the Regulations provides that, in the case of an offence which involves any commodity, the maximum penalty is $5 000 or the value of the commodity. What does the latter mean? Is it the wholesale price which the accused paid for the commodities he is caught selling or is it the retail price at which he is selling the commodity or is it the F prescribed maximum selling price? Taking, as an example, the third case that is being dealt with in this judgment, the gazetted price of a packet of 100 grams of Surf is $35.33, whereas the accused was selling a packet for $69. Is the value of a 100 gram packet of Surf $69 or $35.33 or the wholesale selling price? The accused was found in possession of 39 packets of Surf. G Is the maximum value of the commodity the price of one packet or must all 39 packets be included? In my opinion, the interpretation that should be adopted should relate to the value of only one packet and not to that of all the packets in the convicted person's possession. Furthermore, I consider that the price at which the accused is selling the commodity cannot be regarded as its value. That would be too subjective and would vary from one case to another. H A more certain value would be the selling price fixed by the Minister.

2002 (1) ZLR p588

Smith J

The accused in the third case was sentenced to a fine of $5 302. It is hard to A see how the magistrate arrived at that figure. In the outline of the State case, it is stated that "The accused was issued with a form 265 to that effect which she was to pay a fine of $5 382". However, no indication is given as to how that figure was arrived at. It is much higher than the controlled price of 100 grams of Surf ($35.33) or the price the accused was charging ($69). The B accused was found with 39 packets which she was allegedly selling at higher price. If one multiplies 39 by $69 the result is $2 691 which is far short of $5 382. The magistrate seems to have merely accepted the figure given in the outline of the State case without giving the matter any thought.

Section 39(1)(b) of the Regulations provides that no person shall "without lawful excuse", contravene a price control order. In all three cases, the C accused pleaded guilty and the facts set out in the outline of the State case were put to the accused. After the accused admitted that he or she had sold the goods concerned at a price in excess of the controlled price, he or she was asked if he or she had any right to do so. In order to comply with the requirements of s 39(1)(b) of the Regulations, the accused should have been asked if he or she had any lawful excuse. Furthermore, s 39(1)(b) of the D Regulations provides that no person shall refuse or fail to comply with any order or direction of the Minister. In the three cases, the outline of the State case does not specify the particular order or direction that has been contravened. It merely specifies the gazetted price of the commodity being sold by the accused. It seems to me that the magistrate dealing with the case should insist E that the relevant price control order and its statutory instrument number of the relevant price control order should be specified in the outline of the State case so that he can satisfy himself that the Minister has in fact made the order or direction and that the accused has failed to comply therewith.

In these three cases, the convictions are confirmed but the sentences are set aside and the following substituted: F

(a) in the first case (Ketinah Chihwai), a sentence of $1 000 or, in default of payment, 7 days' imprisonment;

(b) in the second case (Juliet Chambarara), a sentence of $1 000 or, in default of payment, 7 days' imprisonment;

(c) in the third case (Jonas Evyline), a fine of $1 500 or, in default of G payment, 10 days' imprisonment.

In fixing these penalties, I have had regard to the following — the accused is a first offender, the fact that he or she pleaded guilty, the quantity of goods found in his or her possession and the price at which he or she was selling the goods in excess of the prescribed maximum price, because that would reflect the amount that he or she would unlawfully obtain by selling at the higher price. H

Smith J

A I would recommend that the police details that are trying to enforce the price control regulations be advised as soon as possible that $5 000, or the value of the goods being sold, is not the minimum penalty that may be imposed. It is the maximum, and therefore should only be resorted to in the case of hardened offenders. First offenders are not liable to the maximum penalty prescribed by law unless the circumstances peculiar to that particular case B required that the maximum penalty be imposed. In each of these cases, the accused has paid substantially more than the fine I have fixed. The trial magistrate must ensure that the accused is refunded the excess.

Chinhengo J: I am in full agreement with the lead judgment. I would however wish to address certain points if only to elaborate on what has been said by C Smith J. Sections 39(3)(a) and (b) of the Control of Goods (Price Control) Regulations are formulated in the same manner as s 206(2) of the Customs and Excise Act [*Chapter 23:02*] which provides penalties for smuggling goods into Zimbabwe. It reads: *

> "Any person who is guilty of an offence in terms of this Act for which no special penalty is provided shall be liable in respect of each offence — D
>
> (a) in the case of an offence involving goods, to a fine not exceeding treble the duty paid value of the goods or five thousand dollars, whichever is the greater."

In *S* v *Sigauke* HH-108-00, I, with the agreement of SMITH J stated that a provision such as s 39(3)(a) of the Control of Goods (Price Control) E Regulations, 2001 and s 206(2) of the Customs and Excise Act, do not provide for a minimum mandatory sentence. I expressed my dissent from *S* v *Ngonga* HH-61-94 and stated at pp 3-4 of the cyclostyled judgment that —

> "The critical word to a proper understanding of s 206(2) of the Act is the F word 'liable'. When used in a statute, the word must be understood to mean that the person who has been convicted of an offence is subject or exposed to paying the penalty stipulated. It is not used to impose a mandatory penalty s 206(2) should therefore, be construed as giving the judicial officer a very wide discretion to impose a fine not exceeding treble the duty-paid-value of the goods or $5 000, whichever is the G greater. It must be accepted that the phraseology of the provision is unfortunate in that it seems to create a minimum mandatory penalty. That is however not the case. If the legislature was minded to impose a mandatory minimum sentence, it would have used the words 'the court

Smith J

> *shall* impose a fine of not less than treble the duty-paid-value of the A goods or five thousand dollars whichever is the greater' or words to that effect. I am satisfied that the legislature did not intend to impose a minimum mandatory sentence. However, even if it had intended to do so, the language used cannot be interpreted so as to have that effect. Support for the meaning of the word liable which I have adopted herein is to be B found in s 344(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides that —
>
> 'A person liable by law to be sentenced to pay a fine of any amount may be sentenced to pay a fine of any lesser amount.'
>
> This provision shows that the word 'liable' cannot be used for the purpose of imposing a mandatory sentence. It gives the court a discretion C as to the amount of the fine with the maximum being prescribed in the applicable section."

It must now be clear that the word liable is not used for the purpose of creating a mandatory sentence. Confusion arises, understandably, from the unfortunate manner in which the penalty provision is formulated. D

The second point I wish to highlight is that the offence created by s 39(1)(b) is not the selling of any commodity above the maximum prices fixed in any order issued by the Minister. The offence is the refusal or failure to comply with any order or direction of the Minister. Whilst the relevant orders of the Minister stipulate the prices at which certain goods are to be sold, and as such a refusal or failure to comply with an of the orders necessary results in E charging a price in excess of that stipulated, it must be appreciated that the price of the commodity has relevance only to the calculation of the monetary penalty to which may be imposed and not to the offence committed.

The third point I wish to address is the question of the value or price of the commodity being sold. Value is ordinarily related directly to the price of any F goods. The Control of Goods (Price Control) Regulations are also concerned with the trade in goods without using money i.e. barter. In these

days of high inflation, it is not uncommon for people to engage in barter trade. It seems to me that in the case of barter it will be extremely difficult to determine the price at which any goods may be sold unless the price fixed in the order by the Minister is used to determine the value of the goods sold as stated by G Smith J. The Control of Goods (Price Control) Regulations, 2001, define the word "price" as including any form of consideration. Thus to arrive at the value of any commodity resort can only be had to the price fixed by the Minister in the relevant order. H

* Or, rather, "read". The section was repealed and substituted by the Criminal Penalties Amendment Act, 2001. The relevant section is now s 182 — *Editor*.

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Source:
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S v GOMERA 2002 (1) ZLR 591 (H)

Citation	2002 (1) ZLR 591 (H)
Case No	Judgment No. HH-92-02
Court	High Court, Harare
Judge	Chinhengo J & Mavangira J
Heard	12 June 2002
Judgment	12 June 2002
Counsel	*G Manyurureni*, for the appellant *F Ziyambi*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure — *trial — conduct of — unrepresented accused — duty* D *of court to assist — effect of failure to do so — court should not hold technical mistakes against such accused*

Evidence — *identification — approach to be taken in assessing such evidence — honesty of witness not enough — need to demonstrate caution in approaching such evidence*

Headnote

E Where the identification of the accused is in issue, it is not enough for the court to find that the witness is honest. The reliability of his observation must also be tested, depending on a number of factors, which must be relevant to the particular case. These factors must be weighed against each other, in the light of the totality of the evidence and the probabilities. Evidence of identification must be treated with caution, F particularly where the evidence of identification is

given by a single witness. The court should not merely say that it is approaching the matter with caution — indeed the utterance itself is unnecessary where the judgment shows alertness to the real dangers which the cautionary rule seeks to address.

G Where the accused raises an alibi, that defence is in effect a denial of identification, and the onus to disprove the defence lies on the prosecution.

A magistrate has a duty to assist an unrepresented accused. The accused's rights in respect of cross-examination and other procedural matters should be explained, and the accused should be assisted in order to H ensure that cross-examination is meaningfully conducted. The court

Chinhengo J

should be slow to take technical points against the accused or to hold A against him the fact that he has failed to cross-examine on a particular point. Where a court fails to assist the accused in these circumstances, there cannot be said to have been a fair trial.

Cases cited

S v Dhliwayo & Anor 1985 (2) ZLR 101 (S) B

S v Mthetwa 1972 (3) SA 766 (A)

R v Muchena 1966 RLR 731 (A)

S v Musindo 1997 (1) ZLR 395 (H)

S v Mutandi 1996 (1) ZLR 367 (H)

S v Mutimhodyo 1973 (1) RLR 76 (A)

S v Ndhlovu & Ors 1985 (2) ZLR 261 (S) C

Case information

G Manyurureni, for the appellant

F Ziyambi, for the respondent

Judgment

CHINHENGO J: The appellant was convicted by the magistrates court at D Bindura on a charge of housebreaking with intent to steal and theft. He was sentenced to eighteen months' imprisonment of which six months were suspended for five years on condition of good behaviour. He appealed against his conviction. The State conceded that the conviction was unsafe. I agree.

On the evening of 16 July 1999, the complainant and her mother were E returning to their home in Madziva communal area at about 7 o'clock in the evening. There was moonlight. They saw someone coming out of their house through a window and carrying two radio speakers. The complainant said that "she called out as I had identified him as Mandle (the appellant)". She and her window and entered the house and had stolen a radio and a video cassette recorder both valued at $9 300. The complainant said that she was F ten metres away from the intruder when she saw him. She then went to the village head and immediately above five hundred metres away from the complainants' home. The complainant said that upon arrival at the appellant's home she did not find him there. Asked as to how she had identified the appellant as the person who had broken into her home, her evidence was that G he was wearing a white T-shirt and generally that she had known him for the preceding two years.

The complainant's mother also gave evidence which was largely similar to that of the complainant, but which differed from it in certain material respects. She said that she and the complainant had seen the appellant as he left the house from a distance of about five hundred metres. She however H

Chinhengo J

A stated, as did the complainant, that she knew the appellant well as they lived in the same village for about two years and that the appellant was wearing a white T-shirt.

The appellant's defence was that he did not break into the complainant's house and did not steal the complainant's property. He said that he was at his B parent's home when the complainant approached his parents and raised the matter of him having broken into her house. During the trial, the appellant did not at all meaningfully cross-examine the two State witnesses. In fact, he did not cross-examine the second witness at all. Of the complainant, he asked only one question in cross-examination — whether, when she went to his home, she did not find him there, to which the complainant said she found him C at home.

The magistrate did not scrupulously analyse the evidence placed before him and did not make findings of fact which were necessary to enable him to reach a definite conclusion on the evidence. In his judgment, he appears to have accepted the second State witness's evidence that they had seen the intruder leaving the house from a distance of five hundred metres. The magistrate did D not comment on the complainant's evidence that they had seen the intruder from a distance of ten metres. The contradiction of the State witnesses' evidence on this aspect could have been cleared by a purposeful cross-examination of the State witnesses. In his judgment, the magistrate missed out completely on the evidence of the second State witness where he stated, E contrary to what the complainant had said, that she had seen the intruder from a distance of five hundred metres.

The magistrate found that the complainant was a "clear and straightforward" witness who had no basis for falsely implicating the appellant and that by going to the appellant's home soon after the incident she was confirming that it was the appellant whom she had seen leaving her house. He also believed F the second State witness's evidence as corroborative of that of the complainant. It is clear that the magistrate based his conviction on the identification of the appellant by the State witnesses as unimpeachable.

On appeal, two grounds were put forward on the appellant's behalf to challenge the conviction. It was contended that the magistrate erred in G finding that there was no room for mistaken identity and in failing to assist the appellant in conducting a meaningful cross-examination of the State witnesses. The respondent accepted that these valid criticisms against the magistrate's verdict.

Identification Evidence

H It is accepted by our courts that where an accused's identification is in issue

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2002 (1) ZLR p594

Chinhengo J

the assessment by the court of the witness identifying the accused as honest A is not by itself sufficient for the court to reach the conclusion that the accused was correctly identified. Much more is required. Of this, Holmes JA in *S* v *Mthetwa* 1972 (3) SA 767 (A) at 768A-C said:

> "Because of the fallibility of human observation, the evidence of identification is approached by the courts with some caution. It is not B enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various facts such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait, and C dress; the result of the identification parades, if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in any particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities: see *R* v *Masemag* 1950 (2) SA 488 (A); *R* v *Dhladla & Ors* 1962 (1) SA 307 (A) D at p 310C; *S* v *Mehlape* 1963 (2) SA 29 (A)."

The above statement was adopted as correct by our own courts: See *S* v *Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 107A-D (*per* Dumbutshena CJ); *S* v *Ndhlovu & Ors* 1985 (2) ZLRF 261 (S) at 263G-264E (*per* Gubbay JA, as he then was) and *S* v *Mutandi* 1996 (1) ZLR 367 (H) at 370E-371F E (*per* Gillespie J). In *Mutandi*'s case, the evidence of identification was given by the complainant alone and the learned judge correctly stated that the complainant's evidence needed to be treated with caution, not only because it was being given by a single witness but also because it concerned the identification of an accused as a basis for the accused's conviction. In regards to the exercise of caution, Gillespie J at 371F-H said that: F

> "Caution is not demonstrated by the mere statement that one is aware of the need for caution, where the subsequent assessment shows no more than a superficial comparative assessment of demeanour. The shibboleth that the identifying witness was 'composed and remained unshaken during cross-examination' is wholly inadequate as a demonstration of G caution. The uttering of any cautionary words must be

supported by the demonstration in the reasoning of a cautious approach; paradoxically, that utterance itself becomes unnecessary where the judgment shows alertness to the real dangers concerning which the cautionary rule in question seeks to address. The properly cautious approach is, I suggest with great respect, exemplified in cases of issue as to identification by the H

A passage from the judgment of McNally in *S* v *Nkomo* 1989 (3) ZLR 117 (S) at 120F-123D."

The magistrate in the present case neither stated that he was cautious in his assessment of the evidence of identification placed before him nor did his judgment demonstrate an alertness to the dangers which the cautionary rule is intended to address. The magistrates relied largely on the honesty of the B witnesses i.e., on the genuineness of their belief that they had correctly identified the appellant as the intruder and on the apparent truthfulness of that evidence. He also relied on what appeared to be corroboration of the complainant's evidence by that of the second State witness to the same effect and on their prior knowledge of the appellant. In my view, it was not C sufficient in the circumstances to rely on these factors alone without weighing them against the totality of the evidence and the probabilities. The magistrates clearly failed to reconcile the State witnesses' evidence as to the distance from which they saw the intruder. He failed to investigate the significance of the intruder's dress. The magistrate did not also show how he was satisfied that from a distance of some five hundred metres the complainant D and her mother were able to identify the intruder as the appellant. It also remained unclear whether the complainant called out the intruder by name or whether the neighbors, who the second witness said gathered, assisted in identifying the intruder. It is an inescapable conclusion that the magistrate did not demonstrate that he exercised the necessary caution in dealing with the evidence of identification and that he merely relied on the honesty, E confidence and apparent sincerity of the State witnesses. The factor of suggestibility also looms high in this case. The appellant lived some five hundred metres away from the complainant's home and in the same village. It is quite possible that when the complainant saw the intruder, for one reason or another she may have thought that it was the appellant from next door. The F aspect of suggestibility should have been more adequately addressed in this case. Contrary to the magistrate's finding that there was no room for mistaken identity, I am satisfied that on the evidence before him such room existed.

The appellant's defence of *alibi*

Counsel for both the appellant and the respondent did not make any G submissions in respect of the magistrate's treatment of the appellant's defence of an *alibi*. The appellant stated in his defence that he was at home at the time that the offence was alleged to have been committed. In asking the complainant during cross-examination whether she did not find him at his house, the unrepresented accused was trying to justify his defence of an alibi. Though the complainant said that he was not there when she went to his H home, the evidence seems to suggest otherwise. The complainant did not

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deny that appellant was present when she had an altercation with his parents. A This would suggest that he was at his parent's home when the complainant got there. The point here is that the court should have investigated the appellant's defence of an alibi more thoroughly. The defence is in effect a denial of identification and the onus to disprove that defence is on the prosecution — see Hoffman & Zeffertt *South African Law Evidence* 4 ed at B p 619 and *S* v *Mutandi supra*. The magistrate did not ensure that the appellant's defence was shown not to be reasonably credible. Tied, as this defence is, to the issue of identity it becomes quite clear that the prosecution case was not proved beyond a reasonable doubt.

MAGISTRATE'S FAILURE TO ENSURE PROPER CROSS-EXAMINATION C

The procedure of cross-examination has been hailed as a potent tool in establishing the truth at any trial. It is necessary therefore that that procedure is carried out meaningfully in every case. The appellant in this case asked only one question in cross-examination of the State witnesses. He asked it only of the complainant. He did not at all cross-examine the second State D witness who not

only had given evidence which tended to contradict that of the appellant in respect of the distance from which they had seen the intruder but also prejudicial to his defence. The failure by the appellant to meaningfully cross-examine the witnesses arose, in my view from the magistrate's failure to explain to the appellant his rights in regard to cross-examination and the necessity thereof. The record does not shoe that the magistrate advised the E unrepresented appellant of his rights in this regard. It is an essential element of a fair trial that the accused is made aware of his rights so that he does not make mistakes of a technical nature of which the prosecution may take advantage. A failure cross-examine a witness where it is called for is one such technical failure which the prosecution can take advantage of. Beadle CJ in F *R* v *Muchena* 1966 RLR 731 (A) at 736, adverted to the obligation of the court to ensure that an unrepresented accused's case is fairly put, its obligation to assist him in his defence where that is required to ensure that the prosecution does not take an unfair advantage of him. And in *S* v *Mutimhodyo* 1973 (1) RLR 76 (A) at 80A-C, he again adverted to the obligation of the court to assist an unrepresented accused. He specifically stated in relation to G cross-examination that:

> "want to repeat again what this court has said on a number of occasions, that when an accused is unrepresented and when he is not very well educated, not the sort of man who is likely to understand clearly all the intricacies of court procedure, it is very wrong for a trial court to hold against such an accused mistakes he might make such as failure to cross H

Chinhengo J

> A examine; to hold against him, for instance that he has not cross-examined on any particular issue because one would have expected a skilled lawyer to have done so. It is the court's duty to assist unrepresented accused of this description in their defence and not to take technical point against them because of mistakes the accused might make in procedure."

B In *S* v *Musindo* 1997 (1) ZLR 395 (H), the point was also made and emphasized that it is an obligation of the court to explain to an unrepresented accused his rights in respects of cross-examination and other procedural matters.

The trial magistrate in this case neither explained to the accused the purpose of or procedure in respect of cross-examination of witnesses nor did he assist C him in order to ensure that the cross-examination was meaningfully conducted. He fell squarely into the error alluded to by Beadle CJ in *Mutimhodyo supra* when, in reply to the grounds of appeal, he said that the appellant's failure "to conduct a meaningful cross-examination is attributable to overwhelming evidence against (him)". In the same reply, the magistrate said that he explained to the appellant in detail the purposes of cross-examination. There D is no indication on the record that he gave any such explanation at all, let alone a detailed explanation. The conclusion must be reached that the magistrate neither explained to the unrepresented appellant the purpose of cross-examination nor did he assist him in that regards. That seems to be the reason for the appellant's failure to cross-examine the State witnesses and partly the E reason that he was convicted on the charge. The magistrate misdirected himself. The conviction cannot stand because the appellant was not given a fair trial.

In the result, the conviction is quashed and the sentence is set aside.

F MAVANGIRA J concurred.

Guni, Wabatagore & Co, appellant's legal practitioners

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

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Source:
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S v MAVHUNDURA 2002 (1) ZLR 598 (H)

Citation	2002 (1) ZLR 598 (H)
Case No	Judgment No. HH-91-02
Court	High Court, Harare
Judge	Chinhengo J & Mavangira J
Heard	12 June 2002
Judgment	12 June 2002
Counsel	*J Dondo*, for the appellant *F Ziyambi*, for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure (sentence) — *general principles — appeal — alteration on — when permissible — sentence so excessive that it induces sense of* D *shock — meaning*

Criminal procedure (sentence) — *general principles — factors affecting — family reconciliation — need for sentence to achieve reconciliation where criminal and victim are parent and child*

Headnote

The appellant stole a video cassette recorder from his father's house and, a E month later, a television set. His father did not report the first theft to the police, but he did report the second. The appellant was thereafter charged with two counts of theft, to which he pleaded guilty, and was sentenced to two years' imprisonment of which six months were suspended on condition of good behaviour. He was a 22-year-old first F offender. He appealed against sentence on the ground that it was so severe as to induce a sense of shock.

Held, that before an appellate court can agree that a sentence imposed by a lower court is so severe as to induce a sense of shock it must satisfy itself that the sentence not only appears to be severe but that it is disturbingly so. G

Held, further, that before sentencing the appellant the trial court should have called his father to give his views as to the appropriate punishment. Where parent and child are concerned, as they were in this case, the court must ordinarily incline towards reconciling the parties, and this very desirable end was not necessarily achieved by the imposition of a long custodial sentence. H

Chinhengo J

A *Held*, further, that the sentence should be altered to one of a fine coupled with a suspended prison sentence.

Cases cited

S v Bamu HH-141-00

S v Gwarada 1981 ZLR 17 (A)

B *S v Matanhire & Ors* HH-18-02

S v Matanhire & Ors HH-218-00

S v Mayberry 1985 (1) ZLR 192 (H)

S v Mtetwa HH-373-87

S v Sithole HH-50-95

Case information

C *J Dondo*, for the appellant

F Ziyambi, for the respondent

Judgment

CHINHENGO J: This is an appeal against sentence only. The appellant pleaded guilty to two counts of theft of property from his father's house. The appellant lived in Glen Norah in Harare whilst his father lived in D Greendale. On the first occasion, which was during the month of September 2001, the exact date of which was unknown to the prosecutor, the appellant went to his father's house and without the father's consent and in his absence at work, he took a video cassette recorder valued at $10 000. On the second occasion, on 17 October 2001, he went to his father's house and, again without the father's consent and in his absence at work, he took a colour E television set valued at $23 000.

The father did not report to the police the first theft but did so when his son returned and took the television set on the second occasion. He must then have been fed up with his son's conduct. On both occasions, neighbours had informed him that it was his son who had stolen the goods. Upon reporting F the thefts to the police, the television set was recovered on the appellant's indications but the video cassette recorder was not.

Having tendered a plea of guilty, the appellant was sentenced on both counts to 24 months' imprisonment of which six months were suspended for five years on condition of good behaviour. It is against this sentence that the appellant appealed. It was submitted on his behalf that the sentence was so G severe as to induce a sense of shock.

The magistrate's reasons for sentence are quite comprehensive. He addressed all the relevant considerations such as that the appellant was a first offender, that he pleaded guilty to the charge, that a part of the stolen property was recovered and that he was a youthful offender at 22 years of age. H The magistrate was also suite alive to the need to impose a custodial sentence

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in deserving cases only. In this regard, he made reference to the following A cases: *S* v *Mtetwa* HH-373-87; *S* v *Sithole* HH-50-95 and *S* v *Gwarada* 1981 ZLR 17 (A). He justified a custodial sentence on the grounds that the offences were serious; that the larger part of the stolen property was not recovered and, most importantly, that a custodial sentence would be an effective personal and general deterrent. It seems to me that the magistrate also placed considerable weight on the fact that the appellant "kept on offending" and B would continue to do so for "as long as (he) has monetary problems".

Before an appellate court can agree that a sentence imposed by a lower court is so severe as to induce a sense of shock it must satisfy itself that the sentence does not only appear to be severe but that it is disturbingly so. In *S* v *Matanhire & Ors* HH-18-02 at p 3 of the cyclostyled judgment, I said that: C

> "The assessment of sentence is a matter in the discretion of the sentencing judicial officer. There must be a miscarriage of justice occasioned by the exercise of that discretion or some error or misdirection on the part of the judicial officer exercising that discretion: see *S* v *Ramushu* S-25-93 and *S* v *Mundowa* 1998 (2) ZLR 392 (A). In addition, the sentence must not D only appear to be severe, but it must be disturbingly so (*Ramushu (supra*)). An appellate court does not interfere with the sentencing discretion of a lower court unless the criteria I have outlined are satisfied."

In this case, the magistrate over-emphasized certain aspects of the case to the prejudice of the appellant. For instance, he stated that the appellant "kept on E offending" when in fact he had offended on only two occasions. He also over-emphasized the aspect of deterrence. He stated that the sentence should be an effective deterrent to the appellant and to the offending public generally. It is not appropriate to treat as an overriding factor the issue of deterrence and ignore the offender's own personal circumstances: see *S* v *Mayberry* 1985 (1) ZLR 192 (H) at l94. F

The personal circumstances which, in my view, weighed very heavily in favour of the appellant were that he was a first offender, he pleaded guilty, he was a young person and that he stole from his own father. In respect of the last factor, I think the magistrate should have called the father of the appellant to give his views as to the appropriate punishment. For all one knows, the G father may have asked the court to treat his son more leniently. That this was quite likely is apparent from the fact that when the appellant stole on the first occasion and the father became aware of it, he did not report the matter to the police. He only reported when the appellant unlawfully took his property for the second time and, in addition to making the report on the second theft, he also included the first theft apparently to strengthen his report on the second. H

Chinhengo J

A It would seem that when the father recovered the television set whose theft was really the reason for reporting the offences to the police, he was unlikely to have anticipated a severe punishment in respect of the first theft. Where parent and child are concerned, as in this case, the court must ordinarily incline towards reconciling the parties and I do not think the imposition of a long custodial sentence necessarily achieves this very desirable end. The B child as here is likely to become quite irreconcilable to his father because of the hardship he would have suffered as a result of a long custodial sentence. The relationship between the appellant and the victim of the offence, to my mind, and the need to reconcile them distinguishes this case from *S* v *Matanhire & Ors* HH-218-00 (being the review judgment) and *S* v *Matanhire & Ors* HH-18-02 (being the judgment on appeal) and *S* v *Bamu* C HH-141-00. In addition, the appellants in HH-18-02 were not youthful offenders. They were between 28 and 35 years old.

I am quite satisfied that if the factors which I have mentioned had been properly and fully considered, the result should have been a much shorter custodial sentence at the very worst. As to whether a non-custodial sentence D was the more appropriate, I think the scales are so evenly balanced that I cannot say the a non-custodial sentence was not justified. In this situation, the court should incline towards the less rigorous form of punishment. In the result, the sentence imposed by the trial court is set aside and the following is substituted:

> " E Both counts as one for sentence: $8 000/idp four months' imprisonment. In addition, four months' imprisonment all of which is suspended for three years on condition the accused does not during that period commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine."

F MAVANGIRA J concurred.

Chinamasa, Mudimu & Chinogwenya, appellant's legal practitioners

G *Attorney-General*, respondent's legal practitioners

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Source:
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ZIMUNHU v GWATI & ORS 2002 (1) ZLR 602 (S)

Citation	2002 (1) ZLR 602 (S)
Case No	Judgment No. S-43-02
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza AJA

Heard 13 May 2002

Judgment 13 June 2002

Counsel *I E G Musimbe*, for the appellant
F Girach, for the second respondent
No appearance for the other respondents

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Practice and procedure — *execution — sale — when sale in execution may be set aside — sale price said to be unreasonably low — onus on judgment* D *debtor — valuation certificate — what it should contain — need for such certificate to be on oath — weight to be attached to valuation certificate — setting aside of sale on equitable grounds — balance of equities must be in favour of judgment debtor — sale by private treaty capable of realising higher price — when may be treated as equitable ground* E

Headnote

The appellant sought to have the sale in execution of his dwelling house to the first respondent set aside. The house had been sold following failure by the appellant to pay moneys owed to a bank and other creditors. The first ground he advanced was that the sale was for less than the market value. He produced a valuator's certificate, dated a year before F the sale, which put the value as nearly 3 times what it realised at the sale in execution. He also advanced four "equitable" grounds, one of which was that the sale in execution did not realise enough to cover the debts, whereas a sale by private treaty would have.

Held, that the onus of showing that the sale price was unreasonably low lay on the appellant. The valuation obtained was out of date; it did not show G the upper and lower limits of the suggested market price; it was not made under oath; it did not show the qualifications of the valuator; and in any event the opinion of a valuator is only an opinion, and one opinion does not constitute market value. Any opinion is worth less than the acid test of the price actually offered. Consequently, the appellant had failed to discharge the onus on him. H

Sandura JA

A *Held*, further, that only if the balance of equities is in favour of the judgment debtor may a sale in execution be set aside on equitable grounds. The suggestion that a sale by private treaty would realise a higher price is not a basis for setting aside a sale in execution, unless there is a firm offer by a prospective purchaser to pay a price higher than that achieved at the public auction. There had been no such firm B offer and although the bank had given the appellant opportunity to arrange such a sale he had failed to do so. The appellant had not made alternative arrangements to settle his debts, even though he had other immovable property he could have sold to raise the money. On the facts, the appellant had failed to show that the balance of equities was C in his favour.

Cases cited

Lalla v Bhura 1973 (2) RLR 280 (G)

Morfopoulos v Zimbank & Ors 1996 (1) ZLR 626 (H)

Thirlwell v Johannesburg Bldg Soc & Ors 1962 (4) SA 581 (N)

D *Woods v Spence & Anor* 1978 RLR 254 (G)

Zvirawa v Makoni & Anor 1988 (2) ZLR 15 (S)

Case information

I E G Musimbe, for the appellant

F Girach, for the second respondent

E No appearance for the other respondents

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order setting aside the sale in execution of his immovable property ("the property").

The relevant facts are as follows. The appellant owed the second respondent F ("Zimbank") the sum of $1 941 127. Zimbank instituted legal proceedings against him and obtained an order compelling him to pay that sum together with interest at the rate of 43 per cent per annum from 1 June 1996 to the date of payment in full, compounded monthly on the last day of each month, and costs of suit.

Thereafter, a writ of execution was issued and the appellant's immovable G property was attached and sold by public auction on 24 September 1999. Before that date, the third, fourth and fifth respondents, all of whom were judgment creditors of the appellant, lodged their writs of execution with the sixth respondent ("the Sheriff") in order to participate in the distribution of the proceeds from the sale of the property.

H The first respondent, whose bid was $1 050 000, was the highest bidder. He

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paid the required deposit of $105 000 on 24 September 1999, and was A declared the purchaser of the property by the Sheriff on 4 October 1999.

Subsequently, before the sale was confirmed by the Sheriff, the appellant filed a court application in the High Court seeking an order setting it aside. That application was dismissed with costs. Aggrieved by the decision, the appellant appealed to this court. B

The appellant sought the setting aside of the sale on two grounds. The first was that the property was sold for an unreasonably low price, and the second was that the sale should be set aside on equitable grounds.

In submitting that the property was sold for an unreasonably low price, counsel for the appellant relied upon a valuation report prepared by an estate C agent. That report indicates that in October 1998 the forced sale value of the property was $2 325 000 and that its market value was $3 100 000.

In my view, the report is of little or no assistance to the appellant, who must establish, on a balance of probability, that the property was sold for an unreasonably low price. I say so for at least three reasons. D

Firstly, the valuation was carried out about twelve months before the sale. Such a valuation could hardly reflect the value of the property at the time of the sale, bearing in mind the fluctuating prices on the property market. A more recent valuation, giving a reliable indication of the value of the property at the time of the sale, should, therefore, have been produced.

Secondly, the valuation does not indicate the upper and lower limits of the E suggested market price. In my view, every valuation should reflect such limits, to enable the court to properly determine whether the price at which the property was sold is unreasonably low, bearing in mind the expected range of prices.

Thus, in *Zvirawa* v *Makoni & Anor* 1988 (2) ZLR 15 (S) at 17D-E, F Manyarara JA said:

> "It is settled that the market price of property lies between the highest and lowest prices which the property could reasonably be expected to fetch in the open market. It is also settled that what is meant by an unreasonably low price is a price which is substantially less than the market price … G
>
> As the learned judge in the court *a quo* indicated in not so many words, Mr Watson's report, however well informed, does not assist in the ascertainment of the market price in this case, if only because it does not indicate the upper and lower limits upon which he arrived at his figure …"

The third reason why the valuation report is of no value is that it was not made H

Sandura JA

A under oath. In addition, it does not show the qualifications of the person who carried out the valuation.

In any event, a valuation is an opinion of the person who made the valuation, and one opinion does not constitute market value. Thus, in *Thirlwell* v *Johannesburg Building Society & Ors* 1962 (4) SA 581 (D) at 586F-G, B Henning J said:

> "… the applicant faces a fairly formidable task to show that the price realised at the auction was not a fair market value of the property. His case as to value is mainly based upon two recent valuations of the property. Before I deal with those valuations, I would refer to the case of *Estate Hemraj Mooljee* v *Seedat*, 1945 NPD 22 at p 24, where Selke J, C after saying that a price realised in open competition is properly to be regarded as indicating the market price of the property, proceeded to say at p 25, when dealing with evidence of a sworn valuation:
>
> 'But however that may be, the opinion of Mr Mallinson, though possibly entitled to some weight, is, after all, merely the opinion of a valuator and must, it seems to me, be of considerably less value than definite D information about the price actually offered for the property in *bona fide* competition at auction, after due and proper advertisement.'
>
> As was pointed out in *Buxmann's Executors* v *The Master & Ors* 1932 CPD 241 at p 249, sworn appraisements often vary widely in amount. The acid test is what the property concerned will fetch in the market …"

E Those comments, which were made in relation to a sworn valuation, apply to the present case with greater force because the valuation relied upon by the appellant was not sworn.

As already stated, the highest bid was $1 050 000. Central Real Estate Agents (Pvt) Ltd, the company which conducted the auction, indicated in its report F to the Sheriff that in its opinion the forced sale value of the property was $720 000 and the market value was $900 000. In the circumstances, it described the highest bid as excellent.

In addition, the Deputy Sheriff, the commissioner in whose presence the public auction was conducted, certified that the auction was duly and properly conducted and that the price achieved was fair.

G In the circumstances, the appellant failed to establish that the property was sold for an unreasonably low price.

I now wish to deal with the submission that the sale should be set aside on equitable grounds. Four "equitable" grounds were advanced by the appellant.

The first ground was that if the sale is allowed to stand the proceeds from the H sale of the property would be insufficient to discharge all the appellant's

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Sandura JA

debts, whereas a sale of the property by private treaty would realise at least A $2 000 000, which would clear all the debts. I do not think this has ever been recognised as a basis on which a sale in execution may be set aside, unless there is a firm offer by a prospective purchaser to pay a price higher than that achieved at the public auction, as was the case in *Woods* v *Spence & Anor* 1978 RLR 254 (G). That certainly is not so in the present case.

The second "equitable" ground advanced by the appellant was that he was B arranging a sale of the property by private treaty, which would realise at least $2 000 000.

However, it was common cause that no-one had offered to purchase the property at that price, either before or after the sale. All that happened was that about four days before the sale, the appellant instructed Crusader Real C Estate (Pvt) Ltd to sell the property by private treaty as quickly as possible in order to avoid the sale by public auction which was imminent.

Commenting on the appellant's second "equitable" ground, Zimbank averred as follows in its opposing affidavit:

> "The second respondent (Zimbank) has, along with the other creditors, D Scotfin and Sedco, allowed the applicant (now the appellant) ample time in the past to arrange for the sale of his property by private treaty. Indeed, the second respondent has previously arranged for the sale in execution of property belonging to the applicant but has cancelled the sales to enable the applicant to sell the property by private treaty. Regrettably, to date previous promises have not been adhered to and no private treaty E sales have been concluded."

These averments were not seriously challenged by the appellant in his answering affidavit. All he said was that he had not been given ample time within which to sell the property by private treaty. He did not deny that Zimbank had previously arranged the sale of his property by public auction F but had cancelled such sales to enable him to sell the property by private treaty.

I am, therefore, satisfied that there is no substance in the second "equitable" ground.

The third "equitable" ground advanced by the appellant was that at the time G of the sale he had and still has alternative means of settling the respondents' debts. In this regard, it was submitted that the appellant intended selling his immovable property at Darwendale, which had been subdivided into stands, for at least $2 500 000.

One wonders why the appellant has not paid his debts, if he has alternative means of doing so. The application for the authority to subdivide the H

Sandura JA

A immovable property in question was filed with the relevant Ministry in April 1997, and a permit authorising the subdivision was issued in 1998. Since then, the appellant has not sold any of the stands in order to pay his debts.

In the circumstances, it seems to me that the appellant has not exhibited a B serious intention to pay his debts. There is, therefore, no substance in the third "equitable" ground.

I now come to the fourth "equitable" ground, which was that the first respondent, who purchased the property at the public auction, and the third, fourth and fifth respondents, who are creditors of the appellant, did not oppose the appellant's application. It was submitted that because of that the C sale should be set aside.

With respect, I disagree with that submission. The property was sold by public auction at the instance of Zimbank, which had been forced to go to court to obtain satisfaction of its debt. In considering whether to grant the equitable relief sought by the appellant, the court ought to weigh the appellant's interest in setting aside the sale against Zimbank's right to the D payment of its debt by him. The fact that the other respondents did not oppose the appellant's application is irrelevant to that exercise.

In my view, it is only when the balance of equities is in favour of the judgment debtor that a sale in execution should be set aside on equitable grounds. In the present case, I am not satisfied that that is so. The appellant has not exhibited E a serious intention to pay his debts, notwithstanding the fact that he has immovable property which he could sell in order to raise the required money. It appears that he is entirely to blame for the sale of his property by public auction.

As Gillespie J said in *Morfopoulos* v *Zimbank Ltd & Ors* 1996 (1) ZLR 626 (H) F at 634D:

> "All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his home precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade a court that equitable relief is his due."

G The learned judge's comments apply to the present case with equal force. I am not convinced that the appellant is entitled to any equitable relief.

Finally, I wish to say that, generally speaking, courts should not readily interfere with sales in execution. The reason for this was stated by Davies J (as he then was) in *Lalla* v *Bhura* 1973 (2) RLR 280 (G) at 283A H as follows:

Sandura JA

> "… if the this might have a profound effect upon the efficacy of this type of sale. Would-be purchasers might well be deterred from attending and bidding if they considered their efforts might easily be frustrated by an application under r 359, A and as a general principle I think it should be accepted that a court will not readily interfere in these matters." B

In the present case, there is no reason why the sale in execution should be set aside.

In the circumstances, the appeal is devoid of merit and is dismissed with costs. C

ZIYAMBI JA and GWAUNZA AJA concurred.

I E G Musimbe & Partners, appellant's legal practitioners

Gill, Godlonton & Gerrans, second respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/XABA v DIRECTOR OF CUSTOMS & EXCISE 2002 (1) ZLR 609 (H)

XABA v DIRECTOR OF CUSTOMS & EXCISE 2002 (1) ZLR 609 (H)

Citation	2002 (1) ZLR 609 (H)
Case No	Judgment No. HB-45-02
Court	High Court, Bulawayo
Judge	Sibanda J
Heard	19 January 2001
Judgment	13 June 2002
Counsel	*J Tshuma*, for the applicant *P Ncube*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Customs and excise — *seizure — goods imported without duty having been* D *paid — another person subsequently acquiring such goods — true value of goods paid — person acquiring them not aware that they had been imported — seizure more than two years after goods became liable to seizure — right of seizure prescribed*

Headnote

The applicant bought a car over two years after it had first been registered E in Zimbabwe. She paid the market value for the car and had the car inspected and cleared by the police. Some months later, the Director of Customs seized the vehicle on the grounds that when it was imported some three years earlier no duty was paid. An application was brought seeking an order for the release of the vehicle.

F *Held*, that the applicant was entitled to the return of the car. She was not the importer, as defined in s 2 of the Customs and Excise Act [*Chapter 23:02*], nor could she been deemed to be under s 34(2). She was the person covered by s 193(3), as the car was acquired by her after importation for true value and she was unaware at the time of acquisition of the vehicle that the car was liable to seizure. In any event, the right of the Director G to seize the vehicle was prescribed in terms of s 193(3).

Legislation considered

Customs and Excise Act [*Chapter 23:02*], ss 2, 34(2) & 193(3)

Case information

J Tshuma, for the applicant

H *P Ncube*, for the respondent

2002 (1) ZLR p610

Sibanda J

Judgment

SIBANDA J: On 25 October 1999, the applicant instituted an urgent chamber A application seeking a provisional order for the release, by the respondent of her motor vehicle, registration number 735-277N upon service of the provisional order on the respondent. The urgent application came before Cheda J, as he then was, who granted the provisional order. The respondent opposed confirmation of the *rule nisi.*

On the return day the matter came before me on the opposed motion roll and B I confirmed the *rule nisi*. The respondent seems to be labouring under a false notion that confirmation of the *rule nisi* left undecided the issue of who is liable for the payment of import duty. He believes that the applicant is liable and for that reason has refused to release the vehicle to the applicant. I would like to say at the outset that the suggestion that the question of who is liable C for the payment of duty need not arise, because the confirmation of the provisional order was made on the basis of clear evidence that the applicant is not the importer and in terms of the Act only an importer is liable for payment of duty.

The facts of the case are fairly straight forward and admit of no ambiguity in as much as they are common cause. They are as follows: D

Sometime in February 1999, the applicant while perusing *The Herald* newspaper, came across a motor vehicle advertised for sale under the "cars for sale" column. She then contacted the owner of the vehicle who advised her that the vehicle on offer was at the Automobile Association in Harare. The applicant then arranged with the seller, a car dealer, that the vehicle be E sent to Bulawayo in order that she might view the vehicle. The vehicle was duly sent to Bulawayo and the applicant, after an inspection, satisfied herself with the condition of the vehicle.

Subsequent thereto the applicant entered into an agreement of sale with Multi Task (Pvt) Ltd of Stand 3099 St Mary's, Chitungwiza, to purchase F the motor vehicle for the sum of $160 000. However, before making payment of the purchase price, and taking transfer, the applicant took the vehicle to the police for inspection and clearance. The vehicle was duly cleared and the applicant was satisfied that the seller appeared to be a reputable car dealer. She then proceeded to pay the purchase price in cash and duly took transfer. G

In about October 1999, she received a letter from Central Registry requesting her to present the registration book of the vehicle to their office and she obliged. She was later informed that the registration book would be retained at the Registry Office and that she should take her vehicle to an Inspector Ncube of the Car Theft Department at the Bulawayo Drill Hall. She took the vehicle as directed. She was later informed by Ncube that they had no record H

2002 (1) ZLR p611

Sibanda J

A of the clearance of the vehicle. A Mr Gumbo was then called from the Department of Customs and she was later informed that the Bulawayo office was going to conduct a check in Harare to establish

whether the vehicle was cleared by the Customs Department.

On 20 October 1999, she was issued with a notice of seizure of the vehicle. She was at the same time asked to pay duty in the sum of $119 000. B On 25 October 1999, she instituted these proceedings seeking the release of the vehicle by the respondent. The application was opposed by the respondent on the grounds that the vehicle was imported and the applicant has failed to produce proof of clearance as required by the Act. It is respondent's case that in terms of s 2 of the Customs and Excise Act [*Chapter 23:02*], the applicant C is an importer and as such is liable to pay duty for the vehicle in terms of s 34(2) of the Act.

That, of course, leads to the obvious question of who is an importer in terms of the Act. The definition of importer is set out in s 2 of the Act, which provides:

> D "Importer, in relation to goods, includes any owner of or other person possessed of or beneficially interested in any goods at *any time before entry of the same has been made and the requirements of this Act fulfilled …*" (my emphasis).

It is clear that to fall within the ambit of the definition under s 2 *supra*, the applicant must have been the "owner" or "in possession" or "beneficially E interested" in the goods at any time before entry of those goods has been made and the requirements of the Act fulfilled.

The applicant, on the evidence, does not fall within the purview of the definition. She did not own, or possess or have a beneficially interest in the car before entry. The applicant bought the vehicle from a dealer long after its F entry into the country.

The next question to consider is: could the applicant fall within the ambit of an importer in terms of subs (2) of s 34? That subsection provides that where the provisions of subs (1) of s 34 do not apply "… liability for duty on all imported goods or goods deemed to have been imported in terms of section *thirty-six* shall rest upon the importer …" Would the applicant in those G circumstances and because she was found in possession be held to fall within the purview of s 34(2) *supra* of the Act?

In my view, the circumstances under which she came into possession of the vehicle can only lead to the conclusion that she does not fall within the provisions of subs (2). On the evidence, she is the person envisaged by the H proviso to subs (2) which reads:

Sibanda J

> "Provided that liability for duty on goods which are no longer in his A possession shall not rest upon an importer who proves that he —
>
> (a) acquired those goods for their true value after they were imported; and
>
> (b) was unaware at the time of such acquisition that entry had not been made and the requirements of this Act had not been fulfilled in B respect of those goods."

In my view, the applicant has not been shown to have been aware that the vehicle was imported, let alone improperly imported for that matter at the relevant time. On the contrary, the only evidence that there is has shown that the applicant acquired the vehicle for its true value of $160 000 and that C she was unaware at the time of the purchase of the vehicle that, at the time of importation, the importer had not complied with the requirements of the Act.

Further, the applicant, in my view, on this evidence is certainly a person envisaged by s 193(3) of the Act, which the subsection provides, in imperative terms, that: D

> "No seizure shall be made in terms of subsection (1) … where such articles have been acquired after importation for their true value by a person who was unaware at the time of his acquisition, that they were liable to seizure."

To that extent, the applicant has, in my view, discharged the onus, resting E upon her in terms of s 193(3)(ii) of the Act, of showing that indeed, she was unaware, at the time of purchase, that the vehicle was liable to seizure.

It is to be observed that according to the registration book, annexure (A) para (3) the vehicle is said to have been used as new in 1996. If it was imported, then 1996 or 1997 was the year of its importation and liable to F seizure immediately thereafter. The notice of seizure was issued on 20 October 1999, about 3 years from the year of entry or registration. In terms of s 193(3) *supra*, "no seizure shall be made in terms of subs (1) where more than two years have elapsed since the articles first became liable to seizure …" G

The relevant date can only be the date of the year of entry into the country. It follows therefore that, prescription has, in terms of the Act, taken its course. Thus, even if the vehicle was liable to seizure it now cannot, in terms of the Act, be seized.

Mr *Ncube* in his heads of argument says the subsection is of no avail because the vehicle was smuggled in and fraudulently registered and above all the H

2002 (1) ZLR p613

Sibanda J

A Director was not aware of the importation of the vehicle. Mr *Ncube* must be thinking of prescription at common law. Under the Act, the running of the time period is unconditional. If the legislature had wanted conditions under which prescription would not run as is the case at common law it would have provided accordingly. The paucity of the rest of Mr *Ncube*'s submissions are based on the erroneous interpretation that the applicant in terms of the Act is B an importer and are, therefore, irrelevant.

It is some what puzzling that the respondent seeks to recover duty from the applicant, despite the fact that the seller or Mr Chitekeshe has offered to pay the duty. Indeed, such payment, if the seller is not the importer, is envisaged under s 34 of the Act on the basis that the seller dealt with the vehicle on C behalf of the importer or owner, when selling it and thus acting as the importer's agent.

In any case, the offer by Mr Chitekeshe to pay the duty should be seen for what it is, a clear indication, if not an admission, that, firstly, he was aware that duty was not paid at the time of sale of the vehicle, if not importation; and, secondly, that the applicant was not aware that duty was D not paid at the time of purchase; and, thirdly, that by offering to pay the duty he intends indemnifying the applicant as an innocent purchaser, against any claim for payment of duty. Is there any legal impediment, if I may ask, in recovering the duty from Mr Chitekeshe as offered? He has made an offer to pay and I can see no reason why the Director should refuse to accept the E payment.

In the result, I am satisfied that the applicant is not an importer, in terms of the Act. Instead, she is an innocent purchaser for the true value of the vehicle which was publicly advertised in the press prior to the sale. On the evidence, she was not and could never, at the time of purchase, have been aware that the vehicle was imported, let alone imported in contravention of F the provisions of the Act. She responded to a press advertisement and innocently purchased the vehicle, as any other member of the public in her position would have done. She is, therefore, in my view, a person envisaged by the proviso to s 34(2) and s 193(3) of the Act. In the circumstances, she could not be liable to pay duty on the vehicle. The respondent, in my view, should have sought to recover the duty from the importer. If the seller and G Mr Chitekeshe are not the importers then they certainly must be the agents of the importer, or they ought to know the previous owner, who, in turn, should know the importer, if he himself is not the importer, and thus liable to pay the duty.

The applicant, in my view, as an innocent purchaser is entitled to have her H vehicle released to her.

2002 (1) ZLR p614

Sibanda J

Accordingly, the following order is granted. It is ordered: A

1. That the provisional order be and is hereby confirmed with costs.
2. That the respondent be and is hereby ordered to release the vehicle to the applicant forthwith, upon service of this order. B

Webb, Low & Barry, applicant's legal practitioners

Coghlan & Welsh, respondent's legal practitioners

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Source:
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MOYO & ORS v CENTRAL AFRICAN BATTERIES (PVT) LTD 2002 (1) ZLR 615 (S)

Citation	2002 (1) ZLR 615 (S)
Case No	Judgment No. S-66-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza AJA
Heard	18 June 2002
Judgment	18 June 2002
Counsel	*W Ncube*, for the appellants *P Nherere*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

D **Employment** — *industrial disputes — industrial action — notice of — requirement to give notice — form of notice required — period of validity of notice*

Headnote

In August 1997, the appellants, employees and members of a workers committee of the respondent company, wrote to the member in charge E of the local police station, stating their intention to go on strike 14 days later. Their letter was copied to the Ministry of Labour and to the relevant trade union. They did not write directly to the respondent about the proposed strike, although the matter came to the employer's attention indirectly. The Ministry of Labour intervened and the strike did not take place on the stated date. A labour relations officer made a determination F on the matter in October 1997. The appellants, however, went on strike in December, relying on the notice given in August. The respondent applied for authority to terminate the appellants' employment, on the grounds that no notice of the later strike had been given. A senior labour relations officer gave such authority after a labour relations officer G found in favour of the appellants. The Labour Relations Tribunal upheld the ruling of the senior labour relations officer.

Held, that, assuming that the respondent had been given proper notice (as opposed to merely having become aware of the appellants' intention), it would be absurd to hold that a notice would remain valid months later. The "notice" was for a strike to occur on a specific date, which came and H went without the strike occurring, because of the Ministry's intervention.

Gwaunza AJA

That intervention laid the dispute to rest. Whatever gave rise to the A December strike was a fresh dispute, and a fresh notice was required. In any event, s 104(2) of the Labour Relations Act required written notice to be given to the employer by the employees, workers committee or trade union concerned. This was a peremptory requirement, which had not been met. It was not enough to comply with the "spirit" of the subsection. B

Cases cited

Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S)

National Foods Ltd v Magadza S-105-95 (not reported) C

Legislation considered

Labour Relations Act [*Chapter* 28:01], s 104(2)

Case information

W Ncube, for the appellants

P Nherere, for the respondent D

Judgment

GWAUNZA AJA: After hearing argument in this matter, we dismissed the appeal and indicated that the reasons would follow. These are the reasons.

The background to the dispute is as follows:

The appellants, who were employees and members of a workers committee of the respondent, on 26 August 1997 addressed a letter to the Officer-in- E Charge, Norton Police Station, whose text was as follows:

> "Dear Sir
>
> COLLECTIVE JOB ACTION (STRIKE)
>
> We wish to advise you of our intention to go on strike fourteen days from today, 26th of August 1997. This is being done in accordance with the F Labour Relations Act 16 of 1985, section 120, subsections 1 and 2.
>
> We have already sent notices of this strike to the Trade Union and [the] Ministry of Labour.
>
> Yours faithfully,
>
> WORKERS' COMMITTEE." G

It is not in dispute that this notice was not sent directly to the respondent.

Upon receipt of this notice, the Ministry of Labour intervened in the dispute, resulting in a determination by a labour relations officer on or about 13 October 1997. Although no copy of this determination was produced before this court, both parties accept that it was indeed made. H

Gwaunza AJA

A The intervention by the Ministry of Labour, according to the appellants' heads of argument submitted to the Labour Relations Tribunal (p 11 of the record), had the effect of stopping the workers of the respondent, including the appellants, from proceeding with the collective job action within the fourteen days specified in their notice of 26 August 1997.

B Acting on the strength of that same notice, the appellants engaged in another collective job action from 3 to 5 December 1997.

The respondent, being of the view that the strike was illegal since no notice of it had been served on the respondent as required by s 104(2) of the Labour Relations Act [*Chapter* 28:01] ("the Act"), applied to a labour relations officer for authority to terminate the appellants' contracts of employment. C The labour relations officer found in favour of the appellants, prompting the respondent to refer the matter to a senior labour relations officer. The latter found in favour of the employer, that is, the respondent, a circumstance that led to this appeal.

It is important, for a proper consideration of this appeal, to note that there D were two separate and distinct stages in the events that gave rise to this dispute. The first stage involves the notice of 26 August 1997 which, albeit not addressed to, nor received directly by, the respondent, nevertheless came to the attention of the latter. This is implied in the notice and minutes of a management and workers' committee meeting of the respondent, held on 29 August 1997 (p 52 of the record). The notice of 26 August 1997 led to the E intervention of the Ministry of Labour, which effectively put a stop to the threatened collective job action. The second stage of the dispute relates to the collective job action of 3 to 5 December 1997, some three months later, which led to the dismissal of the

appellants. This strike also set in motion the proceedings that culminated in the appeal now before this court.

F The chairman of the Labour Relations Tribunal, in the judgment now being appealed against, made no reference to the first stage of the dispute. He instead considered the matter on the premise that the collective job action of December 1997 had been held on the strength of a defective notice, i.e. the notice of 26 August 1997.

In the light of our determination of this matter, already given, nothing turns G on this oversight, save for the fact that this court reached the same decision through a different route.

To go back to the appeal now before the court. The appellants' main ground of appeal is given as follows in the notice of appeal:

> "The court *a quo* erred in failing to note that the notices of a collective job H action were sent to both the police at Norton and to the respondent, dated

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Gwaunza AJA

> 26 August 1997 as per [the] appellants' heads of argument and confirmed A by the respondent in [its] minutes of 29 August 1997, all filed of record."

When this ground and the other evidence submitted on behalf of the appellants are considered in the light of the background to the dispute, outlined above, it becomes evident that the appellants' attitude is —

(i) that the intervention of the Ministry of Labour in the first stage of the B dispute, albeit putting a stop to the threatened collective job action, had nevertheless not extinguished the notice of 26 August 1997; and

(ii) that in regard to the strike of 3 to 5 December 1997, that same notice had effectively been served on the respondent.

I will revert to the first issue later and consider, first, the second point. This is C because this court must, at the outset, determine whether or not this appeal is on a point of law, and therefore properly before it: *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) at 219-220; *National Foods Ltd* v *Magadza* S-105-95.1

If one were to assume that the appellants are correct in arguing that the two stages that I have distinguished in this dispute were part of the same chain of D events from August to December 1997 (and therefore that the notice of August 1997 sufficed for the strike in December), the question that arises is whether or not such notice complied with s 104(2) of the Act.

Mr *Nherere*, for the respondent, argues that the appeal is invalid as being an appeal on a point of fact, and not law. He supports this argument by E contending that a finding as to whether or not a letter (i.e. the notice) was sent to the respondent is a question of fact and not law. It is contended further for the respondent that the wording of s 104(2) of the Act makes it clear that the notice in question must be given to the other party, by *addressing* it to that party. Where this is not done, even if the other party "somehow" gets to know of the intended strike, the notice would be fatally defective. F

In disputing this argument, the appellants argue from a different perspective. They do not place emphasis on a *letter* having been sent to the respondent, so much as *notice* having been given or having reached the respondent concerning the threatened collective job action. As long as the notice reached the respondent, the appellants argue, s 104(2) was complied with. The evidence G relied on by the appellants as proving that such notice "somehow" reached the respondent is indirect, to wit —

(i) a copy of a notice of a Management and Workers Committee meeting called for 29 August 1997, whose sole agenda item was given as

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Gwaunza AJA

> A "to discuss and resolve (the) letter to management on collective job action" (p 52 of the record); and

(ii) a reference in the minutes of that meeting to an enquiry made by the respondent's managing director as to why the workers' committee "had given management notice to go on strike".

B It is thus evident that while the appellants are giving s 104(2) a wide and loose interpretation, the respondent is giving it a more strict interpretation. To the extent that the determination of this appeal depends on how this court interprets the section in question, the appeal before this court is on a point of law and is therefore appropriately before it. This is regardless of the correctness or otherwise of the appellants' argument that all the events in the C dispute were part of one transaction stretching from August to December 1997.

This then brings me back to point (i) noted above.

The appellants contend that even if they did not proceed with the strike after the initial intervention of the Ministry of Labour official, whose determination D came out in October 1997, the notice of August 26 remained good for purposes of the strike of December 1997.

I have difficulty in understanding this argument. Firstly, a closer look at the wording of the notice itself reveals a contradiction to this argument. The notice, whatever its merits or demerits, clearly states the workers' intention to go on strike "fourteen days from today, 26August 1997". E To my mind, this is a very specific notice, warning of a strike on a day that a simple calculation would have determined. It is not in dispute that that date came and went and the strike did not take place. It did not take place specifically because officials from the Ministry of Labour, who received a copy of the notice of 26 August 1997, had intervened.

F Secondly, even if the notice had not all but spelt out the date of the intended strike, and even if the Ministry of Labour officials had not intervened, it would be absurd, as Mr Nherere contends, to hold that a notice given on 26 August 1997 was still operational more than three months later. Apart from not being what the appellants intended, a period of three months, given the wording of s 104(2) of the Act, cannot be considered a reasonable delay.

G That being the case, I am satisfied that the notice of 26 August 1997, whatever its merits, was meant for the strike planned for fourteen days from 26 August 1997, which strike was averted following the intervention of the Ministry of Labour. There is nothing in the evidence to support the argument that the same notice was intended to be, nor could be, extended to the strike that took H place from 3 to 5 December 1997.

Gwaunza AJA

There is therefore merit in Mr Nherere's contention that the effect of the A initial determination of the labour relations officer was to lay to rest the dispute between the parties at that point in time. Further, that whatever dispute gave rise to the December strike was a fresh dispute, requiring a fresh notice in terms of s 104(2) of the Act.

Indeed, had the appellants not been satisfied with that determination, they B would, one would expect, have continued with the strike on the date suggested in the notice. That they decided not to continue with the strike by the given date is evidence that they accepted their grievance had been addressed.

There is no evidence on record to show the nature of the grievance that led to the strike of December 1997. However, even if the grievance had been the C same — for instance, because the respondent had not complied with whatever determination was made in October 1997 — as long as the original notice period had expired, there would still have been need to issue a fresh notice of the intended strike in accordance with s 104(2) of the Act. It goes without saying that the same would have applied if the grievance had been new, or D different. Whatever the case may have been, it is evident no such notice was ever given by the appellants to the respondent as required by the Act. Therefore, the Labour Relations Tribunal's finding that the strike was unlawful because no notice had been given to the respondent as required by s 104(2) of the Act cannot be faulted.

Because the appellants proceeded on the premise that the notice of August E 1997 was applicable to the strike of 3 to 5 December 1997, and relied on their own interpretation of s 104(2) of the Act to argue that such notice was not only valid but properly given to the respondent, it is necessary that I address this issue.

Section 104 of the Act reads as follows: F

> "(1) Subject to subsection (4), no employees, workers' committees and trade unions shall have the right to resort to collective job action for the redress of lawful grievances.

(2) Subject to subsection (4), no employees, workers' committees or trade unions shall resort to collective job action unless fourteen G days' written notice of intent to resort to such action, specifying the grounds for the intended collective job action, has been given to the party against whom the collective job action is to be taken" (my emphasis).

I find the wording of these provisions, particularly subs (2), to be clear and unambiguous. The notice must be written, and must be given to the party H

Gwaunza AJA

A against whom the collective job action is to be taken, by *the employees, workers' committee or trade union concerned.*

The requirement concerning the giving of notice to the other party clearly suggests that the notice in question must be addressed or directed to the relevant other party. No doubt this was intended to ensure that the relevant other party was left in no doubt as to the date, the grounds for and the B participants in, the threatened collective job action. No other person, in my view, has greater interest in such information than the relevant other party. While *in casu* the notice relied on by the appellants, whatever its merits or demerits in relation to the regulated content, was indeed written, it was not directed to the respondent. Even though it is not in dispute that the respondent C did get to hear of the threatened collective job action, it is evident this was through indirect and, indeed, undefined means not attributable to the appellants. This cannot be what the legislature intended.

In the light of this interpretation, I find no merit in the contention made for the appellants that because a notice they addressed to some people other than the respondent had "one way or another" been received by the latter, the spirit D of s 104 was sufficiently complied with. The wording of subs (2), clearly requires more than compliance with the "spirit" of the section. The requirement is peremptory.

Thus, whichever way one considers the evidence before the court, I am satisfied that the finding of the Labour Relations Tribunal, to the effect that E no notice was given to the respondent as required by the Act and that therefore the collective job action was unlawful, is correct.

Hence, our dismissal of the appeal with costs.

F CHIDYAUSIKU CJ and CHEDA JA concurred.

Mabuye & Co, appellants' legal practitioners

Wintertons, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/SIBANDA v SIBANDA & ANOR 2002 (1) ZLR 622 (H)

SIBANDA v SIBANDA & ANOR 2002 (1) ZLR 622 (H)

Citation	2002 (1) ZLR 622 (H)
Case No	Judgment No. HH-90-02
Court	High Court, Harare
Judge	Smith J
Heard	6 April 2001, 14 May 2001, 9 October 2001

Judgment 19 June 2002

Counsel *G C Chikumbirike*, for the plaintiff
E T Matinenga, for the defendant

Case Type Civil action

Annotations Link to case annotations

Flynote

Damages — *injuria — bigamy — wife in second, bigamous marriage — entitlement to damages for injuria* D

Family law — *husband and wife — divorce — property division following — wife in second, bigamous marriage — entitlement to share of matrimonial property*

Headnote

The plaintiff went through a marriage ceremony with the defendant at a time when a marriage between him and another woman still subsisted. E The plaintiff was unaware of the other marriage. She sued the defendant for divorce, division of the matrimonial property, and damages for the *injuria* suffered by her because of the bigamous marriage.

Held, that because the defendant was married to the other woman when he went through a marriage ceremony with the plaintiff, the purported F marriage between the plaintiff and the defendant was null and void. It was a "putative" marriage.

Held, further, that although in these circumstances the plaintiff was entitled to a fair share of the matrimonial estate, she was not entitled to half the property, because the defendant's real wife and his numerous children, both legitimate and illegitimate, were also entitled to support. G

Held, further, that an action for damages under the *actio injuriarum* lies against a defendant who by his deceit took advantage of a plaintiff's innocence and induced her to enter into a marriage which he knew, but she did not, to be null and void because he was already married. The plaintiff was accordingly entitled to damages for *injuria*, but without evidence that she was a sensitive woman who suffered anguish H

Smith J

A and humiliation when she discovered the fact of the bigamy, the damages would not be high.

Cases referred to

Arendse v Roode 1989 (1) SA 763 (C)

Harwood v Harwood 1976 (4) SA 586 (C)

B *Makovah v Makovah* 1998 (2) ZLR 82 (S)

Makwiramiti v Fidelity Life Assurance Co of Zimbabwe (Pvt) Ltd & Anor 1998 (2) ZLR 471 (S)

Maravanyika v Hove 1997 (2) ZLR 88 (H)

Muzondo v Muzondo 1985 (2) ZLR 240 (S)

Snyman v Snyman 1984 (2) SA 262 (W)

Legislation considered C

Matrimonial Causes Act [*Chapter 5:13*], s 7(1)

Case information

G C Chikumbirike, for the plaintiff

E T Matinenga, for the defendant

Judgment

SMITH J: The plaintiff (hereinafter referred to as "Josephine") issued summons in May 1999 claiming a decree of divorce from the lst defendant (hereinafter referred to as "Joseph"), custody of the two minor children of the marriage and maintenance for them and division of certain movable and immovable property. As some of the immovable property is registered in the name of the second defendant (hereinafter referred to as "JLF"), she also sought an order declaring that the corporate veil of JLF be lifted so that the properties owned by JLF can be apportioned between her and Joseph. Josephine also claimed, in the alternative, an order dissolving the partnership between the parties and awarding her certain property acquired by the partnership together with damages for *injuria* in the sum of $200 000. Alternatively, she claimed damages for fraud in the sum of $3 200 000 and for *injuria* in the sum of $200 000. Josephine filed two notices of amendment to her declaration, one in September 1999 and the other in April 2001. According to Josephine, the parties own the following immovable property: in Harare — a house in Vainona, a house in Avondale, a house in Sunningdale, a house in Greystone Park, a house in Chitungwiza; a house in Glen Norah, a house in Hatfield and property in Willowvale, in Bulawayo — plot 1 Somerby Farm and stand 32397, Entumbane. They also own a total of 21 vehicles, trucks and trailers.

Joseph opposed the claims of Josephine. He pleaded as follows. He and Josephine started living together around February 1986. On 3 March 1994,

the two of them purported to register their marriage in terms of the Customary Marriage Act but that registration had no legal validity because on 10 July 1989 he had entered into a marriage under civil law with one, Esnath Farakezi, and that marriage still subsisted. Josephine was well aware of that marriage and therefore there was no marriage between him and Josephine. He is the father of the two children by Josephine (hereinafter referred to as "the twins"), but they were born out of wedlock. As regards the property which Josephine alleges belonged to the parties, he said that the house in Vainona and the BMW motor car were registered in Josephine's name, but she had no proprietary rights in those properties, and that stand 32397 Entumbane belonged to Josephine. He said that the houses in Avondale and Greystone Park and the property in Willowvale belong to JLF, Plot l, Somerby Farm, Bulawayo belongs to Rera Trading (Pvt) Ltd, and the vehicles, trucks and trailers, other than the BMW, belong to various parties, such as Rera Transport (Pvt) Ltd, H & E Commodity Brokers (Pvt) Ltd, Rera Construction (Pvt) Ltd, Rautelink Transport (Pvt) Ltd and a Mr Kadzura, with the exception of one trailer, which belongs to him, and the Toyota Cressida motor car, which has been sold. As regards the houses in Sunningdale, Chitungwiza, Glen Norah and Hatfield, Joseph said that either he or JLF had personal rights in the properties but no real rights, since transfer of ownership had not been effected into the name of either. Joseph said that the movable property in the house in Avondale belongs to both him and Josephine. He denied any knowledge of 5 of the vehicles and trailers specified by Josephine and said that he did not know who were the owners thereof. Joseph said that Josephine had fraudulently caused the registration of the house in Vainona in her name and that the BMW had been registered in her name as his nominee "at will". As regards the house in Sunningdale, he said that he had entered into a contract with Josephine for the sale of the rights in the property to her but the contract had not been performed because she had breached the terms of the contract.

Josephine testified as follows. She met Joseph in 1986 and they started to live together in that year. She had had two children by another man at that stage. She was then working for Air Zimbabwe. They bought a house in Belvedere where they lived. One day she came home and found two children who were looking very miserable. She phoned Joseph and asked about the children. He said that they were his from a previous marriage and had been abandoned. He contacted the mother who came to collect the children. The mother told her that Joseph had been convicted and sentenced to 4 years' imprisonment in 1981; before going to prison he had given her some money which she gave to his brother; because she could not give him back the money, Joseph had kicked her out. She did not say if the marriage had been registered.

Smith J

A Josephine said that the house in Belvedere that they were living in was too small because there were 4 children, so they bought the house in Avondale at 5 Howden Close (the "Avondale home") which became the matrimonial home. It was bought from a Mr Jack Ferreira and was owned by JLF, and so they merely bought the shares in the company. Joseph said that she could not be a director but did not say who would be the directors. She had problems B with Joseph because of his extra-marital relationships. On investigating the matter, she found that he had fathered 24 children by herself and 8 other women. She moved out of the matrimonial home in September 1993 and went to another house, taking the furniture and the 4 children and a Nissan pick-up. Joseph followed her and got violent so she had to contact the police and get a peace order forbidding Joseph from coming onto the property. C He and she got together later and he promised to change. On 3 March 1994, at Joseph's suggestion, the two of them were married in terms of the African Marriages Act [*Chapter 238 of 1974*]. A marriage certificate was issued. It described her as a spinster and Joseph as a bachelor and stated that she was his first wife. At the time, she was not aware that Joseph was already married D to Esnath. She had been living with him since 1988 and never knew of any previous marriage. In 1987, Joseph had been sued by one of his creditors and a number of properties registered in his name had been attached and sold in execution. At that time, Joseph vowed that any other properties he acquired would be registered in the name of a company, to prevent a similar situation occurring. He had bought the Avondale home for her. At the time, it was in E a bad state of repair and a lot of hard work was needed to get it into good shape. She had lived there with Joseph and the children from 1989.

[*The learned judge then dealt with the evidence in detail, and continued*.]

I found Joseph to be a very poor witness. The papers filed in the various cases brought by one or other of the parties show that he has made conflicting F statements in the affidavits he filed. Moreover, some of the statements he made when giving evidence were contradictory to what he had said in earlier affidavits. As regards his marriage to Josephine, his evidence — that he did not know that he was entering into a marriage and that he was only trying to help her change her name — cannot possibly be accepted. If the ceremony G was merely to change her name, why did he describe himself as a bachelor and why did he sign the marriage certificate? It is very clear from the certificate that it is a document issued under the African Marriages Act, as it was then called. Joseph is no fool. He is not an uneducated man. He must have known that he was participating in a wedding ceremony. The evidence establishes, to my satisfaction, that Joseph did enter into a purported marriage H with Josephine on 3 March 1994 and at that time he was married to Esnath

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Smith J

and that marriage still subsisted. I also find that Josephine was not aware, at A that time, that Joseph was a married man. Since Joseph was married to Esnath when he went through the marriage ceremony with Josephine, there is no valid marriage between the parties. In *Makwiramiti* v *Fidelity Life Assurance of Zimbabwe (Pvt) Ltd & Anor* 1998 (2) ZLR 471 (S) at 473C-F, Gubbay CJ said: B

> "The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary was bigamous and, consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the Marriage Act. By embracing a monogamous regime, the deceased was deemed by law to have waived C his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to the general law of the land. He was precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry."

Since I have found that Josephine was not aware, in March 1994, that Josephn D was a married man, that means that their "marriage" is in fact a putative marriage. In *Makovah* v *Makovah* 1998 (2) ZLR 82 (S), the facts were very similar to those in this case. At 89B-C Gubbay CJ expressed himself as follows:

> "In my view, the appellant's defence was generally dishonest. He got E involved with an unmarried person when he was married without revealing his marital status. This was in spite of the fact that he was a Chairman of the Young People's Christian Movement and a member of the Catholic Church. He went as far as registering his marriage fully aware that he was married in church and that his subsequent registered marriage would be bigamous. He even allowed another lie to be entered F on the subsequent registration certificate — that the respondent was the first wife. After all that he has the temerity to defend the

respondent's suit on the basis that their marriage was bigamous. That, in my view, is the height of dishonesty."

Then, after setting out the provisions of s 7(1) of the Matrimonial Causes Act G [*Chapter 5:13*], he continued at 90B-D:

"In my view, the above provisions cover a marriage, such as the present one, which is declared null and void. If it were not the case it would work a injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was H

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Smith J

A valid. It would also unjustly enrich a dishonest party such as the appellant in this case simply because the property in question is either registered in his name or is under his control. Such a position is unconscionable and the legislature by using the expression 'nullity of marriage' must have envisaged that a situation such as the present one would be covered. I should state that such situations are very common in African society B because of the failure by many to realise that once they contract a 'church' marriage their marriage becomes monogamous.

In the circumstances, the trial judge acted properly in applying the provisions of s 7 of the said Act on the issue of the division of matrimonial property."

C Joseph appears to own no immovable property because none of the immovable property is registered in his name. The Vainona property is registered in Josephine's name, though Joseph claims that this was effected fraudulently. The Avondale home is registered in the name of JLF. The other properties are either registered in the name of a company or are in the process of being acquired. Although JLF was cited as a party, it did not enter appearance to D defend. Joseph claims that he is not a shareholder or director of the company, but it is obvious that it is his company. He has nominee shareholders and directors but he runs the company. Clearly, his fingers were burnt on a previous occasion and he thereafter decided that any property he acquired would be held in the name of a company so as to keep it safe from any creditor E of his. Josephine is, in my opinion, entitled by virtue of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] to a fair share of the matrimonial estate, but the question is what is a fair share? She cannot have half of it, as she claims, because there is Joseph's true wife, Esnath, who deserves a share and there are his numerous other offspring who have to be supported. Even if they are illegitimate, he still has a duty to support them.

F As regards the immovable property, I consider, that a fair share for Josephine would be the Avondale home and the Vainona property. As regards the movable property, I consider that Josephine should be given the BMW that is registered in her name. The other vehicles should not, in my opinion, be taken into consideration.

G With regard to maintenance, Joseph accepts that he is liable but says that he cannot afford to pay what Josephine is claiming. Apparently, Josephine obtained a provisional order requiring Joseph to pay maintenance in the sum of $25 000 a month but that order was not confirmed and has not been observed by Joseph. Josephine claims maintenance for each child at the rate of $8 000 a month for the period 12 May 1999 (when summons was issued) H to 13 October, and $25 000 a month for the period 14 October 1999 to

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2002 (1) ZLR p628

Smith J

5 April 2001 (date of last amendment) and $20 000 a month from 6 April 2001 A onwards. Mr *Chikumbirike* argued that this was not arrear maintenance being claimed and referred the court to *Maravanyika* v *Hove* 1997 (2) ZLR 88 (H) and *Harwood* v *Harwood* 1976 (4) SA 586 (C). When Joseph was giving evidence, he said that he had paid $110 000 towards school fees for the twins. That was not disputed. I accept that Josephine's estimates of what she B requires for maintenance were very vague. However, as McNally JA said in *Muzondo* v *Muzondo* 1985 (2) ZLR 240 (S) at 245D:

"I do not think that the High Court, sitting as it was in this case as a family court, should be required to demand the same standard of accurate accounting as it might do in a commercial case. The court, in a proper case, is entitled, I would think, to use its general knowledge based on the C many similar applications made to it each week. Obviously, if evidence is lacking, it will have to err on the side of caution,

and it may be that in some cases absolution from the instance may be fairer to an applicant than a low award.

In saying this, I do not intend to go in principle beyond what has been said generally in relation to claims when the evidence as to quantum is scanty, D but where it is clear that some quantum exists. I am thinking of cases such as *Esso Standard SA (Pty) Ltd* v *Katz* 1981 (1) SA 964 (A) at 969H *et seq* and *Mkwanazi* v *van der Merwe & Anor* 1970 (1) SA 609 (A) at 631B-632. I am saying only that a court may perhaps be more tolerant of a failure to adduce evidence where it has a working knowledge of the level E at which maintenance orders are regularly made."

Joseph clearly has a substantial income, which he says is in the region of $300 000 a month, with his net monthly income being about $200 000. Had it not been for the fact, which is admitted by Josephine, that he has a large number of illegitimate children, he would be able to pay the maintenance claimed by Josephine. However, he must be left with sufficient to be able to F pay some maintenance for all his other children. As Joseph has made some contributions towards the school fees of the twins, I think that it would not be right to award maintenance in respect of any period prior to the first day of the hearing of this case, which was 4 April 2001. I consider that an award of $10 000 a month, together with the cost of school fees and uniforms and medical aid, would be adequate. G

The only other matter for consideration is Josephine's claim for damages for *injuria* in the sum of $200 000. In *Snyman* v *Snyman* 1984 (2) SA 262 (W) at 264C-F, Goldstone J said:

"In Hahlo *The South African Law of Husband and Wife* 4 ed at 59, the learned author says that: H

Smith J

'... A an action for damages on the ground of breach of promise or fraud may lie against a person who has induced another by fraudulent misrepresentations to enter into a void (e.g. bigamous) marriage with him.'

See, too, at 490 n 45.

B In the present case, Mrs *Cosijn*, who appeared for the plaintiff, limited her submission to the *injuria* suffered by the plaintiff. That a claim lies under that cause of action I have no doubt. In *Viljoen* v *Viljoen* 1944 CPD 137 Sutton J awarded damages for the *injuria* suffered by a woman to whom a promise of marriage had been made by a man who, unbeknown to her, was married. *A fortiori*, in the case where a person purports to C implement his unlawful promise: see, too, *Bull* v *Taylor* 1965 (4) SA 29 (A) especially at 37-38; *S* v *Youngleson* 1948 (1) SA 819 (W) at 822. In the present case, there was both *injuria* and *contumelia* attendant upon the unlawful conduct of the defendant.

The plaintiff satisfied me that she was entitled to the amount claimed by D her as maintenance for the minor child. She also satisfied me that, having regard to the circumstances, and especially the hurt caused to her and the social standing of the parties, she is entitled to a substantial award of damages."

The learned judge awarded the plaintiff damages in the sum of $5 000. The views expressed by the learned judge were approved by Hodes AJ in E *Arendse* v *Roode* 1989 (1) SA 763 (C). At 765D-J, the learned acting judge said:

"The only reported judgment of which I am aware in which a claim for damages arising from bigamy has been considered is that of Goldstone J in *Snyman* v *Snyman* 1984 (4) SA 262 (W). I am, with due respect, in F agreement with Goldstone J and with Hahlo *The South African Law of Husband and Wife* 5 ed at 107 that an action for damages under the actio *injuria*rum lies against a defendant who by his deceit took advantage of a plaintiff's innocence and induced her to enter into a marriage which the defendant knew, but the plaintiff did not know, to be null and void because he was already married.

G As in *Snyman*'s case *supra*, in the present case there was both *injuria* and *contumelia* attendant upon the unlawful conduct of defendant.

It was clear from her testimony in the witness-box and from what I saw of her that plaintiff is a sensitive woman and that she has been and remains affected deleteriously by defendant's wrongful and unlawful H conduct.

Smith J

It does not, however, appear from the evidence before me that there has A been any noteworthy impairment of plaintiff's reputation.

Taking into account all the relevant facts set forth above, including the extent to which plaintiff has suffered anguishand humiliation as a result of defendant's behaviour, plaintiff's social standing and financial circumstances, defendant's financial circumstances and the attitude of B defendant and whether he has

shown any repentance or concern for plaintiff, I am of the view that an amount of R5 000 would be an appropriate award of damages under the *actio injuriarum*.

The plaintiff also claims damages for seduction. This claim does not fall within the ambit of the *actio injuriarum*, but is an action *sui generis*: van den Heever *Breach of Promise and Seduction in South African Law* at C 42-3 and *Carelse* v *Estate de Vries* (1906) 23 SC 532 at 539.

That a plaintiff who had been seduced may recover compensation for the loss of her virginity an the consequent impairment of her marriage prospects is clear: *Bull* v *Taylor* 1965 (4) SA 29 (A) at 38-9.

In deciding what compensation should be awarded, a seduced plaintiff D for the loss of her virginity and for the diminished chances of her making a suitable marriage, a court should, in my view, take into account, *inter alia*, the plaintiff's social standing and financial position as well as that of defendant."

He then awarded the plaintiff an additional R1 500 in respect of her claim for E seduction.

I have found no cases in this country dealing with actions for *injuria* against a bigamist who induces a woman to enter into a marriage which he knew, but she did not know, to be null and void. I am satisfied, on the authorities quoted above, that Josephine is entitled to damages but I consider that amount she F is claiming is excessive. There is no evidence before me that she is a sensitive woman or that she has suffered anguish and humiliation as a result of Joseph's behaviour. Having regard to Joseph's financial circumstances and the fact that he has shown no repentance or concern for Josephine, I consider that an award of $50 000 would be appropriate.

Finally, to deal with the question of costs. I am of the view that Josephine is G entitled to her costs but I can find no basis for awarding them on the higher scale.

It is ordered that:

1. The marriage contracted between the parties in Harare on 3 March 1994 is declared null and void. H

2002 (1) ZLR p631

Smith J

A 2. The two children of the marriage, Tawanda Sibanda and Tadiwa Sibanda, are both declared legitimate.

3. The first defendant shall provide maintenance in respect of the two children until they attain the age of 18 years or become self-sufficient as follows: B
   (a) he shall pay maintenance at the rate of $10 000 a month for each child;
   (b) he shall pay the school fees and all expenses in connection with school uniforms and other school requirements for each child;
   (c) he shall pay medical aid subscriptions for each child and any shortfall on any medical or dental treatment provided to either C child.

4. The following immovable property shall be the property of the plaintiff:
   (a) Stand 14052, Chatsworth Road, Vainona, Harare;
   (b) Lot 3 of Subdivision B of Lot 12 Block D of Avondale and Lot 13 Block D of Avondale, otherwise known as 5 Howden Close, D Avondale, Harare.

5. The BMW motor vehicle, registration number 502-7277 shall be the property of the plaintiff.

6. The furniture and other household property at 5 Howden Close, Avondale shall be the property of the plaintiff. E

7. All other movable matrimonial property in the possession of the plaintiff shall be her property.

8. All other matrimonial property not specifically awarded to the plaintiff shall be the property of the first defendant.

9. The first defendant shall pay the plaintiff $50 000 as damages for F *injuria*.

10. The first defendant shall pay the plaintiff's costs.

Chikumbirike & Associates, plaintiff's legal practitioners

G *Ahmed & Ziyambi*, defendants' legal practitioners

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ECHODELTA LTD v KERR & DOWNEY SAFARIS (PVT) LTD 2002 (1) ZLR 632 (H)

Citation	2002 (1) ZLR 632 (H)
Case No	Judgment No. HH-94-02
Court	High Court, Harare
Judge	Smith J
Heard	28 February 2002
Judgment	19 June 2002
Counsel	*A P de Bourbon* SC, for the plaintiff *F Girach*, for the defendant
Case Type	Civil action
Annotations	Link to case annotations

Flynote

Exchange control — *payment of debt to foreign resident — Exchange* D *Control Regulations, 1996 (SI 109 of 1996) — s 10 — payment to be made in Zimbabwean currency — payment only lawful through exchange control authority at official rate of exchange*

Headnote

The plaintiff claimed from the defendant a sum being the equivalent in Zimbabwe currency of a stated amount in US dollars. Since the time E of the claim, the value of the local currency had collapsed. While official exchange rate had been pegged at 55:1, on the unofficial "parallel" market the rate was some 6 times higher. It was not possible to buy foreign currency at the official rate; anyone wanting foreign currency had to buy at the "parallel" rate. If the plaintiff were paid in F local currency, and attempted to buy foreign currency, it would only be able to get about a fifth of what it was owed. If the defendant had paid the debt when it was due, before the foreign currency crisis began, the plaintiff would have been able to acquire the US dollars it was owed.

Held, that the plaintiff was a foreign resident and under the Exchange G Control Regulations the defendant could only pay the debt it owed to the plaintiff by way of an exchange control authority. In terms of the Exchange Control (Exchange Rate Management) Order 2000 (SI 255B of 2000), the exchange control authority would have to apply the official rate of exchange. This was so even though the official rates of exchange for foreign currencies were far removed from reality. H

Smith J

Cases referred to A

Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd 1993 (1) ZLR 21 (H)

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC)

Case information

A P de Bourbon SC, for the plaintiff

F Girach, for the defendant

Judgment

SMITH J: On 21 October 1998, the plaintiff issued summons claiming from the defendant payment in the sum of the equivalent of Zimbabwe dollars of US$86 735.50, converted as at the date of payment, with interest thereon at the rate of interest applicable to banker's acceptances in New York from 31 May 1997 to the date of payment and costs of suit. The plaintiff's declaration was subsequently amended to increase the claim to the equivalent in Zimbabwe dollars of US$90 385.06. The defendant filed a plea, admitting that there was an outstanding balance due to the plaintiff but disputing the quantum, and also filed a counterclaim. The defendant subsequently withdrew its plea opposing the plaintiff's claim and tendered payment in Zimbabwe dollars of an amount equivalent to US$90 385.06 converted at the official rate of exchange which is US$1 = Z$55, with interest thereon at the current bank rate. The plaintiff considers that the tender is not acceptable because the rate of exchange should be at the parallel market rate, not the official rate.

The plaintiff called one witness, who is the Group Economist with an international bank which operates in this country. He said that he had made a study of the foreign exchange (forex) situation in Zimbabwe, having regard to the inflows, outflows and expected trends. He produced a group showing the actual forex inflows and estimated the inflows would have been had the country not been faced with the adversities that have occurred over the last three years. These adversities are the huge external payment arrears (estimated at over US$1 billion), inevitable food imports, shrinking exports and foreign tourists, fuel financing and the import pipeline (around US$500 million). The graph shows a steady decline in forex inflows since January 1999. On average, the inflows are about one-third of what would have been expected had the circumstances been normal. The net position today is one of acute deficits. There has been a steady build-up of foreign payment arrears since 1999. There are substantial amounts of dividends owed to foreign investors which are trapped in this country. No measures have been taken to set aside forex for the importation of goods which will cost at least US$100 million. The monthly requirements of the country, without including the food imports and foreign payment arrears, amount to about US$250 million and the normal monthly inflow is about US$25 million. Gold

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production has declined at a rate of about 18 per cent each year since 1999. In 2000, the reduction in production was 22 tonnes and in 2001 it was 18.1 tonnes. Income from foreign investors and donors has dropped significantly. When the country was attractive to investors the inflow was in the region of US$100 million annually, but now it is less than US$15 million. Balance of payment assistance and foreign grants have ceased. At present, the exchange rate for the US$ is pegged at 55:1. In August 2000, it moved from 38:1 to 50:1 and it was announced that the policy would be to adjust the rate in line with inflation. If that policy had been maintained, the rate would be between 130 and 150 to 1. However, when the rate reached 55:1 it was pegged and has not moved since. There is in existence what is called the parallel market for forex, which has been very volatile over the last 15 months. In June/July 2002, the rate for the US$ on the parallel market spiked to 400. When rumours started that the official rate would be adjusted, the rate retreated to between 300 and 350.

People in Zimbabwe who earn forex through exports are entitled to retain 60 per cent of their earnings for the purchase of materials and the balance is sold to local banks at the official rate. At one time, importers were allowed to retain 75 per cent of their earnings but that was reduced to 60 per cent some time ago. The 60 per cent that the exporters are allowed to retain are placed in what are termed Foreign Currency Accounts. Authorised dealers and exchange bureaux are supposed to deal with the money in these accounts at the official rate but they deal with them at the parallel market rate. Those banks which are ethical, and comply strictly with the law, lose their customers, because the customers obviously want the benefits from the higher rate. The problem is

that authorised dealers are required by law to buy and sell forex at the official rate, so customers do not bring forex to those who observe the law. The bank which employs the witness is owned by foreign shareholders and they insist that the local bank must obey the law. The result F has been that the bank has lost virtually all its forex inflows. Before the forex crisis the bank handled 20 per cent of the total forex coming into the country, whereas in March 2001 it handled only 2 per cent.

The witness said that if the plaintiff came to his bank to buy US$100 000 and offered to pay in local currency, the bank would not be able to meet the order. It has no forex inflow at the official rate. He could see no change in the present G position in the foreseeable future. There could be no active talks with the International Monetary Fund (IMF) before June 2003 and, even if there were official talks, then a 6-month programme would have to be drawn up. Therefore there could be no resolution of the problem within 2 years. Exporters had lobbied for a compromise adjustment of the exchange rate and the Minister of Finance had supported their initiative but it had been rejected H

Smith J

A by Cabinet. He said that if a person had $5.5 million and wanted to buy US$100 000 at the official rate of 55:1, his bank would not accept his money. It could invest the $5.5 million at short term but, since January 2001, the interest rates had been very low. The rate of return would be negative because of the high rate of inflation. No reputable bank could supply foreign currency to satisfy the judgment debt at the official rate of exchange. Other dealers B could find US dollars at the exchange rate of between 300 and 320 Zimbabwe dollars to US$1. Exchange bureaux are buying US dollars at the rate of 300:1 and therefore they sell them at a higher rate.

Mr *de Bourbon* submitted that if the plaintiff accepted the amount tendered, it would not be able to buy any foreign currency through a reputable bank. C It would have to go elsewhere and pay at least $300 for US$1. That would mean that it would be able to acquire a mere US$18 300, instead of the US$90 385.06 it is owed. He argued that justice requires that the plaintiff should not suffer by reason of the devaluation of the Zimbabwe dollar. The defendant should have paid its debt in May 1997. Had it done so the plaintiff would have been able to acquire the United States dollars it was D owed. In November 1997, the Zimbabwe dollar collapsed. It went from 12 to 18 and then to 55 to one United States dollar. The defendant originally opposed the plaintiff's summons, which was issued in October 1998. It is only now that it has consented to judgment. There must be an obligation on the defendant either to get US dollars or to pay the plaintiff what it will need E to acquire the amount of US dollars owed. The defendant has had the use of the foreign currency since 1997. If it paid at the rate of 55:1, the plaintiff would only get approximately US$18 000. The defendant should be required to meet the reality of the market.

Mr *Girach* argued that, in terms of the Exchange Control Regulation, 1996 (SI 109 of 1996), it would be illegal for the defendant to acquire the foreign F currency from anyone other than an authorized dealer. He agreed that there is currently a shortage of foreign currencies but it is illegal to pay anything above the official rate. The court cannot order payment at any other rate. It is not for the court to set out monetary policies; only the Minister of Finance can do so, irrespective of the realities. Mr *Girach* said he accepted G the reality of the parallel market, which exists and flourishes outside the official market, but the court cannot lend itself to an illegality. The official rate of exchange does provide an element of certainty whereas the parallel rate is very variable, not only from day to day, but from place to place. The court cannot give a judgment that would be concluded in such uncertainty. It cannot disregard the law and enter into areas of policy. The defendant H would be placed in an impossible position if it were ordered to pay in a foreign

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Smith J

currency. It would not be able to get foreign currency from a reputable bank. A If it went to a street-dealer, it would be breaking the law.

In *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC), the court held that where the justice of the case so requires, the court could give judgment in favour of the plaintiff for the amount of foreign currency due to him or its Zimbabwe dollar equivalent at B the time of payment. At 492E-F Gubbay JA (as he then was) said:

> "Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted

> into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of a devaluation in the C value of currency between the due date on which the defendant should have met his obligation and the date of actual payment of the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement." D

Robinson J, in *Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H), when concluding his judgment, said that the plaintiff's counsel in that case, who was also Mr *de Bourbon*, was justified in expressing the plaintiff's loss in United States dollars at the prevailing rate of exchange as at the date of payment. In this case, Mr *de Bourbon* is arguing that the rate E of exchange to be used is that which prevails on the parallel market and not the official rate because, if that is not done, the plaintiff will suffer a substantial loss. Mr *Girach* does not dispute that the plaintiff will, indeed, suffer a substantial loss if the official rate of exchange is to be utilised.

The Reserve Bank of Zimbabwe made the Exchange Control (Exchange Rate Management) Order 2000, which was published in SI 255B of 2000 on F 4 October 2000 (hereinafter referred to as "the Exchange Rate Order"). Section 3 thereof provided that the order shall apply to every foreign currency dealer. Section 4 empowered the Minister of Finance and Economic Development, by direction on every foreign currency dealer, to specify the mid-rate and the bands within every foreign currency dealer shall maintain G the exchange rate above or below the mid-rate (presumably there has been a printer's error and it should read "within which"). The Reserve Bank, on 17 August 2001, amended the Exchange Rate Order by repealing s 3 and by inserting in s 4 the following subsection after subs (30) (*sic*):

> "(4) Any direction issued in terms of subsection (1) shall be binding on any person who, in Zimbabwe, sells or provides any goods or service, H

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> A whether within or outside Zimbabwe, and any such person shall not charge or receive a price in Zimbabwe dollars in respect of such goods or service in excess of the price obtained by applying the maximum exchange rate specified in terms of subsection (1)."

The amendment was published in SI 261A of 2001. (I would comment, in B passing, that the amendment is very ineptly done. In s 2, it sets out the title of the order being amended but does not state the statutory instrument number. That makes it difficult to find the order for the purpose of making the necessary annotations. The new subs (4) provides that any direction in terms of subs (1) of s 3 shall be binding on a wide range of persons. However, subs (1) still provides that the Minister exercises his powers "by direction C binding on every foreign currency dealer" and subs (2) provides that a direction may be issued in writing or verbally and shall be published in the *Gazette*. In terms of subs (2), the direction takes effect from the date it is issued, unless otherwise specified in the notice. Therefore, a direction can be made, which is binding on all concerned, even before it is published in the *Gazette*. Section 5 of the Exchange Rate Order provides that a foreign D currency dealer shall apply the international cross rates prevailing on the day of the transaction on all foreign exchange transactions. Presumably, other persons affected by the Exchange Rate Order are not required to adhere to the international cross rates).

It appears from the summons that the defendant did provide services to the E plaintiff, in that it was "responsible for marketing, booking, operations, resupply, logistics, staffing, accounting and for every other aspect related to" the tourist complex on the island of Magaruque off the coast of Mozambique, in respect of which the plaintiff held the concession to develop. Subsection (4) of s 3 of the Exchange Rate Order provides that any direction issued by the Minister shall be binding on persons such as the defendant, who F sell or provide goods or services, within or outside Zimbabwe. The subsection goes on to provide that any such person shall not charge or receive a price in Zimbabwe dollars in respect of the goods or services concerned in excess of the price obtained by applying the maximum exchange rate specified by the Minister. Thus the direction of the Minister as to the exchange rate to be used is binding on the defendant but only in relation to the charges it makes for G services rendered. It would not apply in relation to any judgment debt the debtor has to pay because that would not be a charge fixed by the defendant for services it has provided to the plaintiff.

In a *Gazette Extraordinary* published on 5 October 2002, in General Notice 453C of 2000, it was notified that the Minister of Finance had specified 50 H Zimbabwe dollars to the United States dollar as the mid-rate and 10 per cent

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as the band above and below the mid-rate within which every foreign A currency dealer shall maintain the exchange rate. One would have thought that when the amendment was published on 17 August 2001, applying the Exchange Rate Order to persons who sell or provide goods or services, the Minister of Finance would have issued a fresh notice which, on the face thereof, applied to persons other than foreign currency dealers. That, however, B has not been done.

Section 10 of the Exchange Control Regulations 1996 (SI 109 of 1996) provides that, unless otherwise authorised by an exchange control authority, no person shall, in Zimbabwe, make any payment to or for the credit of a foreign resident. The plaintiff, in the summons it issued, declares that it is a company duly incorporated under the laws of the British Virgin Islands. C Therefore it is a foreign resident. Accordingly, the defendant can only pay the debt it owes to the plaintiff by way of an exchange control authority. In terms of the Exchange Rate Order, the exchange control authority will have to apply the official rate of exchange. Accordingly, the tender made by the defendant is in accordance with the law.

It is not disputed that the official rates of exchange for foreign currencies are D far removed from reality. Insistence on compliance with the artificial rates of exchange has resulted in the growth of the parallel market. The Reserve Bank has introduced special measures to deal with the situation in the gold mining sector. Had it not done so, all the gold mines in the country would have closed down. Similarly, the Reserve Bank was forced to introduce special measures E to deal with the situation in the tobacco growing industry. Had it not done so there would have been few farmers to carry on growing tobacco in the next season. One wonders how many other sectors will have to face collapse, or collapse, before measures are taken to restore sanity in the foreign currency markets.

It is ordered that: F

1. the defendant pay the plaintiff the Zimbabwe dollar equivalent of US$90 385.06 at the official rate of exchange, namely 55:1, with interest thereon at the prescribed rate from 31 May 1997 to the date of payment;
2. the defendant pay the plaintiff's costs up to 27 February 2002 and the plaintiff pay the defendant's costs after that date. G

Byron Venturas & Partners, plaintiff's legal practitioners

Wintertons, defendant's legal practitioners

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AFRICAN HOMESTEADS TOURING & SAFARIS (PVT) LTD v BARKER & ANOR 2002 (1) ZLR 639 (H)

Citation	2002 (1) ZLR 639 (H)
Case No	Judgment No. HH-101-02
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	8 March 2002

Judgment 19 June 2002

Counsel *P Nherere*, for the applicant
E W W Morris, for the respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

D **Exchange control** — *payment by Zimbabwean resident in foreign currency to non-resident — payment made out of free funds by corporate entity — payment not unlawful — Exchange Control Regulations, 1996 (SI 109 of 1996) — s 11*

Headnote

The applicant company entered into an agreement to buy a guest house and E restaurant from the first respondent, who had emigrated from Zimbabwe. The total price was stated in Zimbabwean currency, but it was agreed that three-quarters of the total price was to be paid in Zimbabwean currency and the balance in US dollars. The first respondent sought to resile from the contract as he had subsequently had a better offer. When the applicant brought an action to enforce the contract, the first respondent F argued that the contract was illegal because it provided for part of the payment in foreign currency. He also argued that upholding the agreement would have the effect of defrauding the fiscus of some of the stamp duty and capital gains tax due.

Held, that under s 11 of the Exchange Control Regulations, payment in G foreign currency outside Zimbabwe was lawful if made from "free funds" held by an individual. The definition of "free funds" made it clear that both individuals and corporate bodies are capable of holding such funds. The Regulations did not specifically prohibit a corporate entity from holding free funds. The logic of the concept of "free funds" and their exemption from exchange control restrictions is that they do H not form part of the country's foreign exchange reserves. In any event,

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the onus was on the first respondent to prove illegality, and he had failed A to do so.

Held, further, that there was no proof of an agreement or collusion between the parties to underpay capital gains tax or stamp duty. The first respondent's affidavit showed that these items were being calculated according to the true sale price. B

Held, therefore, that the contract was thus not tainted with illegality or such illegality as to render it null and void.

Cases referred to

Hattingh & Ors v van Kleek 1997 (2) ZLR 240 (S)

Kroukamp v Buitendag 1981 (1) SA 606 (W) C

Macape (Pty) Ltd v Executrix, Estate Forrester 1991 (1) ZLR 315 (S)

Legislation considered

Exchange Control Regulations 1996 (SI 109 of 1996), s 11

Case information

P Nherere, for the applicant D

E W W Morris, for the respondents

Judgment

HLATSHWAYO J: The applicants prayed the court to confirm the following amended provisional order:

IT IS ORDERED THAT:

1. The first respondent is hereby interdicted and prohibited from selling and/or transferring the property situate in Harare and known as "Barker's Lodge" being Stand 6 of Kambanji of the Grange [hereinafter referred to a "the property"] to anyone other than the applicant.
2. Against payment or tender of payment to first respondent or his legal practitioners of record of the purchase price of Z$20 000 000 in the form of Z$15 000 000 and US$32 500 representing Z$5 000 000, the first respondent is ordered to take all steps and sign all documents that may be necessary to enable the applicant to take transfer of the property from the first respondent.
3. Failing compliance with the provisions of the previous paragraph within seven days of payment or tender of payment, the Sheriff of the High Court of Zimbabwe is authorised to and shall sign all documents on behalf of the first respondent to enable that transfer to take place once he is satisfied that the purchase price has been paid or tendered as in para 2 provided and that the first respondent has failed to sign those documents within the seven day period following that payment or tender.

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4. The second respondent is interdicted from transferring the property to anyone other than the applicant and is hereby directed and authorised to accept the signature of the Sheriff of this Honourable Court as the Seller's representative in effecting transfer of that property to the applicant should the first respondent fail to sign such documents himself in accordance with the provisions of para 2 of this Order.
5. The costs of this application shall be borne by the first respondent.

The background to this matter is as follows:

(a) The first respondent, Andrew Duncan Stephen Barker (hereinafter called "Barker") has been involved in the hospitality industry in Zimbabwe until recently when he emigrated from the country to Australia. He is the registered owner of a piece of land in the District of Harare, being the remainder of stand 6 of Kambanji of The Grange which is situated at 1 Msasa Lane, Kambanji, and upon which is constructed a guest house/restaurant known as Barker's Lodge, which has an excellent reputation in local and international hospitality circles. That land and the improvements thereon are hereinafter referred to as "Barker's Lodge" or "the property". He has been desirous of selling the property, and, before he left for Australia, he commissioned a firm of estate agents, Robert Root & Co, to sell Barker's Lodge.

(b) The applicant is one of a group of subsidiary companies involved in the tourism business in this country and operating under a company called Sky Safaris (Pvt) Ltd. Mr Robert Bailey is the director of the applicant company. He stated in his founding affidavit that, during May and June 2001, he and his brothers gave serious consideration to purchasing Barker's Lodge and accordingly entered into discussions with Robert Root & Co. He explained to the estate agents whom he knew were in regular contact with Barker that "we were interested in purchasing Barker's Lodge through one of the companies in our group which we later specifically identified as the applicant in this matter".

(c) On or about 12 June 2001, Bailey says he made a specific offer to Robert Root & Co to purchase Barker's Lodge for Z$20 million, which offer was acknowledged by the estate agent through an e-mail message on 12 June 2001. A few days later, he confirmed that offer and advised that it would be open until 3 p.m. on 25 June 2001. He also asked the agents to obtain their client's urgent instructions as to whether or not the offer was to be accepted.

(d) On the morning of 25 June 2001, Bailey says he received a telephone call from the first respondent in Australia confirming receipt of the offer but requesting an extension of 24 hours to consider the offer. On 26 June

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2001, Bailey alleges, but Barker denies it, that Barker phoned again A from Australia and advised that he was accepting his offer to purchase Barker's Lodge for Z$20 million. He allegedly said that he would be confirming this with his agents. Bailey then contacted the estate agents shortly thereafter, who confirmed that Barker had phoned advising them of his acceptance of the offer. Mr Patrick Kennan of Robert Root & Co, B in his supporting affidavit, confirms that Barker informed the estate agents of his acceptance of Bailey's offer.

(e) On balance, therefore, I find Bailey's assertion of a verbal contract communicated to and accepted by Barker more probable than Barker's denials.

(f) On 9 July 2001, Bailey received a telephone call from the estate agents C advising that they had received and e-mail from Barker stating that he had decided to sell the property to a third party at a better price.

Based on the above facts, the applicant contends that there is a binding oral agreement with the first respondent for the purchase of Barker's Lodge. Barker, on the other hand, argues to the contrary alleging that: D

(a) He entered into negotiations for the sale of Barker's Lodge with Mr Bailey in his personal capacity and not as a representative of the applicant and that, therefore, the identity of the purchaser was *delectus personae*.

(b) He did not reach any oral agreement with the applicant or Mr Bailey. E

(c) The agreement to pay part of the purchase price (Z$5 million) in foreign currency (US$32 5000) is illegal and unenforceable as it contravenes ss 4(1)(a), 4(1)(b)(ii), 10(1)(a) and (c) and 11(1) of the Exchange Control Regulations, 1996 (SI 109 of 1996).

(d) The written "draft" agreement is silent on that part of the purchase price required to be paid in foreign currency and upholding such an agreement F would have the effect of defrauding the fiscus of some of the capital gains tax and stamp duties as the purchase price is understated by Z$5 million.

I shall deal with the first respondent's objections *seriatim* below.

WAS THE IDENTITY OF THE PURCHASER CRITICAL TO THE CONCLUSION OF THE CONTRACT? G

The first respondent argues that the "identity of the purchaser was a *delectus personae*" in that a portion of the purchaser price was to be paid to the respondent offshore with "free funds" and that such an arrangement is only legal without Ministerial approval if the funds are held by an individual and not by a company. I shall return to the question of the legality or otherwise H

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A of the contract. For now, I shall focus on whether the identity of the purchaser was crucial to the respondent. The term *delectus personae* simply means choice of an irreplaceable person (bound to specific performance of the undertaking). Those are considered as having *delectus personae* who have placed others in relationship towards themselves which involves mutual trust and confidence, e.g., agents, partners, etc. (see Bell's *South African Legal* B *Dictionary*).

The applicant responded to this attack by pointing out that the identity of the offerer is not mentioned anyway in the opposing affidavit as a cause for vitiating the agreement. Indeed, the representative of first respondent's estate agent, Mr Patrick Paul Kennan, in his affidavit, confirms that the identity of C the purchaser was never an issue. Furthermore, when the first respondent received the draft agreement on 28 June 2001, which specifically identified the applicant as the purchaser, he did not take issue with this but replied to Mr Kennan three days later in terms which clearly reflected acceptance of the contract, *viz*., "Everything looks in order". The first respondent's contention that he intended to sell to an individual seems to be an afterthought, for D Mr Barker, even at the stage of breaking the contract, not only did not give the identity of the purchaser as a reason but, in spelling out the various other reasons, claimed that those were the reasons for his not wanting to sell to "Bailey's Company". Accordingly, I have come to the conclusion that the exact identity of the purchaser was not critical to the conclusion of the contract; what mattered to Mr Bailey was that the purchase price was paid as E agreed.

WAS THE CONTRACT ORAL OR SUBJECT TO REDUCTION INTO WRITING?

I have already indicated that, on a balance of probabilities, an oral agreement to sell Barker's Lodge for Z$20 million, Z$5 million of which was to be paid F in foreign currency, was reached between the applicant and Barker. I have also said that the identity of the purchaser appears to have been irrelevant to the seller. However, the first respondent argues further that the sale was subject to the signing of a written agreement; that apart from the purchase price which was settled verbally there were further terms that were not G discussed such as date of *vacuo possessio*, agent's commission, provisions as to default and rights on breach, etc. It appears to me, however, that the contract was verbal and that the reduction into writing was merely to incorporate standard terms and conditions in order to bring about the intention of the parties to conclude the contract as verbally agreed upon. The reason for the request of one Tim Johnson to "look over" the written H contract before the agents could sign on behalf of the seller and the

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examination of the agreement by the purchasers also appears to have been to A ensure compliance with standard terms and conditions.

This conclusion is borne out by the uncontradicted narration of the sequence of events by Mr Kennan in his supporting affidavit, thus:

> "18. I then drafted the agreement of sale and had it printed. Michelle Brinton met with the Baileys on Wednesday 27 June 2001 to go B through it with them. I believe that they had a couple of queries but at the end of the day it was acceptable. On Thursday, 28 June 2001, the agreement was e-mailed to Duncan Barker. On 1 July 2001, he e-mailed us back, advising that he had received the agreement of sale; that it looked in order; that he was sending Mr Tim Johnson a copy to look over and if he was happy with it we should proceed with C the signing of it.
>
> 19. Some days later, I am not sure how many, I spoke to Tim Johnson on the telephone and he advised me that there was a problem with the sale. On questioning him a little closer, he advised that Duncan Barker had received a better offer and wanted to sell the property to D someone else."

It is also revealing that the seller's reasons for wanting to resile from the agreement appear not to be that any of the standard terms and conditions in the written agreement were unacceptable (although in the opposing affidavit the first respondent attempts to do so), but that he had received a better offer E and wanted to sell to someone else.

ALLEGATIONS OF ILLEGALITY

The first respondent alleges that the agreement pertaining to payments, especially the payment of part of the purchase price (Z$5 million) in foreign currency (US$32 5000), is illegal and unenforceable as it contravenes ss 4(1)(a), 4(1)(b)(ii), 10(1)(a) and (c) and 11(1) of the Exchange Control F Regulations, 1996 (SI 109 of 1996).

On close examination, however, it appears that the transaction is not rendered illegal by s 4(1)(a) of the Exchange Control Regulations since it does not involve the buying, borrowing, selling or lending of foreign currency, nor does the contemplated foreign currency payment fall foul of s 4(1)(b)(ii) as G the deal does not involve the sale or lending of foreign currency and the payment would not originate from Zimbabwe. Further, the payment is not to be made from proceeds of any trade, business or other gainful occupation or activity carried on in this country.

The applicant submitted that s 10(1)(a) and (c), which contain provisions proscribing payments inside Zimbabwe to a foreign resident or placing H

A money to his credit without exchange control approval, was not violated because no payments have been made yet and no money has been placed anywhere for the benefit of Barker. However, such payment will have to be made eventually as part of the performance of the contract. The applicant, in my view, rightly conceded that since the first respondent is no longer resident in Zimbabwe, actual payment to him of the Z$15 million in Zimbabwe is B unlawful unless permitted by the exchange control authority.

The challenge of the legality of the contract is further based on s 11 of the Exchange Control Regulations. Section 11 proscribes the payment outside Zimbabwe, without exchange control authority, by any Zimbabwean resident and the prohibition extends to the incurring of any obligation to make C payment outside Zimbabwe. The relevant provisions are s 11(1) and (2), which read as follows:

> "11.(1) Subject to subsection (2), unless authorized by an exchange control authority no Zimbabwean resident shall —
>
> (a) make any payment outside Zimbabwe; or D
>
> (b) incur any liability to make payment outside Zimbabwe
>
> (2) Subsection (1) shall not apply to —
>
> (a) any act done by an individual with free funds which are available to him at the time of the act concerned; or
>
> (b) any lawful transaction with money in a foreign currency account."

E Counsel for the applicant further conceded, and rightly so in my view, that incurring any obligation to pay, let alone making payment, in foreign currency outside Zimbabwe without authority is proscribed by s 11(1)(a) and (b), unless the payment falls under the subs (2) exceptions or is a payment not contemplated in s 11(1). Thus, the agreement to pay part of the purchase F price in foreign currency directly to first respondent in Australia and the balance in Zimbabwe is affected by both s 11 above and s 10 of the Exchange Control Regulations. In other words, payment of 25 per cent of the purchase price in foreign currency falls under the s 11 prohibitions while payment of Z$15 million or 75 per cent of the purchase price locally falls under s 10.

The distinction between the s 10 and s 11 (previously ss 7 and 8 respectively) G prohibitions is aptly made by McNally JA in *Macape (Pty) Ltd* v *Executrix Estate Forrester* 1991 (1) ZLR 315 (S) at 320 thus:

> "The essential point to be noted is that there is a clear difference between ss 7 and 8. The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay.
>
> H In other words, when one is concerned with payments *inside* Zimbabwe

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> it is perfectly lawful to enter into the agreement to pay. But, without A authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments *inside* Zimbabwe, it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the Reserve Bank."

Since he was dealing with payment inside Zimbabwe, the learned Judge of B Appeal concluded that the contract to pay was lawful but "actual payment in pursuance of the contract is unlawful, without permission", and the applicant urged this court to follow that principle. It appears to me, however, that, in casu, the *Macape* principle can be followed only as far as the 75 per cent of the purchase price payable in local currency is concerned. The remaining 25 C per cent payable in foreign currency out of offshore funds is governed by s 11. Now, if these two sections are interpreted differently as decided by McNally JA, then we are here faced with a contract that is 75 per cent lawful and 25 per cent illegal, and one has to delve into the imponderables of severability. It appears to me that legislative intervention is called for here to reconcile the two sections, because circumstances where payment is to be D made partly inside Zimbabwe and partly outside Zimbabwe are certain to abound in any economy that is part of the global system. The alignment of the two sections could be done easily by repealing para (b) of s 11(1), for it seems to me both too cumbersome and illogical to require prior exchange control authority to incur an obligation to make payment, i.e., to enter into a E contract. The proscription of the actual payment without authority would appear to be sufficient.

As already noted, in terms of s 11(1) exchange control authority is required before any payment or obligation to pay outside Zimbabwe is made or incurred. The exceptions are where the payment is made, or obligation incurred, *by an individual* out of free funds or by any person pursuant to a F lawful transaction with money in a foreign currency account. In this case, the obligation was incurred and payment is to be made by the applicant, *a company*, from "free funds in hard currency outside Zimbabwe" to which the applicant's group of companies have lawful access.

Now, in order to determine whether the above arrangement contravenes the G provisions of s 11, one must reflect on the intention of the legislature in prohibiting payments outside Zimbabwe. In brief, the purpose of the prohibition appears to be the preservation of foreign currency resources by ensuring that no external payments are made or incurred without the permission of the exchange control authority. However, where the payment is made by an individual out of "free funds" or is for a "lawful transaction with H

2002 (1) ZLR p647

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A money in a foreign currency account", the transaction does not impinge on foreign currency reserves and exchange control permission is dispensed with. The crisp question, which this case raises, is whether s 11 is contravened where a company, rather than an individual, makes any external payment out of "free funds" that it has lawful access to.

The term "free funds" is defined in the regulations (s 2) as "money which is B lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe". According to this definition, both an individual and a corporate body are capable of holding "free funds". However, the regulations are silent as to whether a C company, like an individual, may utilize "free funds" without exchange control authorisation. On the basis of the *maxim inclusio unius est exclusio alterius* and the legislative history of the provision (the exemption in the SI 399 of 1977 applied to an act done "by a Zimbabwean resident *who is an individual*"), one would come to the conclusion that a corporate body does not qualify under the exemption. The reason for this may be that a Zimbabwean D incorporated company is not expected to hold "free funds" because the foreign currency it generates through its activities is repatriated and becomes available to the company only through its local foreign currency account and other approved schemes.

However, I was not referred to any specific prohibition of the holding by a company of "free funds". On the contrary, and as I have already noted, in the E definition of "free funds" corporate bodies are not excluded from operating such a facility. The logic of the concept of "free funds" and the exemption of their utilisation from exchange controls is that they do not form part of the country's foreign exchange reserves. Therefore, the requirement that companies should first obtain permission before utilising their lawfully held "free funds", if that is the proper interpretation to be given to s 11(1), is, F indeed, mind-boggling. Be that as it may, there is an additional twist in the facts of this case. The applicant indicated that it was able to make the offer to pay in foreign currency "*as our group of companies had lawful access to free funds in hard currency outside Zimbabwe*". Such "lawful access to free funds" could be through the directors of the companies who, as individuals, G may freely use them or it could be through some offshore companies related to the group. No submissions were made to the court one way or the other in this regard, but whatever the case is, the onus was squarely on the party alleging illegality to prove that the payment was going to be unlawful. See Korsah JA in *Hattingh & Ors* v *van Kleek* 1997 (2) ZLR 240 (S) at 245. In this case, the first respondent has failed to prove, on a balance of H probabilities, that the agreement was unlawful.

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I am further fortified in this conviction by the parties' previous dealings, A during which the first respondent, on the advice of his lawyers and entreaty of his partners, had rejected earlier arrangements perceived to potentially violate exchange control regulations. The agreement for the sale of the property for Z$20 million (without the foreign payment component) was recommended to the first respondent by Robert Root & Co, his estate agents, B as "a clean, above board deal". The arrangement for part of the purchase price to be paid in foreign currency was at the first respondent's special request and not the applicant's choice. The applicant replied by indicating that it had lawful access to "free funds" which seems to have satisfied Mr Barker at the time. If now, for reasons known to the first respondent the arrangement was not legal from the start, he must prove such illegality, and this, as I have C already said, he has woefully failed to do.

Mr *Morris*, for the first respondent, submitted that in order for the *Macape* principle (that the underlying agreement is valid but the payment is unlawful without exchange control permission) to apply (and this is with particular reference to payment in local currency), it has to be found that the

agreement between the parties was subject to the tacit term that it was D conditional upon Ministerial approval being given. However, I could not confirm this submission in my reading of the *Macape* case. All the same, I am of the view that the desire by both parties, including their advisers and associates, to ensure that the agreement is above board as shown in the previous paragraph, is enough evidence that the parties expected all the E necessary approvals to be obtained.

Mr *Morris* further submitted that if the provisional order is confirmed, the first respondent would have to wait until approval is either given or refused and that the respondent may have to wait for an inordinately long time to his immense prejudice as a seller. The greater prejudice does indeed fall upon the seller because during the delay the seller has no use and enjoyment of the F purchase price and does not benefit from the appreciation in value of the property. However, it appears to me that it would also be in the interest of the applicant to have the necessary approval granted expeditiously, for otherwise it, too, would not be in a position to enjoy the benefits of the contract. This aspect of the *Macape* principle was alluded to by McNally JA who G observed as follows in this regard:

> "There is no reason why the court should not order payment, subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve Bank in the exercise of its discretion. It is entirely for the Reserve Bank to decide whether or not to authorise the payment. If it decides not to do so the payment may not be H

> A made. The contract remains lawful. Payment will have to await a change either in the law or in the policy of the Reserve Bank."

To my mind, however, a situation where the parties remain bound by a contract pending payment as and when the law or the policy of the Reserve Bank may change seems to be patently unjust. It would appear to me that in such circumstances there is an implied reasonable time by which the B purchaser must obtain the necessary approvals, failing which the agreement lapses. Where the necessary approvals have not been obtained within such reasonable time, I am of the view that a court would look favourably to an application to be released from the contract by an aggrieved party.

Finally, the allegation of fraud on the fiscus through the misrepresentation of C the purchase price in the draft agreement should not concern us here, since it has not been shown that there was agreement or collusion to underpay capital gains tax or stamp duty. The understating of the price in the draft agreement was at the first respondent's special request and instance and it has not been proved that the applicant had knowledge of any illegal purpose that was intended by that act. Neither in the original provisional order nor in the D amended one or in the founding affidavit does the applicant seek to have the purchase price reflected as anything other than what it truly is. The first respondent's own opposing affidavit confirms that both the agents' fee and the capital gains tax liability were being calculated on the true price. In terms of the Capital Gains Tax Act [*Chapter 23:01*] as amended by s 36 of the E Finance Act 29 of 1998, an estate agent, being a depositary as defined in the Act, is obliged to withhold tax consequent upon receipt of the proceeds of a sale. Mr Kennan, in his affidavit, was clearly aware of the estate agents' obligations in this regard. It is only the first respondent who claims that he found the withholding of the capital gains tax according to law "unacceptable to me" (para 34 of the opposing affidavit) and therefore sought to cancel the F contract. If in insisting that the purchase price be understated, the first respondent intended to perpetrate a fraud on the fiscus, it has not been shown that the applicant was party to this scheme. The words of Korsah JA in *Hattingh & Ors* v *van Kleek supra* at 246 are apposite in this regard:

> "The cases clearly show that where a contract is on the face of it legal but, by reason of circumstances known to one party only, is forbidden by G statute, it may not be declared illegal so as to debar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceipt."

The persuasive authority of *Kroukamp* v *Buitendag* 1981 (1) SA 606 (W) puts the far less serious circumstances of this case beyond legal reproach. In H the *Kroukamp* case, an agreement to inflate the purchase price of certain

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immovable property in order to mislead a building society, was found, in the A circumstances, "not so immoral that it should be visited with nullity".

CONCLUSION

All in all, therefore, it is my finding that the parties entered into a binding contract, which is not tainted with illegality or such illegality as to render it null and void. As far as costs are concerned, I consider that costs should B follow the outcome.

In the premise, the provisional order as amended and set out at the beginning of this opinion is confirmed. The first respondent shall pay the costs of this application. C

Coghlan, Welsh & Guest, applicant's legal practitioners

Wintertons, first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/MHAKA & ANOR v ZIMBABWE REINSURANCE CO LTD & ANOR 2002 (1) ZLR 651 (H)

MHAKA & ANOR v ZIMBABWE REINSURANCE CO LTD & ANOR 2002 (1) ZLR 651 (H)

Citation	2002 (1) ZLR 651 (H)
Case No	Judgment No. HH-95-02
Court	High Court, Harare
Judge	Smith J
Heard	6 May 2002
Judgment	19 June 2002
Counsel	*W Muchengeti*, for the applicants *A Gwagwa*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

D **Real rights** — *servitude — exercise — need for servitude to be exercised reasonably with due regard to interests of servient owner*

Real rights — *servitude — praedial servitude — nature — whether servitude created under conditions of establishment of township is praedial servitude*

Headnote

After the applicants bought a residential Stand in a township, the township E developer built a deep open storm-water drain across the Stand. The applicants sought an order requiring the developer

to remove the drain, arguing that they had never agreed to the creation of a praedial servitude allowing it to be built. However, their agreement of sale stated that they purchased the Stand subject to the permit under which the township was established, and one of the conditions of the permit was that owners of F Stands in the township would grant servitudes for such things as storm-water drainage.

Held, that it was a condition of the applicants' title that they had to grant a servitude for the drain; hence there was a servitude over their Stand for the drain.

G *Held*, further, that a right of servitude must be exercised *civiliter modo*, i.e. with due regard to the interests of the servient property and its owner. In this case, the open drain rendered a substantial part of the applicant's Stand unusable and created a very dangerous hazard. The first respondent should therefore be ordered to cover the drain.

Quaere whether the servitude over the applicants' Stand was a praedial H servitude.

Smith J

Cases cited A

Brink v van Niekerk & Anor 1986 (3) SA 428 (T)

Du Plessis v Pieterse 1970 (3) SA 468 (C)

Fison Albatross Fertilizers (Rhod) Ltd v Salisbury Municipality 1931 SR 61

Kakamas Bestuursraad v Louw 1960 (2) SA 202 (A)

Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 B

van den Berg & Anor v Rand Water Board 1945 AD 691

van der Vlugt v Salvation Army Property Co 1932 CPD 56

Case information

W Muchengeti, for the applicants

A Gwagwa, for the respondents C

Judgment

SMITH J: In 1999, the applicants bought a Stand measuring 860 square metres (hereinafter referred to as "Stand 6288") from the respondents. When they visited Stand 6288 in September 2000 they found that a storm-water drain had been constructed down one side of the Stand. It was 39,7 metres long, 2,5 metres wide and 1,5 metres deep. It reduced the area of D Stand 6288 by 99,2 square metres. The first applicant (hereinafter referred to as "Arthur") wrote to the second respondent (hereinafter referred to as "the Estate Agent") asking that the drain be removed. In response, he was advised that there was a servitude over Stand 6288 and the drain had been built on the servitude. Arthur was also told that he had bought Stand 6288 *voetstoots*. In view of the refusal by the respondents to remove the drain, E the applicants filed an application for an order directing the respondents to remove the drain within 10 days and to rehabilitate the area previously occupied by the drain.

The respondents opposed the application. The opposing affidavit was deposed to by the Managing Director of the Estate Agent, who had been authorised F thereto by the first respondent (hereinafter referred to as "ZIMRE"), which wholly owns the Estate Agent. He attached to his affidavit a letter written by the second applicant complaining about the drain and saying that, when the applicants bought Stand 6288, they did not know about the drain because they did not physically visit the Stand; they only saw the site plan or map which did not show any defects. In the opposing affidavit, the following points are G made. The applicants paid the full purchase price for Stand 6288 on 22 November 1999 and, with effect from that date, all risk and profit therein passed to them. The permit authorising the sub-division of the Stands and the relevant diagrams were displayed at the offices of the Ruwa Local Board and of the Estate Agent. It was a requirement of the permit that storm-water drains be constructed, one of which is the one that goes through Stand 6288. It is not H

Smith J

A possible for the drain to be removed, as this would affect the drainage of the whole area and would affect many other Stands. It is generally accepted that, in residential areas, storm drains are not covered. They are only covered in commercial properties or industrial Stands. Therefore it is not a requirement for the respondents to cover the drain.

Arthur filed an answering affidavit but it was out of time. In his heads of B argument, Mr *Muchengeti* said that Arthur was based in the Democratic Republic of the Congo. They tried to get the consent of the respondents' legal practitioners to the late filing of the affidavit but without success. One wonders why a proper application for condonation was not made. Had that been done, condonation would have been granted.

C Mr *Gwagwa* argued *in limine* that the Estate Agent had been improperly joined to the proceedings. It merely acted as agent for ZIMRE in marketing the Stands. The agreement of sale of Stand 6288 is between the applicants and ZIMRE. Therefore, the application against the Estate Agent should be dismissed with costs. That point was raised for the first time in the heads of argument. Had it been raised by the Estate Agent in its opposing affidavit, it D might well have merited serious consideration. However, it did not do so. To the contrary, it was the Managing Director of the Estate Agent who deposed to the opposing affidavit on behalf of both the Estate Agent and ZIMRE. There was no separate opposing affidavit from the Estate Agent. In the opposing affidavit, the Managing Director associates the Estate Agent with ZIMRE and makes no attempt to dissociate or distance the Estate Agent from E the relief sought by the applicants.

Mr *Muchengeti* argued that there was no praedial servitude over Stand 6288. Such a servitude could only be created by agreement between the seller and the purchaser of the property in question and there had been no such agreement between the applicants and the respondents. Furthermore, there F can be no praedial servitude unless there is a dominant tenement and a servient tenement. In *van der Vlugt* v *Salvation Army Property Co* 1932 CPD 56, it was held that a right of a municipality to lay a sewer through privately owned land is not a praedial servitude as the right is not granted in favour of an identifiable tenement.

G Mr *Gwagwa* submitted that the contention by Arthur that, when he first visited Stand 6288, there was no sign of a drain, cannot be accepted in view of the letter from the second applicant in which she said that they did not physically visit the Stand. In clause 6 of the agreement of sale, the applicants acknowledged that they purchased the Stand *voetstoots*, without any warranties against defects, and that they had acquainted themselves with the property, H its nature, extent and boundaries and with all conditions of title applicable

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Smith J

thereto. That acknowledgement is binding on the applicants. They cannot A challenge that acknowledgement.

In *van der Vlugt*'s case *supra*, Van Zyl J referred to the case of *Fison Albatross Fertilizers (Rhodesia) Ltd* v *Salisbury Municipality* 1931 SR 61 at 65, wherein Bissett CJ had expressed doubt whether the right which a municipality had in respect of a pipe-line laid over land was "a praedial B servitude in the true sense". His doubt was based on the fact that, whereas the land over which the pipe was laid was a servient tenement, there was no dominant tenement, because the power given to the municipality to lay the line was not given to it in the capacity of owner of any land or tenement. Van Zyl J agreed with the view so expressed, and said that he did not think that a municipal sewer "such as the one in question" can or should be treated C as a servitude. In that case, the municipality had given the owner of land "notice of expropriation in regard to the sewer". Clearly, the municipality was exercising a power granted to it by statute to expropriate land or rights over land for the purpose of constructing sewers. Similar rights are given to municipal and town councils in Part XII of the Urban Councils Act [*Chapter 29:15*]. In the case of ZIMRE, however, it is not a local authority D and neither does it have any powers that are conferred on a local authority by Act of Parliament. Therefore, the only way it can acquire the right to build storm-water drains or sewers over land belonging to another is by acquiring the necessary servitude.

ZIMRE purchased Dispute Farm and a portion of Galway Estate for the E purpose of developing a township. It was given permission under the Regional, Town and Country Planning Act [*Chapter 29:12*] to consolidate the two pieces of land and to subdivide the estate so created into Stands.

It seems clear, from the papers filed, that when the property was subdivided by ZIMRE into the various Stands, provision was made for matters such as roads, sewerage systems and storm-water drains. In terms of the agreement F of sale filed in the papers, which clearly would be identical to the agreements that would be offered to all other purchasers of Stands in the scheme, every purchaser of a Stand would be expected to visit the Stand and to make himself or herself familiar with the position of the roads, sewerage systems and drains within the scheme. As pointed out by Mr *Gwagwa*, the G purchaser specifically acknowledges in clause 6 of the agreement that he has made himself acquainted with the property and all conditions of title applicable thereto. Although Arthur said that he had visited Stand 6299 and there was no sign of a storm-water drain, there is the letter written by his wife in which she says that they never visited the Stand. Whether or not they visited Stand 6288, however, the applicants are bound by the provisions H

Smith J

A of the agreement of sale that they entered into with ZIMRE. In the preamble to that agreement, it is stated that they are desirous of purchasing the Stand subject to the provisions, terms and conditions of the permit which granted ZIMRE authority to sub-divide the estate. Part II of that permit sets out conditions for inclusion in the deeds relevant to certain specified Stands, one of which is Stand 6288. Clause 4 of that Part provides:

> B "Servitudes over the Stands for all water supply, storm-water drainage channels, sewerage reticulation and other public utility purposes shall be granted by the owners of the Stands as and when required by and at no cost to the relevant authorities."

The applicants claim that they never granted a servitude for the drain. C Unfortunately for them, they have no option. It is a condition of their title that they have to grant a servitude for a storm-water drain whenever one is required. It is clear from the diagram filed that the area was surveyed for, *inter alia*, storm-water drains and that a servitude over Stand 6288 was, and is, required for a storm-water drain. Accordingly, I find that there is a servitude over Stand 6288 as claimed by the respondents.

D That, however, does not dispose of the dispute between the parties. It is a requirement of our law that the dominant tenement must exercise its rights over the servient tenement *civiliter modo*. In *Texas Co (SA) Ltd* v *Cape Town Municipality* 1926 AD 467, Innes CJ expressed the following principle at pp 474-475:

> E "Now the owner of property subject to a servitude of way is bound to allow the holder duly to exercise his right; but the holder on his part is obliged to exercise his right in a reasonable manner, that is, with due regard to the interests of the servient property and its owner. The expression used in the Civil law is *civiliter modo* (see *Digest*, 8.1.9). The same principle is recognised in our law. Thus, it is laid down that the holder of a general F servitude of *via* cannot claim to pass through cultivated land when another route would serve his purpose equally well. (*Voet. Ad. Pand* 8.3.8.). Gluck (*Pandecten*, vol. X, sec. 667, p, 163) points out that this is in accordance with the general principle that a servitude must be exercised *civiliter*, that is, with as much consideration as possible towards the servient property. And Van Leuwen (*Roman-Dutch Law,* G 11.21, sec. 6; *Kotzé*, vol. 1, p. 294) after referring to a number of rural servitudes, of which *via* is one, remarks that they all have this in common, that they must be exercised properly and with the least damage or inconvenience to the *res serviens*."

He went on further to add:

> H "Just as the holder of an ordinary servitude of way must select his route

Smith J

> so as to cause as little prejudice and inconvenience as possible to the A servient property and its owner, so the holder of a servitude of 'siding-way' must so construct his line along the defined route as to prejudice and hamper the servient owner as little as possible in the legitimate use of his property. He must have regard to that obligation in fixing the height of his embankment, for instance; the right of way is his, but in taking the steps necessary for its exercise he must respect the interests and B convenience of the owner of the land. In deciding between two methods of construction, both reasonably practicable, a regard for those interests should be the paramount consideration."

The principle that the owner of the dominant tenement must exercise his servitutal rights *civiliter modo* has been recognised in a number of cases. C Tindall JA in *van den Berg & Anor* v *Rand Water Board* 1945 AD 691 at 705 said:

> "In the interpretation of the present servitude, the South African cases in regard to servitudes conferring grazing rights seem to me only relevant in so far as they emphasise the principle that the owner of a servitude must exercise it *civiliter modo* and, generally speaking, may not make D the position of the servient owner more burdensome than is necessary for the proper exercise of his right."

See also *Kakamas Bestuursraad* v *Louw* 1960 (2) SA 202 (A), *du Plessis* v *Pieterse* 1970 (3) SA 468 (C) and *Brink* v *van Niekerk en' n Ander* 1986 (3) SA 428 (T). E

In the last-mentioned case, which dealt with a right of way, the court held that since the applicant had nowhere alleged that the owner of the dominant tenement had acted in an uncivilised, inconsiderate or burdensome manner with regard to the applicant's property, or that she had not shown the care and consideration of a *bonus pater-familias*, and that there were no allegations of F damage or inconvenience, no case had been made that she had failed to exercise her servitutal rights *civiliter modo*.

I accept that, in the case before me, the storm-water drain is necessary and cannot be moved. I fail to see, however, why it cannot be covered. In his opposing affidavit the General Manager of the Estate Agent said that "it is generally accepted that in residential areas, storm drains are not covered" and G that that is only done on commercial properties and industrial Stands. However, he does not quote any authority for his averment. It is merely a bald allegation. Neither does he say that it is not possible to cover the drain. No doubt it will be more expensive but that would not be an excuse for not doing so. It might well be that storm-water drains that are built alongside roads are not covered, but I cannot agree that that must also be the case with H

Smith J

A storm-water drains on private Stands. However, even if it were that it is generally accepted that such drains are not covered in residential areas, I do not agree that that can be accepted in the case of Stand 6288. The dimensions of the drain are such that a substantial part of the Stand is rendered unusable. What is even more undesirable is that a very dangerous hazard is created. The ordinary married couple expects to have children. It would be very worrying, B and very dangerous, to have small children living on the property when there is a drain 2,5 metres wide and 1,5 metres deep running the length of the Stand. During the rainy season when it is full, or even only partly full, it would be extremely dangerous and even during the dry weather it would be dangerous. A child, or even an adult, falling into a drain 1,5 metres deep could easily break an arm or a leg or even its neck and cause serious injury or even death.

C I consider that ZIMRE must be required to cover the drain in order to avoid exposing the applicants and their family and visitors to any danger created by an open drain. In order to enable the applicants to utilise fully the Stand which they have purchased, I consider that the top cover of the drain must be at least half a metre below the surface.

D It is ordered that:

1. the first respondent shall, before 31 August 2002, cover the storm water drain on Stand 6288 Zimre Park in the District of Goromonzi and rehabilitate the area above it so that there is at least half a metre of soil on top of the drain; E
2. the costs of this application shall be paid by the respondents, the liability being joint and several, the one paying the other to be excused.

Matimba & Muchengeti, applicants' legal practitioners

F *Zamchiya & Costa*, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/DIRECTOR OF WORKS & ANOR v NYASULU & ORS 2002 (1) ZLR 658 (S)

DIRECTOR OF WORKS & ANOR v NYASULU & ORS 2002 (1) ZLR 658 (S)

Citation	2002 (1) ZLR 658 (S)
Case No	Judgment No. S-27-02
Court	Supreme Court. Harare
Judge	Chidyausiku CJ, Ebrahim JA & Ziyambi JA
Heard	28 February 2002
Judgment	20 June 2002
Counsel	*P Nherere*, for the appellants *A Mugandiwa*, for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *disciplinary action — warning — entitlement of employee to be heard before warning issued — transfer other than in accordance* D *with wishes of employee — right of employee to be heard*

Headnote

The respondents, farm managers employed by the City of Harare, received warning letters from the appellant, based on allegations of unsatisfactory performance of their duties. They refused to sign the letters, not knowing what the consequences of signing would be. Their immediate E superior regarded their failure to sign as "disrespectful". Some time later the respondents received letters transferring them elsewhere in the council's service. Although the council's Chamber Secretary acknowledged that the letters of warning and the transfers should be revoked, nothing was done, and the respondents obtained an order from F the High Court setting aside the transfers. On appeal:

Held, that a hearing should have been held before a warning was issued, a warning being a disciplinary measure. Even if the transfers had been justifiable as merely administrative moves and not punitive ones, the respondents had a legitimate expectation of being heard before being transferred, so that their views, wishes and personal circumstances G could be taken into account.

Cases cited

Admin, Transvaal & Ors v Traub & Ors 1989 (4) SA 731 (A)

Gemi v Min of Justice, Transkei 1993 (2) SA 276 (TkG)

Health Professions Council v McGown 1994 (2) ZLR 329 (S) H

Ziyambi JA

A *Kanonhuwa v Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H)

Taylor v Min of Education & Anor 1996 (2) ZLR 772 (S)

Case information

P Nherere, for the appellants

A Mugandiwa, for the respondents

Judgment

B **ZIYAMBI JA:** This is an appeal against a judgment of the High Court setting aside a decision taken by the appellant to transfer the respondents.

The respondents are farm managers employed by the City of Harare on farms owned by the City. The City carries out cattle rearing projects on 3 farms, namely, Ingwe Farm, Crowborough Farm and Pension Farm. Pasture on the C farms is irrigated by partially treated effluent sludge. The goal of the City is to combine effective pollution control with commercially viable farming operations. Farming operations are controlled by the appellant. There is a farm manager on each of the three farms, who is responsible for the day to day management of the farm. The farm managers report to the Farming Manager who in turn reports to the appellant.

D On 8 December 1999, a letter of warning was served on the first respondent by the Farming Manager. The first paragraph of the letter read:

> "I wish to warn you that your behaviour in respect of the following item (marked X) is considered reprehensible/misconduct and has been noted in your file. Whilst no further action may be taken in this case, any future E recurrence of such behaviour may result in a recommendation for your dismissal from Council's service."

The items marked X were "idleness", "inefficiency/carelessness", and "failure to obey lawful instructions". The first respondent refused to sign not knowing what the signature of the document would entail and what the consequences to him would be.

F On 15March 2000, another letter was served on him. In this letter the Farming Manager described as disrespectful the first respondent's refusal to sign the letter of warning "when the cattle death rate at Ingwe Farm is so high" and concluded that:

> "the situation explained above shows a continuous and costly deterioration G in performance resulting from disregard of both written and verbal instructions, neglect of duty and over-reliance on some employees who in turn fail to meet the expected performance standards."

He recommended:

> "7.2.1 That Mr Nyasulu be transferred to another farm in order to break H the link between himself and some trusted employees and also to

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encourage an innovative approach to duty in a different A environment.

> 7.2.2 That Mr Nyasulu's performance be monitored more closely and if he does not improve his attitude and performance, he be subjected to very strong disciplinary action."

The other two respondents received letters similar to annexure 'B'. In the B letter to the second respondent, the conclusion arrived at was:

> "The comparison between the two sets of 5-year production periods and the high financial losses show a continuous deterioration in the commitment by the manager to his duties which should not be allowed to go on indefinitely." C

Paragraph 7.2 of the recommendations provided:

> "That Mr Bobo be monitored and *stiffer disciplinary measures be taken on him* if his performance does not improve" (my emphasis).

With regard to the third respondent, the letter served on him concluded as follows: D

> "The information given above shows a serious neglect of duty by the manager, resulting from disregard of written and verbal instructions, and leaving all the work to his subordinates."

The letter recommended that the third respondent be transferred to another farm "where he will work with different employees in a different environment" and that he be subjected to "very serious and close supervision with decisive E and strong disciplinary measures being instituted on him if he fails to improve his performance".

All the respondents wrote their responses which are annexed to the founding affidavit. In effect, they denied the allegations made in the letter of warning, citing the reason for the increase in the mortality rate as lack of adequate F funding.

Nothing further was heard until 2 January 2001 when the respondents received letters from the appellant advising them of their transfer effective from 9January 2001.

Aggrieved by the appellant's decision, the respondents consulted legal G practitioners who entered into correspondence with the appellant's officials in an effort to persuade them to reverse the transfers on the grounds that they amounted to punitive measures taken against the respondents who were entitled to a hearing before the decisions were made.

In a letter dated 8January 2001, addressed to the respondents' legal H practitioners, the Chamber Secretary of the City of Harare wrote:

2002 (1) ZLR p661

Ziyambi JA

> A "On the question of the warning letter we further concede that, in so far as a warning is a penalty, it has to be founded on a finding of guilty, which in turn should be founded on an inquiry. I have therefore advised the relevant department to consider revoking same."

Notwithstanding the above, neither the letters of warning nor the transfers were revoked and the respondents applied to the High Court for an order B setting aside the transfers in question. The High Court found in their favour and granted the order sought.

In his grounds of appeal, the appellant took issue with the finding by the trial court that the transfer was punitive. There was, it was alleged, no punishment at all and accordingly the respondents' rights, as protected by the principles C of natural justice, had not been breached. In any event, so it was submitted, the decision to transfer was no more than an administrative decision made in terms of clause 21 of SI 66 of 1992, the collective bargaining agreement for the Harare Municipality. To the extent that no prejudice was suffered, the transfers were legitimate.

D Section 21 provides as follows:

> "21.(1) A head of department may permanently transfer an employee from his position or occupation within his department —
>
> (a) which has equivalent rates of pay, hours of work, type of work and terms and conditions of employment without the consent of the employee; E
>
> (b) which is not equivalent within the meaning of para (a), with the consent of the employee.
>
> (2) The employer may transfer an employee from his position or occupation to another position or occupation in another department —
>
> (a) for a period not exceeding three months, without the consent of the F employee; or
>
> (b) for a period in excess of three months, with the consent of the employee.
>
> (3) An employee who has been temporarily transferred in terms of subclause (2) shall, for the duration of such transfer — G
>
> (a) receive pay and allowances no less favourable than the pay and allowances which he received, or would have received in his previous department; and
>
> (b) retain his seniority in his previous department."

This argument was rejected by the learned judge in the court *a quo*. At p 127 H of the record, the learned judge said:

2002 (1) ZLR p662

Ziyambi JA

> "I cannot accede to this submission. The letters that were written to the A applicants contained, in the first part, fairly detailed allegations of alleged negligent conduct and each of these letters conclude their recommendations by suggesting that the action to be taken is one of transfer and further that the conduct of these employees should be monitored on a strict basis. Thereafter, strong disciplinary measures B should be taken in the future."

There is no doubt that the letters contain serious allegations of misconduct against the respondents. The learned judge was, in my view, justified in reaching the conclusion that:

> "even if the penalty of transfer was not involved, I would have thought that they still would have been justified in challenging a mere disciplinary C measure in the form stated in the recommendation, namely, that the applicants were to be monitored closely and, that if they did not improve their attitude and performance they were to be subjected to strong disciplinary action. This was an extremely adverse finding

> likely to affect the applicants' future prospects in their careers and is one that should be taken after a proper enquiry if the rules of natural justice are D to be complied with."

In any event, in a clear acknowledgement that there was an obligation on the appellant to hold an enquiry and afford the respondents an opportunity to controvert the allegations against them before issuing the letters of warning, it was conceded by the Chamber Secretary of the second appellant E that the warning was a disciplinary measure and ought to have been founded on a finding of guilt which in turn should be founded on an enquiry. Since there had been no hearing it was recommended that the appellant should revoke the warning. This course the appellant unfortunately failed to adopt.

The contention on behalf of the appellant — that the transfers were wholly F unrelated to the adverse findings contained in the letters of warning and that the appellant had acted in terms of SI 66 of 1992 — was found by the learned judge to have been an afterthought as there was no indication in the letter of transfer that it was being done in terms of the said statutory instrument. He also found that the letters of warning, as well as the events following it, G give rise to the unavoidable conclusion that the transfers were clearly punitive and were made upon the basis of the recommendations of the Farming Manager as set out above.

I am in respectful agreement with both conclusions reached by the learned judge. It is, therefore, my view that the learned judge was correct in holding that the rules of natural justice had not been complied with in that the H

Ziyambi JA

A respondents were not afforded a hearing before the punitive measures of warnings and transfers were taken against them.

The respondents further contended that even if this court were to hold that the appellant, in ordering the transfers, had acted in terms of SI 66 of 1992, and was merely exercising an administrative function, they had a legitimate B expectation to be heard before the decision to transfer them was taken. The legitimate expectation doctrine has been described as:

> "sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms C of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken … In practice, the two forms of expectation may be interrelated and even tend to merge":

per Corbett CJ in *Admin, Transvaal & Ors* v *Traub & Ors* 1989 (4) SA 731 (A) D at p 758; and, at p 761D-H:

> "where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid E of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled, it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate F expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration."

G The doctrine, which is an extension of the principle of natural justice, has been followed in this jurisdiction. See *Health Professions Council* v *McGown* 1994 (2) ZLR 329 (S); *Taylor* v *Min of Education & Anor* 1996 (2) ZLR 772 (S);

In *Taylor*'s case *supra*, this court applied the doctrine to unwilling transferees H of the public service. In so doing, Gubbay CJ quoted, with approval, the

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Ziyambi JA

following passage from *Gemi* v *Min of Justice, Transkei* 1993 (2) SA 276 (TkG) A :

> "Officials entrusted with public power must exercise such power rationally and fairly. In order to act rationally and fairly, the decision-maker would of necessity have to apply his mind properly to all relevant aspects and circumstances pertaining to a decision and in order to do this he would B in most instances be obliged to afford the person affected by the decision a hearing prior to coming to his decision. Officials are not relieved of this duty except to the extent that a departure from the rules of natural justice is expressly or impliedly sanctioned by the relevant enabling legislation. In the absence of such statutory authorisation, a departure from the rules of natural justice can only be justified in circumstances where it is C necessary to promote some value or end of equal or greater significance than natural justice or, to put it differently, 'where circumstances are so exceptional as to justify such a departure' (*per* Leon J in *Dhlamini* v *Minister of Education and Training & Ors* 1984 (3) SA 255 (N) at 257H). By approaching the test in this manner a balance can be struck between:
>
> 'the need to protect the individual from decisions unfairly arrived at by D a public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in the administration'."

See also *Kanonhuwa* v *Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H).

Thus, it is from a standpoint of fairness and reasonableness that the situation E must be viewed and that necessarily entails, in the context of the present matter, that the views, wishes and personal circumstances of the respondents ought to have been taken into account before the decision to transfer them was made.

The three respondents had lived and worked at the respective farms for F periods of 9, 19 and 18 years, respectively. They had settled on the farms and, it was submitted on their behalf, the schooling of their children would be affected by the transfer. It seems to me, although the matter does not turn on this point, that it could be argued that they had a legitimate expectation to be consulted and allowed to make representations before the decision to transfer them was taken. G

It is no answer for the appellant to say, as was submitted in his heads of argument, that "the applicants put their side of the story and that in fact the decision to transfer was made after due process". The reference there is to the responses made by the respondents in protest against the letters of warning and recommendations for their transfer made by the Farming Manager without affording them an opportunity to be heard. It is upon these H

Ziyambi JA

A recommendations that the appellant was found by the court *a quo* to have acted in issuing the letters of transfer.

As the learned judge remarked, even if the penalty of transfer had not been imposed the appellants would have had an entitlement to be heard before the issue of the letters of warning.

B It is well established that the ability to make representations after the decision has been made rarely cures the procedural defect of a prior fair hearing:

> "The general rule is that once a decision has been reached in violation of natural justice, even if it has not been implemented, a subsequent hearing will be no meaningful substitute. The prejudicial decision taken will be set aside as procedurally invalid. In this way, the human inclination to C adhere to the decision is avoided."

See *Taylor* v *Minister of Higher Education & Anor supra* and *Health Professions Council* v *McGown supra*.

Accordingly, it is my view that the learned judge correctly found in favour of the respondents and the appeal is therefore, dismissed with costs.

D CHIDYAUSIKU CJ and EBRAHIM JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

E *Wintertons*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/NDEBELE v INTERNATIONAL CROPS RESEARCH INSTITUTE FOR SEMI-ARID TROPICS 2002 (1) ZLR 666 (H)

NDEBELE v INTERNATIONAL CROPS RESEARCH INSTITUTE FOR SEMI-ARID TROPICS 2002 (1) ZLR 666 (H)

Citation	2002 (1) ZLR 666 (H)
Case No	Judgment No. HB-65-02
Court	High Court, Bulawayo
Judge	Chiweshe J
Heard	14 June 2002
Judgment	20 June 2002
Counsel	*J Sibanda*, for the applicant *J Tshuma*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Employment — *contract — termination — right of employee to receive* D *salary and other benefits due to him — does not remove employer's right to set off any liquidated debts owed by the employee to the employer*

Headnote

The applicant was engaged by the respondent on a fixed-term contract, which was renewable on certain conditions. Shortly before the contract E was due to expire, the applicant obtained a loan from the respondent. The loan was repayable over a twelve month period, alternatively, on termination of the contract of employment. The contract was not renewed. The respondent withheld the applicant's last month's salary and benefits, invoking the doctrine of set-off. It was argued for the F applicant that the respondent was not entitled to do this, as under s 13 of the Labour Relations Act [*Chapter 28:01*], she was entitled to all the wages and benefits due to her at the time of termination and the respondent was not entitled to withhold them without Ministerial authority.

Held, that the right given by s 13 of the Act to an employee, at the conclusion G of a contract of employment, to receive his pay and benefits does not override the employer's right to set off any liquidated debts owing to him by the employee. Where an employer's indebtedness to an employee has been extinguished or reduced by operation of set-off, the wages and benefits are no longer due or owed to the employee as contemplated by the section. It could not be said that an employer engages in an unfair H

Chiweshe J

A labour practice or acts unreasonably or in bad faith when he withholds a liquidated amount in wages or benefits in order to set off an equally liquidated debt due to him by an employee.

Legislation considered

Labour Relations Act [*Chapter 28:01*], s 13

Case information

B *J Sibanda*, for the applicant

J Tshuma, for the respondent

Judgment

CHIWESHE J: On or about 15 March 2001, the respondent engaged the applicant as its purchasing and stores officer. The engagement was for a C period of one year, renewable upon certain conditions. In January 2002, two months before the engagement period prescribed, the applicant obtained a loan from the respondent in the sum of $225 000. This loan was payable over a period of twelve months, or alternatively, on termination of the contract of employment. Subsequently, by letter dated 28 February 2002, the respondent advised the applicant that her contract of employment would not D be renewed.

The respondent withheld the applicant's March 2002 salary and other benefits. These monies were channelled towards liquidating the applicant's indebtedness to the respondent on account of the outstanding moneys loaned to the applicant. In doing so, the respondent in effect invoked the doctrine of E set off. It is not in dispute that the applicant owes this money nor is it in dispute that the debt became due and payable upon termination of the contract of employment. The sole source of contention is whether the respondent is entitled to withhold payment of the applicant's March 2002 salary and other benefits without a court order and without her consent in order to set off a loan advanced by the respondent to the applicant. It is argued on behalf of the F applicant that the relationship between her and the respondent was that of employee and employer and therefore subject to the provisions of the Labour Relations Act [*Chapter 28:01*]. As such, any agreement that may be reached between the employer and the employee is to the extent that it may be in conflict with the provisions of that Act, null and void. Section 13 of the Act G provides that where a person's employment contract is terminated, he shall be entitled to the wages and benefits due to him up to the time of termination and "the employer concerned shall pay such entitlements" as soon as reasonably practicable. Further, s 13(2) of the Act provides that an employer who, without Ministerial authority, withholds or unreasonably delays payment of such entitlements shall be guilty of an offence. In this case, so it H is argued, because no ministerial authority was obtained by the respondent,

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a criminal act has been committed and that the court should censure the A respondent. The court is asked to order and direct the respondent to release the monies so withheld and allow the applicant to liquidate the loan at a monthly rate. Further the court is asked to order that costs be awarded as between attorney and client against the respondent.

This application is without merit. I agree with the respondent's submissions B at para 8 of their heads of argument where it is stated:

> "It is submitted that the reliance on s 13 is misplaced. The provision does not outlaw the common law doctrine of set off. Where an employer's indebtedness to an employee has been extinguished (or reduced) by operation of set off, the wages or benefits concerned are no longer due C or owing to the employee as contemplated in s 13."

The two subsections provide:

> "(1) Subject to this Act or any regulations made in terms of the Act, whether any person —
>
> (a) is dismissed from his employment or his employment is otherwise terminated; or D
>
> (b) resigns from his employment; or
>
> (c) is incapacitated from performing his work; or
>
> (d) dies;
>
> he or his estate, as the case may be, shall be entitled to the wages and E benefits due to him up to the time of such dismissal, termination, resignation, incapacitation or death, as the case may be, including benefits with respect to any outstanding vacation and notice period, medical aid, social security and any

pension, and the employer concerned shall pay such entitlements to such person or his estate, as the case may be, as soon as reasonably practicable after such event, and failure to do F so shall constitute an unfair labour practice.

(2) Any employer who without the Minister's permission withholds or unreasonably delays the payment of any wages or benefits owed in terms of subs (1) shall be guilty of an offence and liable to a fine not exceeding two thousand dollars or to imprisonment for a period not G exceeding one year or to both such fine and such imprisonment."

Now if it had been intended by means of these provisions to alter the existing common law with regards the doctrine of set off, the legislature would have declared such an intention in clear and unequivocal language. There is nothing in s 13 of the Act that suggests that to have been the intention of the legislature. The section is only operative where wages or benefits are due or H

Chiweshe J

A owing to the employee. Where such wages or benefits are no longer due or owing on account of the employee's indebtedness to the employer, the section cannot be invoked. In my view, the intention of the legislature was to proscribe unfair labour practices and to rein in errant employers. It is clear to me that by these provisions the legislature intended to protect the employee against employers who may be acting *mala fides*. It cannot be said that an B employer such as the respondent engages in an unfair labour practice or acts unreasonably or in bad faith when he withholds a liquidated amount in wages or benefits in order to set off an equally liquidated debt due to him by an employee.

In the premises, I would dismiss the application with costs.

C *Job Sibanda & Associates,* applicant's legal practitioners

Webb, Low & Barry, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/ATTORNEY-GENERAL v MPOFU & ANOR 2002 (1) ZLR 670 (S)

ATTORNEY-GENERAL v MPOFU & ANOR 2002 (1) ZLR 670 (S)

Citation	2002 (1) ZLR 670 (S)
Case No	Judgment No. S-50-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	20 June 2002
Judgment	20 June 2002
Counsel	*M Nemadire*, for the applicant *E Mushore*, for the respondents
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Criminal procedure — *bail — appeal by Attorney-General against grant of bail by judge — leave to appeal — time within which leave must be* D *obtained — whether failure to obtain leave may be condoned*

Headnote

The effect of s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read with s 44(5) of the High Court Act [*Chapter 7:06*] is that where the Attorney-General wishes to appeal against an order of E a judge of the High Court admitting an accused person to bail, he has to obtain the leave of the court *a quo* or the leave of a judge of the Supreme Court within seven days of the court order if the accused person is to remain in custody beyond seven days. This is a statutory requirement and failure to comply with it cannot be condoned under r 4 of the Rules of the Supreme Court, 1964. F

Case cited

S v Dzawo 1998 (1) ZLR 536 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121 G

High Court Act [*Chapter 7:06*], s 44(5)

Supreme Court Rules, 1964, r 4

Case information

M Nemadire, for the applicant

E Mushore, for the respondents H

2002 (1) ZLR p671

Judgment

A Before: **CHIDYAUSIKU CJ**, in Chambers, in terms of r 19 of the Supreme Court of Zimbabwe Rules

This is an appeal by the Attorney-General against the grant of bail to the respondents by the High Court, Bulawayo.

The grounds of appeal appear in a notice of appeal which provides as follows: B

> "1. The learned trial judge did not give due weight and consideration to the State's fears that the respondents may abscond if granted bail.
>
> 2. The learned trial judge did not give due weight to the facts placed on record pointing to the very real possibility that the respondents' will abscond if granted bail."

C There is, also before me, an application headed Urgent Court Application". That application is supported by a certificate of urgency, a founding affidavit, a condonation affidavit (*sic*) and a draft order. The draft order reads as follows:

> "That the application is granted and for the avoidance of doubt, it is hereby ordered that the decision liberating the Respondents, given by a High D Court Judge in Bulawayo, on 14 June 2002, whilst a Condonation Application filed under S-180-02 was still pending, is *suspended*."

The founding affidavit was deposed to by the Director of Public Prosecutions. It reads, in part, as follows:

> "When the two respondents were granted bail I instructed our Bulawayo E Office to immediately note an appeal in terms of section 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. I also instructed our Bulawayo Office to prepare the necessary notice which they duly did.

Subsequently, I received by way of fax, copies of the notice and grounds F of appeal which I assigned to our Appeals Section.

It was subsequently brought to my attention that no notice of appeal had been filed with the Supreme Court. I checked with Mr *Nemadire* who explained that he was under the impression that papers had been duly filed with the Supreme Court.

I, thereafter, instructed Mr *Nemadire* to rectify the anomaly. He G subsequently did so and deposed to an affidavit annexed to this application in which he explains what took place.

May it be noted that the notice of appeal was filed with the Bulawayo High Court and served on respondents' Counsel on 31 May 2002, two days after bail had been granted. This shows that the Attorney-General H was serious in his intention to appeal.

2002 (1) ZLR p672

Chidyausiku CJ

The condonation sought by Mr *Nemadire* had not been deliberated upon A when the High Court subsequently ordered the release of the respondents on the basis that no appeal had been heard within seven days of the suspension of the order granting bail.

I pray that the order of the High Court to release respondents prior to the hearing of the application for condonation for late noting of appeal and B the actual hearing of the appeal be set aside."

Also in support of the Urgent Court Application was an affidavit from Mr *Nemadire* which reads as follows:

"I, the undersigned, MORGEN NEMADIRE, duly sworn gives the Honourable Court to understand that: C

1. I appear in this matter as Counsel for the appellant.
2. The Notice of Grounds of Appeal have been filed after the required 7 day limited today (12 June 2002) with this court.
3. There was some *mix-up* between the Appellant (The Attorney-General's two Offices (i.e. Bulawayo and Harare):

   After the court *a quo* delivered its judgment on 29 May 2002, the D State Counsel then, compiled and filed Notice and Grounds of Appeal against the judgment on 31 May 2002.

   See: Date Stamp on Notice and Grounds.

   It is most probable that State Counsel then, rest assured that Appellant (the State), had duly notified the court as well as provided E the Grounds upon which the appeal was to be made.

   It was only as late as the 12 June 2002, when the appellant's counsel (in the Harare Office), realised that the Notice and Grounds had not been duly filed with the Supreme Court.

   All in all, it is a result of communication breakdown between or F amongst all parties concerned, here (i.e. State Counsel, Bulawayo's High Court Assistant Registrar and Respondent's Counsel).
4. Could this Honourable Court, condone the late filing of Notice and Grounds of Appeal in the matter under S-180-02."

It is quite apparent from the relief sought and the supporting affidavits that G this application is a chamber application and not a court application. A court application is an application to this court usually made up of a minimum of three judges. A chamber application is an application to a single judge of this court. I will, accordingly, treat this application as a chamber application. It is quite apparent that both parties wish this matter to be treated as an urgent chamber application. H

2002 (1) ZLR p673

Chidyausiku CJ

A It is not clear on the papers which particular rule of this court the Attorney-General had failed to comply with and was now seeking condonation. However, the issue of condonation became irrelevant when Mr *Nemadire* conceded that no leave to appeal against the admission to bail of the respondents had been sought and granted from the learned judge who presided over this matter. The failure by the Attorney-General to seek leave B to appeal against the order granting bail is a fatal omission to this appeal.

A proper reading of s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read with s 44(5) of the High Court Act [*Chapter 7:06*] reveals that an appeal from the High Court to this court against the granting or refusal to grant bail is not as of right. The leave of the presiding judge is C required. If such leave is refused only then can a judge of this court entertain an application for leave to appeal and, if such leave is granted, the appeal itself. While there might be some doubt as

to whether the refusal or granting of bail is an interlocutory order or judgment in the usual sense, it is so for the purposes of s 121 of the Criminal Procedure and Evidence Act as read with s 44(5) of the High Court Act. In the case of *S* v *Dzawo* 1998 (1) ZLR 536 (S), D this court proceeded on the basis that such leave is required. Indeed, the Attorney-General did not seek to argue that such leave is not required.

Rule 4 of the Supreme Court Rules empower, a judge of this court to condone or authorise a departure from the Rules of this court. That empowerment does not include the condonation of failure to comply with a statutory requirement. The requirement that the leave of the court *a quo* be obtained prior to this E court hearing the appeal is a statutory requirement which I have no jurisdiction to condone. In the absence of an application for that leave to the court *a quo*, the Attorney-General has no leg to stand on.

The practical effect of s 121 of the Criminal Procedure and Evidence Act as read with s 44(5) of the High Court Act is that where the Attorney-General F wishes to appeal against an admission to bail he has to obtain the leave of the court a quo or the leave of a judge of this court within seven days of the court order if the accused person is to remain in custody beyond seven days. This was not done in this case.

By reason of the Attorney-General's failure to comply with the provisions of G s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read with s 44(5) of the High Court Act this appeal is not properly before me. The appeal, if one can call it that, is accordingly dismissed.

Webb, Low & Barry, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/S v ALLEGRUCCI 2002 (1) ZLR 674 (H)

S v ALLEGRUCCI 2002 (1) ZLR 674 (H)

Citation	2002 (1) ZLR 674 (H)
Case No	Judgment No. HB-37-02
Court	High Court, Bulawayo
Judge	Sibanda J & Cheda J
Heard	20 June 2002
Judgment	20 June 2002
Counsel	*R M Fitches*, for the appellant *M Moya*-Matshanga, for the State
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *general principles — factors affecting — contrition and restitution of stolen property — importance of* D

Headnote

The fact that a person has been convicted of the theft of a substantial amount of money or of goods to a substantial value does not mean that he should not be given the option of a fine. Each case must be considered on its own merits. The individual accused and his conduct are of paramount E importance. If his conduct subsequent to the commission of the offence signifies that of a contrite, repentant and reformed individual then he ought to be rewarded by a non-custodial punishment.

The accused pleaded guilty to and was convicted of insurance fraud involving a large amount of money. When the fraud was revealed he had admitted the offence, co-operated with the insurance company and not F only repaid what he had received but also paid the costs of the company's investigations plus interest. He was sentenced to a lengthy term of imprisonment, and appealed.

Held, that the appellant deserved credit for his conduct and this should be expressed by affording him the option of a fine. G

Cases cited

S v Hapaguti S-142-87

S v Malume 1998 (2) ZLR 508 (H)

S v Mambo S-14-95

S v Marimba S-58-90

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

Sibanda J

A *S v Mvula* S-69-92

R v Zindoga 1980 RLR 86 (A)

Case information

R M Fitches, for the appellant

M Moya-Matshanga, for the State

Judgment

B **Sibanda J:** This is an appeal from the regional magistrates court in which the State has conceded that "the sentence does shock the conscience, and that a fine would meet the justice of the case".

In view of the State concession, we decided not to hear submissions on merits, but invited both counsel to make submissions on the quantum of the C fine to be imposed.

On 24 September 2001, the appellant, a South African citizen was arraigned before a regional magistrate on a charge of fraud. He was convicted on his own plea of guilty and sentenced to three years' imprisonment with labour of which one year imprisonment with labour was suspended for five years on the usual conditions of good behaviour. He now appeals against sentence only.

D The appellant owned a Mazda (twin cab) registration number 726-226H. The said vehicle was under an insurance cover with Eagle Insurance Company. He fraudulently misrepresented to the insurance company that the said vehicle was stolen in South Africa. On that basis, he claimed and was paid an indemnity cover in the sum of $1 560 000 for the vehicle. He defrauded E the company in order to raise funds for the operation of his business, in particular to set up a new business in Zimbabwe.

The insurance company after paying the said amounts conducted its own investigations of the alleged theft. It discovered that the alleged theft was false and that the appellant had in fact sold

the vehicle. When approached, the appellant admitted the fraud, co-operated with the insurer and voluntarily on F his own initiative and accord made full restitution including the costs of investigations plus interest at the rate of 45 per cent *per annum* which rate was 23 per cent *per annum* above the then prevailing rate of 22 per cent *per annum*. He paid in restitution the sum of $2 300 000.

The appeal is against sentence only on the grounds that the court *a quo* misdirected itself in that it failed to have due regard and accord due G consideration to all the mitigating factors, in particular, that the appellant had made full restitution in an amount far in excess of the amount defrauded.

It appears to me that this case falls within the ambit of the case of *S* v *Mambo* S-14-95 (not reported) cyclostyled judgment at p 5 in which the learned judge of appeal, McNally JA stated, "it seems to me that it is also in the Zimbabwean H tradition that compensation, restitution and restoration are at the heart of

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Sibanda J

criminal justice, rather than mere punishment which benefits the victim not A at all". See also *R* v *Zindoga* 1980 RLR 86 (A) at 88F, *S* v *Mpofu (2)* 1985 (1) ZLR 285 (H) at 294 *et seq*, *S* v *Hapaguti* S-142-87 (not reported) at 3, *S* v *Marimba* S-58-90 (not reported), *S* v *Mvula* S-69-92 (not reported) at 8 and *S* v *Malume* 1998 (2) ZLR 508 (H) at 512G.

The instant case is distinguishable from the general line of cases cited *supra*, B in that they mainly deal with the issue of the desirability to induce an accused to pay restitution by suspending part of the sentence on those conditions, whereas in the present case the appellant has already made full restitution without inducement and indeed on his own initiative prior to conviction and sentence.

The State has in my view, on these facts, properly conceded that the sentence C does induce a sense of shock and that a fitting punishment should have been to give the appellant the option of a fine.

I am in agreement with State counsel that the sentence is rather on the punitive side. It has not, given credit to appellant's payment of restitution far in excess of the amount he defrauded the complainant. Further he brought into this D country US$480 000 for investment. He invested in mining at Turk Mine where he employs 80 people. In addition, he employs 37 people in the construction industry and further he is building a lodge between Bulawayo and Victoria Falls which upon completion will employ about 35 people. He is, therefore, an employer and potential employer of 152 people, most likely with families. Thus the appellant has a direct responsibility of providing E means for subsistance to approximately 500 people, assuming of course that each of the 152 employees has a family of between two to three members apart from himself.

Yes, the court a quo is correct when it states that the amount involved in this case is substantial even if inflation is taken into account. It was for that reason that, even though appellant had paid restitution in full and was sorry, the F magistrate still felt that a "certain term of imprisonment would meet the justice of the case".

This reasoning creates an unmistakable impression that only accused convicted of theft of lesser amounts may be given the option of a fine and not those in the category of the appellant. That approach, to me, would constitute an G untenable situation that would amount to pre-judging such cases of theft involving substantial amounts of money or goods of substantial value.

Such notion or view, in my respectful opinion, can only be based upon a false perception that all accused convicted of theft of substantial amounts or goods of substantial value are incapable of contrition repentence and indeed reformation. H

Sibanda J

A The difference between them may be accounted for in respect of courage, ability and opportunity that avail itself or indeed created. But the fact remains that they are all dishonest members of society. Thus, each case must be considered on its own merits. I would neither subscribe to the notion nor view, that in all cases of accused convicted of theft of substantial amounts of money or goods of substantial value, for that matter, who have on their own B initiative and accord prior to conviction and sentence made good their damage by paying full restitution and in circumstances that

clearly indicate that the said accused is contrite, repentent and certainly reformed, should not be given the benefits of the option of a fine in punishment.

In my respectful view, what should be of paramount consideration and C importance are the individual accused and the facts of the case in respect of his conduct. The question in my submission ought to be, does his conduct subsequent to the commission of the offence, signify that of a contrite, repentant and reformed individual. If all the relevant factors consistent with the above factors are found to be present then the individual ought to be rewarded by a non-custodial punishment.

D In the instant case, appellant paid restitution on his own initiative and accord prior to conviction and sentence. He defrauded the complainant of the sum of $1 560 000. He repaid to the complainant a total amount of $2 300 000. The appellant paid an amount of $740 000 in excess of the amount he defrauded his insurer, which amount is said to include unspecified expenses E paid by the insurer in respect of investigations and interest at the rate of 45 per cent *per annum* which was 23 per cent *per annum* above the prevailing rate of 22 per cent *per annum* interest at the time. Further, the court found as a fact that the appellant was sorry.

It is my respectful opinion that the extent of the restitution elevates the instant case to a level of its own which is not comparable to any of the decided cases F that I have had occasion to study. In addition, the appellant is and has been out on bail since his conviction and sentence. In these circumstances, it is my respectful view that to send the appelant to prison would amount to punitive punishment without purpose and objective. I am of the view, therefore, that the appellant deserves credit for his conduct and the same to be expressed by affording the appellant the option of a fine.

G The appeal is against sentence only. I would, therefore confirm the conviction. I would give the appellant the option of a fine, coupled with a wholly suspended term of imprisonment.

Counsel for the appellant, with the concurrence of the State counsel, submitted that a fine in the region of $100 000 would meet the justice of the H case. This submission is based on the fact that appellant apart from payment

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Sibanda J

in restitution of the actual sum defrauded, has in addition paid a total sum of A $740 000. That a fine of $100 000 would bring the cost of the crime to appellant to $840 000. Thus, it is submitted that that amount should constitute adequate punishment of the appellant.

I am in agreement with that submission. Had the appellant not paid in addition to the restitution, the sum of $740 000 I would have found nothing amiss in B sentencing the appellant to a fine in the region about $500 000. Indeed, to a business person in the mould of the appellant, the cost of his fraudulent conduct in the total sum of $840 000 must have conveyed a salutary lesson to him. That, in my view, ought to constitute a just reward for appellant's misadventure into the realm of dishonesty. Most certainly, he must have learnt his lesson that crime does not pay. For these reasons, I am of the C respectful view that in these circumstances punitive punishment is not called for as it would serve no useful purpose.

Accordingly, the sentence is quashed and set aside, and the following substituted. The accused is to pay a fine in the sum of $100 000 or in default of payment three years' imprisonment with labour. In addition, the accused D is sentenced to three years' imprisonment with labour wholly suspended for five years on condition the accused is not, during that period, convicted of a crime in which dishonesty is an element and that upon conviction is sentenced to imprisonment without the option of a fine.

CHEDA J concurred. E

Webb, Low & Barry, appellant's legal practitioners

Criminal Dvision of the Attorney-General's Office, respondent's legal practioner F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 1/GWAZE v NATIONAL RAILWAYS OF ZIMBABWE 2002 (1) ZLR 679 (S)

GWAZE v NATIONAL RAILWAYS OF ZIMBABWE 2002 (1) ZLR 679 (S)

Citation	2002 (1) ZLR 679 (S)
Case No	Judgment No. S-44-02
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza AJA
Heard	14 May 2002
Judgment	24 June 2002
Counsel	Appellant in person *D Mehta*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Employment — *Labour Court — jurisdiction — whether may award delictual* D *damages*
Practice and procedure — *res judicata — essentials — need for subject-matter to be same*
Words and phrases — *"subject-matter" — meaning of in relation to plea of res judicata*

Headnote

E The appellant was dismissed from his employment by the respondent and appealed to the Labour Relations Tribunal (now the Labour Court) seeking reinstatement. While the matter was still being determined, however, he resigned from his employment and was paid his terminal benefits by the respondent. The Tribunal found that the appellant had been dismissed unlawfully and ordered that he be paid his salary from F the date of his purported dismissal until his resignation. The appellant then issued summons against the respondent in the High Court, claiming back-pay and contractual damages under various heads, as well as delictual damages for pain and suffering, *contumelia* and consequential loss. The court dismissed his claim on the ground that the issues had been decided by the Labour Relations Tribunal and were *res judicata* G between the parties. He appealed to the Supreme Court.

Held, that the requisites for a plea of *res judicata* are that the two actions must have been between the same parties or their successors in title, concerning the same subject-matter and founded on the same cause of complaint; all three requisites must be satisfied.

Held, further, that even if the appellant had claimed delictual damages in his H appeal to the Labour Relations Tribunal, the Tribunal would have had

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no power to award them. In so far as delictual damages were concerned, A therefore, the subject-matter of the proceedings before the Tribunal and the High Court was not the same

because the appellant was not demanding the same thing in each of those proceedings. Hence, the matter was not *res judicata* between the parties.

Cases cited B

African Farms & Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A)

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S)

Banda & Ors v ZISCO 1999 (1) ZLR 340 (S)

Gauntlet Security Svcs (Pvt) Ltd v Leonard 1997 (1) ZLR 583 (S)

Horowitz v Brock and Others 1988 (2) SA 160 (A) C

Trotman & Anor v Edwick 1951 (1) SA 443 (A)

Wanderers FC (Pty) Ltd v Wanderers FC 1977 (2) SA 38 (A)

Legislation considered

Labour Act [*Chapter 28:01*], ss 13(6) & 96(1)(c)

Case information

Appellant in person D

D Mehta, for the respondent

Judgment

GWAUNZA AJA: This is an appeal against the judgment of the High Court, Harare, in which the appellant's claim against the respondent for, *inter alia*, damages for wrongful dismissal, was dismissed. The trial court based its decision on two exceptions raised on behalf of the respondent, and thus did E not hear argument in respect of, nor substantively consider the merits of, the dispute between the parties.

The two exceptions raised on behalf of the respondent were, firstly that the matter was *res judicata* and, secondly, that the appellant's claim was prescribed. The learned trial judge, after finding in favour of the respondent in relation to the plea of *res judicata*, then dismissed the appellant's claim, F with no order of costs against him. He found it unnecessary, in view of his determination, to consider the exception relating to prescription.

Despite the lengthy and somewhat rambling fashion in which the appellant's papers (obviously prepared by himself) were presented, the appellant is in reality submitting that the learned trial judge erred in finding that the matter was *res judicata.* G

The facts of the matter are concisely set out in the judgment of the court *a quo* and are, briefly, as follows. The appellant was employed by the respondent from 1978-92. Between 14 and 17 of January 1992, some 4 000 workers of the respondent went on strike action. Following negotiations between the workers and the respondent, the latter sought to reinstate the workers who had gone on strike on condition that they signed re-engagement forms. The H

A appellant, who was included among those workers considered to have gone on strike, refused to sign the forms with the result that the respondent sought to dismiss him. The appellant took the matter of what he considered to have been an unlawful dismissal, to the Labour Relations Tribunal. [1] He was seeking reinstatement. However, while the process of determining the matter was still underway the appellant tendered his resignation and demanded his B terminal benefits. The respondent, which had initially not accepted the appellant's resignation, eventually paid him all his terminal benefits on 13 April 1992. The Labour Relations Tribunal proceeded to hear the matter and handed down its determination on 15 June 1995.

On 3 July 1996, the appellant issued summons against the respondent claiming, "in terms of s 13(6) of the Labour Relations Act 16 of 1985": C

(i) "gross back pay" of $112 000;

(ii) damages for pain and suffering ($50 000);

(iii) a voluntary early retirement package which he asserted he would have been entitled to had he not been wrongfully dismissed ($88 000);

(iv) damages of $42 000 representing the value of lapsed insurance D policies;

(v) damages for the loss of a house that he alleged he was forced of sell due to his inability to keep up with the payment of rentals and related charges ($75 000);

(vi) damages for emotional distress and *contumelia* that he asserted he suffered after his wife left him due to the destitution occasioned by the E unlawful dismissal;

(vii) damages for the loss of a Social Dimensions Fund Loan that he asserts he would have acquired had he offered himself for voluntary early retirement ($80 000);

(viii) damages for the loss of a second wife who he asserts left him ($45 000); and F

(ix) interest on all amounts claimed at the prescribed rate and costs of suit.

The parts of the Labour Relations Tribunal's determination of the appellant's case, that are relevant to the matter before this court read as follows: [2]

> "… appellant cannot be said to have been involved in the unlawful collective job action. There is no proof to show that he was a striking G employee. With that conclusion, appellant cannot be held to have terminated his contract of employment by not signing the re-engagement form … His dismissal, therefore, was unlawful as on a balance of probabilities appellant did not go on strike.

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> The appellant should, therefore, be paid his full salary from January 1992 A to the day he got his terminal benefits when he is deemed to have resigned. This is up to 13 April 1992."

The Tribunal then gave its order in these words:

> "The order of the Tribunal is that:
>
> (i) the appeal succeeds B
>
> (ii) the respondent is ordered to pay the appellant his full salary from January of 1992 up to 13 April 1992 when appellant is deemed to have terminated his contract of employment."

In interpreting this order, the learned trial judge noted, correctly in my view, as follows:

> "It would appear to this court the Tribunal was saying, in effect, that: C
>
> 1. the plaintiff's dismissal from employment was unlawful; and
> 2. the plaintiff is deemed to have resigned from employment on 13 April when he was paid his terminal benefits."

It is evident that had the appellant not tendered his resignation, demanded and was paid, his terminal benefits, he would have been entitled to reinstatement D and payment of any arrear salaries and benefits. Should such reinstatement not have been possible, the appellant would have been entitled to damages as an alternative thereto, in terms of s 96(1)(c) of the Act which provides as follows: [3]

> "Without derogation from the generality of sections *ninety three* and *ninety five*, a determination made in terms of those sections may provide E for —
>
> …
>
> (c) reinstatement or employment in a job.
>
> Provided that any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment." F

In *Gauntlet Security Services (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S) at 586B, Gubbay CJ explained the effect of this section as follows:

> "By its very wording, as well as read in the context of the section as a whole, it is implicit that the alternative award of damages relates solely to the unlawful termination of the contract of employment. The damages G so specified must arise *ex contractu*."

By the same token, had the appellant not tendered his resignation, his claim for damages over and above the wages and benefits he received, would have

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A been properly premised on s 13(6) of the Act. That is, provided such damages and on the authority of *Gauntlet Security Services* case *supra*, had arisen *ex contractu.* There is, in my view, and given the purpose of the Labour Relations Act as a whole, which is generally, to regulate the conditions of employment and related matters, no reason to suppose that other types of damages are envisaged under this section.

B Section 13(6) of the Labour Relations Act [*Chapter 28:01*] reads as follows:

> "(6) Nothing contained in this section shall be construed as precluding a person referred to in subsection (1) or his representative or the executor of his estate, as the case may be, from claiming over and above any wages or benefits to which he or his estate is entitled in terms of subsection (1), damages for any prejudice or loss suffered in connection with such C dismissal, termination, resignation incapacitation or death, as the case may be."

Section 13 deals with the payment of wages and benefits upon the termination of an employee's employment.

The Labour Relations Tribunal ordered that the appellant be paid his full salary from the time he was unlawfully dismissed to the time that he was D deemed to have resigned. Reinstatement or damages in lieu thereof were no longer an option for the appellant. Even had damages in lieu of reinstatement been payable, they would have been limited to compensation for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. [4] Accordingly, any claim by the appellant for damages *ex contractu* arising out of his unlawful dismissal was E properly found by the court *a quo* to be *res judicata*.

The learned trial judge correctly outlined the requisites of a plea of *res judicata* as follows: [5]

> "The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of a plea of *res judicata* which in turn are that the two actions must have been between F the parties or their successors in title, concerning the same subject matter and founded on the same cause of complaint."

The learned judge found that the issue of the plaintiff's unlawful dismissal was canvassed and determined by the Labour Relations Tribunal, which had issued a final and definitive judgment regarding the issue raised.

G My view is that this finding is correct and sound, but only in so far as the part of the appellant's claim that related to damages arising *ex contractu* is

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concerned. The correctness of this finding is reinforced in the following A words, cited with approval by Sandura JA in *Banda & Ors* v *Zisco* 1999 (1) ZLR 340 (S) at 342: [6]

> "The previous judgment is only *res judicata* as regards matters between the parties which the judgment actually affects and when the plea is raised, it therefore becomes essential to determine whether the present claim is actually affected by the previous judgment." B

Applying this principle to the appellant's claims, it is evident that the judgment of the Labour Relations Tribunal affected the parts of the appellant's claim relating to:

(i) "gross" back pay of $112 000;

(ii) voluntary early retirement package of $88 000; and C

(iii) Social Dimension Fund loans that the appellant said he would have acquired had he offered himself for voluntary early retirement.

The issue of back pay was adequately dealt with by the Labour Relations Tribunal when it ordered that the appellant be paid his arrear salaries for the duration of his unlawful dismissal. It cannot be resuscitated. By his action in voluntarily resigning from his job, the appellant forfeited any right he may D have had to a voluntary early retirement. The same applies to the Social Dimension Fund loan which the appellant, correctly or not, claims was linked to voluntary early retirement. However, a closer look at the breakdown of the appellant's claims in his declaration shows that in addition to these claims the appellant was claiming other damages, not on the basis of his contract of employment but on the basis of the law of delict. He was, for instance, E claiming damages for pain and suffering, the value of lapsed insurance policies, forced sale of his house because he could not keep up with certain payments like rent and rates, and damages for "emotional distress and *contumelia*".

It is an accepted principle of the law that the existence of a concurrent contractual liability is no bar to an action in delict, provided that the F requirements of delictual liability are also satisfied. [7] The difference between these two actions is succinctly stated as follows by van den Heever JA in *Trotman & Anor* v *Edwick* 1951 (1) SA 443 (A) at 449B.

> "A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he had sustained because of the wrongful conduct G of another, in other words that, amount by which his patrimony has been diminished by such conduct should be restored to him."

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A Whatever the merits or demerits of his claims and regardless of whether or not the appellant would be able to link these damages to his unlawful dismissal, the point remains that the appellant did not bring those delictual claims before the Labour Relations Tribunal for determination, even had such Tribunal had the jurisdiction to deal with such matters (see above).

The question that then arises is, if in its determination of the appellant's B appeal against wrongful dismissal the Labour Relations Tribunal did not address its mind to these delictual damages, can it now be said that the matter is *res judicata*?

For a plea of *res judicata* to succeed all the three requisites outlined above should be satisfied. This point was stressed by Muller JA in *African Wanderers FC (Pty) Ltd* v *Wanderers FC* 1977 (2) SA 38 (A) at 45E; the C learned Judge was quoting Voet 44.2.3. (Gane's translation) while restating the requisites of a plea of *res judicata* as follows:

> "There is nevertheless no room for this exception unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, *so that the exception falls away if one of these three things is lacking*" (my D emphasis).

There is no doubt that the two actions were between the same parties, and that they were founded on the same cause of complaint, i.e. the wrongful dismissal of the appellant. The other requisite, that the two actions concerned the same subject matter has not, in my view, been satisfied. The question that arises is, of course, what is meant by subject matter. The definition was given E in *Horowitz v Brock and Others* 1988 (4) SA 160 at 178 *as* follows:

> "The requisites of a valid defence of *res judicata* in Roman Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties and the *same thing must have been demanded*" (my emphasis).

To illustrate what was meant by the same thing having been demanded, the F learned judge went on to quote the following passage from *African Farms and Townships Ltd* v *Cape Town Municipality* 1963 (2) SA 555A at 562D:

> "… that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings."

G *In casu*, the appellant neither made, nor could he have (given s 96(1)(c) of the Labour Relations Act) made, the issue of the delictual damages in question, "a question in issue" at the Labour Relations Tribunal. That being the case, it cannot be said that in his claim in the court *a quo*, that he was attempting to "resuscitate" the same issue in subsequent proceedings. Nor can it be said

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that the Tribunal came to a decision on the merits of the same issue. The A subject matter of the two actions was not the same.

I find accordingly that the issue of the delictual damages was not dealt with by the Labour Relations Tribunal and was therefore being brought to court, ie the High Court, for the first time. In that respect, that issue was not *res judicata*. The appellant was entitled, barring any other impediment like prescription, and whatever his prospects of success may have been, to a trial B and a determination, on the merits, of his claim.

On the evidence before the court however, this determination in favour of the appellant becomes academic when consideration is given to the exception relating to prescription. Although the learned trial judge did not make a determination on this exception, I find it appropriate, in order to bring

finality to this matter and not give the appellant the false hope that he may succeed C on his claim, to consider and make a determination on the issue, on the strength of the evidence that is before the court.

It is not in dispute that the cause of action, that is the appellant's unlawful dismissal, arose on 22 January 1992. The appellant took the matter to the Ministry of Labour and eventually to the Labour Relations Tribunal. The Tribunal's determination on the matter was handed down on 25 March D 1995. The appellant issued summons in the present matter on 3 July 1996. In view of this court's finding on the plea of *res judicata*, the dispute concerning whether or not prescription was interrupted, whatever its merits, could only have applied to the parts of the appellant's claim that are premised on his contract of employment. The parts of his claim that are based on delict, E having been brought to court for the first time in the court *a quo*, were clearly instituted outside of the prescriptive period of three years. The plea of prescription in that respect therefore succeeds.

All in all the appeal must, therefore, fail. The respondent, which ordinarily would have been entitled to costs, has chosen to forego them. Therefore, no order of costs shall be made against the appellant. F

The appeal is accordingly dismissed.

SANDURA JA and ZIYAMBI JA concurred. G

Webb, Low & Barry, respondent's legal practitioners

1 Now the Labour Court. — *Editor.*
2 Extracted from page 4 of the trial court's judgment.
3 Section 96 has since been repealed. — *Editor.*
4 This principle is laid down in general terms in *Gauntlet Security Services (Pvt) Ltd* v *Leonard, supra*. In considering the same principle, McNally JA remarked, in *Ambali* v *Bata Shoe Co* 1999 (1) ZLR 417 (S) at 418 that the question of the *quantum* of an award of damages in lieu of re-instatement had not yet come before this court.
5 Set out in Herbstein and van Winsen (ed Cilliers and Loots) *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 249.
6 *Per* Beck's *Theory and Principles of Pleading in Civil Actions* 5 ed at p 171.
7 See Boberg's *The Law of Delict* Vol. 1 at p 1.

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